IN THE SUPREME COURT OF THE VIRGIN ISLANDS
SCT-CRIM-2020-0040

JOSE RIVERA,
Appellant,

-v-

PEOPLE OF THE VIRGIN ISLANDS,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
Re: SX-2012-CR-00065

APPELLEE'S BRIEF

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STATEMENT OF JURISDICTION

The Appellee concurs with the Appellant's statement of jurisdiction.

STATEMENT OF THE ISSUE

1. Whether the Superior Court abused its discretion when it denied Appellant's motion for a new trial based on newly discovered evidence.

STATEMENT OF RELATED CASES OR PROCEEDINGS

This Court heard the Appellant's direct appeal in *Rivera v. People*, 64 V.I. 540 (V.I. 2016).

STANDARD OF REVIEW

This Court reviews "the trial court's denial of a motion for a new trial based upon newly-discovered evidence only for an abuse of discretion, unless the denial was based upon the application of a legal precept in which case our review is plenary." *Wallace v. People of the V.I.*, 71 V.I. 703, 723 (2019). 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. *Id*.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

On or around June 14, 2001, St. Croix Virgin Islands police corporal Wendell Williams ("Williams") went missing. Around a week later, his

sister—Jaslene Williams—reported him missing. (JA-0650). The Virgin Islands Police Department ("VIPD") opened an investigation and learned that, although Williams had not been reporting to work, someone had been punching the timeclock on his behalf. (JA-0658). "His car was also discovered, abandoned, and burned." *Ventura v. People of the V.I.*, 64 V.I. 589, 596 (V.I. 2016). Although the Federal Bureau of Investigations ("FBI") also investigated, not much more was learned until May 2002. At that time, Theresa Coogle ("Coogle") met with law enforcement and reported that she witnessed Williams's murder. (JA-0690-0691). She stated to investigators that she witnessed it in an abandoned building near the former Grapetree Hotel. (JA-0681-0684). "The VIPD investigated the area, including an abandoned building found on the property, but no forensic evidence connected to this case was discovered." *Ventura*, 64 V.I., at 596-597. The investigation went cold for some time before the VIPD reopened the investigation after creating a Cold Case Unit. (JA-1071-1072). VIPD Detective Frankie Ortiz re-interviewed Coogle around June 15, 2011. (JA-1074). Based on this interview, Detective Ortiz returned to the Grapetree area with fellow officers. *Id.* This time investigators located an abandoned building that contained items that Coogle had described in detail during her June 15th interview. (JA-1074-1076). Namely, electrical boxes on the wall, an

old generator, and a pole in the middle of the room. (JA-1076). Based on the information found at the scene, investigators believed they had enough to build a case and make arrests. "In a February 13, 2012 information, Rivera—along with [four others] . . .—was charged with having aided and abetted the murder in the first degree of Williams by shooting him with a firearm, in violation of 14 V.I.C. §§ 922(a)(1) and 11(a), and for having aided and abetted in the killing of Williams during the course of a kidnapping, or felony murder, in violation of 14 V.I.C. §§ 922(a)(2) and 11(a)." *Ventura*, 64 V.I. at 546. Jury selection began on January 21, 2014.

At trial, which commenced on January 28, 2014, Coogle testified that on one night in June 2001, her and her fiancé, Max Velasquez ("Max")—a co-defendant in the case—went out to dinner to celebrate their engagement and then he dropped her off at her home. (JA-0680). She testified that later the same night, he called her and wanted her to pick him up near the Grapetree Hotel. (JA-0680-0681). When she arrived, he was standing on the side of the road. (JA-0681). She testified that she got out of her car and followed him on foot to a building. (JA-0682). She could not say how far off the road it was but described it as a white building. *Id.* She testified that she went into the building where she saw Jose Rivera, Jose Ventura, an individual she said was named Michael, and another individual whom she did not know at the time.

(JA-0682-0683). When asked about the individual she did not recognize, she stated that he was "on his knees. . . . His hands were bounded (*sic*) behind his back. His body looked lifeless." (JA-0683). When pressed on the individual's identification, she stated that she did not recognize him at the time, but, later, after seeing news reports, she knew it was Williams. (JA-0683-0684). Coogle testified that she saw Officer Williams with wires wrapped around his body, connected to a generator used to electrocute him. (JA-0684-0685). Further, she testified that she saw Rivera and Ventura shoot Williams in his hand and mouth. (JA-0685). She stated that after seeing Officer Williams get shot, she went outside and threw up. (JA-0686). Following this, she returned inside, witnessing Rivera sawing off Williams's ankle with a mechanical saw. (JA-0687). After this, she went back outside—was throwing up again—and witnessed Rivera and Ventura walking outside with garbage bags. (JA-0688). She then was instructed by Max to go inside and clean up all the blood. *Id.* She indicated that the garbage bags were dumped into the ocean. *Id.*

Rivera called two witnesses to rebut Coogle's testimony regarding her whereabouts in June 2001, including Mariela Velasquez and Coogle's sister, Sandra Rivera. Each of them claimed that Coogle was not on St. Croix during the month of June. The jury, however, believed Coogle's testimony. While

three of Rivera's co-defendants were exonerated, both Rivera and Ventura were convicted of first-degree murder and sentenced to life imprisonment. (JA-0157). Each moved the Court for a judgment of acquittal—which was denied. *Id.* Ventura also moved for a new trial, which also was denied, but not on the merits. *Id.* Both defendants appealed their sentences to the V.I. Supreme Court. Although each of their convictions was upheld, the Supreme Court remanded their cases back to the lower court to decide Ventura's motion for a new trial. *Id.* "After the cases were remanded, Rivera filed his motion for a new trial based partly on newly discovered evidence and an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963)." (JA-0157). On June 3, 2020, the Superior Court denied Rivera's motion for a new trial.

SUMMARY OF THE ARGUMENT

The heart of this case is whether Jose Rivera should be granted a new trial based upon the theory of newly discovered evidence. For evidence to qualify as newly discovered, it must meet certain criteria: the evidence must be discovered after trial; the movant must have used diligence in obtaining that evidence; the evidence cannot be cumulative or impeaching; it must be material to issue, and the evidence would probably result in a different result than previously. *See*, *Phillips v. People of the V.I.*, 51 V.I. 258, 280 (V.I. 2009)(citations omitted). Rivera's evidence, however, does not meet many,

and at times, all these requirements. For example, he wishes to introduce affidavits from three individuals whose statements do not offer anything contradictory to Coogle's testimony—they merely serve to reiterate the same arguments and theories advanced at trial. The affidavits from these two individuals would only mirror that of other testimony from witnesses that stated the same thing—that they do not believe Coogle left Florida. Coogle, however, testified in great detail about the gruesome murder she witnessed in St. Croix on or about June 14, 2001, and the jury believed her. Velasquez's and Melendez's proffered testimony would be merely cumulative, impeaching, and would not likely result in a different result at a new trial.

Further, Rivera would like to introduce the affidavit of former police officer Jose Rodriquez—a convicted felon. Yet, his statements offer nothing material and are based on his own "personal opinion." (JA-0051). Thus, his opinion is not material or relevant.

Additionally, defense counsel did not exercise due diligence in getting this information from these individuals because the witnesses volunteered to testify at trial (Rodriquez), or defense counsel learned about or should have learned about their identities before or during trial (Velasquez and Melendez). Thus, even if the affidavits were newly discovered evidence—which they are not—they are barred from consideration given that Rivera did

not exercise the requisite due diligence in tracking this information down at an earlier and more appropriate time.

The bottom line is this: Rivera does not have any evidence that can be considered newly discovered because he either did not exercise due diligence in bringing it before the court, or the evidence is immaterial, cumulative, and impeaching, and would not likely result in a different outcome before another jury.

ARGUMENT

POINT I

The Superior Court did not abuse its discretion when it denied Appellant's motion for a new trial based on newly discovered evidence.

In this case, the sole issue is whether the Superior Court erred in denying Appellant's motion for a new trial based upon newly discovered evidence. We shall begin with the plain language of the applicable rule and how it is interpreted.

A. The Rule of Law and Its Application

Rivera asks this Court to overturn the trial court's decision not to allow a new trial under former Superior Court Rule 135.[1] This Rule states:

[1] Rule 135 was repealed on February 15, 2019 by S. Ct. Prom. No. 2019-003.

> The court may grant a new trial to a defendant 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. A motion for a new trial based on other grounds shall be made within 10 days after finding of guilty, or within such further time as the court may fix during the 10-day period. In no event shall this rule be construed to limit the right of a defendant to apply to the court for a new trial on the ground of fraud or lack of jurisdiction.

Joseph v. People of the V.I., 60 V.I. 338, 344-345 (V.I. 2013)

A trial court may grant the request for a new trial based on 'newly discovered evidence' if five requirements are met:

> (a) the evidence must be in fact, newly discovered, *i.e.*, discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Phillips, 51 V.I. at 280.

"Although the decision to grant or deny a motion for a new trial lies within the discretion of the district court, the movant has a 'heavy burden' of proving each of these requirements." *Id.* (citing, *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006)). In fact, "[m]otions for a new trial 'are not favored and should be granted sparingly and only in exceptional cases.'" *Wallace v. People of the V.I.*, 71 V.I. 703, 723 (V.I. 2019)(citing, *Stevens v.*

People, 52 V.I. 294, 305 (V.I. 2009)(citation and internal quotation marks omitted)). "The test to determine whether evidence is 'newly discovered' is both objective and subjective: Evidence is not 'newly discovered' if it 'was [actually] known or could have been known by the diligence of the defendant or his counsel.'" *Cimera*, 459 F.3d at 461 (referencing *United States v. Bujese*, 371 F.2d 120, 125 (3d Cir. 1967)(brackets in original)). "Seeing evidence admitted at trial in a different light or realizing something after trial about the evidence admitted during trial does not make that evidence newly-discovered." *People of the V.I. v. Rivera,* 2020 V.I. LEXIS 54 at *5 (Super. Ct. June 3, 2020), (referencing, *Cimera*, 459 F.3d at 461-462.). Appellant has not met this "heavy burden."

B. The Affidavits Offered Are Not Newly Discovered Evidence.

Rivera wishes for this Court to review the affidavits of three individuals— Francisco Velasquez ("Velasquez"), Kenny Melendez ("Melendez"), and Jose Rodriguez ("Rodriquez")—and to conclude that these affidavits qualify as "newly discovered" evidence, thus, affording them a new trial. They do not. First, these affidavits contain nothing more than cumulative evidence that attempts to impeach Coogle's testimony—disqualifying them as newly discovered evidence. *See, United States v. Rutkin*, 208 F.2d 647, 654 (3d Cir. 1953); *and see United States v.*

Waggoner, 339 F.3d 915, 919 (9th Cir. 2003)(stating, "The evidence cited by Waggoner in support of his new trial motion was cumulative, impeachment-related, or both. . . . None of the tendered evidence was of such a character that it indicated that a new trial probably would result in an acquittal. . . . Accordingly, we affirm the district court's denial of Waggoner's new trial motion.").

Second, Rivera failed to exercise diligence in obtaining the affidavits before or during trial. Therefore, even if the affidavits were newly discovered evidence, which they are not, Rivera fails the second prong of the *Phillips* test. *Phillips*, 51 V.I. at 280.

After all, the trial transcripts clarify that defense counsel knew of Velasquez's existence during trial, and they should have been aware of Melendez because he was friends and in contact with one of the defense's key witnesses on Facebook. (JA-0834; 0035-0036). Further, according to Rodriquez's sworn statement, "Mr. Rivera has been convicted of a crime where I the undersigned have knowledge of information pertaining to the case and volunteered to testify in the presence of police officer (detective) Frankie Ortiz *prior to Mr. Rivera's trial and was never allowed to testify in court.*" (JA-0051)(emphasis added). Because the defense knew of these

individuals at or before the trial, Rivera has failed to show diligence with respect to their affidavits. Therefore, this Court must disregard the affidavits.

1. Affidavit of Velasquez

Velazquez's affidavit lacks materiality. His affidavit contains nine lines, half of which are consumed by his name, address, occupation, and general statements such as, "I remember exact dates as I have always been very good with numbers." (JA-0030). It contains nothing material to show that Coogle was not in the Virgin Islands in June of 2001. Courts have held that alleged newly discovered evidence that lacks materiality does not support the granting of a motion for a new trial. *See*, *e.g.*, *United States v. Lau*, 828 F.2d 871, 877 (1st Cir. 1987)(stating, "discovery of new evidence merits a new trial only if the evidence is material and might have had some impact on the outcome of the trial."). Velasquez simply states that they shared the same bedroom and that he does not recall her traveling to the Virgin Islands during that time. *Id.* This information brings nothing new to the table. Glaringly missing from Velasquez's affidavit is an objectively verified statement from him definitively stating that Coogle was in Florida on June 14, 2001. In addition to not being material, Velasquez's vague statement of memory would do nothing to overwhelm Coogle's graphic testimony describing Wendell Williams's murder and the effect witnessing it had on her. *See, e.g.,*

United States v. Jasin, 2000 U.S. Dist. LEXIS 17635, *8 (E.D. Pa. Nov. 21, 2000)(stating, "that Torrez's proposed testimony is to a large extent cumulative of evidence presented at trial by the defendant that ISC had the capability to remedy any flight irregularities of the Striker. Such evidence is only marginally relevant to the case, and on a new trial it would probably not result in an acquittal."); *see also*, *United States v. Hoffa*, 247 F. Supp. 692, 696 (E.D. Tenn. 1965)(To entitle the defendants to a new trial, it must appear that the new evidence, if undisputed and believed, would have been sufficient, if produced at the time of the trial, to have been reasonably expected to have changed the results of the original trial.).

Further, counsel knew of this witness during and before, trial. For example, during his direct examination of Coogle, counsel asked if any other people lived with Mariela Velasquez in Miami in 2001. She responded, "[i]t was me, myself, Mariela Velasquez; my son, David Solomon; [and] Francisco Velasquez." (JA-1487). Counsel asked Coogle specifically if she was staying "with her [Mariela Velasquez] brother Francisco Velasquez?" (JA-0834). Coogle responded, "That's correct." *Id*. The defense may have made a conscious decision not to call Mr. Velasquez, given that he was only 14 or 15

years old at the time of the murder witnessed by Coogle.[2] Perhaps, it was their trial strategy not to bring such a young boy in to testify given his testimony would mirror that of his sister's or, maybe, they believed the evidence they presented at trial was sufficient—concluding, themselves, that this evidence would merely be cumulative and impeaching. *See, e.g.*, *Ida v. United States*, 207 F. Supp. 2d 171, 181 (S.D.N.Y. 2002)(stating, "Rule 33 does not permit a defendant to make a tactical trial decision not to call certain witnesses and then to seek a new trial later if the tactic does not result in an acquittal."). In any event, Mr. Velasquez's affidavit cannot be viewed as newly discovered evidence because it only serves to reiterate what his sister already testified to in 2014. *See, e.g.*, *United States v. Mensah*, 434 F. App'x 123, 127 (3d Cir. 2011)(citation omitted)(stating, "the new evidence is also cumulative. The two inmates' testimony impugns Adusei's credibility, but defense counsel extensively questioned Adusei for his credibility and inconsistent statements to the FBI. Moreover, as noted above, Adusei's statements to the two inmates that Mensah was not involved with the conspiracy were contemporaneous with his statements to the FBI. Thus, the

[2] In his July 23, 2014, affidavit, Francisco stated he was 15 years old when he moved to Miami in 2001. However, Mariela testified at trial that her brother was only 14.

additional testimony would serve only to reinforce what the jury had already heard.").

Also, counsel clearly could have elicited this information before or during trial. As noted by the Superior Court, Velasquez was living in the Virgin Islands at the time of trial, so he was accessible to counsel. *See*, *People of the V.I. v. Rivera*, 2020 V.I. LEXIS 54, *9 (Super. Ct. June 3, 2020)(stating, "Francisco returned to St. Croix from Miami in October 2001, and should have been available to testify at trial as well as at the evidentiary hearing."). Therefore, the Superior Court's factual determination was not clearly erroneous, and it did not abuse its discretion by denying the motion for a new trial as it pertained to Velasquez's affidavit. Velasquez's affidavit does not satisfy the requirements for a new trial based on newly discovered evidence because it is cumulative, and it only would serve to impeach Coogle's testimony. Furthermore, counsel did not exercise due diligence in seeking this information before or during trial, but, more importantly, even if Rivera presented Velasquez's testimony, it would not probably produce a new result at trial.

2. Affidavit of Melendez

Melendez's affidavit also lacks materiality and, at best, is impeachment evidence. Melendez claims that he was Coogle's boyfriend for "approximately

five weeks[,]" when she lived in Florida. (JA-0034). According to his affidavit, he and Coogle began dating in June of 2001 and broke up sometime in July of that year before giving birth to her son. He stated, "[w]hen I first started dating Theresa Coogle, we would see each other several times a week. After a few weeks when our relationship became more serious, we started seeing each other every day." (JA-0035). The only concrete—or somewhat concrete—details that he can recall during that period was that "either on Father's Day or within a few days after Father's Day in June 2001 [which was after the June 14, 2001 murder] that Theresa Coogle gave me a Father's Day present. . . . I remember being surprised since I was not the father of her daughter." (JA-0035). He also stated that, "on at least two occasions, I picked her up in the evening at work." (JA-0035). He never pinpointed a date on which he picked her up. All this information is speculative, cumulative, and once again, only serves to impeach Coogle's testimony.

First, he admits that he did not see Coogle every day when they first started dating, but only after "a few weeks" did he claim they would see each other every day. The second week in June 2001 began on the 15th—one day after the date suspected of Williams's death. Further, Father's Day came three days after Williams's death. Father's Day in 2001 fell on June 17, 2001. In other words, there is nothing contained in the affidavit that would

definitively prove that Coogle was not in St. Croix during the time she states she witnessed the murder. His statements would not add anything to the testimony of others who stated at trial that they believed Coogle was not in St. Croix during the relevant time frame.

Further, like Velasquez, defense counsel should have known of this individual during the trial but never acted upon it until after the trial. It is not as though Melendez could not be found or reached during the trial because it appears from his affidavit that he was friends with Mariela on Facebook. "Didi [Mariela] Velasquez contacted me through Facebook and told me about what had happened to her brother who was charged along with four other people." (JA-0035-0036). As the Superior Court correctly pointed out: "While Melendez did not say when Mariela contacted him, it still shows that Mariela, who testified at trial, would have known that Melendez could have helpful information. Nothing in the record establishes that Rivera or his attorney was unable to reach Melendez before trial." (JA-0163). According to counsel, it was not until "[a]fter trial [that] we began obviously to do all the things that we could have done had we known the identity quite some time before. I retained an investigator in Florida . . . we got him all the names that we could find of anyone in Florida who might be able to corroborate one way or the other where Ms. Coogle was during our important time frame. . . ."

(JA-0108). Why would counsel wait until *after* trial to get information from witnesses they knew *existed at the time of trial* and should have been readily available?

Thus, like Velasquez, counsel failed to allege facts that demonstrate diligence. *Phillips*, 51 V.I. at 280. Further, Melendez's affidavit only serves to impeach at best. *See, United States v. Middlemiss*, 217 F.3d 112, 123 (2d Cir. 2000) (The court, "also correctly concluded that the evidence Siracusa offered merely was additional impeachment evidence. Furthermore, because defendant Orfanos knew about Siracusa before trial, Judge Stein properly ruled that counsel with due diligence could have discovered the evidence. The district court's denial of the Rule 33 motion was not an abuse of discretion."); *see, also*, *United States v. Beam*, 635 F. App'x 28, 30-31 (3d Cir. 2015)(internal citation omitted)(stating, "Beam asserts that some of the evidence have bolstered his contention that Rebuck believed the CTC trusts were legal, and other evidence would have shown that Rebuck had the motivation to lie at Beam's trial in order to protect his FBI-agent son's career. Although this evidence is 'newly discovered,' it is 'merely cumulative [and/]or impeaching.' Beam had available to him at trial evidence showing that Rebuck initially believed (or at least said that he believed) that the CTC

trusts were legal. The jury either did not credit this evidence, or it did not believe that it showed that Beam was unaware of the trusts' illegality.").

3. Affidavit of Rodriguez

Rivera also attempts to use the affidavit of Rodriguez—a disgraced former police officer—who was arrested in 2007 and "convicted of serious felony charges against a minor female." (JA-0164). This fact, alone, calls into question Rodriquez's credibility; however, as the Superior Court correctly noted, Rodriquez's affidavit represents his personal opinion, not concrete proof that warrants a new trial.[3] Thus, Rodriguez's affidavit lacks materiality. *Phillips*, 51 V.I. at 280. According to his August 11, 2016, affidavit, "[t]he series of events that led to Mr. Rivera's arrest, the evidence withheld at trial, his conviction and the totality of the case itself is ***in my personal opinion*** a result of the willful and deliberate tampering with evidence by these individuals . . . ." (JA-0051)(emphasis added). It is well-settled that the personal opinion of a lay witness not opining on events that he witnessed is irrelevant. *See*, V.I.R.E. Rule 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly

[3] According to the Superior Court, "Rodriquez does not swear to any specific facts in his affidavit, just his 'personal opinion.'" (JA 0164).

understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.). To the Appellee's knowledge, Rodriquez has no perception of the events taking place on or about June 14, 2001, much less one that is rationally based. Nor is the Appellee aware that Rodriquez was present during the collection of evidence at the scene—which, again, calls into question how he can personally opine on any evidence being tampered with.

To the extent that Rodriguez mentions any facts, those facts do not appear to relate at all to the death of Williams. Rodriguez makes various unsupported allegations that corrupt officers conspired to kill Rivera. However, even if those allegations could be verified, they do not concern the central question at the heart of Rivera's motion for a new trial: Theresa Coogle in Florida or St. Croix on June 14, 2001? Therefore, Rodriguez's affidavit is completely irrelevant.

Perhaps, more damning to Rivera is the fact that this information was available *before trial*, thus, once again, demonstrating that he did not exercise due diligence. *See*, *e.g.*, *United States v. Jenkins*, 726 F. App'x 452, 458 (6th Cir. 2018), noting that the Court has held that prior knowledge of evidence forecloses on the defendant's ability to present the evidence as new

after trial). In *United States v. Glover*, 21 F.3d 133, 138-39 (6th Cir. 1994), the court held that a defendant who knew of a witness's testimony before trial could not later submit the testimony as 'newly discovered' evidence because the defendant was 'well aware' of its existence before trial. As stated earlier, according to Rodriquez's affidavit, he volunteered but "was never allowed to testify in court." (JA-0051). Defense counsel knew about this willingness to testify but made a strategic decision not to use him. *See*, *United States v. Martinez-Mercado*, 261 F. Supp. 3d 293, 303 (D.P.R. 2017)(citations omitted)(brackets in original)(stating, "Information that defense counsel, for whatever reason, 'decides not to pursue [. . .] as part of his trial strategy' does not constitute 'newly discovered' [evidence] for purposes of Rule 33(a).").

In short, the affidavit of Rodriquez is not material, and it is filled with personal opinion and bias. Therefore, the trial court did not abuse its discretion by denying Rivera's motion for a new trial based upon Rodriguez's affidavit. This Court should not consider it as a basis for ordering a new trial based on newly discovered evidence. *See*, *United States v. Dittrich*, 204 F.3d 819 (8th Cir. 2000)(stating, the Defendant "has failed to satisfy the fourth and fifth elements necessary to justify a new trial: that the newly discovered evidence be material and likely to produce an acquittal.").

C. Coogle's June 25-July 8 Employment Record and Her Daughter's April 8th Medical Record are Immaterial, Cumulative, and Impeaching

Rivera also attempts to use a medical record for Coggle's daughter dated April 8, 2001, and a Bal-Rod Enterprises, Inc. ("Wendy's") timecard with relevant dates listed between June 25, 2001, and July 8, 2001, for the proposition, that Coogle was not in the Virgin Islands on or around June 14, 2001. Neither of these represents newly discovered evidence in a legal sense. First, the dates do not align with the date of the murder, making them useless. These documents do not even serve as impeachment evidence and are cumulative. As the trial court correctly pointed out, the April medical record and the employment record are not during the same periods that Coogle stated she witnessed Williams's murder. The medical record is some *two months* before the time she witnessed the murder making that evidence irrelevant. The same can be said of the Wendy's employment record.

According to this record, Coogle worked a total of only 27.91 hours during the period *beginning* on June 25, 2001, and ending on July 8, 2001. (JA-0038). Those work hours do not prove that Coogle was not in St. Croix two weeks before the start of this employment cycle. She easily could have been in St. Croix on June 14, 2001, and then traveled back shortly after that to work those 27.9 hours. Like the medical record from April, this

information is cumulative to what was already revealed at trial and is not useful in proving Coogle's whereabouts on June 14, 2001. In short, this Court should not give any weight to these two records in deciding whether to grant Rivera a new trial.

D. The Absence of Travel Records for Coogle Is Not Newly Discovered Evidence

Rivera urges this Court to order a new trial based upon the lack of travel documentation substantiating that Coogle was in St. Croix on or about June 14, 2001. The fact that counsel could not find a travel record does not refute Coogle's direct and graphic testimony regarding the murder.

Moreover, the People have never disputed that Coogle was in Florida at various times in 2001. Counsel's failure to find a travel record is not proof of anything other than counsel's failure to find a travel record. As the Superior Court was wise to point out, this period was before the September 11 terrorist attacks, and much has changed in terms of travel and documentation of travel. (JA-0167). It is important to note that all of counsel's contacts never resulted in anything that can definitively rebut Coogle's testimony.

Furthermore, Rivera failed to show diligence in presenting this "proof" to the Court. Trial counsel for Appellant first reached out to Customs and Border Protection ("CBP") on April 15, 2014, *after* trial and the entering of

sentence and judgment. (JA-0054). Counsel sought documents relating to Coogle's travels between Florida and the Virgin Islands from January 1, 2001, to December 31, 2002. *Id*. The following month, CBP denied this request citing privacy concerns; the fact that the information was readily available from Coogle, herself; and that CBP had no interest in the matter. (JA-0073). After appealing the decision, again, CBP denied relief, yet offered this advice:

> If you feel that this decision is an inadequate response to your appeal, you may obtain judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B) in the United States District Court in the District in which you reside, in the District in which you have a principal place of business, in the District where the Agency records are situated, or in the United States District Court for the District of Columbia.

(JA-0075).

This advice was not followed. Rather, counsel then contacted the prosecutor in the case—Attorney Kippy Roberson ("Roberson"), FBI Agent Tom Calhoun ("Calhoun"), and U.S. Attorney Ronald Sharpe ("Sharpe"). These communications reveal nothing conclusive and, at times, seem confusing. For example, one communication between Attorney Rhea and Calhoun states, "I inquired of Mr. Roberson what time frame you had investigated, and he informed me that you had made inquiries for Coogle's travel with ICE [presumably U.S. Immigration and Customs Enforcement]

and ARC [Airline Report Corporation] for the entire year of 2001." (JA-0082). In another communication from Roberson to Rhea, it states:

> Hi again.
>
> An update for you. I spoke with Special Agent Tom Calhoun from the FBI today. At the time of trial, he was informed of the allegation that Ms. Coogle was not on island at the time of the murder. He did due diligence with US Customs and checked for any I-94 filings during the relevant time period. My understanding is that the I-94 is the document required by Customs if a person is going to leave USVI. There was no record of Ms. Coogle ever leaving the islands during that time frame. He also checked with Airline Report Corporation, which I understand is a service that records any travel on the commercial airlines. They also indicated that there was no travel by Ms. Coogle during the time period in question. Though I do not recall being informed of it at the time, apparently Agent Calhoun had followed up on all possible documentation on that information and there was no indication that Ms. Coogle was absent from STX when the event occurred.
>
> Regards,
>
> Kip (JA-0172).

What is confusing is whether Calhoun searched ICE records, CBP records, or both. Regardless of whether they were each searched or just one, neither of these agencies existed during 2001. As the Superior Court noted, counsel "overlooks that CBP may not have records of cross-border travel from 2001 *before* that office was created." (JA-0167)(emphasis in original).[4]

[4] Although not mentioned by the trial court, according to ICE's home internet page, "ICE was created in 2003 through a merger of the investigative and

Before ICE and CBP, it appears that the U.S. Treasury may have been the responsible entity for maintaining such travel records. (JA-0167)(stating, "[A]ll persons entering the United States are required to complete U.S. Customs Declaration form 6059-B, and these completed forms are kept in possession of the Department of the Treasury.")(citing, *Ditlow v. Shultz*, 379 F. Supp. 326, 328 (D.D.C. 1974)). Even if these agencies were responsible for holding this documentation, and Agent Calhoun had requested this information, why has nothing turned up regarding Coogle's travel from St. Croix to Florida in March 2001—an occurrence that all parties appear to agree upon? If these agencies could definitively state that Coogle did not travel in or around June, they should also be able to provide documentation of her undisputed travel record in March of that year. There does not exist any records that state Coogle did not travel back and forth from Miami to St. Croix, or vice-versa in 2001. All that we have are records of unsuccessful searches for such documentation.

Further, "the Herculean effort of Rivera's counsel, Gordon C. Rhea, Esq., beginning in April of 2014" to track down the existence of these records occurred after trial—despite knowing of her travels to Florida; whom she was

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interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service." Available at, https://www.ice.gov/about-ice. Last accessed on January 17, 2021.

living with, in Florida; and where she was working there at the time. (Appellant's Br. 10). Seeking this information after trial does not represent due diligence on defense counsel's part. Additionally, counsel was aware of the person who purchased Coogle's ticket back to the Virgin Islands for the June 14th episode, but this topic was never explored at trial, nor was there any effort to have that person testify—

> During a pretrial suppression hearing held the day before trial, Rivera did ask Coogle what airline she flew on to return the [*sic*] Virgin Islands. Coogle said she could not recall. Rivera then asked Coogle who paid for her ticket and Coogle said her grandmother, Mary Schneider, "paid for her ticket." She also said that she "may have paid for her own ticket a couple times."

(JA-0166)(cleaned up).

The unsuccessful search for some documentation that would conclusively state Coogle did not travel to St. Croix is not newly discovered evidence—it is no evidence at all. Further, to the extent some documentation could have been had to definitively disprove Coogle's claims about traveling back and forth to St. Croix and Miami, counsel was not diligent in finding this information. His search began after trial—despite being aware of her claims of cross-border crossings and their witnesses who testified they believed she was in Miami uninterrupted during the timeframe in question. Therefore, counsel's inability to obtain the pre-9/11 travel record for Coogle

is not evidence. Consequently, this Court should not consider it as a basis to grant Rivera a new trial.

POINT II

The Interest of Justice Does Not Justify A New Trial

In a final effort, Rivera cites Rule 135's catch-all provision empowering a Court to order a new trial "if required in the interest of justice." "In assessing such 'interest,' the court may weigh the evidence and credibility of witnesses; if the court determines that there has been a miscarriage of justice, the court may order a new trial." *People of the Virgin Islands v. Gagliani*, 51 V.I. 81, 85 (V.I. Super. Ct. June 11, 2009)(citing, *U.S. v. Charles*, 35 V.I. 306, 949 F. Supp. 365, 368 (D.V.I. 1996); *see also*, *Milligan v. People of the V.I.*, 69 V.I. 779, 805 (2018)(citation omitted)(stating, "The decision to grant or deny a new trial is in the sound discretion of the trial court. It can be granted: when after weighing the evidence, the court determines there has been a miscarriage of justice and where there is a reasonable probability that trial error had a substantial influence on the jury verdict."). "If the evidence preponderates heavily against the verdict, the Court, having cautiously considered all of the evidence, may exercise its discretion to order a new trial. *Such an exercise of discretion is to be used only in exceptional*

circumstances, however." *Gov't of the V.I. v. Leycock*, 19 V.I. 59, 93 F.R.D. 569, 571 (D.V.I. 1982)(emphasis added).

Rivera argues that in the interest of justice, this Court should order a new trial. They state, "[w]ith 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." (Appellant's Br. 31). But Rivera's newly discovered evidence is speculative, immaterial, and irrelevant. Rivera has not shown that Theresa Coogle was not in the remnants of an abandoned building near the old Grapetree hotel on June 14, 2001, witnessing Officer Wendall Williams's gruesome murder. Wishing for the desired outcome does not make it so.

Further, Rivera claims that it was a miscarriage of justice that he was convicted based on the "word of a single, unreliable witness, whose statements before and during trial were riddled with inconsistencies. . . ." *Id.* Yet, "this Court has consistently held that the testimony of a single witness is sufficient to support a conviction, even if uncorroborated and contradicted by other testimony." *Estick v. People*, 62 V.I. 604, 612 n.2 (V.I. 2015)(collecting cases). The fact is, the jury believed Coogle; the Superior Court found no miscarriage of justice, nor any error during trial that would

have influenced the jurors, and this Court has previously upheld these convictions. Thus, the interest of justice does not compel the need for a new trial for Rivera.

POINT III

The Evidence Is Not Rebuttal Evidence

Rivera also argues that the Superior Court erred in ruling that their evidence only served to impeach Coogle. (*See*, Appellant's Br. 24). Instead, they consider it to be rebuttal evidence. *Id*. at 25. To support this contention, they rely heavily on the decision in *United States v. Harris*, 557 F.3d 938 (8th Cir. 2009). In that case, "Antonio Harris was convicted of possessing over fifty grams of cocaine base (crack) with intent to distribute it,. . . . On appeal, Mr. Harris maintains that the district court should have granted his suppression motion and that the court erred in two of its evidentiary rulings." *Id*. at 940. One of the case's issues was whether the court erred by allowing the introduction of certain electrical utility records. "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." *Id*. at 942. She testified that she did not witness anything that would indicate drug activity when she was staying there. However, when the power company was contacted, they confirmed a power

outage at Ms. Broadway's home, but it occurred *after* her son's arrest. When the Government introduced those records, they characterized it as impeachment evidence. Yet, the Court disputed this characterization:

> 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 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. 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. (cleaned up).

The evidence presented in *Harris* is completely different from the evidence Rivera is attempting to introduce here. In *Harris*, the evidence rebutted Cynthia Broadway's assertion that she lived with her son during the period he was under surveillance because her house had a power outage. It definitively proved that what she was saying was not true. In the instant matter, Appellant's evidence does not rebut Coogle's testimony. The affidavits, the employment record, the medical record, and the lack of travel records do not pinpoint precisely where Coogle was on or about June 14, 2001. Rivera would have to present verifiable proof that Coogle was not at the murder scene to rebut her testimony. This Court should not grant any

weight to Rivera's assertion that he has offered rebuttal evidence rather than cumulative, impeaching evidence.

CONCLUSION

To conclude, Rivera is asking this Court to order a new trial based on newly discovered evidence. However, Rivera's evidence before this Court does not satisfy the requirements to be considered newly discovered. Namely, it is impeaching, cumulative, irrelevant, and would not produce an acquittal. Additionally, Rivera did not exercise the requisite due diligence in obtaining this information before or during, trial. For these reasons, this Court should deny Appellant's request for a new trial.

Respectfully Submitted,

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Dated: January 27, 2021

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CERTIFICATE OF BAR MEMBERSHIP

IAN S.A. CLEMENT, Counsel for the Appellees, certifies that he is a member in good standing of the bar of the Supreme Court of the Virgin Islands.

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CERTIFICATE OF FILING AND SERVICE PURSUANT TO V.I.S.CT.R. 15(d)

I certify that on January 27, 2021, the undersigned caused a true, correct copy of the foregoing Appellees' Brief to be efiled according to the Rules of the Virgin Islands Supreme Court on Martial A. Webster, Esq., and Richard F. Della Fera, Esq, counsel for Appellant.

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CERTIFICATE OF WORD COUNT
PURSUANT TO V.I.S.CT.R. 22(f)

I certify that according to V.I.S.CT.R. 22(f), the total word count of the foregoing brief is 7091 words.

/s/ Ian S.A. Clement