

FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,)
)
Plaintiff,)
)
v.)
)
ALEXIS JOSE LIMA,)
)
Defendant.)
_____)

CASE NO. ST-08-CR-F437

JURY TRIAL DEMANDED

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: March 3, 2011)

I. Introduction.

Pending before this Court is Defendant's "Motion to Dismiss Counts Charging Unauthorized Possession of a Firearm on Second Amendment Grounds." The Court will deny this motion because Defendant lacks standing to bring said motion under the circumstances of this case. Also submitted for adjudication is Defendant's "Motion to Dismiss for Violation of Mr. Lima's Speedy Trial Rights." This motion also will be denied in light of amendments to the federal and territorial laws governing the judicial structure of the Virgin Islands.

II. Background.

This matter grows out of a nine-count Information brought by the People of the Virgin Islands (the "People") against Defendant Alexis Jose Lima. Mr. Lima is charged with single counts of attempted first degree murder, first degree assault, mayhem, third degree assault, and

first degree reckless endangerment. He also is charged with four counts of unauthorized use of a firearm during a crime of violence. All of the charges are based on an incident said to have occurred on October 11, 2008. On that date, Mr. Lima is alleged to have shot an individual in a crowded nightclub in the Frenchtown area of St. Thomas, U.S. Virgin Islands.

In his motion to dismiss based upon the Second Amendment to the United States Constitution, Defendant asserts that "Virgin Islands law gives the [Police] Commissioner unfettered discretion to ban .45 caliber handguns." In his view, this perceived authority of the Police Commissioner caused Defendant not to pursue a license for his .45 caliber handgun. He argues that, insofar as this prosecution is premised upon his alleged unauthorized possession and/or use of a firearm, his constitutional right to bear arms has been contravened, and counts Two, Four, Six, and Eight of the Information must be dismissed.

He then asserts in his second motion to dismiss that he has a statutory right to a speedy trial under the timelines set out in the Speedy Trial Plan of the District Court of the Virgin Islands. Specifically, Mr. Lima posits that the 70-day time limit of the Plan expired some time ago. Therefore, he argues, he is entitled to a dismissal of this entire prosecution under Virgin Islands law. The Court details below the rationale for denying each of Defendant's motions.

III. Analysis.

a. The Motion to Dismiss Counts Charging Unauthorized Possession of a Firearm on Second Amendment Grounds will be denied because Defendant lacks standing to mount his constitutional challenge.

In Defendant's motion to dismiss on constitutional grounds, he argues that there is a Virgin Islands Police Department ("VIPD") policy against licensing firearms larger than .40 caliber which violates his Second Amendment right to keep and bear arms.¹ While all the provisions of the United States Constitution do not automatically apply in the United States Virgin Islands, the Second Amendment specifically has been incorporated in the Territory through Section 3 of the Revised Organic Act of the Virgin Islands of 1954 ("ROA").² Relying on *District of Columbia v. Heller* ("Heller")³ and *McDonald v. City of Chicago* ("McDonald"),⁴ Defendant argues that the VIPD's policy not to issue licenses for .45 caliber handguns has essentially the same prohibitive effect as the District of Columbia's and City of Chicago's firearms laws at issue in *Heller* and *McDonald*. The People oppose Defendant's motion stating that, because he never applied for a license to carry any firearm in the Virgin Islands, Defendant cannot succeed on said motion. The People's argument raises the question of whether Mr. Lima has standing to challenge the Virgin Islands firearm regulatory scheme under the circumstances presented in this case.

¹ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

² Revised Organic Act of the Virgin Islands 1954, as amended, § 3, 48 U.S.C. § 1561, *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 86 (1995) (*preceding* V.I. CODE ANN. tit. 1). *See also*, *People v. Penn*, No. ST-10-CR-179, 2010 WL 2927465 * 1 (V.I. Super. Ct. July 14, 2010).

³ 554 U.S. 570 (2008).

⁴ 130 S.Ct. 3020 (2010).

Although the Superior Court of the Virgin Islands is not a court established by or pursuant to Article III of the United States Constitution, the "...requirement that a litigant have standing to invoke a court's authority has been incorporated into Virgin Islands jurisprudence."⁵ The standing inquiry focuses on "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."⁶ Standing does not focus on the merits of the issue, rather, it is "a preliminary jurisdictional requirement" necessary to establish that a litigant is entitled to judicial action.⁷

A movant must allege a personal injury fairly traceable to the opponent's allegedly unlawful conduct and that the injury is likely to be redressed by the requested relief.⁸ In other words, to have standing to raise his challenge to the Virgin Islands firearms licensing laws and regulations, Defendant must show that he has suffered "... (i) an actual or threatened injury that was (ii) caused by [the People's] actions and is (iii) capable of judicial redress."⁹ In this case, Mr. Lima cannot establish his standing to challenge the alleged VIPD policy because he cannot show that he suffered any injury-in-fact or that any governmental action was the cause of his alleged injury.

1. Defendant lacks standing because he does not have any Second Amendment right to bear arms under the circumstances of this case.

Mr. Lima cannot establish any injury-in-fact because, based on the circumstances presented in the record before the Court, he does not have any Second Amendment right to bear arms. As noted above, an injury-in-fact is essential for Defendant to establish his standing to raise his challenges. In assessing whether he incurred an injury-in-fact, the Court must look at whether Mr. Lima has demonstrated his alleged injury falls within the "zone of interests" which the Second Amendment is intended to protect.¹⁰

In *Heller*, the United States Supreme Court held that a person has a Second Amendment right to possess a firearm for home defense. *McDonald* extended the *Heller* holding, a case that originated in the District of Columbia, to the States pursuant to the Fourteenth Amendment, which also applies in the Virgin Islands through Section 3 of the ROA. What Defendant ignores, however, is that *Heller* also proclaimed, "...we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation...."¹¹ Rather, "...the Second Amendment protects a personal right to keep and bear arms for **lawful purposes**, most notably for self defense within the home."¹² In this case, Mr. Lima does not assert that he was deprived

⁵ *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 124 (V.I. 2009) (citations omitted).

⁶ *Allen v. Wright*, 468 U.S. 737 (1984).

⁷ *Id.*

⁸ *Id.*

⁹ *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. at 125 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

¹⁰ See, *Anjelino v. New York Times Co.*, 200 F.3d 73, 88 (3rd Cir. 2000); *Jones v. McElroy*, 429 F. Supp. 848, 851 (E.D. Pa. 1977).

¹¹ 554 U.S. at 594 (emphasis in the original).

¹² *McDonald*, 130 S.Ct. at 3044 (emphasis added).

of his right to bear arms for self-defense, protection of his home, or for any other lawful purpose. Indeed, he does not present any purpose for having a firearm at all. He simply argues that a VIPD policy exists which deprives him of a general right to bear a .45 caliber handgun under the Second Amendment. While *Heller* and *McDonald* do not definitively set the parameters of the Second Amendment right to bear arms, they do make clear that the right is not unlimited.

Herein, Defendant was not in possession of a weapon in or within the curtilage of his residence. He is accused of shooting an individual in the back in a nightclub while several other patrons were present. This Court is comfortable in determining that the Second Amendment right to bear arms does not protect this type of alleged activity. Indeed, even if Mr. Lima had a license to carry a firearm and he engaged in the asserted conduct, he still would face serious criminal charges under a different statute which carries maximum penalties that are similar¹³ to those he may face if he is convicted on the challenged charges in the existing Information.¹⁴ This Court concludes that Mr. Lima's alleged injury does not fall within the zone of interests protected by Second Amendment right to bear arms under the circumstances presented. Therefore, he fails to meet his initial burden of demonstrating an injury-in-fact.

2. Defendant also lacks standing under *Poulos v. New Hampshire*.

In addition to his lack of a cognizable Second Amendment right, Mr. Lima never attempted to obtain a license to carry a firearm under Virgin Islands law. Therefore, he cannot demonstrate that any conduct of the government caused him any Second Amendment injury. In order to have standing to challenge a licensing system, generally, the litigant first must have attempted to obtain a license and been refused by the regulatory agency. As previously declared by the United States Supreme Court

¹³ See, 14 V.I.C. § 2251, which provides:

“a) Whoever

(2) with intent to use the same unlawfully against another, has, possesses, bears, transports, carries or has under his proximate control, a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly weapon shall

(A) be fined \$5,000 and imprisoned not more than five (5) years; or

(B) if he has previously been convicted of a felony, or has, possesses, bears, transports, carries or has under his proximate control, any such weapon during the commission or attempted commission of a crime of violence (as defined in section 2253(d)(1) hereof) shall be fined \$10,000 and imprisoned not more than fifteen (15) years, which penalty shall be in addition to the penalty provided for the commission of, or attempt to commit, the crime of violence.”

¹⁴ See, 14 V.I.C. § 2253, which provides:

“a) Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either, actually or constructively, openly or concealed any firearm, as defined in Title 23, section 451(d) of this code, loaded or unloaded, may be arrested without a warrant, and shall be sentenced to imprisonment of not less than one year nor more than five years and shall be fined not less than \$5,000 nor more than \$15,000 or both the fine and imprisonment, except that if such person shall have been convicted of a felony in any state, territory, or federal court of the United States, or if such firearm or an imitation thereof was had, possessed, borne, transported or carried by or under the proximate control of such person during the commission or attempted commission of a crime of violence, as defined in subsection (d) hereof, then such person shall be fined \$25,000 and imprisoned not less than fifteen (15) years nor more than twenty (20) years. The foregoing applicable penalties provided for violation of this section shall be in addition to the penalty provided for the commission of, or attempt to commit, the felony or crime of violence.”

“A close parallel exists between unlawful refusals and failure to apply for license on the ground that such application would be unavailing. Such a defense is not allowed. ‘It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that the application for a license would have been unavailing. * *

* In short, the individual is given the choice of securing a license, or staying out of the occupation, or, before he acts, seeking a review in the civil courts of the licensing authority’s refusal to issue him a license.’”¹⁵

The Virgin Islands firearms scheme is facially valid as it expressly permits persons to possess arms for home protection, which is at the heart of both *Heller* and *McDonald*, and also allows for the licensing of guns and persons for other reasons.¹⁶ Herein, Mr. Lima plainly asserts that he did not apply to the VIPD for a license to carry a .45 caliber handgun. In fact, Defendant did not apply to carry any type of firearm. Moreover, he did not file a civil action to challenge the validity of the alleged VIPD policy. He only claims that his application would have been futile. However, the language of *Poulos* forecloses his ability to raise this defense.

In *Poulos*, the Supreme Court presented a non-exhaustive list of regulated activities for which a person may be criminally prosecuted if he or she does not comply with the applicable licensing or permitting procedures. Notably, the regulation of firearms was named among these activities.¹⁷ Further, both *Heller* and *McDonald* expressly state that they are not intended to invalidate all firearms laws and regulations.¹⁸ Thus, *Heller* and *McDonald* do not overrule or undermine the decision in *Poulos*. Rather, all of these cases can, and should, be read together as authorizing jurisdictions to impose reasonable restrictions on the licensing, possession, and use of firearms. Mr. Lima’s implicit argument that any restriction on his ability to license his .45 caliber firearm is inconsistent with U.S. Supreme Court precedents.

There is another reason that Mr. Lima cannot show that any government conduct caused his alleged injury. Though asserting that VIPD has a policy of not licensing firearms larger than .40 caliber, Defendant has not presented the Court with any statute or regulation to sustain this contention. The applicable gun control statutes are found in Title 23, Chapter 5, Virgin Islands Code. There a firearm is defined as “any devise by whatever name known, capable of discharging ammunition by means of gas generated from an explosive composition, including any air gas or spring gun or any ‘BB’ pistols or ‘BB’ guns that have been adapted or modified to

¹⁵ *Poulos v. New Hampshire*, 345 U.S. 395, 409 n. 13 (1953) (citations omitted) (“*Poulos*”).

¹⁶ V.I. CODE ANN. tit. 23, § 454(3).

¹⁷ “But to allow applicants to proceed without the required permits to run businesses, erect structures, **purchase firearms**, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public. 345 U.S. at 409 (emphasis added).

¹⁸ *Heller*, 554 U.S. at 626-627 and n. 26; *McDonald*, 130 S.Ct. at 3047.

discharge projectiles as a firearm.”¹⁹ The rules promulgated by the VIPD, which have been in effect since 1988, utilize the same definition.²⁰ No statute or regulation places a limit on the caliber of the firearms which may be licensed in the fashion asserted by Mr. Lima. The Court has been advised that there are some efforts underway to revise the VIPD firearm regulations. However, if there is an unofficial policy of the type asserted by Mr. Lima, or an on-going process to revise the existing regulations, any such policy or regulation is of no legal effect until issued by the Commissioner and approved by the Governor.²¹ Had Mr. Lima applied for a license and been rejected based on this alleged policy, he could have challenged the policy via an appeal to this Court.²² Mr. Lima cannot demonstrate that he was injured by any action of the Government merely by asserting that the VIPD’s regulation or policy, the existence of which is questionable or which would be unenforceable in the form he asserts, could potentially have been applied to deny him a license to bear a .45 caliber handgun. Thus, he cannot establish the requisite standing to challenge the Virgin Islands firearms licensing statutes and regulations in this case.

Notwithstanding *Poulos’s* general prohibition on the type of challenge raised by Mr. Lima, the Court has found some recent cases determining that a defendant in a criminal action has standing to challenge firearms laws and regulations when they are the basis for his criminal prosecution and his Second Amendment rights are implicated, even when the defendant has not applied for a firearm permit.²³ These cases are premised on the recent pronouncements of the United States Supreme Court in *Heller* and *McDonald*. Just as in this case, the defendants in *Foster* and *Plummer* asserted that applying for a gun license would have been futile under the applicable statutes and regulations, and the prosecutions should be dismissed as inconsistent with their Second Amendment rights. However, this Court declines to follow these cases because they are distinguishable from the instant matter.

The defendants in *Foster* and *Plummer* were arrested for having unlicensed guns in or immediately outside of their residences, and the laws under which they were being prosecuted clearly would have prohibited those defendants from obtaining a firearm for home defense even if they had applied for a permit. In stark contrast, Mr. Lima is charged with shooting another person in the back with his firearm in a nightclub. Also, the *Foster* and *Plummer* defendants were able to cite to particular firearm statutes or regulations of their respective cities which, in their view, compromised their rights under the Second Amendment to the United States Constitution. Conversely, Defendant herein does not identify, nor can the Court locate, any statutes or rules which set forth the policy of which he complains. Also, he has not presented any facts which reflect when he obtained his .45 caliber firearm and that the alleged VIPD policy of which he complains was in effect at the time. Thus, in *Foster* and *Plummer* the defendants were able to present both an injury-in-fact and causation based on the holdings of *Heller* and *McDonald*. Mr. Lima, as discussed above, fails on both prongs, and therefore lacks the standing present in *Foster* and *Plummer*.

¹⁹ 23 V.I.C. § 451(d).

²⁰ Tit. 23, Ch. 5 V.I. CODE R. § 485-2(d).

²¹ 23 V.I.C. § 485.

²² 23 V.I.C. § 472.

²³ See, *People v. Foster*, No. 2010KN076422, 2010 WL 5187702 (N.Y. Crim. Ct. Dec. 15, 2010) (“*Foster*”); *Plummer v. United States*, 983 A.2d 323 (D.C. Ct. App. 2009) (“*Plummer*”) (expressly declining to follow *Poulos v. New Hampshire*).

Based on the foregoing, because Mr. Lima did not apply for a firearms license, cannot articulate any offensive statute, regulation or action of the Government, and does not have a right to bear arms based on the circumstances of this case, he lacks standing to challenge the Virgin Islands firearm licensing regime. Accordingly, Mr. Lima's Motion to Dismiss Counts Charging Unauthorized Possession of a Firearm on Second Amendment Grounds will be denied.

b. Defendant's Motion to Dismiss for Violation of Mr. Lima's Speedy Trial Rights is premised on an outdated view of the Virgin Islands judicial structure and will be denied.

In Mr. Lima's second motion to dismiss, he asserts that the District Court of the Virgin Islands adopted a Speedy Trial Plan which mandates the application of the time limits and sanctions of the federal Speedy Trial Act to the prosecution of all criminal offenses enacted by the Legislature of the Virgin Islands. Defendant continues that the Legislature chose to adopt the rules of the District Court to govern the practice and procedure in the Superior Court pursuant to 4 V.I.C. § 83.²⁴ Defendant also argues that the holding of *Government v. Quetel*,²⁵ wherein the then-Territorial Court concluded that the District Court's Speedy Trial Plan does not apply in this Court, is not well-taken. Rather, he suggests that *Quetel* was incorrectly decided.

The People oppose Mr. Lima's motion on two bases. First, the People invoke *Quetel*, for the proposition that the Speedy Trial Plan of the District Court was not made applicable to the Superior Court under SUPER. CT. R. 7. Second, the People declare that Defendant's Sixth Amendment speedy trial rights have not been violated when the factors of *Barker v. Wingo*²⁶ are applied to posture and events in this case. Because Mr. Lima has not asserted in his motion that his Sixth Amendment speedy trial rights have been violated, the Court will not address the *Barker* factors in this opinion. Also, the Court agrees with the People that Mr. Lima's motion should be denied, but not based on *Quetel*.

The District Court adopted its Speedy Trial Plan to provide timelines for the prosecution of Virgin Islands crimes being tried before it because the federal Speedy Trial Act did not apply to such prosecutions.²⁷ The Court observes that in *Bryan*, the Third Circuit specifically declined to determine whether *Quetel*, which announced that the federal Speedy Trial Act and the District Court Plan did not apply in the Territorial Court of the Virgin Islands, was correctly decided.²⁸ This Court concludes that the District Court's Speedy Trial Plan does not apply in the Superior Court.

²⁴ "The practice and procedure in the territorial court shall be as prescribed by rules adopted by the district court. Subject to the approval of the district court, the territorial court may from time to time prescribe rules for the conduct of its business consistent with law and with the rules prescribed by the district court may issue all writs and make all orders necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law."

²⁵ 18 V.I. 145 (Terr. Ct. 1982).

²⁶ 407 U.S. 514 (1972).

²⁷ See, *Government v. Bryan*, 818 F.2d 1069 (3rd Cir. 1987) ("*Bryan*").

²⁸ *Id.* at 1072 n. 1.

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In 1984, two years after the *Quetel* opinion, the United States Congress enacted amendments to Sections 21, 22, and 23 of the ROA. Specifically, Section 22 was amended to provide the District Court with the same limited subject matter jurisdiction enjoyed by other federal district courts, with some specific additional jurisdiction over income tax cases.²⁹ The caveat to this amendment was that the Virgin Islands Legislature was required to enact affirmative legislation vesting jurisdiction over local matters in territorially-established courts.³⁰ On August 29, 1990, the Virgin Islands Legislature took the required action by enacting 4 V.I.C. § 76(a) which divested the District Court of jurisdiction over local civil matters as of October 1, 1991 and placed that authority in this Court.³¹ Jurisdiction over all local criminal matters was vested in this Court by Act No. 5890, which became effective on January 1, 1994.³² Additionally, Section 23 of the ROA was amended in 1984 to provide that “The relations between the courts established by the Constitution or laws of the United States and the courts established by local law...shall be governed by the laws of the United States pertaining to the courts of the United States, including the Supreme Court of the United States, and the courts of the several states....”³³ Further, Section 21(c) of the ROA was amended to provide that “The rules governing the practice and procedure of the courts established by local law...shall be governed by local law or the rules promulgated by those courts.”³⁴

Taking these congressional amendments together, the Third Circuit has expressly held that pre-existing territorial laws which bestowed on the District Court authority over local matters and procedures are no longer viable, “...inasmuch as the laws of the Virgin Islands must be consistent with the laws of the United States.”³⁵ Because the relations between the courts of this Territory and those established by Congress now are akin to the relations between state courts and federal courts throughout the Nation, the District Court cannot have any authority to mandate the rules of procedure for the Superior Court. Mr. Lima does not, and cannot, cite to any authority which provides that the courts established by the Constitution or Congress prescribe the procedural rules of state courts. This now is the condition of federal-territorial relations in the judicial framework of the United States Virgin Islands.

And, if the amendments to Sections 21, 22, and 23 of the ROA and *Rawlins* and its progeny do not make it clear enough that this Court has the authority to promulgate its own rules and procedures, 4 V.I.C. § 32(f)(1), enacted in 2004 and amended in 2007, plainly states that “The Superior Court shall adopt the rules of court for the Superior Court of the Virgin Islands consistent with Section 21(c) of the ROA of the Virgin Islands.” Thus, in addition to the supremacy of the amendments to Sections 21, 22, and 23 of the ROA over 4 V.I.C. § 83, the same Virgin Islands legislative enactment also was impliedly repealed by 4 V.I.C. § 32(f)(1).³⁶ Taking all of the local and federal statutory amendments together, it is plain that Defendant’s

²⁹ 48 U.S.C. § 1612.

³⁰ See, *Estate of Thomas Mall v. Territorial Court of the V.I.*, 923 F.2d 258 (3rd Cir.1991).

³¹ *Moravian Sch. Advisory Bd. of St. Thomas, Inc. v. Rawlins*, 33 V.I. 280, 285, 70 F.3d 270, 273 (3rd Cir. 1995). See also, *Edwards v. Hovensa, LLC*, 497 F.3d 355, 358 (3rd Cir. 2007).

³² 1993 V.I. Sess. Laws 214.

³³ 48 U.S.C. § 1613.

³⁴ 48 U.S.C. 1611(c).

³⁵ *Moravian Sch. Advisory Bd. of St. Thomas, Inc. v. Rawlins*, 33 V.I. at 288, 70 F.3d at 275.

³⁶ See, *V.I. Pub. Servs. Comm’n v. V.I. Water & Power Auth.*, 49 V.I. 478, 486 (V.I. 2009).

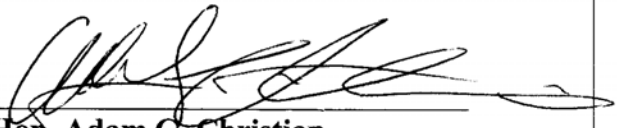
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reliance on the old version of the District Court's jurisdiction is entirely without merit. The practice and procedure in the Superior Court are no longer governed by rules and plans adopted by the District Court unless the Superior Court expressly adopts them. Thus, Lima's Motion to Dismiss for Violation of Speedy Trial Rights will be denied.

IV. Conclusion

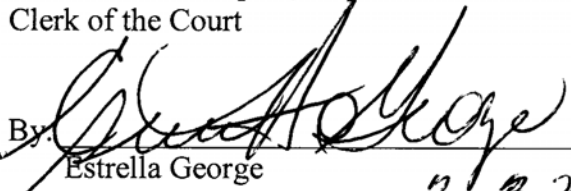
Defendant did not apply to the VIPD for a license to carry a .45 caliber handgun, and his Second Amendment right to bear arms is not implicated in this case. Therefore, Mr. Lima does not have standing to challenge his prosecution under the Second Amendment. Additionally, Defendant's reliance on 4 V.I.C. § 83 to support his claim that the District Court's Speedy Trial Plan is applicable in the Superior Court is misguided. Accordingly, Defendant's Motion to Dismiss Counts Charging Unauthorized Possession of a Firearm on Second Amendment Grounds and the Motion to Dismiss for Violation of Mr. Lima's Speedy Trial Rights will be denied in an order of even date.

Dated: March 3, 2011


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Estrella George

Acting Chief Deputy Clerk 3 / 3-2011