

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
 Vs.)
)
JEFFREY CARTY, JR. **Defendant**)

CASE NO. ST-10-CR-0000299

ACTION FOR: 14 V.I.C. 2253(A)

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: ORDER BOOK
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JULIE GERMAN EVERT, ESQUIRE
JUDGES & MAGISTRATES, SUPERIOR COURT
✓ IT DIVISION
EDWARD VERONDA, ESQ., ASSISTANT ATTORNEY GENERAL

Please take notice that on August 19, 2010 a(n) MEMORANDUM OPINION
AND ORDER dated August 17, 2010 was entered by the Clerk in the
above-entitled matter.

Dated: August 19, 2010

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT

Diane Matthew-Turnbull

DIANE MATTHEW-TURNBULL
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

vs.

**JEFFREY CARTY, JR., KOMORR DONASTORG,
AHMOI LEWIS,**

Defendants.

)
)
)
) **Case No. ST-10-CR-299** ✓
) **Case No. ST-10-CR-300**
) **Case No. ST-10-CR-301**
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MEMORANDUM OPINION

Pending before the Court is the People of the Virgin Islands' (the "People") Motion to Compel blood, saliva, and hair specimens from Defendants Carty, Donastorg, and Lewis. Once the People submit to the Court a subpoena that meets the standards of Fed. R. Crim. P. 17, the Court will sign an Order compelling compliance with the People's subpoena that reflects the terms of this Memorandum Opinion.

FACTUAL AND PROCEDURAL HISTORY

On May 31, 2010, Virgin Islands Police Officer Kerry Rhymer discovered a handgun in a vehicle occupied by Defendants Carty, Donastorg, and Lewis, none of whom has a license to possess a firearm in the Virgin Islands. On June 9, 2010, an Information was filed charging each Defendant with possession of a firearm in violation of 23 V.I.C § 481(b)¹ and 14 V.I.C § 2253(a).² On June 15, 2010, Defendant Lewis filed

¹ Unauthorized possession of a firearm with altered identification marks.

² Unauthorized possession of a firearm.

a demand for discovery pursuant to Federal Rule of Criminal Procedure 16, requesting, among other things, reports, documents, and tangible objects. On the same day, the People filed a reciprocal demand for discovery. On June 16, 2010, Defendant Donastorg also filed a demand for discovery that included a demand for reports, documents, and other tangible objects.

On June 30, 2010, the People filed their Motion to Compel seeking to have Defendants provide DNA³ samples. On July 1, 2010, the People filed a second demand for reciprocal discovery and attached to the motion a tangible object⁴ in response to discovery requests made by Defendants Donastorg and Lewis. On July 7, 2010, the Court ordered all three Defendants to report to the Virgin Islands Police Department or the Roy Lester Schneider Hospital to provide DNA samples. On July 12, 2010, Defendant Lewis filed an Opposition to the People's Motion to Compel, and the People filed a Reply on July 20, 2010.⁵

ANALYSIS

A motion to compel documentary evidence is permissible to ensure compliance with Fed. R. Crim. P. 17(c).⁶ *U.S. v. Vanegas*, 112 F.R.D. 235, 237 (D.N.J. 1986).⁷ In order to discover materials under Fed. R. Crim. P. 17 before trial, the People must

³ Deoxyribonucleic acid.

⁴ Specifically, the People produced a compact disc of photographs.

⁵ Defendant Lewis filed a Response to the People's Reply on August 11, 2010.

⁶ "A subpoena may order a witness to produce any books, papers, documents, data, or other objects the subpoena designates."

⁷ In *Vanegas*, the court granted the government's motion to compel the defendants to submit handwriting exemplars.

demonstrate that the materials (1) are relevant and evidentiary, (2) are not otherwise reasonably procurable before trial, (3) must be obtained and inspected before trial, and (4) are not sought for a general fishing expedition. See *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

In addition to meeting a standard of reasonableness,⁸ a motion to compel compliance with Fed. R. Crim. P. 17 may not be used as a device to acquire additional discovery over and beyond what is accessible pursuant to Fed. R. Crim. P. 16. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220-221 (1951); see also *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). Under Fed. R. Crim. P. 16, the government is required to disclose, upon a defendant's request, four types of information: (1) the defendant's statements,⁹ (2) the defendant's prior criminal record, (3) documents and objects,¹⁰ and (4) scientific reports.¹¹ If the government complies with the

⁸ A subpoena may be quashed "if compliance would be unreasonable." *U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

⁹ The government "must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Fed. R. Crim. P. 16(a)(1)(A); see also *U.S. v. Matthews*, 20 F.3d 538, 550 (2d Cir. 1994) ("statements covered by Rule 16(a)(1)(A) include written correspondence to third persons that come into the possession of the government").

¹⁰ 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." Fed. R. Crim. P. 16(a)(1)(E).

¹¹ 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)(F).

defendant's requests for documents, objects, and scientific reports, the defendant has a reciprocal duty to disclose documents, objects,¹² and scientific reports.¹³

Here, the People responded to the discovery requests of Defendants Donastorg and Lewis for documents and other tangible objects, which entitles the People to discover objects and documentary evidence that Defendant Donastorg and Lewis intend to use in their cases-in-chief. While a sample of DNA evidence may constitute a tangible object, it is not clear whether Defendant Donastorg and Lewis have reciprocal duties to divulge such material because they may not intend to use their DNA as evidence in their cases-in-chief. In addition, given that Defendant Carty did not make a request for discovery materials, the People are precluded altogether from seeking discovery from him under Fed. R. Crim. P. 16.

Notwithstanding, courts have determined that a variety of evidentiary material is discoverable pursuant to Fed. R. Crim. P. 17, irrespective of the constraints posed by Fed. R. Crim. P. 16. See *U.S. v. Messercola*, 701 F.Supp. 482, 484 (D.N.J. 1988) "courts have consistently compelled production of physical evidence ... post-indictment and pretrial upon the government's request without reference to any precise procedural mechanism for their production" (quoting *Vanegas, supra*, at 237). A variety of physical materials

¹² If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial." Fed. R. Crim. P. 16(b)(1)(A).

¹³ If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, 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 defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony. Fed. R. Crim. P. 16(b)(1)(B).

may be brought into evidence without violating an individual's Fifth Amendment rights because the "prohibition of the use of physical or moral compulsion to extort communications from him [does not require the] exclusion of his body as evidence when it may be material." *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990) (quoting *Holt v. United States*, 218 U.S. 245, 273 (1910)). In addition, if the evidence is composed of physical characteristics that an individual reveals in every day life, the collection of that evidence does not constitute a "search and seizure" under the Fourth Amendment. See *Vanegas, supra*, at 238 (D.N.J. 1986); see also *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search"); *U.S. v. Lamb*, 575 F.2d 1310, 1316 (10th Cir. 1978) (court ordered defendant to shave his beard because it was "an attempt to disguise his appearance to prevent trial identification"); *United States v. Holland*, 378 F.Supp. 144, 154 (E.D. Pa. 1974), *aff'd*, 506 F.2d 1053 (3d Cir. 1974) (dental examination to determine if a tooth was missing involved an intrusion into a body cavity but was not a search); *U.S. v. Aquart*, 2006 WL 2380807, at *1 (D. Conn. 2006) (voice samples and handwriting exemplars are not protected by the Fifth Amendment's privilege against compulsory self-incrimination and the procurement of this evidence does not constitute a seizure within the meaning of the Fourth Amendment); *Coddington v. Evanko*, 112 Fed.Appx. 835, 836 (3d Cir. 2004) (cutting hair to acquire a hair sample is not a search under the Fourth Amendment).

On the other hand, the collection of physiological materials that a person does not regularly expose to the public is subject to constitutional scrutiny. See *Schmerber v. California*, 384 U.S. 757, 768 (1966) (compelled intrusion into a person's body to extract

blood for analysis implicates the Fourth Amendment); *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) (blood and saliva samples for DNA analysis is a Fourth Amendment search); *Schlicher v. (NFN) Peters, I & I*, 103 F.3d 940, 942-43 (10th Cir. 1996); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (acquiring the scrapings under a defendant's fingernails constitutes a search and seizure); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-614 (1989) (breathalyzer tests and urine samples are searches under the Fourth Amendment).

Here, the People's request for blood and saliva implicates the Fourth Amendment, as does the request for hair because a hair sample would be forcibly pulled from each of the Defendants. As a result, the People need to demonstrate that there is probable cause, supported by oath or affirmation, to make the search and seizure, and the People must describe with particularity the persons and things to be searched. U.S. Const. Amend. IV.

The People have submitted an affidavit by Virgin Islands Police Officer Denise Frazer who stated that on May 31, 2010, individuals reported that a man in a yellow shirt was brandishing a gun at Magens Bay Beach. Officer Frazer stated that Marshal Blyden observed Defendant Donastorg wearing a yellow shirt on Magens Bay Beach after he was informed that Defendant Donastorg was brandishing a gun. Shortly thereafter, a car—then occupied by all three Defendants—was stopped as it was exiting Magens Bay Beach and was searched. Officer Frazer stated that Officer Rhymer discovered a handgun in a seat pocket of the car and that all three Defendants denied ownership of the handgun. Based on the affidavit, there is a reasonable probability that the handgun may have the DNA of at least one Defendant on it. In addition, the request for the DNA samples meets the particularity requirement of the Fourth Amendment because it indicates the

individuals to be searched and the items to be seized. Moreover, the potentially incriminating evidence—the handgun that may have DNA on it—is already in the People’s possession. The People’s request for DNA samples is simply for identification purposes—so that Defendants’ DNA may be compared with any DNA that may be found on the handgun. See *Vanegas, supra*, at 238.

The Court also finds that the DNA samples in this case (1) are relevant and evidentiary, (2) are not otherwise procurable, (3) must be obtained and inspected before trial, and (4) are not sought for a general fishing expedition. Moreover, because all three Defendants are charged with constructive possession of the same weapon, the testing the People seek to perform has the potential to be exculpatory for some or all of the Defendants and, depending on the results, may be highly probative. As a result, Defendants’ DNA evidence is subject to pre-trial production under Fed. R. Crim. P. 17(c),¹⁴ and the production will not violate the Defendants’ Fourth and Fifth Amendment rights nor the provisions of Fed. R. Crim. P. 16. Once the People submit for the Court’s approval a subpoena that meets the standards of Fed. R. Crim. P. 17, the Court will sign an Order compelling compliance with the People’s subpoena that reflects the terms of this Memorandum Opinion.

Dated: August 17, 2010

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court / /

by: *Rosalie Griffith*
Rosalie Griffith
Court Clerk Supervisor 8/19/2010


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

¹⁴ The Court need not issue a warrant because the people may obtain these items by subpoena. See *People v. Mason*, 989 P.2d 757, 758, 762 (Colo.1999) (subpoena duces tecum that is supported by probable cause may substitute for a warrant).

CERTIFIED A TRUE COPY

Date: 8/19/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: *Deane M. Turnbull*

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,

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) Case No. ST-10-CR-300

) Case No. ST-10-CR-301
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ORDER

Having issued a Memorandum Opinion on this date, it is

ORDERED that the People of the Virgin Islands have twenty (20) days to submit subpoenas compelling Defendants Carty, Donastorg, and Lewis to report to the Virgin Islands Police Department or the Roy Lester Schneider Hospital to provide DNA samples; and it is

ORDERED that a copy of this Order be directed to Defendants and to counsel of record.

Dated: August 17, 2010

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court 17 / 1 / 2010

by: Rosalie Griffith
Rosalie Griffith
Court Clerk Supervisor 8/19/2010


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

Date:

8/19/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By:

Diane M. Turnbull
Court Clerk