

Jacobs in connection with a burglary committed on August 17, 1999.

I. FACTUAL AND PROCEDURAL SUMMARY

On September 1, 1999, the Government of the Virgin Islands ["government" or "appellant"] filed a four-count information against Austin Jacobs ["Jacobs" or "appellee"], charging him with third degree burglary; grand larceny; buying, receiving, or possessing stolen property; and destruction of property. On May 25, 1999, Jacobs moved to exclude the government's fingerprint identification evidence on the grounds that it did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Rule 702 of the Federal Rules of Evidence ["Fed. R. Evid."]. The government did not respond to this motion. On August 15, 2000, Jacobs filed a motion requesting disclosure under Federal Rule of Criminal Procedure 16(a)(1)(E), as well as a motion to compel discovery of information presumably related to the fingerprint evidence.¹ On August 30, 2000, the court ordered the government to respond to these motions within fifteen days. On September 28, 2000, the government responded to the motion to compel discovery, apparently stating that it would

¹ The parties do not provide copies of these motions in the Joint Appendix, and the docket does indicate the subject of the motion to compel discovery.

present a fingerprint expert "who had compared the fingerprints in this case and determined that they matched." (See Br. of Appellant at 5.) At a pretrial conference on the same date, defense counsel requested a written summary of the expert's intended testimony regarding the fingerprints. The expert's report was filed on October 4, 2000. Although ordered to do so, the government never responded to the motion to exclude the fingerprint evidence, believing it not to be "worthy of a response." (See J.A. at 67.) At a pretrial conference on January 4, 2001, defense counsel renewed an oral motion to dismiss, which the court denied without prejudice.² The jury was selected on January 8, 2001, and on January 9, 2001, one day before trial was scheduled to begin, the Territorial Court held a hearing on the pending motions, which included the unopposed *Daubert* motion to exclude the fingerprint identification evidence.

Although the government had notice that the hearing would be to determine the admissibility of the fingerprint evidence under *Daubert*, it did not present any evidence or even produce the proffered expert witness for examination by the defendant or the

² Although it is not clear from the docket on what grounds this motion was made, defense counsel represented at the January 8, 2001 hearing that the motion was based on the government's alleged failure to provide discovery regarding other fingerprint evidence. (See J.A. at 29.)

court. After oral argument, the court granted Jacobs' motion to exclude the government's proffered expert testimony on the grounds that it did not survive the threshold inquiry required under *Daubert* and Rule 702, and also as a sanction for the government's failure to provide requested discovery under Rule 16. When counsel for the government indicated that he would need to check with his superiors regarding a possible appeal of this ruling, defense counsel quickly countered that the government could not appeal the order because it was interlocutory. Counsel for the government apparently accepted defense counsel's representation that it was an unappealable interlocutory order, despite that section 39(a)(1) of title 4 of the Virgin Islands Code expressly allows the government to appeal orders excluding evidence under circumstances like those presented below. Because the government then conceded that it had no evidence to offer at trial other than the fingerprint identification testimony just rejected, the court granted a renewed defense motion to dismiss the information.³

Upon the court's ruling that the dismissal would be without prejudice, counsel for Jacobs moved to withdraw her motion to

³ The grounds for the renewed motion to dismiss appear to be the government's persistent failure to provide discovery as ordered under Fed. R. Crim. P. 16. (See J.A. at 4 (Order, Terr. Ct. Crim. No. F383/1999 (entered Jan. 29, 2001)); *id.* at 77 (Tr. of Hearing on Motions).) The trial court cites that failure as one of its reasons for dismissing the case.

dismiss and announced that her client would be in court the next day for trial. The government did not move for a continuance or otherwise respond in any relevant manner to defense counsel's motion to withdraw the motion to dismiss, or her request that the dismissal be with prejudice. After further reflection that the government had failed to respond to discovery requests or to respond in any manner to the *Daubert* motion, and that the jury had already been selected but not sworn, the court ruled that the dismissal would be with prejudice. A written order was entered on January 29, 2001. The government timely appealed.⁴

II. DISCUSSION

A. Issue Presented

The sole issue presented by the government on appeal is whether the trial judge properly excluded the government's proffered expert testimony.⁵

B. Jurisdiction and Standard of Review

This Court has appellate jurisdiction to review an order of the Territorial Court dismissing an information. See V.I. CODE

⁴ Although he recently filed a meritless motion to dismiss for failure to file an appellant's brief (denied by Order of October 30, 2001), Jacobs did not file his own brief. We thus refer only to the government's submissions and arguments.

⁵ The government does not present any argument regarding the trial judge's decision to dismiss the case with prejudice. See Part II.D, *infra*.

ANN. tit. 4, § 39(c);⁶ Revised Organic Act of 1954 § 23A.⁷ We review the trial court's admission or exclusion of evidence and testimony under the Federal Rules of Evidence under an abuse of discretion standard, but, to the extent the trial court's ruling turns on an interpretation and application of those rules, the review is plenary. *See Government of the Virgin Islands v. Petersen*, 131 F. Supp. 2d 707, 709-710 (D.V.I. App. Div. 2001); *see also Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000).

C. The Trial Court Properly Excluded the Government's Proffered Expert Testimony

Federal Rule of Evidence 702⁸ provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand

⁶ Section 39(c) provides:

The United States or the Government of the Virgin Islands may appeal an order dismissing an information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.

4 V.I.C. § 39(c).

⁷ 48 U.S.C. § 1613a(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

⁸ See TERR. CT. R. 7 ("The practice and procedure of the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the Rules of the District court . . . , the Federal Rules of Criminal Procedure and the Federal Rules of Evidence."). There is no local rule that is inconsistent with Rule 702.

the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court established a "gatekeeping role for the [trial] judge," by which the judge would determine, as a threshold matter, whether the "reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93, 597; see also *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (in applying Rule 702, judges must act as gatekeepers to ensure that the proffered expert testimony is sufficiently relevant and reliable).⁹

The test of admissibility is whether the "particular opinion is based on valid reasoning and reliable methodology."

Kannankeril v. Terminix Internat'l Inc., 128 F.3d 802, 806 (3d Cir. 1997). Several factors may be relevant in evaluating the reliability of an expert's method for developing a relevant expert opinion. These include whether the theory or technique

⁹ As explained by the Court of Appeals for the Third Circuit, Rule 702 has two major requirements: "qualifications" and "reliability." *In re Paoli Railroad PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) ("*Paoli II*"). Although Jacobs was unsatisfied with the expert's curriculum vitae as establishing her qualifications as a fingerprint identification expert, his primary argument below was that the fingerprint identification testimony should be excluded because there was no proof that it was based on a reliable methodology.

can be and has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; whether there are standards controlling the technique's operations; and whether the theory or technique enjoys general acceptance within a relevant expert community.

See *Kumho Tire*, 526 U.S. at 149-50. The proponent of the expert testimony must satisfy this burden "by a preponderance of proof." *Daubert*, 509 U.S. at 593 n.10.

Contrary to the government's suggestions, Jacobs did not seek to exclude the fingerprint evidence on the ground that there exist no reliable, scientifically acceptable methods for comparing fingerprints.¹⁰ At the hearing, defense counsel focused closely on the fact that the government, as proponent of the expert fingerprint testimony of Officer Richardson, offered no proof whatsoever of the methodology she used in comparing the

¹⁰ At some point, Jacobs may have questioned the reliability of fingerprint evidence in general, on the grounds that "the comparison of fingerprints is based on fiction." (See J.A. at 23.) Although fingerprint identification testimony had been generally accepted by courts for years, after *Daubert* and *Kumho Tire* the methodology for comparing fingerprints has been reexamined. In a recent case, the District Court for the Southern District of Indiana put fingerprint identification opinions through the Rule 702/*Daubert* paces and found that it passes with aplomb. See *United States v. Havvard*, 117 F. Supp. 2d 848 (S.D. Ind. 2000) (setting forth the four-step "ACE-V" process used by fingerprint examiners to compare a latent fingerprint to a known fingerprint). In *Havvard*, the fingerprint examiner who testified at trial refused to specify a quantifiable standard in terms of the number of "points" or features that must be identical before an identification opinion can be given. After an evidentiary hearing on fingerprint identification methodology, the court concluded that the methods were reliable despite the absence of a quantifiable standard.

fingerprints. As already noted, the government did not bring Officer Richardson to the hearing for any explication or examination of the technique and/or methodology she used for comparing the fingerprints. In the summary provided to the defendant pursuant to Rule 16(a)(1)(E), Officer Richardson stated simply that "the latent impression was compared with the ink known fingerprint of Austin Jacobs. The result of my examination is positive." (J.A. at 22.) This was the sum total of the proof presented to establish the reliability of the method used by the expert in reaching her conclusion that there was a positive match.

The parties did not include a copy of the expert's report in the joint appendix, and the government has not disputed that the expert's stated methodology consisted of "comparing" the latent print to the known print. Instead, it argues that simply stating that the prints were "compared" is sufficient proof of reliable methodology to get past the *Daubert* gate. As brought out at the hearing, the government operates under the mistaken impression that the first and only time an expert is required to set forth her methods is while testifying on the stand before the jury. (See J.A. at 52 (acknowledging that an expert ordinarily would testify about the "rules" of her field and the proper application of those rules to the facts, but insisting that it is an

evidentiary matter "made at the time of the offering of evidence".) The government does not appear to appreciate fully the import of the *Daubert* gatekeeping function of the trial court in determining admissibility as a threshold matter. (See J.A. at 53 (comments of the trial judge, stating, "I don't think you understand, you know.").)

As the proponent of expert testimony, the government bears the burden of establishing, by a preponderance of the proof, that the methods used by the expert in reaching her opinion were reliable. See *Daubert*, 509 U.S. at 593 n.10; *Kannankeril v. Terminix Internat'l Inc.*, 128 F.3d at 806 (the test of admissibility is whether the "particular opinion is based on valid reasoning and reliable methodology"). Clearly there are established methods and scientific bases for comparing fingerprints, and that at least one court has found that these established methods are reliable under *Daubert* and *Kumho Tire*. See *United States v. Havvard*, 117 F. Supp. 2d 848, 851-853, 855 (S.D. Ind. 2000) (explaining that various techniques are used for obtaining a clear image of a latent fingerprint and setting forth the three levels of fingerprint detail on which a comparison is focused, which includes large scale information, ridge path characteristics, and ridge detail). Here, however, the government failed to provide the trial judge with even the most

basic information regarding the methods and scientific bases its expert used to arrive at her identification opinion. To say that the fingerprints were "compared" does not say anything about how they were compared, *i.e.*, at what level of detail the identification was made with respect to ridge characteristics or ridge detail. See *id.* at 853 ("[B]y tradition, latent print examiners in the United States have required a match of at least six to eight characteristics to show identity, but most experts prefer ten to twelve.") (citing MOENSSENS ET AL., *Scientific Evidence in Civil and Criminal Cases* 514-16 (4th ed. 1995)). Further, there is no indication that the expert's report contained information regarding the quality or clarity of the fingerprint impressions being compared, which are also factors "that an identification opinion must take into account." *Id.* at 853. Without this basic information, the trial court could not have possibly determined the reliability of Officer Richardson's methodology as the basis for her opinion.

Under these circumstances, the trial court was virtually compelled by default to reject the government's fingerprint identification opinion as unreliable, and thus inadmissible, under *Daubert* and *Kumho Tire*. In doing so, the trial court did not abuse its discretion, and the evidence was properly

excluded.¹¹

D. Exclusion of the Evidence as a Sanction and Effect of Dismissal With Prejudice

The trial judge excluded the fingerprint identification testimony not only because it did not meet the *Daubert/Kumho Tire* standard for Rule 702 admissibility but also as a sanction against the government under Rule 16(d)(2) for its "cavalier" failure to provide discovery as required under Rule 16(a)(1)(E), as repeatedly requested by defense counsel, and as ordered by the court. (See J.A. at 72-73, 80.) Although the government does not present any argument relevant to this alternative aspect of the trial court's ruling, we note that Rule 16(d)(2) allows a trial court to prohibit the introduction of evidence not properly disclosed under the rule. Given the government's cavalier neglect of the requirements for the admission of expert testimony, the likelihood of prejudice to the defendant in the event he would be made to defend new and improved fingerprint testimony properly admitted at trial, and the fact that the government did not request a continuance, we cannot say that the

¹¹ A final note: The government argued below and argues here that "'vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" (Br. of Appellant at 10 (quoting *Daubert*, 509 U.S. at 595).) What the government overlooks is that the evidence must be *admissible* before it can be subjected to these traditional means of attack. Because the Court holds that the trial court did not abuse its discretion in excluding the fingerprint identification testimony, there is no evidence to cross-examine.

trial court abused its discretion in excluding the fingerprint testimony as a sanction under Rule 16(d)(2). *Accord United States v. Taylor*, 71 F. Supp. 2d 420, 422 (D.N.J. 1999) ("In selecting a proper sanction, a court should typically consider (1) the reasons the government delayed producing requested materials, including whether the government acted in bad faith; (2) the extent of prejudice to defendant as a result of the delay; and (3) the feasibility of curing the prejudice with a continuance."); see also 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE § 260 (2d ed. 1982). Moreover, once it was established that the government had no other evidence to present at trial, which was scheduled for the next day and for which no continuance had been sought, the court's dismissal made sense, both economically and procedurally. This is especially true in light of the government's easy acquiescence to defense counsel's representation that the government could not appeal before trial the order excluding the fingerprint testimony.

Whether the court could then order the extreme sanction of dismissal of the case *with prejudice* under Rule 16(d)(2) would depend on whether such a dismissal was "just under the circumstances." See FED. R. CRIM. P. 16(d)(2) (providing that the trial court can enter "such other order as it deems just under

the circumstances").¹² We cannot help but note that the government has never quite grasped what it needed to do in order to satisfy the requirements of *Daubert* and Rule 702, either through discovery, by order of the court, at the *Daubert* hearing held on the eve of trial, or in its brief filed in this appeal. In addition, trial counsel appeared to have no idea that the government could appeal the trial court's ruling excluding the evidence. See 4 V.I.C. § 39(a)(1). While it may be that the repeated failure of the government to appreciate the requirements for properly disclosing and/or offering for admission *its only* evidence linking the defendant to the crimes charged might well warrant the extreme sanction of dismissal with prejudice for egregious conduct under Rule 16(d)(2), we do not decide this harder question because it was not preserved for our review. See *Government of Virgin Islands v. Williams*, 892 F.2d 305, 309 (3d Cir. 1989) ("[T]he 'contemporaneous objection' rule of appellate review [. . .] requires a party to a judicial proceeding to

¹² In changing his ruling to a dismissal with prejudice, the trial judge referred to the fact that the jury had been empaneled but "not technically sworn." (J.A. at 80.) Although 5 V.I.C. § 3604 requires the jury to be sworn "as soon as the trial jury in a criminal action has been selected," because the jury had not yet been sworn at the time the information was dismissed, jeopardy did not attach. See *Serfass v. United States*, 420 U.S. 377, 388 (1975) ("In the case of a jury trial, jeopardy attaches when a jury is empaneled *and* sworn.") (emphasis added). For a recent discussion of the potential effect of a dismissal with prejudice in the Territorial Court that does not implicate double jeopardy concerns, see *United States v. Harrigan*, 2001 WL 1444001, at *3-4 (D.V.I. May 4, 2001) (also available at <http://www.vid.uscourts.gov>).

object contemporaneously to any matter believed to be erroneous, at peril of relinquishing the opportunity to challenge that matter on appeal." (citing *United States v. Gagnon*, 470 U.S. 522, 527-31, (1985) (per curiam)); *Virgin Islands v. Kidd*, 79 F. Supp. 2d 566, 571 & n.9 (D.V.I. App. Div. 1999).

As already noted, the government did not object below to the trial judge's decision to dismiss the action with prejudice rather than without prejudice, proceeding apparently on the assumption that any decision of the Appellate Division on the admissibility of the expert testimony would necessarily resolve that issue as well. (See J.A. at 80.) At the conclusion of the hearing, the trial judge stated:

Just so that we're clear, the dismissal is actually going to be with prejudice because even though the jury was not technically sworn, the jury was selected, we are ready to go, and if you of course appeal and it's reversed, then it comes back and it doesn't affect it.

(*Id.* at 80-81.) In response to this statement, counsel for the government said, "Thank you." (*Id.* at 81.) Not having objected to the dismissal with prejudice, the government has waived the issue. This waiver is particularly disturbing given that, with our ruling today on the only issue presented for appeal, the government is now foreclosed from reprosecuting the defendant for these charges, which include the very serious charge of breaking and entering an individual's home to commit burglary in the third

degree.

IV. CONCLUSION

Because the government failed to present sufficient proof that its fingerprint identification expert used a reliable method, or any method at all, in reaching her identification opinion, the trial court did not abuse its discretion in excluding the expert's testimony at trial. The judgment will be affirmed. An appropriate order follows.

ENTERED this 28th day of December, 2001.

the parties' submissions and arguments, and for the reasons set forth in the Court's accompanying Opinion of even date, it is hereby

ORDERED that the judgment of the Territorial Court is **AFFIRMED**.

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judges of the Appellate Panel
Honorable Geoffrey W. Barnard
Honorable Jeffrey L. Resnick
Judges of the Territorial
Court

Richard S. Davis, Esq.
St. Thomas, U.S.V.I.
Nizar Abdullah, Esq.
St. Thomas, U.S.V.I.

St. Thomas law clerks
St. Croix law clerks
Ms. Nydia Hess
Mrs. Cicely Francis
Mrs. Kim Bonelli

NOT FOR PUBLICATION