No.

In The

Supreme Court of the United States

Eugene Roberts,

Petitioner

vs.

People of the Virgin Islands,

Respondent

On Petition For Writ of Certiorari
To The Virgin Islands Supreme Court

APPENDIX

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For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

EUGENE ROBERTS, Appellant/Defendant,	)	**S. Ct. Crim. No. 2019-0051** Re: Super. Ct. Crim. No. 136/2014 (STX)
v.	)	
PEOPLE OF THE VIRGIN ISLANDS, Appellee/Plaintiff.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Darryl Dean Donohue, Sr.

Argued: April 13, 2021
Filed: April 19, 2022

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BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA CABRET,** and Associate Justice **IVE ARLINGTON SWAN**, Associate Justice.

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OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Eugene Roberts appeals the Superior Court's denial of his FED. R. CRIM. P. 29 post trial motion for a judgment of acquittal or, alternatively, a new trial. For the reasons elucidated below, we affirm the Superior Court's decision, but remand to enable the Superior Court to vacate Roberts' first degree assault conviction to comport with our decision in *Titre v. People*, 70 V.I. 797 (V.I. 2019).

I. FACTS AND PROCEDURAL HISTORY

¶2 On April 19, 2014, Kenya Stanley ("Stanley") and Matthew Vernege ("Vernege"), her fiancée, patronized Frontline Nightclub in St. Croix, U.S. Virgin Islands. As they exited the establishment at approximately 2 a.m., a man, who was entering the club with acquaintances, attempted to whisper in Stanley's ear. Stunned, Stanley stepped backwards into a wall. Angered by the man's attempt, Vernege and the man began to argue. Vernege claimed the man's actions were disrespectful. Subsequently, Stanley grabbed Vernege's hand, and they proceeded to Vernege's truck which was parked outside on the side of the club. As Stanley sat in the vehicle's passenger seat waiting for Vernege to enter the driver's side, the man who attempted to whisper in Stanley's ear exited the establishment holding a silver pistol and began to shoot at Vernege's truck. Stanley alerted Vernege to the threat, and he returned fire with his firearm while commanding Stanley to crouch down.

¶3 After the shooting commenced, bedlam and pandemonium punctuated the scene. Concerned patrons entered the club to alert Anthony Hector ("Hector") of the situation. Hector

worked at the club and was an off-duty police officer at the time of the incident. Retrieving his police-issued weapon, Hector exited the club and thereupon saw two men shooting into Vernege's truck. Hector identified himself as a police officer, commanded the men to drop their weapons, and proceeded to fire at the men when they failed to comply with his commands. Hector shot the first man, whom he later identified as Larry Williams, Jr., ("Williams") and saw him stagger. Similarly, Hector shot the second man, whom he later identified as Eugene Roberts ("E. Roberts"), and saw him stagger.

¶4 Immediately after shooting E. Roberts, Hector was tackled from behind by a man he later identified as Lester Roberts ("L. Roberts"). Upon falling to the ground, Hector's weapon was dislodged from his grip. L. Roberts and Hector then began to struggle for control of Hector's weapon. Realizing that he would not regain control of the pistol before L. Roberts acquired it, Hector rose from the pavement and ran towards the property across the street from the club. As he fled, L. Roberts shot Hector with Hector's pistol.

¶5 Before the shooting erupted, Roscar Hurtault ("Hurtault") arrived at the club to purchase refreshments. Hurtault parked his vehicle and proceeded to the establishment's exterior bar. Before he reached the bar, a female stopped Hurtault to ask him for a lighter to ignite her cigarette. As Hurtault lit the cigarette, the shooting commenced. To avoid being killed or injured, Hurtault and the woman huddled by the woman's car. When the shooting ceased temporarily, the woman and her companions hurriedly fled the scene in the woman's car. However, Hurtault continued towards the bar because he could not safely get to his vehicle without crossing the open parking lot and risk being shot. As he approached the bar, Hurtault crouched behind a parked, white Toyota truck. As he peered through the truck's window, Hurtault saw Hector exit the club and the shooting

recommenced. As he continued to huddle behind the truck, Hurtault saw an individual approaching the vehicle. Hurtault hurriedly maneuvered to the front of the truck so the approaching individual could hide in the rear of the vehicle. However, as he hid by the truck's front end, Hurtault turned and saw a man, whom he later identified as E. Roberts, pointing a gun at him. Allegedly, E. Roberts said something to Hurtault and then shot at Hurtault five times. Hurtault was struck twice with gun shots and immediately scrambled under the truck to prevent further injury to himself. While under the truck, Hurtault saw a man fall to the ground after being shot. Hurtault later identified that man as Williams. Continuing his refuge under the truck, Hurtault saw Williams and other individuals leave the scene in a small, four door black SUV vehicle. After the men departed the scene, Hurtault emerged from beneath the truck and was taken to the hospital by spectators for medical treatment.

¶6 During the chaos, Hector called 911 while he hid on the property across the street from the club. Before he made the 911 telephone call, Hector heard a man say that Hector shot him. Subsequently, Hector saw a man assist one of the two men he shot to get into a vehicle and heard the vehicle depart the scene. However, Hector failed to recognize the model of vehicle in which the men departed.

¶7 At approximately 3:15 a.m. on April 19, 2014, officers were dispatched to an automobile accident at Morning Star Hill ("Morning Star") on Northside Road in St. Croix, U.S. Virgin Islands. Upon arrival, officers encountered a black Dodge Caliber vehicle that had crashed into a tree and learned the vehicle was driven by Derick Liburd ("Liburd"). Although Liburd was uninjured, his three companions were injured because they had been shot. Liburd told officers that he and his friends were at Frontline Nightclub when shooting started. Liburd then told officers the group left the club in his Dodge Caliber and were shot at by individuals in a black car as they

passed the entrance to Salt River. After an occupant of the black vehicle allegedly shot at them, Liburd said he lost control of his automobile and crashed into the tree.

¶8 Following his recitation, officers secured Liburd in a police cruiser and traveled to the Salt River entrance to investigate Liburd's allegations. Officers found no evidence of a shooting at the Salt River entrance and observed no bullet holes in Liburd's crashed vehicle. Moreover, 911 personnel informed officers that the Frontline shooting suspects had left the scene in a vehicle that resembled Liburd's vehicle. Finally, officers recovered several firearms from the foliage in the vicinity of Liburd's crashed vehicle and one from the interior of Liburd's disabled vehicle. Ultimately, police forensic personnel would confirm that expended bullet casings from the Frontline shooting matched one of the weapons recovered from the foliage near the Morning Star accident as well as the firearm found inside Liburd's crashed vehicle which was later identified as Hector's police issued weapon.

¶9 Eventually, paramedics arrived at both the Frontline Nightclub and Morning Star Hill crime scenes. Upon arrival at Frontline, paramedics concluded Vernege was deceased. Paramedics at Morning Star identified Williams as the individual with the most severe injuries and transported all injured individuals to the Governor Juan Luis Hospital.

¶10 On May 20, 2014, the People charged five individuals, including Williams and E. Roberts, in a twenty-two count information with crimes associated with the Frontline shooting incident. Additionally, the charges included first degree murder, 14 V.I.C. § 922(a); attempted first degree

murder, 14 V.I.C. § 331; first degree assault, 14 V.I.C § 295, and unauthorized possession of firearm during the commission of a violent crime, 14 V.I.C. § 2253(a).[1]

¶11 On January 20, 2015, Williams filed a motion to compel discovery of outstanding documents namely Stanley's videotaped interview, Hector's personnel records, and all police department internal affairs files that referenced Hector.

¶12 On February 11, 2015, E. Roberts filed a notice to join in Williams' motion to compel.

¶13 On April 15, 2016, Williams filed a motion to specifically compel discovery of Hector's personnel records and his internal affairs file because of alleged prior complaints in which Hector purportedly used excessive force. Moreover, the motion cited an April 19, 2014 internal affairs investigation into Hector's use of force during the Frontline incident which the People failed to disclose.

¶14 On April 21, 2016, E. Roberts filed a notice to join in Williams' motion to compel discovery of Hector's personnel records and his internal affairs file.

¶15 Following an April 28, 2016 hearing on Williams' motion to specifically compel discovery of Hector's personnel records and his internal affairs file, the court issued an April 28, 2016 order that allowed the Virgin Islands Attorney General or his designee access to Hector's internal affairs file for the limited purpose of obtaining exculpatory and discoverable information as they related

[1] In addition to the charges already itemized, the People also charged E. Roberts with third degree assault, 14 V.I.C. § 297(2); possession of ammunition, 14 V.I.C. § 2256(a); first degree reckless endangerment, 14 V.I.C. § 625(a); unauthorized possession of a firearm, 14 V.I.C. § 2253(a); first degree robbery, 14 V.I.C. § 1862(2); grand larceny, 14 V.I.C. § 1083(1); possession of stolen property, 14 V.I.C. § 2101(a); and conversion of government property, 14 V.I.C. § 895(a)(b).

to the *People v. Felix et al.* case.[2] The order also declared that the court would review in camera the material obtained from Hector's internal affairs file.

¶16 On May 2, 2016, the People provided the court with a summary of the results from the review of Hector's internal affairs file. Specifically, the People acknowledged that the file contained a report of an April 23, 2014 alcohol test and a DVD with three videotaped statements. The DVD included Hector's October 27, 2014 statement, Hurtault's July 10, 2014 statement, and Scott Gilbert's May 30, 2014 telephone statement, all of which were connected to the case. The People's summary also stated that the People reviewed thirty-one internal affairs files regarding Hector spanning 1998 to 2003 and none contained relevant information.

¶17 On May 9, 2016, Williams filed a motion to show cause why the People should not be held in contempt for failing to distribute to defendants the documents obtained from the review of Hector's internal affairs file.

¶18 On June 22, 2016, E. Roberts filed a notice to join in Williams' motion to show cause.

¶19 On July 11, 2016, Williams filed a motion for a ruling on his show cause motion. In the motion, Williams informed that the court held a June 22, 2016 hearing on the show cause motion. During the June 22, 2016 hearing, the People produced an illegible copy of a laboratory report, three statements, and a summary of Hector's personnel file. Williams claimed the summary of Hector's personnel file did not comply with Federal Rule of Criminal Procedure 16.1, which stated a defendant must have a reasonable basis to believe a police officer's internal affairs file or

[2] The caption in this case changed after co-defendant Elijah Felix was sentenced to two years' incarceration after he pled guilty to unauthorized possession of a firearm, Lester Roberts agreed to a dismissal of all charges against him without prejudice, and Derick Liburd was acquitted at the close of the People's case in chief.

personnel records contain discoverable information.[3] Following the hearing, the court ordered the People to provide a legible copy of the laboratory report and a summary of Hector's personnel file that complied with Rule 16.1 by June 30, 2016, which the People failed to do. Although the court required the People to provide certain documents to the defendants at the conclusion of the June 22, 2016 hearing, it failed to rule on Williams' show cause motion. Therefore, Williams moved the court again to grant his show cause motion and to hold the People in contempt for failing to produce the mandatory documents.

¶20 On July 11, 2016, E. Roberts filed a notice to join in Williams' motion for a ruling on Williams' show cause motion.

¶21 On July 29, 2016, the People filed an informational motion with the court. In the motion, the People informed the court that a review of Hector's personnel records yielded no discoverable data that related to Hector's credibility or his character for truthfulness. Moreover, the motion explained that the People transmitted a legible copy of the laboratory report to defendants on July 27, 2016.

¶22 On October 20, 2016, the trial commenced. On November 4, 2016, at the close of the People's case in chief, the court granted E. Roberts' Rule 29 motion on several of the original 22 counts and left nine counts remaining.

¶23 On November 4, 2016, the People filed a second amended information that charged Williams and E. Roberts with ten counts, including first degree murder, attempted first degree

[3] Notably, Federal Rules of Criminal Procedure apply to this matter because the Virgin Islands Rules of Criminal Procedure were promulgated after trial in this case commenced. The Virgin Islands Rules of Criminal Procedure became effective on December 1, 2017.

murder, first degree assault, and unauthorized possession of a firearm during the commission of a violent crime.[4]

¶24 However, on November 9, 2016, the People filed a third amended information that charged Williams and E. Roberts with nine counts. The third amended information alleged Williams and E. Roberts committed first degree murder (Count 1), in violation of 14 V.I.C §§ 921, 922(a)(1); E. Roberts committed attempted first degree murder (Count 2) in violation of 14 V.I.C §§ 922(a)(1), 331(1); E. Roberts committed first degree assault (Count 3) in violation of 14 V.I.C. § 295(1); Williams and E. Roberts committed third degree assault (Count 4) in violation of 14 V.I.C. §§ 297(2), 11(a); Williams and E. Roberts committed unauthorized possession of a firearm during the commission of a violent crime (Count 5) in violation of 14 V.I.C. §§ 2253(a), 11(a); E. Roberts committed unauthorized possession of a firearm during the commission of a violent crime (Count 6) in violation of 14 V.I. C. § 2253(a); Williams and E. Roberts committed unauthorized possession of ammunition (Count 7) in violation of 14 V.I.C. §§ 2256(a), 11(a); Williams and E. Roberts committed first degree reckless endangerment (Count 8) in violation of 14 V.I.C. § 625(a); and Williams and E. Roberts committed unauthorized possession of a firearm (Count 9) in violation of 14 V.I.C. §§ 2253(a), 11(a).

¶25 On November 14, 2016, the jury adjudged E. Roberts guilty of seven counts including attempted first degree murder (Count 2), first degree assault (Count 3), unauthorized possession of a firearm during the commission of a violent crime (Counts 5& 6), unauthorized possession of

[4] In addition to the charges already enumerated, the second information also charged E. Roberts with third degree assault, unauthorized possession of a firearm, possession of ammunition, and first degree reckless endangerment.

ammunition (Count 7), first degree reckless endangerment (Count 8), and unauthorized possession of a firearm (Count 9).

¶26 On November 29, 2016, E. Roberts filed a Rule 29 post-trial motion for a judgment of acquittal or, alternatively, a new trial. In the motion, E. Roberts enumerated several alleged errors made during the trial which purportedly justified his acquittal or a new trial. Additionally, E. Roberts asserted that the People committed prosecutorial misconduct during closing arguments when its counsel stated E. Roberts was shot in the leg. E. Roberts also contended that the People's failure to disclose Hector's entire internal affairs file as well as the People's failure to produce Officer Namoi Joseph's Use of Force Report,[5] which he claimed contained impeachment as well as exculpatory evidence and was only produced at the conclusion of the People's case in chief, constituted substantial prejudice that warranted vacatur of the jury verdict. Importantly, after the disclosure of the Use of Force Report, Roberts moved the court for a mistrial, which the court denied.

¶27 On January 9, 2017, the People filed its opposition to E. Roberts' Rule 29 post-trial motion for a judgment of acquittal or, alternatively, a new trial. In the opposition, the People posited E. Roberts sustained no prejudice because of its mischaracterization of his gunshot wound since he did suffer a gunshot wound to his body during the shooting at Frontline Night Club. Moreover, the People also alleged the Use of Force Report is devoid of any exculpatory or impeachment evidence and that E. Roberts was not entitled to discover Hector's entire internal affairs file.

[5] A Use of Force Report is an internal document generated by the Virgin Islands Police Department whenever there is an officer involved shooting.

¶28 On February 21, 2019, the court entered an order denying E. Roberts' Rule 29 post-trial motion. In the order, the court, among other things, opined that the People's mischaracterization of E. Roberts' gunshot wound was inconsequential because the court presumed the jury followed its curative instruction. Furthermore, the court iterated E. Roberts was not entitled to full disclosure of Hector's entire internal affairs file despite the delay he experienced in acquiring the results of the People's investigation of Hector's internal affairs file, as well as his personnel records. Lastly, the court rejected E. Roberts' contention that the People's failure to disclose the Use of Force Report was prejudicial because the information in the report was elicited by E. Roberts' attorney on cross examination and the statement was never adopted by Hector. Moreover, the court declared it had reviewed the Use of Force Report and was unable to identify any exculpatory or impeachment evidence in it.

¶29 On May 16, 2019, the court vacated E. Roberts' sentence for Counts 5, 8, and 9. On the remaining four counts, the court sentenced E. Roberts to thirty-five years' incarceration.

¶30 On June 11, 2019, E. Roberts perfected the instant appeal.

II. JURISDICTION

¶31 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (V.I. 2012)). Because the Superior Court's May 16, 2019 judgment against E. Roberts disposed of all claims submitted for adjudication, the order is final and we exercise jurisdiction over E. Roberts' appeal.

III. STANDARD OF REVIEW

¶32 We review the trial court's factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). "However, in ruling on the correctness of discretionary rulings, such as those granting or denying motions to suppress evidence or for severance, we review only for abuse of discretion." *Ponce v. People*, 72 V.I. 828 (V.I. 2020) (citations omitted). Lastly, "[we] appl[y] a 'particularly deferential standard of review' to sufficiency [of the evidence] claims, and will affirm the verdict so long as the evidence, when viewed in a light most favorable to the People—including the benefit of all reasonable inferences—would allow a rational jury to find all elements of each offense proven beyond a reasonable doubt." *Id.* (citations omitted). *See Coleman v. Johnson*, 566 U.S. 650, 655-56 (2012) (explaining the test for reviewing sufficiency of the evidence is whether any rational trier of fact could fairly find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government); *Greer v. People*, 2021 V.I. 7, 9 n.15 (V.I. 2021) (same) (citing *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019); *United States v. Atkins*, 881 F.3d 621 (8th Cir. 2018); *Ambrose v. People*, 56 V.I. 99, 107 (V.I. 2012); and *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004)).

IV. DISCUSSION

A. Sufficiency of the Evidence

¶33 On appeal, E. Roberts asserts there was insufficient evidence to sustain his convictions for attempted first degree murder (Count 2), first degree assault (Count 3), and unauthorized possession of ammunition (Count 7). We address each contention in turn.

¶34 The People charged E. Roberts with attempted first degree murder of Hurtault. To prove attempted first degree murder, the People had to prove that E. Roberts attempted to kill Hurtault with premeditation and malice.[6] E. Roberts argues the record is devoid of ample facts evidencing malice or premeditation (Appellant's Br. 14). We disagree.

¶35 To satisfy the premeditation element, the People are not required to demonstrate E. Roberts labored over the decision to kill Hurtault or that he had a long standing plan to do so. *James v. People*, 60 V.I. 311, 326 (V.I. 2013). Essentially, "[a]lthough the mental processes involved must [occur] prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill. It is not the length of time or reflection that determines whether an act of murder was premeditated, but rather it is the act of deliberation before murder." *Id.* (citations omitted). *See United States v. Rogers*, 457 Fed. Appx. 268, 271 (4th Cir. 2011) ("'[N]o particular period of time for reflection is essential to a finding of premeditation and deliberation.' While the amount of time for reflection may vary, 'it is a fact of deliberation, of second thought that is important.'") (citations omitted); *Northern Mariana Islands v. Quitano*, No. 2011-SCC-0022-CRM, 2014 WL 1407211, at *6 (N. Mar. I. Apr. 4, 2014) (unpublished) ("[P]remeditation need not involve extensive planning and calculated deliberation . . . [and] can be formulated virtually instantaneously . . .") (citations omitted); *Goodwin v. Keller*, No. 1:10CV679, 2011 WL 1362110, at *11 (M.D. N.C. Apr. 11, 2011) (unpublished) ("'Premeditation' means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. 'Deliberation' means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed

[6] "(a) All murder which (1) is perpetrated by means of poison, lying in wait, torture, detention of a bomb, or by any other kind of willful, deliberate, and premediated killing; (2) is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery, or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny . . . is murder in the first degree." 14 V.I.C. § 922(a)(1)(2).

design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by a lawful or just cause or legal provocation."); *see also Nicholas v. People*, 56 V.I. 718, 731-32 (V.I. 2012) ("In the Virgin Islands, malice aforethought does not mean simply hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from the circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences. And 'where the killing is proved to have been accomplished with a deadly weapon, malice can be inferred from that fact alone.'") (citations omitted).

¶36 Here, the facts undisputedly demonstrate legally sufficient deliberation, premeditation, and malice. E. Roberts approached Hurtault from the rear of the parked white Toyota truck. (J.A. 1298). Upon moving to the front of the truck where Hurtault had ventured in order to secure for himself protection provided by the vehicle's engine, E. Roberts had adequate time to contemplate his actions and form the necessary intent to kill Hurtault. Moreover, after encountering Hurtault at the vehicle's front end, E. Roberts said something to Hurtault as he pointed his gun towards Hurtault and shot at Hurtault five times. E. Roberts' utterance before firing five shots at Hurtault provided E. Roberts with even more time to contemplate his actions, concerning whether he wanted to kill Hurtault. Lastly, E. Roberts' use of a firearm to shoot at Hurtault five times established the prerequisite malice under Virgin Islands law. Under a totality of the circumstances, a reasonable jury certainly could have concluded beyond a reasonable doubt that E. Roberts possessed the necessary premeditation, deliberation, and malice to be guilty of attempted first degree murder of Hurtault. Therefore, E. Roberts' argument regarding the insufficiency of evidence to establish attempted first degree murder is shamefully specious and non-meritorious.

¶37 In the Virgin Islands, first degree assault occurs whenever a perpetrator assaults another with the intent to murder that person. 14 V.I.C § 295(1). Although the information cites first degree assault, which requires an intent to murder, as the basis of the offense for which E. Roberts was convicted, assault, under Virgin Islands law, requires an individual to attempt a battery or to make a threatening gesture demonstrating an immediate intent and ability to commit a battery. 14 V.I.C. § 291. Therefore, E. Roberts technically assaulted Hurtault by merely pointing the gun at him.

¶38 Regardless, E. Roberts' intent to kill as discussed relative to the charge of attempted first degree murder similarly applies to the analysis for first degree assault. Specifically, E. Roberts aimed a firearm at Hurtault and, without legal or just cause, fired five times at Hurtault, a defenseless victim. Importantly, the trial record is devoid of any modicum or scintilla of evidence that E. Roberts acted in self-defense or in defense of another person when he shot Hurtault. Therefore, E. Roberts' actions unequivocally demonstrate his murderous intent and offer sufficient evidence for a reasonable jury to convict him of first degree assault beyond a reasonable doubt. *See Simmonds v. People*, 59 V.I. 480, 488-89 (V.I. 2013) (finding sufficient evidence for first degree assault when the defendant fired shots at the victim); *Phillip v. People*, 58 V.I. 569, 592 (V.I. 2013) (explaining a jury could have convicted the defendant of first degree assault from evidence the defendant pointed a firearm in a threatening manner with the ability to injure and kill the victim.); *Joseph v. Racette*, No. 12-CV-1693 (NGG), 2014 WL 1426255, at *8 (E.D.N.Y. Apr. 14, 2014) (unpublished) ("It was the act of shooting Davis and causing serious physical injury that fulfilled the elements of assault in the first degree.") (citations omitted).

¶39 In the Virgin Islands, a person commits unauthorized possession of ammunition, in pertinent part, if he lacks a firearm license but possesses, sells, purchases, manufactures, advertises

for sale, or uses firearm ammunition. 14 V.I.C. § 2256(a). However, on appeal, E. Roberts alleges the People had to prove that he violated each statutory provision rather than just the one the People presumed relevant. Essentially, E. Roberts contends that, in addition to establishing that he was an unlicensed firearm owner under § 2256(a)(3), the People also had to confirm he was not a licensed firearms or ammunition dealer under § 2256(a)(1) and he was not an on duty law enforcement officer, agent, or employee of the Virgin Islands government or the United States government acting within the scope of his duties under § 2256(a)(2). We agree.

¶40 Undeniably, statutory interpretation commences with ascertaining whether the statutory language is ambiguous. *Wallace v. People*, 71 V.I. 703, 715 (V.I. 2019). If unambiguous, the inquiry ends. *Id.* As stated above, E. Roberts argues that, to be found guilty of unauthorized possession of ammunition, the People had to prove that he was not a territorial or federal law enforcement officer, a licensed firearms dealer, *nor* a locally licensed firearm owner.

¶41 In *Smith v. People*, 51 V.I. 396 (V.I. 2009), the Court agreed with the decision of the United States Court of Appeals for the Third Circuit in *United States v. Daniel*, 518 F.3d 205 (3d Cir. 2008), that "Virgin Islands law," as embodied in 14 V.I.C. § 2256 as worded at that time, "proscribe[d] possession of ammunition without authorization, but it d[id] not establish a mechanism for authorizing possession of ammunition." *Smith*, 51 V.I. at 402. As a result, the Court was "compelled" to "reverse Smith's conviction on" the charge of unlawful possession of ammunition, because "the People failed to prove a requisite element of the offense of unlawful possession of ammunition," namely, that the possession was unauthorized. *Smith*, 51 V.I. at 403 (citing *Daniel*, 518 F.3d at 209-10).

¶42 After the decisions in *Smith* and *Daniel* in 2010, the Virgin Islands Legislature re-wrote subsection (a) of the statute to establish a "mechanism for authorizing possession of ammunition" that those opinions had concluded was lacking. That mechanism was ultimately set forth in four new, enumerated paragraphs of rewritten subsection (a), which have not been amended since. *See* Act No. 7182, § 1 (V.I. Reg. Sess. 2010). The first three paragraphs of rewritten subsection (a) are indisputably worded in the negative regarding what the People must prove. The operative statutory language unambiguously requires that the People first establish that the defendant (a)(1) "is not . . . a licensed firearms or ammunition dealer; or" (a)(2) "is not . . . [an] officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties; or" (a)(3) "is not . . . [a] holder of a valid firearms license for the same firearm gauge or caliber ammunition of the firearm indicated on such license[.]" Continuing, since the conjunctive word "and" appears immediately after these three paragraphs, the fourth element of the statute, set out in paragraph (a)(4), must also be shown, in order to establish that all of the elements of subsection (a) have been proven. However, the language of paragraph (a)(4), in contrast to paragraphs (a)(1) through (a)(3), is set up in the affirmative, requiring the People to prove that the suspect whose status is accurately described by paragraphs (a)(1) or (a)(2) or (a)(3) at the relevant time, simultaneously "possesses, sells, purchases, manufactures, advertises for sale, or uses any firearm ammunition."

¶43 The People argue that the negative status requirements of subsections (a)(1), (a)(2), and (a)(3) should be treated as separate "options" that the People may choose from in order to establish unauthorized possession. But if that construction were to be adopted, an individual who is indisputably "a licensed firearms or ammunition dealer" within the contemplation of 14 V.I.C. § 2256(a)(1) could, at first blush, nevertheless be successfully prosecuted under subparagraph (a)(2)

of the same statute for unauthorized possession of ammunition—based on nothing more than the People's election--premised on the fact that such individual is not an "officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties" at the time such person possessed, sold, purchased, manufactured, advertised for sale, or used any firearm ammunition. Thankfully, it is beyond cavil that such an absurd and unjust result, which can reasonably be presumed to not have been the intent of the Virgin Islands Legislature in enacting and subsequently amending 14 V.I.C. § 2256 to address the holdings in *Daniel* and *Smith*, is foreclosed. *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009) ("A statute should not be construed and applied in such a way that would result in injustice or absurd consequences."); *One St. Peter, LLC v. Bd. of Land Use Appeals*, 67 V.I. 920, 928 (V.I. 2017) ("[A]n 'absurd result,' in the statutory construction context, refers to an interpretation of a statute that would be 'clearly inconsistent with the Legislature's intent.'").

¶44 Here, it is obvious that the People established that E. Roberts was "not . . . [a] holder of a valid firearms license" within the scope of paragraph (a)(3) at the time he indisputably "possesse[d] . . . or use[d] . . . firearm ammunition" to shoot Hurtault. At trial, E. Roberts' only argument that the People failed to "prove an[] essential element of the crime" addressed paragraph (a)(2), pertaining to which he claimed that "the People failed to prove that . . . E. Roberts w[as] not employed by or [was] a federal agent at the time he was alleged to have been in possession of ammunition." (JA 229-230). He made no argument whatsoever regarding whether the People established that he was "not . . . a licensed firearms or ammunition dealer" as contemplated by paragraph (a)(1). Yet, in his appellate brief, he argues that the People's case is deficient because "it was incumbent upon the People to prove not only that E. Roberts was not licensed to carry or

possess a firearm and/or ammunition in the Territory, but also that E. Roberts was (1) not a licensed firearms or ammunition dealer or (2) not an officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties" when he shot Hurtault. Thus, to the extent that E. Roberts argues on appeal that the People failed to present sufficient evidence regarding whether 14 V.I.C. § 2256(a)(1) was satisfied, that argument is being raised for the first time. As such, it is procedurally defaulted and will not be considered. *See, e.g., Fontaine v. People*, 62 V.I. 643, 649 (V.I. 2015) (defendant waived argument that attempted murder and first-degree assault with intent to commit murder were the same offense for Double Jeopardy purposes under Virgin Islands law because it was not raised before the Superior Court). Regarding the question of whether 14 V.I.C. § 2256(a)(2) was satisfied, after considering E. Roberts' argument, the trial court concluded that "the jury could reasonably infer that shooting someone who is unarmed and taking cover during an active shooter situation is not within the scope of the duties of an officer, employee, or agent of the United States Government or of the Government of the Virgin Islands." *People v. Roberts*, 70 V.I. 125, 166 (Super. Ct. 2019). E. Roberts does not challenge this ruling on appeal.

¶45 Finally, we observe that 14 V.I.C. § 2256(f) unambiguously provides that "[t]he defendant shall have the burden of proving . . . an exemption" provided by the statute, and that "[a]n information based upon a violation of this section need not negate any exemption . . . contained" in the statute. Accordingly, to the extent that 14 V.I.C. § 2256(a)(1), (a)(2), and (a)(3) provide exemptions from the punishments available under the statute, it is the defendant who must establish a prima facie case of entitlement to the exemptions thereto.

¶46 Accordingly, E. Roberts has failed to preserve for appeal his argument concerning whether 14 V.I.C. § 2256(a)(1) was satisfied. He has not challenged the Superior Court's ruling that the jury could have reasonably inferred from the evidence that 14 V.I.C. § 2256(a)(2) was satisfied, and he does not dispute that the evidence established that 14 V.I.C. § 2256(a)(3) and (a)(4) were satisfied. In addition, he has not established a prima facie case of his entitlement to qualify for an exemption under the statute. As a result, his conviction and sentence for unauthorized possession of ammunition will be affirmed.

B. Denial of Rule 29 motion for Attempted First Degree Murder and First Degree Assault

¶47 On appeal, E. Roberts next argues the Superior Court erred when it denied his Rule 29 motion for attempted first degree murder (Count 2) and first degree assault (Count 3). E. Roberts first made the motion at the close of the People's case, renewed the motion during the conference on jury instructions, and renewed it again after the jury returned a guilty verdict.

¶48 FED. R. CRIM. P. 29[7] empowers the court, on a defendant's motion, to enter a judgment of acquittal at the close of the People's case in chief or at the end of the presentation of evidence by all parties for any offense which the court finds is unsupported by the evidence. Moreover, a defendant may make or renew a Rule 29 motion 14 days after the jury renders a guilty verdict or the court discharges the jury. FED. R. CRIM. P. 29(c)(1).

[7] We assess the argument under Rule 29 of the Federal Rules of Criminal Procedure rather than the analogous Virgin Islands Rule 29 because this case was decided prior to the December 31, 2017 promulgation of the Virgin Islands Rules of Criminal Procedure.

¶49 "Under a Rule 29 Motion for Judgment of Acquittal, we must first determine whether there is sufficient evidence to sustain a conviction. . . . Therefore, "[w]hen we review evidence for its sufficiency, we neither judge the credibility of a witness nor weigh the evidence." *Mercado v. People*, 60 V.I. 220, 224 (V.I. 2013). *See United States v. Martinez*, 921 F.3d 452, 466 (5th Cir. 2019) (explaining that the test for reviewing sufficiency of the evidence is not whether the jury verdict was correct, but whether the decision was rational); *United States v. Acevedo*, 882 F.3d 251, 259 (1st Cir. 2018) (noting that the government's evidence need not exclude every reasonable hypothesis of innocence and if the evidence rationally supports two conflicting hypotheses, the conviction will not be reversed on appeal).

¶50 In his brief, E. Roberts cites *Simmonds v. People*, 59 V.I. 480, 489 (V.I. 2013) for the proposition that, to be guilty of attempted first degree murder and first degree assault, a suspect must shoot at a victim, strike him, stop, and move closer to the same victim to fire additional shots. We find this argument unpersuasive, preposterous, and outlandish.

¶51 Notably, *Simmonds* involved a charge of first degree murder because the defendant actually killed the victim after first shooting at him. In this case, the defendant only attempted to kill the victim. Given the distinctions between actually killing the victim and merely attempting to kill him, we believe *Simmonds* is inapplicable to this case.

¶52 Nonetheless, the crime of attempt entails (1) an intent to do an act or bring about certain consequences which in law would amount to a crime; and (2) an act in furtherance of that attempt which goes beyond mere preparation. *Audain v. Gov't of the V.I.*, No. 2006-46, 2014 WL 69027, at *3 (D.V.I. Jan. 8, 2014) (unpublished).

¶53 Here, E. Roberts pointed a pistol at Hurtault with the unequivocal intent to kill him. Moreover, E. Roberts shot at Hurtault five times. Even if the act of aiming a firearm at Hurtault failed to demonstrate an act beyond mere preparation needed for commission of attempted first degree murder, the act of shooting at Hurtault five times definitely demonstrated the required actus reus. Similarly, the act of pointing the firearm at Hurtault with the intent to kill him satisfied the elements of first degree assault. Therefore, a reasonable jury definitely could have concluded beyond a reasonable doubt that E. Roberts was guilty of both first degree assault and attempted first degree murder. Accordingly, the Rule 29 motion was correctly denied. Although there was sufficient evidence to convict E. Roberts of both first degree assault and attempted first degree murder, Virgin Islands jurisprudence, announced in *Titre v. People*, 70 V.I. 797 (V.I. 2019),[8] requires vacatur of E. Roberts' sentence for first degree assault. We now address that contention.

C. Vacatur of First Degree Assault Conviction

¶54 The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." *Williams v. People*, 56 V.I. 821, 831 (V.I. 2012). Generally, when a defendant's actions violate two different criminal statutes, the Double Jeopardy Clause dictates that he cannot be sentenced for the same offense or for the lesser and greater included infractions of the same predicate offense. *Id.* In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the United States Supreme Court delineated a test to ascertain if two crimes were the same. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

[8] The standard announced in *Titre* applies to this case because *Titre* was decided in January 2019 before the trial court entered judgment on E. Roberts post trial Rule 29 motion in February 2019.

whether there are two offenses or only one, is whether each provision requires a proof of fact which the other does not." *Id.* However, the *Blockburger* test "is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose[,] the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Williams*, 56 V.I. at 831 (internal citations omitted).

¶55 Locally, the Virgin Islands double jeopardy statute is codified in 14 V.I.C. § 104. Section 104 proclaims "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under any such provisions but, in no case, may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." By its terms, section 104 proscribes multiple punishments when a defendant's actions within a single occurrence violate multiple local laws. However, the prohibition does not apply when the legislature intends to impose multiple punishments for certain infractions even when those infractions occurred in a single transaction. Essentially, where double jeopardy under the Fifth Amendment targets identical crimes, section 104 focuses on all crimes emanating from a single transaction. Thus, section 104 allows a defendant to be charged and convicted of multiple crimes arising from a single transaction, but declares that a defendant can only be sentenced for one offense unless the legislature intends otherwise. *Williams*, 56 V.I. at 832.

¶56 In *Titre*, we abrogated the former merger-and-stay rule and decided that vacatur of ancillary convictions as well as their accompanying sentences, which emanate from crimes completed in a single transaction, was the best remedy for the Virgin Islands. Under the former merger-and-stay

procedure, local courts sentenced a defendant for one crime and stayed[9] convictions and/or sentences for secondary crimes that were completed in a single course of action or a single act. *Titre*, 70 V.I. at 806.

¶57 Before being overturned, the merger-and-stay procedure contrasted the vacatur remedy sanctioned by the United States Supreme Court for double jeopardy violations. See *Rutledge v. United States*, 517 U.S. 292, 301-02 (1996) (To avoid collateral consequences, the Supreme Court opined that the lower court should "exercise its discretion to vacate . . . the underlying convictions' as well as the concurrent [or stayed] sentences[s] based upon [them].") Essentially, under merger-and-stay, local courts merged convictions and stayed sentences for a suspect's secondary transgressions that arose in a single occurrence. Contrastingly, the federal judiciary vacated identical convictions and their requisite sentences for double jeopardy violations. However, given the confusion merger-and-stay created for territorial courts, we consequently adopted vacatur as the remedy for violations of section 104.

¶58 In this case, E. Roberts assaulted Hurtault in the same episode in which he attempted to kill him. Under section 104, the two crimes occurred in a single course of conduct. The Superior Court sentenced E. Roberts to 20 years for attempted first degree murder (Count 2) and 15 years for first degree assault (Count 3). (J.A. Vol. VI 3088-89). The sentences were to run concurrently. However, pursuant to our holding in *Titre*, the Superior Court should have vacated E. Roberts' conviction and sentence for first degree assault and imposed sentence on E. Roberts' attempted first degree murder conviction. Accordingly, the Superior Court erred when it failed to do so.

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[9] A stay of execution is 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. BLACKS LAW DICTIONARY 1201(10th ed. 2015).

Consequently, we reverse E. Roberts' conviction and sentence for first degree assault and remand to the Superior Court with instructions to vacate E. Roberts' conviction and sentence for first degree assault in order to comport with our ruling in *Titre*.

D. Denial of Motion for a Mistrial

¶59 On appeal, E. Roberts also challenges the trial court's denial of his motion for a mistrial. In his appellate brief, E. Roberts frames the argument as one that contests the People's continuous discovery violations. However, the main reason E. Roberts apparently disputes the court's denial of his mistrial motion is the emergence of the Use of Force Report despite defendants' numerous discovery motions which failed to result in the report's disclosure. Thus, E. Roberts contends the report should have been disclosed pursuant to FED. R. CRIM. P. 16[10] and that the People's failure to so disclose caused him substantial prejudice that warranted the court granting his mistrial motion.

¶60 Importantly, we review the denial of a motion for a mistrial for abuse of discretion. *Connor v. People*, 59 V.I. 286, 299 (V.I. 2013). "If the prosecutor did engage in misconduct, we will reverse unless the error is harmless. . . . Under harmless error analysis, '[i]f the error is constitutional, we will affirm [only] if we find the error is harmless beyond a reasonable doubt'

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[10] "Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and copy or photocopy books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is in the government's possession custody, or control and: (i) the item is material to preparing the defense; (ii) The government intends to use the item in its case-in-chief at trial; or (iii) The item was obtained from or belongs to the defendant." FED. R. CRIM. P. 16(a)(1)(E).

"Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows-or through due diligence could know-that the item exists; and the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial." FED. R. CRIM. P. 16(a)(1)(F).

while 'if the error is non-constitutional, we will affirm when it is highly probable the error did not contribute to the judgment." *Id.* (citations omitted).

¶61 Here, it is undeniable that the People had the police's Use of Force Report in its possession when the defense initially sought discovery of all relevant documents under Rule 16(a)(1)(E) and Rule 16(a)(1)(F) in November 2014, December 2014, and January 2015. (J.A. Vol. I 54-81). This assertion is confirmed by the fact the report was authored by Officer Naomi Joseph ("Joseph") on April 19, 2014, which is the same day of the shooting at Frontline Nightclub. (J.A. Vol. V 2615-2620). Moreover, although the court said the document did not contain exculpatory or impeachment evidence, the proper inquiry under Rule 16(a)(1)(E) or Rule 16(a)(1)(F) is essentially whether the document was in the People's possession and whether the People intended to use it in its case in chief or the document is helpful to the defense in developing a defense strategy. *Id.* If those circumstances are met, the document must be transferred to the defense. *See United States v. Hinkson*, No. CR-04-127-C-RCT, 2004 WL 7333649, at *1-2 (D. Idaho Dec. 3, 2004) (unpublished) ("Fed. R. Crim. P. 16 permits a defendant to request and inspect certain types of evidence in conformance with due process considerations, such as exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). . . . [Additionally, the government also has an] obligation to disclose impeachment information discoverable under *Giglio v. United States*, 405 U.S. 150 (1972)."); *United States v. Wilson*, No. CR 04-00476 SJO, 2017 WL 11489965, at *2 (C.D. Cal. Dec. 4, 2017) (unpublished) ("To receive discovery under [Rule 16(a)(1)(E)(i)], the defendant must make a threshold showing of materiality, which requires a presentation of facts [that] tend to show . . . the Government is in possession of information helpful to the defense. [However,] '[n]either a general description of the information sought nor conclusory allegations of materiality

suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense. . . .' Under *Brady* and its progeny, 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . .' Evidence is material for *Brady* purposes if a reasonable probability exists that the result of a proceeding would have been different had the government disclosed the information to the defense. . . . Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes.") (citations omitted); *United States v. Foskey*, 570 Fed.Appx. 878, 881 (11th Cir. 2014) ("A reviewing court considers materiality 'in terms of the cumulative effect of suppression.'") (citations omitted); *see also United States v. Clark*, No. 11-032 (JRT-LIB), 2011 WL 13382878, at *3 (D. Minn. Mar. 2, 2011) (unpublished) (explaining Federal Rule of Criminal Procedure 16(a)(1)(F) requires the transfer of the results of physical and mental examinations to defendant).

¶62 Here, although the People did not utilize the Use of Force Report in its case in chief, the document certainly could have assisted the defense in its examination of Hector by compelling the defense to interview Joseph to ascertain which individuals she consulted before drafting the document. Apparently, the only valid application of the report would have been to impeach some of Hector's assertions including the statement that he encountered two males aiming firearms at Vernege's truck when he exited the club on the night of the incident. (J.A. Vol. V 2664-66).

¶63 In terms of the report's materiality under Rule 16(a)(1)(E)(i) or *Brady*, Williams, in his January 2015 motion to compel, stated that he was entitled to all impeachment and exculpatory

evidence in the people's possession.[11] Obviously, exculpatory evidence is material because it usually exonerates the accused while impeachment evidence raises doubts about the People's case and witnesses. Therefore, because the Use of Force Report was in the People's possession when the defense sought discovery of it and the report was material to the defense because it impeached Hector's credibility, the document should have been transmitted to the defense under either Rule 16(a)(1)(E)(i) or *Giglio*. Thus, the People's failure to do so was error.

¶64 However, in deciding E. Roberts' mistrial motion, the Superior Court acknowledged that the defense had access to multiple contradictory statements by Hector, which they used to impeach his credibility on cross examination. (J.A. Vol III 1161-1210; J.A. Vol. III 1262-85; J.A. Vol. V 2665-66). Thus, the court determined the exclusion of another inconsistent statement was harmless because the record already contained evidence of Hector's prior inconsistent statements. Moreover, the court also noted that Hector did not independently adopt the statement in Joseph's Use of Force Report. *See United States v. Valdez-Gutierrez*, 249 F.R.D. 368, 372 (D.N.M. 2007) ("The only situations in which circuit courts of appeal have held that a testifying witness adopted a statement or report prepared by someone else is where the testifying witness either had some part in making the statement or report or the testifying witness participated in conducting the underlying investigation and later approved the accuracy of the contents of statement or report of the investigation.") (citations omitted).

¶65 We agree with the Superior Court and iterate that the jury is in the best position to assess witness credibility. *See United States v. Radosh*, 490 F.3d 682, 686 (8th Cir. 2007) ("Prior inconsistent statements do not disqualify a witness . . . ") (citations omitted); *Ostalaza v. People*,

[11] E. Roberts filed a February 2015 notice to join in Williams' January 2015 motion to compel.

58 V.I. 531, 546 (V.I. 2013) ("Courts have long recognized that the simple failure to include every detail in a prior statement does not necessarily render it inconsistent with a more thorough testimony provided at a later time.") (citations omitted); *Nanton v. People*, 52 V.I. 466, 485-86 (V.I. 2009) ("It is inconsequential for the purposes of appellate review [] whether [the witness's] testimony reaffirming what he had told to the police conflicted with his testimony on cross-examination . . . '[W]e are not at liberty to substitute our own credibility determinations for those . . . of the jury.'") (citations omitted). Therefore, the Superior Court did not abuse its discretion when it denied E. Robert's motion for a mistrial.

¶66 Despite our holding that the court below did not err when it denied E. Roberts' mistrial motion, we note that, even if it did, the error was harmless beyond a reasonable doubt because, as already stated, the defense possessed several conflicting statements with which to impugn Hector's credibility. Despite the presentation of these contrary declarations, the jury still convicted L. Williams and E. Roberts. Therefore, the exclusion of Hector's contradictory statements in the Use of Force Report from the record did not affect the trial's outcome and was thus harmless because the jury heard other contradictory statements by Hector from which it could evaluate Hector's creditability. Consequently, E. Roberts was not prejudiced by the omission of the Use of Force Report.

E. Failure to Disclose the Entire Use of Force Report

¶67 On appeal, E. Roberts' also contends that the court's failure to disclose the entire Use of Force Report violated *Brady* and warrants a new trial because of the prejudice he incurred. Under *Brady*, a defendant must establish three elements to demonstrate a due process violation. *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002). "First, the evidence at issue must be favorable

to the accused, because it is either exculpatory or impeachment material. . . . Second, the evidence must have been suppressed by the State, either willfully or inadvertently. . . . Third, prejudice must result from the failure to disclose the evidence. . . . [However,] [e]vidence is deemed prejudicial, or material, only if it undermines the outcome of the trial." *Id.* (citations omitted). *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Agurs*, 427 U.S. 97, 110, 111-12 (1976).

¶68 In this case, E. Roberts prevails on the first two prongs of the *Brady* test because the Use of Force Report contained an impeachable statement by Hector and the People unintentionally failed to disclose it. However, E. Roberts' argument falters on the test's third element because the report was immaterial since its inclusion would not have changed the trial's outcome. Specifically, as iterated above, the defense possessed several contradictory statements by Hector and employed Hector's prior inconsistent statements to impeach him on cross-examination. Although E. Roberts' believes the report may have contained exculpatory evidence, the record does not support that allegation. Importantly, the trial court reviewed the Use of Force Report and informed the defense that it did not contain any exculpatory evidence. Therefore, E. Roberts incurred no prejudice resulting from the court's failure to disclose the entire Use of Force Report and its exclusion was essentially harmless.

F. Denial of Post-Trial Rule 29 Motion

¶69 Finally, E. Roberts argues the court erred when it denied his post-trial motion for a judgment of acquittal or, alternatively, a new trial because of the cumulative effect of the People's misconduct, namely the prosecution's mischaracterization of E. Roberts' being shot in the leg.

¶70 However, this Court has opined that Rule 29 is inapplicable to claims of prosecutorial misconduct. Therefore, because E. Roberts' challenge involves prosecutorial comments, we will not address it. *See Davis v. People*, 69 V.I. 619, 627 n.7 (V.I. 2018) ("[R]elief under Federal Rule 29 is only available for challenges to the sufficiency of the evidence; it is not available for discovery violations or allegations of prosecutorial misconduct.").

V. CONCLUSION

¶71 For the above reasons, we affirm E. Roberts' convictions on all counts except his conviction for first degree assault. We remand the matter to the Superior Court with instructions to vacate the conviction for first degree assault in order to comport with our decision in *Titre v. People*.

Dated this 19th **day of** April **2022**

IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk II

Date: 4/19/2022

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

EUGENE ROBERTS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2019-0051** Re: Super. Ct. Crim. No. 136/2014 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Darryl Dean Donohue, Sr.

Argued: April 13, 2021
Filed: April 19, 2022

Cite as: 2022 V.I. 10

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA CABRET,** and Associate Justice **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Renee D. Dowling, Esq.
Law Office of Renee D. Dowling
St. Croix, U.S.V.I.
Attorney for Appellant,

Aysha R. Gregory, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

JUDGMENT

SWAN, Associate Justice

AND NOW, consistent with the Opinion of even date, it is hereby

ORDERED that the Superior Court's May 16, 2019 judgment and commitment is affirmed except regarding E. Roberts' conviction for first degree assault. Regarding E. Roberts' conviction for first degree assault, we reverse that conviction and sentence. We remand the matter to the Superior Court with instructions to vacate the conviction and sentence for first degree assault as to comport with our decision in *Titre v. People*, 70 V.I. 797 (V.I. 2019). It is further

ORDERED that copies be directed to the appropriate parties.

SO ORDERED this 19th day of April, 2022.

BY THE COURT:

IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Date: 4/19/2022

Copies (with accompanying Opinion of the Court) to:
Justices of the Supreme Court
Judges and Magistrate Judges of Superior Court
Renee D. Dowling, Esq.
Aysha R. Gregory, Esq.
Veronica J. Handy, Esq., Clerk of the Supreme Court
Tamara Charles, Clerk of the Superior Court
Joseph Gasper II, Esq., Superior Court Law Librarian
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book
Westlaw
Lexis/Michie

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

Mr. Eugene Roberts
Appellant/Plaintiff

v.

People of the Virgin Islands
Appellee/Defendant

SCT-CRIM-2019-0051
Re: SX-2014-CR-00136

NOTICE OF ENTRY OF FINAL JUDGMENT/ORDER

TO: **Justices of the Supreme Court**
Judges and Magistrate Judges of Superior Court
Renee D. Dowling, Esq.
Aysha R. Gregory, Esq.
Veronica J. Handy, Esq., Clerk of the Supreme Court
Tamara Charles, Clerk of the Superior Court
Joseph Gasper II, Esq., Superior Court Law Librarian
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book
Westlaw
Lexis/Michi

Please take notice that on **April 19, 2022** a(n) **OPINION OF THE COURT** dated **April 19, 2022**, was entered by the Clerk in the above-entitled matter.

Dated: **April 19, 2022**

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)	CASE NO. SX-14-CR-0000136
Vs.)	ACTION FOR: 14 V.I.C. 921
EUGENE ROBERTS **Defendant**)	

NOTICE OF ENTRY OF JUDGMENT AND COMMITMENT

TO: RENEE DOWLING, ESQ.
R. OLIVER DAVID, ESQ.
PROBATION
ERIC CHANCELLOR, ESQ.
BUREAU OF CORRECTIONS

Please take notice that on May 20, 2019 a(n) JUDGMENT AND COMMITMENT dated May 16, 2019 was entered by the Clerk in the above-entitled matter.

Dated: May 20, 2019

Estrella H. George
CLERK OF THE SUPERIOR COURT

ROXANNE SERRANO
COURT CLERK SUPERVISOR

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	**CASE NO. SX-14-CR-136**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
EUGENE ROBERTS,	)	
	)	
Defendant.	)	
	)	

JUDGMENT AND COMMITMENT

THIS MATTER came before the Court for Sentencing on May 10, 2019. Assistant Attorney General Eric Chancellor, Esquire appeared on behalf of the People of the Virgin Islands. The Defendant appeared personally and through counsel, Renee Dowling, Esquire. After a trial by jury on November 14, 2016, Defendant was found guilty on all counts of the Third-Amended Information applicable to him, except on Counts One, the lesser-included offense to Count One, and Count Four, of which he was found not guilty. The premises considered, it is hereby

ORDERED, ADJUDGED and DECREED that as to Count One, murder in the first degree, a violation of Title 14, Sections 921, 922, and 11(a) of the Virgin Islands Code, the Defendant Eugene Roberts is **ACQUITTED**. It is further

ORDERED, ADJUDGED and DECREED that as to the lesser-included offense of Count One, murder in the second-degree, a violation of Title 14, Section 922(b) of the Virgin Islands Code, the Defendant Eugene Roberts is **ACQUITTED**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Two, attempted murder in the first degree, a violation of Title 14, Section 922(a)(1) and Section 331(1), the Defendant Eugene Roberts is **CONVICTED** and remanded to the care, custody and control of the Director, Bureau of Corrections for

a period of **twenty (20) years**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Three, assault in the first degree, a violation of Title 14, Section 295(1) and 11(a) of the Virgin Islands Code, and as per Title 14, Section 332 of the Virgin Islands Code, the Defendant Eugene Roberts is **CONVICTED** and remanded to the care, custody and control of the Director, Bureau of Corrections for a period of **fifteen (15) years**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Four, assault in the third-degree, a violation of Title 14, Sections 297(2) and 11(a), the Defendant is **ACQUITTED**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Five, unauthorized possession of a firearm during the commission of a crime of violence, a violation of Title 14, Sections 2253(a) and 11(a), the Defendant Eugene Roberts's conviction is **VACATED** pursuant to Title 14, Section 104, of the Virgin Islands Code, as clarified by *Titre v. People*, 2019 VI 3, ¶20. It is further

ORDERED, ADJUDGED and DECREED that as to Count Six, unauthorized possession of a firearm during the commission of a crime of violence, a violation of Title 14, Sections 2253(a) and 11(a), the Defendant Eugene Roberts is **CONVICTED** and remanded to the care, custody and control of the Director, Bureau of Corrections for a period of **fifteen (15) years** and further assessed **a fine of $25,000**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Seven, possession of ammunition, a violation of Title 14, Sections 2256(a) and 11(a) of the Virgin Islands Code, the Defendant Eugene Roberts is **CONVICTED** and remanded to the care, custody and control of the Director, Bureau of Corrections for a period of **five (5) years** and further assessed **a fine of $10,000**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Eight, reckless endangerment in the first degree, a violation of Title 14, Sections 625(a) and 11(a) of the Virgin Islands Code, the Defendant Eugene Roberts's conviction is **VACATED** pursuant to Title 14, Section 104, of the Virgin Islands Code,

as clarified by *Titre v. People*, 2019 VI 3, ¶20. It is further

ORDERED, ADJUDGED and DECREED that as to Count Nine, unauthorized possession of a firearm, a violation of Title 14, Sections 2253(a) and 11(a) of the Virgin Islands Code, the Defendant Eugene Roberts's conviction is **VACATED** pursuant to Title 14, Section 104, of the Virgin Islands Code, as clarified by *Titre v. People*, 2019 VI 3, ¶20. It is further

ORDERED that the sentence imposed on Count Two shall run concurrently with the sentence imposed on Count Three, and the sentence imposed on Count Six shall run concurrently with the sentence imposed on Count Seven, but the sentences imposed on Counts Six and Seven shall run ***consecutively*** to the sentences imposed Counts Two and Three. It is further

ORDERED that the Defendant Eugene Roberts shall be given credit for time served, to wit: 1,773 days. It is further

ORDERED that, pursuant to Title 34, Section 203(d)(3), of the Virgin Islands Code, the Defendant Eugene Roberts shall, jointly and severally with Lester Roberts, pay restitution in the amount of $2821.00 to Roscar Hurtault. It is further

ORDERED that, pursuant to Title 4, Section 33(d), of the Virgin Islands Code, the Defendant Eugene Roberts has thirty (30) days to appeal. It is further

ORDERED that the Defendant must pay court costs of Seventy-Five Dollars ($75.00). Any bail previously posted is exonerated and all sureties are released.

DONE AND SO ORDERED this 16TH day of May, 2019.

DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Court Clerk Supervisor
Dated: 5/16/19

CERTIFIED A TRUE COPY
DATE: 5/29/19
ESTRELLA H. GEORGE
CLERK OF THE COURT
BY: _____
COURT CLERK

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)) **Vs.**)) EUGENE ROBERTS) **Defendant**)	CASE NO. SX-14-CR-0000136 ACTION FOR: 14 V.I.C. 921

NOTICE OF ENTRY OF MEMORANDUM OPINION & ORDER

TO: SC LAW CLERKS
RENEE DOWLING, ESQ.
R. OLIVER DAVID, ESQ.
LAW LIBRARY
JUDGE'S STX / STT
INFORMATION TECHNOLOGY
ERIC CHANCELLOR, ESQ.

Please take notice that on February 21, 2019 a(n) MEMORANDUM OPINION & ORDER dated February 21, 2019 was entered by the Clerk in the above-entitled matter.

Dated: February 21, 2019

Estrella H. George
CLERK OF THE SUPERIOR COURT

TAMARA ALLEN
COURT CLERK II

FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	**CASE NO. SX-14-CR-136**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
EUGENE ROBERTS,	)	
	)	
Defendant.	)	
	)	

Cite as: 2019 VI SUPER 20

Appearances:

ERIC CHANCELLOR, ESQ.
R. OLIVER DAVID, ESQ.
Assistant Attorney General
U.S. Virgin Islands Department of Justice
Christiansted, VI 00820
For People of the Virgin Islands

RENEE DOWLING, ESQ.
Christiansted, VI
For Eugene Roberts

MEMORANDUM OPINION
(Filed February 21, 2019)

DONOHUE, SR., Senior Sitting Judge:

¶1 **BEFORE THE COURT** is a motion filed by Eugene Roberts for judgment of acquittal or in the alternative for a new trial. The People of the Virgin Islands oppose the motion. For the reasons stated below, Roberts's motion will be denied.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On or about April 19, 2014, multiple shots were fired at the vicinity of the Frontline nightclub on St. Croix, U.S. Virgin Islands, resulting in the death of Matthew Vernege, Jr. and injury to several

[1] Excerpts of certain witness's trial testimony were requested and prepared by court reporters. However, complete transcripts of the entire trial were not requested by the parties. Citations are to official transcript, albeit only excerpts in some instances.

others. The perpetrators rode off in a vehicle that later got into a car accident in the vicinity of Estate Morning Star. Elijah Felix, Derrick Liburd, Eugene Roberts, Lester Roberts, and Larry Williams, Jr. were later arrested and charged on May 20, 2014 with murder in the first degree, attempted murder in the first degree, assault in the first and third degrees, unauthorized possession of a firearm, possession of ammunition, reckless endangerment in the first degree, robbery in the first degree, grand larceny, possession of stolen property, and conversion of government property.[2]

¶3 Prior to trial, a dispute arose between parties about the discoverability of the record of the Internal Affairs Bureau within the Virgin Islands Police Department pertaining to Sergeant Anthony Hector, who ran Frontline and who had engaged the shooters, injuring several of them. In particular, Roberts filed a notice on April 22, 2016, to join the motion filed by Williams to compel the personnel records and internal affairs files for Hector. The Court conducted an *in camera* review of the file and decided what documents were discoverable.

¶4 After a delay unrelated to Roberts's motion, jury selection commenced on October 18, 2016. The jury was empaneled on October 20, 2016 and trial commenced immediately thereafter, concluding on November 14, 2016. Prior to trial, Liburd had filed a notice of intent to offer a redacted DNA lab report (hereinafter "DNA Report") in his defense.[3] In response Williams filed a motion to sever. which Roberts joined on October 13, 2016, and which the Court denied. *See generally People v. Roberts*, SX-14-CR-136, 2016 V.I. LEXIS 232 (V.I. Super. Ct. Oct. 25, 2016).

¶5 Roberts was found not guilty of first-degree murder and the lesser-included offense of second-degree murder as to Matthew Vernege, Jr., not guilty of third-degree assault as to Kenya Stanley, but guilty of attempted murder in the first degree, first-degree assault, (as to Roscar Hurtault), and guilty

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[2] Elijah Felix, Lester Roberts, and Derrick Liburd were also charged. Felix agreed to plead guilty to unauthorized possession of a firearm and was sentenced to two years incarceration. Lester Roberts agreed to a dismissal of all charges against him without prejudice. Liburd was acquitted of all charges by the Court after the close of the People's case-in-chief.

[3] The DNA Report, dated May 27, 2014, was prepared by Forensic DNA Analyst Crystal Oechsle F-ABC, whom the People ultimately decided they would not call as a witness.

of three counts of unauthorized possession of a firearm, one count of possession of ammunition, and one count of first-degree reckless endangerment. Williams was found not guilty of first-degree murder and third-degree assault and guilty of the lesser-included offense of second-degree murder, guilty of two counts of unauthorized possession of a firearm, possession of ammunition, and first-degree reckless endangerment. The evidence in support of the charges in the third amended information, filed on November 9, 2016, showed the following.

¶6 Kenya Stanley and Matthew Vernege were at the Frontline nightclub on Midland Road, Estate Calquohoon on April 19, 2014. walking out of the nightclub around 2am, Stanley was in front and Vernege was behind her. Five guys were coming in as they were leaving. One guy approached her and whispered in her ear, which startled her, catching her off-guard. She jumped back, hitting the wall. Vernege confronted him and they started to argue. "[F]ace-to-face cursing." (Trial Tr. Excerpt 14:18, Oct. 21, 2016.) Kenya pulled Vernege away and they left, walking towards Vernege's truck.

¶7 Stanley went to the passenger side and Vernege went into the driver's side. Just then a guy exited the club and walked towards them, pointing a silver gun at them. Vernege pushed Stanley down, and shots rang out. Vernege had a gun and he returned fire. He got up and was shot twice. He later succumbed to his wounds. Stanley did not identify the shooter by name or in court, but through a photo array that was admitted into evidence. She also testified that the person who tried to talk to her and the person who shot at them was the same individual and confirmed, Lester Roberts's cross-examination, that only one person shot at her and Vernege.

¶8 Virgin Islands Police Sergeant Anthony Hector was at the Frontline club on the night of April 19, 2014. He "used to run the nightclub." (Trial Tr. 6:25, Oct. 24, 2016.) Around 3am, he turned on the lights in the club to signal the patrons that it was closing time. Two ladies then approached him to tell him there was a shooting outside. He drew his gun and "ran outside to see what was going on." (Trial Tr. 8:25.) When Hector reached outside, he "saw this guy, Larry Williams . . . and this gentleman

. . . Mr. Roberts, in front of a truck, with a gun pointing to the truck, firing shots." (Trial Tr. 10:1-4.) Hector announced himself as a police officer and told them to drop their guns, but "they just ignored" him. (Trial Tr. 10:5-6.) Hector then decided that he "had to neutralize the threat." (Trial Tr. 10:15-16.) He aimed at Williams and fired and "saw how he buckle." (Trial Tr. 10:17.) Hector aimed at Roberts next and fired and "saw when he buckle." (Trial Tr. 11:2, Oct. 24, 2016) Hector was then struck from behind, knocking the gun from his hand and him to the ground. Lester Roberts got on top of him and grabbed his gun. Hector started to run away, but he was shot multiple times.

¶9 Roscar Hurtault had been at the casino on the night of April 19th and stopped at Frontline on the drive home around 3:00 in the morning. Two or three minutes later, gunshots erupted. Hurtault dropped to the ground to take cover. He saw a guy inside the porch area exchanging gunshots with someone outside in a pickup truck. (Trial Tr. Excerpt 9:4-15 (Oct. 25, 2016.) Hurtault then saw Hector, whom he knew, exit the club, "take a stance," and call out to the guys. (Trial Tr. Excerpt 23:7 (Oct. 25, 2016).) Then "pandemonium broke out," *id.* at 23:10, with multiple gunshots being fired. Hurtault took cover behind truck, thinking the engine block would protect him, but Eugene Roberts came around and shot him twice. Hurtault rolled underneath the truck for protection. Hurtault could not see the person shooting at the pickup truck. But he identified Eugene Roberts as the person who shot him because Roberts was only two or three feet away at the time.

¶10 Approximately fifteen minutes later, the police received a call of shots fired near Salt River and a car accident in the Estate Morning Star area. Virgin Islands Police Officer Melford Murray was dispatched to the accident scene. He was the first office to arrive. The driver identified himself as Derrick Liburd, whom Murray identified in court. Liburd said he was driving near the entrance to Salt River when another vehicle approached and fired shots at his car, causing him to lose control and run off the road. At least two other men were with Liburd, both were outside the vehicle on the ground,

crying and in pain. They had blood on them. On cross-examination, Murray confirmed that the blood was from gunshot wounds.

¶11 Virgin Islands Police Officers Arthur Joseph, Gregory Bennerson, Luis Encarnacion, Rolando Huertas, and Herminia Rivera were also dispatched to the vehicle accident at Estate Morning Star. Joseph and Bennerson combed the scene and discovered multiple firearms, including one discovered by Huertas under the front seat, near the passenger side. Three men were taken to the hospital, one of whom was identified as Williams by EMT Jacqueline Greenidge-Payne. Rivera took Liburd into custody, securing him in the back of a police cruiser. He told her that he had been at Frontline and was concerned about his friends who had been shot.

¶12 Virgin Islands Police Officer Karen Stout testified that Larry Williams and Eugene Roberts were not licensed to carry firearms in the Virgin Islands. Forensic technicians and expert testimony also established that the shell casings retrieved from Frontline matched the firearms retrieved from the Morning Star accident scene.

¶13 At the close of the People's case-in-chief, Roberts made a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, which the Court granted in part and denied in part. The jury heard testimony from witnesses offered by Williams. Roberts rested without presenting any evidence. Roberts renewed him motion at the close of all of the evidence, which the Court granted in part and denied in part.

¶14 The jury deliberated on a Third Amended Information, which charged nine counts: Count One: Murder in the First Degree/Principals and the lesser included offense of Murder Second Degree/Principals (Eugene Roberts and Larry Williams, Jr.) pertaining to Vernege; Court Two: Attempted Murder in the First Degree (Eugene Roberts only) pertaining to Hurtault; Count Three, Assault in the First Degree/Principal (Eugene Roberts only) pertaining to Hurtault; Count Four: Assault in the Third Degree/Principals (Eugene Roberts and Larry Williams, Jr.) pertaining to Stanley;

Count Five, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principals (Eugene Roberts and Larry Williams, Jr.); Count Six, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principal (Eugene Roberts only); Count Seven, Possession of Ammunition/Principals (Eugene Roberts and Larry Williams, Jr.); Count Eight, Reckless Endangerment in the First Degree/Principals (Eugene Roberts and Larry Williams, Jr.); and Count Nine, Unauthorized Possession of a Firearm/Principals (Eugene Roberts and Larry Williams, Jr.). The jury found Roberts not guilty of Counts Two and Four and guilty of Counts Two, Three, Five, Six, Seven, Eight and Nine on November 14, 2016.

¶15 Roberts filed a timely motion for judgment of acquittal or for new trial on November 29, 2016.[4] Over Roberts's objection, the People filed their response on January 11, 2019. Roberts filed his reply on February 1, 2017.

DISCUSSION

¶16 Roberts moves for judgment of acquittal and, in the alternative, for a new trial and raises ten claims of error in support: that the prosecution committed misconduct during closing arguments by arguing to the jury that he had been shot in the leg; that the Court erred when it refused to compel disclosure of the internal affairs file for Virgin Islands Police Sergeant Anthony Hector; that the prosecution committed misconduct when it withheld until trial a use of force report prepared by a police officer pertaining to Hector; that the Court erred when it denied Roberts's motion for a mistrial after the use of force report was disclosed; that the Court erred when it denied Williams's motion to sever; that the Court erred when it precluded Roberts from introducing Liburd's redacted DNA report; that the Court erred when it denied Roberts's pre-conviction acquittal motions as to attempted murder and first-degree assault; that the Court erred when it denied Robert's *limine* motion to preclude the

[4] The deadline for Roberts to file his motion was November 28, 2016. However, because the Superior Court was closed on November 28, 2016 as a result of a fire at HH Tire and Battery, Roberts' motion for judgment of acquittal is deemed timely.

prosecution from arguing that he was at the Morning Star accident scene; that the evidence was insufficient for every count he was found guilty of; and finally that the Court erred when it decided not to use Roberts's guilt-by-association instruction.

¶17 Except for his challenge to the sufficiency of the evidence, the other challenges Roberts raises are in support of his motion for a new trial.[5] Courts "may grant a new trial to a defendant if required in the interest of justice." Super. Ct. R. 135.[6] Unlike a motion for judgment of acquittal, the trial court "exercises its own judgment in assessing the [prosecution's] case." *Stevens v. People*, 52 V.I. 294, 305 (2009). That is, "[w]hen deciding a motion for a new trial, the Superior Court is uniquely situated to weigh the credibility of witnesses—as opposed to when deciding a motion for a judgment of acquittal." *Ventura v. People*, 64 V.I. 589, 617 (2016). "However, even if [the trial court] believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that miscarriage of justice has occurred-that is, that an innocent person has been convicted." *Stevens*, 52 V.I. at 305. Trial courts must exercise their discretion "'with extreme caution.'" *People v. Encarnacion*, SX-10-CR-342, 2015 V.I. LEXIS 16, *7 (V.I. Super. Ct. Feb. 11,

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[5] In his motion, Roberts stated that he "now hereby moves for judgment of acquittal or in the alternative for a new trial after the jury verdict." (Mot. 2.) But the words "new trial" appear only in the passage just quoted, in the title of his motion, and in the conclusion. *Cf. id.* at 14 ('For the reasons presented and the authorities cited, this Motion for Judgment of Acquittal or for a New Trial should be GRANTED."). Because a motion for a judgment of acquittal necessarily challenges the sufficiency of the evidence, the Court assumes that the other errors Roberts raised go to his motion for a new trial. *Cf. United States v. Hope*, 487 F.3d 224, 227 (5th Cir. 2007) ("A motion for judgment of acquittal challenges the sufficiency of the evidence to convict. Indeed, as the text of the rule, all of our case law and the relevant practice guide make clear, the only proper basis for a motion for judgment of acquittal is a challenge to the sufficiency of the government's evidence." (quotation marks, citations, and brackets omitted)). *Accord Sapp v. State*, 913 So. 2d 1220, 1223 (Fla. Dist. Ct. App. 2005) ("A motion for judgment of acquittal challenges the legal sufficiency of the evidence" (citation omitted)); *State v. Lyles*, 517 A.2d 761, 768 (Md. 1986) (Eldridge, J., concurring) ("[T]he only issue which the defense may raise by a motion for judgment of acquittal is the sufficiency of the evidence. The making of the motion itself is an assertion that the evidence is legally insufficient to be considered by the jury.").

[6] This Court previously concluded that "Superior Court Rule 135 was repealed by implication when the Supreme Court of the Virgin Islands decreed that the Virgin Islands Rules of Criminal Procedure, promulgated on October 16, 2017, took effect on December 1, 2017." *People v. Rivera*, 68 V.I. 393, 402 n.3 (Super. Ct. 2018) (citations omitted). However, because "[a]pplying rules of procedure retroactively may implicate due process and *ex post facto* concerns," *id.* (citations omitted), particularly in criminal cases, the Court will apply Superior Court Rule 135 because that was the rule in effect when Roberts filed his motion. *But cf. Davis*, ___ V.I. at ____ n.24; 2018 V.I. Supreme LEXIS 23 at *48 n.24 (observing that "the rules in effect *at the time the Superior Court decide*[s an]issue" govern, not the rules in effect at the time when a motion is filed).

2015) (quoting *Gov't of the V.I. v. Grant*, 19 V.I. 440, 445 (Terr. Ct. 1983)). "'[T]he power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.'" *Id.* (quoting *Grant*, 19 V.I. at 445). Because many of the claims of error intersect or overlap, the Court will consider related claims together.

A. Closing Arguments

¶18 In his motion, Roberts claims that the prosecution committed misconduct during closing arguments first, by arguing that he had been shot in the leg and then, by arguing that he was present at the scene of the accident in Morning Star. (*See* Def.'s Mot. for Jgmt of Acquittal or New Trial 4, filed Nov. 29, 2016 (hereinafter "Mot.") ("Here, as where Eugene Roberts was not placed on the scene at the vehicle accident at Estate Morning Star, nor shown to have gotten a gunshot injury as a result of a shooting at Frontline Night Club on April 19, 2014, by any evidence whatsoever. It was prejudicial to allow the People to argue facts that were not in evidence, and that it had failed to prove in its case in chief.").) The Supreme Court of the Virgin Islands explained in *Castor v. People*, 57 V.I. 482, 495 (2012), that "[a] prosecutor may argue any reasonable inference drawn from the evidence presented at trial, but the People are forbidden to make arguments based on evidence not presented at trial, to misstate the evidence presented, or to mislead the jury as to the inferences it may draw." (quotation marks and citations omitted). But the Supreme Court has also recognized that even if the prosecution does err by misstating or mischaracterizing evidence, the misconduct does not *ipso facto* translate into a denial of due process. *E.g.*, *Davis v. People*, S. Ct. Crim. No. 2015-0121, ___ V.I. ___, ____; 2018 V.I. Supreme LEXIS 23, *14 (V.I. July 27, 2018) ("[E]ven had the comment been improper, we presume that the jury followed the curative instruction given immediately to them." (citing *Monelle v. People*, 63 V.I. 757, 770 (2015)); *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997)). Instead, the question is first, "whether the prosecutor's comments were in fact improper and, if so, whether the

remarks prejudiced the defendant's right to a fair trial." *Davis*, ___ V.I. at ____; 2018 V.I. Supreme LEXIS 23 at *10 (citing *Monelle*, 63 V.I. at 770); *see also DeSilvia v. People*, 55 V.I. 859, 872 (2011).

(1) Being Shot and Shot in the Leg

¶19 During closing arguments, counsel for the People and counsel for Roberts both referred to Roberts as having been shot. In fact, counsel for Roberts questioned whether Roberts must be "the bionic man" because, according to the People's witnesses, he had been shot but was still able to chase after Hector. In attempting to rebut Roberts' "bionic man" argument, counsel for the People asked the jury to reject Roberts's recollection of the evidence—that he could not have been the person who ran after Hector because he had been shot in the leg. At that point, counsel for Roberts objected and the Court sustained the objection. Roberts now argues that remarks about him being shot, and shot specifically in the leg, were not reasonable inferences the prosecution could draw from the evidence at trial. *Cf. Castor*, 57 V.I. at 495. ("[A] prosecutor may argue any reasonable inference drawn from the evidence presented at trial").

¶20 First, Roberts is patently incorrect insofar as he argues that he "was not . . . shown to have gotten a gunshot injury as a result of a shooting at Frontline Night Club on April 19, 2014, by any evidence whatsoever." (Mot. 4.) And this Court joins the other courts that have held that a party who raises a challenge about an aspect of trial must obtain an official transcript. *See Titone v. State*, 882 N.E.2d 219, 221 (Ind. Ct. App. 2008) ("In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript." (emphasis omitted) (quoting Ind. R. App. P. 9(F)(4)); *Commonwealth v. Preston*, 904 A.2d 1, 7 (Pa. Super. Ct. 2006) ("It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts." (citing *Commonwealth v. Williams*, 715 A.2d 1101, 1105 (Pa. 1998)); *accord Flanagan v. Chambers*, No. 354852, 1991 Conn. Super. LEXIS 2811, *2 (Super. Ct. Oct. 23,

1991) ("If counsel is making a claim concerning the charge, he should order a transcript of the court's charge before arguing the motion." (quotation marks and citation omitted)); *Fallowfield Dev. Corp. v. Strunk*, Civ. No. 89-8644, *et seq.*, 1993 U.S. Dist. LEXIS 248, *4-5 (E.D. Pa. Jan. 8, 1993) ("Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial . . . or (b) file a verified motion showing good cause to be excused from this requirement." (quoting E.D. Pa. Local R. Civ. P. 20(e)). Hector identified Roberts at trial as the second person at whom he shot and whom he hit and saw buckle. (*See* Trial Tr. 11:2, Oct. 24, 2016) Moreover, Roberts's counsel extensively cross-examined Hector about Hector's testimony that he shot Williams and Roberts. (*E.g.*, Trial Tr. Excerpt 27:7-11, Oct. 25, 2016 ("Sergeant Hector, so that if you got – shot them and they never were behind you before you shot them and you ran after you shot them, then the answer to my question is they never got behind you; is that correct?").

¶21 Just as it is "not the judge's *post hoc* personal recollections . . . that constitutes the record," but rather "the transcript . . . prepared by the court reporter," *People ex rel. M.R. and W.V.*, 64 V.I. 333, 346 (2016) (*per curiam*) (citations omitted), it is also not the recollections of the parties or their counsel that constitutes the record. Although, when courts speak of transcripts and records, they typically speak from an appellate perspective. *Cf. id.* (referring to the record as the record "on appeal"). But the record is the record, whether at trial, or on appeal, or in an ancillary proceeding such as petition for a writ of certiorari or for a writ of habeas corpus. Arguments and errors generally must be raised to the trial court in the first instance so as to allow the trial court the opportunity to correct its own errors. It stands to reason then, that the parties should obtain transcripts at the trial-court level if the issue is to be raised and if the judge's personal recollection cannot control. And the record contradicts what Roberts claims. Had the parties obtained transcripts, Roberts would have seen that this claim is frivolous. Raising frivolous claims, particularly when based on the recollections of counsel, is itself in error. Thus, the Court rejects this claim as a basis for granting a new trial.

¶22 The other claim Roberts raised is that there was no testimony that he was shot in the leg. Roberts is correct in this regard. Hector testified he fired his gun at Williams and at Roberts, further that both men were "hit," and that both men "buckled" after they were hit. But no one testified as to where on his body Roberts was shot. It was only the prosecutor who stated in rebuttal in closing arguments that Roberts was shot in the leg. Although technically that remark was not based on the evidence, this Court cannot conclude that the misstatement "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *DeSilvia*, 55 V.I. at 872.

¶23 Roberts claims the prosecutor's reference to his leg was "highly prejudicial" because "the People had presented not one scintilla of evidence that . . . [he] received a gunshot to his right leg." (Mot. 4, 3.) Again, Roberts is correct. But as Roberts himself concedes, the prosecutor's statement came in response to defense counsel remarking that Roberts must be the "bionic man" to have been able to run after Hector after being shot. In rebuttal, the prosecutor argued that the jury should reject defense counsel's version because the testimony was that Roberts ran after Hector even though he had been shot in the leg. But no evidence not identified where Roberts was shot. Again, the Court cannot find prejudice here. If anything, the prosecutor's misstatement could have worked in Roberts's favor insofar as it bolstered defense counsel's argument that Roberts could not have run after anyone after being shot. But as the People point out, "the exact location of Roberts' gunshot wound was inconsequential and had no bearing on the jury's determination of his guilt." (People's Opp'n 4, filed Jan. 10, 2017 (hereinafter "Opp'n").) The Court instructed the jury that their recollection controls, not the recollections of counsel, and further that arguments of counsel are not evidence. "When a jury is given an instruction . . . the presumption is that the jury will follow the instruction." *Monelle*, 63 V.I. at 770 (citations omitted). This claim of error is also rejected.

(2) Being at the Scene of the Morning Star Car Accident

¶24 Roberts claims the prosecutor committed further misconduct by arguing that he was at the Morning Star car accident scene even though "was not placed on the scene at the vehicle accident at Estate Morning Star." (Mot. 4.) "Absent the People's argument that Eugene Roberts was on the ground at Morning Star, no witness testified that Eugene Roberts was there," which "is exactly what the jury had to find in order to convict Eugene Roberts for the shooting at Frontline Night Club because the persons alleged responsible for the shooting at Frontline took off in a car that got into an accident at Morning Star." (Def.'s Reply 1, filed Feb. 1, 2017 (hereinafter "Reply").) Roberts contends that "[t]he fact that . . . [he] was never named by any law enforcement personnel or emergency medical services workers [wa]s crucial to his defense." *Id.* The People acknowledge that they "did argue that there was testimony that Eugene Roberts was at Morning Star on April 19, 2014, from . . . Huertas, . . . Murray, and the paramedics who treated the injured." (Opp'n 11.) The People then concede (though not in so many words) that they did misspeak because, in their opposition, they respond, noting that it is the jury's recollection that controls. *See id.* ("At the time of the argument it was pointed out that it was the jury's recollection of the testimony that controlled."). But that's not the point Roberts was making.

¶25 No testimony placed Roberts at the scene of the Morning Star car accident. Murray was the first officer to arrive, followed by Joseph, Huertas, and Rivera as well as Greenidge-Payne who treated passengers with gunshot wounds. She identified Williams and Huertas and Rivera identified Liburd as the driver. But no one testified as to who the other persons were, who were taken away by ambulance. Nevertheless, even though the People mischaracterized the evidence, the Court does not find the mischaracterization to be dispositive here. The case agent, Dino Herbert, testified that he later saw Roberts and Williams getting treated at the hospital. And as the People point out in their opposition,

> Hector testified that he shot Eugene Roberts and that the perpetrators of the shooting left the scene together in a vehicle. . . . Larry Williams was found at Morning Star with a gunshot wound next to a black SUV that had crashed into a tree. . . .Under the circumstances the jury could infer from the evidence that Eugene Roberts, who left the scene with Larry Williams, was one of those individuals.

(Opp'n 11.) Accordingly, the Court finds that the misstatement was harmless and does not warrant a new trial. Roberts's claim of error is rejected.

B. Internal Affairs File of Police Officer

¶26 Next, Roberts raises three errors concerning the reports and papers prepared by Internal Affairs ("IA") during its investigation of Roberts's use of force on April 19, 2014. Specifically, Roberts claims the Court erred in denying Williams's motion to compel, which he joined; that the People violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by withholding the use of force report prepared by Office Naomi Joseph; and finally, that the Court erred when it denied Roberts's motion for a mistrial after the report became known. Each will be considered in turn.

(1) Motion to Compel

¶27 Roberts raises a general claim of prejudiced because he was not able "to establish bias and a motive to testify falsely," (Mot. 5), during Hector's testimony without the IA file. He "needed the disclosure of the IA investigation so that he may cross-examine . . . Hector effectively," he argues. *Id.* But Roberts fails to identify any specific harm or show how he was prejudice. Moreover, as the People point out, "there is no authority for [a] wholesale inspection of . . . Internal Affairs files." (Opp'n 5 (citing *Commonwealth v. French*, 578 A.2d 1292 (Pa. Super. Ct. 1990)).) Further,

> Roberts was not denied disclosure of the Internal Affairs file of Sergeant Hector. The court ordered the People to produce any and all statements, reports, or other documentation contained in Internal Affairs Unit files regarding Sergeant Anthony Hector, which the Attorney General or his designee deems may be material, exculpatory, or otherwise contains discoverable information in the above-styled matter so that the Court may make an *in camera* review of same. The People did in fact submit the Internal Affairs file for in camera review, and pursuant to that review several documents from Sergeant Hector's Internal Affairs file were released to Roberts. All recorded statements of witnesses made during the investigation were also released to Roberts.

Id. In reply, Roberts finds it "curious that the People would cite . . . *French* . . . [as t]his case stands for the proposition that the court should have permitted the defense to inspect *statements* in the IA[] file." (Reply 2 (emphasis added).) And herein lies the distinction that Roberts misunderstands.

¶28 First, this Court agrees with *French* insofar as when the prosecution "has in its possession pretrial statements of its witnesses which have been reduced to writing and which relate to the witness' testimony at trial, it must, upon request, furnish copies of the statements to defense." 578 A.2d at 1301 (citations omitted). The Court also agrees that this right "does not extend to the defense request for wholesale inspection of the entire IA[] file . . . [or] create a general rule of access to all of the [government's] files." *Id.* On appeal, the Supreme Court of Pennsylvania affirmed. *See Commonwealth v. French*, 611 A.2d 175 (Pa. 1992). The court explained that the trial court's error was in

> denying the defense access to the witnesses' statements in the IA[] file . . . . Relevant, pre-trial statements of witnesses in the possession of the [government] must be made available to the accused, upon request, during trial. Moreover, a determination of whether the statements of the prosecution witnesses would have been helpful to the defense is *not to be made by* the prosecution or the trial court. Matters contained in a witness' statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness.

Id. at 179 (quotation marks and citations omitted).

¶29 In ruling from the bench on April 28, 2016 on Williams's motion to compel, this Court directed the People to investigate Hector's personnel records and to disclose all statements he may have made in response to the IA investigation, any disciplinary actions taken against him, anything that may be impeachable. In fact, the Court used the specific example of a prior instance where, for example, Hector may have been found to have false statements, that too would have to be disclosed. The Court expressly rejected Williams's request for all reports including disciplinary reports, citizen complaints, departmental and agency complaints, and so forth of the type authorized by Rule 16.1 of the Local Rules of Criminal Procedure promulgated by the District Court of the Virgin Islands, which might have applied at that time in the Superior Court of the Virgin Islands through Superior Court Rule 7.

But cf. Roberts, 2016 V.I. LEXIS 232 at *1 n.2 (citing *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563 (2015), and explaining that federal rules and local rules of the District Court do not apply as of right in the Superior Court through Rule 7 but only as a last resort). *See also* V.I. R. Crim. P. 16-1 (promulgated subsequently).

¶30 Following the April 28, 2016 hearing, the attorney for the prosecution at that time, Andrette Watson, complied, and in a May 2, 2016 letter, advised the Court that she was submitting for *in camera* review a DVD with three recorded statements: an October 27, 2014 videotaped statement of Hector; a July 10, 2014 videotaped statement of Hurtault; and a May 30, 2014 audiotaped statement of Scott Gilbert. Also produced was an April 23, 2014 alcohol test report. The Court did not review those files, however, because the clerk's office docketed the letter and placed it in the case file. The Court did trust that its bench ruling—to disclose the statements to the defense—was followed. Cf. French, 611 A.2d at 178 ("[T]he determination of whether the statements of the prosecution witnesses would have been helpful to the defense is not to be made by . . . the trial court.").

¶31 Unfortunately, counsel for the prosecution did not comply, which prompted Williams to file a motion for an order to show cause, which the Court heard on June 22, 2016. During the June 22, 2016 hearing, the Court learned that the May 2, 2016 letter was only submitted to the Court. Courtesy copies were provided to defense counsel at the hearing, following which the Court ordered the prosecution to review its files, including the IA files of Hector, and certify in writing whether any exculpatory information was contained therein. Subsequently, counsel for the prosecution, Daniel H. Houston, Esq., complied and certified in a July 29, 2016 informational motion that, in his opinion, "there is no information material to the preparation of the defense, or that could reasonably bear on Sgt. Anthony Hector's credibility or character for truthfulness, with the possible exception of the clinical laboratory report dated April 23, 2014, that was provided to counsel . . . on July 26, 2016."

¶32 Again, as stated above, Roberts does not point to any specific prejudice or harm in his motion, which he suffered at trial. Instead, in reply to the People, Roberts reiterates that he had the right "to review and inspect all reports, forms or documents which contained all statements of any witnesses, that were known to [I]nternal Affairs." (Reply 2.) This Court does not agree. Moreover, while there was a delay in learning that there was no discoverable information in the IA file, that delay did not prejudice Roberts. Defense counsel thoroughly cross-examined Hector, including as to whether he had been drinking on night when he used force to shoot Roberts and Hector. Since there were no statements to produce, Roberts's general objection to the denial of Williams's motion is rejected.

(2) Motion for Mistrial

¶33 Next, Roberts contends that the Court erred when it refused to declare a mistrial after Roberts learned from Police Officer Naomi Joseph that she had taken a statement from Hector shortly after the Frontline shooting. Roberts explains that "[a]fter the close of the People's case, during the presentation of Larry Williams, Jr's case in chief, the existence of an 8 page 'Use of Force Report' became known to the defense." (Mot. 7.) Roberts became aware of the report through an independent investigator who stated under oath outside the presence of the jury that he spoke with Joseph and she confirmed that she took a statement from Hector. Roberts then moved for a mistrial, which the Court denied. In his motion, Roberts claims the denial was in error.

¶34 The Supreme Court of the Virgin Islands recognized in *Najawicz v. People*, 58 V.I. 315, 324 (2013), that "if a defendant consents to a mistrial—and is not coerced into agreeing to a mistrial as a result of prosecutorial or judicial misconduct—a retrial is permitted even in the absence of manifest necessity. This is because the protections afforded by the Double Jeopardy Clause — like all other constitutional rights — may be waived by the defendant, through his counsel" (citations omitted). But no motion is granted solely because it is made. *Cf. Ayala v. Lockheed Martin Corp.*, 67 V.I. 290, 303 (Super. Ct. 2017) ("[A] 'motion is not automatically granted simply because it is unopposed.'"

(quoting *In re: Alumina Dust Claims*, 67 V.I. 172, 187 (Super. Ct. 2017)). Instead, a motion for mistrial should "be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 580 N.E.2d 1, 9 (1991) (citing *Arizona v. Washington*, 434 U.S. 497, 505-506 (1978)); *Illinois v. Somerville*, 410 U.S. 458, 462-463 (1973)).

¶35 The Court reviewed the Use of Force Report during trial and did not find it exculpatory, noting that it was not impeachment of Hector because Officer Naomi Joseph testified that the summary is what she gathered from various officers on the scene and Hector never adopted any part of the report as his own statement. Moreover, the Court found that the summary in the report was similar to what was testified to at trial. And for this reason, the denied Roberts's motion for mistrial. Roberts has not presented any new arguments in his motion. Accordingly, his claim of error is rejected.

(3) *Brady / Giglio* Violation

¶36 The last issue Roberts raises concerning the Use of Force Report is that the People's failure to produce the report prepared by Officer Naomi Joseph "was a clear violation of the People's obligation under *Brady* and *Giglio* as . . . [it] contained both exculpatory and impeachment materials: much of the information in the report contradicted key government witnesses, and some of the information was exculpatory to Eugene Roberts." (Mot. 6) "More importantly, the report contained information regarding other potential witnesses who were not called by the People in their case, but whom Eugene Roberts would have called had he had notice of their existence." *Id.* However, because the report was not obtained by Roberts until after the close of the People's case, Roberts had no opportunity, he argues, "to utilize the impeachment nature of the report as all of the People's witnesses had completed their testimony." *Id.* Hence, Roberts concludes that he "was denied the right to put forward a full and complete defense." *Id.*

¶37 In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." And in *Giglio v. United States,* 405 U.S. 150, 154 (1972), the Court extended *Brady* to include any information that could be used to impeach the credibility of a witness for the prosecution. To prevail on a claim of a *Brady* violation, "the defendant must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense." *Williams v. People*, 59 V.I. 1024, 1039 (2013) (quoting *People v. Ward*, 55 V.I. 829, 842 (2011)).

¶38 Suppression occurs "when . . . the prosecution failed to disclose the evidence in time for the defendant to make use of it, and . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) (citation omitted); *accord Wearry v. Cain*, 136 S. Ct. 1002, 1007 n.8 (2016) ("'*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.'" (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006) (*per curiam*))). "Evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense." *Bowry v. People*, 52 V.I. 264, 274 (2009) (quotation marks and citations omitted). But "[t]he ultimate inquiry 'is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Stevens v. People*, 55 V.I. 550, 556 (2011) (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)).

¶39 Under the *Williams* factors, the prosecution's failure to disclose the Use of Force Report does constitute a suppression, even though the evidence was known only to the police or a few officers. It is imputed to the prosecution. *See Wearry*, 136 S. Ct. at 1007 n.8. The evidence was also favorable to Roberts. As the Court explained in denying Roberts's motion for a mistrial, the Use of Force Report could have been used for cross-examination purposes. But the Court cannot find that it was material because similar information was elicited on cross-examination by defense counsel. Defense counsel

repeatedly asked Hector if he had been drinking before he used force to "neutralize" Williams and Roberts. Counsel for Roberts played a recording of the call Hector made to 911 as well as portions of a videotaped statement he gave to the police. The inconsistencies were brought out at trial and the Use of Force Report was cumulative and, more importantly, was never adopted by Hector. So, Roberts's claim of error is rejected.

C. Severance / DNA Report

¶40 Next, Roberts contends the Court erred by denying Williams's motion to sever as well as his request to introduce a redacted DNA report in his case-in-chief. Both issues overlap because what prompted Williams to move to sever was a notice filed by Liburd "that he intend[ed] to offer a redacted version of the DNA lab report . . . prepared by Forensic DNA Analyst Crystal Oeshsle, F-ABC." *Roberts*, 2016 V.I. LEXIS 232 at *1. "The People had already represented on the record that they w[ould] not be calling the forensic DNA analyst(s) that prepared the DNA Report."[7] *Id.* Liburd wanted to use the DNA Report at trial because it showed "that no DNA matching him was detected on any of the recovered weapons," *id.* at *7, even though samples were taken from him. In short, Liburd believed the report helped exonerate him. Williams moved to sever out of concern that "a jury could speculate that DNA samples were also taken from him and thus, concludes that DNA matching Defendant Larry Williams, Jr. was detected on the recovered weapons." *Id.* at *8. Roberts, who also objected to the use of the DNA report, joined in Williams's motion. The Court disagreed and denied the motion to sever.

¶41 Later, after the Court acquitted Liburd of all charges once the People rested, and after Williams had rested, Roberts advised the Court and counsel that he intended to introduce the same DNA Report that had prompted him to join Williams's motion to sever. Williams and the People objected. The People objected because there had been no testimony to that point about DNA, including no expert

[7] The People were forced to not use the DNA Report after the DNA analyst refused to travel to St. Croix. She was pregnant at the time of trial and a zika outbreak had occurred in the Caribbean, including on St. Croix. *Cf. Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1179 n. 12 (Conn. 2017) ("Pregnant Women Advised to Avoid Travel to Active Zika Zone in Miami Beach." (citation omitted)).

testimony. Williams objected for the same reasons as before, the risk that the jury might infer that his DNA was found on the firearms and could raise a *Bruton* issue. *Cf. Bruton v. United States*, 391 U.S. 123 (1968). Williams also objected because he too had rested by that point. Additionally, neither party requested the appearance of the chemist who performed and authored the DNA report in question.

¶42 The Court initially advised Roberts's counsel that it would need to see how Roberts redacted the report before deciding and then granted him time to prepare the redactions. But the arguments of counsel continued at sidebar and Roberts did not take the time allotted. Ultimately, after hearing from counsel, evaluating the issues raised, including potential *Bruton* issues, and considering the absence of an expert through whom the report would be admitted, the Court concluded that it could not allow the report in. It could be prejudicial to Williams, the Court reasoned. It also might be misleading without expert testimony, the Court explained. Roberts then rested without putting on a case. He now argues that the Court erred in denying Williams's motion to sever and in preventing him from introducing a redacted version of the DNA report.

¶43 Roberts's first claim of error is rejected for the same reason as stated previously, which the Court incorporates herein. Severance is a matter vested within the discretion of the trial court. See Roberts, 2016 V.I. LEXIS 232 at *5-6 ("Under Superior Court Rule 129, a judge may order that two or more complaints be tried together if the offenses arose out of the same facts and circumstances, regardless of the number of defendants. However, if the Court finds the consolidation for trial to prejudice a defendant or the government, the Court has the discretion to order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires if the Court finds the consolidation for trial to prejudice a defendant or the government." (quotation marks, brackets, and citation omitted)).

¶44 Roberts's second claim of error is also rejected as an attempt at whipsawing the court. *See Najawicz*, 58 V.I. at 337 (warning against "the trial court's prospects of being whip-sawed by

assertions of error no matter which way it rules." (quotation marks and citation omitted). The twelve-page report, prepared on May 27, 2014, by Crystal Oechsle, F-ABC with DNA Labs International, detailed the results of DNA testing performed on samples taken from twenty different items, including blood stains on Liburd's pants, blood found on an ice machine at Frontline, and firearms and live rounds of ammunition. Roberts's DNA was found to match only a sample taken from a black Dodge Caliber, presumably the same vehicle that crashed in Morning Star. Otherwise, he was excluded from all other samples taken; Liburd was excluded entirely. Only Williams matched the majority of samples taken.

¶45 However, rather than join with Liburd before trial, Roberts joined with Williams in asking for severance. He then had a change of heart and asked to introduce the report he implicitly opposed by joining Williams. This is an attempt at whipsaw, claiming error no matter which way the court ruled. Roberts and Williams sought severance if Liburd was going to be allowed to introduce the redacted DNA report. The Court denied that motion, finding the issue premature, since Liburd had only given notice and "*limine* rulings are 'necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds.'" *In re: Asbestos, Catalyst & Silica Toxic Dust Exposure Litig.*, 68 V.I. 507, 532-33 (Super. Ct. 2018) (quoting *People v. Rodriguez*, 885 P.2d 1, 67 (Cal. 1994)) (remaining citations omitted)).

¶46 But more importantly, Roberts was not diligent in presenting this evidence in his defense. Rather than present it in the form he intended to use, Roberts raised the issue "on the fly," so to speak, just as Williams concluded his case, but without redacting the report in advance. And even though the Court said that it would grant him some time to prepare the document, Roberts did not take that time. Then, as the discussion continued and further complications arose, the Court indicated that it was not inclined to allow the DNA report in, without a foundation. Roberts did not request a continuance. He accepted the Court's ruling and then rested. Raising the issue at the last possible moment and then

claiming error after-the-fact constitutes whipsaw to this Court. If "[t]he fact that Eugene Roberts was excluded as an individual who handled any of the guns discovered at the Morning Star accident site on April 19, 2014, was crucial to his defense," (Mot. 9), as Roberts now claims, then he should have been more diligent and not waited until the last possible moment to present the evidence in an unredacted form. Counsel knew well in advance of trial of the existence of the DNA Report and certainly by October 7, 2016, the date when Liburd gave notice that he intended to use a redacted version of the report in his defense at trial. It is of interest to note that while Roberts wanted to use the DNA report to show that none of the firearms had his any evidence of his possessing them. That same report shows the presence of blood matching his DNA within the vehicle involved in the accident at Estate Morning Star.

D. Jury Instruction

¶47 Next, Roberts claims that the Court erred when it failed to give the following instruction Roberts proposed: "'You may not infer that any defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.'" (Mot. 14 (quoting Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions: Criminal* 6-5 (2005 ed.)).) Following the charging conference, Roberts notified the Court that he wanted a guilt by association instruction given in addition to a mere presence instruction. Roberts argued that there was a distinction between the two because mere presence instructs the jury that they may not infer guilt because someone happens to be present at the scene whereas a guilt by association instruction instructs the jury that they cannot infer wrongdoing based on who someone associates with. Williams joined in Roberts's request. The People opposed. The Court rejected the request, finding the mere presence instruction sufficient. Roberts now argues that, because the testimony established that he and Williams "had been at the Frontline together in a group drinking at the bar," and "were associating together," (Mot. 14.), the Court should have given the guilt by association instruction.

¶48 To prevail on a challenge to the trial court's refusal to give a proposed jury instruction, Roberts must show that the instruction was legally correct and not covered by other instructions, and that its omission was prejudicial. *See Phillips v. People*, 51 V.I. 258, 269 (2009) ("evaluate[] whether the proffered instruction was legally correct, whether or not it was substantially covered by other instructions, and whether its omission prejudiced the defendant.'" (quoting *United States v. Pitt*, 193 F.3d 751, 755-56 (3d Cir. 1999)); *accord United States v. Fallen*, 256 F.3d 1082, 1090 (11th Cir. 2001) ("To prevail on this challenge, Fallen must show that the district court failed to give an instruction that was (1) correct; (2) not substantially covered by other instructions that were given; and (3) so vital that failure to give the requested instruction seriously impaired the defendant's ability to defend himself." (quotation marks and citation omitted)). Roberts cannot satisfy these requirements.

¶49 First, Roberts has not shown that the instruction he proffered was correct under Virgin Islands law. He took it from a treatise with model federal jury instructions, not from a Virgin Islands decision. *Cf. Najawicz*, 58 V.I. at 328-29 ("[T]this Court has previously indicated that the Third Circuit Model Jury Instructions are, at best, advisory." (citing *Fontaine v. People*, 56 V.I. 571, 595 n.19 (2012)). Moreover, no binding precedent has not embraced guilty by association jury instructions. Courts in the Virgin Islands have long held that "[m]erely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct . . . to find that a defendant aided or abetted the commission of . . . [a] crime." *Gov't of the V.I. v. Motta*, No. 260/2001, 2002 V.I. LEXIS 49, at *6 n.1 (Sep. 30, 2002), *aff'd* D.C. Crim. App. No. 2002/163, 2004 U.S. Dist. LEXIS 25112, *22 (D.V.I. App. Div. Nov. 30, 2004); *accord Gov't of the V.I. v. Davis*, 35 V.I. 72, 80 (Terr. Ct. 1997) ("Mere presence at the scene of a crime is not sufficient to establish that a defendant aided and abetted the crime unless the Government proves beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator." (citing *United States v. Wright*, 742 F.2d 1215, 1221 (9th Cir. 1984)). And Virgin Islands courts also recognized that persons may not be

found guilty by association. *Cf. People v. Howson*, 48 V.I. 299, 302-03 (Super. Ct. 2007) (acquitting after a bench trial) ("Guilt, however, cannot be established by association."); *see also People v. Elmes*, 55 V.I. 342, 347-48 (Super. Ct. 2011) (granting motion for new trial after repeated references and innuendos during trial and closing arguments to gang affiliations). But binding precedent has not explicitly endorsed instructing the jury that they may not find someone guilty by association. Since the instruction has not been endorsed, Roberts cannot show that the instruction was warranted by Virgin Islands law.

¶50 Second, the instruction that Roberts wanted the Court to give was substantially covered by other instructions. The jury was instructed to consider the evidence for each defendant separately; further, that they must find each defendant guilty beyond a reasonable doubt; and lastly, that merely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct to find that a defendant aided or abetted the commission of a crime.

¶51 Lastly, even if it were error to not give a guilt by association instruction, the error did not impair Roberts's ability to defend himself. "[A] defendant is entitled to an instruction on any cognizable defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Prince v. People*, 57 V.I. 399, 411-12 (2012) (quotation marks and citations omitted)). Liburd may have prevailed here because the evidence did show that he was merely present and faced a risk of being found guilty by association. But the evidence established that Roberts shot Hurtault twice from approximately three feet away. He was not found guilty because he associated with Williams. Giving a guilt by association instruction was might have confused the jury because it was not supported by the evidence and jury instructions should instruct not confuse.

E. Sufficiency of the Evidence

¶52 Finally, Roberts challenges the sufficiency of the evidence for each offense he was convicted of. When a defendant challenges the sufficiency of the evidence following conviction, "the Superior Court . . . views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *Stevens*, 52 V.I. at 305 (internal quotation marks and citations omitted)). Trial courts must uphold the jury's verdict "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Codrington*, 57 V.I. at 189 (quotation marks and citation omitted). "The reasonable doubt which will prevent conviction must be the jury's doubt and not that of this Court. If there are conflicts in the testimony, such conflicts present credibility issues for the jurors to resolve. Courts cannot substitute their own credibility determinations for those of the jury." *People v. Ventura*, SX-12-CR-076, 2014 V.I. LEXIS 53, *15 (V.I. Super. Ct. July 25, 2014) (quotation marks, brackets, and citations omitted), *rev'd in part on other grounds*, 64 V.I. 589 (2016). However, when evidence is truly insufficient, then the trial court must set aside the verdict.

(1) Attempted Murder / First-Degree Assault

¶53 In his motion, Roberts argues that there is "no evidence of any willful, premeditated, deliberation . . . Nothing in the record suggests that the shooting of Roscar Hurtault was anything other than what the witness described: a crime of opportunity." (Mot. 12.) But Roberts forgets that "'although the mental processes involved must take place prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill.'" *Velazquez v. People*, 65 V.I. 312, 321 (2016) (brackets omitted) (quoting *Nicholas v. People*, 56 V.I. 718, 734 (2012)). "Moreover 'it is not the length of time or reflection that determines whether an act of murder was premeditated, but rather it is the act of deliberation before the murder.'" *Id.* (quoting *James v. People*, 60 V.I. 311, 327 (2013)).

¶54 Furthermore, to show an attempt, "the government has the burden of proving the following: (1) an intent to commit the crime, (2) and overt act toward its commission, (3) failure of consummation

and (4) the apparent possibility of the commission." *Parson v. Gov't of the V.I.*, 167 F. Supp. 2d 857, 860 (D.V.I. App. Div. 2001) (*per curiam*) (citing *Cheatham v. Gov't of the V.I.*, 30 V.I. 296, 303 (D.V.I. App. Div. 1994)). Whereas to prove an assault in the first degree, the People had to show that Roberts assaulted Hurtault with the intent to commit murder. *Cf. Fahie v. People*, 62 V.I. 625, 632 (2015) ("To convict Fahie of first degree assault, the People were required to prove, beyond a reasonable doubt, that Fahie assaulted another with the intent to commit murder.").

¶55 Here, the evidence established both crimes beyond a reasonable doubt. Roberts was approximately two to three feet away from Hurtault, who was crouching down taking cover behind the engine block of a truck, when Roberts approached and shot him twice. Hurtault heard five shots in total. Clearly, firing shots at someone shows both intent to commit murder and assault because the firing of shots would place another in reasonable apprehension of a battery. *Cf.* 14 V.I.C. § 291 (defining assault as an attempted batter or threating gesture showing intent to commit a battery). A reasonable jury could find that Roberts acted with intent to commit murder when he shot Hurtault, thus taking an overt step toward its commission. *Cf. Parson*, 167 F. Supp. 2d at 860. Roberts also failed to consummate the crime of murder because Hurtault survived. But by shooting Hurtault, it was "apparently possible" that Hurtault could have died. Further, firing multiple shots at an unarmed individual from two to three feet away is sufficient for a jury to find premeditation. *Accord Brown v. People*, 54 V.I. 496, 506-07 (2010) (identifying "the nature of the weapon used," "lack of provocation," and "the use of a deadly weapon on an unarmed victim" as factors supporting a finding of premeditation).

¶56 Roberts contends that, pursuant to *Simmonds v. People*, 59 V.I. 480 (2013), he cannot be convicted of both assault in the first degree as well as attempted murder in the first degree. (*Cf.* Mot. 12 ("Count Three is a crime charging the same incident as that in Count Two, i.e., the shooting of Roscar Hurtault.").) But Roberts is mistaken on two bases. First, *Simmonds* did hold, albeit in a

footnote, that "the plain language of the statute," meaning Section 295 of Title 14 of the Virgin Islands Code, "precludes simultaneously charging and convicting a defendant of both first-degree murder and first-degree assault." *Simmonds*, 59 V.I. at 488 n.5. But the Virgin Islands Supreme Court qualified its holding, explaining the preclusion applies only when "the assault charge is brought pursuant to section 295(2)." *Id.*; *see* 14 V.I.C. § 297(2) ("Whoever . . . with intent to kill, administers or causes to be administered to another, any poison or other noxious or destructive substance or liquid, and death does not result."). The Court specifically declined to address "the propriety of simultaneously charging and convicting a defendant of first-degree murder and first-degree assault for the same act." *Simmonds*, 59 V.I. at 488. Instead, the Court reasoned that, because the defendant had fired multiple shots at the victim,

> the jury could reasonably find that Simmonds committed first-degree assault when he fired his first volley of shots from a distance—resulting in wounds only to Rouse's arms and buttocks—and then initiated a second first-degree assault when he moved closer to Rouse and shot him in the head, which transformed into a first-degree murder once Rouse died from those injuries.

Id. at 489. This case is similar to *Simmonds* insofar Hurtault testified that Roberts fired five shots at him, only two of which struck him. As in *Simmonds*, the jury could have found that Roberts committed assault in the first degree when he fired the other shots at Hurtault that did not hit him.

¶57 But Roberts claims that first-degree assault and attempted murder are one and the same because "[b]oth counts require[proof of] the intent to murder," (Reply 5), and therefore being convicted of both violates the Double Jeopardy Clause as interpreted in *Blockburger v. United States*, 284 U.S. 299 (1932). *See id.* at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Assuming that Roberts is correct,[8] the question becomes whether being punished for the crime attempted as well as the crime

[8] Because Roberts failed to provide any authority from this or any other jurisdiction that attempt crimes should be treated differently, the Court could presume that none exists. *Accord State v. Martinez*, No. 30,637, 2010 N.M. App. Unpub.

committed violates *Blockburger*. But "[t]he *Blockburger* test . . . 'is a rule of statutory construction, and because it serves as a means of discerning legislative purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Williams v. People*, 56 V.I. 821, 831 (2012) (brackets omitted) (quoting *Albernaz v. United States*, 450 U.S. 333, 340 (1981)). The Legislature has given some indication for attempt crimes, *see* 14 V.I.C. § 332, but whether that intent is "clear" and "contrary" is unclear. *Cf. Williams*, 56 V.I. at 831 (considering "*clear* indication of *contrary* legislative intent." (emphasis added) (quotation marks and citation omitted)).

¶58 Section 332 of Title 14 of the Virgin Islands Code provides that "[w]hoever attempts unsuccessfully to commit an offense and accomplishes the commission of another and different offense, whether greater or lesser in guilt, shall be punished as prescribed by law for the offense committed, *notwithstanding* the provisions of section 331 of this title" (emphasis added). Section 331 provides as follows:

> Whoever unsuccessfully attempts to commit an offense, shall, unless otherwise specially prescribed by this Code or other law, be punished by—(1) imprisonment for not more than 25 years, if the offense attempted is punishable by imprisonment for life; or (2) in any other case, imprisonment for not more than one-half of the maximum term, or fine of not more than one-half of the maximum sum prescribed by law for the commission of the offense attempted, or by both such fine and imprisonment.

14 V.I.C. § 331. Generally, when construing statutes, courts first "determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *Ubiles v. People*, 66 V.I. 572, 590 (2017) (quotation marks and citations omitted). "This canon of interpretation exists because the Legislature is presumed to have expressed its intent through the ordinary meaning of the language of

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LEXIS 454, *3 (Ct. App. Dec. 16, 2010) ("Defendant provides no authority from this or any other jurisdiction to support his argument that attempt crimes should be treated differently from completed crimes for double jeopardy purposes, and he provides no authority from this or any other jurisdiction to support his argument that the Legislature did not intend that attempted second degree murder would be punished separately from the offense of shooting at or from a motor vehicle. We therefore assume that no such authority exists." (citing *In re: Adoption of Doe*, 676 P.2d 1329, 1330 (N.M. 1984)). However, because it is not clear "whether a similar waiver principle [as applies on appeal] can, or should, apply at the trial court level," *Ventura*, 2014 V.I. LEXIS 53 at *32 n.5, the Court will consider Roberts's argument since he does make a perfunctory claim. *Cf. id.*

the statute" and courts generally "take the plain language as an accurate reflection of the legislative intent underlying the statute and . . . give effect to all the words of the statute, if reasonably possible, unless to do so would undermine the statute's purpose." *Id.* (citations omitted). Courts also "apply any specific definitions that are statutorily prescribed. [But w]hen no statutory definition is provided, words that have an accumulated legal meaning will be given that meaning, and other words will be given their common, dictionary, meaning." *Id.* (citations omitted).

¶59 Here, the term "notwithstanding" in Section 332 as well as the words "shall be punished" in both sections are not defined and can lend themselves to conflicting interpretations. "'Shall normally suggests something mandatory not discretionary.'" *Chaput v. Scafidi*, 66 V.I. 160, 187 (Super. Ct. App. Div. 2017) (quoting *Dennie v. People*, 66 V.I. 143, 152 n.6 (Super. Ct. App. Div. 2017)). By contrast, "notwithstanding" means "[d]espite; in spite of." *Black's Law Dictionary* 1231 (10th ed. 2014); *accord Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("[I]n construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section *override* conflicting provisions of any other section." (emphasis added) (citing *Shomberg v. United States*, 348 U.S. 540, 547-48 (1955)). One way to construe the statutes is to read Section 331 as criminalizing an attempt to commit a crime and Section 332 as criminalizing the crime that is actually accomplished, since an attempt to commit one crime does not always result in the commission of another crime. But if a crime is actually accomplished, "whether greater or lesser in guilt," 14 V.I.C. § 332, then the defendant must be punished for that crime, "notwithstanding" that it also constituted an attempt to commit "another and different offense." *Id.* Another way to construe the statutes is to read them in harmony, namely that, "notwithstanding" whether someone attempts to commit one crime, if he "accomplishes the commission of another and different offense, whether greater or lesser in guilt," he must also be punished for the crime committed. The question here is whether Roberts "shall be punished" for first-degree assault, pursuant to Section 332, and, pursuant to

Section 331, "shall [also] . . . be punished" for attempted murder, or must Roberts only be punished for first-degree assault, because he actually "accomplishe[d]" that offense, "notwithstanding" that he attempted to commit murder. Unfortunately, the plain language is ambiguous and Virgin Islands courts have not construed Section 332 of Title 14 of the Virgin Islands Code, meaning this issue is one of first impression.

¶60 The United States Court of Appeals for the Third Circuit, sitting as the *de facto* court of last resort for the Virgin Islands, reported that they had "discovered no judicial interpretation of this provision," Section 322 of Title 14 of the Virgin Islands Code, but nonetheless concluded "that § 332 relates only to sentencing." *Gov't of V.I. v. Douglas*, 812 F.2d 822, 828 (3d Cir. 1987). The historical source note of Section 322 explains that the statute was carried forward into the Virgin Islands Code from the Code of Laws for the Municipality of St. Thomas / St. John and the Code of Laws for the Municipality of St. Croix, specifically Title IV, Chapter 2, Section 12, which provided that "[t]he last two sections do not protect a person who, attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed." Code of Laws for Munic. of St. Thomas / St. John, tit. IV, ch. 2, § 12 (1921), *repealed by* 1 V.I.C. § 5(2). "Last two sections" referred to Section 10, which specified the punishment for attempt, currently codified as amended and revised at Section 331 of Title 14 of the Virgin Islands Code, and Section 11, which is no longer found in our criminal code. *See* Code of Laws for Munic. of St. Thomas / St. John, tit. IV, ch. 2, § 10 (1921) ("A criminay [sic] act is not less punishable as a crime because it is also declared to be punishable as a contempt."), *repealed by* 1 V.I.C. § 5(2).

¶61 So far as the Court can discern from its limited research, Title IV, Chapter 2, Section 12 of the 1921 Code may have been borrowed from the Puerto Rico Penal Code. *Cf. People v. Rivera*, 36 P.R. Dec. 194, 194 (1927) ("The last two sections do not protect a person who, attempting unsuccessfully

to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); *accord* P.R. Penal Code, tit. III, § 51, *reprinted in* Rev. Stat. & Codes of P.R. 479-80 (1902) (same). However, because another Superior Court judge recognized that "the duty of a trial court regarding borrowed legislation is first to determine which jurisdiction the statute was borrowed from, then to discern whether the highest court of that jurisdiction settled the meaning of its statute, and finally to apply the settled meaning, if any," *Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 173 (Super. Ct. 2017) (citations omitted), the Court also notes that New York had a statute similar to the version the Virgin Islands enacted in 1921. *Cf. People v. Pisano*, 142 A.D. 524, 527 (N.Y. App. Div. 1911) ("Section two hundred and sixty-one supra does not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed." (quotation marks, brackets, and citation omitted)). But so do California, Idaho, Oklahoma, Nevada, and South Dakota.[9] The language of the Puerto Rico statute mirrors the language of the 1921 statute the closest, however. And other sections within Chapter 12 of Title IV of the 1921 Codes mirror similar statutes within Title III of the 1902 Puerto Rico Penal Code, lending further support to the conclusion that the Puerto Rico was the "lending jurisdiction." *Accord Berkeley v. W. Indies Enterps., Inc.*, 10 V.I. 619, 625 (3d Cir. 1973) (borrowed from Puerto Rico); *People v. Simmonds*, 58 V.I. 3, 25 (Super. Ct. 2012) (same).

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[9] *See* Cal. Penal Code § 665 (Deering) ("Sections 663 and 664 do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Idaho Code § 18-307 ("The last two (2) sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Okla. Stat. Ann. tit. 21, § 43 (enacted 1910) ("The last two sections do not protect a person who in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Nev. Rev. Stat. Ann. tit. 15, ch. 193.330, § 2 ("Nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed."); S.D. Laws Ann. tit. 22, ch. 22-4, § 2 ("The provisions of § 22-4-1 do not protect a person who, in attempting unsuccessfully to commit a crime, commits another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.").

Nevertheless, because neither the Supreme Court of Puerto Rico, nor the Supreme Courts of California, Idaho, Oklahoma, Nevada, or South Dakota construed their statutes before 1921, it leaves the Court without any binding precedent to turn to. *Cf. Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 419 (2016) ("[W]here a Virgin Islands statute is patterned after a statute from another jurisdiction, the borrowed statute shall be construed to mean what the highest court from the borrowed statute's jurisdiction, prior to the Virgin Islands enactment, construed the statute to mean." (quotation marks and citations omitted)).

¶62 But courts may still consider decisions rendered after the date a statute was borrowed, even though "decisions rendered after a statute is borrowed are only persuasive." *Jones*, 68 V.I. at 176. Here, the Court finds persuasive the decision of the Supreme Court of Nevada in *Jackson v. State*, 291 P.3d 1274 (Nev. 2012) (*en banc*). In *Jackson*, the Nevada Supreme Court considered the same question at issue here:

> A single act can violate more than one criminal statute. When it does, the question arises whether the defendant can, in a single trial, be prosecuted and punished cumulatively for that act. These appeals present specific applications of that question: When the elements of both crimes are met, can a defendant who shoots and hits but fails to kill his victim be convicted of and punished for both attempted murder and battery? If he shoots and misses, can he be convicted of and punished for both attempted murder and assault?

Id. at 1276. In answering these questions, the court observed, that "[w]hether conduct that violates more than one criminal statute can produce multiple convictions in a single trial is essentially a question of statutory construction, albeit statutory construction with a constitutional overlay." *Id.* at 1277. The court further observed that the Supreme Court of the United States "presumes that where two statutory provisions proscribe the same offence, a legislature does not intend to impose two punishments for that offense." *Id.* at 1278 (quoting *Rutledge v. United States*, 517 U.S. 292, 297 (1996)). But when legislation "clearly authorize[s] multiple punishments for the same offense—as routinely occurs when a statute authorizes incarceration and a fine for a given crime—dual

punishments do not offend double jeopardy, even though they are imposed for the 'same offence.'" *Id.* (brackets omitted) (citing *Whalen v. United States*, 445 U.S. 684, 688-89 (1980)). Construing the Nevada statute, the court concluded that if it "expressly authorizes punishment for both attempted murder (the 'unsuccessful attempt to commit one crime') and assault and/or battery (the crime[] actually committed'), the double jeopardy analysis ends there: The Legislature has authorized cumulative punishment." *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359 366 (1983)).

¶63 Although the court ultimately decided the appeal under *Blockburger*, *see id.* at 1280, this Court believes the interpretation given to the Nevada statute to be correct. "'[T]he law of attempt is complex and fraught with intricacies and doctrinal divergences.' 'As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it.'" *People v. Bailey,* 279 P.3d 1120, 1128 (Cal. 2012) (brackets omitted) (quoting *Moorman v. Thalacker*, 83 F.3d 970, 974 (8th Cir. 1996), and *People v. Super. Ct. of Los Angeles Cty*, 157 P.3d 1017, 1022 (Cal. 2007)). The Virgin Islands Legislature has decreed that the attempted commission of a crime and the commission of a crime are distinct offenses, and that a punishment must be imposed for each. Thus, the Court cannot acquit Roberts of first-degree assault or attempted murder. And further, since Sections 331 and 332 are more specific—pertaining only to crimes attempted and accomplished—they govern to the exclusion of Section 104 of Title 14 of the Virgin Islands Code. *Cf. Velazquez v. People*, 65 V.I. 312, 319 (2016) ("'[T]the more specific statute takes precedence over the more general one, unless it appears the Legislature intended for the more general to control.'" (quoting *Rohn v. People*, 57 V.I. 637, 647 (2012)). Therefore, Roberts's claim is rejected.

(2) Unauthorized Possession of Firearms

¶64 Roberts was convicted of three counts of unauthorized possession of a firearm, two of which further charged that the possession occurred during the commission of a crime of violence. Following from his claim about first-degree assault and attempted murder, Roberts argues that "the corresponding

Counts Five and Six must also fail when Counts Two and Three fail since it is imperative that the underlying crimes be proven first to sustain convictions for possession of a firearm during the commission of a crime of violence." (Mot. 12.) Roberts offered no further argument and cites no law in support. The Court could find this argument waived. *But cf. supra*, note 8. However, courts "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." V.I. R. Crim. P. 29(a). Here, there evidence was sufficient for all three counts.

¶65 To prove the crime of unauthorized possession of a firearm during the commission of a crime of violence, "all that is required . . . is evidence that the defendant had an unlicensed firearm in his possession during a crime of violence." *Percival v. People*, 62 V.I. 477, 489 (2015). The evidence, when viewed in the light most favorable to the People, was sufficient to prove beyond a reasonable doubt that Roberts was guilty. Detective Stout testified that on or about April 19, 2014, Roberts did not have a license to possess a firearm. The evidence also showed that Roberts possessed a firearm during the commission of a crime of violence, namely the assault on, or attempted murder of, Hurtault. *See* 23 V.I.C. § 451(g) ("'Crime of violence' means the crime of, or the attempt to commit, murder in any degree . . . assault in the first degree."); 14 V.I.C. § 2253(d)(1). Therefore, even if Roberts were correct that he must be acquitted of attempted murder or first-degree assault, his conviction for Count Six, unauthorized possession while assaulting or attempting to murder Hurtault, stands.

¶66 Similarly, the evidence was also sufficient to show that Roberts possessed a firearm while assaulting Stanley or murdering Vernege. Admittedly, Roberts was acquitted of both crimes as well as aiding and abetting Williams in committing both crime. But courts cannot acquit based on inconsistent verdicts. *See People v. Faulkner*, 57 V.I 327, 335 (2012) ("An inconsistent verdict is not a sufficient reason for setting a verdict aside, even in situations where the jury acquits a defendant of a predicate felony, but convicts on the compound felony."). "[W]here truly inconsistent verdicts have been reached, the most that can be said is that the verdict shows that either in the acquittal or the conviction

the jury did not speak their real conclusions; but that does not show that they were not convinced of the defendant's guilt." *Id.* at 333 (quotation marks, brackets, and ellipsis omitted) (quoting *United States v. Powell*, 469 U.S. 57, 64-65 (1984)).

¶67 Here, the evidence was sufficient to show that Roberts assaulted Stanley or murdered Vernege, or that he aided and abetted Williams in committing either crime.

> [E]stablishing the offense of aiding and abetting requires the People to prove (1) that the substantive crime has been committed, and (2) the defendant knew of the crime and attempted to facilitate it. In addition, the People must prove that the defendant associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his words or action to make it succeed.

Todmann v. People, 59 V.I. 675, 684 (2013) (quotation marks and citations omitted). Although Stanley was clear in her testimony that she only saw one person firing shots at her and Vernege and that the shooter was the same person who had whispered in her ear earlier as she was leaving the club, Hector testified that, at the time when he left the bar and engaged Williams and Roberts, they were firing at the truck. (See Trial Tr. 9:25-10-6 ("When I reach outside, I saw this guy, Larry Williams. I saw him, and I saw this gentleman in the plum-colored shirt, Mr. Roberts, in front of a truck, with a gun pointing to the truck, firing shots, and I -- I raised my weapon, and I said, police, drop your gun. And they just ignored me, so.").) It was the firing of shots at Vernege and Stanley which the People claimed constituted the crimes of murder and assault. Clearly the jury credited Hector's testimony and found Roberts guilty of possessing a gun without a license while committing a crime of violence, namely the assault on Stanley or the murder of Vernege. Again, acquitting Roberts of the predicate offenses was inconsistent, but "an inconsistent verdict may stand *where there is sufficient evidence* to support the conviction." *Milligan v. People*, S. Ct. Crim. No. 2016-0090, ___ V.I. ___, ___ n.5; 2018 V.I. Supreme LEXIS 27, *11 n.5 (V.I. Sep. 11, 2018) (citations omitted) (emphasis added). Therefore, Roberts's claim is rejected as to Count Five.

¶68 Turning to Count Nine, the People charged that Roberts and Williams, while aided and abetted by one another and others, did when unauthorized by law possess, bear, transport or carry either actually or constructively open or concealed a firearm. Roberts claims that "Count Nine has no evidence to sustain it where, as here, Eugene Roberts was never placed on the scene at Estate Morning Star, nor was there any evidence that he was shot on April 19, 2014." (Mot. 13) "To infer that he was there and responsible for the shootings is a big stretch which the law does not allow a finder of fact to make," he argues. *Id.* But again Roberts misstates or misremembers the evidence.

¶69 The evidence showed beyond a reasonable doubt that Roberts possessed a firearm without legal authorization on April 19, 2014 because Hurtault testified that Roberts shot him, and Stout testified that Roberts did not have a firearm license. This testimony was sufficient. *Cf. Francis v. People*, 57 V.I. 201, 224 (2012) ("[T]he testimony of a single witness, if credited by the jury, is sufficient to sustain a conviction."). Moreover, even though the Third-Amended Information did not charge Roberts with being in possession of a firearm unlawfully at Estate Morning Star specifically. As the People point out, "[e]ven if Roberts is correct that he was not placed on the scene at Estate Morning Star, the testimony at trial from Anthony Hector and Roscar Hurtault established that Roberts was in possession of a firearm on April 19, 2014, while at the Frontline Nightclub." (Opp'n 13.) However, because the evidence did not establish that Roberts possessed more than one firearm or that he lost and regained possession of a firearm, Roberts's conviction on Count Nine must merge with his conviction on Count Six. *See* 14 V.I.C. § 104 ("An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one.").

(3) Possession of Ammunition

¶70 Possession of ammunition is deemed a crime when a

> person who is not: (1) a licensed firearms or ammunition dealer; or (2) officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope

> of his duties; or (3) holder of a valid firearms license for the same firearm gauge or caliber ammunition of the firearm indicated on such license; and (4) who possesses, sells, purchases, manufactures, advertises for sale, or uses any firearm ammunition.

14 V.I.C. § 2256(a). Roberts argues that "the People failed to prove and an essential element of the crime. Namely, the People failed to prove that Eugene Roberts were not employed by or a federal agent at the time he was alleged to have been in possession of ammunition." (Mot. 13.) But Roberts ignores that "[w]hether a defendant is . . . authorized by the exceptions to the statute is an affirmative defense on which he bears the burden of proof." *Hunt v. Gov't of the V.I.*, 46 V.I. 534, 538 (D.V.I. App. Div. 2005); *see also* 14 V.I.C. § 2256(f) ("An information based upon a violation of this section need not negate any exemption herein contained. The defendant shall have the burden of proving such an exemption.").

¶71 Roberts failed to cite this statute or raise a challenge to its burden-shifting provision. Therefore, any claim of error is waived. But more importantly, the evidence showed that Roberts used ammunition because he shot Hurtault and further showed that he was not licensed to carry a firearm. Further, the jury could reasonably infer that shooting someone who is unarmed and taking cover during an active shooter situation is not within the scope of the duties of an officer, employee, or agent of the United States Government or of the Government of the Virgin Islands. Hence, Roberts's claim of error is rejected.

(4) Reckless Endangerment in the First Degree

¶72 Concerning his conviction of reckless endangerment in the first degree, Roberts claims there

> was conflicting testimony that Eugene Roberts was the person shooting at Frontline. Sergeant Hector testified that he was tackled and shot by Lester Roberts. The People theorized that the person who shot Sergeant Hector ran after him and chased him down to shoot him. The evidence shows that the gun belonging to Sergeant Hector is responsible for the casings left at the area where Roscar Hurtault was shot. It stands to reason that the person who was recklessly endangering others was either Sergeant Hector or Lester Roberts who is alleged to have taken his gun.

(Mot. 13.) But again, Roberts ignores that the Third Amended Information charged him with reckless endangerment "by discharging several shots in the vicinity of Frontline Nightclub, a public establishment." A jury could find beyond a reasonable doubt that Roberts committed reckless endangerment in the first degree when he discharged several shots at Hurtault outside the Frontline club. It is beyond question that firing multiple shots constitutes an act and firing the shots outside a crowded night club adjacent to a road satisfies the "public place" requirement. *E.g.*, *Powell v. People*, S. Ct. Crim. No. 2015-0008, 2019 V.I. Supreme LEXIS 2, * 67-71 (V.I. Jan. 16, 2019) (Swan, J., concurring) (collecting cases). Roberts's claim of error is rejected.

CONCLUSION

¶73 For the reasons stated above, Robert's motion for judgment of acquittal or in the alternative for a new trial must be denied. An appropriate order follows.

DONE this 21st day of February, 2019.

DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Court Clerk Supervisor
Dated: 2/21/19

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. EUGENE ROBERTS, Defendant.	SX-14-CR-136
PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. LARRY WILLIAMS, JR., Defendant.	SX-14-CR-144

VOLUME XIV

Friday, November 4, 2016

Kingshill, St. Croix

The above-entitled action came on for JURY TRIAL before the Honorable DARRYL DEAN DONOHUE, SR., Judge, in Courtroom Number 206.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

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I N D E X

E X H I B I T S

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(Proceedings in Chambers at 10:31 a.m.)

THE CLERK: People of the Virgin Islands versus Eugene Roberts and Larry Williams, Junior.

THE COURT: All right. We're in chambers here on the record. All counsel of all parties are present.

Attorney Chancellor, you wanted to put something on the record, sir?

MR. CHANCELLOR: Yes, sir.

THE COURT: Okay.

MR. CHANCELLOR: Yesterday, when we left, I had made an objection to certain witnesses being called by the defense; specifically, there was a toxicologist and certain witnesses from Internal Affairs as well as -- well, I think those were the ones. There was also a witness from the hospital with the medical records for Anthony Hector.

Your Honor, at that point, stated that we should talk to the witnesses this morning and then we can deal with that particular objection.

I have talked with two of those witnesses, Your Honor. I have talked with the medical records keeper for the hospital and I talked with the lab supervisor. The medical records -- the keeper of the medical records informed us that there was no

witnesses that she spoke with and the only name that she asserted was Sergeant Hector. Am I correct?

THE WITNESS: That's correct.

THE COURT: Okay.

MS. DOWLING: All right. Mr. Jackson, that's it. If there are no other questions of you, that's all I have.

THE WITNESS: Thank you.

(The witness was excused at 2:35 p.m.)

THE COURT: Okay.

MS. DOWLING: Your Honor, at this time, the Defendant Eugene Roberts would move for a mistrial because of The People's withholding of exculpatory material that was -- should have been given to the defense pursuant to the rules of discovery, namely Federal Rules of Criminal Procedure Rule 16.

It's obvious on the record that Naomi Joseph had an interview with Sergeant Hector on the 19th of April, 2014 relative to this Frontline incident and that she -- from that interview that she had, she prepared a Use of Force form. Neither the Use of Force form nor the subject matter of the interview, meaning as whether a synopsis or whether her notes or whether her report concerning the

interview, has ever been disclosed to the defense. The defense should have had this information especially if you're -- if -- if the incident summary, which we were now handed since we've come back from lunch, is to be believed, Miss -- Sergeant Joseph, in her interview of Mr. Hector, Sergeant Hector, noted in her summary several statements that he made which are completely contradictory to what he testified to on direct examination when he was called in The People's case in chief.

MS. WALKER: And different from evidence that's been in before.

MS. DOWLING: And different from evidence that has been entered. This is information that should have been given to the -- the fact that Naomi Joseph had an interview with Sergeant Hector should have been disclosed. The sum and substance of her interview should have been disclosed to the defense. The defense should not have had to cross-examine Sergeant Hector without having this information. Not only that, the defense should have had an opportunity to call Naomi Joseph as a witness for the defense.

Your Honor, this is The People withholding evidence that is exculpatory that is required to be

given to the defendant not only under Rule 16 but also as a result of Brady and Giglio material.

And the Defendant Eugene Roberts moves for a mistrial at this time.

MS. WALKER: Your Honor, Defendant Larry Williams joins in the motion.

And in addition to everything that Attorney Dowling has explained, I want to highlight the inconsistencies with the statement that's included in the Use of Force summary that contradicts what Sergeant Hector testified to as well as evidence that wasn't ever introduced by The Government.

One, there's a statement here that Sergeant Hector exited the club and he observed a male individual with a gun. So that would be one male as opposed to the two males that he testified about.

He says that the subject pointed the weapon at him and he fired, striking the individual, which, again, is consistent with his statement which he testified that the backs of the two individuals were facing him. Now, here, he's saying that the person pointed the weapon at him and he fired, striking the individual.

He also says that he was tackled from behind, a struggle ensued, and a black male gained control of the weapon. He says that he was able to run a short distance before he received a wound and he was able to retreat into the club for cover until assistance arrived, as opposed to saying that he ran down the street or ran down the street and hid in the yard of a neighboring property.

It also says in his statement that Sergeant Hector shot Lester Roberts as opposed to Eugene Roberts and Larry Williams.

And where it lists -- after it indicates that he shot Lester, the following information is that other individuals sustained gunshot wounds but not that Anthony Hector inflicted those wounds.

Larry Williams' concern with the statement is not only the assertions contained in them which can be attributed to Sergeant Hector based on Naomi's information to the investigator, Jackson, that she spoke directly to Hector. Her statement was submitted, I believe Your Honor told us, April 19, 2014, at 3:28 p.m. That means that this was the first statement that VIPD took from Sergeant Hector because Dino Herbert testified that he did not take a statement from Sergeant Hector until the following

day. So this would be the first statement. It completely contradicts his statement. There was even a portion of my cross-examination of Sergeant Hector where I was referring to his IA statement which he gave in October, I believe, of --

MS. DOWLING: 2014.

MS. WALKER: -- 2014 where he says he aimed for Larry Williams' chest.

Now, it would have been helpful if I'd had a second statement from him where he said he aimed at an individual's chest when I was attempting to impeach him.

This statement was withheld. It was withheld over not only Larry Williams' discovery requests but a general motion to compel discovery where I requested this form, a second motion which resulted in an evidentiary hearing to compel any excess use of force -- or excessive use of force investigation documents. This is -- this is based on a statement that Sergeant Hector gave. It's exculpatory. It would have been used to impeach him. And it really prejudices the defendant to now receive this in the middle of him putting on his case.

So for those reasons, I join in the

motion.

THE COURT: All right. People?

MR. CHANCELLOR: Well, Your Honor, I'm not sure what -- how to respond seeing that we have the investigator for one of the defendants stating that the defendants -- that somebody lied or said something contrary which --

THE COURT: Mr. Jackson didn't say anybody lied.

MR. CHANCELLOR: Well --

THE COURT: Mr. Jackson's testimony was simply that he spoke to Sergeant Joseph and Sergeant Joseph said that in preparing her summary she spoke to Sergeant Hector and other witnesses, names she cannot recall. That's pretty much all he said.

MR. CHANCELLOR: Right. And to that extent, Your Honor, first of all, that is not competent in terms of deciding a motion to -- for a mistrial on hearsay information from Mr. Jackson who is associated with one of the defendants.

Secondly, Your Honor, we've had testimony in here before on the 911 tapes that Hector said he shot one person. That's been there.

Looking at this statement, Your Honor, and it's a summary, there is nothing in here to say that

this is some exculpatory information that is not already in the hands of these defendants.

Secondly, this file was reviewed even in camera and it was determined what was necessary to be given to the defendants. So even if now the defendants believe that there's exculpatory information here, which I don't believe, certainly this is not information that The Government withheld.

And secondly, secondly, Detective Joseph is not here to testify that -- to what was said. So for us to say that we're going to take the word and decide this case on the word of an investigator who's associated with one of the defendants, Your Honor, I think it's not right.

THE COURT: All right. Well, the thing is --

MR. CHANCELLOR: Your Honor, Attorney David has a point.

THE COURT: Sure.

(Mr. Chancellor and Mr. David confer.)

MR. CHANCELLOR: But -- and the other thing is -- well -- yeah.

MR. DAVID: Sorry, Judge.

THE COURT: What else you want to say?

MR. CHANCELLOR: That's okay, Your Honor.

THE COURT: Okay. All right. The thing that we have here is Mr. Jackson's statement is pretty much a statement of him receiving from Sergeant Joseph that she spoke with Sergeant Hector and she spoke with other witnesses. That's pretty much all he says.

So, frankly, there's nothing that Sergeant Joseph tells us at this point that's any different than what's contained in the summary portion of the -- what was that document called? -- the Use of Force form. And that section, again, is titled "Summary." There's nothing in that where Sergeant Hector adopts as his own statement. It's just a summary of what was gleaned from an interview with him and other individuals.

I don't find that exculpatory. It may, at best, be information that could be used for impeachment purposes, for cross-examination purposes. The 911 tape was played in court which actually already has said it has information with respect -- with respect to the one individual -- one of the individuals that was shot.

So at this point, I don't find a basis for a mistrial. I'm not going to declare a mistrial at

this point. The parties have made their record and you can take the appropriate action if in fact that comes to pass. Okay?

Are you ready -- your other witnesses are here to testify?

MS. WALKER: Your Honor, at this point, I would want to have Naomi Joseph brought here because she may be a witness for the defense.

And the reason for that is, yes, the 911 tape was played, but nowhere in the tape does he say he shot Lester Roberts. His testimony was that he shot Larry Williams --

MS. DOWLING: And Eugene Roberts.

MS. WALKER: -- and Eugene Roberts from behind. In this statement it says that he shot Lester Roberts, not Larry. And that's completely different from anything he said.

On top of that, there was this testimony --

THE COURT: Counsel, Counsel, if you want Sergeant Roberts -- I'm sorry -- Sergeant Joseph here, fine, prepare the subpoena, have her served.

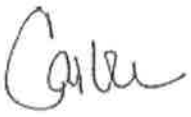
MS. DOWLING: Your Honor, I, on behalf of Eugene Roberts, would ask this Court for a recess so that I could go and interview Sergeant Joseph and so

CERTIFICATE OF REPORTER

I, CAROL GRECO, Registered Professional Reporter, Official Court Reporter, of the Superior Court of the Virgin Islands, Division of St. Croix, do hereby certify that I reported by machine shorthand, in my official capacity, the Jury Trial in the case of *People of Virgin Islands v. Eugene Roberts, SX-14-CR-136, and People of the Virgin Islands v Larry Williams, Jr., SX-14-CR-144*, in said Court, on the 4th day of November, 2016.

I FURTHER CERTIFY that the foregoing 132 pages are a true and accurate computer-aided transcription of my stenotype notes of said proceedings.

I HAVE HEREUNTO subscribed my name, this 2nd day of October, 2019.



CAROL GRECO, RPR
REGISTERED PROFESSIONAL REPORTER
Official Court Reporter

HW

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS) SX-14-CR-136
vs.)
EUGENE ROBERTS,)
Defendant

EUGENE ROBERTS' POST TRIAL MOTION FOR JUDGMENT OF ACQUITTAL OR FOR A NEW TRIAL

COMES NOW Eugene Roberts by and through the undersigned counsel, and hereby moves this Honorable Court pursuant to Fed. R. Crim. P. 29 (c) for a judgment of acquittal. The basis of this motion is set forth in the attached Memorandum of Law.

WHEREFORE, Eugene Roberts prays that this Court enter a ruling pursuant to Fed. R. Crim. P. Rule 29 (c) in this matter and grant Eugene Roberts an acquittal of all charges or a new trial.

Respectfully submitted,

DATED: 11/28/16

RENEE D. DOWLING, ESQ.
V.I. Bar No. 411
Attorney for Eugene Roberts
P.O. Box 1047
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and exact copy of the foregoing **Eugene Roberts' Motion for Judgment of Acquittal or for a New Trial** to be served on this 29th day of November, 2016, on

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Christiansted, VI 00820

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS) SX-14-CR-136
vs.)
EUGENE ROBERTS,)
Defendant

MEMORANDUM OF LAW IN SUPPORT OF
EUGENE ROBERTS' MOTION FOR JUDGMENT OF ACQUITTAL
OR FOR A NEW TRIAL

STATEMENT OF FACTS

The trial in this matter commenced on October 17, 2016. Eugene Roberts went to trial on a 22 Count Amended Information. On November 3, 2014, at the close of the People's case, Eugene Roberts made a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 (a), which motion was granted in part and denied in part. The jury deliberated on a Third Amended Information with 9 counts against Eugene Roberts. In the People's Third Amended Information Eugene Roberts has been charged with Murder First Degree/Principal and the lesser included offense of Murder Second Degree/Principal, Attempted Murder First Degree/Principal, Assault First Degree/Principal, Assault Third Degree/Principal, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principal (2 counts), Possession of Ammunition/Principal, Reckless Endangerment

Degree/Principal, and Unauthorized Possession of a Firearm/Principal.

Thereafter, Eugene Roberts rested his case without the introduction of any evidence. Again Eugene Roberts made a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 (a) at the close of all of the evidence. The jury returned a verdict of guilty on Attempted Murder First Degree/Principal, Assault First Degree/Principal, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principal (2 counts), Possession of Ammunition/Principal, Reckless Endangerment/Principal, and Unauthorized Possession of a Firearm/Principal. The jury acquitted Eugene Roberts on the charges of Murder First Degree/Principal, the lesser included offense of Murder Second Degree/Principal, and Assault Third Degree/Principal. Eugene Roberts now hereby moves for judgment of acquittal or in the alternative for a new trial after the jury verdict.

LEGAL ARGUMENTS

I. The People Committed Prosecutorial Misconduct During Closing Arguments Which Requires An Acquittal or the Grant of a New Trial

During closing argument the People improperly told the jury that Eugene Roberts was shot in the leg. Eugene Roberts made a timely objection, which was sustained. However, the bell had been rung, there was no taking it back. Accordingly, Eugene Roberts should have had a mistrial declared. There is no excuse for the People's behavior. It was a deliberate act. The record was clear and unambiguous that the People had presented not one scintilla of evidence that Eugene Roberts received a gunshot to his right leg. Nevertheless, in an act of desperation, the People decided at closing to bolster its argument in favor of Eugene Roberts' conviction. When prosecutorial misconduct is alleged, reversal is warranted if "that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." *United States v. Young*, 470 U.S.1, 11 (1985).

Moreover, while specific, isolated instances of misconduct may not rise to the level reversible error, their cumulative effect may nonetheless be so prejudicial that reversal is warranted. *See, e.g. Gumm v. Mitchell*, 775 F.3d 345, 382 (6th Cir. 2014)(reversing based on cumulative effect of prosecutor's misconduct); *United States v.*

Conrad, 320 F.3d 851, 856 (8th Cir. 2003)(noting the cumulative effect of the prosecutor's improper remarks); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)(''In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.''). Here, as where Eugene Roberts was not placed on the scene at the vehicle accident at Estate Morning Star, nor shown to have gotten a gunshot injury as a result of a shooting at Frontline Night Club on April 19, 2014, by any evidence whatsoever. It was prejudicial to allow the People to argue facts that were not in evidence, and that it had failed to prove in its case in chief. This amounted to prosecutorial misconduct which was highly prejudicial to Eugene Roberts.

II. Eugene Roberts was Entitled to the Disclosure of the Internal Affairs File of Sergeant Anthony Hector

Larry Williams, Jr. made a motion to compel the production of Sergeant Anthony Hector's Internal Affair Unit's file related to the investigation of his use of force on April 19, 2014. Eugene Roberts joined in that motion. The purpose of the introduction of Sergeant

Hector's IA investigation was to establish bias and a motive to testify falsely. Proof of bias is almost always relevant and is an acceptable method of attacking a witness' credibility. *U.S. v. Green*, 617 F.3d 233, 251 (3d Cir. 2010).

Accordingly, in order to properly present a full and complete defense Eugene Roberts needed the disclosure of the IA investigation so that he may cross-examine Seargeant Hector effectively. There was no opportunity for Eugene Roberts to do so as this Court denied the motion to compel this disclosure.

III. The People Committed Prosecutorial Misconduct in Withholding Exculpatory And Impeachment Material

The constitutional mandate of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) overrides the statutory mandates of the Jencks Act. *See United States v. Starusko*, 729 F. 2d 256 (3d Cir. 1984). And as such, Eugene Roberts was entitled to the discovery of all materials that were either exculpatory or impeachment materials as he requested. The People's non-disclosure of the Use of Force Report, which was prepared by Officer Naiomi Joseph was a clear violation of the

People's obligation under *Brady* and *Giglio* as this Use of Force Report contained both exculpatory and impeachment materials: much of the information in the report contradicted key government witnesses, and some of the information was exculpatory to Eugene Roberts. More importantly, the report contained information regarding other potential witnesses who were not called by the People in their case, but whom Eugene Roberts would have called had he had notice of their existence. But because the Use of Force Report was obtained by Eugene Roberts until the close of the People's case, there was no opportunity for Eugene Roberts to utilize the impeachment nature of the report as all of the People's witnesses had completed their testimony. Also, Eugene Roberts had no knowledge of the potential witnesses, did not know their identity, had not had an opportunity to interview the witnesses, nor did he have any knowledge of the witnesses whereabouts. In short, Eugene Roberts was denied the right to put forward a full and complete defense.

IV. Eugene Roberts' Motion for a Mistrial Should be Granted Because Denying It Violates His Right To Due Process

After the close of the People's case, during the presentation of Larry Williams, Jr.'s case in chief, the existence of an 8 page ''Use of Force Report'' became known to the defense. At the time that Eugene Roberts received notice of, and an actual, excerpt from the ''Use of Force Report'' he made an oral motion for a mistrial. This motion was summarily denied by the Court. In the excerpt were contradictory statements, which could have been used to impeach several of the People's witnesses on cross-examination. There was also included in the excerpt information that could have led to the discovery of exculpatory witnesses or information. All of which Eugene Roberts was denied due to the Court's refusal to compel the IA Investigation disclosure. This refusal to compel the disclosure of the IA Investigation file denied Eugene Roberts the right to due process as guaranteed by the *Fifth Amendment to the United States Constitution*.

V. A Motion to Sever Should have been Granted

On or about October 11, 2016, Defendant Larry Williams, Jr. made a *Motion to Sever*. Eugene Roberts joined in this *Motion to Sever*, which joinder was filed on or about October 13, 2016. The *People* filed an opposition to

this motion on or about October 17, 2016. In the same manner, Defendant Derick Liburd filed an opposition to the motion to sever. By his joinder Eugene Roberts fully adopted the arguments made by Larry Williams, Jr. in his *Motion to Sever*. Specifically, Eugene Roberts' endorsed the argument that the defendants should have been granted a severance because there were statements made by co-defendants and their defenses were not aligned. The Confrontation Clause of the Sixth Amendment to the United States Constitution and *Bruton v. United States,* 391 U.S. 123 and its progeny required a separate trial. Likewise, an opportunity to present a full and complete defense also dictated that the defendants should have separate trials. This Court in a Memorandum Opinion and Order dated October 25, 2016, denied the *Motion to Sever*.

VI. Eugene Roberts' Constitution Right to Due Process Was Violated Because He Was Not Allowed to Introduce His DNA Defense

Eugene Roberts gave the notice that he intended to offer (redacted) DNA Report. The *Notice of Intent to Offer [Redacted] DNA Report was filed by Derick Liburd* on or about October 7, 2016. Eugene Roberts filed a joinder on October 14, 2016. At trial, after Derick Liburd's case was

dismissed at the close of the People's case, Eugene Roberts moved to introduce the redacted DNA Report as part of his case in chief. This Court denied Eugene Roberts' motion to introduce the DNA Report. Eugene Roberts rested his case.

The denial of Eugene Roberts' motion to introduce the DNA Report, after it was redacted, violated Eugene Roberts right to due process as guaranteed by the Fifth Amendment to the United States Constitution. ''An accused has a constitutionally protected right to present a full defense, without undue interference by the Court,'' *Government of the V.I. v. Mills,* 956 F.2d 443 (3d Cir. 1992). This DNA defense went to the heart of the trial, which involved the use of several guns found in the vicinity of a car driven by one of the co-defendants. The fact that Eugene Roberts was **excluded** as an individual who handled any of the guns discovered at the Morning Star accident site on April 19, 2014, was crucial to his defense as it exonerated him of liability.

VII. Rule 29 Motion to Dismiss Count Two or Three of the Third Amended Information Should Have Been Granted Along with a Dismissal of Count Five or Six

At the close of the People's case Eugene Roberts made

a Fed. R. Crim. P. 29(a) motion to dismiss all of the counts of the People's 22 Count Amended Information. Moreover, Eugene Roberts joined in the arguments made by counsel for Larry Williams, Jr. Specifically, Eugene Roberts adopted the arguments made regarding the ruling in *Simmonds v. People*, 2013 WL 4404592. Eugene Roberts argued that there was no basis for the jury to find both Attempted Murder First Degree and Assault in the First Degree on the basis of a single incident. *Simmonds* dictates that there must be a separate and distinct incident for each charge. As such, because there was no evidence to support the two separate charges, one must be dismissed. Eugene Roberts argued again at the close of all evidence for the dismissal of Count Two or Three. By the same token, Counts Five and Six must also be revisited as they were on November 7, 2016, in a subsequent Rule 29(a) motion made at the close of all of the evidence. At that time this Court indicated that it would have to dismiss one of the counts if the jury returned a verdict of guilty as to both. Moreover, if Count Two or Count Three is dismissed, then the corresponding Count Five or six must also be dismissed.

VIII. The Denial of Eugene Roberts Motion in Limine to Prohibit the People From

Arguing that Eugene Roberts Was at Morning Star on April 19, 2014 Violated His Right to Due Process

At the close of all of the evidence, Eugene Roberts made an oral *Motion in Limine* to prohibit the People from arguing in closing that Eugene Roberts was at the scene of the motor vehicle accident at Estate Morning Star in the early hours of April 19, 2014. This motion was denied although the record contains not one scintilla of evidence that Eugene Roberts was there at the scene. Several police officers and other law enforcement personnel testified to responding the to the accident at Estate Morning Star. Additionally, several EMS personnel also testified to responding to the accident scene on April 19, 2014. However, none of these law enforcement or EMS personnel testified that Eugene Roberts was on the scene at this accident. This was a glaring hole in the People's case, as the occupants of the vehicle involved in the accident at Estate Morning Star were directly related to the shooting at Frontline Night Club.

This Court improperly allowed the People to argue at closing that Eugene Roberts was at the scene at Estate

Morning Star even though there was no evidence to support this fact.

IX. The Evidence Was Insufficient to Sustain a Conviction on Counts 2,3,5,6,7,8, & 9 of the Third Amended Information

On Count Two, Eugene Roberts is charged with Attempted Murder in the First Degree. There is no evidence of any willful, premeditated, deliberation on the part of Eugene Roberts against Roscar Hurtault. Nothing in the record suggests that the shooting ot Roscar Hurtault was anything other than what the witness described: a crime of opportunity. Defendant is alleged to have come around the vehicle and shot Roscar Hurtault without any rhyme or reason. There was no premeditation or deliberation. Count Three is a crime charging the same incident as that in Count Two, i.e., the shooting of Roscar Hurtault. Pursuant to *Simmonds v. People*, 2013 WL 4404592 as it charged a single event in two counts. Likewise, the corresponding Counts Five and Six must also fail when Counts Two and Three fail since it is imperative that the underlying crimes be proven first to sustain convictions for possession of a firearm during the commission of a crime of violence. As to Count Seven, Possession of Ammunition, the

People failed to prove and an essential element of the crime. Namely, the People failed to prove that Eugene Roberts were not employed by or a federal agent at the time he was alleged to have been in possession of ammunition. On Count Eight there is likewise insufficient evidence as there conflicting testimony that Eugene Roberts was the person shooting at Frontline. Sergeant Hector testified that he was tackled and shot by Lester Roberts. The People theorized that the person who shot Sergeant Hector ran after him and chased him down to shoot him. The evidence shows that the gun belonging to Sergeant Hector is responsible for the casings left at the area where Roscar Hurtault was shot. It stands to reason that the person who was recklessly endangering others was either Sergeant Hector or Lester Roberts who is alleged to have taken his gun. Finally, Count Nine has no evidence to sustain it where, as here, Eugene Roberts was never placed on the scene at Estate Morning Star, nor was there any evidence that he was shot on April 19, 2014. To infer that he was there and responsible for the shootings is a big stretch which the law does not allow a finder of fact to make.

There must be a modicum of evidence to support the inference. *Hughes v. People*, 2013 V.I. Supreme LEXIS 80.

X. Eugene Roberts Proposed Jury Instruction Re: Impermissible To Infer Participation From Association Should Have Been Given

On November 7, 2016, Eugene Roberts proposed the following jury instruction:

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

You may not infer that any defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

Sand, et.al., Modern Federal Jury Instructions.
Instruction 6-4 (2005)

The testimony at trial was that the co-defendants had been at the Frontline together in a group drinking at the bar. They were associating together. As such, Eugene Roberts proposed the above-referenced instruction, which was relevant and appropriate to the facts in evidence. The Court decided not to give this instruction. Eugene Roberts should have been granted the opportunity to have the jury consider this instruction.

CONCLUSION

For the reasons presented and the authorities cited, this Motion for Judgment of Acquittal or for a New Trial should be GRANTED.

Respectfully submitted,

DATED: 11/28/16

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and exact copy of the foregoing **Eugene Roberts' Memorandum of Law in Support of Motion for Judgment of Acquittal or for a New Trial** to be served on this 28 day of November, 2016. on

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IN THE SUPREME COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
****

EUGENE ROBERTS,	)	
	)	**SCT-CRIM-2019-0051**
Appellant,	)	
	)	
vs.	)	
	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Appellee.	)	
	)	

ON APPEAL FROM A JUDGMENT AND COMMITMENT ENTERED BY THE SUPERIOR COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX (SX-2014-CR-00136)

APPELLANT'S BRIEF

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. Basis for Subject Matter Jurisdiction in the Superior Court.

Eugene Roberts was charged in an Information dated May 20, 2014, with multiple criminal violations of Virgin Islands law. "Subject to the concurrent jurisdiction on the District Court of the Virgin Islands by sections 21 and 22 of the Revised Organic Act of the Virgin Islands, as amended, the Superior Court shall have original jurisdiction in all criminal actions." 4 V.I.C. §76(b).

B. Basis for Jurisdiction in the Supreme Court.

Authority over "all appeals from the decisions of the courts of the Virgin Islands established by local law is conferred on the Supreme Court of the Virgin Islands." 48 U.S.C. §1613a(d). The Supreme Court of the Virgin Islands also was granted jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court. 4 V.I.C. §32(a). Since the May 20, 2019, Judgment and Commitment of the Superior Court is a final order it grants this Court jurisdiction over this appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the Trial Court Erred in Denying the Rule 29 Motions for Count Two Attempted Murder First Degree and Count Three Assault First Degree?

II. Whether there was Insufficient Evidence to Sustain the Convictions for Count Two Attempted Murder and Count Three Assault First Degree?

III. Whether there was Insufficient Evidence to Sustain the Conviction for Count Seven Possession of Ammunition/Principal?

IV. Whether the Trial Court Erred by Not Vacating the Conviction on Count Three Assault First Degree at Sentencing?

V. Whether the Trial Court Erred in Not Compelling the Production of the Use of Force Report in its Entirety?

VI. Whether the Trial Court Erred by Failing to Grant a Mistrial Due to the People's Continuous Violation of Their Discovery Requirements and the Method of *In Camera* Review that was Utilized?

VII. Whether the Trial Court Erred by Failing to Grant a Judgment of Acquittal or New Trial Due to the Cumulative Effect of the Prosecutorial Misconduct in this Matter?

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case is related to the matter of *Larry Williams, Jr. v. People of the Virgin Islands*, SCT-CRIM-2019-0051. The undersigned is not aware of any other related cases or proceedings at this time.

STATEMENT OF THE CASE

Eugene Roberts was arrested on April 19, 2014, and charged on May 20, 2014, by a twenty-two (22) count Information with Murder First Degree/Principals, Attempted Murder First Degree/Principals (2 counts), Assault First Degree/Principals (3 counts), Assault Third Degree/Principals, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principals (4 counts), Possession of Ammunition/Principals, Reckless Endangerment First Degree/Principals, Unauthorized Possession of a Firearm/Principals (5 counts),

Robbery First Degree/Principals, Grand Larceny/Principals, Possession of Stolen Property/Principals and Conversion of Government Property/Principals. It appears that the People intended to amend the Information, although no such document appears on the docket. A Second Amended Information was filed on November 4, 2016, and a Third Amended Information was filed November 9, 2016. The initial Information charged five (5) individuals as principals: Elijah Felix, Eugene Roberts, Derick Liburd, Lester Roberts and Larry Williams, Jr. The purported Amended Information only charged three (3) defendants: Eugene Roberts, Derick Liburd and Larry Williams, Jr. The Second Amended Information and Third Amended Information charged two defendants: Eugene Roberts and Larry Williams, Jr.

The trial in this matter began on October 17, 2016, with jury selection and the matter lasted several weeks. At the conclusion of the People's case in chief, Eugene Roberts made a Rule 29 motion for judgment of acquittal. Mr. Roberts' Motion for Judgment of Acquittal was successful in reducing the number of counts against him from twenty-two (22) to ten (10) and then eventually nine (9). On November 14, 2016, the jury returned its verdict in this case finding him guilty of seven (7) of the nine (9) counts. Roberts was convicted on Counts Two, Three, Five, Six, Seven, Eight and Nine of the Third Amended Information.

At the conclusion of the trial of this matter Eugene Roberts made a *Motion for Judgment of Acquittal* pursuant to Fed. R. Crim. P. 29(c). This motion was denied

by the trial court. However, at sentencing the court vacated the convictions on Counts Five, Eight and Nine. Roberts was sentenced on the remaining four counts to thirty-five (35) years in prison. He filed a timely *Notice of Appeal* on June 11, 2019.

STATEMENT OF THE FACTS

In the early morning hours of April 19, 2014, there was a shooting at the Frontline Nightclub in Estate Colquohoun, Christiansted, St. Croix. Kenya Stanley and her fiancé Matthew Vernege were at the nightclub when a male individual came up to her and started talking (J.A. 000981; J.A. 000985-J.A.000986). Her fiancé and the male individual argued when the fiancé confronted him (J.A. 000989). Thereafter, Kenya Stanley and Matthew Vernege left the nightclub and went into their vehicle in the parking lot of Frontline Nightclub (J.A. 000990). Kenya Stanley saw one male individual who then engaged in an exchange of shots with Matthew Vernege (J.A. 001000). Matthew Vernege sustained multiple gunshot wounds and he succumbed to his injuries.

Anthony Hector, an off-duty police sergeant, was inside the Frontline Nightclub at the time of the shooting (J.A. 001068). Sergeant Hector responded to the shots by coming out of the nightclub with his gun drawn (J.A. 001070). He saw two male individuals shooting into a pickup truck, which was later identified as the vehicle belonging to the deceased Matthew Vernege (J.A. 001072). Sergeant Hector

ordered the individuals to drop their weapons, and when they did not obey he aimed and fired at the individuals (J.A. 001072). Sergeant Hector shot the first individual and he buckled and then he shot the second individual and also saw him buckle (J.A. 001072-J.A. 001073). Sergeant Hector was tackled from behind and landed on the ground (J.A. 001073). At this time Sergeant Hector lost his weapon when it flew out of his hand. *Id.* Then Sergeant Hector got up and ran from the scene to a road adjacent to the nightclub. *Id.* While he was fleeing Sergeant Hector called 911 (J.A. 001074). He also observed several individuals get into a vehicle and flee the scene at Frontline Nightclub. *Id.* Sergeant Hector received a gunshot wound to the left side of his body below his armpit (J.A. 001117). Sergeant Hector identified the individuals who he shot as Larry Williams, Jr. and Eugene Roberts (J.A. 001072-J.A. 001073). Sergeant Hector identified the person who tackled him to the ground as Lester Roberts (J.A. 001102).

Roscar Hurtault also received gunshot wounds at the Frontline Nightclub on April 19, 2014 (J.A. 001299). Hurtault was hiding alongside a vehicle in the company of some females when he heard the shots ring out (J.A. 001294). While there was a break in the shooting, the females got in their vehicle and left the scene, but Hurtault advanced closer to the shooting and hid to the side of a white pickup truck (J.A. 001296). Hurtault saw the police officer he calls "Rebel" come out of Frontline and pandemonium broke loose (J.A. 001297). People started screaming

and running; shooting came from every direction (J.A. 001298). A male individual ran from the front of the truck, and Hurtault made room for him on the side of the truck. *Id.* The individual said something, Hurtault turned and looked at him and the individual started shooting at Hurtault. *Id.* Hurtault heard five shots (J.A. 001299). Hurtault had to have surgery for his injuries (J.A. 001306). While he was in the hospital, someone showed him a copy of the St. Croix Avis with the picture of Eugene Roberts identified as a suspect who had been arrested for the Frontline Nightclub shooting (J.A. 001368). Subsequently, Mr. Hurtault identified the individual who shot him as Eugene Roberts in a photo array shown by Detective Dino Herbert after he left the Juan Luis Hospital (J.A. 001313).

The police responded to the Frontline Nightclub and began processing the crime scene. Shortly after the shooting incident at Frontline Nightclub, another call came in to 911 reporting a vehicle accident in the area of Estate Morning Star on the Northshore Road. Police officers Melford Murray, Rolando Huertas, Hermina Rivera, Arthur Joseph, Gregory Bennerson, and Corporal Luis Encarnacion responded to the accident scene at Estate Morning Star. Also responding to the accident scene were the EMTs Marlon Anthony, Jacqueline Greenidge Payne and Jeremy Galloway. The police officers were there to process the scene. The EMTs were there to treat and transport individuals from the accident scene to the Juan Luis Hospital. None of the police officers nor any of the EMTs related seeing, treating

or transporting Eugene Roberts from the scene of the accident at Estate Morning Star.

On April 15, 2016, Larry Williams, Jr. filed a Motion to Compel Personnel Records and Internal Affairs Files of Sergeant Anthony Hector (J.A. 000098-J.A. 000107). Eugene Roberts on April 21, 2016 filed a Joinder in Larry Williams, Jr.'s Motion to Compel Personnel Records and Internal Affairs Files of Sergeant Anthony Hector (J.A. 000108).

The Trial Court held a Hearing on the Motion to Compel on April 28, 2016 (J.A. 000112). The Trial Court specifically ordered the People to produce the Use of Force Report from the April 19, 2014 incident and required as follows:

> THE COURT: But, but **regardless of what you find in his disciplinary records, I think if he made a statement to Internal Affairs regarding the discharge of his weapon on the night in question, that is discoverable to Defense**. I know when the police give their statements they are – **there is an agreement between them and the police department that it's confidential, but in this particular case under these particular circumstances that's not going to happen**.
>
> MS. WATSON: Okay, I'll let them know.
>
> THE COURT: **That has to be shared with Defense**.
>
> MS. WATSON: No problem.

(J.A. 000121) (emphasis added). The Trial Court also required the People to communicate the results of the People's review of the records in writing to the Court and to copy all Parties. The Trial Court required as follows:

> MS. WATSON: How would the Court like for me to communicate to you regarding my completion of the review?
>
> THE COURT: I would imagine you can do that in writing and you share – **and you copy it to all of the parties**.
>
> MS. WATSON: Okay, I will do it.

(J.A. 000127)(emphasis added). The Trial Court also set a deadline of April 29, 2016 at 5:00 p.m. for the People to report the results of the review of Sergeant Hector's files to the Court and all parties (J.A. 000127-J.A. 000128).

The Trial Court also issued an April 28, 2016 Order requiring the Internal Affairs Unit ("IAU") of the Virgin Islands Police Department ("VIPD") to allow the Attorney General, or his designee, to make copies of all statements, reports or other documentation contained in its files regarding Sergeant Anthony Hector so that the Court could make an *in camera* review of the same (J.A. 000109). However, the Trial Court's April 28, 2016 Order did not rescind the Trial Court's ruling from the bench to provide the Use of Force Report regarding the April 19, 2014 incident to the Court and all of the parties by 5:00 p.m. on April 29, 2016 (J.A. 000127-J.A. 000128).

Counsel for the People on April 29, 2016 emailed the Trial Court and copied all of the Defense Counsels indicating that Counsel for the People reviewed all of Sergeant Hector's Internal Affairs files and because the Courthouse was close on April 29, 2016, the results of the search would be submitted on May 2, 2016 (J.A.

000129). Counsel for Larry Williams, Jr. emailed Counsel for the People on April 29, 2016 and reminded Counsel for the People of the Trial Court's Order from the bench to provide certain information to Defense Counsel by 5:00 p.m. on April 29, 2016 (J.A. 000130).

Counsel for the People wrote a letter to the Trial Court dated May 2, 2016 and submitted materials for the Trial Court's *in camera* review (J.A. 000110). Counsel for the People did not copy Defense Counsels on the May 2, 2016 letter. Moreover, Counsel for the People did not submit the Use of Force Report regarding the April 19, 2014 incident to either the Court or to Defense Counsels and as required by the Trial Court's Order from the bench on April 28, 2016 (J.A. 000121). Counsel for the People indicated in the May 2, 2016 letter that she reviewed the IAU file concerning the April 19, 2014 incident and thirty-one (31) additional IAU files regarding Sergeant Hector (J.A. 000110). The Trial Court later admitted that the Trial Court did not immediately review the May 2, 2016 letter and materials from Counsel for the People because the Clerk's Office of the Superior Court docketed the letter and placed it in the Court's file (J.A. 000268).

On May 9, 2016, Larry Williams, Jr. filed a Motion to Show Cause, along with relevant exhibits (J.A. 000111-J.A. 000130). Eugene Roberts on June 22, 2016 filed a Joinder to Larry Williams, Jr.'s Motion to Show Cause (J.A. 000131). Larry Williams, Jr. on July 11, 2016 filed a Motion for Ruling on Motion to Show Cause

(J.A. 000132-J.A. 000135). On July 11, 2016 Eugene Roberts filed a Joinder to Larry Williams, Jr.'s Motion for Ruling on Motion to Show Cause (J.A. 000136).

Counsel for the People on July 27, 2016 submitted Supplemental Discovery to Defense Counsels of Internal Affairs Blood Alcohol results regarding Sergeant Hector (J.A. 000137-J.A. 000138). On July 29, 2016 (Pleading misdated as June 29, 2016), Counsel for the People submitted an Informational Motion to the Trial Court advising that Counsel for the People conducted a search for and review of Sergeant Hector's personnel and internal affairs files in July of 2016 and that with the possible exception of the clinical laboratory report dated April 23, 2014 and provided to Defense Counsel on July 27, 2016, Counsel for the People did not locate any information or material that reasonably bear on Sergeant Hector's credibility or character for truthfulness (J.A. 000137-J.A. 000138).

After the conclusion of Sergeant Hector's testimony in the People's case in chief, a one (1) page "Incident Summary" of a Use of Force Report that consisted of a total of eight (8) pages with respect to the April 19, 2014 incident was provided to Defense Counsels on November 4, 2016 (J.A. 000139). The "Incident Summary" indicates thereon that it is page one (1) of eight (8). Defense Counsels were never provided with a full copy of the Use of Force Report and as Ordered by the Trial Court on April 28, 2016 (J.A. 000121). Defense Counsels learned of the existence of the Use of Force Report in speaking with an IAU Agent (J.A. 002607-J.A.

002613). Moreover, Defense Counsels requested a copy of this Use of Force Report in their Discovery Demands and was the subject of a Motion to Compel, a Motion to Show Cause and a Motion for Ruling on the Motion to Show Cause. Additionally, the Use of Force Report was not provided to Defense Counsels after the direct examinations of witnesses for the People who were interviewed in the preparation of the Use of Force Report. Counsel for the People provided the Trial Court with a full copy of the Use of Force Report for the first time on November 4, 2016 and after the conclusion of the People's case in chief. The Trial Court on November 4, 2016 conducted an *in camera* review of the Use of Force Report and the Trial Court provided Defense Counsels with a verbal "summary" of what was in the Use of Force Report without providing a full copy of the Use of Force Report and only the first page of an "Incident Summary" was provided to Defense Counsels (J.A. 002615-J.A. 002621; J.A. 000139).

Eugene Roberts on November 4, 2016 made a Motion for Mistrial as a result of the People's willful and continued withholding of the Use of Force Report and Larry Williams, Jr. joined in the Motion for Mistrial (J.A. 002659-J.A. 002665). The Trial Court denied the Motion for Mistrial (J.A. 002666-J.A. 002667).

Counsel for the People in Rebuttal Closing claimed that Eugene Roberts got shot in the leg (J.A. 002971). Sergeant Hector never testified to shooting Eugene Roberts in the leg. Moreover, there was no testimony from any other individual at

the trial in this matter that Eugene Roberts was shot in the leg. Thus, Eugene Roberts objected to this false statement by Counsel for the People and the Trial Court sustained the objection (J.A. 002971). Counsel for the People is not allowed to make up their own facts or misstate the facts, even in Closing.

Counsel for the People claimed in Opposition to Eugene Roberts' Motion for Judgment of Acquittal or for a New Trial that even if there was no evidence at trial showing that Roberts was shot in the leg, there was no prejudice because the jury was instructed on the issue (J.A. 000235–J.A. 000236). Nevertheless, the Trial Court erred in denying the Motion for Judgment of Acquittal or New Trial made by Eugene Roberts as a result of the cumulative effect of the prosecutorial misconduct in this matter (J.A. 000217–J.A. 000232).

ARGUMENTS

A. THE TRIAL COURT ERRED IN DENYING THE RULE 29 MOTIONS FOR COUNT TWO ATTEMPTED MURDER FIRST DEGREE AND COUNT THREE ASSAULT FIRST DEGREE.

The conviction on the charges of Attempted Murder First Degree and Assault First Degree, Count Two and Count Three of the Information, respectively, violates the principle of *Simmonds v. People,* 58 V.I. 480 (2013). Here, unlike in *Simmonds,* there was no evidence to establish both attempted murder and the assault. The witness, Roscar Hurtault, testified to one incident of a shooter firing five shots at him and hitting him twice (J.A. 001290-J.A.001393). Here the facts are different.

Unlike *Simmonds* where there was a first volley of shots striking the victim in a non-fatal manner, and then a second volley of shots after *Simmonds* moved closer to the victim and shot him in the head. Roberts was found to have shot five times at Hurtault in a single continuous action. There were no two separate shootings of Hurtault such that you have an assault and an attempted murder. More specifically, Hurtault counted five shots, seemingly one after the other as Roberts stood over him (J.A. 001299).

Roberts first raised this issue in his Rule 29 motion for judgment of acquittal made at the close of the People's case (J.A. 002484). The second time Roberts raised this argument was during the conference on the jury charge. Roberts renewed his Rule 29 argument for dismissal a second time with permission of the court (J.A. 002869). Roberts raised this issue yet a third time when he made a Rule 29(c) motion for judgment of acquittal after the verdict was entered (J.A. 000217-J.A. 000232).

B. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS FOR COUNT TWO ATTEMPTED MURDER AND COUNT THREE ASSAULT FIRST DEGREE.

Both of the crimes charged in Counts Two and Three of the Third Amended Information requires Roberts to have acted either willfully, deliberately, and/or with premeditation and malice aforethought (J.A. 000146). Count Two charges Roberts with Attempted Murder in the First Degree for which the elements include: 1) that Defendant attempted to kill a human being, Roscar Hurtualt; 2) that Defendant acted

with malice aforethought; and 3) that Defendant acted willfully, deliberately, and with premeditation, among others. Count Three charges Roberts with Assault in the First Degree, which includes this element: 2) That Defendant did so with the intent to murder that person; among others. The Virgin Islands Code defines murder as "the unlawful killing of a human being with malice aforethought." 14 V.I.C. §921. Consequently, both charges require a finding of the element of malice aforethought, and Count Two requires the additional element of premeditation and deliberation. However, the record herein is devoid of any facts that would justify such a finding of either malice aforethought or premeditation and deliberation. There is no evidence of any willful, premeditative, deliberation on the part of Eugene Roberts against Roscar Hurtault. Nothing in the record suggests that the shooting of Roscar Hurtault was anything other than what the witness described: a crime of opportunity (J.A. 001290-J.A.001393). As further evidence that Roberts was not targeting Hurtault with any malice aforethought, Hurtault was not even concerned with being shot again as he laid on his stomach under the truck looking out on the scene (J.A. 001346-J.A.001347). A person who is trying to murder you is not going to leave you there lying on your stomach looking out and walk away.

C. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR COUNT SEVEN POSSESSION OF AMMUNITION/PRINCIPAL.

14 V.I.C. §2256(a) reads:

> (a) Any person who is not:

> (1) a licensed firearms or ammunition dealer; or
> (2) officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties; or
> (3) holder of a valid firearms license for the same firearm gauge or caliber ammunition of the firearm indicated on such license; and
> (4) who possesses, sells, purchases, manufactures, advertises for sale, or uses any firearm ammunition
>
> is guilty subject to imprisonment for up to seven years or a fine not more than $10,000 to both fine and imprisoned.

As Eugene Roberts was charged herein with possession of ammunition according to the statute 14 V.I.C. §2256(a), it was incumbent upon the People to prove not only that Roberts was not licensed to carry or possess a firearm and/or ammunition in the Territory, but also that Roberts was (1) not a licensed firearms or ammunition dealer or (2) not an officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties. At trial the people relied on the testimony of Karen Stout, Supervisor of Firearms Bureau. Ms. Stout gave testimony that Roberts was not licensed to carry or possess a firearm and/or ammunition in the District of St. Croix and in the District of St. Thomas, St. John and Water Island (J.A. 001993-J.A. 001996). However, Ms. Stout did not shed any light on the fact of whether Roberts was a licensed firearms or ammunition dealer, nor on the fact of whether Roberts was an officer, agent or employee of the Virgin Islands, or the United States, on duty and acting within the scope of his duties. Moreover, the People did not call any other witness, nor introduce any other evidence to establish that these elements of the crime charged were met. This Court

has established that it will affirm a verdict "so long as the evidence, when viewed in the light most favorable to the People—including the benefit of all reasonable inferences—would allow a rationale jury to find all elements of each offense proven beyond a reasonable doubt. *Ponce v. People,* 2020 VI 2, citing *Fahie v. People,* 62 V.I. 625, 630 (V.I. 2015).

Initially Roberts raised an argument for dismissal of Count Seven, which at trial was Count Twelve, on other grounds (J.A. 002485-J.A. 002486). Then in his Rule 29(c) motion for judgment of acquittal, Roberts raised the issue of the missing elements of the crime. (J.A. 000229-J.A. 000230).

D. THE TRIAL COURT ERRED BY NOT VACATING THE CONVICTION ON COUNT THREE ASSAULT FIRST DEGREE AT SENTENCING.

Eugene Roberts' conviction on Count Three Assault First Degree of the Third Amended Information should have been vacated at sentencing. Notwithstanding the fact that the trial court recognized the law regarding multiple convictions based upon the same set of facts, the court erred in sentencing Roberts on both Count Two Attempted Murder First Degree and Count Three Assault First Degree. The two arguments that could be raised here are: first, the prohibition against being punished for the same offense multiple times, and second, the constitutional prohibition on double jeopardy. The first is codified by the Legislature of the Virgin Islands under 14 V.I.C. §104, and the second arises out of the Double Jeopardy Clause of the Fifth

Amendment. U.S. CONST. amend. V. The United States Supreme Court established the "*Blockburger"* test to determine if the Double Jeopardy Clause has been violated. *Blockburger v. United States,* 284 U.S. 299 (1932). In accordance with this Court's rationalization in *Titre v. People,* 70 V.I. 797 (2019), Roberts argues that his constitutional right founded in the Double Jeopardy Clause of the Fifth Amendment was violated by the trial court not dismissing Count Three Assault First Degree and sentencing him on both Count Two Attempted Murder First Degree and Count Three Assault First Degree. The *Titre* decision was reaffirmed by this Court in *Glenwood David III v. People,* 2020 WL 3086465. Here, as in *Titre,* the "Blockburger" test is satisfied because the People were not required to prove any additional elements to obtain a conviction for Count Three Assault First Degree. Although it appears that the trial court recognized such when it opined, "Now, on the flip side, if a jury were to bring back a verdict for attempted murder first degree and assault first degree -- it is not -- the Court will not be able to sentence the defendant for both of those charges. One of the charges would have to be dismissed." (J.A. 002873), it did not apply the law at the time of sentencing Roberts. This rule was again reexamined in *Celestine v. People of the Virgin Islands,* 2020 WL 3270737. There, in affirming the rule, this Court restated the holding that a new legal rule will by default apply retroactively to "all pending cases, whether or not these cases involve predecision events." *Mercer v. Bryan,* 53 V.I. 595, 601 (V.I. 2010).

E. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL DUE TO THE PEOPLE'S CONTINUOUS VIOLATION OF THEIR DISCOVERY REQUIREMENTS AND THE METHOD OF *IN CAMERA* REVIEW UTILIZED.

Rule 16 of the Federal Rules of Criminal Procedure (the Federal Rules of Criminal Procedure were applicable to proceedings in the Superior Court at the time of trial in this matter in 2016), required the disclosure of the complete Use of Force Report prepared by IAU of the VIPD with respect to the April 19, 2014 incident wherein Sergeant Hector discharged his firearm. A full copy of the Use of Force Report should have been provided to Defense Counsels in response to the Discovery Demands in this matter, however, it was not provided to Defense Counsels. Thus, Defense Counsels made a Motion to Compel, a Motion to Show Cause and a Motion to Dismiss as a result of Counsel for the People's continuous and willful failure to disclose the Use of Force Report, even after the Trial Court Ordered the disclosure of the Report on April 28, 2016. It was only after Sergeant Hector testified during the People's case in chief that the People provided the Trial Court on November 4, 2016 with the Use of Force Report from the April 19, 2014 incident for an *in camera* review. The Trial Court then released to Defense Counsels a 1 page "Incident Summary" of a Report that consisted of a total of 8 pages. Thus, the Trial Court erred by failing to require that the People produce the full report of the IAU investigation regarding Sergeant Hector's discharge of his firearm on April 19, 2014

and this error should result in either a Judgment of Acquittal or New Trial for Eugene Roberts.

The Trial Court on April 28, 2016 clearly and unequivocally required that Counsel for the People produce the Use of Force Report regarding the April 19, 2014 incident to Defense Counsel by no later than 5:00 p.m. on April 29, 2016. April 29, 2016 came and went and Counsel for the People did not email the Use of Force Report to Defense Counsels. On May 2, 2016, Counsel for the People submitted a letter and materials to the Trial Court, however, Counsel for the People did not copy Defense Counsels on the letter to the Trial Court and Counsel for the People did not provide the Use of Force Report. Counsel for the People in the May 2, 2016 transmittal of materials to the Trial Court did not include the Use of Force Report concerning the April 19, 2014 incident.

Counsel for the People indicated that she conducted a review of Sergeant Hector's IAU files at the VIPD on April 28, 2016 and reviewed a total of thirty-two (32) files, however, the Use of Force Report concerning the April 19, 2014 incident with respect to Sergeant Hector was not even provided to the Trial Court in April of 2016 for an *in camera* review nor was it provided to Defense Counsels via email as had been Ordered by the Trial Court. A different Counsel for the People conducted another review of Sergeant Hector's IAU files in July of 2016 and still the Use of Force Report concerning the April 19, 2014 incident was neither provided to the

Court for an *in camera* review nor to Defense Counsels. The very first time that the Trial Court received a copy of the Use of Force Report concerning the April 19, 2014 incident was after Sergeant Hector had already testified in the People's case in chief. Thus, Eugene Roberts' rights to confront witnesses and to due process were infringed upon because of the People's willful and continuous failure to disclose the Use of Force Report from the April 19, 2014 incident. Moreover, Sergeant Hector had already testified in the People's case in chief at the time that Defense Counsels were provided with the 1 page "Incident Summary" and thus it was provided at a time when Defense Counsels had already completed the cross-examination of Sergeant Hector. Additionally, the Trial Court only allowed the release of a 1 page "Incident Summary" from a Report that consisted of a total of 8 pages.

The Trial Court erred by effectively requiring that Counsel for the People conduct an "*in camera*" review of Sergeant Hector's IAU files and determine what information and materials to submit to the Trial Court for an *in camera* review by the Trial Court. The Trial Court incorrectly allowed Counsel for the People to determine whether materials contained in Sergeant Hector's IAU files were either exculpatory, of impeachment value or affecting Sergeant Hector's credibility or truthfulness. It is the responsibility of Defense Counsels in defense of a client to determine whether or not information is of impeachment or exculpatory value or affecting credibility and truthfulness or pertinent to the defense of a case and the

Trial Court prevented Defense Counsels from exercising this role by precluding Defense Counsels from reviewing Sergeant Hector's IAU files.

Counsel for the People on April 29, 2016 reviewed thirty-two (32) IAU files with respect to Sergeant Hector, however, the Use of Force Report from the April 19, 2014 incident was not submitted to the Trial Court and Defense Counsels. The Trial Court Ordered from the bench on April 28, 2016 that if Sergeant Hector made a statement to IAU regarding the April 19, 2014 discharge of his firearm, the statement must be disclosed to Defense Counsels. Counsel for the People ignored that Order and did not submit the Use of Force Report regarding the April 19, 2014 incident to the Trial Court or Defense Counsels. Defense Counsels filed a Motion to Show Cause and a Motion for Ruling on the Motion to Show Cause because of the People's failure to produce the Use of Force Report concerning the April 19, 2014 incident. A different Counsel for the People reviewed Sergeant Hector's IAU files in July of 2016 and still the Use of Force Report regarding the April 19, 2014 firearm discharge by Sergeant Hector was not provided to the Trial Court and Defense Counsels. Even after Sergeant Hector completed his testimony on direct examination by Counsel for the People, the Use of Force Report from the April 19, 2014 incident was not provided to Defense Counsels. Moreover, Defense Counsels were entitled to receive a full copy of the Use of Force Report to prepare their defenses and to cross-examine witnesses at the trial in this matter.

The Supreme Court of the United States held that after a witness in a criminal action has testified on direct examination for the prosecution and upon motion by the defense, the prosecution must produce for inspection all written reports or statements made by the witness concerning the subject matter of the testimony. *Jencks v. United States*, 353 U.S. 657, 668, 77 S.Ct. 1007, 1013 (1957). The Use of Force Report was concerning the April 19, 2014 incident and at a minimum, the Use of Force Report should have been at the conclusion of Sergeant Hector's direct examination by the prosecution or any other witness' direct examination and who provided a statement for the Use of Force Report.

In a case that is analogous to this case, it was held that it was error to not allow a defendant through counsel to review statements made by police officers as part of an Internal Affairs investigation and that the error was not harmless. *Robinson v. State*, 354 Md. 287, 313, 730 A.2d 181, 195 (1999). Moreover, in *Robinson* it was noted "that it is defense counsel, rather than the trial judge, who should review a witness's prior statement for inconsistency with his or her trial testimony." *Robinson*, 354 Md. at 311, 730 A.2d at 193-94 (Citing *Jencks v. United States*, 353 U.S. at 669, 77 S.Ct. at 1014; *Carr v. State*, 284 Md. 455, 472-73, 397 A.3d 606, 615 (1979); and *Leonard v. State*, 46 Md.App. 631, 421 A.2d 85 (1980)). Finally, the court in *Robinson* found that an *in camera* review by the trial court when a "defendant has a particularized need for access to the officers' statements, to test the

officers' trial testimony" is not harmless error and the court reversed a conviction and ordered a new trial. *Robinson*, 354 Md. at 311-18, 730 A.2d at 194-97. *See, also Commonwealth v. French*, 396 Pa.Super. 436, 453-54, 578 A.2d 1292, 1301 (1990), *aff'd*, 531 Pa. 42, 611 A.2d 175 (1992) wherein it was concluded that where officers are witnesses at trial, the court's denial of access to defense counsel of the police witnesses' statements in an internal affairs investigation constituted error. The court in *French* noted that because of the adversarial system of justice, a trial court's *in camera* review of statements and determination that it is without impeachment value and of no use to the defense is one that is reached without the benefit of an advocate's eye. *French*, 396 Pa.Super. at 455, 578 A.2d at 1301. The court in *French* also stated that a trial court is not in a position to determent the value that a prior statement has for the defense without first allowing defense to inspect the statement and hearing arguments from defense after the inspection. *French*, 396 Pa.Super. at 455, 578 A.2d at 1301-02 (quoting *Commonwealth v. Hamm*, 474 Pa. 487, 498-99. 378 A.2d 1219, 1225 (1977). In another case from Pennsylvania it was contended by the prosecution that the trial court should conduct an *in camera* review of statements and it was noted that the Pennsylvania Supreme Court "has been unequivocal in its insistence that defense counsel be included in any review of potentially exculpatory, non-privileged information." *See Commonwealth v. Mejia-Arias*, 199 Pa.Super. 147, 734 A.2d 870, 877 (1999) (citations omitted).

The Trial Court erred by allowing two (2) Counsels for the People to review the thirty-two (32) IAU files regarding Sergeant Hector and determine what information contained therein was of impeachment value, of value to the defense and whether the information affected Sergeant Hector's credibility and truthfulness. Defense Counsels should have been given the opportunity to review Sergeant Hector's IAU files to determine what information contained therein was useful to the defense. After review of the IAU files by Defense Counsels, the Trial Court would be the ultimate decider of whether or not the information was admissible or if it could be utilized at trial. The Trial Court's error was further compounded by the People not even providing the Use of Force Report regarding the April 19, 2014 incident to the Trial Court or Defense Counsels in a timely manner. The first time that the Trial Court was provided with a copy of the Use of Force Report from the April 19, 2014 incident was on November 4, 2016 and after the People had concluded their case in chief. Thus, Defense Counsels could not utilize the Use of Force Report to cross-examine witnesses or for impeachment purposes. Moreover, Defense Counsels were only provided with a copy of a one (1) page "Incident Summary" of a Use of Force Report that contained a total of eight (8) pages. For all of the foregoing reasons, it is respectfully requested that this Honorable Court reverse the convictions in this matter and order a new trial. The Trial Court's errors

in this matter were not harmless and Eugene Roberts was deprived of his rights to due process and to confront witnesses as a result of these errors.

F. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE FULL DISCLOSURE OF THE USE OF FORCE REPORT AND IN VIOLATION OF *BRADY/GIGLIO.*

The trial court erred in not compelling the production of the Use of Force Form in its entirety as requested in discovery. The Use of Force Form contained information that was exculpatory for Roberts, which information could have been used to impeach the prosecution's witnesses, and it should have been turned over to the defense pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). The excerpt of the Use of Force Report was only revealed to Roberts when the Internal Affairs Representative was about to testify in the trial (J.A. 002412). Agent Latefah Klyvert was called as a witness by Larry Williams, Jr. At the time Agent Klyvert was preparing to take the witness stand the People had concluded its case in chief, all of its witnesses had testified, and it had rested (J.A. 002365). Only after Attorney Walker made the oral request at trial did Roberts get an excerpt of the Use of Force form which was prepared after the shooting at Frontline on April 19, 2014 (J.A. 002419). The Court had finally reviewed the Use of Force Form after the insistence of Attorney Walker (J.A. 002416-002417). The Court presented a synopsis of the information contained in the Use of Force Form, which synopsis made no mention of Eugene Roberts as being

involved in this incident (J.A. 002419-002420). Roberts was never allowed to view the Use of Force Form in its entirety; he must rely on the excerpt or summary given and the synopsis made on the record by the trial court (J.A. 000139).

This Court repeated its explanation that a *Brady* violation occurs when the prosecution suppresses evidence favorable to a criminal defendant "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *People v. Ward,* 55 V.I. 829, 842 (2011) citing *Stevens v. People,* S. Ct. Crim. No. 2010-0001, 2011 WL 3490547.

In order "to prevail on a *Brady* claim the defendant must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense." *Ward,* 55 V.I. at 842 (citing *Bowry v. People,* 52 V.I. 264, 268 (V.I. 2009)). In the case at bar, Roberts meets the first prong in that the Use of Force Report was not produced to Roberts in its entirety ever; and the excerpt that was made available was not released until the People had completed its case in chief. The second prong is also met by Roberts in that the limited information released to Roberts in the excerpt or summary of the Use of Force Report is favorable to the defense. The excerpt or summary of Sergeant Hector's interview contains multiple instances of contradictory statements, which vary drastically from the evidence brought out at trial in the People's case. For instance, Sergeant Hector, in his interview with Sergeant Naomi Joseph, said that he encountered one shooter as he existed the

nightclub: at trial he testified that he encountered two shooters and one of them was Eugene Roberts. Also, in his statement to Sergeant Naomi Joseph, Sergeant Hector said that he shot Lester Roberts, not Eugene Roberts as he testified to at trial. Moreover, Sergeant Hector's statement to Sergeant Naomi Joseph did not include any mention that he shot anyone else other than Lester Roberts. For the third prong of the *Ward* test, the limited information which was revealed in the excerpt or summary of the Use of Force Report provided to the defense is material to the defense in that Eugene Roberts could have impeached Sergeant Hector's testimony which placed Roberts at the scene and with a gun in his hands.

The impeachment value of the Use of Force Report cannot be overstated. Eugene Roberts was entitled to the production of the Use of Force Report in its entirety, not just because it was exculpatory, but also because it contained material which could have been used to impeach the People's witnesses. *Giglio v. United States,* 405 U.S. 150 (1972). It is possible that all of the People's fact witnesses could have been impeached by the Use of Force Report because from the Court's *in camera* review at the trial, the Use of Force Report consisted of an eight-page report, which mentioned each person involved in the shooting at Frontline Nightclub on April 19, 2014 (J.A. 002619-002620). For each of the persons mentioned in the report there was a summary of their involvement (J.A. 002620). We know this because the Court in fact directed the People to "copy each of the summary portions"

for defendants to take a look at it (J.A. 002621). However, the People never produced the summaries of the other persons involved in the April 19, 2014, shooting. But in fact, Roberts was entitled to the full Use of Force Report, not just the summaries.

G. THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT OF ACQUITTAL OR NEW TRIAL AS A RESULT OF THE CUMULATIVE EFFECT OF THE PROSECUTORIAL MISCONDUCT IN THIS MATTER.

The Trial Court erred by failing to grant Eugene Roberts' Motion for Judgment of Acquittal or New Trial as a result of the cumulative effect of the prosecutorial misconduct in this case. Counsel for the People in Rebuttal Closing Argument claimed that Eugene Roberts had been shot in the leg. There was no testimony at the trial in this matter nor was any other evidence presented that Eugene Roberts had been shot in the leg. Counsel for the People is allowed to make arguments at Closing, however, Counsel for the People is not allowed to make up facts or to misstate facts.

When Counsel for the People mischaracterized the facts by claiming that Eugene Roberts had been shot in the leg, undersigned Counsel timely objected and the Trial Court sustained the objection. However, the bell had already been rung and it is not possible to "unring" the bell. The record is clear and there was not a scintilla of evidence that had been presented by the People that Eugene Roberts was shot in the leg. Where prosecutorial misconduct is alleged, reversal is warranted if

"that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." *United States v. Young*, 470 U.S. 1, 11 (1985).

A claim of prosecutorial misconduct requires the resolution of two questions: 1) whether the comment of the prosecutor was improper; and 2) whether the defendant's right to a fair trial was prejudiced by the remark. *Gonsalves v. People*, 70 V.I. 812, 831 (2019) (citations omitted). The touchstone of a prosecutorial misconduct analysis is the fairness of the trial as a whole and not the culpability of the prosecutor. *Id.* at 850. Reversal will result if after considering the entire trial proceeding, the prosecutorial misconduct infected the trial with unfairness and the resulting conviction constituted a denial of due process. *Monelle v. People*, 63 V.I. 757, 770 (2015) (citation omitted). Although specific and isolated instances of prosecutorial misconduct may not rise to the level of reversible error, their cumulative effect may nonetheless be so prejudicial that reversal is warranted. *See, e.g. Gumm v. Mitchell*, 775 F.3d 345, 382 (6th Cir. 2014) (reversing based on cumulative effect of prosecutor's misconduct); *United States v. Conrad*, 320 F.3d 851, 856 (8th Cir. 2003) (noting the cumulative effect of the prosecutor's improper remarks); and *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant").

Here, the Trial Court on April 28, 2016 ordered from the bench that the prosecution submit to the Trial Court and Defense Counsels by no later than 5:00 p.m. on April 29, 2016 the Use of Force Report from the April 19, 2014 incident. The prosecution ignored this Order of the Trial Court and thus Defense Counsels had to file a Motion to Show Cause and a Motion for Ruling on Motion to Show Cause. A second Counsel for the People reviewed Sergeant Hector's thirty-two (32) IAU files in July of 2016 and yet the Use of Force Report from the April 19, 2014 incident was not submitted to the Trial Court and Defense Counsels. Finally, Counsel for the People submitted the Use of Force Report from the April 19, 2014 incident to the Trial Court on November 4, 2016 and after the People had already concluded their case in chief and thus the report could neither be used effectively in the preparation of a defense for Eugene Roberts nor for cross-examination of witnesses that testified for the People.

The cumulative effect of the prosecution's unlawful withholding of the Use of Force Report from the April 19, 2014 incident until such time that it could not be effectively used by Defense Counsel in the trial of this matter and mischaracterizing the facts by claiming that Eugene Roberts was shot in the leg likely affected the jury's discharge of its duties and deprived Eugene Roberts of his constitutional rights to due process and to confront witnesses. Thus, it is respectfully requested that this

Honorable Court reverse Eugene Roberts' convictions due to the cumulative effect of the prosecutorial misconduct in this matter.

RESPECTFULLY SUBMITTED,

DATED: October 20, 2020

/s/ *Renee D. Dowling, Esquire*
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CERTIFICATE OF BAR MEMBERSHIP

I HEREBY CERTIFY that pursuant to Virgin Islands Rule of Appellate Procedure 22(l) that I am a member in good standing of the Bar of the Supreme Court of the United States Virgin Islands.

/s/ *Renee D. Dowling, Esquire*

CERTIFICATE OF WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the foregoing **APPELLANTS' BRIEF** complies with the word count requirements of Virgin Islands Rule of Appellate Procedure 22(f) and contains 7,786 words that count towards the 7,800 words limit, exclusive of pages containing the table of contents and the table of authorities.

/s/ *Renee D. Dowling, Esquire*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2020, I caused two true and exact paper copies of the foregoing **APPELLANT EUGENE ROBERTS' BRIEF** along with a paper copy of the **JOINT APPENDIX** to be served via hand-delivery to Appellee c/o **Assistant Attorney General Aysha Gregory, Esquire** at Virgin Islands Department of Justice, 34-38 Kronprindsens Gade, GERS Building, 2nd Floor, St. Thomas, VI 00820 and Appellant Larry Williams, Jr. c/o **Kye Walker, Esquire,** The Walker Legal Group, 16 AB Church Street, 2nd Floor, Christiansted, VI 00820.

/s/ *Renee D. Dowling, Esquire*