

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

SUPERIOR COURT
DISTRICT OF COLUMBIA
CRIMINAL DIVISION
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UNITED STATES,

v.

DYLAN M. WARD,
JOSEPH R. PRICE,
and
VICTOR J. ZABORSKY,

Defendants.

FILED

Criminal No. 08-CFI-26997

Judge Frederick H. Weisberg

Status Hearing – Sept. 11, 2009

DEFENDANTS' MOTION TO ENFORCE THIS COURT'S MAY 26, 2009 ORDER

Approximately five months ago, defendants requested, through informal discovery, access to items in the government's possession for independent forensic testing. On May 26, 2009 the Court entered an Order requiring the government to release certain items of evidence to Defendants for testing (the "Order"). While the government produced some of this evidence on July 2, 2009, some items have not been turned over. The government's delay in turning over these items and the FBI's testing case files¹ effectively prevents the defense experts from conducting their examinations. Defendants respectfully request that the Court order the government to immediately and fully comply with this Court's May 26, 2009 Order.

FACTUAL BACKGROUND

On May 26, 2009, this Court entered an Order requiring the government to turn over various items to the defense for independent forensic testing and analysis (the "Items"). *See* May

¹ These files contain, among other things, the examiners bench notes. Experts retained by the defense have instructed counsel that they are unable to proceed with any testing unless they have the FBI files.

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08/05/2009
Dkt: ROYCR

26, 2009 Order, attached hereto at Exhibit A. On July 2, 2009, the government transferred some, but not all of the Items to the Defense.

As a threshold matter, many of the Items which the government did transfer cannot be subjected to meaningful testing at this time because the government has not produced: (1) Defendants' and Mr. Robert Wone's DNA profiles; and (2) the FBI Laboratory testing case files and bench notes. The government's withholding of the DNA profiles and case files is addressed in Defendants' pending Renewed Motion to Compel, which was filed on July 2, 2009.

Representatives of the defendants went to the Mobile Crime Lab on July 2, 2009, and met with an evidence technician to take possession of some items of evidence for testing. The following listed items were not available:

Item #	Description	Reason Stated for Not Producing the Item
29 (Q223-Q226)	Swabs and smears from thigh/external genitalia	These Items were "not available;" no other explanation was provided.
N/A	Combination of specimens Q223-Q236, created and subjected to DNA analysis by the FBI	The combination of specimens was a "duplicate" of Items 29-31 (Q223-Q236).
Q203-2	Specimen collected and tested by the FBI from a Knife Set Box (Item 199)	The government was unable to locate this Item at this time.
Q203-3	Specimen collected and tested by the FBI from a Knife Set Box (Item 199)	The government was unable to locate this Item at this time.
K1	Robert Wone's nuclear and mitochondrial DNA profile	This Item was at the FBI Laboratory, had not been retrieved by MPD, and therefore could not be produced at that time.
Not Numbered	Complete set of Robert Wone's palm and finger prints	Defendants understand that it is the government's/MPD's policy not to relinquish custody of fingerprints, but that a defense expert may analyze the prints at a government laboratory. ²
86-95	Latent prints from "drinking glasses" from 1509 Swann Street	Defendants understand that it is the government's/MPD's policy not to relinquish custody of fingerprints, but that a defense expert may analyze the prints at either the MPD's or the FBI's Laboratory. ³

² Assuming this is the government's policy, the defense requests that the government be ordered to allow a defense expert access to Mr. Wone's known palm and finger prints, along with use of the appropriate equipment, or permit the defense expert to bring and utilize his own equipment, at a suitable government laboratory location, for defense inspection of these Items.

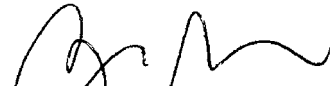
³ Assuming this is the government's policy, the defense requests that the government be ordered to allow a defense expert access to Items 86-95, along with use of the appropriate equipment, or permit the defense expert to bring and utilize his own equipment, at a suitable government laboratory location, for defense inspection of these Items.

Additionally, defendants have repeatedly requested copies of their own Nuclear (STR) and Mitochondrial DNA profiles, as well as those of Mr. Wone, for use in the testing and analysis defendants wish to pursue. Much of defendants' testing cannot proceed until they have all four DNA profiles. Consequently, the government should be required to immediately provide defendants with all four Nuclear (STR) and Mitochondrial DNA profiles.

As a result of the government's failure to fully comply with this Court's May 26, 2009 Order, defendants have been prejudiced by additional delay, are incurring additional fees and expenses in seeking relief from this Court, and will eventually have to send another representative to pick up the remaining Items and then transport them to defendants' laboratory.

Wherefore, defendants respectfully request that the Court grant defendants' Motion to Enforce This Court's May 26, 2009 Order.

Respectfully Submitted,



Bernard S. Grimm (DC Bar # 378171)

COZEN O'CONNOR

1627 I Street, N.W., Suite 1100

Washington, D.C. 20006-4007

Telephone: 202-912-4835

Facsimile: 877-260-9435

Email: bgrimm@cozen.com

Counsel for Defendant Joseph R. Price

David Schertler / BSG

David Schertler (DC Bar # 367203)
SCHERTLER & ONORATO LLP
601 Pennsylvania Ave., N.W.
North Building, 9th Floor
Washington, D.C. 20004
Telephone: 202-628-4199
Facsimile: 202-628-4177
Email: dschertler@schertlerlaw.com

Counsel for Defendant Dylan M. Ward

Thomas G. Connolly / BSG

Thomas G. Connolly, Esq. (DC Bar # 420416)
WILTSHIRE & GRANNIS, LLP
1200 18th St., N.W., 12th Floor
Washington, D.C. 20036
Telephone: 202-730-1339
Facsimile: 202-730-1301
Email: tconnolly@wiltshiregrannis.com

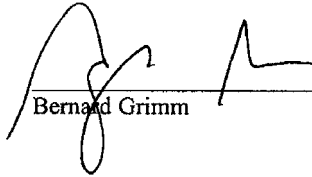
Counsel for Defendant Victor J. Zaborsky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Enforce this Court's May 26, 2009 Order, was served, via hand delivery, this 7th day of July, 2009, upon:

Glenn Kirschner, Esq.
Assistant United States Attorney
Office of the United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20001

Patrick Martin, Esq.
Assistant United States Attorney
Office of the United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20001


Bernard Grimm

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES,

v.

DYLAN M. WARD,
JOSEPH R. PRICE,
and
VICTOR J. ZABORSKY,

Defendants.

Criminal No. 08-CF1-26996
Criminal No. 08-CF1-27068
Criminal No. 08-CF1-26997

Judge Frederick H. Weisberg

ORDER

It is hereby ORDERED this ____ day of July, that Defendants' Motion to Enforce This Court's May 26, 2009 Order is GRANTED; and it is hereby

FURTHER ORDERED that the government shall produce to defendants' no later than seven (7) days from entry of this Order, the following: (1) Item 9 (Q223-Q226) – swabs and smears from thigh/external genitalia; (2) Combined specimen of Items Q-223-Q236; (3) Item Q203-2 – specimen collected from Knife Set Box (Item 199); (4) Item Q203-3 – specimen collected from Knife Set Box (Item 199); and the (5) the Nuclear (STR) and Mitochondrial DNA profiles of Mr. Robert Wone, Joseph R. Price, Dylan M. Ward and Victor J. Zaborsky. To the extent that the government cannot locate a given Item, the government is to file no later than seven days from entry of this Order a memorandum providing an explanation why the item cannot be located or produced.

It is FURTHER ORDERED that the government shall provide defendants' representative, after reasonable notice, in this case specifically Mr. Robert Wone's known palm

and finger prints and Items 86-95 along with use of the appropriate equipment at a government laboratory, for analysis of these Items by the defense or permit the defense expert to bring and utilize his own equipment.

Entered this: ____ day of _____, 2009

Judge Frederick H. Weisberg
Superior Court for the District of Columbia

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CRIMINAL DIVISION

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2009 JUL 10 P 2:05

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DYLAN M. WARD,
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Defendants.

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✓Criminal No. 08-CF1-26997

Judge Frederick H. Weisberg

Status Hearing – Sept. 11, 2009

NOTICE OF FILING

Defendant Dylan W. Ward, through undersigned counsel, respectfully requests that the attached discovery letter, dated July 10, 2009, be made a part of the record in this case.

Respectfully submitted,



David Schertler (DC Bar # 367203)
Schertler & Onorato, LLP
601 Pennsylvania Avenue, N.W.
Suite 900 – North Building
Washington, D.C. 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
Email: dschertler@schertlerlaw.com

Counsel for Defendant Dylan W. Ward

Case: 2008 CF1 026997
0003523434
DR: NOFORN



SCHERTLER & ONORATO, L.L.P.

David Schertler
DC & IL Bars

Danny C. Onorato
DC & CA Bars

Vincent H. Cohen, Jr.
DC, MD & NJ Bars

David H. Dickieson
DC, MD, VA & PA Bars

Lisa Fishberg
DC, MD & NY Bars

Mark E. Schamel
DC, MD & NY Bars

Robert J. Spagnoletti
DC, NJ, NY & TX Bars

Habib F. Ilahi
DC & TX Bars

Carroll Crumbaugh Love
DC & MD Bars

Julie L. Mitchell
DC, MD & VA Bars

Mansi J. Shah
VA Bar

Michael Starr
DC Bar

Peter V. Taylor
DC Bar

July 10, 2009

VIA FACSIMILE ((202) 307-2022) AND FIRST CLASS MAIL

Glenn L. Kirschner, Esq.
T. Patrick Martin, Esq.
Assistant United States Attorneys
United States Attorney's Office
for the District of Columbia
555 4th Street, NW
Washington, DC 20530

Re: **United States v. Joseph Price, et al., Case No. 08-CF127068**

Gentlemen:

I am writing on behalf of all three defense counsel in response to your letter of July 7, 2009. In that letter, you state that you cannot produce, for another four weeks, the FBI Laboratory testing case files as well as the DNA profiles of the three Defendants and Robert Wone. You claim this additional month of delay is necessitated by the fact that these materials are "voluminous" and will take weeks to collect.

On May 22, 2009, the Government committed to produce the FBI case files and DNA profiles to the Defendants. Yet more than seven weeks have passed and we have not received that information. We have difficulty understanding the delay, because this seems to be more than sufficient time for the Government to have collected and produced these materials, even given FBI Examiner Moretti's two-week vacation.

Limiting the discussion to only the DNA profiles of the three Defendants and Robert Wone, which the government was ordered to produce on May 26, 2009, we don't understand why those profiles cannot be produced immediately. They are not "voluminous," but rather consist of no more than a few pages of information. We ask that you provide the DNA profiles immediately, in advance of the production of any other information. Our concern, as we have told you repeatedly, is that ***the defense cannot proceed with its own forensic testing without the DNA profiles.***

We also reiterate our request for the FBI case files. Again, it is difficult for us to understand why those files, even if voluminous, couldn't have already been copied and provided to us. As we say in our

ATTORNEYS AT LAW

601 Pennsylvania Avenue, N.W.
North Building, 9th Floor
Washington, D.C. 20004-2601

202.628.4199
202.628.4177 fax
www.schertlerlaw.com

July 2, 2009 Renewed Motion to Compel, the fact that one of the FBI analysts involved in this case was on vacation for two weeks in June does not justify a seven-week delay in simply copying those files and delivering them to us.

As you know, the FBI case files and the DNA profiles, along with a significant quantity of long overdue discovery promised by the government, are the subject of our motions with the Court. We believe that another month delay in producing these materials, particularly in light of the fact it prevents us from conducting our testing of the evidence is simply too long and not justified. We would ask that the DNA profiles be provided immediately and that you agree to provide us all the FBI case files by July 17, 2009.

As always, we appreciate your consideration in this matter.

Sincerely,



David Schertler


cc: Court File

CERTIFICATE OF SERVICE

I certify that on this 10th day of June 2009 the foregoing letter was served via first class mail, postage pre-paid, and via facsimile (202 307-2022), upon:

Glenn L. Kirschner, Esq.
Assistant United States Attorney
Chief, Homicide Section
555 4th Street, NW
Washington, DC 20530

T. Patrick Martin, Esq.
Assistant United States Attorney
Homicide Section
555 4th Street, NW
Washington, DC 20530

A handwritten signature in black ink, appearing to read "David Schertler", is written over a horizontal line.

David Schertler