

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

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. SX-2015-CR-0000065
	)	
-vs-	)	V.I. Code Ann. tit. 14, §§ 1708 (a)(4), tit.16
	)	§ 91(b)(5); tit. 14 § 622(1); tit. 16.
	)	§ 91(b)(11)
JIMMY DAVIS,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER REQUIRING DISCLOSURE OF JENCKS MATERIAL

Before the Court is Defendant's Motion for Early Disclosure of *Jencks* Material and Timely Disclosure of *Brady/Giglio* Material, which was filed on March 10, 2017. The People filed a Response on March 16, 2017.¹ Defendant requests that the Court issue an order requiring the People to disclose their witnesses' recorded statements and reports before trial commences. The premises considered, the Court will grant the Motion.

I. The Court Will Order the People to Disclose Any *Jencks* Material in Their Possession Before Trial Commences.

A. The Jencks Act Does Not Apply to the Superior Court.

Defendant expresses concern that, pursuant to the Jencks Act, the People will choose to not disclose witness statements and reports before their witnesses testify. In particular, Defendant asserts that a video recorded interview of Lucy Soames, the complaining witness's mother, has not been provided to him.

The Jencks Act is a federal statute that requires a prosecutor to produce a statement or report made by a government witness, but only after the witness has testified.² The Jencks Act was passed by the United States Congress in response to the U.S. Supreme Court's decision in *Jencks v. United States*.³ In *Jencks*, in absence of Congressional legislation, the U.S. Supreme Court prescribed procedural rules requiring a prosecutor to provide witness statements to a defendant under certain circumstances.⁴ The Jencks Act created a more limiting mechanism for disclosure of witness statements. For example, Subsection (a) requires that no statement of a government witness made to an agent of the government and in the government's possession should be turned over to a defendant until the witness has testified on direct examination. In addition, Subsection (c) establishes a procedure in which a trial court reviews a statement to determine its relevancy before it is provided to a defendant. While several states have enacted statutes akin to the federal law,⁵ the Virgin Islands has not enacted its own version of the Jencks Act.

¹ The Court notes that the Response has a signature dated March 17, 2017. This appears to be a harmless typographical error.

² 18 U.S.C. § 3500; *see also Jencks v. United States*, 353 U.S. 657 (1957).

³ 353 U.S. 657 (1957); *see Palermo v. United States*, 360 U.S. 343, 346 (1959).

⁴ *Palermo*, 60 U.S. at 345.

⁵ *See, e.g.,* CONN. GEN. STAT. § 54-86b; N.Y. CRIM. PROC. LAW § 240.45.

The Court notes that, in *Government of Virgin Islands v. Lovell*, the U.S. Court of Appeals for the Third Circuit held that the Jencks Act applies to prosecutions brought by the Government of the Virgin Islands even though it is a federal statute.⁶ However, this Court disagrees and also determines that the Third Circuit's opinion is not binding authority for the Superior Court.

In *Defoe v. Phillips*, the Supreme Court of the Virgin Islands held that the Superior Court should treat interpretations of Virgin Islands local law by the Third Circuit and the Appellate Division of the District Court as binding precedent.⁷ However, the Third Circuit in *Lovell* did not interpret or apply a Virgin Islands statute but instead applied a federal statute after noting that “[t]he Virgin Islands Legislature has expressed no view with regard to the production of documents for the purpose of impeaching Government witnesses in prosecutions initiated by the Virgin Islands.”⁸ The Jencks Act does not state that it applies to prosecutions brought by the Government of the Virgin Islands or any other United States territory. Therefore, *Defoe* does not require the Court to follow the Third Circuit's holding in *Lovell* because the Third Circuit interpreted and applied federal law, not Virgin Islands law.

Moreover, the Court finds that the Third Circuit's application of Jencks Act was based on tenuous reasoning and reliant upon precedent that is dissimilar to the question of law at issue in *Lovell* and has since been abrogated by amendments to the Revised Organic Act. The Third Circuit held “[w]e believe that the legislative gloss placed on the *Jencks* case by Congress in enacting [the Jencks Act] has resulted in a sound rule. Policy and logic dictate that such a rule shall obtain [sic] [apply] in all criminal prosecutions in the Virgin Islands.”⁹ The Third Circuit cited its previous ruling in *Government of the Virgin Islands v. Solis* as its authority.¹⁰ However, the pertinent holding in *Solis* concerned interpretation of Federal Rule of Criminal Procedure 5. In *Solis*, the Third Circuit held that U.S. Supreme Court precedent should dictate interpretation of federal procedural rules applied as Virgin Islands local law.¹¹ Relying upon *Solis*'s holding that interpretation of an adopted federal rule of procedure should be determined by federal precedent, the court in *Lovell* went considerably farther by applying a federal statute to a local prosecution.

In addition, the Court determines that *Solis* had since been abrogated by the 1984 amendments to the Revised Organic Act of 1954 § 23A(b).¹² In deciding that it can apply federal policy to all criminal prosecutions in the Virgin Islands, the Third Circuit stated the following:

Considerations of logic and policy underlie the requirement that the Federal Rules be applied to all criminal proceedings in the District Court of the Virgin Islands, whether the crime is proscribed by local or Federal law. Certainly, the legislature of the Virgin

⁶ 378 F.2d 799, 805-806 (3rd Cir. 1967).

⁷ 56 V.I. 109, 119 (2012).

⁸ *Lovell*, 378 F.2d at 805.

⁹ *Id.*

¹⁰ 334 F.2d 517 (3d Cir. 1964).

¹¹ *Id.* at 519 (“At oral argument, the Government intimated that though the Federal Rules might be applicable, the interpretation of those rules by the United States Supreme Court is not binding upon us in this case involving a local crime defined by the Virgin Islands legislature. The distinction is devoid of substance, for the rules cannot be considered in a vacuum but only in the context of the interpretation which has been placed upon them by the courts. And the proper construction of Rule 5 has been supplied in *Mallory v. United States*, 354 U.S. 449 (1957)] by the very Court which prescribed the rule”); see also *Antilles v. Lemach*, 64 V.I. 400, 420 (V.I. 2016) (indicating that the V.I. Supreme Court and Superior Court do not have to follow federal interpretation of federal procedural rules when applied as local law).

¹² 48 U.S.C. § 1613a.

Islands has authority to define and proscribe criminal offenses. But it must be remembered that the Virgin Islands are an unincorporated territory of the United States of America and the powers of its government are derived from and set forth in the Revised Organic Act of 1954, a Congressional enactment, 48 U.S.C. § 1541 (1958 ed.). Thus, those principles inherent in our Federal system requiring due regard for the procedural safeguards devised by an independent, sovereign state government are wholly irrelevant to the formulation and application of proper procedural standards to be applied to all criminal proceedings in the District Court of the Virgin Islands.¹³

However, with the 1984 amendments, “the Congress has extended the principles of federalism to the judicial system [to the Virgin Islands].”¹⁴ Subsequently, the Third Circuit held in *Edwards v. HOVENSA, LLC*, that when presiding as an appellate court over a local matter, Appellate Division of the District Court and the Third Circuit are required to apply Virgin Islands law, as required by *Erie R.R. Co. v. Tompkins*.¹⁵ In addition, when confronted with an undecided issue of Virgin Islands law, the Appellate Division of the District Court must attempt to predict how the V.I. Supreme Court would rule on the issue.¹⁶ Since *Lovell* was decided before *Erie* applied to the Virgin Islands, the Court determines that the Third Circuit’s rationale behind application of the Jencks Act to local matters is no longer valid.

As such, the Court determines that the Jencks Act does not apply to criminal matters before the Superior Court. It only applies to cases tried before federal courts and prosecuted by the federal government. However, the Court will colloquially refer to pertinent witness statements and reports as “Jencks material.”

B. *Jencks v. United States Does Not Apply to the Superior Court.*

The V.I. Supreme Court has stated that the Superior Court should continue to follow the U.S. Supreme Court’s interpretation of the U.S. Constitution.¹⁷ However, the decision in *Jencks* was not based upon constitution grounds but instead on the U.S. Supreme Court’s supervisory authority.¹⁸ While the Confrontation Clause might have been an underlying consideration, *Jencks* does not provide

¹³ *Solis*, 334 F. 2d at 519-520.

¹⁴ *George & Benjamin Gen. Contrs. v. Gov’t of the V.I. Dept of Prop. & Procurement*, 921 F. Supp. 304, 307 n.9 (D.V.I. 1996); see also *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 360 (3d Cir. 2007) (“Although the 1984 Revised Organic Act provided the path that ultimately led to the District Court being divested of its jurisdiction over local law, it also expanded the jurisdiction of the District Court by investing it with diversity jurisdiction and thereby extended the principles of federalism to the judicial system of the Virgin Islands”).

¹⁵ 497 F.3d 355 (3d Cir. 2007) (“A federal court under *Erie* is bound to follow state law as announced by the highest state court”); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938).

¹⁶ *Edwards*, 497 F.3d at 361 n.3 (“now that the Virgin Islands has established an insular appellate court and will begin developing indigenous jurisprudence, the District Court, when exercising jurisdiction over cases requiring the application of Virgin Islands law, will be required to predict how the Supreme Court of the Virgin Islands would decide an issue of territorial law, and should seek guidance from Superior Court decisions in undertaking this endeavor”); see also *Hamed v. Hamed*, 63 V.I. 529, 536 (2015).

¹⁷ *Antilles Sch., Inc.*, 64 V.I. at 418.

¹⁸ *Pennsylvania v. Ritchie*, 480 U.S. 39, 68 (1987) (Brennan, J., dissenting) (“Exercising our power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts, this Court . . . decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses”).

an interpretation of the U.S. Constitution.¹⁹ Therefore, *Jencks* is not binding precedent for the Superior Court.

C. Federal Rule of Civil Procedure 26.2 Does Not Require Nor Preclude Pre-trial Disclosure of Witness Statements.

Defendant also moves the Court to order early disclosure of witness statements and reports pursuant Federal Rule of Criminal Procedure 26.2 (“Rule 26.2”).²⁰ Defendant asserts “Rule 26.2 . . . contains no language explicitly precluding the disclosure of witness statements prior to trial.” Rule 26.2 states “[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government . . . to produce . . . any statement of the witness . . .” A plain meaning reading reveals Rule 26.2 does not require the People to produce witness statement before trial. However, Rule 26.2 also does not provide that a trial court can only order production of a witness statement after said witness has testified. For this reason, the Court determines Rule 26.2 does not preclude it from ordering pre-trial disclosure of a witness statement.

D. Pursuant to Its Supervisory Authority, the Court Determines that This Matter Warrants Early Disclosure of Witness Statements.

Similar to the U.S. Supreme Court in *Jencks*, absent a statute or procedural rule, the Court must rely on its supervisory power to determine if it should require pretrial disclosure of witness statements in the People’s possession. The Court has inherent authority to manage its docket.²¹

The Court recognizes that reviewing a government witness’s prior statements can be crucial to a defendant’s ability to present a defense. Without the benefit of a witness’s prior statements in the possession of the government, a defendant would be less able to attack a witness’s credibility.²² This would leave the witness’s testimony unchecked and deny the defendant an opportunity to provide a defense.²³

There are also legitimate reasons for not producing a report or statement prepared by a witness before trial, such as protecting said witness from intimidation to ensure a witness appears to testify.²⁴ But once a witness has testified on direct examination in open court, the safety of the witness is not

¹⁹ *Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., dissenting).

²⁰ Federal Rule of Criminal Procedure 26.2 is applicable pursuant to Superior Court Rule 7. The Court notes that Federal Rule of Criminal Procedure 16(a)(2) bars discovery of statements by government witnesses or prospective government witnesses except as provided in the *Jencks* Act. However, as provided above, the *Jencks* Act does not apply to proceedings before the Superior Court and the Virgin Islands does not have a local version of the *Jencks* Act. Therefore, to avoid an absurd result in which the People never have to produce witness statements, the Court determines that the last sentence of Rule 16(a)(2) is not applicable to the Superior Court.

²¹ See *Melchior v. Univ. of the V.I.*, 2016 V.I. LEXIS 56, at *10 (V.I. Super. Ct. Apr. 27, 2016); *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 126 (V.I. Super. Ct. 2016).

²² See *Jencks*, 353 U.S. at 667 (“Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness’ testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness’ trial testimony”).

²³ *Id.*

²⁴ *Pennsylvania v. Kontos*, 276 A.2d 830, 832-33 (Pa. 1971).

protected by continuing to withhold his prior statement.²⁵ Another reason, several courts have reasoned that until a witness actually testifies, a defendant does not have a need to cross-examine or discredit the witness.²⁶ Therefore, absent special circumstances, a defendant would not be entitled to production of a witness statement until after said witness testified on direct examination.

However, the Court recognizes that a matter's particular circumstances might warrant pre-trial disclosure. In addition to receiving copies of a witness statement, defense counsel needs time to review the document to use it effectively.²⁷ In *United States v. Holmes*, the U.S. Court of Appeals for the Fourth Circuit held that a trial court abused its discretion by denying defense counsel's request for an adjournment to examine *Jencks* material provided after a witness testified.²⁸ The *Jencks* material was an eight-inch thick stack of documents²⁹ and the allegations against the defendant were charged under a vague conspiracy statute.³⁰

This matter involves special circumstances that persuade the Court to exercise its discretion to order early disclosure of *Jencks* material. First, the People informed the Court that J.D., the complaining witness, is only available to testify for a few days because she is living outside of the Virgin Islands and is enrolled in Job Corps. Furthermore, as the Court explained previously,³¹ because the undersigned is assigned to the Division of St. Thomas and St. John, this Court has limited access to a courtroom on St. Croix. These facts compel the Court to reduce the need for recesses and adjournments once jury selection and trial have commenced. While the Court is unaware as to the depth and bulk of the witness statements in the People's possession, the likely possibility that defense counsel would need to ask for a recess to review witness statements motivates the Court to require early production of said statements in order avoid prolongment of Defendant's trial.

The People's Response does not address whether Defendant is entitled to the pertinent material but instead requests that the Court impose the least severe sanction for any possible discovery violations.³² The People also inform the Court that Soames has complained about receiving threats from Defendant and they represent that she told the police that she obtained a restraining order against Defendant. However, the Court is not persuaded that the alleged threats against Soames from Defendant involve a law enforcement reason weighing against earlier disclosure. Defendant already knows Soames's identity from previous disclosures and, therefore, disclosure of her recorded statement would not expose her to more danger.

²⁵ *Id.* (Once the Commonwealth's witnesses have appeared at trial, their personal safety and freedom from potential intimidation are in no way enhanced by denying to the defendant access to their pretrial statements").

²⁶ *See, e.g., United States v. Blais*, 98 F.3d 647, 651 (1st Cir. 1996) (holding *Jencks* not applicable where the declarant was never called as a witness); *United States v. Wilkinson*, 124 F.3d 971, 977 (8th Cir. 1997) (holding defendant not entitled to a special agent's grand jury testimony where she did not testify at trial); *United States v. Grado*, 154 F. Supp. 878, 880 (W.D. Mo. 1957) ("the very touchstone of the *Jencks* decision is the issue of credibility of the witnesses at the trial. Before the defense is entitled to disclosure of any statements made by a Government witness for the purpose of discrediting him, the credibility of the witness whose prior statements are sought must be in issue").

²⁷ *See* Fed. R. Crim. P. 26.2(d).

²⁸ 722 F.2d 37, 40 (4th Cir. 1983).

²⁹ *Id.* at 40.

³⁰ *Id.* at 41 ("Their need for careful study of *Jencks* Act materials was greater than in the usual case where greater specificity of the charge is alleged").

³¹ Order (Feb. 27, 2017).

³² Defendant's Motion does not call for sanctions against the People due to any discovery violation.

Because of the unique circumstances surrounding this matter, the Court concludes that it should order pretrial production of any *Jencks* material in the People's possession. The Court notes that Virgin Islands courts previously have ordered early disclosure of witness statements.³³ However, this Memorandum Opinion and Order should not be interpreted as establishing a right for defendants to always receive a witness statement before said witness testifies. Typically, pursuant to Rule 26.2, a defendant is entitled to a witness statement after a witness testifies on direct examination.

II. Defendant's Request Regarding *Brady* Material is Inapplicable Because the *Jencks* Act Does Not Apply to this Matter.

Defendant also appears to request a preemptive order requiring the People to disclose information material to the preparation of Defendant's defense, as required by *Brady v. Maryland*³⁴ and its progeny. Defendant argues the People should not be allowed to avoid providing witness statements and reports before trial because of the *Jencks* Act's restriction on pretrial disclosures. Defendant points out that several courts have held the disclosure requirements established by *Brady* and its progeny might require pretrial disclosure of certain witness statements even if the *Jencks* Act allows a prosecutor to wait until a witness testified. However, as the Court pointed out above, the *Jencks* Act does not apply to proceedings before the Superior Court because it is a federal law. Therefore, the People are unable to rely on the *Jencks* Act to avoid pretrial disclosure of statements and reports, as required by *Brady*.

However, finding that there appears to be confusion amongst the parties as to the applicability of the *Jencks* Act, the Court will order the People to disclose, before trial commences, any information material to Defendant's defense and any information that might exonerate Defendant.

III. The Court Will Not Allow Soames to Testify as to the Circumstances Surrounding Her Restraining Order Against Defendant.

The People assert "Ms. Soames should be allowed to testify to threats received from the defendant as it pertains to this case." The People also state that Defendant has received discovery regarding Soames's domestic violence complaint against Defendant in another matter and a transcript of a restraining order hearing.³⁵ However, the Court finds that such testimony would be wholly irrelevant to this matter.³⁶

Under Federal Rule of Evidence 402, only relevant evidence is admissible at trial. The test for relevance is whether proffered evidence has "any tendency" to make the existence of any fact that is "of consequence" to the determination of the action "more probable or less probable than it would be without the evidence."³⁷ The Court finds that any alleged threats received by Soames after the events underlying this matter are not probative as to whether Defendant committed any of the crimes alleged

³³ See, e.g., *Gov't of the V.I. v. Smalls*, 32 V.I. 157 (V.I. Super. Ct. 1995) (superseded by statute on other grounds).

³⁴ 373 U.S. 83 (1963).

³⁵ The domestic violence matter is *Lucy Soames OBO [J.D.], Minor, and Lucy Soames, Individually v. Jimmy Davis*, Case No. SX-15-DV-47. The court adjudicating this matter issued two permanent restraining orders that prohibit Defendant from having any contact with Soames and J.D., her daughter.

³⁶ The Court notes that Soames has recourse available to her regarding any violation of the permanent restraining orders.

³⁷ FED. R. EVID. 401.

in the Second Amended Information. Therefore, Soames is barred from testifying at trial concerning her domestic violence complaint against Defendant and her restraining order against Defendant.

Accordingly, it is hereby

ORDERED that Defendant's Motion for Early Disclosure of *Jencks* Material and Timely Disclosure of *Brady/Giglio* Material is **GRANTED**; and it is further

ORDERED that, **on or before Friday, April 7, 2017**, the People **SHALL** provide to Defendant copies of all statements and reports made by the People's witnesses, including video recorded interviews; and it is further

ORDERED that, **on or before Friday, April 7, 2017**, the People **SHALL** provide to Defendant copies of all information that is material to Defendant's defense, that might exonerate Defendant, or that the People would otherwise be required to disclosed by *Brady v. Maryland* and its progeny; and it is further

ORDERED that during jury selection and trial, including opening statements and closing arguments, the parties are **PROHIBITED** from referencing any alleged threats received by Lucy Soames, the domestic violence complaint filed by Soames against Defendant, or her attempt to obtain a restraining order against Defendant; and it is further

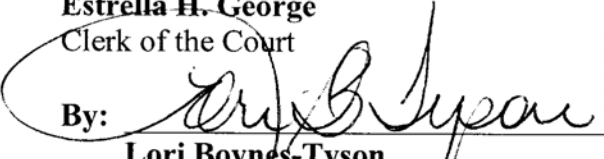
ORDERED that during trial the parties, particularly the People, are **PROHIBITED** from eliciting testimony from witnesses that references any alleged threats received by Lucy Soames, the domestic violence complaint filed by Soames against Defendant, or her restraining order against Defendant; and it is further

ORDERED that a copy of this Memorandum and Order Requiring Disclosure of *Jencks* Material shall be directed to Vanessa Hewitt-Quinland, Assistant Attorney General and Yvette Ross-Edwards, Esquire, Court-appointed counsel for Defendant.

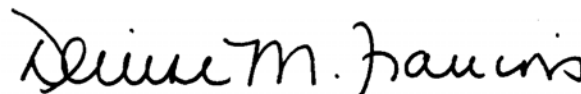
DATED: March 24, 2017

ATTEST:

Estrella H. George
Clerk of the Court

By: 

Lori Boynes-Tyson
Chief Deputy Clerk 3/24/17



DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands