

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
ANDRE HENRY	:	NO. 06-33-01
	:	

ORDER & MEMORANDUM

ORDER

AND NOW, this 2nd day of February, 2007, upon consideration of the United States' Motion for an Order Declaring the Defendant in Contempt of Court for Failure to Provide Palm Prints Pursuant to Court Order (Document No. 346, filed January, 26, 2007), following a hearing on the issue on January 29, 2007, **IT IS ORDERED** that the United States' Motion for an Order Declaring the Defendant in Contempt of Court for Failure to Provide Palm Prints Pursuant to Court Order is **GRANTED**.

IT IS FURTHER ORDERED that the government and defense counsel shall file and serve proposed jury instructions on consciousness of guilt on or before 5:00 p.m. on Monday, February 12, 2007. Two (2) copies of the proposed jury instruction shall be served on the Court (Chambers, Room 12613) when the original is filed.

MEMORANDUM

I. INTRODUCTION

Defendant, Andre Henry, is charged in a 28-count Superseding Indictment in connection with eight robberies of fast food restaurants, the purchase and possession of firearms and assault weapons, possession of body armor, two armed bank robberies, a conspiracy to commit a third armed bank robbery, a car jacking that involved shots fired at a police officer, and solicitation to

commit murder of a federal grand jury witness. Currently before the Court is the United States' Motion for an Order Declaring the Defendant in Contempt of Court for Failure to Provide Palm Prints Pursuant to Court Order, in which the government seeks a jury instruction at the conclusion of the trial as to the defendant's consciousness of guilt. For the reasons set forth below, the government's motion is granted.

II. BACKGROUND

Among the criminal charges against defendant in the superseding indictment are two counts of robbery of the Pulaski Savings Bank in Philadelphia on September 18, 2003 and September 29, 2003, in violation of 18 U.S.C. § 2113(d). During the processing of the crime scenes, law enforcement officers recovered 11 palm prints. (Gov't Mot. to Compel at 2.) These palm prints were forwarded to the Latent Print Operation Unit of the Federal Bureau of Investigation in Quantico, Virginia for comparison. (Id. at 2.) Nine of the 11 palm prints excluded defendant, but the remaining two palm prints could not be compared to defendant's prints because of the poor quality of defendant's prints. (Id.)

On November 28, 2006, the government filed a Motion for an Order Compelling Defendant to Provide Palm Prints. By Order dated December 7, 2006, the Court granted the government's motion, subject to the *provis* that defense counsel was permitted to be present when the palm prints were taken.

On December 15, 2006, and again on January 9, 2007, the United States "Marshals transported defendant from the Federal Detention Center, two agents from the [FBI] were present to take the defendant's palm prints, and defense counsel was also present to witness the taking of the prints. . . . On both occasions, the defendant refused to provide agents with his palm prints . .

..” (Gov’t Mot. at 2.) On January 26, 2007, the government filed the instant motion, seeking a jury instruction at the conclusion of the trial as to the defendant’s consciousness of guilt for refusing to provide palm prints.

On January 29, 2007, the Court conducted a hearing during which it addressed the government’s motion for contempt. First, the Court confirmed with defendant that he had refused to provide the palm prints. (Jan. 29, 2007 Hearing Transcript at 22.) Next, the Court asked defendant and counsel to confer in order for defendant to decide whether he would now agree to provide the palm prints. (Id. at 23.) Defense counsel reported as follows:

[M]y client advises me that he’s not going to provide palm prints and he fully understands that what he’s risking is an adverse instruction by the Court that the jury can look at that refusal as consciousness of guilt. And this is an issue we have discussed at least with respect -- because I was there on both times when we tried to get palm prints and this is an issue that we have discussed in the past and he’s obviously aware of the risk.

(Id. at 24.)

The Court then conducted an extensive colloquy with defendant, explaining to defendant the consequences of his refusal to provide the palm prints. Both the Court and defense counsel detailed the impact of a jury instruction as to the defendant’s consciousness of guilt. Defense counsel explained that defendant’s refusal to provide palm prints “could be held against him. In fact the jury can -- if the jury will specifically be told it can be held against him, they can infer that the reason he didn’t want to provide palm prints is he was afraid it was going to be a positive match. I can’t put it any simpler than that.” (Id. at 25.) The Court then explained as follows:

Mr. Henry, this is a very important decision that you’re being asked to make, it’s important because a jury instruction on consciousness of guilt might very well be sufficient to tilt the jury against you and to form the basis or at least a significant part of the basis for a finding of guilty on some of the crimes charged, maybe all of the crimes charged. And are you sure you don’t want to provide palm prints with this at risk, at risk

being the consciousness of guilt instruction to the jury?

(Id. at 26.) Defendant again refused to provide the palm prints. (Id. at 28.)

The Court then noted that if defendant changed his mind before the government raised the issue at trial, the Court would reconsider its decision. (Id. at 29.)

III. LEGAL STANDARD

Several circuits have held that “evidence of a defendant’s refusal to comply with a lawful court order [is admissible] on the ground that ‘[a]n attempt by a criminal defendant to suppress evidence is probative of consciousness of guilt and admissible on that basis.’” United States v. Jackson, 886 F.2d 838, 845-846 (7th Cir. 1989) (noting that a defendant’s refusal to provide fingerprints, voice exemplars, or handwriting specimens deprives the government of evidence that is directly related to the defendant’s guilt or innocence of the underlying crime”) (citing United States v. Wagner, 834 F.2d 1474, 1484 (9th Cir. 1987) (quoting United States v. Castillo, 615 F.2d 878, 885 (9th Cir. 1980)). Indeed, a criminal defendant’s refusal to furnish palm print has specifically been held admissible as consciousness of guilt. United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983), cert. denied, 461 U.S. 931 (1983) and 464 U.S. 992 (1983).

By analogy, the Third Circuit has held that “evidence of a defendant’s flight after a crime has been committed is admissible to prove the defendant’s consciousness of guilt.” United States v. Katzin, 94 Fed. App’x 134, 138 (3d Cir. 2004) (citing United States v. Pungitore, 910 F.2d 1084, 1151 (3d Cir.1990); United States v. Green, 25 F.3d 206, 210 (3d Cir.1994)); cf. United States v. Franklin, 2000 WL 217527, at *4 (E.D. Pa. Feb 14, 2000) (noting “that the admission into evidence of a defendant’s refusal to submit to a blood-alcohol test does not offend his constitutional privilege against self-incrimination”) (citing South Dakota v. Neville, 459 U.S.

553 (1983); Schmerber v. California, 384 U.S. 757, 767-72 (1966)).

IV. DISCUSSION

The Court's December 7, 2006 Order compelling defendant to provide palm prints was appropriate. The taking of fingerprints from a defendant while lawfully incarcerated is constitutional. See United States v. Whitfield, 378 F.Supp. 184, 187 (D.C. Pa. 1974) (citing Beightol v. Kunowski, 486 F.2d 293 (3 Cir. 1973) (noting that the taking of fingerprints from a defendant while lawfully incarcerated does not violate the Fourth, Fifth, or Sixth Amendments). Moreover, the Court had the power to order defendant to have his palm prints taken. See In re Reardon, 445 F.2d 798 (1st Cir. 1971) (holding that defendant was not entitled to relief from an order requiring him to have his palm print taken on the ground that the prosecution's evidence could not be obtained by administrative summons).

During the January 29, 2007 hearing, the Court ensured that defendant understood the repercussions of his refusal to comply with the Court's December 7, 2006 Order. Specifically, the Court explained in detail the impact of a jury instruction as to the defendant's consciousness of guilt. After the Court's explanation, the Court asked defendant whether he would comply with the Order. Defendant stated that he would not. Accordingly, the Court concludes that a jury instruction on the defendant's consciousness of guilt is appropriate. Nevertheless, if defendant changes his mind before the government raises this issue at trial, the Court will reconsider its decision.

V. CONCLUSION

For the foregoing reasons, the Court grants the United States' Motion for an Order Declaring the Defendant in Contempt of Court for Failure to Provide Palm Prints Pursuant to Court Order.

BY THE COURT:

/s/ JAN E. DUBOIS, J.

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