

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

THE PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
	)	Case No. ST-18-CR-40
vs.	)	
	)	
GREGORY WILLIAMS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Gregory Williams' Motion to Dismiss on grounds of double jeopardy and prosecutorial vindictiveness. Williams is charged with several gun-related charges growing out of the alleged possession of a single firearm, as well as two domestic-violence-related counts. However, Williams was already acquitted in the District Court of the Virgin Islands of a charge of possession of a firearm by a convicted felon related to that same gun. For the reasons set forth below, the Court finds that the gun-related charges are barred by double jeopardy and will dismiss those counts. However, the Court does not find prosecutorial vindictiveness, so it will not dismiss the remaining charges.

FACTS

On October 31, 2017, after Williams' arrest on a warrant issued by this Court, the People of the Virgin Islands filed an Information charging Williams with six

violations of the Virgin Islands criminal code.¹ Four of the charges related to unauthorized possession of a firearm or ammunition. On November 6, 2017, after Williams had been arraigned, the People filed a Motion to Dismiss without Prejudice.² The Court granted the motion the next day and dismissed the case without prejudice.

Separately on October 31, 2017, in the District Court of the Virgin Islands, a Magistrate Judge signed a criminal complaint for Williams. The complaint alleged violations of 18 U.S.C. § 922(g)(1), unlawful possession of a firearm by a convicted felon, and 18 U.S.C. § 922(k), unlawful possession of a firearm with serial number removed. The Affidavit in support of that complaint and arrest warrant described the identical incident and firearm as was described in the Affidavit accompanying the warrant in the Superior Court case.³ On November 29, the U.S. Attorney filed an Information with the District Court charging one count of possession of a firearm by a convicted felon. A jury trial was held on January 25, 2018 in which the parties stipulated to Williams' prior felony conviction for purposes of establishing him as a

¹ The counts in that case were: Count One, Second Degree Assault – Domestic Violence; Count Two, Simple Assault – Domestic Violence; Count Three, Unauthorized Possession of a Firearm with Altered Identification Marks; Count Four, Unauthorized Possession of a Firearm; Count Five, Failing To Report Firearm; and Count Six, Unauthorized Possession of Ammunition.

² The People did not state a specific reason for seeking dismissal. The Motion to Dismiss said only: "Upon review and consideration of this matter, the People of the Virgin Islands hereby requests that the above-captioned matters against Defendant Gregory Williams be dismissed without prejudice."

³ Both affidavits, the one supporting the warrant in the Superior Court case and the one supporting the warrant in the District Court case, described an incident in which, following a September 11, 2017 domestic altercation with his girlfriend, law enforcement officers approached Williams in the area of Savan, on St. Thomas, on September 25, 2017, and that as officers approached Williams ran from officers, pulled a gun from "his waistline" and threw the gun away from his person. Both affidavits stated that upon inspection of the area, officers recovered a black Smith and Wesson .40 caliber firearm with a silver/chrome slide with an obliterated/altered serial number.

felon. At the end of the trial, a jury found Williams not guilty and acquitted him of the sole charge.

On January 26, one day later, the People again filed a Petition for the Issuance of an Arrest Warrant with the Superior Court. The Affidavit in support of that arrest warrant was similar to the Affidavit supporting the warrant in the first case before this Court.⁴ The Court issued a warrant on January 30, and Williams was arrested on February 12. The People filed the Information in this case on February 27, alleging six counts that are nearly identical to the six counts alleged in the first case filed with this Court. Four counts again relate to unauthorized possession of a firearm or ammunition.⁵

On March 1, 2018, the Court issued a Scheduling Order, which set a motions hearing date for September 5, 2018, and ordered that all motions be filed at least 30 days before the motions hearing.⁶ On September 5, moments before the motions hearing began, Williams filed the instant motion to dismiss on grounds of double

⁴ The affidavits contained largely the same facts, except that the later affidavit added information relating to Williams' alleged violation of a no-contact order (regarding his girlfriend) on October 24, 2017 (although the Information does not include a charge for that alleged offense). The original Information charged failing to report a firearm, which is not included in the Information in this case. Instead, the Information in this case has a charge for alteration of identifying marks of weapons prohibited in violation of 23 V.I.C. § 481(a).

⁵ The current charges are: Count One, Second Degree Assault – Domestic Violence, in violation of 14 V.I.C. § 296(3) and 16 V.I.C. § 91(b)(1)(2); Count Two, Simple Assault – Domestic Violence, in violation of 14 V.I.C. §§ 292, 299(2) and 16 V.I.C. § 91(b)(1)(2); Count Three, Alteration Of Identifying Marks of Weapons Prohibited, in violation of 23 V.I.C. § 481(a); Count Four, Unauthorized Possession of a Firearm With Altered Identification Marks, in violation of 23 V.I.C. § 481(b); Count Five, Unauthorized Possession of a Firearm, in violation of 14 V.I.C. § 2253(a); and Count Six, Unauthorized Possession of Ammunition, in violation of 14 V.I.C. § 2256(a).

⁶ In other words, all motions were to be filed no later than August 5, 2018.

jeopardy and prosecutorial vindictiveness, and then served the People with their copy *at the motions hearing*. The People objected to the motion based on untimeliness and verbally moved the Court to deny the motion. The Court declined to rule immediately and ordered the People to respond to the motion in writing within two weeks. The People timely filed an opposition memorandum on September 19. Williams filed a reply to the People's opposition on October 1. That motion is currently before the Court.

ANALYSIS

I. Although the Motion to Dismiss Was Untimely, the Court Will Consider It in the Interest of Justice.

Before considering the merits of Williams' arguments, the Court will respond to the People's objection to Williams' motion based on untimeliness. The People point out that the deadline set by the Court for filing motions was 30 days before the motions hearing, but Williams provided the People his motion only at the hearing itself. The People argue also that Williams' filing of his Motion to Dismiss does not comply with the Virgin Islands Rules of Criminal Procedure and argue that the motion should therefore be denied.⁷ Rule 12 of the Virgin Islands Rule of Criminal Procedure relates to pleadings and pretrial motions. Rule 12(c)(1) directs that, as

⁷ The People also cite to a case from the District Court for the Virgin Islands and argue that it is, "well established in law that 'If [sic] a party does not meet the deadline for making a [motion to suppress], the motion is untimely and *deemed waived* absent a showing of "good cause" for the delay.'" *United States v. Quinones-Davila*, 2017 U.S. Dist. LEXIS 77605, *10 (2017). However, this Court is not bound by decisions of the District Court, and since the motion before the Court is not a motion to suppress, *Quinones-Davila* is inapposite here.

was done in this case, “[t]he court may, at the arraignment or as soon afterward as practicable, set a schedule for discovery and other proceedings, and may establish a deadline for the parties to make pretrial motions and may also schedule a motion hearing.” Rule 12(b) distinguishes between motions that may be made at any time (12(b)(2) motions), and motions that must be made before trial (12(b)(3) motions). Rule 12(c)(3) then states, “[i]f a party does not meet the deadline [set by the court] for making a Rule 12(b)(3) motion, the motion is untimely.” However, it also adds, “a court may consider the defense, objection, or request upon a showing of good cause or in the interest of justice.” V.I. R. Crim. P. 12(c)(3).

Without deciding whether Williams’ motion to dismiss on double jeopardy and vindictiveness grounds is a 12(b)(2) motion, or a 12(b)(3) motion that must be made before trial, the Court finds that the interest of justice compels it to consider the motion. A violation of the Double Jeopardy Clause implicates serious constitutional issues. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage[.]”); *People of the V.I. v. Vergile*, 50 V.I. 127, 134 (V.I. Super. Ct. 2008) (“The double jeopardy clause provides . . . fundamental protections to an accused.”); *Rowbottom v. State*, 341 Ark. 33, 37 (2000) (“[D]ouble-jeopardy protection is a fundamental right and [the accused] can raise his double-jeopardy claim for the first time in his [post-conviction relief] petition.”).

Likewise, “allegations of prosecutorial vindictiveness implicate serious Fifth Amendment due process considerations because prosecutorial vindictiveness can discourage a defendant from exercising his or her constitutional or statutory rights.” *People of the V.I. v. Celestine*, 2013 V.I. LEXIS 17, *3 (V.I. Super. Ct.) (citing *Gov’t of the V.I. v. Diaz*, 40 V.I. 110, 117 (V.I. Super Ct. 1998)); *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (“To punish a person because he has done what the law plainly allows him to do[, exercise his right’s under the Fifth or Fourteenth Amendments,] is a due process violation ‘of the most basic sort.’”) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). In view of the weightiness of the issues, if a double jeopardy violation or vindictiveness taints this prosecution, the Court cannot decline to remove the stain merely because a pretrial motion deadline was not met. Therefore, the Court will consider the Motion to Dismiss.

II. Williams’ Issue-Preclusion Argument.

Williams argues that certain claims are barred by double jeopardy from prosecution in this Court because of Williams’ acquittal in the District Court. Specifically, Williams argues that because he was acquitted in the District Court of the charge of possession of a firearm by a convicted felon, the People are barred in this case from prosecuting Counts Three (Alteration of Identifying Marks of Weapons Prohibited in violation of V.I. Code Ann. tit 23, § 481(a)), Four (Unauthorized Possession of a Firearm with Altered Identification Marks in violation of V.I. Code Ann. tit 23, § 481(b)), Five (Unauthorized Possession of a Firearm in violation of V.I.

Code Ann. tit. 14 § 2253(a)), and Six (Unauthorized Possession of Ammunition in violation of V.I. Code Ann. tit 14, § 2256(a)). In essence, Williams' argument is that because the Virgin Islands and the federal government are considered one sovereign for prosecutorial purposes, the People's prosecutorial discretion in this case is limited by the issue-preclusion protection embodied in the Double Jeopardy Clause. He argues that because the parties in the District Court case stipulated to Williams' prior conviction, the only issue left for the jury to decide was Williams' possession of a firearm, and the jury found in his favor on that issue. He argues that because the jury in that case found in his favor—that the People did not prove his possession of a firearm—the People cannot re-litigate that issue here. Because the People cannot again attempt to prove the element of possession of a firearm, Williams argues that the Court should dismiss the firearm and ammunition-related counts, Counts Three through Six.

The People argue that the "real issue" is whether the federal offense of which Williams was acquitted required Williams and the government to litigate the same elements as the offenses currently before this Court. After offering no legal argument to challenge Williams' assertion that the Virgin Islands and the federal government are a single sovereign for prosecutorial purposes, the People simply assert that "the issue of sovereignty is irrelevant." The People come to this conclusion by arguing that, "[h]ypothetically, even assuming single sovereignty," the current charges would not constitute double jeopardy because the charges and elements raised in the instant

matter are different from those in the federal case. The People's basic argument is that because the charges before this Court require proof of additional, different elements than the charge of which Williams was acquitted, issue preclusion does not affect those charges.⁸

a. The Virgin Islands and the Federal Government Are a Single Sovereign for Purposes of Prosecutorial Discretion.

Ordinarily, a state and the federal government may both try someone for the same crime without running afoul of double jeopardy. This dual power of prosecution is attendant to the dual sovereignty doctrine, which, "is founded on the common-law conception of crime as an offence against the sovereignty of the government." *Heath v. Ala.*, 474 U.S. 82, 88 (1985). "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences,'" for which he may be put in jeopardy. *Id.* (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)). Because an offense, "in its legal signification, means the transgression of a law," *Heath*, 474 U.S. at 88 (citing *Moore v. Illinois*, 55 U.S. 13, 19 (1852)), "when the same act transgresses the laws of two sovereigns, 'it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly

⁸ The People assert that Williams has made, "various inventive but ultimately, meritless arguments," that are, "nothing but a diversion," and based on, "a misplaced reliance" on Supreme Court precedent, in a "misplaced attempt to make an end run around" what the People see as the controlling rule in this case. The People conclude that Williams' arguments "utterly fail under *Blockburger*." However, for reasons that will become clear below, it is the People's argument that suffers from a confused understanding of the issues and ultimately fails to hit the mark.

punishable,” *Heath*, 474 U.S. at 88 (citing *Moore*, 55 U.S. at 20); *c.f. Rivera-Moreno v. Gov’t of the V.I.*, 61 V.I. 279, 305 (V.I. 2014) (“The Supreme Court of the United States has interpreted the Double Jeopardy Clause . . . to prohibit different legal subdivisions of a single sovereign from engaging in multiple prosecutions for essentially the same offense.”) (citing *Robinson v. Neil*, 409 U.S. 505, 506-07 (1973)).

In *Heath*, the U.S. Supreme Court explained that the “crucial determination” under the dual sovereignty doctrine is, “whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns,” which question turns on, “whether the two entities draw their authority to punish the offender from distinct sources of power.” 474 U.S. at 88-89 (citations omitted). Following that formulation, the Supreme Court affirmed that states, with their “separate and independent sources of power and authority” to punish offenders, “are no less sovereign with respect to each other than they are with respect to the Federal Government.” *Id.* at 89-90. Thus, “two identical offenses are *not* the ‘same offence’ within the meaning of the Double Jeopardy Clause,” if prosecuted once by a state and once by a different state, *id.* at 92 (citing *Lanza*, 260 U.S. 377), or if prosecuted once by a state and once by the federal government.

Not so, the U.S. Supreme Court has found, for the Virgin Islands and her sister territories. “[W]hile Congress has generally chosen to treat the Virgin Islands as the equivalent of a state government,” *Rivera-Moreno*, 61 V.I. at 305, the territory, “does not have independent sovereignty but derives [prosecutorial powers] directly from

congressional grant under article IV, section 3 of the federal Constitution,” *Gov’t of V.I. v. Dowling*, 633 F.2d 660, 669 (citing *United States v. Wheeler*, 435 U.S. 313, 321 (1978)). “[T]hus, ‘the Virgin Islands and the federal government are considered one sovereignty for the purpose of determining whether an individual may be punished under both Virgin Islands and United States statutes for a similar offense growing out of the same occurrence.’” *Rivera-Moreno*, 61 V.I. at 305 (quoting *United States v. Hodge*, 211 F.3d 74, 78 (3d Cir. 2000)). Accordingly, “successive prosecutions by federal and territorial courts,” of the same offense growing out of the same occurrence, “are barred because such courts are ‘creations emanating from the same sovereignty.’” *Heath*, 474 U.S. at 90 (quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264) (citing *Grafton v. United States*, 206 U.S. 333, 354-55 (1907) (the Philippine Islands)); *Rivera-Moreno*, 61 V.I. at 305. The protections embedded in the Double Jeopardy Clause attach to prosecutions between the Virgin Islands Superior Court and District Court of the Virgin Islands in the same way they attach to prosecutions by a single sovereign. Thus, Williams is correct that, “any dual or subsequent prosecutions from either the Virgin Islands Department of Justice or the Federal Department of Justice located in the Virgin Islands must be examined for violation[s] of Double Jeopardy.”⁹

⁹ Mot. 4.

b. Issue Preclusion Applies to the Issue of Whether Williams Possessed a Firearm and Bars Counts Three, Four, Five and Six.

Williams argues that the double jeopardy protection applicable here is the right to the issue-preclusive effect of an acquittal. Issue preclusion is a component of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.¹⁰ *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 (2016). “In criminal prosecutions, as in civil litigation, the issue-preclusion principle means that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’” *Id.* (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

The test to be applied for issue preclusion is not, as the People argue, the *Blockburger* rule, under which a court looks to the elements of two crimes to determine if separate statutory provisions constitute one criminal offense.¹¹ Instead, under an issue-preclusion challenge, a court must look at whether a jury’s

¹⁰ The Fifth Amendment is expressly made applicable to the Virgin Islands by virtue of section 3 the Revised Organic Act of 1954. V.I.C. Rev. Org. Act of 1954 § 3; 48 U.S.C. § 1561 (“The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States ... the first to ninth amendments inclusive[.]”).

¹¹ *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”) (citations and internal quotations omitted).

determination of fact in one proceeding bars the government from re-litigating that fact in another proceeding.¹² This inquiry, the "*Ashe* inquiry", requires a court to determine what "the jury necessarily determined" in the prior proceeding. *Bravo-Fernandez*, 137 S.Ct. at 365. As Williams articulated it in his Motion, "the doctrine of issue preclusion . . . looks past the formal elements of each charge. The rule turns on the arguments the parties advanced and the evidence they presented at the first trial." Mem. 5 (citing *Ashe*, 397 U.S. at 444).

Where, as here, a previous judgment of acquittal is based upon a general verdict, a court must, "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (citing *Mayers & Yarbrough*, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39).

To determine whether the jury in the District Court case necessarily determined the issue of whether Williams possessed a firearm, this Court needn't

¹² The doctrine of issue preclusion is equivalent to the doctrine of collateral estoppel in civil litigation, differing in name but not in substance:

Although the doctrine of collateral estoppel had developed in civil litigation, we had already extended it to criminal proceedings when *Ashe* was decided. The justification for this application was first offered by Justice Holmes, who observed that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 161 (1916). Currently, the more descriptive term "issue preclusion" is often used in lieu of "collateral estoppel." See Restatement (Second) of Judgments § 27 (1980).

Yeager v. United States, 557 U.S. 110, 119 n. 4 (2009) (alteration in original).

delve far into the record. In the District Court case, Williams was charged with a single count, Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1).¹³ The Information charged that Williams:

Having been convicted of a crime punishable by imprisonment of a term exceeding one year, did knowingly and unlawfully possess a firearm, to wit, a Smith and Wesson .40 caliber handgun, in and affecting interstate and foreign commerce.

Based on this language and the language of the code¹⁴, there were only two discernible elements to Williams' charge: (1) his being a felon, and (2) his possession of a firearm. The parties stipulated prior to trial to Williams having been a felon. Thus, "the single rationally conceivable issue in dispute before the jury was whether" Williams had possessed a firearm. *Ashe*, 397 U.S. at 445. The verdict in the District Court can only be interpreted as a determination by the jury that Williams was not guilty of possession of the firearm.

Applying the single-sovereign doctrine, this Court must view that jury's verdict—that the People had failed to prove Williams possessed a firearm—as if it were rendered before this Court. Since the charges in this proceeding arose out of

¹³ The Information charged Williams with a violation of 18 U.S.C. § 924(a)(2) as well. However, section 924 relates to the sentencing provisions for firearms crimes under Title 18. (The Court notes also that there is no § 924(a)(2)).

¹⁴ That statutory provision states:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922.

the same occurrence and course of conduct, that determination is binding in this case. The People may not relitigate the issue of whether Williams possessed a firearm. The jury's determination was that Williams was not guilty of possessing a firearm, and that determination, "represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager*, 557 U.S. at 111. "Its finality is unassailable." *Id.* (citing *Arizona v. Washington*, 434 U.S. 497, 503 (1977)).

Among the Counts that Williams challenges on issue-preclusion grounds, Counts Three, Four and Five are clearly affected by the acquittal in the District Court trial. All three counts (Three, Alteration of Identifying Marks of Weapons Prohibited; Four, Unauthorized Possession of a Firearm with Altered Identification Marks; and Five, Unauthorized Possession of a Firearm) required proof of possession of a firearm.¹⁵ After hearing the evidence and arguments presented by the prosecution, the jury acquitted Williams of possession of a firearm. The Virgin Islands Department of Justice is barred from attempting to prove a necessary element of Counts Three, Four and Five. Thus, those counts must be dismissed.

¹⁵ Count Three, Title 23 V.I.C. § 481(a): "No person shall within the Virgin Islands change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark or identification on any pistol, machine gun, or sawed-off shotgun. Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same within the Virgin Islands"; Count Four, 23 Title V.I.C. § 481(b): "Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either, actually or constructively, openly or concealed, any firearm"; Count Five, Title 14 V.I.C. § 2253(a): "Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either, actually or constructively, openly or concealed any firearm".

Whether Count Six, Unauthorized Possession of Ammunition, is impacted by the acquittal is less obvious, though Williams ultimately prevails on that count as well. The Affidavit supporting the warrant in this case says that officers “recovered the firearm that Mr. Williams discarded[,]” inspected the gun and found, “the magazine contained one (1) bullet and there was (1) round in the chamber of the firearm.”¹⁶ The jury found Williams not guilty of possession of that firearm¹⁷, and there are no other factual allegations in the supporting affidavit that support the charge that Williams was in possession of ammunition. The prosecution cannot again attempt to prove that Williams possessed the gun containing the ammunition. Therefore, Count Six must be dismissed as well.

The Court will dismiss Counts Three through Six.

III. Williams’ Prosecutorial Vindictiveness Argument.

Williams argues that the Constitutional presumption of vindictiveness bars the People from re-filing in its entirety the case against Williams. Williams argues the Court should infer that the People dismissed their original case against him to allow the federal government to prosecute its case against Williams. He argues that a presumption of vindictiveness is raised because the People dismissed their original case against Williams for that reason, and then re-filed with this Court only after Williams was acquitted in the District Court. He argues, “[h]ad Mr. Williams not

¹⁶ ¶ 12.

¹⁷ Officers may have found a gun that contained one bullet in the magazine and one round in the chamber of the firearm, but the People failed to prove Williams guilty of possession of the gun that contained the bullet.

been acquitted of the federal charges . . . it is undeniable that the People would not have,” re-filed.¹⁸ Williams concludes that the People have “unequivocally proven” an intent to punish him for his alleged violations of law after he exercised his legal right to a trial by jury. In the alternative, he argues that the circumstances of the People’s filing of this case evidence actual vindictiveness. He asks the Court to find either a presumption of vindictive prosecution applies to his case, or to find actual vindictiveness in this prosecution, and dismiss all charges against him.

The People argue that Williams relies on nothing more than the procedural history of the case, along with accusations and speculation, to support his argument. The People argue that, accordingly, Williams has not met his burden of showing either actual vindictiveness or a presumption of vindictiveness, and thus fails to shift the burden to the People to justify its decision to prosecute.

a. The Court Does Not Find Prosecutorial Vindictiveness and Will Not Dismiss Counts One and Two.

Prosecutorial vindictiveness is the, “act or an instance of intentionally charging a more serious crime or seeking a more severe penalty than is proper, especially in retaliation for a defendant’s lawful exercise of a constitutional right.” Black’s Law Dictionary (10th ed. 2014). “The gravamen of a vindictive prosecution is the increase in charges or a new prosecution brought in retaliation for the exercise of constitutional rights.” *People v. Valli*, 187 Cal. App. 4th 786, 802 (Cal. App. 3d Dist.

¹⁸ Mot. 8.

2010) (citing *North Carolina v. Pearce*, 395 U.S. 711, 723–26 (1969), overruled on other grounds in *Alabama v. Smith*, 490 U.S. 794 (1989)). The Virgin Islands Supreme Court has articulated the standards for proving vindictiveness in this jurisdiction:

In claims of vindictive prosecution, the defendant has the burden of proof and must establish either “(1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness. Thereafter, the burden shifts to the prosecution to justify its decision with legitimate, articulable, objective reasons. If the defendant does not meet his burden of proof, however, there is no need to reach the government justification issue.

Castillo v. People of the V.I., 59 V.I. 240, 274-75 (V.I. 2013) (quoting *Whiteplume v. State*, 874 P.2d 893, 896 (Wyo. 1994)).

“A finding of actual vindictiveness requires direct evidence, such as evidence of a statement by the prosecutor demonstrating a prosecutor's retaliatory motive,” *Celestine*, 2013 V.I. LEXIS 17, *4 (citing *Diaz*, 40 V.I. at 118) (internal quotations omitted), evidence “which is available only in a rare case,” *United States v. Johnson*, 221 F.3d 83, 94 (2d Cir. 2000) (citation and internal quotations omitted).¹⁹ Williams

¹⁹ See also, e.g., *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007) (“Jenkins may establish prosecutorial vindictiveness by producing direct evidence of the prosecutor's punitive motivation towards her. Alternatively, she is entitled to a presumption of vindictiveness if she can show that . . . charges ‘were filed because [she] exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness.’”) (quoting *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982); *United States v. Bucci*, 468 F. Supp. 2d 251, 256 (D. Mass. 2006) (“‘Actual vindictiveness’ requires direct evidence that the prosecutor was motivated by a desire to punish the defendant for asserting legal rights, a standard that has been characterized as a ‘rare’ and ‘exceedingly difficult’ to meet.”) (citing *Goodwin*, 457 U.S. at 380-81; *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002)); *Mraz v. State*, 2016 WY 85, *P32 (Wyo.) (“‘To find actual vindictiveness requires direct evidence, such as evidence of a statement by the prosecutor, which is available only in a rare case.’”) (quoting *United States v. Rodella*, 59 F.Supp.3d 1331, 1350-51 (D. New Mexico 2014) (quoting *Johnson*, 221 F.3d at 94)).

has submitted no direct evidence showing a retaliatory motive of the People. He points to the “immediacy of the new petition”, it being filed one day after the acquittal in the District Court case, and the additional charges brought in this case, and concludes there is “overwhelming” evidence to show actual vindictiveness. The Court disagrees. Williams failed to provide any direct evidence showing that the People made those prosecutorial decisions based on improper motive. He merely relies on inferences from the history of the charges. The Court cannot and does not find actual vindictiveness from those mere inferences. Without a showing of actual vindictiveness, the charges may be dismissed, “only if a *presumption of vindictiveness* . . . is warranted.” *Goodwin*, 457 U.S. at 381.

The Court finds such a presumption is not warranted. Prosecutors hold, “broad discretion . . . to select the charges against an accused.” *Id.* at 380 n. 11 (citation omitted). “Within the limits set by the legislature’s constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not itself a . . . constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard” *Id.* (citing *Bordenkircher*, 434 U.S. at 364) (internal quotations omitted). “A charging decision does not levy an improper ‘penalty’ unless it results solely from the defendant’s exercise of a protected legal right[.]” *Goodwin*, 457 U.S. at 380 n. 11. Williams’ reliance on the procedural history of this case does not lend enough support to his contention that the government is punishing him for exercising his right to a jury trial.

Valli, a case from the California Court of Appeal, while not binding, offers a helpful analysis. In *Valli*, the court reviewed an appeal from a defendant who was convicted, following a jury trial, on charges that arose from the same course of conduct as the charges of which defendant was acquitted in an earlier jury trial. The court, relying on *United States v. Esposito*, 968 F.2d 300 (1992), a case from the U.S. Third Circuit Court of Appeals, declined to apply a presumption of vindictiveness, finding that, “[t]he timing of the People’s decision to charge defendant”—the defendant was arrested on the separate counts the *same day* as the acquittal—“indicates it was a response to the acquittal, not to defendant’s testifying at trial.” 187 Cal. App. 4th at 805. In *Valli*, like here, the defendant had argued his arrest immediately after acquittal, “strongly suggests the People would not have brought the evasion charges had the jury not acquitted him.” *Id.* (citing the record). The Court of Appeal disagreed, finding, “[n]umerous courts have held the filing of new charges after an acquittal on separate charges do not, without more, give rise to a presumption of vindictiveness.” *Id.* (citing *United States v. Johnson*, 171 F.3d 139, 141 (2d Cir. 1999); *United States v. Wall*, 37 F.3d 1443, 1449 (10th Cir. 1994); *United States v. Rodgers* 18 F.3d 1425, 1430–31 (8th Cir. 1994); *Esposito*, 968 F.2d at 306).

This Court agrees that the filing of new charges after an acquittal does not, without more, give rise a presumption of vindictiveness. By merely relying on the fact that this case was filed the day after his acquittal in the District Court, Williams has not met his burden of showing a realistic likelihood of vindictiveness. “When a

[government] brings another indictment supported by evidence against a defendant after an acquittal, the acquittal is a legitimate prosecutorial consideration because the [government] is not levying punishment for a right exercised but rather for the crimes he committed." *Esposito*, 968 F.2d at 304. By offering no other evidence but the timing of the filing of this case, Williams has not persuaded the Court that the People recharging was anything but a legitimate prosecutorial decision detached from improper motive.²⁰ Indeed, the Court has no trouble surmising that the People's filing of this case after Williams' acquittal followed the "the prosecutor's normal assessment of the societal interest in prosecution." *Goodwin*, 457 U.S. at 380 n. 11 (citing Westin & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471, 486 (1978)). The Court finds no presumption of vindictiveness.

Absent actual vindictiveness or a presumption of vindictiveness, no due process violation has been established. Therefore, Counts One and Two will not be dismissed.

²⁰ Nor does the fact that the People filed charges in this Court and then dismissed them in order for the U.S. Attorney to pursue charges in the District Court. There may have been strategic reasons that the prosecution chose to first bring and resolve the firearm-related charges in the District Court. Neither does the fact that the People did not state on the record their reasons for their voluntary dismissal raise a presumption of vindictiveness. To the contrary, the Court would not expect the People to disclose any strategic motives they may have had, in a motion that does not require such a disclosure, if they had in mind the possibility of pursuing the same charges at a later date.

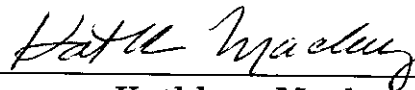
CONCLUSION

Williams is correct that for purposes of prosecutorial discretion, the Virgin Islands and the federal government are a single sovereign. Hence, double jeopardy protections attach to the People's prosecution before this Court, and issue preclusion bars the People from re-litigating Williams' possession of a firearm in the instant case. Because a jury found in Williams' favor on the issue of his possession of a firearm, the Court must dismiss Counts Three, Four, Five and Six, the counts related to unauthorized possession of a firearm and ammunition.

However, Williams has not met his burden of showing actual vindictiveness or a presumption of vindictiveness. No due process violation has been established. Therefore the Court will not dismiss the remaining counts, Counts One and Two.

An order consistent with this Memorandum shall issue.

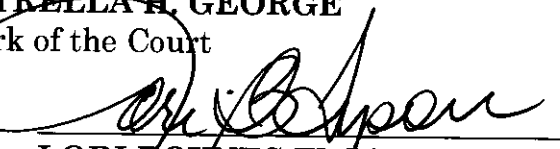
DATED: November 8, 2018



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY: 

LORI BOYNES TYSON
Chief Deputy Clerk 11/9/18