Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PEOPLE OF THE VIRGIN ISLANDS,	)	**S. Ct. Crim. No. 2009-028**
	)	Re: Super. Ct. Crim. No. 195/2007
Appellant/Plaintiff,	)	
	)	
v.	)	
	)	
JOSE ALBERTO RODRIGUEZ,	)	
	)	
Appellee/Defendant.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Considered: July 16, 2009
Filed: April 14, 2010

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

ATTORNEYS:

Kenrick E. Robertson, Esq.
Assistant Attorney General
St. Croix, U.S.V.I.
Attorney for Appellant,

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OPINION OF THE COURT

Cabret, Justice.

The People of the Virgin Islands charged Jose Alberto Rodriguez with numerous offenses stemming from an April, 2007 kidnapping and rape. The People obtained DNA evidence that purportedly connected Rodriguez to the crimes, but failed to timely provide him with certain requested discovery materials related to the DNA testing, despite a court order to do so. Due to the People's discovery violations, the Superior Court ultimately ordered that the DNA evidence

would be excluded at trial. The People filed this interlocutory appeal. For the reasons that follow, the Superior Court's order excluding the DNA evidence will be reversed and the matter remanded for further consideration by the court.

I. FACTS AND PROCEDURAL BACKGROUND

The record shows that on May 3, 2007, the People charged Rodriguez, by Information, with seven crimes related to an April 23, 2007 kidnapping and rape. During the two months that followed, the Virgin Islands Police Department obtained blood samples and other DNA evidence from Rodriquez and the victim and sent the samples to the Federal Bureau of Investigation ("FBI") for analysis. On October 17, 2007, the Superior Court granted the People's motion to continue the trial date from October 22, 2007 to December 10, 2007. On December 6, 2007, the Superior Court again continued the trial date from December 10, 2007 to June 2, 2008. It is not clear from the record who requested this second continuance or if the Superior Court ordered the continuance *sua sponte*. On February 12, 2008, the People provided Rodriquez with a copy of the DNA analysis report prepared by the FBI. On April 11, 2008, Rodriquez moved the Superior Court for a continuance of the June 2, 2008 trial date. In support of his motion, Rodriquez stated:

> The People have produced to the Defendant a copy of the DNA Analysis report submitted by the FBI lab. The Defendant needs additional time to investigate the findings contained in the report. Moreover, on a personal note, defense counsel is getting married on May 31, 2008 and will not be able to try this case on June 2, 2008.

(J.A. at 57.) The Superior Court granted Rodriquez's motion and continued the trial to November 10, 2008.

On May 5, 2008, Rodriquez's counsel sent the People a letter requesting discovery of various materials related to the testing, analysis, and chain of custody of the DNA samples. The People did not respond to the discovery request, and on October 6, 2008, Rodriquez sent a second letter to the People reminding them about the outstanding discovery. After again receiving no response from the People, on November 8, 2008, Rodriquez moved the Superior Court to sanction the People's failure to produce the discovery by either dismissing the charges against him or, alternatively, excluding the DNA evidence at trial. In his motion, Rodriquez cited to his repeated requests for the discovery[1] and argued that "[t]he continued failure of the Government to provide these key pieces of evidence warrant the dismissal of this matter which has been pending since June of 2007." (J.A. at 64.) At a December 11, 2008 hearing on the motion, Rodriquez further argued that he would be prejudiced by the admission of the DNA report because he had not had an opportunity to review any of the materials related to the testing, analysis, and chain of custody of the DNA samples underlying the report. The People responded that they had given Rodriquez all the materials they had in their possession concerning the DNA analysis and that the materials Rodriquez sought were in the possession of the FBI and could be

[1]I note that in his motion, Rodriquez disingenuously reported to the Superior Court that "in a Motion for Continuance filed on April 11, 2008, [he] informed the Court that he was not prepared for trial due [sic] he did not have crucial evidence regarding the collection of the DNA evidence and a [sic] FBI Laboratory Report of examination produced by the Government." (J.A. at 62.) Rodriquez's counsel repeated this assertion at a hearing on his motion for sanctions. Belying these assertions, however, is Rodriquez's April 11, 2008, motion for continuance which, as stated above, actually asserted that Rodriguez needed a continuance because he wanted to investigate the findings in the DNA report and because his attorney was getting married. Nowhere in his motion for a continuance did Rodriquez mention that he was unprepared because he lacked crucial evidence, and, in fact, the record shows that Rodriquez did not request the subject discovery from the People until May 5, 2008, almost one month *after* his motion for a continuance. It is troubling that Rodriquez not only misrepresented these facts to the Superior Court, but also that he failed to remind the court that his request for continuance was necessitated by counsel's pending wedding.

obtained from that entity. On January 27, 2009, the Superior Court entered an order compelling the People to provide the requested DNA materials to Rodriquez before February 10, 2009.

The People did not produce the materials by the court-ordered deadline, and on February 11, 2009, Rodriquez filed a renewed motion to sanction the People, either by dismissing the charges or excluding the DNA evidence at trial. On February 26, 2009, before the Superior Court ruled on Rodriquez's renewed motion, the People produced to Rodriquez all the materials he requested concerning the testing, analysis, and chain of custody of the DNA samples. Nevertheless, the Superior Court scheduled a hearing on Rodriguez's motion for sanctions. At the March 6, 2009 hearing, the prosecutor stated that he had only recently rejoined the Attorney General's office, and he did not know the reason why the DNA materials were not produced earlier. He explained that the Attorney General's office had inexplicably failed to request the materials from the FBI and that as soon as they were provided by the FBI, the People produced the materials to Rodriquez's attorney.

Rodriquez contended that although the People had produced the discovery, he was prejudiced by the untimely production because he had not identified an expert to evaluate the evidence. Specifically, Rodriquez argued:

> first of all, we have to identify the expert that we need to look over the evidence. We have to get the evidence to that particular person. That person would then have to review the information, and render whatever test necessary, get the results back. On top of that, we would have to go over what the expert or what our expert has produced and then also make sure that he is available for trial on April 20[, 2009]. I'm sure that all of us who have had dealings with experts in the past realize to get an expert on such short notice and have them ready for trial, within the limited period, I mean, we are talking a little over a month, is impossible.

(J.A. at 98.) When the trial judge inquired of Rodriquez's attorney whether she had identified an expert when she first received the DNA test results, which was approximately thirteen months

earlier, counsel explained that because the People had repeatedly promised to produce the materials related to the testing, analysis, and chain of custody of the DNA samples, she "decided to . . . hold off on picking the particular expert until the information had been provided." (J.A. at 100.)

On March 9, 2009, the Superior Court entered an order granting Rodriquez's motion to exclude the DNA evidence at trial. In its order, the court pointed out that it had ordered the People to produce the evidence to Rodriquez by February 10, 2009, and that the People did not produce the evidence until February 26, 2009. In support of its exclusion of the evidence, the Superior Court found as follows:

> The various documents appear to have been generated from mid-2007 to mid-2008, although it does not appear that the People attempted to retrieve them from the FBI laboratory until February of 2009. The evidence is clearly discoverable, as set forth in this Court's Order entered January 27. Defendant has diligently sought production of the evidence. The People have never clearly articulated a reason for failing to produce it.
>
> Defendant correctly points out that the late production of the evidence will prejudice him in light of the April 2009 trial date.[2] The People have not requested a continuance, and the Defendant has noted in his filings that he opposes any further continuance. Further, Defendant correctly points out that this matter has been pending in excess of two years.
>
> The People's conduct in the pretrial stages of this case has been dilatory in the extreme. While the Court does not ascribe any conscious ill motive, the People have shown this file a remarkable lack of attention, which is in complete contrast to the diligence displayed by Defendant's counsel and which, for the reasons articulated by Defendant's counsel at the March 6, 2009 hearing in the instant case, have prejudiced Defendant. For these reasons, and pursuant to F.R.Crim.P. 16(d)(2)(c), the Court will grant Defendant's request and will exclude all evidence produced along with the People's Supplemental Response to Discovery Request.

(J.A. at 24-25) (footnote added).

On March 30, 2009, the People filed the instant interlocutory appeal from that order.

[2] The record indicates that the Superior Court scheduled the trial for April 20, 2009.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to title 4, section 33(d)(2) of the Virgin Islands Code which authorizes, *inter alia*, the People to file an interlocutory appeal "from a decision or order of the Superior Court suppressing or excluding evidence" in a criminal matter.

We review the Superior Court's decision concerning the appropriate remedy for a discovery violation for an abuse of discretion, while the Superior Court's "factual findings upon which the decision was based are reviewed for clear error." *United States v. Lee*, 573 F.3d 155, 160 (3d Cir. 2009) (citing *Gov't of V.I. v. Fahie*, 419 F.3d 249, 258 (3d Cir. 2005)). Under the clearly erroneous standard of review, we will not reverse the Superior Court's factual determinations unless a "determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Georges v. Gov't of the V.I.*, 119 F.Supp.2d 514, 519 (D.V.I. App.Div. 2000) (internal quotation marks and citation omitted).

III. DISCUSSION

There is no doubt in this case that the People were required to produce the subject discovery upon request by Rodriquez. This question is governed primarily by Rule 16 of the Federal Rules of Criminal Procedure, which provides in pertinent part:

> (E) Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.
> (F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the

> results or reports of any physical or mental examination and of any scientific test or experiment if:
> (i) the item is within the government's possession, custody, or control;
> (ii) the attorney for the government knows--or through due diligence could know--that the item exists; and
> (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

Fed. R. Crim P. 16(a)(1)(E),(F).[3] Evidence related to the People's testing, analysis, and chain of custody of the DNA samples are undeniably material and could potentially assist Rodriquez in attacking the reliability of the DNA test results at trial. *See, e.g. People v. Venegas*, 954 P.2d 525, 555 (Cal. 1998) (ruling that DNA evidence should have been excluded because laboratory personnel did not follow the correct testing procedures).[4] Indeed, the People seemed to concede that the requested materials were discoverable at the Superior Court's hearing on Rodriguez's motion for sanctions.[5]

Thus, the sole issue left to be decided is whether the Superior Court abused its discretion in excluding the evidence as a sanction for the People's untimely production. Rule 16(d) identifies a range of measures that the Superior Court may employ upon finding that a party has failed to provide discovery required by the rule:

> If a party fails to comply with this rule, the court may:
> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
> (B) grant a continuance;
> (C) prohibit that party from introducing the undisclosed evidence; or
> (D) enter any other order that is just under the circumstances.

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[3] Pursuant to Rule 7 of the Rules of the Superior Court, the Federal Rules of Criminal Procedure apply to practice in the Superior Court "to the extent [they are] not inconsistent" with the Rules of the Superior Court.

[4] The issue of whether such impeachment evidence may go to the weight or the admissibility of the DNA evidence at trial is not before this Court on appeal.

[5] The Assistant Attorney General stated: "I can understand counsel's frustration with the delays and the information myself, in my opinion all that information should have been discoverable, shouldn't even be an argument about it." (J.A. at 96.)

Fed. R. Crim. P. 16(d).

As a general rule, a trial court should balance three factors in determining which of these actions, if any, it should take to address a discovery violation by the government:

> (1) The reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance.

United States v. Martinez, 455 F.3d 1127, 1130 (10th Cir. 2006) (citing *United States v. Muessig*, 427 F.3d 856, 864 (10th Cir. 2005)).

In the instant case, the Superior Court considered the first two factors, but did not consider the last factor. In addressing the reasons for the People's delay, the Superior Court found that the People never clearly articulated a reason for their untimely production of the discovery. The record plainly demonstrates, however, that, as found by the court, the People exhibited a "remarkable lack of attention" to the case. (J.A. at 25.) In fact, it appears that although the FBI could have given the materials to the People much earlier in the proceedings, and one would think that a diligent prosecutor would have wanted them to prepare for trial, the People did not request the materials from the FBI until Rodriquez renewed his motion for sanctions. Thus, it appears that, rather than attempting to gain some ill conceived tactical advantage from withholding the supplemental discovery, the People's violation was the result of nothing but indifference. Under these circumstances, the Superior Court's finding that the violation was not the product of "conscious ill motive," is not clearly erroneous.[6]

[6] In light of the Superior Court's explicit finding of no "conscious ill motive," I respectfully disagree with Justice Swan's characterization of the People's conduct as "contumacious" and "brazen."

I also find no clear error in the Superior Court's finding that Rodriquez was prejudiced by the People's dilatory conduct in producing the discovery. "To support a finding of prejudice, the court must determine that the delay impacted the defendant's ability to prepare or present its case." *United States v. Golyansky*, 291 F.3d 1245, 1250 (10th Cir. 2002). Here, it is obvious that if the People had provided the discovery materials to Rodriguez earlier in the proceedings, Rodriguez could have been better prepared to address the evidence with his own expert at trial. I note, however, that any prejudice visited upon Rodriquez by the People's dilatory conduct was only exacerbated by his own inaction in failing to retain an expert earlier in the proceedings. Fourteen months before the Superior Court excluded the evidence, the People provided Rodriquez with the DNA analysis report prepared by the FBI. Although Rodriquez could have retained an expert to review the report at that time, counsel made a professional judgment to await further discovery. It is unclear what advantage, if any, could have been gained by Rodriguez by awaiting such an important decision. Likewise, ten days before the Superior Court excluded the evidence the People produced to Rodriquez all the supplemental discovery he had requested. Yet, with the discovery in hand, it does not appear that Rodriquez made any effort to even identify an expert to review the material prior to the sanctions hearing. Finally, I note that, had the People produced the discovery only sixteen days earlier, they would not have violated the Superior Court's discovery order and Rodriquez could not have claimed that his inability to retain an expert warranted suppression of the evidence. While the extent of prejudice caused by this sixteen day delay is questionable, because the record contains some evidence that Rodriguez was prejudiced by the People's delay, the Superior Court's finding of prejudice was not clearly erroneous.

As for the third consideration, the feasibility of curing the prejudice with a continuance, the Superior Court merely noted that the case had been pending for over two years, that the People had not requested a continuance, and that Rodriguez opposed any further continuances. The court, however, did not address the feasibility of curing any prejudice with a continuance, notwithstanding the lack of a request and Rodriquez's objection. This is particularly crucial in this case given the drastic alternative chosen by the court: exclusion of the evidence. Whether considered a sanction or a remedy, appellate courts considering such matters almost universally agree that a trial court must take the least severe action to address a discovery violation, especially where there is an absence of bad faith. *See United States v. Bishop*, 469 F.3d 896, 905 (10th Cir. 2006) ("Despite this broad grant of power, the district court's exercise of discretion should be guided by several factors; and if a sanction is imposed, it should be the least severe sanction that will accomplish prompt and full compliance with the court's discovery orders. It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings." (internal quotation marks and citations omitted)); *United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006) ("'District courts should embrace the "least severe sanction necessary" doctrine, and hold that suppression of relevant evidence as a remedial device should be limited to circumstances in which it is necessary to serve remedial objectives.'" (quoting *United States v. Maples*, 60 F.3d 244, 247-48 (6th Cir. 1995))); *United States v. Hammond*, 381 F.3d 316, 336 (4th Cir. 2004) (stating that the "court must impose the least severe sanction that will 'adequately punish the government and secure future compliance' and quoting *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002) for the proposition that "[i]It would be a rare case where, absent bad faith, a district court should exclude evidence

rather than continue the proceedings.'"); *United States v. Garrett*, 238 F.3d 293, 298 (5th Cir. 2000) ("However, notwithstanding this broad discretion, we have consistently held that a district court, when considering the imposition of sanctions for discovery violations, must carefully weigh several factors, and if it decides such a sanction is in order, it "should impose the least severe sanction that will accomplish the desired result-prompt and full compliance with the court's discovery orders."); *United States v. Johnson*, 228 F.3d 920, 926 (8th Cir. 2000) ("'When a court sanctions the government in a criminal case for its failure to obey court orders, it must use the least severe sanction which will adequately punish the government and secure future compliance.'" (quoting *United States v. DeCoteau*, 186 F.3d 1008, 1010 (8th Cir.1999))); *United States v. Marshall*, 132 F.3d 63, 70 (D.C. Cir. 1998) ("A trial judge should impose "the least severe sanction that will accomplish the desired result-prompt and full compliance with the court's discovery orders." (internal quotation marks and citation omitted)); *United States v. Perez*, 960 F.2d 1569, 1572 (11th Cir. 1992) ("Where the court detects even a clear violation of a discovery order, it must weigh the circumstances surrounding the violation and impose the least severe sanction needed to elicit compliance with its orders."); *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985)).[7]

In the instant case, the Superior Court expressly found an absence of bad faith, yet took the extreme action of excluding the evidence at trial. *See Perez*, 960 F.2d at 1573 (characterizing

[7] I note that although the Court of Appeals for the Third Circuit does not appear to have expressly adopted the least severe sanction rule in any published opinion addressing sanctions for discovery violations, in its recent unpublished opinion in *United States v. Tagliamonte, No. 07-4275*, 2009 WL 2430937, at *7 n.8 (3d Cir. Aug. 10, 2009), the court quoted, with approval, the Eleventh Circuit's decision in *Euceda-Hernandez*, for the position that "courts should fashion 'the least severe sanction that will accomplish the desired result-prompt and full compliance with the court's discovery orders'" (quoting *Euceda-Hernandez*, 768 F.2d at 1312). *See also Gov't of the V.I. v. Fahie*, 419 F.3d 249, 259 (3d Cir. 2005) (in addressing whether dismissal was an appropriate sanction for a discovery violation, the court observed that other circuits instruct courts to consider "'the feasibility of curing . . . prejudice by granting a continuance.'" (quoting *Euceda-Hernandez*, 768 F.2d at 1312).

the exclusion of relevant evidence an "'extreme sanction.'") (citation omitted)). Under such circumstances, and considering the abundant authority cited above, the Superior Court was obligated to consider whether a less drastic action, such as a continuance, was appropriate to address the People's discovery violation. This is particularly true where, as here, there is no indication in the record that a short continuance of the trial date was impractical or that such a continuance was even necessary given the fact that the Rodriquez possessed the evidence on February 26, 2009, and the trial was not scheduled to commence until April 20, 2009, a period of almost two months. *See Golyansky*, 291 F.3d at 1250 ("Nothing in the record suggests that, given time, Defendants cannot adequately incorporate the impeachment evidence into the presentation of their case.") *Cf. United States v. Davis*, 244 F.3d 666, 670-71 (8th Cir. 2001) (affirming trial court's exclusion of DNA evidence as discovery sanction where the government provided the evidence to defendant only four days before trial and the trial court faced "significant scheduling problems" due to defendant's speedy trial rights); *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988) (affirming trial court's exclusion of government's laboratory report as discovery sanction because the government provided the evidence to defendant only ten days before trial, the jury had already been selected, and the trial court faced scheduling constraints that would not permit a continuance).

While I do not condone the People's "remarkable lack of attention,"[8] it is clear that the Superior Court was obligated to consider whether some action, short of exclusion, could cure whatever prejudice resulted from the People's conduct. The Superior Court plainly did not consider this question, and it is essential that it do so in this case because there was an absence of

[8] (J.A. at 25).

bad faith, no finding that the court's docket rendered a continuance impractical, and excluding the DNA evidence would substantially prejudice the People's ability to vindicate the rights of the public and would likewise have "a tremendously distorting effect on the search for truth." *People v. Lee*, 18 P.3d 192, 198 (Colo. 2001); *accord Garrett*, 238 F.3d at 301 (finding that exclusion of evidence had "the effect of eviscerating the government's case"); *United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999) ("we are convinced the sanction of total exclusion is too severe and hinders, rather than forwards, the 'public interest in a full and truthful disclosure of critical facts.'" (quoting *Taylor v. Illinois*, 484 U.S. 400, 412, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988))). I do not suggest that a continuance is the sole action available to a trial court in a case such as this. If a court is concerned about future compliance or desires to punish the People or the individual prosecutors for violating discovery orders, it may not only grant a continuance, but may access its contempt powers. *See United States v. Sarcinelli*, 667 F.2d 5, 6 (5th Cir. 1982). In addition, where the prosecutors' conduct violates an applicable ethical rule, the court can "call the prosecutors' conduct to the attention of the appropriate disciplinary authorities." *United States v. Starusko*, 729 F.2d 256, 265 (3d Cir. 1984) (addressing violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)); *accord Gonzales*, 164 F.3d at 1293. In light of these considerations, I conclude that the Superior Court abused its discretion in ruling that the DNA evidence would be excluded at trial. *See id.; Lee*, 18 P.3d at 197-98; *People v. Sutton*, 763 N.E.2d 890, 898-99 (Ill. Ct. App. 2002).

IV. CONCLUSION

To properly exercise its discretion in this case, the Superior Court was required to consider the feasibility of addressing the People's discovery violation with a less drastic action

than excluding the DNA evidence. Accordingly, the order excluding the DNA evidence will be reversed, and on remand the Superior Court will be required to consider whether a continuance or some other less severe action will achieve the desired results.

Dated this 14th day of April, 2010.

FOR THE COURT:

_____/s/_____
MARIA M. CABRET
ASSOCIATE JUSTICE

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

SWAN, Associate Justice, concurring in part, dissenting in part.

For the reasons enumerated in the discussion section of this opinion, I agree with the majority decision to reverse the trial court's March 10th, 2009 Order Excluding the Deoxyribonucleic Acid ("DNA") evidence; however, I disagree that the case should only be remanded to the trial court. I would remand the case with specific instructions that the trial court grant Appellant a short period of time before trial, in order for Appellant's expert to review and to analyze, in preparation for trial, the People's DNA analysis and the People's DNA test data.

I. FACTS AND PROCEDURAL HISTORY

A fifteen-year-old female,[1] who had escaped from the Youth Rehabilitation Center, was allegedly sexually assaulted in the vicinity of John Woodson Jr. High School on St. Croix at approximately 3:00 a.m. on April 23rd, 2007. The minor female was transported to the Juan F. Luis Hospital where she was examined by medical personnel, who administered a rape kit examination upon her, and collected DNA samples and other forensic evidence from her. The People of the Virgin Islands ("Appellant" or "People") forwarded the DNA samples from the minor female and the DNA samples from Jose Alberto Rodriguez ("Appellee"), a Virgin Islands Police Officer, to the Federal Bureau of Investigation ("FBI") for laboratory testing. However, prior to completion of the DNA testing and during the ongoing investigation, Appellant's counsel determined that it had probable cause to arrest Appellee for committing a sexual assault upon the minor female. After Appellee's arrest, he was charged in a May 4th, 2007 Information with several crimes in the Virgin Islands Code; namely: Count I, Kidnapping for Rape, in violation of title 14, section 1052(b) of the Virgin Islands Code; Count II, Aggravated Rape in the Second

[1] The name of the minor female has intentionally been omitted to safeguard her identity.

Degree, in violation of title 14, section 1700a(a) of the Virgin Islands Code; Count III, Rape in the First Degree, in violation of title 14, section 1701(3) of the Virgin Islands Code; Count IV, Unlawful Sexual Contact in the First Degree, in violation of title 14, section 1708(1) of the Virgin Islands Code; Count V, Child Abuse in violation of title 14, section 505 of the Virgin Islands Code; and Counts VI and VII, two separate counts of Interfering With Officer Discharging His Duty in violation of title 14, section 1508 of the Virgin Islands Code. (J.A. at 1-4.)

Appellee made several legitimate requests for discovery information from Appellant, pursuant to Rule 16 of the Federal Rules of Criminal Procedure. However, Appellant disconcertingly failed to provide the requested discovery information to Appellee. Between April 2008 and March 2009, Appellee filed numerous motions importuning the trial court to compel Appellant to produce the requested discovery, to exclude the discovery material from the trial, or alternatively to dismiss the case against Appellee. On October 18th, 2007, the trial court granted Appellee a continuance because Appellee's attorney had been appointed only recently to represent Appellee, and Appellant had not received the DNA test analysis results from the FBI. (*Id.* at 59-61, 99.) In February 2008, the results of the DNA testing were provided to Appellee's attorney. In April 2008, the trial court granted Appellee a second continuance, for a period of five months, because although Appellee's counsel had received the DNA test results from Appellant, she had not received any underlying data from the DNA testing. (*Id.* at 62, 99.) On appeal, Appellant made no attempt to conceal the fact that it woefully failed to provide Appellee with any underlying DNA data until February 26th, 2009.

Prior to December 2008, Appellant's counsel had represented to the trial court and to Appellee that the requested DNA discovery material would be produced. At a December 11th, 2008 hearing, and for the first time, Appellant's counsel argued that it had complied with Appellee's discovery request, that the information sought by Appellee was not in Appellant's possession, and that Appellee could either retain an expert or subpoena the FBI laboratory personnel to obtain the discovery. (*Id.* at 119-120.) Nonetheless, what is critical is that in its January 26, 2009 Order, the trial court ordered Appellant to provide Appellee with the requested discovery information by February 10th, 2009. Instead, Appellant gave Appellee all requested discovery information by February 26th, 2009, or sixteen days after the February 10th, 2009 deadline. However, it is noteworthy that at the time of the trial court's January 26th, 2009 Order, Appellee had already received by February 2008, or approximately one year earlier, the very important DNA test analysis results. Therefore, only the requested DNA test data remained outstanding. Nonetheless, Appellee received the DNA test data on February 26th, 2009, thereby completing discovery on the DNA evidence, which was almost two months before the April 20th, 2009 trial date.

A show cause hearing was held on March 6th, 2009, during which the problems Appellee had encountered in obtaining discovery information from Appellant were addressed by the trial court. At the hearing, Appellant's counsel informed the trial court that the DNA test results identified body fluids from both the minor female and Appellee as being present in the DNA samples the FBI had analyzed. (*Id.* at 102.)

In its March 10th, 2009 Order addressing Appellee's Request to Exclude, the trial court adjudicated the issues raised at the hearing and concluded that the "People's conduct in the pretrial stages of this case has been dilatory in the extreme. While the [c]ourt does

not ascribe any conscious ill motive, the People [has] shown this file a remarkable lack of attention, which is in complete contrast to the diligence displayed by Defendant's counsel[.]" (*Id.* at 25.) Accordingly, the trial court proceeded to exclude from the trial all DNA test analysis results and other related evidence Appellant previously had delivered to Appellee.

Appellant filed its Certification for Interlocutory Appeal on March 30th, 2009 and filed its Motion for Expedited Appeal on April 24th, 2009. Appellant's counsel asserted that the People had no intention of withholding the DNA test results from Appellee. Appellant's counsel further asserted that any delay in producing the DNA evidence resulted from an unceasing turnover of attorneys in Appellant's counsel's office. (*Id.* at 05-06, 18-20.)

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to title 4, section 33(d)(2) of the Virgin Islands Code. V.I. CODE ANN. tit. 4, § 33(d)(2) ("An appeal by the Government of the Virgin Islands shall lie to the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence . . . in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information[.]"). The trial court entered its Order on March 10th, 2009, and Appellant filed its timely Certification for Interlocutory Appeal on March 30th, 2009. *See* V.I.S.CT. R. 5(b)(1)(iv) ("When an appeal by the Government is authorized by statute, the notice of appeal shall be filed in the Superior Court within thirty days after . . . the entry of the judgment or order appealed from[.]").

Review of the Superior Court's application of law is plenary. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 247 (3d Cir. 2008); *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 576 (3d Cir. 2000). The Superior Court's findings of fact are reviewed for clear error. *Id.* The Superior Court's determinations of admissibility of evidence are reviewed for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141-42, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *see United States v. Gauvin*, 173 F.3d 798, 802 (10th Cir.1999).

III. ISSUES

The issues raised by Appellant are:

A. Whether the trial court abused its discretion in excluding the results of the DNA test analysis and other DNA related evidence as a sanction upon Appellant for its failure to comply with the trial court's discovery orders.

B. Whether Appellant's failure to earlier provide Appellee with the DNA test analysis results and the DNA data would have prejudiced Appellee if the trial court had granted a continuance of the trial to allow Appellee sufficient time to review the DNA test analysis and the other related DNA evidence.

IV. DISCUSSION

Appellant contends that the sanction imposed by the trial court pursuant to Rule 16 of the Federal Rules of Criminal Procedure[2] was inappropriate for two reasons. First, Appellant's counsel argues that it had fully complied with Appellee's discovery requests when Appellant provided Appellee with the DNA analysis report, although it had failed to provide Appellee with any of the underlying data that was also requested in discovery.

[2] Rule 7 of the Rules of the Superior Court renders the Federal Rules of Criminal Procedure applicable to criminal trials in the Superior Court of the Virgin Islands. SUPER. CT. R. 7 ("practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure.").

Second, Appellant's counsel argues that sixteen days after the trial court's deadline, it fully complied with the court's January 28th, 2009 Order, compelling Appellant to provide the requested discovery to Appellee by February 10th, 2009. Therefore, according to Appellant, Appellee had sufficient time to prepare for the April 20th, 2009 trial after receiving the requested discovery or alternatively, he could have requested a short continuance. Appellant further asserts that, if a short continuance of the case had been granted, Appellee would not have suffered any prejudice because of Appellant's tardy release of the DNA data and test analysis results to Appellee. However, Appellee contends that Appellant's delay in providing Appellee with the DNA requested discovery violated his Sixth Amendment right to a speedy trial and "severely impaired" and likely impeded Appellee's ability to prepare for trial.

I ardently disagree with both of Appellant's arguments. First, Appellant initially and unjustifiably failed to provide Appellee with the underlying DNA data in its response to Appellee's discovery requests. Second, unless the trial court granted a continuance to allow Appellee sufficient time to have the underlying DNA data analyzed by Appellee's expert witness, Appellee could have been prejudiced had he been compelled to go to trial on the approaching trial date and not having timely received from Appellant the DNA data to review. Nonetheless, I conclude that whatever the degree of prejudice Appellee suffered by not timely receiving all the DNA evidence test results, including the underlying data, that such prejudice does not outweigh the preference for deciding cases on their merits. Moreover, such prejudice could have been cured with a short continuance of the trial date. A short continuance of the April 20th, 2009 trial date would have allowed Appellee's expert to conduct an independent review of all the DNA analysis and associated testing

data Appellee had received by February 26th, 2009, or fifty-four (54) days before the April 20th, 2009 trial date.

A. Whether the Trial Court Abused its Discretion in Excluding the Results of the DNA Test Analysis and Other DNA Related Evidence as a Sanction Upon Appellant for its Failure to Comply With the Trial Court's Discovery Orders.

When a party fails to comply with the disclosure requirements of Rules 16(a) and (b) of the Federal Rules of Criminal Procedure, the trial court has broad discretion to sanction the party under Rule 16(d). Rule 16(d)(2) provides:

> (2) Failure to Comply. If a party fails to comply with this rule, the court may:
> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
> (B) *grant a continuance*;
> (C) prohibit that party from introducing the undisclosed evidence; or
> (D) *enter any order that is just under the circumstances*.

Fed. R. Crim. P. 16(d)(2) (emphasis added). The appropriateness of sanctions imposed pursuant to Rule 16(d)(2)(C) is evaluated by considering at least three factors:

> (1) the reasons for the government's delay in producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance.

Gov't of the Virgin Islands v. Ubiles, 317 F.Supp.2d 605, 608 (D.V.I.App.Div.2004); *see United States v. Gainer, III*, 468 F.3d 920, 927 (6th Cir. 2006).

At the March 6th, 2009 show cause hearing, the trial court noted that Appellant had provided the requested discovery to Appellee sixteen days late, and after approximately ten months of continuances, primarily occasioned by Appellant's failure to comply with court orders and failure to timely respond to Appellee's discovery requests. The trial court heard

Appellee's argument that he would be prejudiced by not having timely received the requested discovery, if he had proceeded to trial on the scheduled April 20th, 2009 trial date. (J.A. at 95, 98-99.) Appellee further asserted that he would have suffered significant prejudice because he needed time for his counsel to review the DNA data evidence, needed time to retain an expert to review the DNA evidence on his behalf, and needed time to afford his retained expert sufficient time to examine the DNA evidence. (*Id.* at 98.) Likewise, Appellee further asserted that he needed time to review his expert's findings on the DNA evidence and to secure the appearance of the same expert, if possible, at the April 20th, 2009 trial. (*Id.*) Appellee's counsel stated that she could not intelligently discuss with Appellee the advisability of him accepting a plea offer from Appellant without first reviewing the underlying data of the DNA analysis. Furthermore, Appellee's counsel asserted that without the DNA evidence requested in discovery, she is unable to formulate a defense on Appellee's behalf. The trial court, however, never addressed the issue of what number of days that his expert required after Appellee received all the DNA evidence, in order to review and to analyze the complete DNA evidence before the April 20th, 2009 trial date. Similarly, the trial court never determined how many days after the April 20th, 2009 trial date that Appellee's expert required in order to complete an analysis of all DNA evidence Appellee had received in discovery by February 26th, 2009.

Appellee also posited the issue of the additional frustrations visited upon him by Appellant's reversal of its initial position of promising to deliver the DNA testing analysis data to Appellee, to that of suddenly contending that Appellee was not entitled to the

discovery he sought.[3] Appellee emphasized the seriousness of Appellant's failure to produce the discovery and reiterated his request for Rule 16(d) sanctions against Appellant.

More than one year elapsed between the time of Appellee's initial discovery request and the time when Appellant provided Appellee with the requested underlying DNA data discovery. The trial court stated that this case had been pending for approximately two years and directed to Appellant's counsel its observation that "this isn't meant to be a reflection of you individually since, you know, you just rejoined the office. But this is not your office's finest hour." (J.A. at 101.) Appellant's counsel agreed but asserted that, having had the "opportunity to review the original DNA sheets, . . . the original swabs taken did identify both the alleged victim and the defendant [Appellee] in the case as having fluids present." (*Id.* at 102.) The trial court further stated that it would rule on the issues raised by Appellee within a few days following the hearing. (*Id.* at 105.)

In the trial court's March 10th, 2009 Order which addresses Appellee's Request to Exclude Evidence, the trial court noted that the DNA evidence was "clearly discoverable"

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[3] Appellant has abandoned its argument that the underlying DNA data is not discoverable. However, I trust that the Supreme Court of the United States' recent decision in *Melendez-Diaz v. Massachusetts*, ___U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314, No. 07-591, 2009 WL 1789468 (June 25, 2009), has quelled any doubt in Appellant's mind that under the facts in this case, the DNA evidence at issue is not only discoverable, but also testimonial in nature and consequently subject to the Sixth Amendment right to confrontation. *See Melendez-Diaz*, 2009 WL 1789468, at *11 (analysts' statements specifically prepared for use at trial were testimonial against the accused and consequently the analyst was subject to the defendant's Sixth Amendment right to confrontation). Similar to the prosecution in *Melendez-Diaz*, Appellant argued at trial that Appellee was in a better position to access the DNA data analysis and related evidence because Appellee could retain an expert or subpoena the laboratory. (J.A. at 119-20.); *Melendez-Diaz*, 2009 WL 1789468, at *11. The Supreme Court of the United States explicated:

> [T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

Id. Accordingly, I expect that any uncertainty previously suffered by Appellant no longer exists.

and that Appellee had "diligently sought production of the evidence." (*Id.* at 24.) Before entering its Order, the trial court considered Appellee's arguments that Appellant's late production of the discovery would prejudice Appellee if he goes to trial on the scheduled date, that Appellee had not requested a continuance of the trial date, and that Appellant was opposed to any further continuances. Although the trial court found no "conscious ill motive" on the part of Appellant, the trial court concluded that Appellant's conduct in responding to Appellee's discovery requests had been "dilatory in the extreme." (*Id.* at 24-25.) Therefore, the trial court granted Appellee's Motion and simultaneously excluded all DNA test analysis evidence, pursuant to Rule 16(d)(2)(C) of the Federal Rules of Criminal Procedure. (*Id.* at 25.)

In light of the circumstances in this case, exclusion of direly needed evidence for a successful prosecution is an ill-conceived and ill-advised sanction when considered within the context of the broad discretion afforded trial courts by Rule 16(d) of the Federal Rules of Criminal Procedure. Rule 16(d)(2) provides the trial court with five options: (1) impose no sanction; (2) order the party to permit discovery or inspection; (3) *allow a continuance*; (4) exclude the evidence at issue; or, (5) "*enter any order that is just under the circumstances*." Fed. R. Crim. P. 16(d)(2) (emphasis added); *see U.S. v. Wicker*, 848 F.2d 1059, 1060-61 (10th Cir. 1988) (paraphrasing the language of Rule 16(d)(2) and enumerating the "factors the [trial] court should consider in determining *if a sanction is appropriate*[.]") (emphasis added).

In *Ubiles*, 317 F.Supp.2d at 608-09, the Appellate Division of the District Court of the Virgin Islands ("Appellate Division") concluded that the trial court abused its discretion in responding to the government's "dilatory tactics" by dismissing the matter

with prejudice – the most severe sanction available under Rule 16(d)(2)(C). Assuming the defendants were prejudiced by the government's conduct, the Appellate Division asserted that less harsh sanctions than dismissal with prejudice were available. *Id.* at 609. Likewise, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in *Gainer, III*, 468 F.3d at 927-28, concluded that the trial court abused its discretion by excluding relevant evidence when the reasons for the delay caused by the government were not considered, no bad faith conduct on the part of the government was found, and the record reflected no "prejudice to [the defendant] that could not have been cured with a less severe sanction, such as a continuance or limitation in the scope of . . . testimony."

Although trial courts have broad discretion under Rule 16(d), they are simultaneously constrained by the 'least severe sanction necessary' doctrine in their exercise of that discretion. *Ubiles,* 317 F.Supp.2d at 609 ("this prejudice could have been cured by a less severe sanction[.]"); *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982) (the trial court "should impose the least severe sanction that will accomplish the desired result–prompt and full compliance with the court's discovery orders.");[4] *Gainer, III, 468* F.3d at 927 ("[trial] courts should embrace the least severe sanction necessary doctrine, and hold that suppression of relevant evidence as a remedial device should be limited to circumstances in which it is necessary to serve remedial objectives.") (quoting

[4] Some jurisdictions, such as the United States Court of Appeals for the Tenth Circuit, have adopted the position that absent an objection at trial specifically seeking alternative sanctions, a party must demonstrate on appeal that the trial court committed plain error by declining to impose the least severe sanction. *See, e.g., United States v. Taylor,* 536 F.2d 1343, 1345 (10th Cir. 1976). It is noteworthy that the United States Court of Appeals for the Third Circuit, however, has agreed with *Sarcinelli* in a recent unpublished opinion, *United States v. Tagliamonte*, No. 07-4275, 2009 WL 2430937, at *7 n.8 (3d Cir. Aug. 10, 2009). Unfortunately and lugubriously, because *Tagliamonte* is an unpublished opinion, it is non-precedential and I am precluded from citing it as legal precedent by Rule 5.7.1 of the Supreme Court of the Virgin Islands Internal Operating Procedures.

United States v. Maples, 60 F.3d 244, 247 (6th Cir.1995) (internal quotations omitted)). Moreover, the Supreme Court of the United States has held that the most severe sanction is ordinarily reserved for those cases in which willful misconduct is found. *Taylor v. Illinois*, 484 U.S. 400, 417, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988); *see also, United States v. Bishop*, 469 F.3d 896, 904 (10th Cir. 2006) (no abuse of discretion when court allowed continuance instead of excluding evidence and defense counsel never indicated that time allotted for continuances would be insufficient to review improperly disclosed e-mails); *United States v. Golyansy*, 291 F.3d 245 (10th Cir. 2002) (the district court erred in excluding testimony of government witnesses when there had been no bad faith by the government in failing to promptly disclose impeachment material and a continuance would have cured any prejudice to the defense). These principles should apply equally to the prosecution and the defense. *Gainer, III*, 468 F.3d at 927. Although the exclusion of the DNA evidence affects Appellant and Appellee, the exclusion of the evidence in this case serves no remedial objective.

The trial court determined that: (1) Appellant's reasons for the delay in giving Appellee the requested DNA discovery material were wholly inadequate; however, the trial court found no bad faith on Appellant's part; (2) Appellee would be prejudiced by the high likelihood that he would be unable to adequately prepare for the impending trial date, and; (3) that two substantial continuances had already been granted. However, the trial court did not consider utilizing an additional, abbreviated continuance to afford Appellee whatever time was deemed necessary for him to prepare his case, after Appellee had received the requested discovery from Appellant. In *Gainer, III*, the Sixth Circuit found that the trial court had failed to assess the degree of prejudice to the defendant and

the propriety of a less harsh sanction. *Id.* at 927. Although the trial court may expand upon the three-factor analysis, *United States v. Davis*, 244 F.3d 666, 670-71 (8th Cir. 2001), at least one other jurisdiction had treated the trial court's failure to establish a record of *all* pertinent considerations to be an abuse of discretion. *Gainer, III*, 468 F.3d at 927 (citing *United States v. Sarracino*, 340 F.3d 1148, 1170-71 (10th Cir.2003)).

The trial court likewise failed to consider all of the factors adopted by the Appellate Division in *Ubiles*, and specifically, the third factor in the context of Rule 16(d) as a whole. The third *Ubiles* factor calls for the trial court to consider the curative effect of granting a continuance to the aggrieved party. *See also, United States v. Golyansky*, 291 F.3d 1245, 1250 (10th Cir. 2002) ("In considering the feasibility of curing Defendants' prejudice through a continuance, the court should consider whether a continuance will effectively cure the unfair surprise as a result of the Government's delayed disclosure.") Although the *Ubiles* decision is merely persuasive precedent for this Court, I will follow the three-factor test because it has been adopted by a number of jurisdictions and is legally sound. *See, e.g., United States v. Garrett*, 238 F.3d 293 (5th Cir. 2000); *Gainer, III*, 468 F.3d 920 (6th Cir. 2006); *United States v. Euceda-Hernandez*, 768 F.2d 1307 (11th Cir. 1985); *see also Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986).

This case had been pending in the trial court for approximately two years because of the inexcusable dilatory tactics of Appellant and its unwillingness to provide the requested discovery to Appellee. Appellant consistently opposed Appellee's requests for sanctions, arguing that dismissal of the case or exclusion of the evidence was unwarranted. (*See, e.g.*, JA at 26-27, 124.) Significantly, at the time of the March 6th,

2009 hearing, although its actions were untimely, Appellant had already provided Appellee with all of the requested discovery. Although Appellee was opposed to further continuance of the proceedings,[5] it was in both parties' best interest for a continuance to be granted to allow Appellee and Appellee's expert sufficient time to review the DNA underlying data for use in the preparation of Appellee's defense. Any concern that Appellant would initiate further delays in the case was allayed because the primary cause for the delays, Appellant's failure to provide the DNA underlying data to Appellee, no longer existed. Additionally, although no trial court in the Virgin Islands would dispute that court dockets in this jurisdiction are crowded, no claim was made by either party or the trial court that a later trial date could not practically be scheduled considering the trial court's docket.

Significantly, I dissent in part from the majority, which would only remand the case to the trial court. However, I would instruct that upon remand, the trial court shall grant a continuance of the trial in order to afford Appellee adequate time to prepare for a trial or alternatively to determine whether a plea offer by Appellant is more advantageous than other options available to Appellee.

Importantly, prior to an appellate court providing relief from a trial court's Rule 16 sanction, the law in this circuit "require[s] a showing that the [trial court's] actions resulted

[5] Appellee also asserts that his Sixth Amendment right to a speedy trial has been violated by the delay resulting from the multiple continuances that have been granted in this case. Although Appellee has asserted his right, Appellee has failed to present any argument in support thereof. A criminal defendant's efforts to assert the right to a speedy trial are one factor to be considered in ascertaining whether the defendant's rights have been violated. *Barker v. Wingo*, 407 U.S. 514, 528 (1972). Because Appellee raised the issue on appeal, yet has failed to advance any argument to support his assertion, I find Appellee's efforts to assert this right to be languorous at best. Therefore, absent evidence in the record of willful or egregious conduct contributing to the delay, considering Appellee's acquiescence in and contribution to a portion of the delay, and considering Appellee's failure to advance any legal argument on the issue, as required by Virgin Islands Supreme Court Rule 22(a)(5), Appellee's assertion that his Sixth Amendment right to a speedy trial has been violated will not be considered at this time.

in prejudice to the [complaining party]." *United States v. Lopez, Jr.*, 271 F.3d 472, 484 (3d Cir. 2001). Irrefutably, the trial court's sanction of excluding the DNA evidence is highly prejudicial to Appellant because the results of the DNA testing and analysis by Appellant's expert implicates Appellee in the crimes charged in this case. Furthermore, the DNA test analysis evidence is extremely relevant to the requisite proof for the charges of Aggravated Rape in the Second Degree and Rape in the First Degree, *see* 14 V.I.C. §§ 1700a, 1701(3), and an integral part of the proof Appellant needs for a successful prosecution. Moreover, without the DNA test analysis evidence, a successful prosecution of the case against Appellee would depend upon the testimony of the minor female and minimally upon four alleged witnesses.

The parties are reminded that at trial, Appellant must prove the rape charges beyond a reasonable doubt. *E.g.*, *Gov't of the Virgin Islands v. Pinney*, 967 F.2d 912, 915 (3d Cir. 1992) ("[O]n the charge of aggravated rape the government has the burden of proving beyond a reasonable doubt . . . ."); *see also Gov't of the Virgin Islands v. Ament*, 820 F.2d 635, 637 n.7 (3d Cir. 1987) ("The government will not as long as I sit on this bench . . . prove vaginal intercourse without proving beyond a reasonable doubt . . . ."). Therefore, the DNA evidence, which is convincing, cogent and persuasive, is crucial to Appellant's ability to prove the elements of the rape charges beyond a reasonable doubt.

The statements of Appellant's counsel at court hearings are indicative of the importance of the DNA evidence to Appellant's case. Appellant's counsel stated that the use of the DNA evidence renders this case, in the vernacular of basketball, a "slam dunk[,]" which means that relevant DNA test analysis results make the evidence against Appellee overwhelming, and a conviction is almost assured.

Considering the paucity of other possible evidence in the limited record before us, it was an abuse of the trial court's discretion to have excluded the DNA test analysis evidence as a sanction against the People without first considering less severe sanctions against Appellant under Rule 16(d)(2) of the Federal Rules of Criminal Procedure. *See Sarcinelli*, 667 F.2d at 5 ("We view the imposition of this sanction, [suppression of the government's evidence,] which will deprive the government of the most probative and incriminating evidence available to it in this case, as an abuse of discretion"); *see also U.S. v. Garrett*, 238 F.3d 293, 301 (5th Cir. 2000) (concluding that, pursuant to consideration of the three-factor Rule 16(d) analysis, as set forth in *Sarcinelli*, the trial court abused its discretion by excluding several of the government's "witnesses with the effect of eviscerating the government's case[.]"). Indeed, exclusion of the DNA test analysis evidence only punishes the People and the minor female, while the persons responsible or blameworthy for not producing the requested discovery material are granted complete impunity. Undeniably, Appellant has suffered substantial and extreme prejudice by the trial court's exclusion of all DNA test analysis evidence because it is extremely doubtful that the prosecution can succeed without the DNA test results. The prejudice to Appellant by the exclusion of the DNA evidence immensely outweighs any prejudice to Appellee caused by the delay in Appellee receiving the DNA evidence for examination by his expert. The reason is that despite the delay, Appellee, having already received all the DNA evidence, would have an opportunity to have the DNA test analysis and the DNA data analyzed and reviewed by his expert witness for use in his defense during trial at a later date.

The trial court could have sanctioned Appellant in any manner consistent with the interests of justice. Specifically, when the trial court expressed its dismay with the conduct of Appellant's counsel and when the necessity of the particular evidence was readily apparent for both parties, the trial court would have been well within its province of discretion to impose sanctions against the offending party and specifically against Appellant's counsel of record, instead of summarily excluding important evidence from the trial. *See Taylor*, 484 U.S. at 433 (Brennan, J., dissenting.) ("In the absence of any evidence that a defendant played any part in an attorney's willful discovery violation, directly sanctioning the attorney is not only fairer but *more* effective in deterring violations than excluding defense evidence.) (emphasis in original). Appellant's counsel's conduct in prosecuting this case, while not found by the trial court to be willful, demonstrated a lackadaisical attitude towards a felony prosecution. Furthermore, the conduct of Appellant's counsel, in withholding the discovery from Appellee after several legitimate demands, is reprehensible, disgraceful, contumacious and egregious. Nonetheless, the conduct of Appellant's counsel should not be allowed to manipulate the guiding principle of "the least severe sanction" when the trial court exercises its discretion. Appellant's counsel is solely blameworthy for the exclusion of the evidence and should not be afforded impunity at the expense of the People and the minor female. Furthermore, I emphasize and underscore that this opinion does not condone the vexatious conduct of Appellant's counsel. As will be elucidated below, it advocates a realistic, viable and less-severe alternative sanction to that of summarily excluding relevant evidence direly needed for a successful prosecution.

More succinctly, when confronted with similar circumstances as in this case, the trial court is instructed, as an option, to "enter any order that is just under the circumstances." *See* Fed. R. Crim. P. 16(d)(2)(D). Instead of excluding the DNA evidence, the trial court should have pursued a more appropriate sanction against Appellant's counsel such as civil[6] and criminal[7] contempt of court proceedings for violating the trial court's numerous orders and for Appellant's counsel's brazen, callous and unjustified failure to timely produce the material Appellee requested in discovery. For ignoring the trial court's orders, the trial court could have endeavored to conduct contempt proceedings against the Attorney General of the Virgin Islands ("Attorney General"), the chief of the criminal division of the Department of Justice, and the individual assistant attorney general who was the People's last counsel of record. For example, the trial court should have entered an order, not directed to the People, but directed to these three individuals who hold the positions of Attorney General, chief of the criminal division, and the most recent assistant attorney general of record in this case, ordering them to fully comply with the trial court's discovery orders. If any of these three individuals failed to comply with the court's order, the offending individual would be held in contempt of court and appropriate sanctions imposed. An appropriate sanction

[6] Civil contempt is defined as "contempt that consists of disobedience to a court order in favor of the opposing party[.] The sanctions for civil contempt end upon compliance with the order." MERRIAM-WEBSTER'S DICTIONARY OF LAW, 100-101 (Collector's ed. 2005). Additionally, "for civil contempt the punishment is remedial, and for the benefit of the complainant." *Hicks v. Feiock*, 485 U.S. 624, 631, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988) (internal quotations and citation omitted).

[7] Criminal contempt is defined as "contempt consisting of conduct that disrupts or opposes the proceedings or power of the court[.] The sanctions for criminal contempt are designed to punish as well as to coerce compliance." MERRIAM-WEBSTER'S DICTIONARY OF LAW, 101 (Collector's ed. 2005). "[F]or criminal contempt the sentence is punitive, to vindicate the authority of the court." *Feiock*, 485 U.S. at 631 (internal quotations and citation omitted).

against these three individuals is codified in title 14, section 581 of the Virgin Islands Code, which provides in pertinent language:

> Every court of the Virgin Islands shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as –
> . . . .
> (3) disobedience or resistance to its lawful writ, process, order, rule decree, or command.

14 V.I.C. § 581.

The Third Circuit has specifically stated that it is "not at all confident that the government, *qua* the government, as distinguished from a specific officer, agency, or precise identifiable unit of that government, may be subject to penalties of fine or imprisonment–the normal sanctions for civil and criminal contempt." *United States v. Starusko*, 729 F.2d 256, 264 (3d Cir. 1984) (internal citation omitted). I agree. However, in this case I find that a less-severe sanction than exclusion of the evidence was available specifically against the government's assistant attorney general assigned to prosecute the case, the chief of the criminal division at the Department of Justice and the Attorney General whose duties and responsibilities entail supervision over the assistant attorneys general.

The Attorney General is statutorily charged with prosecuting this case, pursuant to title 3, section 114(a)(3) of the Virgin Islands Code. The chief of the criminal division of the Department of Justice and the prosecuting assistant attorney general are under the Attorney General's direct supervision; therefore, the Attorney General can discipline his staff attorneys for malfeasance. *Compare Sarcinelli*, 667 F.2d at 6 (the *Sarcinelli* court opined "the [trial] judge could have cited the prosecutor for civil contempt and put her in

jail, if that would have been necessary to coerce her into obeying the magistrate's discovery orders. The court could have called the United States Attorney to task as well; for, after all, he bears the ultimate responsibility for ensuring that his lawyers conduct themselves in conformance with the law."). Combined with a brief continuance to afford Appellee time to prepare for trial, holding in contempt the persons responsible for Appellant's failure to comply with the trial court's discovery orders would be well-tailored to "remedy the prejudice and deter future wrongdoing on the part of the government." *United States v. Davis*, 244 F.3d 666, 673 (8th Cir. 2001). It is appropriate for the trial court to have issued an order to the assistant attorney general to show cause for violating the court's discovery orders. Moreover, it would entail little effort for the trial court to have the Attorney General subpoenaed to appear in court to explain the conduct of his office.

I am convinced that holding the Attorney General in contempt of court for the conduct of his office in violating the trial court's innumerable discovery orders would yield immeasurable positive results, would establish a sound precedent for Superior Court Judges, and would avoid a reoccurrence of Appellant's reprehensible conduct. This example illustrates that the broad discretion vested in the trial court by Rule 16(d) permits the trial court to impose sanctions on the culpable party that are effective, without necessarily precluding the Appellant from utilizing lawful evidence in the prosecution of this case. Excluding the DNA evidence would victimize the minor female and unnecessarily punish the People, while simultaneously allowing those responsible for the failure in this case to enjoy total impunity, with no incentive for Appellant's counsel to comply with future trial court's discovery orders. The trial court's decision to exclude

the evidence upon the facts and circumstances of this case establishes an untenable precedent when other viable, less-severe sanctions are available.

Without the DNA analysis evidence, a scenario is created in which the jury will be compelled to decide this case based upon the competing testimony of a naïve and perhaps inarticulate minor female against the testimony of Appellee, an experienced police officer, who is most likely a veteran witness of the courtroom. Under these circumstances an acquittal, rather than a fair trial, is assured. *See Sarcinelli*, 667 F.2d at 6 (the trial court's suppression of the government's evidence would produce an acquittal.).

B. Whether Appellant's Failure to Earlier Provide Appellee with the DNA Test Analysis Results and the DNA Data Would Still Have Prejudiced Appellee if the Trial Court had Granted a Continuance of the Trial to Allow Appellee Sufficient Time to Review the DNA Test Analysis and the Other Related DNA Evidence.

I find that the trial court did abuse its discretion in excluding the DNA test analysis evidence and other related evidence as a sanction against Appellant instead of granting an abbreviated continuance or sanctioning Appellant's counsel. For the reasons explicated above, Appellant's second issue on appeal is moot.

V. CONCLUSION

The sanction imposed by the trial court had the effect of excluding Appellant's most probative evidence. Absent an indication in the record that other evidence exists upon which Appellant may prove its case beyond a reasonable doubt, extreme prejudice will be suffered by both Appellant and the minor female in this case. Ironically, the word 'justice' appears in the name of the government department charged with prosecuting this case, which is the Virgin Islands Department of Justice. However, because of the actions of the

trial court and the Department of Justice, for the minor female and Appellant, *the only justice there is is that there is no justice.*

Moreover, I dissent from the majority and conclude that as an alternative to excluding the DNA evidence, it is justified under the circumstances of this case for the trial court to have ordered a continuation of the April 20th, 2009 trial in order to afford Appellee sufficient time to have his expert witness review all DNA analysis reports and the DNA data test analysis results. Importantly, Appellee had received all DNA evidence fifty-four (54) days before the trial date. A continuance would have afforded Appellee sufficient time to prepare for trial. Moreover, at the time the trial court entered its March 6th, 2009 Order excluding the evidence, Appellee had already received all the DNA analysis reports and knew the results of the DNA analysis. This fact urges a finding that the trial court abused its discretion in excluding the DNA test results instead of continuing the approaching trial date. Secondarily, for violating its discovery orders, the trial court could have initiated contempt proceedings against the Attorney General, the chief of the criminal division of the Department of Justice and the assistant attorney general who is prosecuting this case. Accordingly, I would REVERSE the Order of the trial court excluding the results of all DNA test analysis and associated evidence and REMAND the case to the trial court for proceedings consistent with this opinion, including a continuance to afford Appellee a reasonable time to conduct his own expert review and analysis of both the DNA analysis and the DNA data test analysis.

Dated this 14th day of April

_____/s/_____
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

HODGE, Chief Justice, dissenting.

Although I agree with the majority and concurring opinions that the People were required to produce the requested discovery and that the Superior Court did not err in its findings with respect to the reasons for the People's delay and the extent of the prejudice to Rodriguez caused by the delay, I write separately in dissent because while the majority and concurring opinions rely on the abuse of discretion standard of review, such a standard is not appropriate because the more strict plain error standard should apply to this case. Furthermore, I do not believe the Superior Court committed plain error or abused its discretion in its consideration of the third factor or in choosing exclusion of evidence as the appropriate sanction.

I. PROCEDURAL BACKGROUND

The instant interlocutory appeal stems from a seven-count information the People filed on May 4, 2007, which charged Rodriguez with kidnapping for rape, aggravated rape in the second degree, rape in the first degree, unlawful sexual contact in the first degree, child abuse, and two counts of interfering with an officer discharging his duty. During May and June 2007, the Virgin Islands Police Department obtained blood samples and other DNA evidence from both Rodriguez and the alleged victim, which were sent to the Federal Bureau of Investigation (hereafter "FBI") for analysis. The FBI provided the People with the results of its analysis through a February 12, 2008 letter, which the People turned over to Rodriguez's counsel. However, the February 12, 2008 letter, while stating the results of the DNA test, did not include any additional information, such as chain of custody or the methods the FBI used to conduct its analysis. Consequently, Rodriguez, through his attorney, informed both the Superior Court and the People in April 2008 that the information provided was insufficient to proceed to trial. After holding a hearing on the matter, the Superior Court continued Rodriguez's trial date—over

Rodriguez's objection—until November 10, 2008, which the People agreed would be sufficient time to provide Rodriguez with these materials. Subsequently, Rodriguez's counsel served the People with a May 5, 2008 letter which expressly identified all of the requested information.

The People, however, did not produce this additional discovery by the court-imposed deadline. On November 8, 2008, Rodriguez, citing the People's failure to comply with the Superior Court's discovery schedule, filed a motion to exclude all DNA evidence as a sanction pursuant to Federal Rule of Criminal Procedure 16(d)(2)(C).[1] The Superior Court held a hearing on Rodriguez's motion on December 12, 2008, at which the People argued, for the first time, that the requested materials were not discoverable. The Superior Court subsequently issued a January 26, 2009 Order holding that the materials are discoverable and compelling the People to provide them to Rodriguez before February 10, 2009.

Nevertheless, the People again failed to comply with the Superior Court's order. Consequently, Rodriguez filed a renewed motion to exclude on February 11, 2009. Although the People eventually produced the evidence on February 26, 2009, the Superior Court held a hearing on Rodriguez's renewed motion on March 6, 2009. The Superior Court subsequently granted Rodriguez's motion in a March 10, 2009 Order excluding the evidence as a sanction pursuant to Fed. R. Crim. P. 16(d)(2)(C). The People filed its notice of appeal and interlocutory certification on March 30, 2009, as well as a motion for reconsideration on April 1, 2009.

II. DISCUSSION

A. Standard of Review

As a threshold matter, it is necessary to identify what standard of review should apply to

[1] The Federal Rules of Criminal Procedure apply to proceedings in the Superior Court to the extent they are not inconsistent with local procedural rules. Super. Ct. R. 7.

this appeal. I agree that generally "a trial court's decision as to the appropriate remedy [for a discovery violation] may only be reversed for abuse of discretion." *United States v. Muse*, 83 F.3d 672, 675 (4th Cir. 1996). However, "[i]t is well established that when a criminal defendant fails to object to an issue at trial, an appellate court will limit its review to plain error." *Phillips v. People*, S.Ct. Crim. No. 2007-037, 2009 WL 707182, at *3 (V.I. Mar. 12, 2009). Furthermore, it is equally well established that this same principle applies when the People have not raised an issue before the trial court. *See United States v. Avants*, 278 F.3d 510, 520-21 (5th Cir. 2002) (applying plain error standard when government raised issue for the first time on appeal); *see also United States v. Lucas*, 499 F.3d 769, 785 (8th Cir. 2007) (collecting cases).

The Supreme Court of Oregon, in affirming a trial judge's decision to exclude evidence as a discovery sanction under a state rule of criminal procedure containing language equivalent to Federal Rule of Criminal Procedure 16, explained that a litigant's "failure to object to the particular sanction imposed by the judge or, in the alternative, to argue for some other sanction, fails to preserve a claim on appeal that the judge erred in failing to consider the availability of a less onerous sanction" because the sanctioned party must "identify adequately for the judge the issue of alternatives . . . ." *State v. Wyatt*, 15 P.3d 22, 27 (Or. 2000). *See also United States v. Taylor*, 536 F.2d 1343, 1345 (10th Cir. 1976) (reviewing for plain error trial court's failure to *sua sponte* sanction the government for discovery violations when "the trial court had no opportunity to exercise its discretionary power relative to the question here presented" because litigant failed to object to an "obvious" problem). *Cf. People v. Pena*, 688 N.Y.S.2d 123, 123 (N.Y. App. Div. 1999) (holding that defendant's request for "drastic and unwarranted remedy of dismissal" as remedy for failure to disclose evidence "did not preserve for review his current argument that the trial court should have fashioned, *sua sponte*, some lesser sanction.")

Here, the People—like the sanctioned party in *Wyatt*—clearly did not properly raise the issue of alternative lesser sanctions before the Superior Court. Moreover, the People also failed to object to other aspects of the Superior Court's March 10, 2009 Order. Significantly, the People did not file an opposition to Rodriguez's renewed motion, and not only failed to argue in favor of a lesser sanction than exclusion of the DNA evidence at the March 6, 2009 hearing, but did not even request that the Superior Court refrain from imposing any sanction.[2] Moreover, the People did not contend at the March 6, 2009 hearing that Rodriguez had not been prejudiced, nor request an additional continuance in lieu of a sanction. Furthermore, although the People eventually argued that Rodriguez had not been prejudiced in its March 30, 2009 interlocutory certification and April 1, 2009 motion for reconsideration—both of which were insufficient to fully preserve the prejudice issue on appeal[3]—even in these documents the People did not propose any alternate lesser sanctions or argue that the chosen sanction was too harsh. (J.A. at 14; 20). Consequently, I disagree with the majority and concurring opinions' application of only the abuse of discretion standard of review and would instead initially review the Superior Court's order under the more stringent plain error standard of review. *See United States v. Ratliff*, No.

[2] In fact, the People's counsel did not even object to Rodriguez's request to dismiss the information without prejudice--a more severe sanction than exclusion of evidence—and expressly informed the trial judge that the People could re-file charges against Rodriguez within the statute of limitations if the matter was dismissed without prejudice. (J.A. at 104.)

[3] Superior Court Rule 7 provides that "[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court . . . ." Rule 1.2 of the District Court's Local Rules of Criminal Procedure provides that "[i]n cases of general procedure not covered by these Rules, the Local Rules of Civil Procedure shall apply." Local Rule of Civil Procedure 7.3, which governs motions for reconsideration of all orders or decisions that do not constitute final judgments, requires that any party seeking reconsideration file its motion within ten days of entry of that order. Because both of the People's filings were untimely, they cannot serve as a basis for precluding plain error review even with respect to the trial court's finding that Rodriguez had been prejudiced. *See United States v. Vampire Nation*, 451 F.3d 189, 208 n.18 (3d Cir. 2006) (holding that "a failure to timely raise [an] issue . . . constrains us to plain error review."). *See also United States v. Milan-Rodriguez*, 828 F.2d 679, 683-84 (11th Cir. 1987) (holding that untimely motion in a criminal case may only be reviewed for plain error even if trial court considered motion on the merits).

09-10327, 2009 WL 3042041, at *1 (11th Cir. Sept. 24, 2009) ("If an error was not preserved, we do not apply the usual abuse of discretion standard of review but rather review for plain error."); *Wyatt*, 15 P.3d at 29; *see also Puckett v. United States*, --- U.S. ---, 129 S.Ct. 1423, 1433 (Mar. 25, 2009) (explaining that plain error review "serves worthy purposes, has meaningful effects, and is in any event compelled by the Federal Rules," and cannot be circumvented by an appellate court even if the alleged error "is a serious matter."); *People v. Brocato*, 169 N.W.2d 483, 497 (Mich. Ct. App. 1969) ("Counsel cannot sit back and harbor error to be used as an appellate parachute . . . .").

The United States Supreme Court has established a four-prong test that governs whether an appellate court may overturn a trial court's decision on the basis of an unpreserved error in a criminal case:

> First, there must be an error or defect-some sort of "[d]eviation from a legal rule"-that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error-discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Meeting all four prongs is difficult, "as it should be."

Puckett, 129 S.Ct. at 1429 (quoting *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1997) and *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)) (citations omitted).

I do not believe that any of these four factors are met in this case. With respect to the first factor, I would hold, for the reasons given in the sub-sections that follow, that the trial court properly considered all three balancing test factors and did not commit any error even under the

abuse of discretion standard of review. However, even if the trial court erred, its error could not have been plain because the People's failure to object to any aspect of Rodriguez's February 11, 2009 renewed motion, either through a written opposition or orally at the March 6, 2009 hearing, could have led the Superior Court to properly assume that the motion was unopposed and that the People had conceded that exclusion of the evidence or dismissal without prejudice were appropriate sanctions for its discovery violations. *Cf. Taylor*, 536 F.2d at 1345 (holding no plain error when trial court failed to *sua sponte* sanction the government under Rule 16 because "[t]he court could assume defendant had decided not to seek any sanctions for violation of Rule 16" due to litigant's failure to object to obvious discovery violation). Furthermore, I would hold that the purported errors identified by the majority and concurring opinions—that the Superior Court failed to properly consider whether a continuance could cure the prejudice to Rodriguez or apply the least severe sanction—would not have changed the outcome of the Superior Court proceedings because the trial judge was not required to *sua sponte* order a third continuance over Rodriguez's objection, a continuance would not have cured the prejudice to Rodriguez, and none of the proposed alternate sanctions were suggested to the trial court or even available against the government. Consequently, I do not believe the fourth plain error factor—that the trial court's actions "seriously affected the fairness, integrity or public reputation of judicial proceedings"—could have been met. Thus, for the reasons that follow, I believe the Superior Court not only failed to commit plain error, but properly acted within its discretion.

B. The Superior Court Properly Considered and Weighed the Three *Ubiles* Factors

To determine whether a trial court erred in choosing a particular Rule 16 sanction, this Court must first consider "(1) the reasons for the government's delay in producing the requested materials, including whether or not the government acted in bad faith when it failed to comply

with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance." *Gov't v. Ubiles*, 317 F.Supp.2d 605, 608 (D.V.I. App. Div. 2004); *see also Gov't v. Fahie*, 419 F.3d 249, 258 (3d Cir. 2005) (citing *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985)); *United States v. Muessig*, 427 F.3d 856, 864 (10th Cir. 2005); *United States v. Maples*, 60 F.3d 244, 247 (6th Cir. 1995). For the reasons that follow, I believe the Superior Court properly considered and balanced all three factors and acted within its discretion.

1. The Superior Court's Finding of Extreme Dilatoriness Does Not Preclude Exclusion

The People correctly note that, with respect to the first factor, the Superior Court did not find that the People, in failing to provide the discovery items as ordered, acted in bad faith. However, the absence of bad faith does not, in and of itself, preclude exclusion of evidence as a sanction under this balancing test. *See Gov't of the V.I. v. Blake*, 118 F.3d 972, 978 n.5 (3d Cir. 1997) ("Although the discovery sanctions may penalize the government for the 'carelessness and confusion' of one prosecutor who failed to follow discovery rules, this is entirely appropriate under Rule 16."). In its March 10, 2009 Order, the Superior Court found that "[t]he People's conduct in the pretrial stages of this case has been dilatory in the extreme" and that "the People have shown this file a remarkable lack of attention. . . ." (J.A. at 25.) Such conduct, even without an express finding of bad faith,[4] was more than sufficient for the Superior Court to consider exclusion of evidence as a sanction, particularly given the length of the continuances

[4] Although the Superior Court declined to expressly hold that the People acted in bad faith, I note that its findings with respect to the People's extreme dilatory conduct in this case, including violating multiple court orders, would not only clearly support a finding of bad faith, but justify imposition of severe sanctions. *Cf. Mercer v. Raine*, 443 So.2d 944, 947 (Fla. 1983) ("A deliberate and contumacious disregard of the court's authority will justify application of th[e] severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.").

was more than sufficient to allow for production of the requested discovery.[5] *See Blake*, 118 F.3d at 978 n.5*; see also Wicker*, 848 F.2d at 1061 ("Although the district court did not consider whether the government acted in bad faith in not complying with the discovery order, the district court was clearly justified in concluding that the government's reason was not sufficient to justify the delay.").[6]

2. The Superior Court Properly Identified Prejudice to Rodriguez

The People also argue that the Superior Court could not properly have excluded evidence as a sanction because Rodriguez had purportedly failed to show that he was prejudiced by the People's actions.[7] However, the Superior Court explicitly found "that the late production of the evidence will prejudice [Rodriguez] in light of the April 2009 trial date." (J.A. at 25.) Because the party who has not violated discovery rules in a criminal matter has a "protected interest in the scheduled trial date,"[8] the substantial delay of Rodriguez's trial caused by the People's repeated failure to provide the requested discovery constituted sufficient prejudice to warrant a severe sanction. *Harris v. State*, 195 P.3d 161, 180 (Alaska Ct. App. 2008) (construing state equivalent of Fed. R. Crim. P. 16). Moreover, the record clearly indicates that Rodriguez repeatedly

[5] Notably, the People disclosed in its motion for extension of time that it would only take the Federal Bureau of Investigation two weeks to provide the materials once requested by the People. (J.A. at 26-27.)

[6] Moreover, in addition to Rule 16, the Superior Court possesses both the statutory and inherent power to enforce compliance with a discovery order, including sanctioning a party for non-compliance, regardless of whether non-compliance was in bad faith. *See* 4 V.I.C. § 281(2) ("Every judicial officer shall have power . . . [t]o compel obedience to his lawful orders.").

[7] Although prejudice to the defendant is a factor the Superior Court must consider in its analysis, the absence of prejudice will not preclude exclusion of evidence as a sanction under this test if other factors are present that make exclusion appropriate under the circumstances. *See United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979) ("We find no abuse of discretion where . . . a district judge . . . suppresses evidence that, under a valid discovery order, the government should have disclosed earlier, even if the nondisclosure did not prejudice the defendants.").

[8] This interest, however, "can be overridden when justice requires." *Harris*, 195 P.3d at 180.

informed the Superior Court that he could not retain an expert witness or otherwise prepare to challenge the report until the People provided the outstanding discovery. (J.A. at 65; 100.) In the context of a trial court's pre-trial order excluding evidence as a sanction under Fed. R. Crim. P. 16, such a reason is also sufficient to support a finding of prejudice to the defendant. *See, e.g.*, *Wicker*, 848 F.2d at 1061; *Davis*, 244 F.3d at 671.

3. The Superior Court Properly Considered a Continuance

While the majority opinion characterizes the Superior Court as failing to properly consider the third factor—the feasibility of curing the prejudice to Rodriguez with a continuance—I believe that the Superior Court's order reflects that it adequately considered a continuance but rejected it as ineffective. Specifically, the Superior Court noted "that this matter has been pending in excess of two years" and that "[Rodriguez] . . . opposes any further continuances" that would delay his trial date. (J.A. at 25.) Although appellate courts have correctly held that "[a] continuance may normally be the most desirable remedy for the government's failure to comply with a discovery order," no authority supports the proposition that a trial court is under an obligation to provide the government with a second or third continuance when it has failed to comply with a prior continuance granted to remedy the same discovery violation. *Compare United States v. Ivory*, 131 Fed.Appx. 628, 631 (10th Cir. 2005) (holding abuse of discretion because trial court did not award any continuance, even though continuance would have remedied preparation problem) *with Wicker*, 848 F.2d at 1062 (holding no abuse of discretion in excluding evidence rather than granting second continuance because government failed to comply with deadline set by earlier continuance). *See also Harris*, 195 P.3d at 180 ("[W]hen a trial judge is confronted with willful disobedience of discovery rules and orders, the judge is not required to keep delaying the trial to protect the offending party's interest

in a full hearing of the evidence. Rather, the judge has the discretion to order the trial to go forward with abridged evidence.").

Here, the Superior Court had previously granted two continuances to allow the People the opportunity to provide the requested discovery to the defense, but the People failed to meet those deadlines. Consequently, the Superior Court was not required to consider a third continuance prior to imposing a sanction against the People. Furthermore, because Rodriguez was harmed not only because he could not obtain an expert witness to rebut the DNA evidence, but also because of the substantial delays in his criminal trial caused by the People's actions, a continuance—which, by its nature, would have delayed Rodriguez's trial even further—could not have wholly cured the prejudice to Rodriguez. Accordingly, I do not believe the Superior Court erred in considering and applying the three balancing test factors.

C. The Superior Court's Choice of Sanction Does Not Warrant Reversal

Finally, I disagree with the majority and concurring opinions' assertions that the Superior Court abused its discretion because it failed to consider or impose a lesser sanction than exclusion of the DNA evidence.[9] As a threshold matter, I note that while the Superior Court's

[9] The concurring opinion, citing *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. 1982) and *United States v. Garrett*, 238 F.3d 293 (5th Cir. 2000), also contends that exclusion of the DNA evidence is nevertheless inappropriate because the DNA evidence is "an integral part of the proof [the People] need[] for a successful prosecution," and that its admission would "make the evidence against [Rodriguez] overwhelming," (Concurring Op. at 15-16.) However, although the Fifth Circuit in *Sarcinelli* and *Garrett* explained the impact of excluding evidence on the government's ability to prosecute the defendant, in both cases it did so primarily in the context of admonishing the trial court for reaching its decision without considering the required balancing test factors. *See Sarcinelli*, 667 F.2d at 7 (holding that order excluding "all physical evidence, all statements made by the defendants . . . and all electronic recordings or tape recordings previously ordered produced and not produced" without explaining why it was necessary "to tie the hands of the government by suppressing its proof" constituted an abuse of discretion because magistrate clearly did not consider three-factor balancing test); *Garrett*, 238 F.3d at 301 (holding that excluding testimony of 25 government witnesses "with the effect of eliminating or substantially diminishing the government's case against the defendants" was "excessive" when withheld evidence was clearly cumulative of disclosed evidence, evidence was only submitted two days late, defense counsel acknowledged a two or three day continuance would remedy any prejudice, and trial court had concluded government's delay was an unintentional mistake made in good faith).

March 10, 2009 Order does not expressly discuss sanctions other than exclusion of evidence, it is well established that a court is not required to formally assess, on the record, the feasibility of sanctions that are either not available to it, are obviously ineffective, or were not proposed by either party. The Oregon Court of Appeals, in a case also involving a discovery violation in a criminal case, expressly held that the least severe sanction doctrine does not impose on a trial judge the duty to *sua sponte* consider lesser sanctions that were not proposed by either party:

> [I]mplicit in defendant's assignment of error is the assumption that, even in the absence of a contemporaneous objection, the trial court, after making the determination that there had been a discovery violation, had an obligation to consider *sua sponte* . . . whether a lesser sanction than exclusion of the witness would be a sufficient cure for the violation. That assumption is wrong.

State v. Cunningham, 105 P.3d 929, 935 (Or. Ct. App. 2005). The Supreme Judicial Court of Maine made a similar observation in a case involving a discovery violation by the prosecution:

> By his strategic choices, defendant's trial counsel offered only two alternatives-the trial could continue, or the charge could be dismissed. It is beyond question that had a lesser sanction, such as a mistrial or a continuance, been promptly requested, it would have been ordered. We must view the case, however, in the posture in which it was placed by the actions of defense counsel. . . . By insisting on the most extreme sanction and ignoring any lesser measure, trial counsel assumed a burden that defendant has not been able to surmount.

State v. Grover, 518 A.2d 1039, 1041 (Me. 1986). *See also United States v. Harris,* Nos. 95-10506, 95-10551, 1997 WL 85569, at *2 (9th Cir. 1997) (holding no plain error in granting motion to exclude evidence in lieu of *sua sponte* imposing alternate sanction because "[t]he district court was not required to apply less drastic sanctions" when litigant offered no explanation for discovery violation and proposed no alternate sanction); *cf. Briscoe v. Klaus,* 538 F.3d 252, 263 n.6 (3d Cir. 2008) (holding no abuse of discretion in trial court's failure to thoroughly consider alternative sanctions when record indicated lesser sanctions were not offered); *In re Rodriguez Gonzalez*, 396 B.R. 790, 800 (B.A.P. 1st Cir. 2008) (holding trial court

not required to consider lesser sanctions when "lesser sanctions were not available for the court to consider.").

Moreover, even when a statute expressly mandates formal findings with respect to lesser sanctions—which is not the case here—the error would only justify reversal if an appellate court determines that the trial court could have permissibly employed an alternate sanction that was both available and effective. *See People v. Edwards*, 22 Cal.Rptr.2d 3, 13 (Cal. Ct. App. 1993). Although the majority and concurring opinions identify other, purportedly lesser, sanctions that the Superior Court could have considered in its March 10, 2009 Order and may consider again on remand, I believe that these sanctions either could not have been permissibly applied by the Superior Court or would constitute more severe sanctions than exclusion of the evidence. With respect to holding the People in civil contempt, the concurring opinion itself acknowledges that "[t]he sanctions for civil contempt end upon compliance with the order." (Concurring Op. at 18 n.6.) *See also Hicks v. Feiock*, 485 U.S. 624, 631-32, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988) (distinguishing civil and criminal contempt). Since the People provided the requested materials to the defense on February 26, 2009—albeit well beyond the due date—and the principles of sovereign immunity preclude imposing monetary sanctions against the People to compensate Rodriguez or the court, the Superior Court could not have held the People or its counsel in civil contempt at the time it issued its March 10, 2009 Order. *See United States v. Bein*, 214 F.3d 408, 413 (3d Cir. 2000) (stating that courts are precluded from assessing monetary sanctions against the government for violations of Fed. R. Crim. P. 16). Furthermore, while civil contempt may arguably represent a lesser sanction than excluding evidence, *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982), no federal or state appellate court has characterized criminal contempt as a lesser sanction than exclusion of evidence, nor has any appellate court held that a trial court

abused its discretion in excluding evidence in lieu of initiating criminal contempt proceedings against a prosecutor when the three-factor balancing test allowed for a sanction rather than a continuance. On the contrary, multiple appellate courts have affirmed orders excluding the government's evidence as a discovery sanction without considering whether the trial court could or should have exercised its contempt powers against the government. *See, e.g.*, *Wicker*, 848 F.2d at 1062; *Davis*, 244 F.3d at 671. Moreover, even if criminal contempt constitutes a lesser sanction than exclusion of evidence, the Third Circuit has held that, unlike other litigants, the government may not be cited for criminal contempt. *See United States v. Starusko*, 729 F.2d 256, 264 (3d Cir. 1984). Consequently, the Superior Court could not have held the People in civil or criminal contempt as an alternative to excluding the DNA evidence.

Likewise, it is important to emphasize that a trial court only errs if it declines to impose a less severe sanction that would have the effect of both "remedy[ing] the prejudice and deter[ring] future wrongdoing on the part of the government." *Davis*, 244 F.3d at 672-73.[10] While the majority opinion correctly recognizes that the purpose of a continuance is to remedy the prejudice to a defendant, it is necessary to emphasize that a continuance is not a sanction and thus is ineffective at deterring discovery violations when compared to exclusion of evidence. As the Maryland Court of Appeals observed in the context of the rule requiring pre-trial disclosure of alibi witnesses:

> Excluding the evidence has proved effective . . . In contrast, the threat of a continuance is not a sanction at all. . . . If all [a party] risks is a continuance, [it] will purposely not give notice because the continuance is valuable to [it] . . . .

[10] Significantly, the *Davis* court noted that the government's lack of an explanation for its failure to comply with a discovery order favores exclusion as a sanction. 244 F.3d at 673. Although the People state, for the first time on appeal, that its failure can be attributed to "managerial failures" in the Attorney General's Office caused by a high turnover of Assistant Attorney Generals, the People's counsel did not provide this or any other explanation at the March 6, 2009 hearing. (J.A. at 100-01.)

> The effect of using continuance as a "sanction" is also contra the deep concern of the bench and bar with trial delay.

Taliaferro v. State, 456 A.2d 29, 40 (Md. 1983) (quoting Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 29, 35-36 (1964)). This observation is consistent with a pronouncement of the United States Supreme Court in a related context:

> It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice . . . and the harm to the adversary process.

Taylor v. Illinois, 484 U.S. 400, 413, 108 S.Ct. 646, 655, 98 L.Ed.2d 798 (1988). Consequently, appellate courts have repeatedly observed that, for discovery rules in criminal cases to have any practical significance, trial courts must be allowed to exclude evidence as a sanction when a continuance is not possible or if a prior continuance has proven ineffective, for to hold otherwise would render those rules ineffective. *See, e.g., United States v. Barron*, 575 F.2d 752, 757 (9th Cir. 1978) ("[I]f the rule is to have any teeth, trial courts must be able to impose sanctions, even the drastic one employed in this case."); *State v. Davis*, 624 P.2d 376, 381 (Haw. 1981) (stating that sanctions are "essential" for discovery rules "to have practical significance."); *State v. Flohr*, 301 N.W.2d 367, 372 (N.D. 1980) ("Without the threat and use of the [exclusion] sanction, the policies of the rule would likely go unfulfilled. . . . Alternative sanctions [to exclusion] appear less effective and often entail delay and expense, . . .").

Similarly, I disagree with the majority opinion's finding that, "where the prosecutors' conduct violates an applicable ethical rule, the court can 'call the prosecutors' conduct to the attention of the appropriate disciplinary authorities.'" (Maj. Op. at 13 (quoting *Starusko*, 729 F.2d at 265).) As a threshold matter, it is well-established that "[a] referral cannot be characterized as a sanction" because "[t]hrough a referral, a district court simply indicates that in

its view, conduct of the attorneys merits further examination by the disciplinary committee, which may or may not result in a sanction." *Adkins v. Christie*, 227 Fed.Appx. 804, 806 (11th Cir. 2007). However, even if notifying the appropriate authorities could be properly characterized as a sanction,[11] the *Starusko* court expressly held that referring an individual attorney to the bar is not an appropriate remedy for the government's failure to disclose evidence because such a sanction must be imposed against the government even though the non-disclosure was caused by one of its agents.[12] *Starusko*, 729 F.2d at 264.[13] *See also Blake*, 118 F.3d at 978 n.5 ("Evidence was excluded under Rule 16 because the government failed to comply with the court's discovery orders. Although the discovery sanctions may penalize the government for the 'carelessness and confusion' of one prosecutor who failed to follow discovery rules, this is entirely appropriate under Rule 16.").[14] The Third Circuit's analysis is consistent with the plain text of Rule 16, which expressly authorizes sanctions against "a party" that fails to comply with discovery orders even though—as in the instant case—non-compliance may have been the fault of that party's attorney or other agent. Fed. R. Crim. P. 16(d)(2); *Blake*, 118 F.3d at 978 n.5.

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[11] I also note that, just as a continuance lacks any deterrence effect, an order merely referring the People's attorneys to a disciplinary committee would do nothing to remedy the prejudice to Rodriguez, for Rodriguez would be forced to choose between either foregoing retaining his own expert witness to obtain a speedy trial or requesting a continuance and have his trial delayed even longer.

[12] Furthermore, the *Starusko* court noted that such referrals may only be appropriate in cases where it appears that an attorney intentionally failed to make required disclosures. *Starusko*, 729 F.2d at 264.

[13] It is worth noting that the *Starusko* court, while vacating the trial court's order because remedies for *Brady* violations may only be assessed post-trial, nevertheless observed that "the sanction might have passed muster as a valid exercise of its inherent authority to punish for the willful disregard of a court order." *Starusko*, 729 F.2d at 262 n.6.

[14] I reject, for this same reason, the concurring opinion's contention that utilizing exclusion as a remedy is inappropriate because it punishes the People rather than the specific attorneys responsible for the discovery violation. (Concurring Op. at 16.)

Accordingly, I cannot agree that the Superior Court erred in choosing to exclude the DNA evidence in lieu of imposing a different sanction. Consequently, I would also find that the Superior Court could not have committed a plain error and that its failure to *sua sponte* identify and reject alternate sanctions could not have affected the People's substantial rights because doing so would not have changed the outcome of the proceedings or brought the fairness or integrity of judicial proceedings into question.[15]

III. CONCLUSION

Based on the foregoing, I do not believe that the Superior Court committed any error—let alone a plain error—and that it thus acted within its discretion in ordering exclusion of the DNA evidence as a discovery sanction pursuant to Rule 16(d)(2). Consequently, I would affirm the Superior Court's March 10, 2009 Order.

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[15] On the contrary, I would find, given the facts of this case, that reversing the Superior Court for the reasons given in the concurring opinion would affect Rodriguez's substantial rights and call the fairness of judicial proceedings into question. The concurring opinion acknowledges that Rule 16 "should apply equally to the prosecution and the defense." (Concurring Op. at 12). I agree with this finding, for Rule 16 does not distinguish between the government and the defendant, but instead "assumes, as it must, that the State and a criminal defendant begin on a level playing field at the outset of trial," with "[e]ach party ha[ving] similar remedies against the other should there be a deviation from the standard discovery procedure . . . ." *Hill v. State*, 502 S.E.2d 505, 564 (Ga. Ct. App. 1998) (Blackburn, J., concurring). Consequently, "if the courts do not apply sanctions or remedies equally to the defendant or the State for comparable breaches of duty, the goals of [Rule 16] will be fatally undermined." *Id.*

Nevertheless, the concurrence's findings that the trial court's decision should be reversed because "[e]xcluding the DNA evidence would victimize the minor female and unnecessarily punish the People," (Concurring Op. at 20), and that a trial judge may only impose the sanction of excluding evidence against the People "[a]bsent an indication in the record that other evidence exists upon which [the People] may prove its case beyond a reasonable doubt," (Concurring Op. at 21), are inconsistent with this principle. Notably, it does not appear that any appellate court has reversed a sanction against the People on this basis when the three *Ubiles* factors had otherwise been met, while multiple appellate courts have affirmed orders excluding a defendant's evidence as a sanction for equivalent or less egregious discovery violations than committed by the People in the instant case. *See, e.g., Wyatt*, 15 P.3d at 27; *Harris*, 195 P.2d at 180; *Coleman v. State*, 749 So.2d 1003, 1009-10 (affirming exclusion of defendant's witness because "[a]llowing a trial judge the discretion to exclude otherwise admissible evidence on the basis of an intentional discovery violation, even when less drastic sanctions are available, undergirds the principles of fairness in our adversarial system . . . . [R]ules of fairness require that constitutional limitations and sanctions be applied equally in the pursuant of justice."). Consequently, I believe that the rule adopted by the majority would impermissibly apply Rule 16 in a way that favors the People by subjecting it to a more-favorable standard than defendants, and thus may negatively affect the public's perception of the fairness of judicial proceedings. *See Washington v. Texas*, 388 U.S. 14, 22, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (holding that rule that applies unequal standards to defendants and the state is not rational).

_____/s/_____
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court