

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS  
Plaintiff )  
Vs. )  
RODNEY E. MILLER, SR. )  
Defendant )

CASE NO. ST-08-CR-0000427

ACTION FOR: 14 V.I.C. 834

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

TO: WILLIAM J. GLORE, ESQUIRE  
ORDER BOOK  
LIBRARIAN  
JUDGES & MAGISTRATES, SUPERIOR COURT  
IT DIVISION  
DENISE GEORGE-COUNTS, ESQ., ASSISTANT ATTORNEY GENERAL  
CHARLES GRANT, ESQUIRE

Please take notice that on February 17, 2010 a(n) MEMORANDUM OPINION  
AND ORDER dated February 16, 2010 was entered by the Clerk in the  
above-entitled matter.

Dated: February 17, 2010

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



DIANE MATTHEW-TURNBULL  
COURT CLERK II

**SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. THOMAS AND ST. JOHN**

<b>PEOPLE OF THE VIRGIN ISLANDS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. ST-08-CR-426</b>
	)	<b>CASE NO. ST-08-CR-424</b>
<b>AMOS W. CARTY, JR.</b>	)	<b>CASE NO. ST-08-CR-425</b>
<b>PETER NAJAWICZ</b>	)	<b>CASE NO. ST-08-CR-427 ✓</b>
<b>RODNEY E. MILLER, SR. ✓</b>	)	
<b>JUNE ADAMS,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

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**MEMORANDUM OPINION**

Pending before the Court is Charles S. Russell, Jr., Esq.'s ("Russell") October 16, 2009, Motion to Quash. On October 30, 2009, the People of the Virgin Islands (the "People") filed an Opposition, and Russell filed a Reply on November 12, 2009. For the following reasons, the Court will deny Russell's motion in part and grant the parties leave to supplement the record.

**FACTUAL AND PROCEDURAL HISTORY**

This case involves the criminal prosecution of former officers and Board members of the Roy Lester Schneider Hospital and Community Health Center (the "Hospital") on charges of embezzlement and other offenses. Between November, 2007, and August 8, 2008, Russell and his law firm, Moore Dodson & Russell, P.C., served as legal counsel to the Hospital. On August 11, 2008, and August 25, 2008, Russell was subpoenaed by the Attorney General's office to provide testimony in this matter. On

October 22, 2008, a one hundred forty-four (144) count Information was submitted by the People against Rodney E. Miller, Sr. (“Miller”), Amos W. Carty, Jr. (“Carty”), Peter R. Najawicz (“Najawicz”), and June Adams (“Adams”). On October 29, 2008, Russell was again subpoenaed by the Attorney General’s office to provide testimony.<sup>1</sup> On October 1, 2009, the People served upon Russell a subpoena requiring him to appear on October 27, 2009, and to produce a variety of documents, including all notes prepared by Russell as counsel for the Hospital, all documents concerning the Roy Lester Schneider Foundation (the “Foundation”), and all email communications between Russell and the Defendants in this case.

## ANALYSIS

### a) Russell’s notes

Russell argues that the notes that he generated as counsel for the hospital are protected pursuant to the work product doctrine. Although the work product doctrine is a more frequently asserted bar to discovery requests in civil actions, it also applies in criminal proceedings. *United States v. Nobles*, 422 U.S. 225, 238 (1975). The work product doctrine “shelters the mental processes of the attorney, providing a privileged area within which he [or she] can analyze and prepare his [or her] client’s case.” *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003). The doctrine promotes “the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.” *Jones v. Nationwide Mut. Fire Ins. Co.*, 2010 WL 181753, at \*2 (M.D. Pa. 2010). The Third Circuit has adopted a two

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<sup>1</sup> Russell also received a subpoena on September 8, 2009, requiring him to appear on September 10, 2009,

pronged test for determining whether a document was prepared “in the anticipation of litigation.” *Muse-Freeman v. Bhatti*, 2008 WL 2165147, at \*1 (D.N.J. 2008). First, the document must have been prepared “at a time when litigation was reasonably predictable or foreseeable.” *Id.* Second, the document must have been prepared “primarily for the purpose of litigation.” *Id.*; see also *U.S. v. Ernstoff*, 183 F.R.D. 148, 156 (D.N.J. 1998) (material protected by the work product doctrine “must have been produced because of th[e] prospect of litigation and for no other purpose”). When materials are prepared “merely in the ordinary and regular course of a party’s business, they are outside the scope of work product protection.” See *Ernstoff, supra*, citing *Diversified Industries, Inc. v. Meredith*, 572 F.2d at 604 (8<sup>th</sup> Cir. 1977). As an evidentiary privilege, the work product doctrine should be strictly construed. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991). A party who asserts the work product doctrine has “the burden of proving that the material was in fact prepared in anticipation of litigation.” *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2001). Moreover, the work product doctrine does not apply to non-parties. *Grider v. Keystone Health Plan Central, Inc.*, 2005 WL 2030456, at \*5 (M.D. Pa. 2005); *Gonzalez v. City of New York*, 2009 WL 2253118, at \*2 (E.D.N.Y. 2009).

Foremost, neither Russell or his former client, the Hospital, are parties in this criminal proceeding. In addition, it would appear that any notes that Russell took during the Hospital’s corporate meetings were made in the ordinary course of business and were not generated solely in the anticipation of litigation. Moreover, notes that Russell

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but was unable to attend because he was traveling to undergo a medical procedure on September 11, 2009.

generated after his law firm ceased to represent the Hospital are not work product. See *Gonzalez, supra*, at \*3-4 (E.D.N.Y. 2009) (work product doctrine not implicated when documents created after the conclusion of litigation were requested). Finally, Russell's attorney indicated at the October 29, 2008, deposition that Russell was using certain notes "for the purpose of his refreshing his own recollection." (Russell Deposition, at page 5). Pursuant to Federal Rule of Evidence<sup>2</sup> 612(2)<sup>3</sup>, if a witness "uses a writing to refresh memory for the purpose of testifying either (1) while testifying, or (2) before testifying ... [and] if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced ...." Even documents protected by the work product doctrine are subject to production under Rule 612. See *Laxalt v. McClatchy*, 116 F.R.D. 438, 454-455 (D. Nev. 1987); see also *S & A Painting Co., Inc. v. O.W.B. Corp.*, 103 F.R.D. 407, 409 (D. Pa. 1984) ("even a narrow construction of Rule 612 mandates waiver of protections for portions of documents actually used to refresh" a witness's recollection). As a result, the work product doctrine does not apply to Russell's notes in this case.

Russell also argues that once an information is filed, the Federal Rules of Criminal Procedure govern discovery requests thereafter and place limits on the People's ability to exercise their subpoena power pursuant to 4 V.I.C. § 601. Russell cites *Fonseca v. Government of the Virgin Islands*, 119 F. Supp. 2d 531 (D.V.I. 2000), in which the

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<sup>2</sup> Pursuant to Fed. R. Civ. Pro. 30(c)(1), the examination of a deponent proceeds as it would at trial under the Federal Rules of Evidence. Moreover, under Fed. R. Crim. P. 16(e), depositions are to be taken in the same manner that they are taken in a civil action.

<sup>3</sup> Fed. R. Evid. 612 is limited by 18 U.S.C.A § 3500, otherwise known as the Jencks Act, which has now been effectively incorporated into Fed. R. Crim. P. 26.2 and 17(h). See *U.S. v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988).

district court commented that the government abused its subpoena power by issuing a subpoena after a defendant's arrest. Although the Third Circuit reversed the district court's decision<sup>4</sup> and decided it would not review the district court's conclusion with respect to the "limitations on the Attorney General's subpoena power" on the grounds that the court's conclusion was "obiter dicta ... not part of the holding, and not precedential," this Court finds the district court's discussion of the limitations of the government's subpoena power to be persuasive.

Prior to returning an indictment, a grand jury is vested with broad powers to inquire into violations of criminal law. See *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). Once a grand jury has returned an indictment, however, its investigative powers are limited to the investigation of additional crimes by the indicted defendant or to the investigation of additional defendants. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1041 (3d Cir. 1980). In the Virgin Islands, the Legislature has not established a grand jury for charging local crimes prosecuted in the Superior Court. See *U.S. v. Harrigan*, 177 F.Supp.2d 405, 406-407 (D.V.I. 2001); see also *Ballantine v. Hendricks*, 351 F. Supp. 208, 211 (D.V.I. 1972) (Congress left it to the Virgin Islands Legislature whether or not establish a grand jury, the constitutionality of which is well-settled). Instead, the Legislature determined that every criminal action involving a felony shall be prosecuted by an information. 5 V.I.C. § 3581. Notwithstanding, the Federal Rules of

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<sup>4</sup> *Government of Virgin Islands v. Fonseca*, 274 F.3d 760, 764 (3d Cir. 2001).

Criminal Procedure govern criminal proceedings in the Virgin Islands. See *Government of the Virgin Islands v. Solis*, 4 V.I. 615, 619 (3d Cir. 1964).

Pursuant to Fed. R. Crim. P. 17(c)(1):

A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

The chief purpose of Fed. R. Crim. P. 17(c)(1) is to “expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials.” *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 220 (1951). The rule, however, was not intended to “provide an additional means of discovery.” *Id.* As a result, even though “requested material may be evidentiary and subject to subpoena at trial under *Bowman*,” a party is only permitted to acquire and inspect the material before trial if:

(1) the documents are evidentiary and relevant; (2) ...they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) ... the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) ... the application is made in good faith and is not intended as a general "fishing expedition."

*U.S. v. Cuthbertson*, 630 F.2d 139, 145 (3d Cir. 1980). Moreover, a court may modify or quash a subpoena if it is “unreasonable or oppressive.” Fed. R. Crim. P. 17(c)(2).

Once an information is filed, the Federal Rules of Criminal Procedure limit the People’s investigative powers in the same way they limit the investigative powers of a grand jury. To find otherwise would eviscerate the effect of the Federal Rules of Criminal Procedure in this jurisdiction. Here, the People requested Russell turn over his notes on

October 27, 2009, over a year after the Information was filed. As a result, unless the People supplement the record to show they made a similar request(s) concerning Russell's notes prior to the filing of the Information, they must meet the factors set forth in *Cuthbertson* concerning Russell's notes.

**b) Russell's email correspondence**

In addition, Russell challenges the People's ability to discover his email correspondence with Defendants Miller, Carty, and Najawicz on the grounds that said correspondence is present on the Hospital's computer systems and server. Unless the People demonstrate that the email correspondence they seek is not otherwise reasonably procurable in advance of trial, they are not entitled to this information from Russell. See *Cuthbertson, supra*; see also *U.S. v. Dunning*, 2009 WL 3815739, at \*1 (D. Ariz. 2009) (party is not required to conduct forensic analysis on computer hard drives when opposing party is in possession of the same hard drives).

**c) Documents concerning the Roy Lester Schneider Foundation**

In an October 30, 2009, disclosure letter to the Court *in camera*, the People have demonstrated that the material they seek concerning the Foundation is permissibly sought. Thus, the subpoena will be enforced regarding this material during the period from November, 2007, through August 8, 2008, when Russell was counsel for the Hospital.



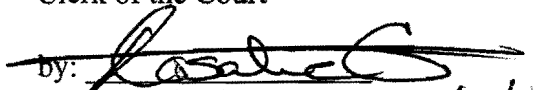
An Order consistent with this Opinion shall follow.

Dated: February 16, 2010

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

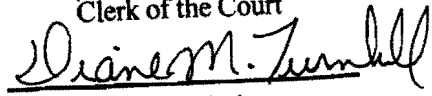
Attest:

Date: February \_\_\_\_\_, 2010  
Venetia H. Velazquez, Esq.  
Clerk of the Court

by:   
Rosalie Griffith  
Court Clerk Supervisor 2/17/10

CERTIFIED A TRUE COPY

Date: 2/17/10  
Venetia H. Velazquez, Esq.  
Clerk of the Court

By:   
Court Clerk

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

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<b>JUNE ADAMS,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

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**ORDER**

UPON CONSIDERATION of the premises, it is hereby


ORDERED that Russell's motion to quash is DENIED with respect to the People's discovery requests concerning the Roy Lester Schneider Foundation; and it is

ORDERED that the People supplement the record with any subpoenas concerning Russell's notes that the People issued prior to the filing of the Information; and it is

ORDERED that the People supplement the record advising the Court whether the email correspondence that they seek between Russell and Carty, Miller, Najawicz, and/or Adams is on the Hospital's computer hard drives or network server in their possession; and it is

ORDERED that copies of this Order be directed to counsel of record.

Dated: February 16, 2010

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

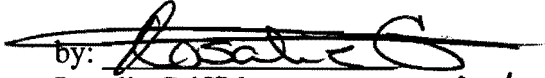
People of the Virgin Islands v. Rodney Miller, et al.  
Case No. ST-08-CR-427  
Order, February 8, 2010  
Page 2 of 2

Attest:

Date: February \_\_\_\_\_, 2010

Venetia H. Velazquez, Esq.

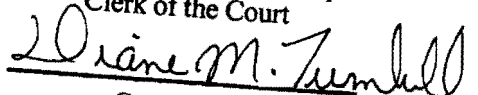
Clerk of the Court

by:   
Rosalie Griffith  
Court Clerk Supervisor 2/17/10

CERTIFIED A TRUE COPY

Date: 2/17/10

Venetia H. Velazquez, Esq.  
Clerk of the Court

By:   
Court Clerk