

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFF,

v.

**EUGENE ROBERTS; DERICK LIBURD; LARRY
WILLIAMS, JR.**

DEFENDANTS.

SX-14-CR-136

SX-14-CR-137

SX-14-CR-144

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant Larry Williams, Jr.'s motion to sever, filed on October 11, 2016. In response, the People filed an opposition and Defendant Derick Liburd filed an opposition.

BACKGROUND¹

On October 7, 2016, Defendant Derick Liburd filed a notice of intent to offer [redacted] DNA report (hereinafter, "Notice"). In his Notice, Defendant Derick Liburd advised the Court and his co-defendants that he intends to offer a redacted version of the DNA lab report captioned "DNA Certificate of Analysis," dated May 27, 2014 and prepared by Forensic DNA Analyst Crystal Oeshsle, F-ABC (hereinafter, "DNA Report"). The People had already represented on the record that they will not be calling the forensic DNA analyst(s) that prepared the DNA Report.

In response to Defendant Derick Liburd's Notice, Defendant Larry Williams, Jr. filed this instant motion to sever.

¹ This memorandum opinion recites the factual background only to the extent necessary to explain the present issues and the bases of the Court's decision.

STANDARD OF REVIEW

Federal Rule of Criminal Procedure 14 provides:²

Rule 14. Relief from Prejudicial Joinder

- (a) **RELIEF.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
- (b) **DEFENDANT'S STATEMENTS.** Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence

For a defendant to prevail on a motion to sever pursuant to Rule 14, s/he has a heavy burden and must "pinpoint clear and substantial prejudice resulting in an unfair trial." *United States v.*

² The Court must note at the outset that under the Revised Organic Act, both the Virgin Islands Judiciary and the Virgin Islands Legislature are vested with the authority to promulgate procedural rules, but only the Virgin Islands Legislature is permitted to establish substantive rules. *Gerace v. Bentley*, 2016 V.I. Supreme LEXIS 31, *17 (V.I. 2016); *see also*, *Gov't of the V.I. v. Durant*, 49 V.I. 366, 373 (V.I. 2008) (holding, *sua sponte*, that substantive aspects of Federal Rule of Criminal Procedure 12.2(c)(1)(A) were not applicable to Superior Court proceedings). In *Durant*, the Supreme Court defined the differences between a procedural rule versus a substantive rule of law:

A procedural rule regulates ... the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. A substantive rule of law[, on the other hand,] creates and defines the rights, duties, and obligations that are subsequently administered by procedural rules of law. *Durant*, 49 V.I. at *12 (Internal quotations and citations omitted).

Here, Federal Rule of Criminal Procedure 14 (hereinafter, "Rule 14") is a procedural rule—namely, it gives the Court the discretion to order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires if the Court finds the consolidation for trial to prejudice a defendant or the government. Fed. R. Crim. P. 14(a). Thus, the Court has the authority to adopt Rule 14 in this proceeding.

However, before the Court adopts Rule 14, the Court must next address the issue raised by the Supreme Court of the Virgin Islands (hereinafter, "Supreme Court") in *Vanterpool v. Government of the Virgin Islands*, 2015 V.I. Supreme LEXIS 23, *16 (V.I. 2015). In *Vanterpool*, the Supreme Court cautioned that "the Federal Rules of Criminal Procedure...should represent rules of last resort rather than first resort and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from [the Supreme] Court reveals the absence of any other [applicable] procedure." There are currently no applicable Virgin Islands statutes, Superior Court rules, or Supreme Court precedents that directly addresses the procedure for severance with regard to a prejudicial joinder.

Judges and attorneys in the Superior Court have relied on the provisions of Rule 14 over the years, and thus, the practice of following the procedure set forth under Rule 14 for severance with regard to a prejudicial joinder has become routine and expected within the Superior Court. *See e.g.*, *GVI v. Petersen*, SX-85-CR-156, SX-85-CR-157, SX-85-CR-158, 1985 V.I. LEXIS 47 (Super. Ct. July 16, 1985) (Unpublished); *People of the Virgin Islands v. Austrie*, ST-08-CR-370, ST-08-CR-371, 2009 V.I. LEXIS 32 (Super. Ct. June 4, 2009); *People of the Virgin Islands v. James*, ST-09-CR-622, ST-09-CR-624, ST-09-CR-625, 2010 V.I. LEXIS 103 (Super. Ct. Mar. 11, 2010) (Unpublished); *People of the Virgin Islands v. Ponce*, SX-11-CR-736, 2015 V.I. LEXIS 73 (Super. Ct. June 25, 2015) (Unpublished). The Court believes it is good practice to continue applying the same procedure for severance with regard to a prejudicial joinder to avoid confusion and ensure consistency in the Superior Court. Thus, applying Rule 14 here is not a "mechanistic and uncritical reliance" of the Federal Rules of Criminal Procedure. Based on the foregoing, the Court will adopt and apply Rule 14 in this proceeding.

Quitero, 38 F.3d 1317, 1343 (3d Cir. 1994). “Severance should only be granted if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Riley*, 621 F.3d 312, 335 (3d Cir. 2010) (internal quotations and citation omitted).

DISCUSSION

In his motion to sever, Defendant Larry Williams, Jr. argued that “the admission of the DNA [R]eport without the opportunity to cross-examine the expert at trial prejudices Mr. Williams and violates his Sixth Amendment right.” (Motion, p. 3) Defendant Larry Williams, Jr. acknowledged that the exclusion of the redacted DNA Report will be prejudicial to Defendant Derick Liburd since the information contained therein is helpful to Defendant Derick Liburd. (Id.) Thus, Defendant Larry Williams, Jr. concluded that “[s]everance of the trials of Mr. Williams and Mr. Liburd is the only way to cure the potential prejudice and conflict concerning the DNA [R]eport and findings.” (Id.) Accordingly, Defendant Larry Williams, Jr. requested the Court to grant his motion to sever and re-schedule Defendant Derick Liburd’s trial for a later time while Defendant Larry Williams, Jr.’s trial commences on October 17, 2016. (Id.)

The People argued in their opposition that “there is no substantial prejudice proven by any Defendant if severance is not granted.” (People’s Opp., p. 2) The People pointed out that the DNA Report is a hearsay document and that the “information sought by Liburd could just as easily be introduced through cross examination of the People’s forensic witness or the case agent.” (Id.) The People went on to explain that there is no need to introduce the redacted DNA Report into evidence, which could potentially prejudice other Defendants, because “Liburd’s counsel could simply ask forensic officer Lewitt [sic], who sent off the swabs and received the DNA [R]eport, whether he has any information that Liburd’s DNA was found on any weapon.” (Id.) Furthermore, the People also argued that even if the DNA Report is admitted into evidence, “any prejudice to any other Defendant

could be cured by an appropriate cautionary instruction to the jury.” (Id.) Thus, the People requested the Court to deny Defendant Larry Williams, Jr.’s motion to sever. (Id.)

Defendant Derick Liburd argued in his opposition that Defendant Larry Williams, Jr.’s motion to sever should be denied for the following reasons: (1) “while Williams may seek severance of his own case...these authorities do not empower Williams to request the removal of the case of his co-defendant, Liburd, from the docket and for [sic] recommend that Liburd be tried separately, at a future date” (Liburd’s Opp., p. 1); (2) “Williams’ motion is premature in that all that Derick Liburd has filed with the Clerk of the Court is a notice of intention to offer into evidence a redacted version of the DNA [R]eport” and thus, “the proposed tender may take effect if and only if Liburd elects to present evidence in his case-in-chief” (Id.); (3) “the proposed tender of essentially exculpatory evidence does not present a case involving ‘antagonistic or mutually exclusive defenses’” (Id., at p. 3); and (4) “Williams claim that severance is the only way to address what he perceives as a ‘potential prejudice and conflict concerning the DNA [R]eport and findings’ is ill conceived” because the Court has “the discretion to provide the jury with a ‘limited instruction to cure any risk of prejudice.’” (Id.)

A. Whether the Prejudice Alleged by Defendant Larry William’s, Jr. is sufficient to Warrant Severance

Under Superior Court Rule 129, “[a] judge may order that two or more complaints be tried together if the offenses arose out of the same facts and circumstances, regardless of the number of defendants.” However, if the Court finds the consolidation for trial to prejudice a defendant or the government, the Court has the discretion “order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires if the Court finds the consolidation for trial to prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). As noted above, the defendant moving for severance has a heavy burden. *Quintero*, 38 F.3d at 1343.

Here, the Court finds that Defendant Larry Williams, Jr. failed to meet the heavy burden and that his request for severance is without merits. First, at this juncture, it is premature for Defendant Larry Williams, Jr. to assert prejudice given that Defendant Derick Liburd has yet to actually offer the redacted DNA Report into evidence; Defendant Derick Liburd merely filed a notice advising the Court and his co-defendants of his intention to offer the redacted DNA Report into evidence. Even if the redacted DNA Report is offered, it may still be excluded from evidence if the Court concludes that the probative value of the redacted DNA Report is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”³ FED. R. EVID. 403; *Alexander v. People of the Virgin Islands*, 60 V.I. 486, 496 (V.I. 2014). Second, Defendant Derick Liburd may not even need to offer the redacted DNA Report into evidence if he can introduce the same information—namely, that DNA samples were taken from him and that no DNA matching him was detected on any of the recovered weapons—another way, such as through the cross-examination of the People’s witness, Forensic Officer Alan Lewit.⁴ According to the People’s opposition, Forensic Officer Alan Lewit was the individual who sent off the swabs of DNA samples and received the DNA Report. (People’s Opp., p. 2) Finally, the fact that Defendant Derick Liburd wants to offer evidence indicating that DNA samples were taken from him and that no DNA matching him was detected on any of the recovered weapons is not in and of itself an antagonistic or mutually exclusive defense. This is not the situation where each defendant accuses the other and relies on the guilt of the other for his acquittal. Here, Defendant Derick Liburd is not casting blame upon Defendant Larry Williams, Jr.; Defendant Derick Liburd merely wants to assert that DNA samples were taken from him and that no DNA matching him was detected on any of the recovered weapons. While Defendant Larry Williams, Jr. implied that, based

³ “A trial court has wide discretion in determining whether to exclude otherwise admissible evidence under Rule 403 of the Federal Rules of Evidence.” *Alexander*, 60 V.I. at 494.

⁴ The People indicated on their witness list that they intend to call Forensic Officer Alan Lewit to testify in their case-in-chief.

on the foregoing, a jury could speculate that DNA samples were also taken from him and thus, concludes that DNA matching Defendant Larry Williams, Jr. was detected on the recovered weapons, the Court disagrees. Based on the foregoing, a jury could just as easily speculate in Defendant Larry Williams, Jr.'s favor—namely, that DNA samples were taken from Defendant Larry Williams, Jr. and that no DNA matching Defendant Larry Williams, Jr. was detected on any of the recovered weapons, similar to Defendant Derick Liburd. Regardless, the Court intends on giving a cautionary instruction to the jury advising them against speculation and to only consider evidence offered at trial. Here, a jury could believe that DNA samples were taken from Defendant Derick Liburd and still believe that no DNA samples were taken from Defendant Larry Williams, Jr.

In summary, Defendant Larry Williams, Jr.'s motion to sever failed to "pinpoint clear and substantial prejudice resulting in an unfair trial." *See Quitero*, 38 F.3d at 1343. Defendant Larry Williams, Jr. based his arguments on speculated prejudice rather than actual prejudice, which is insufficient to warrant severance. *See e.g., United States v. Solomon*, 2007 U.S. Dist. LEXIS 30511, *12 (W.D. Pa., April 25, 2007) ("speculation is not a sound basis for severance"). The Court finds that a joint trial in this instance would not compromise the specific trial right of any of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. *See Riley*, 621 F.3d at 335.

CONCLUSION

Based on the foregoing, the Court will deny Defendant Larry Williams, Jr.'s motion to sever.⁵

An Order consistent with this Memorandum Opinion shall follow.

⁵ Given that the Court will deny Defendant Larry Williams, Jr.'s motion to sever, the Court need not address whether it was appropriate for Defendant Larry Williams, Jr. to request the continuance of his co-defendant's, Defendant Derick Liburd, trial to a future date.

DONE and so ORDERED this 25th **day of October, 2016.**

ATTEST:

Estrella H. George
Acting Clerk of the Court


DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge of the Superior Court

By:

Dated:


Court Clerk Supervisor

10/25/16