

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
NO. 09-10479

COMMONWEALTH

v.

PHILIP MARKOFF

**COMMONWEALTH'S MOTION AND FOR AN ORDER FOR TAKING OF A
BIOLOGICAL SAMPLE FROM THE DEFENDANTS**

INTRODUCTION

On June 18, 2009, the Suffolk County grand jury returned the above-numbered indictments against the above defendant. The indictments arise out of the April 14, 2009 attempted armed robbery and murder of Julissa Brisman, the April 10, 2009 armed robbery of Trisha Leffler, the April 16, 2009 armed robbery of a third victim in the state of Rhode Island, and related firearm offenses. The medical examiner determined the cause of Brisman's death to be multiple gunshot wounds. In her findings, the medical examiner noted severe blunt force trauma to Brisman's head. The Commonwealth alleges that on April 14, 2009, inside the victim's room at the Copley Marriott Hotel, the defendant bludgeoned 25-year-old Julissa Brisman with a firearm before shooting her three times in the chest and abdomen at close range. Four days earlier, on April 10, 2009, the defendant robbed Trisha Leffler at gunpoint after forcefully confining her in her room at the Westin Hotel a short distance away. The defendant arranged to meet both victims after responding to advertisements for erotic services that the two female victims posted in the internet classified service Craigslist. The defendant bound, or attempted to bind, both women at gunpoint using plastic ties. The eyewitness, forensic,

electronic, and documentary evidence presented to the grand jury identifies Philip Markoff as the man responsible for these assaults as well as a related armed robbery in Warwick, Rhode Island that he perpetrated on April 16, 2009.

On April 9, 2009, Philip Markoff contacted Trisha Leffler in response to an advertisement she posted on Craigslist. Using one of several disposable Tracphones – a cellular telephone service that allows the user to subscribe for cellular telephone service without providing any identifying information to the cell phone carrier – Markoff called Leffler and arranged to meet her at the Copley Westin Hotel in the Back Bay section of the City of Boston. Ms. Leffler let Markoff in to her hotel room and closed the door. The defendant immediately drew a firearm and ordered Leffler to the ground. Leffler complied and lay on her stomach as the defendant bound her hands behind her back with plastic ties. As she lay on the ground, the defendant ransacked the room stealing credit cards, American Express Gift Cards, cash and other personal effects. The defendant took a pair of Leffler's underpants and put them in his pocket. As he was rifling through Leffler's belongings, the defendant told Leffler to remain quiet. Before leaving, the defendant took off the leather gloves he was wearing and attempted to gag Leffler with duct tape. He then cut the phone lines, disabled Ms. Leffler's cellular telephone, and left the room.

Ms. Leffler waited a few minutes to make sure the defendant had left the area, then immediately summonsed the aid of a guest in a nearby room. Video surveillance cameras in the Westin Hotel captured the defendant both before and after the assault. The Boston Police latent print examiners recovered fingerprints left behind on the duct tape used to gag Ms. Leffler, and on one of the plastic ties the defendant used to bind her hands during the robbery, and matched them to the defendant's known fingerprint

exemplars. On April 20, 2009, Leffler positively identified the defendant's photograph during a blind and sequential photographic identification procedure.

A few days after he forcefully confined and robbed Leffler, the defendant answered an advertisement for erotic massage services that Julissa Brisman posted on Craigslist. The defendant sent an email – from an internet account he set up the day before the murder – in response to Ms. Brisman's Craigslist posting. The defendant created the account using an internet protocol address maintained by Comcast that listed the defendant as the subscriber as well as Markoff's 8 High Point Circle, Quincy, address and home telephone number. Once the defendant had initiated contact by email, he received a response from a third party instructing him to call a cell phone number to set up the appointment with Brisman. The defendant did so by utilizing a second disposable Tracfone, arranging an appointment with Brisman for 10:00 PM on the 14th at the Copley Marriot Hotel a short distance from the Copley Westin Hotel.

The defendant entered the Copley Marriott Hotel at approximately 10PM that night. In his short encounter with Brisman the defendant bound her hands with the same type of plastic ties he used to forcefully confine Leffler a few days earlier. In the course of the assault, the defendant struck Brisman with the gun causing a severe, but not life threatening, head injury, before shooting her in the chest and abdomen. Brisman suffered three gunshot wounds to the upper torso. The blunt force trauma to the head resulted in, among other injuries, severe lacerations. When Brisman was found lying unconscious at the threshold of her room, she had one plastic tie on her wrist and bruising on her other wrist. She was rushed urgently to Boston Medical Center where she was pronounced upon arrival. The cause of death was multiple gunshot wounds. Once again, high quality video surveillance cameras in the Copley Marriot

Hotel capture the defendant coming and going minutes before and after he murdered Julissa Brisman.

Two days later, on April 16, 2009, in Warwick, Rhode Island, the defendant robbed a third woman who had posted an advertisement on Craigslist for erotic services. Using yet a third untraceable disposable Tracfone, the defendant made arrangements to meet the victim in her room at the Holiday Inn Express Hotel in Warwick, Rhode Island. In the course of the assault, the defendant drew a semi-automatic pistol and bound the female victim with a plastic tie. The defendant attempted to use a ball gag on the victim. Video surveillance in the hotel captured the defendant – wearing what appears to be the same clothing he was wearing during the April 10th and 14th assaults in Boston – entering and leaving the hotel, and fingerprint evidence from the scene links Markoff to this third assault.

Boston Police Homicide detectives, with assistance from the United States Secret Service, the Federal Bureau of Investigation, the Massachusetts Attorney General's Office Cybercrime Division and the Massachusetts State Police, tracked the internet protocol address that the defendant used to answer Julissa Brisman's Craigslist posting to the defendant and his 8 High Point Circle apartment in Quincy. On April 20, 2009, members of the Boston Police Department Fugitive Unit, who had had Markoff under surveillance, stopped the defendant as he was driving on Interstate 95 in Foxboro with his fiancée.

During a subsequent search of the defendant's 8 High Point Circle apartment and his car, investigators recovered a Gray's Anatomy Textbook that had been hollowed out. Secreted inside the hollowed out medical textbook, investigators located the 9 mm semi-automatic firearm that the defendant used to shoot and kill Julissa Brisman. The

defendant bought the weapon at a gun shop in Mason, New Hampshire in late February using the name Andrew Miller – the same name as that on a driver's license the defendant was carrying at the time of his arrest. Boston Police Department latent print examiners recovered the defendant's fingerprints off of the purchasing documents that the defendant filled out when he bought the murder weapon a few months before the murder. Criminalists from the Boston Police Department Crime Laboratory have determined that swabs of two stains on the same firearm were positive for the presence of human blood.

In addition, investigators located other items secreted in various locations within the defendant's apartment, including plastic ties of the same type the defendant used to bind all three victims, four pairs of women's underwear wrapped inside of socks inside of a box spring, a ball gag, a spare firearm magazine, and additional 9mm ammunition. Police investigators recovered several laptop computers including one that has, among other things, remnants of the email communication discussing the scheduling of the appointment in response to Julissa Brisman's Craigslist posting. Police investigators also recovered several disposable Tracphones, including the one which the defendant used to set up the appointment with Leffler just before he robbed her.

Criminalists from the Boston Police Department crime laboratory are in the process of examining items, including those items listed above taken from the defendant's apartment during the execution of the search warrant. Criminalists have already identified two blood stains from swabs taken from the 9 mm firearm that the defendant used to assault Brisman that police investigators seized from the defendant's apartment. In light of the results of such testing and analyses the Commonwealth has filed a Motion for Order for Taking of Biological Sample from the Defendant. The

Commonwealth maintains that such a sample will constitute, or lead to the discovery of, material evidence relevant to the determination of the Defendant's guilt or innocence. Commonwealth v. Maxwell, 441 Mass. 773, 777-779 (2004); Commonwealth v. Trigones, 397 Mass. 633, 640-641 (1986); Schmerber v. California, 384 U.S. 757, 768-769 (1966). For the reasons set forth below, the Commonwealth submits that the motion should be allowed.

ARGUMENT

It is well-settled that a blood, hair, or saliva sample is not "testimonial" or "communicative" evidence and that its use at trial does not violate the Fifth Amendment principle against self-incrimination. Schmerber v. California, 384 U.S. 757, 760-765 (1966); Commonwealth v. Downey, 407 Mass. 742, 476, n.6 (1990). "Compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the Fifth Amendment]." Schmerber at 764. See also, United States v. Mara, 410 U.S. 19, 22 (1973) (handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 14 (1973) (voice exemplar); In Re Melvin, 550 F.2d 674 (1st Cir. 1977) (participation in line-up); Commonwealth v. Brennan, 386 Mass. 772, 776 (1982) (breathalyzer test); Commonwealth v. Tarver, 369 Mass. 302, 310 (1975) (hair samples); Commonwealth v. Burke, 339 Mass. 521, 535 (1959) (requiring defendant at trial to assume stance described in testimony).

Accordingly, a court may order the taking of a blood, hair, or saliva sample from a suspect or defendant for identification purposes if the procedures undertaken comply with the Fourth Amendment and fundamental principles of due process. Maxwell, 441 Mass. At 777-779; Commonwealth v. Downey, 407 Mass. 472, 475-477 (1990); Trigones, 397 Mass. At 640-641, and cases cited.

In Schmerber, the United States Supreme Court held that the taking of a blood sample does not violate the Fourth Amendment where (1) there is probable cause to

believe that relevant evidence will be obtained, (2) the need for the intrusion is reasonable, and (3) the intrusion is performed in a reasonable manner. Id. at 766-768. See also, Cupp v. Murphy, 412 U.S. 291, 293-296 (1973) (fingernail scrapings taken incident to a station house detention of defendant permissible if based upon probable cause). The Schmerber Court upheld a warrantless seizure of a blood sample for the purpose of obtaining evidence relevant to the issue of intoxication, noting that such tests are "commonplace" and "for most people the procedure involves virtually no risk, trauma or pain." Id. at 771. The Court concluded that such a "seizure" of material evidence relevant to intoxication was (1) based upon probable cause, (2) reasonable, and, since the sample was taken by a qualified physician according to accepted medical practices, (3) performed in a reasonable manner. Id. at 770-771.

In Commonwealth v. Maxwell, 441 Mass. at 777-779, the Supreme Judicial Court upheld a post-indictment order for the taking of a defendant's buccal swab for the purpose of comparing the defendant's DNA with sperm cells found in a rubber glove that the defendant allegedly used during a sexual assault. The Court in Maxwell held that an order compelling the production of a buccal swab is constitutionally permissible when based upon a showing that the "sample sought will probably provide evidence relevant to the question of the defendant's guilt." Maxwell, 441 Mass. 773, 777-779. When such a showing is made, the Commonwealth has "...adequately justified the relatively minor intrusion so as to make the search 'reasonable'." Id. at 640-641, citing Winston v. Lee, 105 S. Ct. 1611, 1620 (1985). While the defendant is entitled to a hearing, the court need not hold an evidentiary hearing. Maxwell, 441 Mass. at 778. Moreover, at such a hearing, the Commonwealth need not "make a showing that there is probable cause to believe that the defendant committed the crime, beyond the existence of the indictment itself." Id.

Here, in support of its motion, the Commonwealth has submitted an Affidavit of Criminalist Kevin Kosiorek of the Boston Police Department Crime Laboratory, outlining

the significance of the evidence recovered relative to comparative DNA analysis. A comparison of any DNA profiles generated from the items of evidence can be compared to the DNA profile of the defendant and of the three victims to either include or exclude those individuals as possible donors of said profiles. Such a determination would likely provide evidence relevant to the question of the defendant's guilt. Maxwell, 441 Mass at 777-778.

The "veracity" and "basis of knowledge" of the various facts set forth in the affidavit satisfy the two-prong test generally applicable in the Commonwealth to the determination of probable cause in analogous cases involving applications for search warrants. See Commonwealth v. Upton, 394 Mass. 363, 374-376 (1985), and its progeny. The affidavit establishes that buccal swab samples "will probably produce evidence relevant to the question of the Defendants' guilt." Trigones, 397 Mass. at 640. Accordingly, the Commonwealth has made the requisite showing and "adequately justified the relatively minor intrusion so as to make the search 'reasonable'." Id. at 640-641. In addition, the Commonwealth is seeking to take an oral swab from the defendant's mouth – a less intrusive procedure than that approved of in Schmerber and Trigones. See Maxwell, 441 M ass. at 777 n.9.

CONCLUSION

For the reasons set forth above, the Commonwealth respectfully submits that its Motion for Taking of a Biological Sample of the Defendant should be allowed.

Respectfully Submitted
For the Commonwealth,

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by: _____

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Dated: October 7, 2009

AFFIDAVIT IN SUPPORT OF MOTION FOR ORAL SWAB FROM DEFENDANT

I, Kevin Kosiorek, do hereby depose and state as follows:

1. I am a criminalist at the Boston Police Crime Laboratory. I have been so employed since June of 2003.
2. Before accepting my present position, I was employed as a Forensic Technologist for three and one half years at the Boston Police Crime Laboratory. My work as a forensic technologist included processing sexual assault evidence collection kits, preparing and maintaining the quality assurance/quality control for the reagents in the laboratory, and processing crime scenes.
3. My current duties at the Boston Police Crime Laboratory include laboratory organization, managing the day-to-day operation of the serology unit of the laboratory, performing scientific analysis on physical evidence, preparing reports, presenting expert witness testimony, and processing crime scenes.
4. Results from the Boston Police (BPD) Crime Laboratory examination of physical evidence in this case (BPD case #09-304, CC# 090200272) indicated the presence of blood on two swabs collected from a firearm (item 65), recovered from a search warrant at 8 High Point Circle, Apartment 301, Quincy, MA.
5. Evidence recovered from a search warrant at 8 High Point Circle, Apartment 301, Quincy, MA includes a gag ball (item 68) and two socks with each sock containing two pairs of underwear (item 69).
6. DNA stands for Deoxyribonucleic Acid. It is a biochemical material that a person inherits from his/her parents that serve as a blueprint to that individual's growth and development. DNA is found in most biological substances, including blood, semen, and saliva.
7. DNA analysis is routinely performed to link an individual (i.e. victim or suspect) to biological evidence recovered from a crime scene. Common types of biological evidence recovered from crime scenes are blood, semen, and saliva. DNA analysis can be also be performed on other types of samples that may contain biological evidence, such as clothing without any stains detected, to test for "wearer" DNA.
8. With an oral swab from Philip Markoff, DNA testing could be performed to determine whether Mr. Markoff is either included or excluded as the likely source of the blood on the firearm, potential "wearer" DNA recovered from the aforementioned items or any other evidence associated with this case.
9. Boston Police investigators have been trained on how to properly collect and preserve an oral swab for use with DNA casework. The Boston Police investigator will collect the oral swab and deliver it to the BPD Crime Laboratory for analysis.

Signed under the pains and penalties of perjury this 7th day of October 2009.


Kevin Kosiorek, Criminalist