IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)) **Vs.**))) JOSE VENTURA **Defendant**)	CASE NO. SX-12-CR-0000076 ACTION FOR: 14 V.I.C. 922(A)(2)

NOTICE OF ENTRY OF MEMORANDUM OPINION

TO: SUPREME COURT OF THE VIRGIN ISLANDS
MAGISTRATES OF THE SUPERIOR COURT
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JUDGES OF THE SUPERIOR COURT
JOSEPH PONTEEN, ESQ.
DANIEL CEVALLOS, ESQ.
CHIEF DEPUTY, TAMARA BERMUDEZ

Please take notice that on July 25, 2014 a(n) MEMORANDUM OPINION dated July 25, 2014 was entered by the Clerk in the above-entitled matter.

Dated: July 25, 2014

Estrella H. George
ACTING CLERK OF THE SUPERIOR COURT

ROXANNE SERRANO
COURT CLERK SUPERVISOR

NOT FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff,	CASE NO. SX-2012-cr-076
v.	CHARGES: 14 V.I.C. § 922(a)(1); 14 V.I.C. § 11(a)
JOSE VENTURA, Defendant,	

MEMORANDUM OPINION

BEFORE THE COURT is Defendant Jose Ventura's motion, asking the Court to enter judgment of acquittal on his conviction of murder in the first degree or, in the alternative, to grant him a conditional new trial, both pursuant to Federal Rule of Procedure 29. Additionally, and also in the alternative, Ventura moves for a new trial pursuant to Federal Rule of Criminal Procedure 33. Lastly, Ventura moves for an extension of time to supplement his arguments "upon receipt of the still unprepared transcript of trial." (Def.'s Post-Verdict Mots. Pursuant to R. 29 & 33 of Fed. R. Crim. P. Submitted Prior to Receipt of Trial Tr.; Mot. for Extension of Time to Supp. Post-Verdict Mot. Upon Receipt of Tr.; and Reservation of Right to Supp. Upon Receipt of Tr. at 1, filed Feb. 21, 2014 (hereinafter "Def.'s Mot.").) The People filed an Opposition to Ventura's Motion on February 28, 2014, to which Ventura later filed a Reply on March 5, 2014. The People then responded further by filing a reply to Ventura's Reply on March 12, 2014. In an Order entered on April 10, 2014, the Court denied Ventura's motion for judgment of acquittal and motions for new trial, denied his motion to supplement as moot, and struck the People's reply. In furtherance of the April 10, 2014 Order, the Court now issues this Memorandum Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

In a February 13, 2012 Superseding Information, the People charged Jose Ventura along with four others, Maximiliano Velasquez, III, Juan Velasquez, Sharima Clercent, and Jose Rivera, in kidnapping and murdering Virgin Islands Police Corporal Wendell Williams in 2001 in violation of section 922(a)(1) of title 14 of the Virgin Islands Code, and murder during the commission of a kidnapping, or felony murder, in violation of section 922(a)(2) of title 14 of the Virgin Islands Code

Jury selection commenced on January 21, 2014 and ended two days later, on January 23, 2014. The jury was later empaneled and sworn on January 28, 2014 and returned its verdict on February 5, 2014. The evidence before the jury was as follows.

The People's first witness Jaslene Williams, sister to Wendell Williams, testified that she saw her brother regularly in 2001 because they shared a post office box and because Wendell Williams was the one who picked up the mail for both of them. (Jan. 28, 2014 Trial Tr. 58:5-59:22.) Sometime in June 2001, Ms. Williams noticed that her brother had disappeared. *Id.* at 59:5-61:20. He had stopped checking their mailbox, stopped going to work, and never took a previously-purchased cruise. *Id.* at 62:11-12. Ms. Williams was unsure when exactly he disappeared because one of the officers at the Virgin Islands Police Department, not identified by name at trial, had been signing her brother in for his shifts. Ms. Williams eventually contacted the police, and later the FBI, for help because she was worried about her brother. *Id.* at 64:16-25 & 69:7-19. The last time she saw or heard from her brother was in June 2001. *Id.* at 58:11-13.

Williams's friend, James Liburd, testified next and corroborated Ms. Williams's testimony regarding her brother's disappearance. Liburd told the jury he was a close friend of Williams and that the last time he saw Williams was in June 2001 at the Five Corners gas station in Christiansted. *Id.* at 84:9-21. Williams had just finished his shift and was going home. Like Ms. Williams, Liburd testified that he had not heard from or seen Williams since that morning in June 2001. *Id.* at 85:8-10.

The People's third witness, Theresa Coogle—girlfriend of Maximiliano Velasquez III and mother of two of his children—testified that one night in June 2001, she and Max Velasquez went out to dinner when he asked her to marry him. *Id.* at 88:1-19 & 92:23-93:11. Coogle was seventeen years old at the time and eight months pregnant with a second child by Max Velasquez. Later that night after she returned home, Max Velasquez asked her to meet him out at the Grapetree Bay area on the southeastern area of St. Croix. *Id.* at 94:5-10. When she got to the area, she met Max Velasquez and then followed him to an abandoned building, which was part of the former Grapetree Resort hotel. *Id.* at 94:12-95:14. Although it was dark, Coogle said she was able to see because a hanging construction light powered by a portable generator illuminated the abandoned building inside. *Id.* at 97:19-20 & 98:4-6. Max Velasquez, Jose Rivera, Jose Ventura, and Sharima Clercent were there. *Id.* at 95:15-19 & 101:16-17. Also there was another man who was stripped to his underwear and on his knees up against a pole inside the abandoned building with his hands bound together behind the pole. *Id.* at 95:25-96:8. Coogle testified that she later recognized the man from news reports as Wendell Williams. *Id.* at 96:24-97:2. Coogle saw Ventura and Rivera shoot Williams in his hand and in the side of his head. *Id.* at 98:20-23. Rivera later dismembered the body and Ventura put the body into plastic bags and then carried the bags to a boat on the shore. *Id.* at 100:9-14, 101:3-4, & 101:21-24. Max Velasquez then ordered her and Clercent to clean up the blood. *Id.* at 101:9-17.

Coogle identified each of the Defendants and the People moved into evidence the photo arrays law enforcement showed her to identify then. *Id.* at 90:1-92:21. Coogle also explained to the jury that she initially could not identify Jose Ventura from one of the photo arrays because he looked different in first photograph she was shown, which was taken in 2011. The VIPD later obtained a photograph of Jose Ventura from 2001 and Coogle then identified him from that photograph. Coogle also told the jury that she did confuse Jose Ventura and Jose Rivera at a pretrial hearing held on Monday, January 27, 2014. At that hearing, counsel for the People had asked Coogle to identify each of the Defendants. Coogle identified Jose Rivera when she had been asked to identify Jose Ventura. When counsels objected, Coogle then directed a Superior Court marshal, walking in the row behind the Defendants, to stop when he reached the correct defendant. Coogle told the marshal to stop when he reached to

Rivera. She again pointed to Rivera instead of Ventura. Eventually, however, Coogle corrected herself and explained that she had confused Rivera with Ventura because they had just been discussing Rivera. She also explained to the jury that she had confused the two men named Jose.

Coogle also acknowledged on both direct and cross examinations that she gave multiple statements to both federal and local law enforcement agencies, including the Federal Bureau of Investigation, the Drug Enforcement Agency, and the Virgin Islands Police Department, and those statements were partly inconsistent with her testimony in court. *See, e.g.*, *id.* at 104:1-25 & 167:4-5. Coogle explained to the jury that the law enforcement agents might have confused the facts of Williams's murder with another homicide she witnessed and spoke with the agents about. Counsels for the Defendants also brought out on cross-examination that Coogle was living in Miami, Florida with Mariela Velasquez, Max Velasquez's sister, where she worked at Wendy's Restaurant. According to Coogle, she flew back and forth between Miami and St. Croix during this period of time and reiterated to the jury that she was on St. Croix at the time of Williams's murder.

After Coogle, the People called law enforcement agents. VIPD Detective Frankie Ortiz testified about the photo arrays prepared by the VIPD and sent to federal agents to show Coogle. He also testified about photographs taken of the crime scene, including the distance from the shore to the abandoned building and whether a boat could reach the shore. FBI agents Clifford Goodman and Kimberly Quesinberry also testified about statements they took from Theresa Coogle, Hector Davis, and Jimmy Davis as well as their overall investigation into Williams's disappearance, including contact with Jaslene Williams who, according to Goodman, believed that the VIPD might have been involved in her brother's disappearance.

Jimmy Davis and Hector Davis also testified on behalf of the People. In his testimony, Jimmy Davis told the jury that law enforcement wanted him to lie about Rivera's involvement in Williams's disappearance. (Jan. 31, 2014 Trial Tr. 90:11-91:7.) He otherwise denied making any statements to law enforcement. Jimmy Davis's brother, Hector, testified that he could not remember any discussions with law enforcement because of medication he was taking for mental illness and depression that affected his memory. The People recalled Agents Goodman and Quesinberry to impeach the testimonies of the Davis brothers and then rested, after which Ventura, through counsel, moved for a judgment of acquittal on both counts. Following arguments, the Court denied the motion as to Count I, first-degree murder, but granted the motion as to Count II, murder committed during the course of a kidnapping, or felony murder. (Feb. 3, 2014 Trial Tr. 88:10-12 & 108:23-109:4.)

Jose Ventura did not put on a defense. However, Jose Rivera did, calling six witnesses in his defense.[1] Rivera's first witness, his sister, Gricel Rivera, testified that her brother was shot in December 2000. *Id.* at 116:16-20. The injury required surgery after which he spent the next few months recuperating at their mother's house. *Id.* at 118:7-17. Rivera later had to be readmitted to the hospital on June 6, 2001 because of pain in his stomach. *Id.* at 119:2-25. He went into surgery the next day because "he had something wrong with his intestines." *Id.* at 120:2-3. According to Gricel, her brother had an incision running from his breastbone to his navel that was closed with staples. *Id.* at 121:6-12. It looked "like a C-section," she told the jury. *Id.* at 121:15. After her brother was released from the hospital, he had to have help from family members for the next few weeks to do even minor tasks like bathing, going to the bathroom, and getting up from the recliner. *Id.* at 125:5-127:10. He was unable to drive a car for three to four weeks after the second surgery. *Id.* at 128:23-25. Rivera had the staples from his incision removed on June 15, 2001. *Id.* at 131:16-23.

Rivera called another sister, Magali Roldan, as his second witness. *Id.* at 132:9, 133:23. Roldan corroborated Gricel Rivera's testimony regarding their brother's pain, discomfort, and overall lack of mobility following his second surgery in June 2001. *Id.* at 134:16-137:18. She also recalled that it was

[1] Although Ventura did not call any witnesses in his defense, the jury heard the testimonies of the witnesses Rivera called and, therefore, the Court will reference their testimonies as well, particularly as the Defendants were charged with aiding and abetting each other in violation of section 11(a) of title 14 of the Virgin Islands Code and because Ventura adopted Rivera's alibi defense in his Motion. (*See* Def.'s Mot. at 15.)

two to three weeks after her brother's surgery before he could walk unaided and more than a month before he could drive a car. *Id.* at 137:19-24.

Rivera's third witness, his sister, Tania Ruemmel, similarly spoke to the jury about her brother's shooting injury in December 2000:

> I was at my home doing laundry on that evening. And my brother drove up in his car, an Acura. . . . He drove up and I was hanging out clothes. He ask me to get him a Cheetos and a juice, which he usually do every night. I told him to get off the car and go get it himself . . . . [Then] I saw that he was shot. So I put him into my car—he walked to my car and we drove to the Juan Luis Hospital. . . . He was shot in his stomach and he was shot in his arm.

Id. at 145:1-18. Ruemmel then corroborated the testimony of Rivera's other two sisters regarding his surgery and recovery after the shooting and his second surgery in June 2001. All three sisters testified that Rivera's girlfriend would drive him around if he needed to get anywhere. *Id.* at 129:3-6, 141:2-6, 152:5-18.

Rivera's next witness, Mariela Velasquez, sister of Maximiliano Velasquez III and Jose Ventura, testified that she left St. Croix and moved to Miami, Florida in 1998. *Id.* at 154:24, 155:21-156:18, & 157:22-158:7. Theresa Coogle came to stay with her three years later, in March 2001, when she flew to Miami to take her eight-month old daughter to see a doctor for an ear infection. *Id.* at 160:16-161:3. She eventually moved in with Mariela Velasquez and got a job in April 2001 working at Wendy's in North Miami. *Id.* at 161:17-164:4. Mariela Velasquez testified that Coogle slept by her apartment every night and stayed there with her until she delivered her second child in July 2001. *Id.* at 167:3-20. According to Mariela Velasquez, Coogle did not leave Miami until October 2001. *Id.* at 168:19-21.

Rivera called as his next witness Dr. Lloyd Henry who testified about surgeries he underwent in 2000 and 2001. (Feb. 4, 2014 Trial Tr. 8:9-17.) Dr. Henry informed the jury that Rivera arrived at the hospital on December 18, 2000 "with multiple gunshot wounds. One was in the abdomen and there were other wounds in the left upper arm, left forearm and the right index finger." *Id.* at 10:2-5. He checked himself out of the hospital two days later. *Id.* at 13:19-22. Dr. Henry next saw Rivera on June 6th or June 7th of 2001 when he was operated on a second time. *Id.* at 15:15-18. Scar tissue was removed from the first operation that had caused a blockage in Rivera's intestines. *Id.* at 20:4-18. Rivera was discharged from the hospital on June 11, 2001. *Id.* at 22:3-7. Dr. Lloyd testified that typically the recovery time for someone to walk upright without assistance after the type of surgery Rivera had is approximately ten days to two weeks after leaving the hospital. *Id.* at 23:4-10. His staples were removed on June 15, 2001. *Id.* at 29:1-3. Dr. Lloyd explained on cross-examination that he expected that Rivera's recovery time would be shorter because of his age and would also be shorter than the time it took him to recover from the first surgery. *Id.* at 27:1-6, 30:8-13.

Sandra Rivera, sister of Theresa Coogle, was Rivera's last witness. She testified that she was on St. Croix in June 2001, having moved back in April 2000 from Miami, Florida. *Id.* at 34:6-23. Rivera testified that she saw her mother every day after she returned because she would drop her son off at her mother's to watch him while she was working. *Id.* at 37:3-20. Rivera recalled last seeing her sister Theresa on St. Croix in April 2001. *Id.* at 38:18-20. She claimed to know "to a degree of certainty" that her sister was not on St. Croix in June 2001 because Theresa did not attend their mother's birthday party and because she sent her mother pictures and letters from Miami. *Id.* at 39:4-40:5. On cross examination, however, Sandra Rivera told the jury that she could not "positively, definitively" say that in June 2001 her sister did not get on an airplane and fly back to St. Croix for a visit. *Id.* at 42:12-19.

Following Sandra Rivera's testimony, Rivera and Ventura each rested. *Id.* at 43:5-13. The Defendants then moved for judgment of acquittal, which the Court took under advisement after hearing arguments from the parties. *Id.* at 50:18-19. After discussing jury instructions in chambers, the parties then informed the Court that they were satisfied with the instructions as drafted. *Id.* at 54:2-24. Following closing arguments, the Court then instructed the jury and on the second day of deliberations, the jury returned their verdicts, finding Jose Ventura and Jose Rivera guilty of first-degree murder of Wendell Williams and Maximiliano Velasquez III not guilty.

Both Rivera and Ventura renewed their motions for judgment of acquittal. Ventura also moved for a new trial. The People, through substitute counsel,[2] filed their Oppositions to the Defendants' motions, and Ventura later responded by filing his Reply. The People then filed a second response to Ventura's Reply, but without seeking permission from the Court. Subsequently, the Court, in an Order entered on April 10, 2014, denied Ventura's Motion and struck the People's Reply. Both Defendants were sentenced to life imprisonment without the possibility of parole on April 4, 2014. The Court now enters this Memorandum Opinion to provide the analysis and discussion for the April 10, 2014 Order.

DISCUSSION

A. Motion for Judgment of Acquittal

"When the Superior Court considers a motion for judgment of acquittal, it views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *Stevens v. People*, 52 V.I. 294, 305 (2009) (internal quotation marks and citations omitted)). The court must uphold the jury's verdict "'if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Codrington v. People*, 57 V.I. 176, 189 (2012) (quoting *Smith v. People*, 51 V.I. 396, 398 (2009)). "The reasonable doubt which will prevent conviction must be the jury's doubt and not that of this Court." *Smith*, 51 V.I. at 398 (internal quotation marks, citation, and brackets omitted). If there are conflicts in the testimony, such conflicts present "credibility issues for the jurors to resolve." *Id.* Courts cannot "substitute [their] own credibility determinations for those of the jury." *Id.* (internal quotation marks, ellipsis, and citation omitted).

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[2] Assistant Attorney General Joseph Ponteen appeared in place of trial counsel for the People, Assistant Attorney General Kippy Roberson, Esq., who had filed a motion, which the Court construed as a notice, informing the Court that he would be out on sick leave for an undetermined amount of time.

Ventura raises three primary challenges to the evidence and testimony brought out at trial: Coogle's testimony was inherently inconsistent, improbable, and irreconcilable; Coogle failed to identify Ventura, and the People failed to establish the "corpus delicti" for first-degree murder. The Court will consider each argument below.

(1) Incredible as a Matter of Law

In support of his first argument, Ventura correctly points out that "[t]he Virgin Islands Supreme Court declared recently that testimony may be declared improbable where it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature."[3] (Def.'s Mot. at 10 (internal quotation marks and citations omitted).) In certain instances courts can find that the testimony of a witness was incredible as a matter of law. To prevail, however, Ventura must show "that it would have been physically impossible for the witness," in this case Coogle, "to observe what [s]he described, or [that] it was impossible under the laws of nature for those events to have occurred at all." *Fontaine v. People*, 59 V.I. 640, 649 (2013) (quoting *United States v. Hayes*, 236 F.3d 891, 896 (7th Cir. 2001)). According to Ventura, three portions of the record support his argument: Coogle's testimony regarding the topography around the crime scene, her testimony that

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[3] In a series of recent opinions, the Supreme Court of the Virgin Islands recognized the potential that a witness's testimony may have been "incredible as a matter of law." *See, e.g.*, *Mercado v. People*, S. Ct. Crim. No. 2011-0067, 60 V.I. ___, 2013 WL 6266029, *2-4 (V.I. Dec. 3, 2013); *Thomas v. People*, S. Ct. Crim. No. 2011-0073, 60 V.I. ___, 2013 WL 6236080, *4-5 (V.I. Dec. 2, 2013); *Fontaine v. People*, 59 V.I. 640, 658-50 (2013); *George v. People*, 59 V.I. 368, 384-86 (2013); *Ostalaza v. People*, 58 V.I. 531, 544-46 (2013); *Phillip v. People*, 58 V.I. 569, 584-85 (2013). But the Court also described the "incredible as a matter of law" doctrine as an "ultra narrow" aspect of an appellate court's review of the sufficiency of the evidence in a criminal case. *See Thomas*, 2013 WL 6236080 at *4-5. *Cf. Fontaine*, 59 V.I. at 648 ("Fontaine is correct that some courts have recognized *an appellate court's responsibility* to review credibility determinations in sufficiency challenges where the witness's testimony was 'incredible as a matter of law.'" (emphasis added) (citation omitted)); *Phillip*, 58 V.I. at 584 ("An *appellate court* may disregard the jury's reliance on a witness's testimony when that testimony is inherently incredible or improbable." (emphasis added) (internal quotation marks and alteration omitted)). Although the Supreme Court has not stated whether the Superior Court may also assess whether a witness's testimony was incredible as a matter of law, this Court believes—because the Supreme Court applies "the same standard as the trial court" when reviewing the sufficiency of the evidence in the context of a motion for judgment of acquittal, *Thomas*, 2013 WL 6236080 at *4 (internal quotation marks and citations omitted)—that the "incredible as a matter of law" doctrine is merely a vehicle for challenging the sufficiency of a witness's testimony at both the trial and appellate levels. Therefore, unlike standards of review applicable only on appeal, this doctrine is not limited solely to an appellate court. *But cf. Najawicz v. People*, 58 V.I. 315, 333 n.11 (2013) (noting that "abuse of discretion, *sufficient evidence*, clear error, deference, reversible error, and similar concepts are standards applicable to appellate courts, not trial courts." (emphasis added)).

she was back and forth between Miami and St. Croix just prior to the murder, and Rivera's alibi defense, which Ventura claims was "so intertwined with Jose Ventura's alleged acts so as to essentially alibi Jose Ventura as well." (Def.'s Mot. at 14.) As explained below, however, all of this testimony was "'well within the province of the jury to sort out.'" *Fontaine*, 59 V.I. at 649 (quoting *Hayes*, 236 F.3d at 896). For this reason, Ventura cannot show incredibility as a matter of law.

First, concerning Coogle's testimony in general, and in particular the differences Ventura points to in the statements she gave to law enforcement officials over the course of the investigation into Williams's disappearance, Ventura overlooks one key point: inconsistencies in a witness's testimony do not necessarily render that testimony inherently incredible as a matter of law unless the inconsistencies concern some physical impossibility or other impossibility under the laws of nature. Moreover, the inconsistencies Ventura takes issue with are inconsistencies in statements written by FBI and VIPD officials memorializing their discussions with Coogle. In fact, FBI agent Goodman testified—albeit in response to questions from Rivera's counsel concerning statements taken from Hector Davis—that it is not FBI policy to show statements to a witness or to have witnesses adopt statements. Instead, the statements are the FBI agent's own recollection of what the witness stated, something Rivera's attorney brought out at trial:

> Q. Okay. Now, let me ask you what I asked you before. In your conversations with Mr. Davis, did you record what he had to say?
> A. No, we did not.
> Q. No video or audio recordings, right?
> A. That's correct, sir.
> Q. And did you have him write a statement and sign it so that we could look at it here in court?
> A. No, we did not.
> Q. As a matter of fact, a statement was prepared, typewritten, sometime after the interview, correct? A report was prepared?
> A. An investigative report was prepared, yes, sir.
> Q. Okay. And that report was never reviewed by Mr. Davis or signed by Mr. Davis, was it?
> A. That's not something we generally do.
> Q. So the answer would be it was not, right?
> A. It's my statement of the interview and that of Special Agent Dennis Kinney.

(Feb. 3, 2014 Trial Tr. 42:7-43:1.)

Ventura overlooks this important point, namely that Coogle did not write any of the statements she gave to the FBI. Instead, those statements were the recollections of the agents who interviewed her. She also did not write any statements given to the VIPD, though she did testify that she signed a statement she gave to the VIPD. But she also told the jury that she did not read that statement line by line. (Jan. 29, 2014 Trial Tr. 20:24.) Thus, all of the "inconsistencies" Ventura points to are not inconsistencies in Coogle's trial testimony. Rather, the inconsistencies are instead contradictions between what Coogle told the jury and what law enforcement officials wrote down years earlier. The Court instructed the jury that the prior statements—of any witness, including Coogle and the Davis brothers—and any testimony about such statements went only to impeach the credibility of those witnesses and not to establish the truth. (*See* Feb. 5, 2014 Trial Tr. 20:8-21:10 ("The testimony of a witness may be discredited, or as we may say, impeached, by showing that he or she has previously made statements which are different than that or here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of a witness and not to establish the truth of these earlier statements made somewhere other than here during this trial."). Because the jury obviously credited Coogle's testimony, it is not for this Court to undo that determination.

The Court similarly rejects Ventura related argument that Coogle's testimony was inherently incredible based on facts "[t]he defense established about the crime scene. (Def.'s Mot. at 10.) Ventura argues that the Court should, pursuant to Federal Rule of Evidence 201, take judicial notice of certain facts "generally known within the trial court' territorial jurisdiction" and from those facts find that Coogle's testimony was inherently incredible. Specifically, Ventura argues that that the Court should—based on a Google Earth image of the Grapetree Bay area that was moved into evidence as People's Exhibit 16—take judicial notice of the distance and direction of the path from the abandoned building where Williams was murdered to the shoreline, take judicial notice of the homes visible on that map, and also take judicial that the reef at the shoreline "rendered it impossible for a boat to be anchored . . .in the line of sight" from the abandoned building. *Id.* at 11. From these judicially-noticed facts, Ventura argues the Court should find that Coogle's testimony defied the laws of nature.

Federal Rule of Evidence 201 allows a court to take judicial notice of a fact that is not subject to reasonable dispute because it is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).[4] "Judicial notice may be taken at any stage of

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[4] The Federal Rules of Evidence were "restyled" in 2011 as part of larger project of revising all of the federal rules to remove archaic terms, present the rules more clearly, and to otherwise make the rules easier to read and to understand. *See generally* Fed. R. Evid. 101 advisory committee's note to 2011 amendments. These stylistic changes took effect after the Virgin Islands adopted the Federal Rules of Evidence on April 7, 2010 as the rules of evidence for the Superior Court of the Virgin Islands. *See generally* Act. No. 7161, § 15(a), 2010 V.I. Sess. L. 50. By enacting Act 7161, the Legislature repealed the Uniform Rules of Evidence, previously codified at title 5, chapter 67 of the Virgin Islands Code, and replaced it with the "Federal Rules of Evidence, Pub., L. 93-595, § 1, January 2, 1975, 88 Stat. 1926, and all subsequent amendments thereto." *Id.* at 50. To date, no court in the Virgin Islands has considered whether Act 7161's language "all subsequent amendments thereto" should include only the amendments adopted up through April 7, 2010—the date the Federal Rules of Evidence became "just as much a part of Virgin Islands law as any other enactment passed by the Legislature and approved by the Governor," *Simmonds v. People*, 59 V.I. 480, 500 (2013)—or whether Act 7161 should be read to include any amendment that the federal courts may adopt in the future. Construing Act 7161 to include all amendments after April 7, 2010 is compelling given that the Legislature acknowledged its own failure to update the Uniform Rules of Evidence "to address current trends in the law" as one of the reasons for adopting the Federal Rules of Evidence. 2010 V.I. Sess. L. at 50. Additionally, by repealing the Uniform Rules of Evidence the Legislature also sought to "alleviate the current ambiguity and discrepancies in the application of the law," *id.*, particularly given the decision of the Supreme Court of the Virgin Islands in *Phillips v. People*, 51 V.I. 258 (2009). In *Phillips*, the Court noted a conflict among Virgin Islands courts as to whether the Uniform Rules of Evidence applied only in civil actions or in both civil and criminal cases and then resolved that conflict by holding that the Uniform Rules of Evidence governed all actions in the Superior Court. *Id.* at 273-74. Therefore, construing Act 7161 to have anticipated subsequent amendments to the Federal Rules of Evidence would comport with the Legislature's goal of avoiding ambiguity and discrepancy. But construing Act 7161 to have anticipated any subsequent amendments to the Federal Rules of Evidence after April 7, 2010 also requires finding that the Legislature intended to delegate its authority for promulgating laws in the Virgin Islands to the agencies and branches of the federal government tasked with considering, revising, adopting, and approving changes to the federal rules of evidence, *see* 28 U.S.C. § 2702-04, a form of *laissez-faire* legislating the Supreme Court of the Virgin Islands has resoundingly rejected. *Accord Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 980 (2011) (rejecting proposition that the Legislature possesses the authority to adopt a statute that effectively delegates power to change Virgin Islands law to institutions or other jurisdictions). Moreover, if the Legislature had intended Act 7161 to incorporate subsequent changes to the Federal Rules of Evidence it could have used much clearer language as it has done in the past. *See, e.g.*, 3 V.I.C. § 770t(d) ("Notwithstanding any other provision of law to the contrary, contributions to the plan are subject to the applicable limitations imposed by Title 26, Section 415 of the United States Code, as that section may be amended from time to time and as these limits may be adjusted by the Commissioner of the Internal Revenue Service."); 13 V.I.C. § 140(a)(("Nothing in this chapter shall be construed as authorizing programs which would disqualify the Virgin Islands from maximum federal funding of special nutrition programs under Title 42, Chapters 13 and 13A, United States Code, or any future amendments thereto."). Additionally, by admitting its own failure to keep current with trends and proposed changes in the law of evidence, the Legislature also acknowledged its own duty to revisit the rules of evidence from time to time to consider such trends and changes, something the Legislature in fact did in 2011 when it amended chapter 67 of title 5 to provide for evidentiary privileges in Virgin Islands law, such as the attorney-client privilege, even though Federal Rule of Evidence 502 already addresses this area. *See* Act No. 7306, 2011 V.I. Sess. L. 204, *codified at* 5 V.I.C. §§ 851-63. While the Court need not resolve the question here as the only changes to Rule 201 since Act 7161 was adopted are the 2011 stylistic

the proceeding." Fed. R. Evid. 201(f).

Ventura is correct that the Court could take judicial notice of "the fact that Coogle cannot see through houses on a line of sight along sea-level." (Def.'s Mot. at 11.) It cannot be reasonably questioned that people cannot see through or around buildings. Ventura is also correct that the Court could take judicial notice of the approximate distance from the abandoned building to the shoreline because the approximate distance is shown on People's Exhibit 16 and could be readily determined. But even if the Court were to take judicial notice of these facts, the Court could not then conclude from these facts that Coogle's testimony was inherently incredible. In order to find that Coogle's testimony was inherently incredible as a matter of law because buildings or other structures prevented her from seeing from the abandoned building to the shore, the Court would need to know which of the homes depicted on the map were there in June 2001. People's Exhibit 16 was taken in October 2006. (Jan. 30, 2014 Trial Tr. 126:6-8.) At a side bar conference, the People explained that they were offering the Google Earth map "to show the geographic proximity to the water and the general area around where the alleged crime took place," and then welcomed any "curative instructions," for example that "the vegetation may [have] change[d]." *Id.* at 126:11-14. None of the Defendants, including Ventura, objected. *Id.* at 127:24-128:10. In fact, counsel for Rivera explained that "[w]e affirmatively would like to have it admitted." *Id.* at 126:18-19. Thus, even if the Court did judicially find that there were houses in the Grapetree Bay area and that Coogle could not see through buildings, the Court cannot

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amendments, the Court will, out of an abundance of caution, use the language of the Rule 201 in effect as of April 7, 2010. *Compare* Fed. R. Evid. 201(a) (2010 ed.) ("This rule governs only judicial notice of adjudicative facts."), *with* Fed. R. Evid. 201(a) (2014 ed.) ("This rule governs judicial notice of an adjudicative fact only, *not a legislative fact*." (emphasis added)). *Compare also, e.g.*, Fed. R. Evid. 801(d)(2) (2010 ed.) ("The statement is offered against *a party*"), *with* Fed. R. Evid. 801(d)(2) (2013 rev. ed.) ("The statement is offered against *an opposing* party"). *See also generally* Fed. R. Evid. 101 advisory committee's notes to 2011 amendments (explaining how "substantive change" was defined for purposes of the 2011 stylistic amendments); James J. Duane, *Some Comments on the Proposed Style Revision of the Federal Rules of Evidence*, 8 (Feb. 16, 2010) ("Rule 801(d)(2) grants a right to use otherwise inadmissible hearsay if it is offered 'against a party' as long as it was made by that party or his agents. The proposed revision, for no apparent reason, would evidently narrow its scope to statements 'offered against an opposing party'. . . . That would be a substantive change in the rule . . . ."), *available at* www.uscourts.gov (search for "09-EV-018"); Elizabeth L. DeCoux, *Are the 2011 Changes to Federal Rules of Evidence 413-415 Invalid? The Rules Enabling Act and the Drafters' Definition of "Stylistic"*, 34 N.C. Cent. L. Rev. 136 (2012).

conclude from those judicially-noticed facts where Coogle was standing or which houses blocked her view. Neither are facts of general knowledge. "[T]he Superior Court may only take judicial notice of a fact if it represents general knowledge that cannot be reasonably questioned or disputed." *Farrell v. People*, 54 V.I. 600, 613 (2011).

Similarly, while it may be general knowledge that a reef exists along the shoreline, the Court cannot conclude from that fact alone that it was impossible for a boat to land on the shore because of the reef. It is also general knowledge that tides affect water levels and rise and fall twice each day. *See, e.g.*, *Mefer S.A.R.L. of Paris, Fr. v. Naviagro Maritime Corp.*, 533 F. Supp. 337, 347 (S.D.N.Y. 1982) ("the court can and does take judicial notice of the fact that high tides occur twice every day."); *Otto v. Alper*, 489 F. Supp. 953, 954 n.* (D. Del. 1980) ("It is common knowledge in Delaware that Rehoboth Bay is subject to the ebb and flow of the tide; the Court takes judicial notice of that fact."). Unlike a cliff, for example, a reef does not necessarily prevent a boat from landing, particularly during high tide. Thus, even if the Court took judicial knowledge of the existence of a reef, that does not render Coogle's testimony incredible as a matter of law.

The Court must also reject Ventura's alternate argument that Coogle's testimony was incredible as a matter of law because she was pregnant, not on St. Croix, and therefore could not have seen him and Rivera shoot Williams. Ventura summarily concludes, without citation to any authority whether legal or medical, that "[i]t was physically impossible for Theresa Coogle to have witnessed the events she alleged to have seen" because she was "7 ½ months pregnant." (Def.'s Mot. at 11.) While Mariela Velasquez did testify that Theresa Coogle came to Miami in April 2001 and did not leave again until approximately six months later in October 2001, and Coogle's sister, Sandra Rivera, also testified that she did not see Coogle on St. Croix in the middle of June 2001, their testimonies do not show that it was physically impossible for Coogle to have returned to St. Croix, particularly as Coogle emphatically denied that she was in Miami and not on St. Croix in the middle of June 2001.

As she explained, she was "back and forth" between Miami and St. Croix at that time. Ventura disputed Coogle's assertion at trial and he continues to reject her claim in his Motion. But however unlikely it may have been that Coogle "then a 17-year old girl, was regularly flying 'back and forth' between Miami, St. Croix and St. Thomas, and just happened to be on St. Croix the night of the alleged crime," that does not make her "bald claim" physically impossible or impossible under the laws of nature. (Def.'s Mot. at 11.)

This is not an instance where evidence showed that air traffic was grounded either in the Virgin Islands, or Florida, or both, during the time when Williams was murdered because of a hurricane or tropical storm, for example. Such evidence might certainly have shown that it was physically impossible for anyone, including Coogle, to have been on an airplane flying to St. Croix in the middle of June 2001. Likewise, the jury did not have before it evidence such as Coogle's payroll records from her job at Wendy's in North Miami or social security earning statements that showed that she was working in Miami in the middle of June 2001. Such evidence might have shown that it was impossible under the laws of nature for her to be on St. Croix witnessing a homicide while also working shifts at Wendy's in Miami because no one can be in two places at the same time. None of the evidence admitted at trial showed that it was physically impossible, either for Coogle specifically or for people generally, to have flown from Miami to St. Croix in the middle of June 2001. As the People point out, "[t]he fact that Ms. Coogle was pregnant does not mean that she could not, as a matter of law, fly between Miami, Florida and St. Croix." (People's Opp'n at 12.) Instead, what the jury had before it was conflicting testimony: Coogle's testimony that she was on St. Croix and witnessed Jose Rivera murder Wendell Williams in contrast to the testimony of Mariela Velasquez who said Coogle did not leave Miami until October 2001. Inconsistencies go to the weight of the testimony, not its admissibility, and what weight to give to testimony is solely the province of the jury. *See Alexander v. People*, S. Ct. Crim. No. 2012-0060, 60 V.I. __, 2014 WL 323063, *5 (V.I. Jan. 29, 2014) ("The law irrefutably declares that the jury, and not the court, determines the credibility of witnesses in a jury trial. It is the jury's special province to weigh conflicting testimony, determine credibility and draw factual inferences." (internal quotation marks, citations, and alterations omitted)).

The Court also rejects Ventura's argument that Coogle's testimony was rendered inherently incredible by the "medical alibi" evidence Rivera introduced at trial. (Def.'s Mot. at 15.) As with his other argument, Ventura fails to cite any authority here. Assuming that this failure along does not render his argument waived,[5] it nonetheless fails to provide a basis for setting aside the jury's verdict. Presumably, by referring to the "unrefuted scientific evidence" of Rivera's witnesses, (Def.'s Mot. at 15), Ventura somehow claims that the laws of medicine and nature, as testified to by Dr. Henry and Rivera's sisters, established beyond doubt that Rivera was rendered immobile from approximately June 6, 2001 when he was admitted to the hospital through his discharge from the hospital on June 11, 2001 and then past the approximate date when Williams was allegedly killed. Putting aside that none of Rivera's witnesses testified to any such scientific or medical "laws," and ignoring the concern with how courts might determine what such "physical laws of medicine" or the "laws" of nature are, Ventura nevertheless misreads the testimony of Rivera's witnesses, which he relies on to argue that such natural and medical laws showed Coogle's testimony to be inherently incredible.

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[5] It is well established that appellate courts generally do not review any claim of error that is not supported by argument or citation to legal authority. *See, e.g., Berhardt v. Berhardt*, 51 V.I. 341, 3456 (2009) ("'[I]ssues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived for purposes of appeal.'" (quoting parenthetically *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 36 (1st Cir. 1994)). Here, for example, Ventura's entire "medical alibi" argument consists of two sentences, neither of which cite to the record, argue any law, or even adopt Rivera's arguments or refer to them. (*See* Def.'s Mot. at 15 ("Defense adduced unrefuted scientific evidence, including a medical doctor, who testified that one of the co-defendants would have been medically unable to participate in this alleged act. This co-defendant's alleged acts were so intertwined with Jose Ventura's alleged acts so as to essentially alibi Jose Ventura as well.").) It is not at all clear, however, whether a similar waiver principle can, or should, apply at the trial court level, as it is not the duty of any court of law to develop a litigant's argument, especially if that party is represented by counsel. *Accord United States v. Zannio*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." (internal quotation marks and citations omitted)). Nonetheless, because Ventura does make a perfunctory claim that his "alleged acts were so intertwined with" Rivera's, (*see* Def.'s Mot. at 15), the Court incorporates here the analysis from the May 2, 2014 Memorandum Opinion addressing the very same arguments Rivera made in his motion for judgment of acquittal.

Rivera underwent surgery on either on June 6, 2001 or June 7, 2001, was walking on June 8, 2001, either one or two days later, and discharged three days after that on June 11, 2001. Four days later, his incision had healed well enough that his staples were removed. Thus, in a span of either nine or ten days, Rivera went from being cut open from navel to chest and operated on to having that incision healed well enough so that the staples could be removed. According to Ventura, this evidence somehow shows that Coogle's testimony was incredible. But in fact Dr. Lloyd testified that Rivera was walking a day or two after his surgery. He also told the jury he would have expected that Rivera would have recovered relatively quickly due to his youth at the time and in fact recovered more quickly from the second surgery. The jury also heard testimony that in December 2000 Rivera drove with multiple bullets in his body, including in his arm and stomach, not to the hospital, but to his sister's house where upon arrival he asked her for a drink and a snack. Using their common sense as the Court directed them they could, the jury could infer from all of this testimony that Rivera was generally in good physical shape and could have recovered quickly from his surgeries. Moreover, neither Rivera's sisters nor Dr. Lloyd testified that Rivera was bedridden for every moment of every day after he was released from the hospital on June 11, 2001. In fact, all three of Rivera's sisters testified that his girlfriend drove him around if he wanted to go anywhere. Their testimony shows, therefore, that Rivera was mobile.

Lastly, and most importantly, Ventura's entire incredibility argument fails because it is misapprehends the incredible as a matter of law doctrine. In addition to the concern with courts determining when testimony is "physically impossible" or impossible under the "laws of nature," a related concern is that courts, including our Supreme Court, often discussed this doctrine without giving examples of when testimony should be found inherently incredible, even if such examples would constitute only *dicta*. Instead, courts simply state what the doctrine requires and then conclude, based on the specific facts raised in that appeal, that the challenged testimony was not incredible as a matter of law. *See, e.g.*, *George v. People*, 59 V.I. 368, 384-85 (2013) (defining doctrine and then explaining that inconsistencies in witness testimony cannot show physical impossibility or impossibility under the laws of nature). *Accord United States v. Truman*, 688 F.3d 129, 139-40 (2d Cir. 2012) ("The District Court determined that Truman, Jr.'s testimony . . . was incredible as a matter of law based on a number of factors. . . . Although these factors surely impaired Truman, Jr.'s credibility, none of them rendered his testimony incredible as a matter of law." (internal citation omitted)); *United States v. McKenzie*, 768 F.2d 602, 605-06 (5th Cir. 1985) ("Nor can we declare the testimony of Davis and Buckner to be incredible as a matter of law unless it is so unbelievable on its face that it defies physical laws. The weaknesses in the testimony of Davis and Buckner do not rise to this standard." (internal quotation marks, ellipsis, and citations omitted)). But even without examples, one characteristic of the incredible as a matter of law doctrine that is clear is that the challenged testimony must be *inherently* incredible. That is, the testimony must be found to be incredible in and of itself, not by comparing it with other evidence or testimony at trial. Courts ask whether the testimony is "inherently" incredible since inherent means belonging to or being an essential part of. For a witness's testimony to be incredible as a matter of law, such incredibility must be apparent on its face, a blind man testifying to what he witnessed, for example, or a deaf woman telling a jury what she heard. *Cf. United States v. Lerma*, 657 F.2d 786, 789 (5th Cir. 1981) ("Only when testimony is so unbelievable *on its face* that it defies physical laws should the court intervene and declare it incredible as a matter of law." (emphasis added)); *People v. Garafolo*, 353 N.Y.S.2d 500, 502-03 (App. Div. 1974) ("testimony which is incredible and unbelievable, that is, impossible of belief because it is *manifestly* untrue, physically impossible, contrary to experience, or *self-contradictory*, is to be disregarded as being without evidentiary value, *even though it is not contradicted by other testimony or evidence* introduced in the case." (citation omitted)). Because neither inconsistencies between law enforcement statements and Coogle's testimony nor inconsistencies between "medical alibi" evidence and Coogle's testimony can show that her testimony was "inherently" incredible, Ventura has not shown a basis for setting aside the jury's verdict and the Court, therefore, rejects his incredible as a matter of law argument.

(2) Coogle's Identification of Ventura

Ventura's next argument is that Coogle's failure to identify him warrants granting his motion for judgment of acquittal. (Def.'s Mot. at 12.) But as the People point out in their Opposition, Coogle did not fail to identify Ventura on direct examination in front of the jury, she initially misidentified him a pretrial hearing that was held outside the presence of the jury. (People's Opp'n at 14.) For this reason, the Court rejects this argument as well.

To support his argument, Ventura cites a recent decision of the District Court of the Virgin Islands addressing eyewitness identifications. *See generally United States v. Haddow*, Crim. No. 2012-35, 2014 WL 552108, *1 (D.V.I. Feb. 12, 2014). In *Haddow*, thirteen witnesses testified in a criminal tax evasion case against David Haddow and Hansel Bailey. *See id.* at *2-5. While a few of the witnesses spoke about their dealings and interactions with "Dave," none of them identified Haddow directly. Accordingly, Haddow moved for judgment of acquittal, claiming the United States never identified him as the person who was named in the indictment and on trial for the crimes charged therein. The District Court denied Haddow's motion, concluding that there was sufficient circumstantial evidence before the jury for them to find that Haddow was the defendant based in part on Haddow's attorney's introduction of him to the jury and subsequent references to him by name throughout the trial. *See id.* at *9-10. Ventura then argues that under a "totality of the circumstances" test, which he claims *Haddow* adopted, (*see* Def.'s Mot. at 12), Coogle at best "only identified Jose Ventura—and that's it," "[s]he did not say anything to the effect of 'that's the guy that was at the scene of the crime.'" *Id.* at 15. That is simply not correct.

Ventura is correct that Coogle did misidentify him, but that occurred at a pretrial hearing held prior to the jury being empaneled and sworn. At that pretrial hearing, the following exchange occurred:

> Q. And Mr. Jose Rivera that you identified previously, is he in the courtroom?
> A. Yes.
> Q. Would you identify him as well, please, by his location and an article of clothing?
> A. He is sitting behind the attorneys and he is wearing a beige and blue shirt.
> MR. ROBERSON: I'd ask for the record to indicate the witness has identified the defendant Mr. Jose Rivera.
> MR. RHEA: Your Honor, I do object. She's identified the wrong person.
> THE COURT: People?
> MR. RHEA: I'd ask the record reflect that Mr. Rivera is not wearing a beige and blue shirt.
> THE WITNESS: He's sitting next to Sharima Clercent.
> THE COURT: Okay.
> BY MR. ROBERSON:
> Q. And is Sharima Clercent the only female on the bench?
> A. Yes.
> MR. RHEA: Your Honor, may the record reflect that my client, Mr. Jose Rivera, is not sitting next to Ms. Clercent. She's identified the wrong person.
> THE COURT: The record will reflect so.
> MR. RHEA: Thank you, sir.
> BY MR. ROBERSON:
> Q. Are you sure of your identification of mister --
> MR. RHEA: Object, Your Honor, this is leading at this point.
> THE COURT: Overruled.
> MR. ROBERSON: I can impeach. Thank you, Your Honor.
> BY MR. ROBERSON:
> Q. Are you sure of your identification of Jose Rivera?
> A. He's sitting behind attorney number one, two, three.
> Q. And again, I'd ask you -- for you to --
> THE COURT: Okay. Here's what we're going to do.
> MR. ROBERSON: Yes.
> THE COURT: All right. So that we're clear here, ma'am, would you please stand? Can you point to who you were referring to, ma'am?
> THE WITNESS: The individual right there.
> MR. ROBERSON: Could the Marshals please have the individual stand that she's indicating?
> THE COURT: Well, not stand, no. I'm not going to have the Marshal do that, no. The Marshal can walk over and then you direct the Marshal to point to the person that you're referring to.
> MR. ROBERSON: Thank you, Your Honor.
> THE COURT: Marshal? Well, there's a Marshal right there. All right, ma'am. . . . Tell the Marshal where to stand.
> THE WITNESS: Stop.
> THE COURT: Okay. And that is who you identify as Jose Rivera?
> THE WITNESS: That is correct.
> THE COURT: Okay, very well. And according to Attorney Rhea, if I

> understood you correctly the last time, that is not Jose Rivera.
> MR. RHEA: Your Honor, the person the Marshal stopped behind and that she positively identifies as Jose Rivera is not Jose Rivera.
> THE WITNESS: I'm sorry. That's Jose Ventura.
> MR. RHEA: Sorry, Your Honor.
> MR. WITNESS: I do apologize.
> THE COURT: Okay.
> MR. RHEA: Objection, there's no question before the witness.
> THE COURT: That's all right. It's okay. All right. Ma'am, are you stating that's Jose Rivera?
> THE WITNESS: The gentleman with the dreadlocks, sitting next to Maximiliano Velasquez, is Jose Rivera, Jr.

(Jan. 27, 2014 Hr'g Tr. 77:10-80:10.) Unquestionably this testimony shows that Coogle misidentified Jose Rivera as Jose Ventura. Because this "game show" with the marshal, as Ventura calls it, ultimately gave Coogle a few "not-so-subtle" cues, she finally "got the hint" that she had the wrong person. But for those clues, he argues, she would not have been able to independently identify him. (Def.'s Mot. at 14.) But Ventura ignores two important points.

First, it was Coogle who corrected herself, as the testimony excerpted above shows. No one told her the name of the person she had incorrectly identified as Jose Rivera. Additionally, Coogle explained that the reason she was confused was because she thought the prosecutor had asked her to identify Ventura, not Rivera. *Id.* at 81:16-18. Her subsequent explanation to jury about her confusion was consistent: "I was confused as to which Jose, because we had just finished talking about the other Jose, Rivera. And when he asked me to identify Jose Ventura, I got them mixed up." (Jan. 28, 2014 Trial Tr. 153:14-16.) The sequence at the hearing lends some support to her explanation as the prosecutor had first asked her about the photo array shown to her of Max Velasquez, followed by Rivera's photo array, and then Clercent's photo array, Ventura's photo arrays, and finally Juan Velasquez's photo array. (*See generally* Jan. 27, 2014 Hr'g Tr. 64:13-75:5.) Lastly, Coogle assured the jury that despite her confusion as to "which Jose," she was positive in her identification because "she had known Jose Rivera for a couple of years, and Jose Ventura I've known for about five or six years." *Id.* at 154:22-24.

Although this case is clearly distinguishable from *Haddow*—because there thirteen witnesses never identified Haddow whereas here Coogle, as well as Hector Davis and Mariela Velasquez, all identified Jose Ventura (*see* Feb. 3, 2014 Trial Tr. 23:3-7 & 156:13-157:3)—this case is similar to *Haddow* in one respect and that is that Ventura's counsel, like Haddow's counsel, repeatedly referred to him by name. (*See* Jan. 28, 2014 Trial Tr. 6:22-25.) In fact, in this case Ventura's counsel essentially identified Ventura for the jury himself during his opening statement when he asked Ventura to stand for the jury to see him. *See id.* at 45:2-4 ("Good morning, ladies and gentlemen of the jury. My name is Danny Cevallos. I represent Jose Ventura. Stand up Jose. You can sit down now. Thank you."). From all of this evidence, the jury could reasonably find that Jose Ventura was the person on trial for murdering Wendell Williams and therefore the Court rejects Ventura's misidentification argument.

(3) Corpus Delicti

Ventura's final argument is that the People failed to carry their burden of proving "corpus delicti," or the body of the crime. Essentially, he argues that there should be "*some* corroboration justifying a conviction in a no-body murder case." (Def.'s Mot. at 16.) Since here the only evidence is Coogle's testimony, it should be not be enough since it was uncorroborated by any other evidence. But this argument must also fail because corroboration is only necessary in a bodiless homicide case if the defendant's out-of-court statements are admitted as proof of guilt, not when an eyewitness testifies to what he or she saw.

The Supreme Court of the Virgin Islands has not had occasion yet to address the proof required to show murder in a bodiless homicide case. However, the United States Court of Appeals for the Third Circuit, sitting as the *de facto* court of last resort for the Virgin Islands, has addressed it and that authority is binding on this Court. *Cf. Better Bldg. Maint. of the V.I. v. Lee*, S. Ct. Civ. No. 2012-0092, 2014 V.I. Supreme LEXIS 27, *24 (V.I. Apr. 15, 2014) ("the Superior Court is only required to follow cases the Third Circuit decided while serving in its capacity as the de facto court of last resort in the

Virgin Islands, as opposed to those cases decided in its capacity as a federal court exercising jurisdiction in federal question or diversity cases." (internal quotation marks and citation omitted)).

In *Government of the Virgin Islands v. Harris*, 938 F.2d 401, 408 (3d Cir. 1991), the Third Circuit explained that "corpus delicti, defined as the body or substance of the crime charged, has two components: (1) an unlawful injury, and (2) an individual's unlawful conduct as a source of that injury." Every offense has its own corpus delicti and requires showing that "a specific injury, loss, or harm resulted, and that the injury was caused by a criminal agency rather than by an innocent or accidental one." *Id. Accord* Black's Law Dictionary 369 (8th ed. 2004) ("'The phrase "corpus delicti" does not mean dead body, but body of the crime, and every offense has its corpus delicti.'" (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 140 (3d ed. 1982)). Corpus delicti in a homicide case requires the prosecution to show "that: (1) a human being is dead (rather than simply disappeared, in those circumstances where no body has been produced, to ensure that the victim will not reappear alive and well at a later time); and (2) the death can be attributed to another's unlawful conduct (rather than by accident, suicide, or natural causes)." *Harris*, 938 F.2d at 408. Where the evidence includes a defendant's out-of-court admissions or confession, the "corpus delicti doctrine incorporated the almost-universal American rule that . . . the defendant's statement must be corroborated by some evidence" of the unlawful injury and the defendant's unlawful conduct as the cause of that injury. *Id.* at 409 (internal quotation marks omitted). According to *Harris*, although "[m]ost jurisdictions today follow the original corpus delicti doctrine requiring proof *aliunde* (from another source) that a crime has occurred," "federal courts and a number of state courts have adopted the trustworthiness doctrine." *Id.* at 409 (internal quotation marks omitted). *Harris* then adopted the trustworthiness doctrine for the Virgin Islands. Under the trustworthiness doctrine, a defendant's confession is seen as strong proof of his or her guilt but any such "confessions, admissions, and exculpatory statements must [still] be corroborated by 'substantial independent evidence which would tend to establish the trustworthiness of the statement.'" *Id.* at 410 (quoting *Opper v. United States*, 348 U.S. 84, 93 (1954)). Thus, even though a defendant's out-of-court admissions or statements are admitted at trial, those statements are not sufficient to sustain a conviction beyond a reasonable doubt without substantial independent evidence, not necessarily of the crime, but that the defendant's confession or admission is trustworthy and corroborates the incriminating statements.

As the People note in their Opposition, *Harris* and the trustworthiness doctrine concern "admissions of a defendant's confession, not . . . testimony of an eyewitness. In other words, there does not have to be substantial independent evidence of an eyewitness'[s] testimony to corroborate the defendant's activities." (People's Opp'n at 17.) It simply is not applicable here. All that was necessary to convict Ventura was proof beyond a reasonable doubt of each element of the crime he was charged with. Here the crime he was charged with was first degree-murder, which is a violation of section 922(a)(1) of title 14 of the Virgin Islands Code. Section 922(a)(1) provides that all murder—defined as the unlawful killing of a human being with malice aforethought, *see* 14 V.I.C. § 921—"perpetrated by means of poison, lying in wait, torture, detonation of a bomb or by any other kind of willful, deliberate and premeditated killing" is murder in the first degree. "[M]urder in the first degree that does not involve poison, lying in wait, torture, or detonation of a bomb . . . requires that the People prove [that] the defendant (1) unlawfully killed another, (2) with malice aforethought, and (3) in a willful, deliberate, and premeditated manner." *Codrington*, 57 V.I. at 184-85 (citing *Brown v. People*, 54 V.I. 496, 501 (2011)). Malice aforethought "extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences." *Nicholas v. People*, 56 V.I 718, 731-32 (2012) (quoting *Gov't of the V.I. v. Sampson*, 94 F. Supp. 2d 639, 644 (D.V.I. App. Div. 2000)). If the killing is done with a deadly weapon such as a firearm, "malice can be inferred from that fact alone." Premeditation means that someone "conceive[d] the design or plan to kill. A deliberate killing is one which has been planned and reflected upon by the accused and is committed in a cool state of the blood, not in sudden passion engendered by just cause of provocation." *Simmonds v. People*, 59 V.I. 480, 487 (2013) (quoting *Brown*, 54 V.I. at 507). The person need not have "brooded over his plan to kill or entertained it for any considerable period of time." *Id.* (quoting *Brown*, 54 V.I. at 507). Instead, "a brief moment of thought" is "sufficient to form a fixed, deliberate design to kill." *Id.* (quoting *Brown*, 54 V.I. at 507).

To convict Ventura, the People had to prove beyond a reasonable doubt that that Wendell Williams was a human being, that Jose Ventura killed him, and that he did so willfully, deliberately, and with premeditation and malice aforethought. Additionally, because the People also charged that the Defendants committed murder while aiding and abetting each other, the People could also show that Ventura knowingly associated himself with the crime and through his actions intended to facilitate Williams's murder. Ventura himself concedes that a body is not necessary to prove murder. (*See* Def.'s Mot. at 18 ("It has always been acknowledged by the defense that the production of the body of a missing person was generally not required under the common law in order to establish the corpus delicti for homicide.").) He also concedes that a bodiless homicide may be proven through solely circumstantial evidence. *See id.* at 16. Here, however, there was direct evidence as to every element.

Wendell Williams's sister, Jaslene Williams, and his friend, James Liburd, both testified to their relationships with Williams and his employment with the Virgin Islands Police Department. Jaslene Williams also identified her brother from a photograph, which the People later moved into evidence. Williams and Liburd both testified that they had not heard from or seen Wendell Williams since the middle of June 2001, which corroborates Coogle's testimony that she saw a man, who she later learned was Wendell Williams, shot and then dismembered in the middle of June 2001. This evidence was sufficient for the jury to find that Wendell Williams was a human being, that he was killed, and that his killing was done unlawfully. Similarly, Coogle testified that she saw Williams stripped to his underwear and bound to a post with his hands tied behind his back. Jose Rivera and Jose Ventura later shot the bound man in the hand and then in the head. Ventura then cut up the body and he and Rivera stuffed Williams's body into garbage bags and carried the bags to a boat. From this testimony the jury could find that Williams was killed deliberately, or with premeditation, meaning that his killing was "planned and reflected upon" and "committed in a cool state of the blood, not in sudden passion engendered by just cause of provocation." *Simmonds*, 59 V.I. at 487 (citation omitted). The jury could also infer malice solely because a firearm was used to kill Williams. *See Nicholas*, 56 V.I. at 732. Accordingly, the Court finds the evidence sufficient to prove the corpus delicti of murder in the first degree and therefore must reject Ventura's final challenge to his conviction. The Court also rejects, therefore, Ventura's motion for conditional ruling under Federal Rule of Criminal Procedure 29(d).

B. Motion for New Trial

In addition to arguing that the Court should set aside the jury's verdict and acquit him, Ventura also moves for a new trial pursuant to Federal Rule of Criminal Procedure 33. Because the Superior Court has its own rule that governs motions for new trial, the Court will construe Ventura's motion as if it were brought under Superior Court Rule 135. *See Joseph v. People*, S. Ct. Crim. No. 2012-0132, 60 V.I. ___, 2013 WL 6795161, *3 (V.I. Dec. 23, 2013) ("Unquestionably, Superior Court Rule 135 applies to the exclusion of Federal Rule 33.").

Pursuant to Superior Court Rule 135, the court "may grant a new trial to a defendant if required in the interest of justice." If the motion is not based on newly discovered evidence, it "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." Super. Ct. R. 135. Superior Court Rule 9 directs that any deadline less than eleven days—which includes the ten-day deadline under Rule 135 for filing a motion for new trial—excludes intervening Saturdays, Sundays, and holidays. In other words, if a deadline is less than eleven days, Rule 9 directs that only business days are counted. The jury returned its verdict finding Ventura guilty on February 5, 2014. Ten days later as calculated by Superior Court Rule 9 was Thursday, February 20, 2014, excluding intervening Saturdays, Sundays, as well as the President's Day holiday which fell on Monday, February 17, 2014. Ventura filed his motion on Friday, February 21, 2014, which was one day beyond Rule 135's ten-day deadline. Because Ventura's counsel did not orally request an extension of time to file a motion for new trial within the ten-day period, the Court must first address whether his motion must be denied because it was untimely filed. Because no court in the Virgin Islands has decided whether the ten-day time limit in Superior Court Rule 135 can be set aside, the Court must consider the question.

Superior Court Rule 135[6] was promulgated in 1955 and mirrors nearly word-for-word Federal Rule of Criminal Procedure 33 as promulgated by the Supreme Court of the United States in 1944.[7] Although Rule 33 has been amended six times since it took effect in 1946, Rule 135 has not. In fact, it has not been amended once since being adopted in 1955. And while there are differences between Rule 135 and the version of Rule 33 in effect when Rule 135 was first adopted, those differences

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[6] Superior Court Rule 135 in its entirety reads as follows:

> 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

[7] As initially promulgated, Federal Rule of Criminal Procedure 33 read as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury 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, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Fed. R. Crim. P. 33 (1946 ed.), as quoted in *United States v. Smith*, 331 U.S. 459, 472 (1947). *Accord Mills v. United States*, 281 F.2d 736, 737 n.1 (4th Cir. 1960); *United States v. Crawley*, 32 F.R.D. 168, 168-69 (W.D.S.C. 1963).

appear to concern the jurisdiction of the Municipal Court, which was the predecessor court to the Superior Court, and which was limited in 1955 solely to conducting bench trials.[8] While those differences are not relevant here, what is relevant are the similarities. Both Rule 135 and Rule 33 give a deadline for filing a motion for new trial based on any ground other than newly discovered evidence. Rule 33 gave a defendant five days whereas Rule 135 gives the defendant 10 days. Although that is a substantive difference, it does not diminish the nearly verbatim language used in both rules and for this reason the Court finds that Superior Court Rule 135 was borrowed from Federal Rule of Criminal Procedure 33.

Because Rule 135 was borrowed from the federal rules, the Court must determine how to interpret a borrowed rule. Unlike borrowed statutes—which presume that the legislature of the borrowing jurisdiction is aware of and intends to adopt the interpretations of the borrowed statute by the highest court of the jurisdiction from which it is taken, *see, e.g., Berkeley v. W. Indies Enters., Inc.*, 480 F.2d 1088, 1092 (3d Cir. 1972) ("the language of a Virgin Islands statute which has been taken from the statutes of another jurisdiction is to be construed to mean what the highest court of the jurisdiction from which it was taken had, prior to its enactment in the Virgin Islands, construed it to mean.")—borrowed rules are generally not construed the same. In other words, courts do not state that borrowed rules incorporate the construction given them by the highest court of jurisdiction from which they were borrowed. Instead, courts typically view such earlier constructions of borrowed rules as persuasive, not mandatory. *See, e.g., Harbel Oil Co. v. Steele*, 298 P.2d 789, 792 (Ariz. 1956) ("In construing our own rules we recognize and typically give much weight to interpretations made of similar federal rules. However, in those scattered instances wherein this court has determined to depart somewhat from the federal rules, we feel no blind devotion thereto is required."), *order dismissing*

[8] For example, the language "[i]f trial was by the court without a jury" was deleted from Rule 135, presumably because the Municipal Court could only conduct bench trials in 1955 when the court's rules were first adopted. Similarly, the language from Rule 33 concerning whether an appeal is pending was presumably removed because the Municipal Court's decisions were not final until reviewed by the District Court of the Virgin Islands.

appeal vacated on other grounds, 301 P.2d 757 (Ariz. 1956); *Wheat State Tel. Co. v. State Corp. Comm'n*, 403 P.2d 1019, 1022 (Kan. 1965) (interpreting state agency rules, borrowed from state civil procedure code which was in turn borrowed from federal rules of civil procedure, according to well-settled meaning given by federal courts); *Frush v. Brooks*, 104 A.2d 624, 626 (Md. 1954) ("The Maryland summary judgment rules, and especially the requirements of supporting or opposing affidavits, were taken from the Federal Rules of Practice and Procedure, Rule 56, 28 U.S.C.A., so that interpretations of the Federal Rules are especially persuasive as to the meaning of the Maryland rules."); *Dobbins v. State*, 483 P.2d 255, 258 (Wyo. 1971) ("In considering the points raised here perhaps it should first be noted that the foregoing rules were taken from Rules 8(a), 13, and 14, Fed.Rules Cr.Proc. Consequently precedent emanating from the Federal courts on such matters must be given great weight on the question before us."). *But see, e.g.*, *Samsung Elec. Co., Ltd v. Rambus, Inc.*, 440 F. Supp. 2d 495, 506 (E.D. Va. 2006) ("the Federal Rules of Civil Procedure have the force and effect of law, and the Supreme Court has made clear that district courts are bound by the canons of statutory construction in interpreting them." (citing *Business Guides, Inc. v. Chromatic Comm. Enters., Inc.*, 498 U.S. 533, 540 (1991)).

The Virgin Islands Supreme Court has not directly resolved this issue. It has noted, however, that the ten-day deadline in Superior Court Rule 135 is "unquestionably" a claims-processing rule and not jurisdictional. *Joseph*, 2013 WL 6795161 at *4 n.7. But the question in *Joseph*—which the Court expressly declined to resolve, *see id.*—was whether the Superior Court, on its own motion, and not the defendant, was limited to the ten-day deadline. Thus, the Supreme Court's commentary constitutes dicta and the Superior Court cannot follow it. *See Todmann v. People*, 57 V.I. 540, 547 n.6 (2012) (per curiam) (noting that fleeting references in opinions cannot be construed as resolving deeper questions not raised on appeal) ("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." (citation omitted)).

Additionally, and more importantly, the Virgin Islands Supreme Court has held that that all canons of statutory interpretation apply when interpreting and construing rules of procedure. *See Corraspe v. People*, 53 V.I. 470, 480-81 (2010) ("'in one form or another almost every rule of construction for statutes finds application in the interpretation of the rules of practice.'" (quoting parenthetically Norman J. Singer, *Southerland Statutes and Statutory Construction* § 67:14 (6th ed. 2003)). *Cf. In re Pet. for Disbarment of Plaskett*, 56 V.I. 441, 447 (2012) (citing *Corraspe* and noting parenthetically that "principles of statutory construction apply when construing and applying court rules."). *Accord People v. Rivera*, 54 V.I. 116, (Super. Ct. 2010) ("The procedural rules of courts are construed in accordance with the canons of statutory construction."). The Supreme Court has followed this approach by looking to decisions of other courts when interpreting rules that both the Superior Court and Supreme Court borrowed from other jurisdictions. *See, e.g.*, *Brown v. People*, 49 V.I. 378, 381 (2009) ("federal cases construing the federal rule can provide insight into our own rule permitting extensions of time to file a notice of appeal."), *overruled on other grounds Williams v. People*, 56 V.I. 821, 832 n.8 (2012); *Stevens*, 52 V.I. at 304 ("Rule 135, like its federal counterpart, Rule 33 of the Federal Rules of Criminal Procedure, permits a trial court to grant a new trial in "the interest of justice. Given the similarity between the two rules, on appeal we review a denial of a motion for new trial under Rule 135 using the same standard as federal courts use in reviewing a denial of a motion for a new trial under Rule 33"). For example, in *Brown* the Court noted that Supreme Court Rule 5(b)(5) and Federal Rule of Appellate Procedure 4(b)(4) were nearly "identical" and then concluded that "federal cases construing the federal rule can provide insight into our own rule permitting extensions of time to file a notice of appeal." 49 V.I. at 381. What's more, the Court then cited to *Berkeley* and observed parenthetically that "language of a local statute taken from a statute of another jurisdiction shall be construed *the same as it is construed* in the foreign jurisdiction." *Id.* (emphasis added) (citing *Berkeley*, 480 F.2d at 1092). The Court further added an additional citation to another case regarding how borrowed statues are construed, *In re Buckley's Estate*, 536 F.2d 580 (3d Cir. 1976), and then quoted that case parenthetically as stating that "'the contemporary judicial interpretation of statutes of foreign jurisdictions that are adopted *in haec verba* by the Virgin Islands *is assumed to be carried over* into the law of the Virgin Islands.'" *Brown*, 49 V.I. at 381 (emphasis added) (quoting *Buckley's Estate*, 536 F.2d at 582). Thus, the Court finds that because the canons of statutory interpretation apply to rules of procedure, borrowed rules, like borrowed statutes, must be construed to mean what the highest court of the jurisdiction from which they were taken construed them to mean before the rule was borrowed.

How borrowed statutes and borrowed rules are interpreted is critical here because decisions of the Supreme Court of the United States prior to 1955 construing Federal Rule of Criminal Procedure 33 would be binding on Superior Court Rule 135. This means that Ventura's motion must be denied because it was filed late. The Supreme Court held in *United States v. Smith*, 331 U.S. 469, 474-76 (1947), that federal courts cannot address a motion filed beyond the five-day time limit in Rule 33. Federal courts regularly enforced Rule 33's deadline until the Supreme Court later departed from *Smith* in 2005. *See, e.g.*, *United States v. Washington*, 184 F.3d 653, 659 (7th Cir. 1999) ("We have previously emphasized that the 7–day period is jurisdictional, and that the court is without jurisdiction to consider even an amendment to a timely new trial motion if it is filed outside the seven day period, absent a timely extension by the court or new evidence.");[9] *United States v. Simon*, 225 F.2d 260, 263 (3d Cir. 1955); *Oddo v. United States*, 171 F.2d 854, 858 (2d Cir.1949) (citing *Smith*, 331 U.S. at 473 n.2)); *Accord* 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 590 (4th ed. 2011) ("Prior to 2005, courts viewed the time limits as jurisdictional. Courts concluded that they did not have the power to consider untimely motions for a new trial."). In 2005, the Supreme Court

[9] The Supreme Court amended Federal Rule of Criminal Procedure 33 in 1966, inter alia, to increase the time for filing a motion for new trial from five days to seven days. *See* Fed. R. Crim. P. 33 (2014 ed.) (advisory committee notes to 1966 amendments).

reexamined its interpretation of deadlines in court rules and then held that Rule 33's deadline represented a claims-processing rule that could be waived if not asserted, rather than a jurisdictional limitation on the authority of the federal district courts. *Eberhart v. United States*, 546 U.S. 12, 13 (2005) (per curiam). Now, the fourteen-day deadline[10] in Federal Rule of Criminal Procedure 33 serves "to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often." *Id.* at 18. However, because canons of statutory construction apply to rules of procedure, *see Corraspe*, 53 V.I. at 480, a borrowed rule, like a borrowed statute, brings with it the construction given by the highest court of the jurisdiction from which it was taken prior to when it was adopted, that means that *Smith*, not *Eberhart*, is binding on Superior Court Rule 135. For this reason, Ventura's motion must be denied.

Although this Court does believe that the ten-day deadline in Superior Court Rule 135 should be viewed as a claim-processing rule, the Superior Court is duty bound to follow binding precedent. The Court has, however, attempted to express its concerns—particularly given *Eberhart*, the dicta in *Joseph,* and the People's failure to note that Ventura's motion was filed late—which should facilitate resolution of the issue on appeal. *Accord Eberhart*, 546 U.S. at 19-20 (approving of the lower court's "prudent course" of "adhering to its understanding of precedent, yet plainly expressing its doubts" which in turn "facilitated [appellate] review."). Because the Court denies the motion for new trial as being untimely filed, the Court declines to address the substance of the motion.

C. The People's Surreply

One final point concerning the arguments of the parties is that the Court did not consider the second document filed by the People, which was captioned as a reply to Rivera's Reply. Local Rule of Civil Procedure 7.1(a)—applicable in criminal proceedings through Local Rule of Criminal

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[10] The Supreme Court amended the deadline in Rule 33 again in 2009 to "set[] a more realistic time" for filing a motion for new trial. *See* Fed. R. Crim. P. 33 (2014 ed.) (advisory committee notes to 2009 amendments).

Procedure 1.2 and in the Superior Court through Superior Court Rule 7—provides that only a motion, a response in opposition and a reply are allowed unless leave of court is granted. Because Ventura was the movant, the People were only allowed to file a response in opposition to his motion. Their Reply to Ventura's Reply, which was essentially a surreply though not captioned as such, violated Rule 7.1(a) because it was filed without leave of court. Accordingly, the Court struck it from the record in the April 11, 2014 Order and did not consider it in reaching its decision on Ventura's Motion.

CONCLUSION

For the reasons stated above, Ventura's motion for judgment of acquittal and his motion for new trial were denied in the April 11, 2014 Order. The People's Surreply was also ordered stricken from the record. In a separate Order of even date, the Court will enter its Judgment and Sentence, memorializing the Court's decision from the bench at the sentencing hearing on April 4, 2014.

DONE AND SO ORDERED this 25th day of July, 2014.

DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court
By:
Court Clerk Supervisor
Dated: 7/25/14