

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION - FELONY BRANCH

UNITED STATES OF AMERICA)	CRIM. NO. F 6602-81
)	
V.)	JUDGE UGAST (SENIOR JUDGE)
)	
DONALD GATES)	CLOSED CASE

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO VACATE CONVICTIONS BASED ON ACTUAL INNOCENCE**

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully provides this Response on Defendant's Motion to Vacate Convictions Based on Actual Innocence.

1. The government can now advise the Court that today, December 14, 2009, we received a final report from Dr. Angela Williamson, Ph.D., Director of Forensic Casework at Bode-Technology, advising that Mr. Gates has been excluded as a possible contributor to the male DNA profile obtained from the vaginal slide (Medical Examiner Vagina A 81-06-489), previously submitted for testing. This report is now attached to this Response as Exhibit 1.

2. The government has also reviewed the defense arguments on the questions surrounding microscopic hair analysis, as outlined in the defendant's Motion to Vacate, and the allegations set forth against the hair examiner who testified at trial in this case, Michael P. Malone, in the Special Report issued by the Department of Justice Office of the Inspector General. The government has also reviewed the specific evaluations of Malone's work in

this case, as outlined in the FBI's Independent Case Review conducted by Steve Robertson, and later provided through the General Counsel of the FBI to Amy Jabloner in the Department of Justice Criminal Division. Although copies of the documents attached to the Motion to Vacate indicate that this report was sent directly to the United States Attorney's Office for the District of Columbia, it appears that this material was never received in the Special Proceedings Division.

It is of significant concern to our office that the Division apparently never received the results of the independent FBI investigation concerning the work of hair examiner Michael P. Malone in this case, which, as part of our general practice, we would have disclosed upon receipt. Accordingly, we are now investigating the matter in order to determine whether the FBI letter was, in fact, received by our office, and if so, whether it was subsequently transmitted to the Special Proceedings Division.


3. At this point, the government submits that the defendant should be immediately released from incarceration pending further testing. The United States requests a brief additional period of time in order to locate the family of Catherine Schilling to advise them of the results of the DNA testing; to obtain a buccal swab from one of the parents of Catherine Schilling and send that to Bode-Technology, in order to confirm that the female DNA profile obtained from testing the vaginal slide represents, in fact, the DNA profile of the decedent in this case; and also to obtain a second buccal swab from defendant Donald Gates, for further comparison against the DNA profile of Donald Gates previously obtained

for testing based on the Court's Order of November 4, 2009.

4. A defendant is entitled to release pending the determination of a collateral attack motion if he establishes "exceptional circumstances" warranting such release. See Baker v. Sard, 420 F.2d 1342, 1343 (D.C. Cir. 1969). The government believes defendant has made such a showing in this case, and therefore does not object to defendant's release pending the final disposition of his motion. A proposed Order is attached.

Respectfully submitted,

CHANNING D. PHILLIPS
ACTING UNITED STATES ATTORNEY



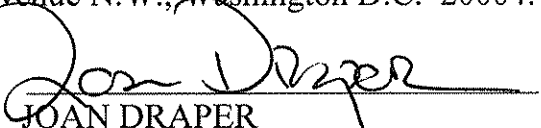
ROBERT D. OKUN, CHIEF
SPECIAL PROCEEDINGS DIVISION



JOAN DRAPER
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

I certify that I caused the Government's Response to Defendant's Motion to Vacate Conviction to be delivered by first class mail this 14th day of December, 2009, to counsel for defendant, Sandra Levick and Parisa Dehghani-Tafti, Special Litigation Division, Public Defender Service, 633 Indiana Avenue N.W., Washington D.C. 20004.



JOAN DRAPER
SPECIAL PROCEEDINGS DIVISION
USAO-DC
555 4th Street, N.W.
Washington, D.C. 20530



10430 Furnace Road, Suite 107
Lorton, VA 22079
Phone: 703-646-9740



**Supplemental Forensic Case Report
December 11, 2009**

To:

Parisa Dehghani-Tafti
Public Defender Service for the District of Columbia
633 Indiana Ave. NW
Washington DC 20004

BODE Case #: CCA0968-0130
Agency Case #: 1981-323-208

Sandra Levick
Public Defender Service for the District of Columbia
633 Indiana Ave. NW
Washington DC 20004

Joan Draper
United States Attorney's Office
555 4th St. NW
Washington DC 20530

List of Evidence Received on October 8, 2009 for possible DNA analysis:

<u>BODE Sample #</u>	<u>Agency Description</u>
CCA0968-0130-E02	Labeled as "Slide marked "Medical Examiner, Vagina A 81-06-489, District of Columbia""

List of Evidence Received on November 23, 2009 for possible DNA analysis:

<u>BODE Sample #</u>	<u>Agency Description</u>
CCA0968-0130-E03	Labeled as "Slide marked "Medical Examiner, Mouth B 81-06-489, Dist. of Columbia""

List of Evidence Received on November 24, 2009 for possible DNA analysis:

<u>BODE Sample #</u>	<u>Agency Description</u>
CCA0968-0130-R04	Labeled as "Bode Buccal DNA sample collection kit for Donald E. Gates"

STR CASE PROCESSING, RESULTS, AND CONCLUSIONS:

Sample CCA0968-0130-E02 was processed for DNA typing by analysis of the following loci: D13S317, D7S820, D2S1338, D21S11, D16S539, D18S51, CSF1PO, FGA, and the gender determining locus Amelogenin using the AmpFLSTR® MiniFiler™ kit.

Sample CCA0968-0130-R04 was processed for DNA typing by analysis of the 13 CODIS Short Tandem Repeat loci, the D2S1338 locus, the D19S433 locus, and the gender determining locus Amelogenin using the AmpFLSTR® Identifiler® kit.

Appropriate positive and negative controls were used concurrently throughout the analysis. The DNA profiles reported in this case were determined by procedures that have been validated according to standards established by the Scientific Working Group on DNA Analysis Methods (SWGDM) and adopted as Federal Standards.

BODE Case #: CCA0968-0130
Agency Case #: 1981-323-208

Date: December 11, 2009

STR CASE PROCESSING, RESULTS, AND CONCLUSIONS (cont.):

1. A DNA profile was obtained from sample CCA0968-0130-R04 (Donald E. Gates).
2. The DNA profile obtained from the sperm fraction (SF) of sample CCA0968-0130-E02 is consistent with a male profile. One additional allele was reported at the D13S317 locus.

The individual associated with sample CCA0968-0130-R04 (Donald E. Gates) is excluded as a possible contributor to the DNA profile obtained from the sample noted above.

3. The DNA profile obtained from the epithelial fraction (EF) of sample CCA0968-0130-E02 is consistent with a mixture of two individuals including a major component female profile.

The individual associated with CCA0968-0130-R04 (Donald E. Gates) is excluded as a possible contributor to the DNA profile obtained from the sample noted above.

See **Table 1** for summary of allele reported for each sample.

NOTES:

1. The submitted evidence and extracts will be retained temporarily by Bode until requested by the submitting agency.
2. A supplemental report was issued due to additional processing. See previous report dated October 12, 2009.
3. Sample CCA0968-0130-E02 was extracted two times (-E02a1 and -E02a2). Data from CCA0968-0130-E02a2 are reflected in this report. Data from CCA0968-0130-E02a1 will be reported separately.
4. Sample CCA0968-0130-E03 was not processed at this time.

Report submitted by:



Amy Jeanguenat
DNA Analyst III

BODE Case #: CCA0968-0130
 Agency Case #: 1981-323-208

Date: December 11, 2009

Table 1: Analysis of Short Tandem Repeat Loci

Locus	CCA0968-0130- E02a2-SF	CCA0968-0130- E02a2-EF	CCA0968-0130- R04a1
D8S1179	Not Tested	Not Tested	14,14
D21S11	28,35	30,---	31,35
D7S820	9,10	9,(10)	10,12
CSF1PO	7,11	(7),9,11	7,11
D3S1358	Not Tested	Not Tested	16,17
TH01	Not Tested	Not Tested	9,9
D13S317	(8),12	8,11,(12)	10,12
D16S539	12,13	11,12	12,13
D2S1338	21,24	17,21	19,21
D19S433	Not Tested	Not Tested	13,13
vWA	Not Tested	Not Tested	17,18
TPOX	Not Tested	Not Tested	9,10
D18S51	13,16	12,15	16,19
Amel.	X,Y	X,X	X,Y
D5S818	Not Tested	Not Tested	11,13
FGA	24,---	21,23	21,27

Key: () Minor allele
 --- Possible additional alleles

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UNITED STATES OF AMERICA)	CRIM. NO. F 6602-81
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DONALD GATES)	CLOSED CASE

ORDER

Upon consideration of Donald Gates' Application for Post-Conviction DNA Testing Pursuant to the Innocence Protection Act; the Affidavit of Donald Gates in support of this Application; the Government's Initial Response to the Defendant's Application, advising of the search for the trial evidence; the Government's Notice of Filing, advising of the discovery of vaginal slides retained at the Medical Examiner's Office since the 1981 autopsy in this case; the Court's Order of September 15, 2009, directing the laboratories to review the material on the vaginal slides; the Reports of Microscopic Examination submitted by Bode-Technology and National Medical Services; the Court's Order of November 4, 2009 directing the Bode-Technology Group to commence DNA testing; the Court's Order of November 17, 2009 directing the National Medical Services to commence DNA testing; the reports of DNA Testing submitted by National Medical Services and Bode-Technology; the Defendant's Motion to Vacate Convictions on the Grounds of Actual Innocence; and the Response of the United States, it is this _____ day of December, 2009:

ORDERED that Donald E. Gates be immediately released from the United States Penitentiary in Tucson, Arizona; and it is further

ORDERED that the parties in this case return to Court on the _____ day of January, 2010, at which time the Court will address the defendant's motion to vacate his convictions for first degree felony murder while armed, rape while armed, and carrying a pistol without a license.

The Honorable Fred B. Ugast, Senior Judge

cc:

Parisa Dehghani-Tafti, Staff Attorney
Sandra Levick, Chief, Special Litigation Division
Public Defender Service
for the District of Columbia
633 Indiana Ave. NW
Washington, DC 20004

Joan Draper, Senior Assistant United States Attorney
Robert D. Okun, Chief, Special Proceedings Division
Office of the United States Attorney
555 4th St. NW
Washington, DC 20530

Dr. Rainey Brandt
Special Counsel
Superior Court of the District of Columbia
500 Indiana Avenue N.W.
Washington D.C. 20002

Warden Craig Apker
Federal Correctional Complex - Tucson
USP TUCSON
9300 South Wilmet Road,
Tucson, Arizona 85756

Joyce Zoldak, Douglas W. Curless
Office of the General Counsel
Federal Bureau of Prisons
320 First Street, Room 977
Washington D.C. 20534

Augustus Faller
Operations Manager - Alpha Team
Bureau of Prisons
Designation and Sentence Computation Center
346 Marine Forces Drive
Grand Prairie, Texas 75051