**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

**CASE NO.: SCT-CRIM-2020-0040**
**LOWER CASE NO.: SX-2012-CR-00065**

**JOSE RIVERA**

**Appellant,**

**vs.**

**PEOPLE OF THE VIRGIN ISLANDS**

**Appellee.**

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**APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS**

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# INITIAL BRIEF OF APPELLANT

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# TABLE OF CONTENTS

## TABLE OF CONTENTS

## CASES

**OTHER AUTHORITIES**

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal of the denial of a Motion for New Trial based on Newly Discovered Evidence filed in the Superior Court of the Virgin Islands. The Superior Court had subject-matter jurisdiction pursuant to 4 V.I.C. § 76(b). Rivera's Motion for New Trial based on Newly Discovered Evidence was denied by the Superior Court by a Final Order dated June 3, 2020. (JA 0155-0176). A notice of appeal was filed on June 26, 2020. (JA 0001-0002). This Court has jurisdiction over appeals arising from final orders of the Superior Court pursuant to 4 V.I.C. § 32(a).

This case was previously before this Court upon the direct appeal on Rivera's conviction. *Rivera v. People*, 64 V.I. 540 (2016)

## STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Rivera seeks review of the lower court's denial of his Motion for New Trial based on Newly Discovered Evidence.

This Court reviews the denial of a motion for new trial based on newly discovered evidence for an abuse of discretion. *Stevens v. People*, 52 V.I. 294 (2009).

## STATEMENT OF THE CASE AND FACTS

## STATEMENT OF THE CASE

In June 2001, Corporal Wendell Williams, an eighteen-year officer with the Virgin Islands Police Department [VIPD], disappeared without a trace from his small island community of St. Croix. On February 13, 2012, over ten years later, the People charged the Jose Rivera and others with aiding and abetting one another in the commission of the first-degree murder of Williams. Jury selection occurred January 21-23, 2014. The jury was sworn on January 28, 2014, and it returned its guilty verdict on February 6, 2014. Sentencing was on April 4, 2014, and the Superior Court entered its Judgment and Commitment for a sentence of life without parole on May 2, 2014.

Following his conviction, Rivera filed a notice of appeal to this Court. In an opinion rendered on May 4, 2016, *Rivera v. People*, 64 V.I. 540 (2016), this Court, citing its opinion in the appeal of Jose Ventura, one of Rivera's co-defendants, remanded the matter back to the Superior Court for a determination on a motion for new trial which was denied in the lower court. *Ventura v. People*, 64 V.I. 589 (2016)

On January 30, 2017, Rivera filed a separate motion for new trial as permitted under this Court's remand. (JA 0003-0028). In that motion, Rivera argued that a new trial was warranted based upon evidence discovered after trial regarding the only

witness presented by the People at trial who testified she witnessed Jose Rivera and the other defendants torture and kill Williams, Theresa Coogle.

The motion for new trial was heard on June 14, 2018 before the Honorable Darryl Dean Donohue, Senior Sitting Judge for the Superior Court of the Virgin Islands, Division of St. Croix. (JA 0101-0152). On June, 3, 2020, Judge Donohue issued a Memorandum opinion denying the motion for new trial. (JA 0155-0176). Rivera filed a timely notice of appeal on June 26, 2020. (JA 0001-0002). This appeal follows.

## STATEMENT OF FACTS

In May 2002, Theresa Coogle reported to the FBI that she witnessed the slaying of VIPD Officer Williams and she identified Appellant Jose Rivera as one of several people, including her former fiancée, who were allegedly involved. (JA 1464-69). An arrest warrant was issued for Rivera on February 6, 2012, nearly 11 years after the alleged murder. In pretrial discovery, the People redacted the name of Theresa Coogle. From thereon, Ms. Coogle was referred to in court documents as only "the People's eyewitness."

On December 27, 2013, with jury selection set in the case for January 21, 2014, the People finally disclosed the name of Theresa Coogle as the People's eyewitness. (JA 2081-2083). The timing of this disclosure greatly hampered Rivera's ability to conduct a thorough investigation into Ms. Coogle and her

testimony, with less than a month before trial was set to commence and in the middle of the holidays between Christmas Day and Three King's Day. Thus, Rivera was not able to fully investigate evidence prior to trial concerning Ms. Coogle and a key issue in the case; that is, whether Coogle, who stated she had been in Miami, Florida beginning in April of 2001, had actually traveled to St. Croix at some point prior to when the crime allegedly took place on June 14, 2001.

On January 28, 2014, the People called Coogle as a witness at trial. Coogle testified was seventeen years old and approximately eight months pregnant with her second child on the day she allegedly witnessed Williams' murder. (JA 833). At trial, she testified that, in 2001, she had been in a long-term relationship with defendant Maximiliano Velasquez, who was the father of both her daughter and her unborn son. (JA 675). Coogle testified that, in mid-June 2001, when she allegedly witnessed Williams' murder, she was living in St. Croix with her mother, sisters, and stepfather. (JA 674).

In July 2001, Coogle gave birth to her son in Miami, Florida, where she had been "staying with" Mariela Velasquez and her younger brother Francisco Velasquez. (JA 833-834). Coogle claimed that she traveled back and forth between Florida and St. Croix in mid-2001. (JA 834-839).

Regarding the disappearance of Corporal Williams, Coogle testified that, on ***an unknown date*** in mid-June 2001, she and Maximiliano Velasquez celebrated

their engagement at a restaurant on St. Croix, the name of which she could not recall, then he dropped her off at home. (JA 679-680). Later, he called and asked her to pick him up at the old Grapetree hotel. (JA 680-681). When she arrived there, he took her into an abandoned building where she claims she saw Appellant, codefendant Jose Ventura, someone named Michael, and Corporal Williams (whom she was later identified from news reports), who was on his knees, with his hands behind his back, and wires wrapped around his body that were used to electrocute him; his body looked lifeless. (JA 681-685). She testified that she saw Jose Ventura shoot Corporal Williams in the hand. (JA 685). Then she changed her testimony and said Appellant Jose Rivera shot the officer in the hand, and Jose Ventura shot him in the mouth. *Id*. Coogle claimed that she went outside and vomited, and when she returned to the building, she saw Rivera sawing off the Corporal's ankle with a green John Deere electric or gas-powered saw. (JA 688-689). She went outside again, and she saw Rivera and Jose Ventura walk outside with garbage bags. (JA 688). She went inside again and, on the order of her fiancée, defendant Maximiliano Velasquez, she helped defendant Sharima Clercent clean up "bunch of blood everywhere." *Id*. After that, she went outside again. *Id*. She claimed she could see the shore from where she was and that she saw the "garbage bags were going to the shore," but that she never saw what was ultimately done with the bags. (JA 688-689).

Coogle waited until May 21, 2002 to report the alleged murder. (JA 690, 748-753, 770-776). She admitted that "[t]here is an inconsistency and some kind of confusion as to my statements:" *Id*. Coogle admitted that she identified numerous additional people present at the alleged crime scene, including two men from St. Martin named Michael and Daniel, and Miguel Torres. *Id*. Coogle denied that she reported her sister, Sandra Rivera, as being present, contrary to the agents' notes, which reflected that she had identified her sister as having been present. (JA 770).

Rivera opened his defense with evidence that he was physically incapable of committing the brutal acts of violence against Corporal Williams. On June 6, 2001, Rivera had an abdominal operation; he was discharged from the hospital on June 11, 2001—just ***three days*** before the alleged crime. (JA 1560-1561). Rivera's doctor, Dr. Henry, testified that the incision from the surgery was closed with staples, and his directions for Rivera's discharge included avoiding heavy lifting, driving, and excessive stair climbing. (JA 1565-1568). Rivera's sister, Gricel Rivera, testified that she visited her brother daily between June 6-15, 2001, and that between June 11 and June 15, Rivera required assistance to get out of chairs, to use the toilet, and to shower, and that he spent all day in a recliner. (JA 1452-1461). After the staples were removed on June 15th—the ***day after*** the alleged crime— it took Rivera almost two weeks to do things on his own, such as showering, and his gait during that timeframe was so slow and stooped over that he looked like an elderly person. *Id*.

Gricel also testified it took an additional 2 weeks before Rivera could ride in a car, a few more weeks before he could lift things, and 3-4 weeks before he was able to drive himself. *Id*. After 3-4 weeks, he was walking around unassisted, but only slowly. *Id*. Another of Rivera's sisters, Magali Roldan, confirmed that that was unable to walk without assistance for 2-3 weeks and could not drive for about a month. (JA 1464-1471). Rivera's third sister, Tanya Ruemmele, confirmed that Appellant was physically unable to walk unassisted for 2-3 weeks after his June 11 discharge. (JA 1472-1482).

In sum, the clear testimony of Dr. Henry and of Rivera's three sisters, who were his frequent companions, was that, on or about June 14, Appellant was physically unable to engage in the strenuous acts that Coogle accused him of doing during the alleged murder.

Rivera also presented the testimony of two witnesses to rebut the testimony of Theresa Coogle that, in mid-June 2001, she was living on St. Croix with her mother, sisters, and stepfather. First, Mariela Velasquez, with whom Coogle lived in Miami, testified that Coogle never spent a full night away from her Miami apartment between May and the end of July. (JA 1487-1499). Second, Coogle's own sister, Sandra Rivera, testified that throughout 2001, she went to their mother's house daily to pick up her son, and the last time she saw Coogle was in April 2001. (JA 1578-1583). Sandra never saw Coogle in St. Croix after April 2001. (JA 1584).

When asked specifically about the month of June, Sandra testified that their mother's birthday was June 19, and Coogle did not visit her that day. (*Id.*). Rivera's counsel asked Sandra, "Can you tell us to a degree of certainty that Ms. Coogle was not on St. Croix in June of 2001?" (JA 1585). Sandra responded, "Yes." (*Id*.) On cross-examination, counsel for the People asked, "Can you say positively, definitively during this timeframe you talked about in mid-2001 that Theresa Coogle had never gotten on an airplane and come back to St. Croix for a visit?" (JA 1587). Sandra responded, "No." *Id*. Thus, although Sandra acknowledged that Coogle may have been in St. Croix sometime in mid-2001, she was sure that Coogle was not on the island in June of that year.

Following the close of the evidence, the jury retired for its deliberations on February 5, 2014. On February 6, 2014, the jury convicted Rivera of Murder in the First Degree. On April 4, 2014, Rivera was sentenced to life imprisonment without the possibility of parole.

**RIVERA'S MOTION FOR NEW TRIAL**

Following the remand from this Court on direct appeal, Rivera filed a Motion for New Trial. (JA 0003-0028). As exhibits to the Motion for New Trial, Rivera presented the affidavits of two witnesses, Francisco Velasquez and Kenny Melendez, discovered post-trial who provided sworn testimony that Coogle was in Miami, Florida in June of 2001 and therefore could not have witnessed Williams'

murder in St. Croix, Virgin Islands. (JA 0029-0036). Specifically, Francisco Velasquez stated that Coogle slept in the same bedroom as he from April of 2001 through October 17, 2001. Velazquez stated that Coogle did not travel to the Virgin Islands during that time. Similarly, Kenny Melendez stated that he dated Coogle in Miami during the month of June 2001. Melendez recalled that Coogle gave him a wristwatch as a Father's Day gift that year for being good to her daughter. He states that he began seeing Coogle every day and that she did not travel to St. Croix during the month of June 2001.

Rivera also presented documentary evidence demonstrating Coogle was living and working in Miami in June and July of 2001 and was receiving medical care in Miami in April of 2001. (JA 0037-0049). An affidavit from a former VIPD officer, Jose A. Rodriguez, (JA 0050-0051) was presented that alleged that Rivera was unfairly targeted on two occasions by corrupt VIPD officers, including the lead case agent in the Williams' case, Frank Ortiz.

The motion and additional exhibits also catalogued the Herculean effort of Rivera's counsel, Gordon C. Rhea, Esq., beginning in April of 2014 through June of 2015 to obtain any records (or lack thereof) of Coogle's travel between Miami and the Virgin Islands during the relevant time period prior and subsequent to June 2001. (JA 0052-0087). In one exhibit, Exhibit 9, a letter Attorney Rhea wrote to Tom Calhoun of the Federal Bureau of Investigation on February 25, 2015 recounts a

conversation Attorney Rhea had with Assistant Attorney General Kippy Roberson who told him that Agent Calhoun had researched records of Ms. Coogle's travel in 2001 and could find none. (JA 0081-0082).

The People filed a response to the Motion for New Trial. In the response, the People argued that the evidence was cumulative, impeaching and not relevant and, thus, did not meet the standard for a new trial under Rule 135 of the Rules of Procedure. (JA 0088-0097). The People also argued that Rivera had failed to exercise due diligence in securing the testimony of Francisco Velasquez or Kenny Melendez. Rivera filed a Reply to the Response. (JA 0098-0100).

A hearing was held on the motion on June 14, 2018. (JA 101-0154). Rivera, through counsel, reminded the court that the only witness at trial that claimed a crime was committed and that Rivera was a perpetrator in that crime was Theresa Coogle. (JA 0104-0105). Rivera also stated that that there was no witness to corroborate that Coogle was on St. Croix during the time frame the crime allegedly occurred. (JA 00106). Rivera explained that Coogle's identity was only disclosed by the People shortly before jury selection which hamstrung efforts to conduct a complete investigation of her and her testimony. (JA 00107-0108). Rivera described the efforts made post-trial to locate additional defense witnesses and evidence. (JA 0108-0118). Investigation revealed that no record of Coogle's travel to and from

Miami and the Virgin Islands could be found. (JA 0113-0115). Rivera argued that a new trial was required in the interest of justice. (JA 0116).

In the Order denying the motion for new trial, the court first commented on whether Rivera had failed procedurally to produce evidence at the hearing to meet his burden on the motion. (JA 0161). The court, citing a lack of precedent on the issue, elected to review the materials submitted by Rivera in this motion and decide whether a new trial was warranted on the merits. *Id.*

The court began its analysis by finding that the evidence submitted was "new." (JA 0161). The court then proceeded to analyze whether the evidence was "newly discovered." (JA 0161-0162). The court found that the testimony contained in the affidavits of Francisco Velasquez and Kenny Melendez were cumulative and impeaching as the testimony, in the court's view, was similar to the testimony of two witnesses who testified at trial, Mariela Velasquez and Sandra Rivera. (JA 0162-0163).[1]

The court also found that Rivera was not diligent in uncovering and securing for trial the testimony of Francisco Velasquez and Kenny Melendez. *Id*. The court faulted Rivera for not submitting the affidavits until two years after the trial, all the

[1] The court noted, however, that Sandra Rivera admitted on cross-examination that "she could not 'positively, definitively' say that in June of 2001 [Coogle] never got on an airplane and flew back to St. Croix [from Miami] for a visit." (JA 0162).

while acknowledging that the affidavits were executed one month and four months following the verdict. *Id.*

The court also rejected, out of hand, the affidavit of Jose A. Rodriguez. (JA 0164). The court did not focus on the allegations that demonstrated a bias against Rivera by the VIPD but instead focused on the fact that Rodriguez is a convicted felon and that he stated in his affidavit that his "personal opinion" that Rivera's conviction in this case was the result of willful and deliberate tampering of evidence by corrupt VIPD officers. *Id.*

The court also considered that the medical and pay stub records were not sufficient to warrant a new trial. (JA 0164-0165). The court found that the issue of whether Coogle spent time in Miami around the time of the incident was not in dispute. *Id*. The court further found that medical records from April 2001 and pay stub records for the pay period of June 25, 2001 through July 8, 2001 were not dispositive to the issue of Coogle's whereabouts on June 14, 2001, the date of the incident. *Id.*

The court also rejected Rivera's evidence regarding the absence of proof that Coogle traveled from Miami to St. Croix prior to June 14, 2001 following her arrival in Miami in April. (JA 0165). The court recognized the efforts Rivera took to obtain the information but found that it did not demonstrate due diligence. (JA 0166). The court noted Coogle was asked about the particulars of her travel at a pretrial hearing

where she stated she could not recall. *Id.* The court further noted that these questions were not repeated at trial. *Id.*

The court concluded by stating that Coogle's testimony that she was in St. Croix on June 14, 2001 was disputed by her own sister. (JA 0167). The court held that, in the absence of "video footage, dated documentation, or anything refutable that contradict [sic] Coogle's testimony and shows conclusively that Coogle was somewhere other than St. Croix on or about June 14, 2001," (JA 0167-0168). Consequently, the court denied Rivera's motion for new trial. (JA 0176).

## ARGUMENT

### THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERY EVIDENCE

Rivera argues in this brief that the lower court abused its discretion in denying Rivera's motion for new trial. Rivera satisfied the factors identified in this Court's precedent for the granting of a new trial. The lower court erred in characterizing the new evidence as insufficient to warrant a new trial. The court also disregarded the materiality of the evidence. Finally, the interest of justice requires a new trial based on the newly discovered evidence which rebutted the testimony of the People's sole eyewitness against Rivera.

A motion for new trial is authorized by Virgin Islands Superior Court Rule 135 which states, in pertinent part:

> The court may grant a new trial if required in the interest of justice. The court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before, or within two years after, final judgment.

The standards for reviewing a motion for new trial were announced by this Court in *Phillips v. People*, 51 V.I. 258 (2009) which held a movant requesting a new trial based on newly discovered evidence must satisfy a five-part test: (a) the motion must allege facts from which the Court may infer diligence on the part of the

movant; (b) evidence must indeed be newly discovered, meaning discovered since trial; (c) evidence must not be merely cumulative or impeaching; (d) evidence must be material to the issues involved; and (e) evidence must be of such probative value and of such a nature it would probably produce an acquittal if presented at a new trial. *Accord, e.g.*, *United States v. DiSalvo*, 34 F.3d 1204, 1215 (3d Cir. 1994); *Gov't of the Virgin Islands v. Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985); *see also United States v. Jasin*, 280 F.3d 355, 361 (3d Cir. 2002)(quoting *United States v. Iannelli*, 528 F.2d 1290 (3d Cir. 1976).

This Court will review the denial of a motion for a new trial for an abuse of discretion. *Ventura v. People*, 64 V.I. 589, 614 (V.I. 2016) (*citing Percival v. People*, 62 V.I. 477, 490-91 (V.I. 2015)). An abuse of discretion occurs when the trial court makes a decision that rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *Thomas v. People*, 60 V.I. 688, 697 (V.I. 2014) (quoting *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012)) (internal quotation marks omitted). "The court may grant a new trial to a defendant if required in the interest of justice." V.I. SUPER. CT. R. 135. In making such a determination, the court "may weigh the evidence and credibility of witnesses, and if the court determines there has been a miscarriage of justice, the court may order a new trial." *Fahie v. People*, 62 V.I. 625, 632 (V.I. 2015) (citation omitted).

A review of the facts presented in this appeal as applied to the governing legal principles establishes the lower court's denial of the motion for new trial was an abuse of discretion and justice requires a new trial where Rivera can present this evidence.

## I. EVIDENCE SUPPORTING RIVERA'S MOTION FOR NEW TRIAL

### A. AFFIDAVITS OF FRANCISCO VELASQUEZ AND KENNY MELENDEZ

The lower court rejected as newly discovered evidence warranting a new trial the affidavits of two witness, Francisco Velasquez and Kenny Melendez, who both stated Coogle was in Miami, Florida in entire month of June 2001. The court first questioned whether Rivera was unable to discover these witnesses prior to trial. However, as noted above, the identity of Theresa Coogle as the sole eyewitness was disclosed on the eve of trial, which was over a decade after the incident alleged occurred. To expect counsel to uncover every potential witness for the defense in the short period of time and under these circumstances was patently unreasonable.

The court also questioned the timing of the execution of the affidavits and their ultimate submission to the court. However, as discussed further below, the due diligence standard applies to the discovery of the evidence not its presentation to the court. As demonstrated in the record, the affidavits of Velasquez and Melendez were obtained shortly after the verdict in this case. Any delay in submitting them to

the court as a part of a motion for new trial, to the extent it is at all relevant, should take into account the case was on direct appeal for nearly two years. The motion for new trial was submitted six months after the mandate remanding the case back to the lower court.

## B. AFFIDAVIT OF JOSE A RODRIGUEZ

The lower court determined the Affidavit of former-VIPD officer Jose A. Rodriguez was not entitled to any weight as the allegations, according to the court, were merely "personal opinion" and general commentary on alleged corrupt practices within the Virgin Islands Police Department. However, the court completely overlooked the allegations that Rodriguez overheard detectives, including those involved in this case, conspiring to arrest and harm Rivera. These allegations go directly to the bias of the officer who investigated Rivera in this case. Therefore, the court's analysis concerning the materiality of Rodriguez's testimony is flawed. While Rodriguez's affidavit did refer in some respects to his "personal opinion" the allegations of statements by the officers evidencing a direct bias against Rivera were not based on personal opinion.

The court also noted Rodriguez has a felony conviction. However, that does not make Rodriguez's testimony inherently incredible. Of course, a jury would have to consider the fact as a felony conviction but would be instructed it was only one factor of many in deciding whether the witness was being truthful.

## C. THE MIAMI RECORDS

The court disregarded the Wendy's employment records stating it was undisputed that Coogle worked at Wendy's while in Miami. And certainly, the records did not pinpoint Coogle's employment on days she alleged to have been on St. Croix and witnessed the murder. However, with the records showing Coogle's employment in the month of June, Rivera would have been able to show Coogle's description of her travel was not credible. Without the records, the jury could have understood Coogle only worked in Miami prior to her alleged return to St. Croix in early June. In fact, Coogle testified she was *living* on St. Croix in mid-June of 2001. JA 0674. She also stated she was unemployed. She stated she could not recall specifically when in June of 2001 the alleged murder took place. JA 0748. Had this evidence been available, it would have created a reasonable doubt as to Coogle's testimony as to its most critical point and to the People's case as a whole.

## D. ABSENCE OF EVIDENCE OF TRAVEL

The lower court dismissed the impact of the absence of evidence that Coogle travelled to St. Croix from Miami. The court held the documentation of Rivera's efforts to obtain travel records was insufficient to cast doubt on Coogle's testimony that she did travel from Miami to St. Croix in June of 2001. However, it is clear from the documentation provided by Rivera that FBI Special Agent Thomas Calhoun had conducted a due diligence search and determined no evidence existed that showed

Coogle had traveled to or from the Virgin Islands during the relevant time period. This information was not available to the defense at the time of the trial.

Therefore, the lower court's finding that Rivera could not produce any evidence attesting to the absence of records of Coogle's cross-border travels is incorrect. Rivera discovered, after trial, that the FBI was aware of the lack of records. Whether newly discovered evidence or *Brady* material, this is a factual circumstance that would have certainly had an effect on the jury's resolution of Coogle's testimony. This is so, particularly in light of the fact Coogle was eight months pregnant in June of 2001, had been living in Miami since April of 2001 and, according to the employment records, was in Miami working on June 25, 2001. Had Rivera been able to present this entire set of facts and circumstances to the jury there is a great likelihood the jury would have found Coogle was not on St. Croix on or about June 14, 2001.

The court erred in finding that Rivera had not demonstrated due diligence in obtaining the evidence; yet the court notes the first subpoena for the records was dated on April 15, 2014, approximately two months after the verdict. Again, the court faults Rivera for not presenting the evidence to the court until January 30, 2017. However, the due diligence requirement refers to the discovery of the evidence, not its presentation to the court. Secondly, as the lower court recounts in its Order denying the Motion for New Trial, Rivera's case was on direct appeal to

this Court up until the time the Court issued its mandate remanding the case on June 22, 2016.

## II. APPLICATION OF THE PHILLIPS v. PEOPLE FACTORS

Rivera now turns to the five factors in *Phillips v. People*, 51 V.I. 258 (2009) in support of his argument that the lower court erred in denying his motion for new trial:

### A. THE MOTION ALLEGED FACTS FROM WHICH THE COURT MAY INFER DILIGENCE ON THE PART OF THE MOVANT.

There should be no question the motion alleged facts that would infer diligence on the part of the Rivera. Firstly, it cannot be overstated that Rivera had a very short window of time to conduct investigation into Theresa Coogle as the People successfully kept her identity undisclosed until one month prior to trial. Moreover, that one month was over the winter holiday period of Christmas through Three Kings Day.

The motion for new trial indicated Francisco Velazquez and Kenny Melendez were located and their affidavits were obtained by an investigator in Florida, as were the medical and employment records. From the affidavits we see that this work was done in April through July of 2014. Thus, diligence in discovering this evidence can be inferred. The affidavit of former-officer Rodriguez is dated August 11, 2016.

Finally, Rivera commenced his effort to obtain the travel records of Ms. Coogle in April of 2014.

A motion for new trial on the grounds of newly discovered evidence should be granted if the evidence was unknown at the time of trial and the movant used due diligence to learn of the evidence at an earlier time. *United States v. Deavault,* 190 F.3d 926, 929 (8th Cir. 1999). Whether sufficient diligence was used must ordinarily be determined from the composite knowledge and conduct of both the accused and his counsel. *United States v. Lawhorne,* 29 F. Supp. 2d 292, 305 (E.D. Va. 1998), *citing* Charles Alan Wright, Federal Practice Procedure § 557 at 327-329. All that is required is ordinary diligence, not the highest degree of diligence, as the due diligence requirement is circumscribed by a rule of reason. *Id*. Furthermore, the new facts to be presented "must have been in existence at the time of trial and the moving party must have been excusably ignorant of their existence," *Morton* v. *Best* 1981 WL 704861 (Terr. V.I. 1981) *(citing Brown* v. *Pennsylvania Railroad,* 282 F.2d 522, 527 (3d Cir. 1960), cert. denied, 365 U.S. 818 (1961)). The terms "due diligence" and "excusably ignorant" refer to those circumstances where the movant was not able to find the evidence prior to trial, though all reasonable avenues had been pursued. *Id.*

In this case, the record shows Rivera diligently did his best to learn the informant's identity and uncover exculpatory evidence. The court permitted the

People to withhold Coogle's identity until December 27, 2013 and when her identity was ultimately revealed, counsel for Rivera worked assiduously to locate witnesses who could testify she was in Florida at the time of the killing. After the trial, counsel remained diligent, hiring an investigator in Florida who uncovered two witnesses, Velasquez and Melendez, and secured affidavits from them. That diligence continued as counsel made every effort to procure Coogle's travel records- or to demonstrate the absence of such records- by petitioning the pertinent Federal agency, appealing an adverse ruling, and filing a Freedom of Information Act request. Counsel then petitioned both the prosecutor and the investigating FBI agent, to no avail, but in the process learned that they, too, had been unable to obtain any records from the Federal agencies indicating Coogle had traveled to St. Croix during the pertinent timeframe. In an effort to leave no stone unturned, counsel also obtained records from the Miami hospital where Coogle's daughter had been treated and from the Wendy's where Coogle had worked. In sum, counsel's persistence in taking all trails possible in an attempt to locate exculpatory evidence - and his success in doing so - fully satisfies the due-diligence requirement. In the face of this record, this Court should find the lower court abused its discretion in finding Rivera had not met the due diligence prong of the *Phillips* standard.

**B. THE EVIDENCE WAS NEWLY DISCOVERED**

In its Order denying the Motion for New Trial, the lower court seems to suggest that the evidence was not discovered since trial as Ms. Coogle's testimony that she was on St. Croix at the time of the murder was challenged at trial. Order at (JA 0162). However, this finding disregards the fact that the actual evidence itself, not simply the content of it, was not known at trial. Surely, some evidence that Coogle was not on St. Croix at the time of Williams' disappearance was available at trial. However, the specific witnesses and evidence presented in the motion for new trial were not. As a result, the lower court abused its discretion in finding that the evidence was not newly discovered.

## C. EVIDENCE WAS NOT BE MERELY CUMULATIVE OR IMPEACHING

While the Superior Court characterized the newly discovered evidence as evidence that only serves to impeach Coogle, it does much more than that. It not only calls in to question her overall credibility but it disputes critical factual assertions of her testimony. In *United States v. Quiles*, 618 F.3d 383 (3rd Cir. 2010) the court conducted a lengthy analysis that is quite instructive the present inquiry. The *Quiles* court stated

> We agree with appellants that in certain unusual circumstances a court should not deny a new trial that a defendant seeks on the basis of newly discovered evidence merely because the evidence is impeaching in character. In stating our limited agreement with appellants we observe that Rule 33(a) as written permits courts to grant a new trial when the interest of justice requires it and does not distinguish between newly

> discovered circumstantial and direct evidence as a basis for granting such a motion. Yet we recognize that notwithstanding Rule 33's language, there are opinions that say that a court should not grant a motion for a new trial on mere impeachment evidence. But these cases do not seem to give enough significance to the wording of Rule 33 which, as we have indicated, makes clear that the interest of justice guides the courts on deciding Rule 33 motions and does not suggest that a court should distinguish between impeachment and direct evidence in making that determination.
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> . . .
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> [In *United States v. Davis*, 960 F.2d 820, 825 (9th Cir.1992)], a jury convicted the defendants on drug charges in part on the basis of testimony of an undercover police officer. Some months later the same officer was convicted of stealing drug money that the government had confiscated as evidence. The court in Davis said that "[i]f newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the 'interest of justice' would support a new trial under Rule 33." *Davis*, 960 F.2d at 825.15

*United States v. Quiles*, 618 F.3d 383, 391-92 (3d Cir. 2010)

An important distinction, not addressed by the lower court, was that the newly discovered evidence advanced by Rivera was much more then impeachment evidence. It was rebuttal evidence. Impeachment evidence would provide a basis for testing the inherent credibility of Coogle as an overall honest or dishonest person. The Virgin Islands Rules of Evidence provide for methods of attacking a witness's credibility. Rule 607 of the Virgin Islands Rules of Evidence, *Reporter's Notes,* enumerates these methods as follows:

> Subject to the provisions of Rule 403, the credibility of a witness may be impeached by any party, including the party calling the witness, with any proof that is relevant to the witness's credibility. Impeachment may be undertaken, among other means, by: ● introduction of evidence of the witness's bad general reputation for the traits of truth and veracity, as provided in Rule 608(a) and (b); ● evidence of prior conviction, as provided in Rule 609; ● evidence of bias for or prejudiced against a party. Extrinsic evidence of such bias or prejudice may be admitted. ● prior inconsistent statements as provided in Rules 613 and 801; ● any other evidence which is probative on the issue of credibility because of a logical tendency to convince the trier of fact that the witness's perception, memory, or narration is defective or impaired, or that the sincerity or veracity of the witness is questionable. A witness may also be contradicted by testimony or other evidence.

However, evidence that has a tendency to prove Coogle was in Miami, Florida at the time of the alleged murder goes further than demonstrating her credibility on the account of what she says she observed is suspect. The evidence serves to rebut her claim that she was even present on St. Croix at the time of Williams' murder on June 14, 2001. This, of course, was a crucial dispute of the case and the newly discovered evidence, if presented to the jury, would more than likely have affected the outcome of the trial.

The United States Court of Appeals for the Eighth Circuit, in *United States v. Harris*, 557 F.3d 938 (8th Cir. 2009), directly addressed the question of impeachment versus rebuttal evidence. In that case, the court began by framing the dispute between the parties as to the nature of the evidence at issue:

> Mr. Harris contends finally that the trial court erred by admitting certain utility records into evidence. At trial, Cynthia Broadway, Mr. Harris's mother, testified that because of a power outage at her home she stayed at Mr. Harris's home during the period that Mr. Harris was under surveillance. Her further testimony that she did not see anything indicating drug activity during her stay was intended to bolster Mr. Harris's defense that Detective Liston planted the drugs seized at his home. The utility company records indicated that there was indeed a power outage at Ms. Broadway's address, but that it occurred after Mr. Harris was arrested.

*Harris*, 557 F.3d at 942.

Having laid the foundation for the legal analysis, the Court continued:

> When the government offered the records, it stated that they were being introduced for purposes of impeachment. But impeachment of a witness involves evidence that calls into question the witness's veracity. It deals with "matters like the bias or interest of a witness, his or her capacity to observe an event in issue, or a prior statement of the witness inconsistent with his or her current testimony." *Berry v. Oswalt*, 143 F.3d 1127, 1132 (8th Cir. 1998). The evidence at issue here, on the other hand, is rebuttal evidence: "Impeachment is an attack on the credibility of a witness, whereas rebuttal testimony is offered to explain, repel, counteract, or disprove evidence of the adverse party." *Berry v. Oswalt*, 143 F.3d 1127, 1132 (8th Cir. 1998). The evidence at issue here, on the other hand, is rebuttal evidence: "Impeachment is an attack on the credibility of a witness, whereas rebuttal testimony is offered to explain, repel, counteract, or disprove evidence of the adverse party." *Sterkel v. Fruehauf Corp. v. Fruehauf Corp.*, 975 F.2d 528, 532 (8th Cir.1992). The utility records were not offered to show that Ms. Broadway was not a credible person but to show that she was not living at Mr. Harris's apartment when it was under surveillance. It was therefore admissible as relevant substantive evidence.

*Id*.

The Eighth Circuit had the opportunity to revisit and reaffirm its holding in *Harris* in the case of *United States v. Jean-Guerrier*, 666 F.3d 1087, 1092 (8th Cir. 2012)

> Rebuttal evidence "is offered to explain, repel, counteract, or disprove evidence of the adverse party." *United States v. Harris*, 557 F.3d 938, 942 (8th Cir.2009) (citation omitted). It is distinct from impeachment evidence which is "an attack on the credibility of a witness." Id. (citation omitted).

Therefore, the newly discovered evidence centering on Coogle was not simply impeachment evidence. It was substantive rebuttal evidence concerning a dispute of fact; was Coogle on St. Croix on June 14, 2001? Thus, the lower court abused its discretion in dismissing the evidence as insufficient to grant a new trial.

**D. EVIDENCE WAS BE MATERIAL TO THE ISSUES INVOLVED**

For the purposes of a motion for a new trial based upon newly discovered evidence, "material evidence" is evidence which is relevant, which goes to the substantial matters in dispute, or which has a legitimate and effective influence or bearing on the decision. *United States* v. *Riggs*, 495 F. Supp. 1085 (M.D. Fla. 1980). In addition, new evidence is material when there is a reasonable probability that it would have affected the outcome of the trial." *Szubak v. Sec'y of Health & Human Servs.*, 745 F.2d 831, 833 (3d Cir. 1984). During trial, the People offered no evidence placing Rivera at the alleged crime scene, except for the testimony of Coogle. Testimony offered to show that the People's sole eye-witness did not travel

back and forth between Miami and the Virgin Islands during the time period of the alleged crime, in addition to testimony of two witnesses -- one who lived with Coogle and one who dated her -- placing Coogle in Miami during the time period of the alleged crime, is certainly material and certainly undermines the People's case. And so, too, is the testimony of Officer Rodriguez, who stunningly demonstrates that Rivera was targeted by certain police officials. Hence the newly discovered evidence fully satisfies the "materiality" element of the test. The lower court erred in determining Rivera had not met this element.

## E. THE NEWLY DISCOVERED EVIDENCE IS LIKELY TO PRODUCE AN ACQUITTAL

The standard generally applied in evaluating motions for a new trial is that the newly discovered evidence probably would result in an acquittal. *See United States. v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 49 L. Ed. 342 (1976) *(holding modified by, United States. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481(1985)). Articulated differently, when considering a motion for new trial on the grounds of newly discovered evidence, the court must weigh whether there is a significant chance the disclosure would have induced reasonable doubt in the minds of enough jurors to prevent conviction. *See United States. v. Spencer*, 4 F.3d 115 (2d Cir. 1993); *United States v. Mucci*, 630 F.2d 737 (10th Cir. 1980); *United States. v. Geders*, 625 F.2d 31 (5th Cir. 1980); *United States. v. Davis*, 604 F.2d 474 (7th Cir. 1979); *United States. v. Carlone*, 603 F.2d 63 (8th Cir. 1979).

Even though the People conducted two forensic examinations of the alleged crime scene, they found no physical evidence placing Rivera or the victim there. The only evidence of Rivera's guilt is Ms. Coogle's purported eyewitness testimony. If she was not on St. Croix on June 14, 2001, she could not have seen the things she claimed to have seen, and Riverat must necessarily be acquitted. As set forth above, the newly discovered evidence all points to the fact that Ms. Coogle -eight months pregnant, living in Miami with Mariela and her son, working at Wendy's, and generating no record of airline travel with any of the agencies that demand and retain such documentation - was not on St. Croix at the time of the occurrence. Moreover, the testimony of former-VIPD officer Jose Rodriguez would establish a motive for framing Rivera. It is inconceivable that a jury knowing this information could not harbor a reasonable doubt about Rivera's guilt. Therefore, the new evidence in all likelihood would result in an acquittal.

**III. A NEW TRIAL SHOULD BE ORDERED IN THE INTEREST OF JUSTICE**

Superior Court Rule 135 empowers the Court to "grant a new trial if required in the interest of justice." Comparable discretion is vested in Federal courts, which enjoy broad discretion in determining whether to grant such a motion. *See, e.g., United States.* v. *Barlow,* 693 F.2d 954, 966 (6th Cir. 1982) (citations omitted). "The permissible reasons for granting new trial ... are not

limited by" Rule 33. *United States* v. *Bast,* 144 F. Supp. 2d 892, 901 (W.D. Mich. 2001). With the addition of the newly discovered evidence that Coogle did not travel between Florida and the Virgin Islands during the pertinent portion of 2001, her trial testimony can by no stretch of the imagination be considered credible. Moreover, allowing a man to be convicted and sentenced to life without parole solely on the word of a single, unreliable witness, whose statements before and during trial were riddled with inconsistencies and were uncorroborated by any physical evidence or by the testimony of any other witness, is a clear miscarriage of justice. That miscarriage is rendered even more egregious by the newly discovered evidence detailed above. Therefore, "in the interest of justice," the Superior Court should have ordered a new trial.

## IV. CONCLUSION

Based on the foregoing, Rivera submits that the lower court abused its discretion in denying the motion for new trial. An abuse of discretion occurs when the trial court makes a decision that rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *Thomas v. People*, 60 V.I. 688, 697 (V.I. 2014) (quoting *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012)) (internal quotation marks omitted). The record here establishes the lower court made erroneous factual and legal findings and failed to properly apply the facts to the law. Therefore, this Court should

vacate the order denying the motion for new trial and remand the case to the lower court with instructions to hold a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to V.I.R.App.P. 15(d), that on December 30, 2020, the foregoing brief was e-filed pursuant V.I.R.App.P. 40.1(2) and that foregoing document will be e-served by the Notice of Electronic Filing on the following attorneys, who are Filing Users: Ian S. A. Clement, Assistant Attorney General, Department of Justice, GERS Complex, 2nd Floor, St. Thomas, V.I. 00802.

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## CERTIFICATE OF WORD LENGTH

In accordance with V.I.R.App.P. 22(f), Rivera hereby certifies that the instant brief contains 7790 words.

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