

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

PEOPLE OF THE VIRGIN ISLANDS,)
Plaintiff,)

v.)

HAROLD B. OVESEN,)
Defendant.)

CASE NO.
SX-14-CR-399

MURDER 1ST; ACCESSORY AFTER THE
FACT; ATTEMPTED MURDER 1ST

PEOPLE OF THE VIRGIN ISLANDS,)
Plaintiff,)

v.)

RUBEN RIVERA-MORENO,)
Defendant.)

SX-14-CR-400

MURDER 1ST; ASSAULT 3RD;
UNAUTHORIZED POSSESSION OF FIREARM
DURING THE COMMISSION OF A CRIME OF
VIOLENCE

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on August 11, 2015 for hearing on People's Motion to Detain Defendants Pending Trial ("Motion"), filed July 13, 2015, and Opposition of Defendant Ovesen to Government's Motion to Detain Pending Trial, filed August 3, 2015.¹

For the reasons set forth below, the Court finds that the People has failed to meet its burden of establishing by clear and convincing evidence that each Defendant committed first degree murder as charged. Therefore, the People's Motion will be DENIED.

I. BACKGROUND

Defendants Harold Ovesen and Ruben Rivera-Moreno were each convicted of first degree murder in the District Court of the Virgin Islands (Crim. No. 91/13). Following trial that concluded October 16, 1991, the jury found Ovesen guilty of Murder First Degree of Juan Ramon Rodriguez, among other crimes, and found Rivera-Moreno guilty of Murder First Degree of V.I. Police Officer Dexter Mardenborough, among other crimes. Defendants were each sentenced on the murder convictions on December 6, 2011, with Judgment and Commitment entered in each case on December 18, 1991, to terms of life imprisonment without parole. Each conviction was affirmed on appeal in unpublished opinions by the United States Court of Appeals for the Third Circuit on December 17, 1992 (*U.S. v.*

¹ Defendant Rivera-Moreno did not file a written opposition. At the hearing joined in all of Defendant Ovesen's arguments.

Ovesen, No. 92-7015) and on January 20, 1993 (*U.S. v. Moreno*, No. 92-7014). See 28 V.I. 547 (3d Cir. 1993).

Both Defendants filed petitions for writs of habeas corpus in the Superior Court (*Ovesen v. Government of V.I.*, SX-05-CV-246) and *Rivera-Moreno v. Government of V.I.*, SX-10-CV-111). This Court's January 9, 2014 Order denying Rivera-Moreno's petition with prejudice was reversed by the Supreme Court on September 24, 2014, which remanded the case to the Superior Court with instructions to grant Rivera-Moreno's habeas corpus petition, to vacate the portion of the December 18, 1991 Judgment and Commitment adjudicating him guilty of first-degree murder and other local charges, and to order a new trial on the local charges, if the Government should determine to retry the case.² By Order entered October 17, 2014 in SX-10-CV-111, this Court on remand granted Rivera-Moreno's petition for writ of habeas corpus, vacated the Virgin Islands convictions that were subject of the District Court's December 18, 1991 Judgment and Commitment, and required that the Office of the Attorney General advise if the People intended to retry the local criminal charges against Rivera-Moreno. By Notice filed October 31, 2014, the People advised of its intention to refile a criminal information against Rivera-Moreno and his co-defendant Ovesen.

In SX-10-CV-111, Rivera-Moreno filed his Emergency Motion for Release on October 23, 2014, which motion was redirected for disposition to SX-14-CR-400. By Order entered November 12, 2014, SX-10-CV-111 was closed.³

Ovesen's habeas corpus action was originally dismissed by the Superior Court, which dismissal was reversed and remanded by the Appellate Division of the District Court. Ultimately, Ovesen's petition was granted, and by Order entered October 23, 2014 in SX-05-CV-246, the Superior Court vacated the December 18, 1991 Virgin Islands convictions entered in the District Court, granted Ovesen's request for a new trial, and required that the People advise if it intended to retry the local

² The procedural history of Rivera-Moreno's habeas corpus proceeding is set out in more detail in the Supreme Court's Opinion. See *Rivera-Moreno v. Government of V.I.*, 61 V.I. 279 (2014). The Supreme Court held that: (1) because the habeas corpus statute, V.I. Code Ann. tit. 5, §§ 1301 to 1325, authorized remedies other than discharge, the trial court erred when it converted a habeas corpus petition into a motion for new trial or judgment for acquittal; (2) because verification under 5 V.I.C. § 1302 was a claims-processing rule rather than a jurisdictional requirement, the Government could not for the first time on appeal invoke petitioner's failure to verify his petition; and (3) the empanelment of a juror who had been excused for cause had been conclusively proven and constituted a violation of petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments. Because the empanelment of a biased juror was a structural error that mandated reversal without regard to whether the underlying error was harmless, petitioner was entitled to habeas relief. *Rivera-Moreno*, 61 V.I. at 280.

³ On March 13, 2015, Rivera-Moreno filed his Motion for Expedited Ruling on Release. By Order entered herewith a hearing is scheduled on the release motions of Rivera-Moreno which remain pending.

criminal charges against Rivera-Moreno. By Notice filed October 31, 2014, the People advised of its intention to refile a criminal information against Ovesen and his co-defendant Rivera-Moreno.

Ovesen filed an Emergency Motion for Release on October 21, 2014, which motion was granted following hearing by Order entered October 29, 2014.⁴

The People filed an Information against both Defendants on April 9, 2015, charging in Count One that Rivera-Moreno “did willfully and unlawfully kill Dexter Mardenborough, a human being, with malice aforethought, deliberation and premeditation, by shooting him with a firearm, in violation Title 14 V.I.C. § 922(a)(1).” In Count Five, the People charges that Ovesen, “while aided and abetted by another, did unlawfully kill Juan Ramon Rodriguez, a human being, with malice aforethought, in the perpetration of a kidnapping; and in the alterative, while aided and abetted by another, did willfully and unlawfully kill Juan Ramon Rodriguez, a human being, with malice aforethought, deliberation, and premeditation, by shooting him with a firearm, in violation of Title 14 V.I.C. §§ 922(a)(1), (a)(2) and 11.”⁵

The People argues, in support of its Motion, that there is clear and convincing evidence that each of the Defendants committed first degree murder, as a consequence of which the Court should detain both Defendants while they await trial. The People’s written Motion alleges that the following sequence of events occurred:

(1) At about 2:00am on January 27, 1991 in the street outside Hondo’s in downtown Christiansted, Defendant Rivera-Moreno (“Cano”) tapped Cristobal Sankitts on the shoulder, and shot him in the leg when he turned around;

(2) Rivera-Moreno was with two men, Ivan Santiago Munoz and Juan Ramon Rodriguez (“Loquillo”), all of whom fled as Sankitts pointed them out to Police Officer Dexter Mardenborough, who pursued them and yelled “police;”

⁴ Ovesen Exhibit 1. The Court ordered that Ovesen be released from the custody of the Bureau of Corrections and into the custody of one of the three approved third-party custodians upon the posting of a fully-secured cash bond in the amount of bail set at \$500,000 by Petitioner and third-party custodian or, in the alternative, upon the posting of a surety bond secured by real property having an unencumbered fair market value of \$1,000,000 or more.

⁵ Ovesen argues that he is only charged in the Information as the principal in the crime against Juan Ramon Rodriguez, while aided and abetted by another, not as an “aider and abettor” of another who did the shooting. As such, Ovesen claims that he has not been put on notice of any potential evidence to support a charge that he acted as an aider and abettor to another who perpetrated the killing, and that presentation of such evidence would constitute an “intolerable variance” from the charging document against which he has not been sufficiently put on notice to enable him to defend. No determination is required on that argument at this stage. Ovesen also states that the District Court dismissed that portion of the charge against Ovesen alleging murder in the perpetration of kidnapping, although evidence of such dismissal is not in this record. To the extent that the murder during kidnapping charge was previously dismissed, to prosecute Ovesen again on that same charge would appear to constitute double jeopardy. That issue is also not determinative of the present Motion and is not addressed here.

- (3) Officer Mardenborough fired a warning shot into the air, but the subjects kept running;
- (4) Rivera-Moreno turned around at the intersection of Strand Street, took aim and fired several shots at Officer Mardenborough;
- (5) Officer Mardenborough was struck and died as a result of the gunshot wounds;
- (6) Rivera-Moreno, Santiago, and Rodriguez ran to a house in the JFK Housing Community, where they were met by Defendant Harold Ovesen ("Buddy"), who took their guns;
- (7) Within hours of the shooting, Ovesen drove Rivera-Moreno to the airport;
- (8) At the airport, Rivera-Moreno was confronted by police who discharged shots, struck and apprehended him. He told officers that his name was David Sanchez; he admitted shooting Sankitts in the leg, but denied shooting the officer;
- (9) Rivera-Moreno was transported to the hospital where he told police that a black police officer had chased them and that "Pipi" shot the officer;
- (10) Police searched for Santiago and Rodriguez, who had been taken to a house where they stayed for about two weeks;
- (11) On February 10, 1991, two men drove Santiago and Rodriguez to the hills by Carambola under the guise that they were going on a boat. Upon arrival, they met Ovesen and another male waiting for them. Ovesen shot Rodriguez and the other male shot Santiago, both of whom fell down the hill. Rodriguez died and Santiago survived.

II. LEGAL STANDARD

Section 3 of the Revised Organic Act of 1954 ("ROA") provides that "[a]ll persons shall be bailable by sufficient sureties in the case of criminal offenses, except for [those charged with] first degree murder or any capital offense when the proof is evident or the presumption great." That is, the ROA "provides for the automatic detention of those charged with first degree murder when the proof of a defendant's guilt is evident." *Browne v. People of the Virgin Islands*, 50 V.I. 241, 248 (V.I. 2008). In *Browne*, the Supreme Court held "that section 3 of the ROA governs the issue of pretrial detention for first degree murder defendants in local Virgin Islands courts, and that title 5, section 3504a is inapplicable to the extent that it purports to grant pretrial bail for defendants charged with first degree murder in the Superior Court under Virgin Islands law where the proof is evident and the presumption great." *Id.* at 257-58, footnote omitted. Pre-trial detention in the Virgin Islands is limited only to defendants charged with first degree murder. *People of the Virgin Islands v. Velasquez*, 59 V.I. 106, 112 (V.I. Super. Ct. 2012). The People bear the burden of presenting evidence to support a finding of "clear

and convincing evidence that the defendant committed the offense for which he is before the court prior to detaining a first degree murder defendant pursuant to section 3 of the ROA.” *Browne*, 50 V.I. at 263.⁶

To the extent that its provisions run afoul of the ROA, 5 V.I.C. § 3504a has been abrogated. However, 5 V.I.C. § 3504a(b) “continues to govern the conduct of pre-trial detention hearings in the Superior Court. Significantly, the explicit language of section 3504a(b)(3) provides that the rules governing the admissibility of evidence need not be adhered to in pre-trial detention hearings.” *Williams v. People of the Virgin Islands*, 53 V.I. 514, 526 (V.I. 2010), footnote omitted. As such, hearsay is admissible and authentication of documentary evidence is not required.

The Supreme Court explained that “we are unwilling at this time to hold, as some courts have, that the clear and convincing standard can never be met by exclusively hearsay evidence.” *Id.* at 528.⁷ However, the clear and convincing standard will generally not be reached by hearsay evidence alone.⁸ “To allow Virgin Islands defendants to be detained pending trial solely upon the presentation of potentially unreliable hearsay testimony would impermissibly chip away at the constitutional right to liberty.” *Id.* at 532. The *Williams* Court held that “when the People elect to present exclusively hearsay evidence at a pre-trial detention hearing, the trial court, when determining whether the evidence is clear and convincing, must undertake by whatever means are appropriate under the circumstances to ascertain the reliability of the underlying hearsay statements when their accuracy is in question.” *Id.* at 532-33. The Court must “focus on the strength of the People’s evidence rather than the defendant’s ultimate guilt or innocence, and may not resolve direct conflicts as to the inculpatory and exculpatory facts.” *Id.* at 522, citing *Browne*, 50 V.I. at 262-63, 266.

⁶ “The *Browne* Court interpreted the standard to be applied in this case to require ‘clear and convincing evidence,’ which indicates ‘that the thing to be proved is highly probable or reasonably certain.’” *People of the V.I. v. Austria*, 50 V.I. 116, 120 (V.I. Super. Ct. 2008) (quoting *Browne*, 50 V.I. at 265).

⁷ “‘Denial of bail may not be predicated upon hearsay alone. There must be competent, direct evidence to support the denial. The hearsay evidence may be admitted in corroboration. We are moved to so hold because, except for the exception, a defendant has a constitutional right to bail in this state. A variance of that right should not be made lightly.’ *Gladney v. District Court of Denver*, 188 Colo. 365, 535 P.2d 190, 192 (Colo. 1975). See also *Azadi v. Spears*, 826 So.2d 1020, 1020 (Fla. Dist. Ct. App. 2001) (holding that pre-trial detention orders are statutorily prohibited from being based exclusively upon hearsay).” *Williams*, 53 V.I. at 527-528.

⁸ See *Williams*, 53 V.I. at 528, citing cases.

III. DISCUSSION

A. Evidence Presented

To determine whether the People has met the burden of the clear and convincing standard, the Court has before it: (1) direct testimony from retired VIPD Detective Ruby Urgent;⁹ (2) an Affidavit in Support of Information and Detention of Harold B. Ovesen and Ruben Rivera-Moreno of VIPD Detective Dino Herbert;¹⁰ (3) the Second Superseding Indictment against both Defendants in Crim. No. 91/13, filed June 11, 1991; (4) the Judgment and Commitment of Harold Ovesen, December 18, 1991; (5) the Judgment and Commitment of Ruben Rivera-Moreno, December 18, 1991; (6) Order vacating convictions and granting new trial to Harold Ovesen (SX-05-CV-246, October 23, 2014); (7) Order of the Court reversing the denial of Rivera-Moreno's petition for habeas corpus and remanding to grant a new trial (V.I. Supreme Ct. Civ No. 2014-10, September 26, 2014); (8) Statement of Ruben Rivera-Moreno dated January 26, 1991; (9) partial transcripts from District Court trial on October 11, 1991, October 15, 1991, and October 16, 1991 of the following witnesses: Eileen Cook (grand jury court reporter), Ivan Santiago Munoz, Christobal Sankitts, Henry Rohlsen, VIPD Lt. James Rhymer (now deceased), VIPD Officer Ramon A. Gonzales, VIPD Det. Ruby Urgent, Dr. James S. Glenn (pathologist, now deceased), Tasha Jacobs and Pricilla Farrelly;¹¹ (10) written statements from Kevin Allong, dated January 27, 1991 and June 1, 1991.

Defendant Ovesen presented as hearing exhibits the Superior Court's October 29, 2014 in SX-05-CV-246, granting in part and denying in part Ovesen's motion for release, and a transcript of the October 28, 2014 hearing on that motion. Defendant Rivera-Moreno presented no evidence.

⁹ Because the evidence included testimony this one live witness, the People did not present "exclusively hearsay evidence." *Williams*, 53 V.I. at 532. Detective Urgent testified as to her recollection of the investigation of the incident that occurred more than twenty-four years ago, acknowledging that she met with counsel for the People on the day prior to the hearing to refresh her recollection of the events. At the hearing, Detective Urgent candidly admitted that in light of the passage of time that she could not remember many details. The Court does not consider her testimony to provide clear and convincing evidence that the Defendants committed first degree murder. Because all of the rest of the People's evidence is hearsay, it is necessary to ascertain the reliability of that hearsay evidence.

¹⁰ Detective Herbert was not on the police force at the time of the original investigation and his affidavit, dated July 13, 2015, is exclusively hearsay. By its terms, the affidavit is presented to provide probable cause to support the Information, as well as to meet the higher standard of proof required for detention. "To hold in this case that Detective [Herbert's] repetition of the hearsay statements in his probable cause affidavit met the clear and convincing standard in this case would in effect be setting a precedent that would permit the People to detain a defendant without bail upon the showing of mere probable cause that the defendant committed first degree murder." *Williams*, 53 V.I. at 532.

¹¹ Defendants objected to the admissibility of the partial transcripts that were not certified and were incomplete and that they claim do not reflect accurately what happened at trial. Defendants at the hearing were "entitled to present information by proffer or otherwise, to testify, and to present witnesses" (5 V.I.C. § 3504a(b)(3)), and could have submitted a complete certified transcript to insure that the trial was accurately represented at the hearing. Nonetheless, as rules of evidence do not apply, the Court accepts the transcript excerpts to be a reliable representation of what occurred at trial.

B. First Degree Murder Standard

Title 14 V.I.C. § 922(a)(1) provides that all murder (defined as the unlawful killing of a human being with malice aforethought) which is perpetrated by means of poison, lying in wait, torture, detonation of a bomb, or by any other kind of willful, deliberate and premeditated killing constitutes first-degree murder.¹² *Cascen v. People of the Virgin Islands*, 60 V.I. 392, 393 (V.I. 2014). “[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.” *People of the V.I. v. Ventura*, 2014 V.I. LEXIS 53, at *48-49 (V.I. Super. Ct. July 25, 2014) (quoting *Codrington v. People of the Virgin Islands*, 57 V.I. 176, 184-85 (2012) (citing *Brown v. People*, 54 V.I. 496, 501 (2011)). The mere use of a deadly weapon, such as a firearm, satisfies the element of malice aforethought. *Id.* Premeditation can happen in a “brief moment of thought” whereby one makes a plan to deliberately kill. *Id.*; *Brown*, 54 V.I. at 501; *Simmonds v. People*, 59 V.I. 480, 487 (2013). Deliberation means that one committed the killing in a “cool state of blood” as opposed to in response to a sudden passion. *Simmonds*, 59 V.I. at 487 (2013). Additionally, the People must prove that the defendant had the specific intent to commit murder. *Cascen*, 60 V.I. at 393.

1. Analysis for Rivera-Moreno

On the basis of the evidence presented in support of the Motion, consisting most substantively of the original trial transcript, the Court finds that there is insufficient evidence to find that Rivera-Moreno killed Dexter Mardenborough deliberately, premeditatedly, and willfully. Rivera-Moreno admittedly shot Christobal Sankitts in the leg. As he and his two companions fled, there was an exchange of gun fire. Santiago, one of Rivera-Moreno’s companions, testified that as they ran away he heard a shot “from the direction of the man that was following us ... I don’t know the direction, but I feel it was towards our direction.” PVI Exhibit 7: Transcript (Tr.) 171:25-172:1-9. He testified that after Rivera-Moreno shot Sankitts, “I ran. They followed me running. From a distance, I heard that someone had seen what had happened and he followed us running.... I was running without looking behind me. Behind me was Loquillo and Cano following me. All of a sudden, I hear a gun fired. Then, immediately after that, I hear about five or seven other gun shots.” *Id.* 137:10-19. Santiago never testified that he knew who fired any of the shots.

¹² Although charged in the Information, there is nothing in the present record supporting any charge against Ovesen of murder committed in the perpetration of kidnapping. 14 V.I.C. § 911 (a)(2). See *supra* n. 5.

Witness Henry Rohlsen testified that he heard at least four shots and observed a person he identified several days later in a photo array and at trial as Rivera-Moreno fire a hand gun in the direction of Hondo's. PVI Exhibit 8: Tr. 17:22-24; 20:21:21; 23:20-24-7. However, he testified that he had immediately prior heard two shots fired that "could have been from outside Hondo's" and that he did not know whether the person he saw firing had been fired upon himself. *Id.* 26:4-17.

Santiago also testified that he and the other men never discussed that they wanted to kill the person who was running after them. PVI Exhibit 7: Tr. 172:22-173:2. Santiago testified that "Cano told me and Loquillo that he had shot the gentleman that we were having an argument with and that he feels that he may have killed him.... [t]he gentleman that was following us." *Id.* 138:15-22.¹³

Apart from the hearsay and double hearsay testimony implicating Rivera-Moreno as the person who shot Officer Mardenborough, there is other evidence that Rivera-Moreno consistently told police after the incident that another shooter killed the police officer. Police Officer Ramon Gonzales testified that Rivera-Moreno "said that he was involved in an altercation with a fellow whom he had met before at Hondo's, and he had to shoot him. He admit to shot him in his leg. And then after he was chased by a black police officer. And, he mentioned subsequently thereafter that his partner Pipi was at the corner on the street. And he was the one who opened fire and kill the police officer." PVI Exhibit 8:Tr. 125:9-18.¹⁴ Consistently, Lt. James Rhymer testified that Rivera-Moreno after being apprehended at the airport "kept repeating that he had shot the other individual which name was Sankitts. He did not shoot the police officer." *Id.* 115:18-20. "He indicated that he shot the other guy, not the officer. He didn't use Sankitts name." *Id.* 116:2-3.¹⁵

The Court does not have the authority to weigh conflicting testimony as inculpatory or exculpatory, but must instead determine whether sufficient facts have been presented to meet the clear

¹³ Santiago further testified "that's what Ruben Moreno, Cano, and that he told me he shot the police officer and he killed him." At the deserted hotel to which they ran, "I reached there and he said, he said, 'Listen, I killed him. I shot him and I think I killed him.'" Further: "Yes, what I'm saying is that after he reached to the hotel, he was scared. And, he told me that he thought that he killed him, that he shot at him and he killed him." PVI Exhibit 7: Tr. 174:3-19. Pricilla Farrelly who lived in the JFK project testified that Ovesen "say Goffey [Officer Mardenborough] get shoot. He laying down in the gut. He brains there out. And he was laughing." She testified that Rivera-Moreno reacted "He said, I F-ed up this time. I shot a cop." PVI Exhibit 9: Tr.63:6-17.

¹⁴ Rivera-Moreno gave a written statement in the emergency room on January 26, 1991, wherein he stated, "The black police officer came running and started to chase us. We made a left, and when I reached the corner on Strand Street, I saw Pipi, a dangerous man in Puerto Rico who after seeing the police chasing me pull his nine millimeter and fired several times hitting the officer." PVI Exhibit 6; PVI Exhibit 8:Tr. 134:2-7.

¹⁵ Lt. (then Sgt.) James Rhymer was dispatched to the St. Croix airport after 6am on the morning following Officer Mardenborough's shooting. *Id.* 114:23-115:1. When he arrived, he met Rivera-Moreno who had been shot. He had a conversation with him after he had been advised of his rights. *Id.* 115:4-15.

and convincing standard. "Direct conflicts as to inculpatory and exculpatory facts cannot be resolved by the trial judge in pretrial bail proceedings." *Browne*, 50 V.I. at 266 (quotation omitted). Rather, "the trial judge should focus on the strength of the People's evidence rather than the defendant's ultimate guilt or innocence." *Williams*, 53 V.I. at 522, citing *Browne*, 50 V.I. at 262-63.

Rivera-Moreno's self-serving statement to police on the morning after the incident identified a Puerto Rican named Pipi as the person who shot Officer Mardenborough. The only trial witness who identified the shooter of Officer Mardenborough was Henry Rohlsen, who testified that Rivera-Moreno fired shots in the direction of Hondo's. The fact that the Court is constrained not to resolve conflicts as to inculpatory and exculpatory evidence prohibits a finding that the People's evidence is clear and convincing that Rivera-Moreno committed first degree murder.

Further, Rivera-Moreno's alleged statement to his companions that "he thinks he may have shot the cop," tends to weigh against a finding of premeditation and deliberation. Even if the evidence can be deemed sufficiently clear and convincing to permit a finding that Rivera-Moreno fired a weapon as he and his companions fled from Hondo's, such appears to have been done without the "deliberate formation of and reflection upon the intent to take a human life" that constitutes premeditation. *Brown*, 54 V.I. at 506, quoting 40A Am. Jur. 2d *Homicide* § 448 (Feb. 2010). Premeditation "involves the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning *for a period of time, however short.*" *Id.* (emphasis in original). The Supreme Court has "described the mindset necessary to establish first degree murder: [t]o premeditate a killing is to conceive 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." *Codrington v. People*, 57 V.I. at 189-90, citing *Brown*, 54 V.I. at 507 (quoting *Gov't of the Virgin Islands v. Martinez*, 780 F.2d 302, 305 (3d Cir. 1985)).

The evidence suggests that the shooting of Officer Mardenborough did not involve a preconceived design or plan to kill, or a killing that had been planned and reflected upon by Rivera-Moreno, and committed in a cool state of the blood. To the contrary, the accused was running away from Hondo's and reacted to one or more shots fired from a pursuer by returning fire. Additionally, the evidence does not point to any indication that Rivera-Moreno acted with specific intent to kill. Indeed, he expressed to his companions fear and anxiety as a result of the shooting, stating that "I f---d up."

Thus, because the People's evidence is insufficient to meet the clear and convincing standard to show premeditation and deliberation and specific intent to kill, necessary elements of first degree murder, the People's Motion seeking the detention of Rivera-Moreno will be denied.

2. Analysis for Ovesen

Focusing on the strength of the People's case, the Court cannot find that the proof is evident or the presumption great that Defendant Ovesen committed first degree murder. Santiago's apparently reliable eyewitness trial testimony relating to the murder of Rodriguez (Loquillo) was impeached by reference to conflicting testimony he had given to the grand jury.¹⁶

At trial on October 11, 1991, Santiago testified that he and Loquillo, under the guise that they were being taken to a boat (PVI Exhibit 7:Tr. 145:13-20), were driven to a hillside road where they met Buddy and another dark, tall, thin man with braids. *Id.* 146:24-147:20. Loquillo and Buddy started talking and Santiago walked away from them "because I wanted to pee." *Id.* 152:2-3. "Just as I was finishing doing what I was doing, I turned around and Loquillo and Buddy was talking. And then I saw Buddy pull out a gun to Loquillo. Buddy shot Loquillo. And as I was zipping up and turn around to see if I could do anything, the tall guy with the braid shot me. Loquillo fell down on to one side, down. And I also fell down the precipice, but I went face first. After the guy with the braid shot at me, Buddy came over by him and he shot at me again. But thanks to God, it didn't hit me." *Id.* 152:11-21. When asked how close he was to Buddy when Buddy shot Loquillo, Santiago testified "I know that he was close and I saw him with my own eyes shoot my friend." *Id.* 177:16-17. The distance between Santiago and Buddy was estimated to be about 15 feet. *Id.* 178:20-179:2.

Santiago's trial testimony was impeached by reference to statements he had made to the grand jury shortly after the incident and his release from the hospital. During his grand jury testimony, Santiago was asked, "Did you actually see Buddy shoot Loquillo?" He answered, "No. He said no. He only heard the shot and saw Loquillo rolling down."¹⁷ *Id.* 181:2-5. When specifically asked if he remembered giving that testimony to the grand jury, Santiago replied: "I don't know. I don't know. Like

¹⁶ Following his release from the hospital, Santiago was "In a prison in Miami.... they had me there, according to them for protection, but... I don't know why I was there." In response to the prosecutor's question whether he had been "admitted into the witness protection program," Santiago replied: "Yes. I know that they're protecting me. I don't know if it's under that program, but I know that they're protecting me." PVI Exhibit 7:Tr. 162:1-13. The fact that Santiago received "protection" in exchange for his trial testimony is a circumstance to be considered in ascertaining the reliability of those hearsay statements when determining whether the evidence of Ovesen's commission of first degree murder is clear and convincing.

¹⁷ Although not explained in the transcript, the Court infers that the use of the third person pronoun in response to the question was on account of the fact that Santiago testified through an interpreter, who characterized that portion of Santiago's testimony rather than translating and repeating verbatim the words Santiago used.

I said, it's been eight months. I don't remember what I said or didn't say." *Id.* 181:6-10. Santiago also replied "Yes, of course" when asked if the events about which he testified "were fresher in his mind then than now." *Id.* 181:17-22.

At the trial, Tasha Jacobs, the girlfriend of Ovesen's cousin, testified that after the Mardenborough killing, Ovesen brought to her mother's house two Puerto Ricans (Loquillo and Santiago) who needed a place to stay for a day or two, although they ended up staying a week and a half. PVI Exhibit 9: Tr. 27:1-28:14. She testified to multiple statements of Buddy during that period threatening to kill people.¹⁸

Another friend of Defendant Ovesen's girlfriend, Pricilla Farrelly (*Id.* 54:25-55:2), testified that her brother told her "Mr. Ovesen wants him to go and help him get rid of the guys." (Santiago and Loquillo). As an inducement to help, "He say Buddy say he going pay him \$10,000." It was "two or three days later" that Loquillo was killed and Santiago injured. *Id.* 74:7-22.

This additional hearsay testimony buttresses the People's case by providing a motive and "to complete the story of the crime as well as to explain the relationship of the parties or the circumstances surrounding a particular event." *Chinnery v. Virgin Islands*, 55 V.I. 508, 526-27 (V.I. 2011) (internal quotation and citation omitted). Yet, these witnesses did not testify at the detention hearing. Notwithstanding the fact that the testimony was given under oath, subject to Defendants' cross-examination, the Court is unable to independently evaluate the reliability of these witnesses from the written transcript.

With the exception of the testimony of retired VIPD Detective Urgent, the People elected to present exclusively hearsay evidence at the detention hearing, and the Court must undertake to ascertain the reliability of that hearsay evidence. Further, the Court must not resolve direct conflicts as to the inculpatory and exculpatory facts. In this setting, there is a direct conflict between Santiago's October 1991 trial testimony that he observed Ovesen shoot Loquillo "with my own eyes," and his grand jury testimony that he "only heard the shot." (Compare PVI Exhibit 7: Tr. 177-16-17 with 181:3-5.) The Court focuses on the strength of the People's evidence rather than Defendant Ovesen's ultimate guilt or

¹⁸ Jacobs could not object to Loquillo and Santiago staying longer than expected because "Buddy told us if we say anything to anybody that he would have us killed." *Id.* 28:9-11. Loquillo and Santiago tired of staying in the house and considered making a break for it, but Buddy said "they can't leave because if the police hold them, they know too much about him" in which case "He said the only thing left is they have to die." *Id.* 36:25-37:12. Jacobs testified that she spoke to Oveson on Monday February 11, 1991. He wanted help cleaning up the house and said that "the boys were gone." He wanted "all of the fingerprints off the walls and the doors." *Id.* 39:17-40:3. Jacobs also testified that Ovesen told her that "if any police come to ask us any question tell them we don't know nothing...." "He said, either you lie or you die." *Id.* 41:5-25.

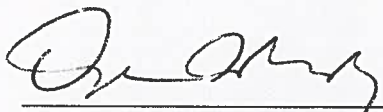
innocence. Since the People determined not to present the live testimony at the detention hearing of the witnesses upon whom it primarily relies, the Court is hampered in undertaking to ascertain from the written transcript the reliability of the hearsay statements of those witnesses. While the People's evidence in support of its Motion for pretrial detention is compelling, primarily consisting of sworn testimony from the 1991 trial, the Court cannot find that it clearly and convincingly proves that Ovesen committed first degree murder. As such, the People's Motion seeking the pretrial detention of Ovesen will be denied.

IV. CONCLUSION

The Court finds that the People has not met the burden of presenting clear and convincing evidence that either Defendant Rivera-Moreno or Defendant Ovesen committed the murders in the first degree as charged in the Information. In accordance with the foregoing Memorandum Opinion, it is hereby

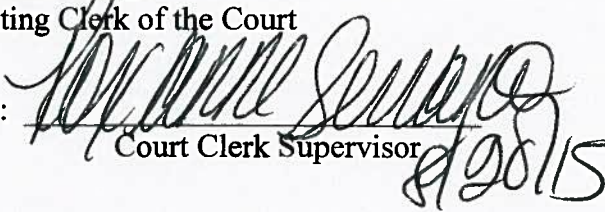
ORDERED that the People's Motion to Detain Defendants Pending Trial is DENIED.

DATED: August 20, 2015.


DOUGLAS A. BRADY
Judge of the Superior Court

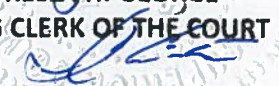
ATTEST:

Estella George
Acting Clerk of the Court

By: 

Court Clerk Supervisor
8/20/15

CERTIFIED A TRUE COPY

DATE: Aug 20, 2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK II