Case No. S. Ct. Crim. No. 2009-0022

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MITCHELL NICHOLAS,

Appellant-Defendant;

v.

PEOPLE OF THE VIRGIN ISLANDS,

Appellee-Plaintiff.

Superior Court Case

***People v. Nicholas,* No. ST-05-CR-334**

Appealed from

The Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Hon. Michael C. Dunston

BRIEF OF APPELLANT NICHOLAS

ELECTRONIC VERSION WITH REDACTIONS
(Supreme Court Promulgation Order 2010-001)

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STATEMENT OF JURISDICTION

This is an appeal as of right by Defendant-Appellant Mitchell Nicholas, pursuant to VISCR 4, from the Judgment and Commitment of the Superior Court entered January 7, 2008. Appendix, page iii (hereafter in the form, "App. iii"). A timely notice of appeal was filed. VISCR 5(b)(1); App. i.[1] The Superior Court of the Virgin Islands had subject matter jurisdiction hereof by virtue of 4 V.I.C. § 76(b). This Court has appellate jurisdiction pursuant to 4 V.I.C. § 32(a).

ISSUES PRESENTED

1. Whether the evidence recovered incident to Defendant's warrantless arrest should have been suppressed, where officers had an 11-hour opportunity to obtain a warrant but made no effort to do so?

Defendant filed a Motion to Suppress dated March 26, 2007. Special Appendix, page 28 (hereinafter in the form, "S.App. 28").[2] An evidentiary hearing thereon was conducted on April 19, 2007. S.App. 121. The Superior Court, Hon. Edgar D. Ross presiding, issued its Order denying (in material part) the Motion to Suppress. *Memorandum Opinion,* S.App. 98.

The Court should review a ruling on a motion to suppress for "clear error as to the underlying facts," but "exercise[] plenary review as to its legality in light of the court's properly found facts." *United States v. Givan,* 320 F.3d 452, 458 (3d Cir.2003).

2. Whether the Defendant was fundamentally deprived of a fair trial due to the admission (directly or indirectly) of multiple inadmissible hearsay statements; massive amounts of impermissible "prior bad acts" and negative character evidence; substantial testimony lacking foundation as to personal knowledge; countless instances of prohibited opinion testimony that Defendant killed the Decedent; additional irrelevant and grossly prejudicial evidence; and inflammatory character attacks by the prosecutor?

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[1] The Superior Court relieved appointed defense counsel immediately upon sentencing, and directed the Clerk of the Court to file a notice of appeal. No post-trial motions were filed. The undersigned was appointed as appellate counsel by this Court.

[2] The main Appendix ("App.") is comprised of two volumes and includes the entire trial transcript, including opening and closing argument; pages are numbered in a single continuous sequence covering both volumes. The Special Appendix ("S.App.") contains the written motions, transcript of the suppression hearing and the memorandum opinion, certain trial exhibits, etc. and is separately numbered.

The People filed their Motion *in Limine* to Admit Evidence [of] Oral Statements Made Pursuant to Federal Rule of Evidence 807 dated June 18, 2007. S.App.1. The Defendant filed an Opposition dated September 28, 2007. S.App.8. Oral argument thereon, and the trial court's oral rulings allowing the evidence (in part), are found at App. 40 -55. Hearsay statements attributed to the deceased victim were adduced by the People on innumerable occasions throughout the trial, in both a direct and indirect manner ("backdoor hearsay"), and sometimes in violation of trial court restrictions.[3] Evidence of "prior bad acts" of the accused was also admitted on multiple occasions.[4] The same is true as to negative character evidence,[5] and of ultimate opinion testimony on the guilt of the accused.[6] Additional evidence was improperly admitted in violation of simple relevancy/prejudice criteria.[7] There was also improper comment and argument by counsel for the People.[8]

Interpretations of the rules of evidence are subject to plenary review. *United States v. Serafini,* 233 F.3d 758, 768 (3d Cir.2000); *Phillips v. People*, 51 V.I. 258, 2009 WL 707182, *7 (V.I. 2009) (standard of review in determining whether a hearsay exception applies is *de novo*). A judge's application of correctly interpreted rules of evidence is reviewed for abuse of discretion. *Simmonds v. People*, 2010 WL 1813502, 12 (V.I. 2010).

Plain error standards govern evidentiary issues outside the scope of the Court's Rule 807 ruling, and indeed to all improper evidence admitted without objection.

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[3] E.g., Witness Joseph: App.102,ll.9-22; Green: App.209, l.11-210, l.4; Pinney: App.273,l.22-p.274, l.15.

[4] E.g., Witness Joseph: App.98,ll.15-24; App.102,ll.9-22; App.103,ll.3-9; App.104,ll.7-16; Richardson: App.161,l.20-162,l.22; App.210, l.15-211, l.6.

[5] E.g., Witness Joseph: App.104,ll.7-16; Richardson: App.166,ll.17-25; Green: App.105,ll.8-18; App.288,ll.11-25; Pinney: App.284,l.3-285,l.2; App.286,ll.3-12.

[6] E.g., Witness Joseph: App.100, ll. 1 7-23; Jones (relating Green's statement that "he killed her") and interpreting: App.147,ll.1-15; Richardson (repeating Green's statement and her own identical opinion): App.160,ll.1-19; App.160,ll.10-13; App.160,ll.14-24; App.200, l.12-201,l.10; Green: App.200, l.12-201,l.10; App.204,ll. 2-5; Davis (relating another's statement): App.238,ll.1-12; Officer Tyson ("reason to believe he had killed his wife"): App.282,ll. 5-9; Pinney: App.552, ll. 6-22.

[7] E.g., Richardson: App.166, ll.17-25; Green: App.205,ll.8-18.

[8] E.g., Defendant called a "loser," App.228,ll.11-25; and a "liar." App.715, ll.9-10.

> [W]hen a criminal defendant fails to object to a Superior Court decision or order this Court ordinarily only reviews for plain error, provided that the challenge has been forfeited rather than waived. ... *Francis v. People*, 52 V.I. 381, 390 (V.I. 2009). For this Court to reverse the Superior Court under the plain error standard of review, "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights'." *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997)). However, even "[i]f all three conditions are met," this Court may reverse the Superior Court "only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 390–91.

Farrell v. People, 2011 WL 1304467, *3 (V.I. 2011).

3. Whether the evidence is insufficient, as a matter of law, to sustain Defendant's conviction of first degree murder?

Counsel for the Defendant orally moved for judgment of acquittal under Fed.R.Crim.P. 29 when the People rested, which the Court denied, App.669-670; and then orally renewed the Motion at the close of the evidence, which the Court also denied. App.698,701.

This Court, in reviewing a conviction for insufficiency of evidence, applies a "particularly deferential" standard, viewing the evidence "in a light most favorable to the People"; nevertheless, there must be sufficient evidence for a "rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." *Phillips*, 2010 WL 683716 at *2-3, citing *Smith v. People*, 2009 WL 1530694, at *1 (V.I. 2009) and *Latalladi v. People*, 2009 WL 357943, at *5 (V.I. 2009).

4. Whether the evidence is insufficient, as a matter of law, to sustain Defendant's conviction of illegal possession of ammunition?

See above.

5. Whether the Defendant's conviction of unlawful possession of a firearm is invalid as a matter of law, because the Virgin Islands gun licensing statute is unconstitutional?

Review of the constitutionality of a statute is plenary. *United States v. Rodia,* 194 F.3d 465, 469 (3d Cir.1999). Second Amendment challenges are accorded (at least) an "intermediate" level of judicial scrutiny. *U. S. v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010).

RELATED PROCEEDINGS

Pursuant to VISCR 22(a)(3), Defendant advises the Court that no part of this case has been before this Court previously, and there are no known related proceedings.

STATEMENT OF THE CASE: PROCEDURAL CHRONOLOGY

On July 30, 2005, Defendant Mitchell Nicholas was arrested in St. Thomas in connection with the shooting death of Georgia Gottlieb. The People filed an Information on August 10, 2005, and later an Amended Information, charging Mr. Nicholas with: **Count One**-first degree murder, 14 V.I.C. §§ 921, 922(a)(1); **Count Two**-unlawful possession of firearm in a crime of violence, 14 V.I.C. § 2253(a); **Count Three**-first degree assault, 14 V.I.C. § 295(1); and **Count Four**-unauthorized possession of ammunition, 14 V.I.C. § 2256(a). S.App.18.

Through a Motion dated March 26, 2007, Defendant sought to suppress evidence recovered from his hotel room in a search incident to his warrantless arrest; and, separately, evidence obtained from the subsequent warrantless search of his rental vehicle. S.App.28. Upon an evidentiary hearing before the Hon. Edgar D. Ross, Senior Sitting Judge, the Superior Court upheld the arrest and related search; but suppressed evidence acquired in the later warrantless vehicular search. *Memorandum Opinion,* May 21, 2007; S.App.98.

The People, prior to trial, filed a Motion *in Limine* to admit certain evidence of the deceased victim's alleged statements under the residual hearsay exception of Rule 807, Federal Rules of Evidence, on June 18, 2007. S.App.1. Defendant filed his Opposition on September 28, 2007. S.App.8. The trial court granted the Motion, in part, in its oral rulings in chambers at trial. App.40-50.

The Superior Court, Hon. Michael C. Dunston presiding, conducted a jury trial of this matter, and the jury on October 4, 2007 found the Defendant guilty on all Counts.

A sentencing hearing was held on December 7, 2007; the Court, on January 7, 2008, entered its Judgment and Commitment sentencing Defendant to life imprisonment without parole on **Count One**-murder in the first degree; 20 years imprisonment (to run concurrently)

on **Count Two**- unlawful possession of a firearm in a crime of violence, with a fine of $25,000; and 5 years imprisonment (to run consecutively) on **Count Four**-unlawful possession of ammunition, with a fine of $5,000. App. ii.[9]

The Clerk of the Superior Court, acting under directions of the Judge, filed a Notice of Appeal on the Defendant's behalf promptly after the sentencing hearing (but before issuance of the formal written Judgment and Commitment) on December 10th. App. i.

STATEMENT OF THE CASE: FACTUAL SUMMARY

1. The Arrest/Suppression Hearing

As summarized by the Superior Court:

> In is undisputed that Georgia Gottlieb ("Gottlieb") died from a gun shot to the back of her head in the early hours of July 29, 2005. The Police came to Ms. Gottlieb's apartment in the evening and found her dead body. Her seven year old son [█████; also Defendant's child], who resided with her, was gone. Police interviewed neighbors and relatives in attempt to resolve the case. Based on those interviews, their deductions and inferences, detectives concluded that a crime had been committed; that the boy's father, also the deceased's boyfriend, Mitchell Nicholas, [who] had been seen taking his son from Gottlieb's premises, may have committed the crime.
>
> During the evening of July 29, 2005, Police detectives received reports that calls were being placed from Georgia Gottlieb's mobile telephone. The person using the telephone did not identify himself or herself. The calls gave the impression that Georgia Gottlieb was alive, because her name and telephone number were displayed on the digital display screen of the recipient's mobile telephone. Police concluded that this was an attempt to undermine their investigation by delaying detection of the dead body. Subsequently, local authorities contacted the Federal Bureau of Investigation (FBI) to assist in identifying the source of the telephone calls. At midnight, on July 30th, the FBI determined that the calls came in from the area of Hull Bay and Raphune Hill. Additionally, the FBI determined that a call had been placed from Gottlieb's telephone to Buena Vista Hotel.
>
> Detectives visited Buena Vista Hotel, but finding no personnel with sufficient authority to assist them, decided to come back. At 7:00 a.m., July 30, 2007 [Saturday], detectives approached a hotel staff member, Mrs. Anderia Francis. She remembered registering Defendant (and his son) into Room 205, and readily identified him when shown his picture. Mrs.

[9] **Count Three**-assault in the first degree, was deemed merged with Count One. *Id.*

> Francis volunteered that a relative of Defendant's was also a guest. Detectives obtained a master key from Mrs. Francis, and, with it, they attempted to gain entrance into Room 205. The door chain was locked from inside the room, stopping detectives from making an entrance.
>
> Therefore, they knocked down the chain lock and entered the room. Inside the room was Defendant armed with a handgun, and his son. Detectives identified themselves as police and FBI, and commanded Defendant to put his gun on the floor. He complied. * * * Among the items in the detectives' plain view and recovered from Room 205 were: (1) [Defendant's wallet and contents] ... ; (2) one "Glock" .45 caliber pistol, model "30," serial number FXZ532 with one cartridge chambered and a magazine containing eight cartridges [in a] ten round capacity magazine; (3) a "Motorola" cellular telephone, serial number CED0168; [and] (4) keys to Defendant's rental car.

Memorandum Opinion on Motion to Suppress, at pages 2-4; S.App.98.

Neither the Virgin Islands police, nor the federal officers assisting them in the investigation and arrest, obtained a warrant. S.App.139-143. There was no evidence of any attempt to obtain a warrant.

Officers had obtained the core investigative information cited by the trial court shortly after their arrival at the scene of the crime on early Friday evening. E.g., S.App.136,ll. 4-16; Written Statement of Charmaine Joseph, SH Hearing Exhibit at S.App.77, 7:45 p.m.; Written Statement of Erima Williams at S.App.60; 6:55 p.m.

Officers, from these early interviews, also acquired information that Mr. Nicholas had physical custody of his son. S.App.197, l.19-198, l.l4. Special Officer Warrington Tyson, Jr., employed by the Virgin Islands Police Department by assigned to the FBI Task Force, testified in the suppression hearing that probable cause to arrest Mr. Nicholas existed from the time officers learned that Mr. Nicholas was the last to leave the residence (with the child), and that witnesses had heard a "thumping sound" near the time of Gottlieb's death. S.App.200, ll.1-10.

Officers that Friday evening placed an APB on Gottlieb's vehicle, which Mr. Nicholas had been observed driving the morning of the 29th. S.App.240.

Also, later that same evening, FBI officers working in conjunction with the Virgin Islands Police Department—having been provided with information by family members, including Charmaine Joseph, that hang-up calls were being made with Decedent's phone after her death—issued and served a post-dated federal "Grand Jury Subpoena" (with no known federal grand jury ever having been convened in this or any other matter involving Mr. Nicholas) upon two local cellular telephone service providers, thereby obtaining information tracing the locations of recent phone use through GPS technology, and further showing that a call from Ms. Gottlieb's phone had been recently placed to the Bella Vista Hotel in St. Thomas. S.App.240,242.

Based upon this information, according to the testimony of Detective Cpl. Lionel Bess of the Virgin Islands Police Department, officers went to the Hotel around midnight Friday. S.App.242. They could find no hotel management personnel on-site, so they "left the hotel with the intention of coming back there first thing in the morning." S.App.241, l.22 – 242,l.16. No territorial or federal officers remained overnight at the Hotel for security or surveillance purposes, according to any evidence at the hearing (or trial).

At approximately 6:00 a.m. Saturday, territorial and federal officers convened, initially, in a nearby Pueblo store parking lot to coordinate the arrest. S.App.82. Present were at least 7 or 8 officers or agents, including FBI Special Agent Ted Sulzbach. S.App.168,l.18-169,l.17. Then (as stated in the trial court's factual summary), upon ascertaining that Mr. Nicholas was indeed a guest in the Hotel in Room 205, officers entered the room and made the arrest.

When asked why no warrant was obtained, Officer Tyson testified that there was insufficient time because that process could take hours or days. S.App.207,l.22-208,l.5. Officer Tyson further testified that time was of the essence because of concerns that the child was possibly in mortal danger, due to his status as a witness or even as a potential hostage. S.App. 210, ll.2-14.

Another officer testified that judges were unavailable on Saturdays. S.App.231,ll.3-5.

2. The Evidence at Trial

Defendant summarizes the salient evidence, by witness, and in the order presented at trial.[10]

Charmaine Joseph is the niece of the Decedent. Throughout the day of Friday, July 29, 2005, she had been concerned because she was informed that the Decedent was absent from work without explanation, which was uncharacteristic. App.95,ll.13-22. At approximately 2:00 p.m. she received a hang-up call from Ms. Gottlieb's cellular telephone; Decedent's number displayed on her (Ms. Joseph's) telephone as an incoming call. App.96,l.16-97, l.5. At that time, she testified, "I felt kind of funny because of the different threats she was getting..." App.98,ll.15-24.

In the late afternoon of the 29th, Ms. Joseph went to Ms. Gottlieb's residence, but there was no response, so she called 911 for help. App.99,ll.18-35. Two officers arrived, and proceeded into the residence. Ms. Joseph overheard an officer use the term "homicide." Ms. Joseph testified that she then screamed:

> [O]h God, he killed my aunt, he killed her, and she [an officer] asked me who am I talking about, I told her, "her boyfriend, she had put him out and I saw him with her last night and that's the last time I saw my aunt alive and it's he who killed her."

App.100,ll.l7-23.

Ms. Joseph identified Mitchell Nicholas in court. App.100,ll.24-11. She testified that she had seen Mr. Nicholas, the Decedent, and their son, ████, together, at a ballpark after a church summer camp program that ████ attended the evening before Ms. Gottlieb died. App.101,l.15-102,l.8.

[10] Defendant offers this unusually lengthy and detailed summary because (among other reasons) appellate review under the plain error standard requires an examination of the entire record. *U.S. v. Booker,* 375 Fed. Appx. 225, 229 (3rd. Cir. 2010), citing *U.S. v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) ("Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. * * * It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means.")

Ms. Joseph testified about her prior conversations with the Decedent. The prosecutor asked, “what, if anything, did you discuss that you told your aunt as it relates to whatever problems she was having with the defendant [*sic*]”? Ms. Joseph responded: “I asked her if you are having problems why don’t you go and put a restraining order so he could stop coming by you....” App.102,ll.9-22. Ms. Joseph told the Decedent “just go and do a restraining order” on two occasions, the first time two weeks before she died, and the second a week before. App.103,ll.3-9.

Mr. Joseph also related two conversations with Defendant Nicholas, taking place at an unspecified time. In the first, Mr. Nicholas allegedly said that he was watching her aunt “like a detective.” App.104,ll.7-16. Ms. Joseph testified that in the other conversation, Mr. Nicholas—during a time when the Decedent was away on a cruise—asked, “[A]re you going to come and spend some time with me when your aunt leaves”? Ms. Joseph thought that this was an inappropriate overture, and she “told her aunt that she need[ed] to address it.” (*Id.*)

On cross-examination, Ms. Joseph acknowledged that the Decedent and Defendant were not fighting the evening before her death, and that they had indeed attended their son ████’s program at the Methodist Church together. App.109,l.20-110,l.1. Ms. Joseph never saw Decedent and the accused having a “violent argument.” App.111,ll.8-11.

She did not know whether Mr. Nicholas’ cell phone service had been cut off, or whether he would borrow the Decedent’s telephone sometimes. App.110,ll.14-19.

Ms. Joseph assumed and maintained custody of ████ (who testified at trial) immediately after Ms. Gottlieb’s death. App.110,ll.20-25. She denied having any “extreme” conversation with ████ about his mother’s death, stating that she merely told ████ that his mother had an “accident” and “went to heaven.” App.110,ll.2-7.

Erima Williams was the downstairs neighbor of the Decedent and Mr. Nicholas in the two-storey structure in ██████████. App.112, l.22-113,l.10. On the morning of July 29th, she and her husband attended an early-morning church service between 4:30 and 6:00 a.m. App.113,ll.11-23. They returned home and went to bed, and she was awakened by a

sound like a gunshot. App.114,ll.9-17. She estimated the time to be 7:00 a.m., but was uncertain because she had been asleep. App.118,ll. 21-57. She did not call the police when she heard the noise; she just went back to sleep. App.122,ll.2-14.

She never heard Ms. Gottlieb and Mr. Nicholas fight. App.120,ll.5-24. She saw Mr. Nicholas driving Ms. Gottlieb's champagne-colored vehicle on a regular basis. App.101,ll. 6-11.

Malika Ludvig is the daughter of Erima Williams, and also lived downstairs from Ms. Gottlieb and Mr. Nicholas. App.129,l.24-130,l.4. She was outside the [redacted] residence on the morning of July 29, 2005. App.124,ll.10-23. At approximately 7:00 a.m. she saw Mr. Nicholas driving the Decedent's vehicle, "going westward like he was heading to town." App.124, l.24-125,l.12. Mr. Nicholas soon returned, exchanged greetings with Ms. Ludvig, and headed up the stairs to the residence. App.125,ll.14-21. She went inside, and took a 15-minute shower, and then, at approximately 7:30-8:00 a.m., looked through her window saw the same vehicle reversing to leave the back yard. App.125,l.22-126,l.8.

There was nothing out of the ordinary in Mr. Nicholas' appearance that morning. He was "just in a hurry." App.125,ll.15-19. He did not seem angry or upset. App.129,ll.3-12. He was not bearing a firearm. App.129,ll.3-9. She heard no unusual noises that morning. App.131,ll.18-22. She had observed Mr. Nicholas driving Ms. Gottlieb's champagne-colored Ford vehicle almost daily. App.130,ll. 5-8.

Ms. Ludvig had known Mr. Nicholas for 5-6 months, but only to exchange pleasantries. He did tell her, one or two days before Ms. Gottlieb's death, that he was "vex[ed]" because "he needs to move out, he needs to find a place." App.126,l.22-127,l.1.

Linda Bailey, also a neighbor, was outside dealing with a flat tire on the morning of the 29th. App.134,ll.3-23. She knew Mr. Nicholas from high school. *Id.*; also App.139,ll. 19-23. She saw Mr. Nicholas leaving in the champagne-colored vehicle with the child, [redacted], at approximately 8:30 a.m. App.134,l.19-135,l.5. Mr. Nicholas' behavior did not appear strange or abnormal. App.137,ll.6-12.

Paul Jones was a co-worker of Decedent with the Virgin Islands National Park; he knew her for 20 years through work, and also through community choir activities. App.130,ll.1-24. He also knew Mr. Nicholas. App.141,ll.22-23.

When asked "what type of person" the Decedent was, Mr. Jones testified that Ms. Gottlieb was a "good friend, very conscientious, very organized, loving." App.144,ll.4-8. Over defense counsel's objection, he testified that Mr. Nicholas, was, by contrast, "a very standoffish person. He really didn't, I would say, mesh with a group of friends." App.143,l.23-144,l.5. When there was a gathering at the home, Mr. Nicholas would "basically segregate himself or, you know, basically if you try to speak to him, he really won't." App.143,ll.14-21.

A week before Ms. Gottlieb's death, Mr. Jones arranged to disable the electronic combination lock to her car, by contacting a technician-friend to disable the device. This was because "she was afraid of him having access to the car through the combination." App.146,ll. 5-25.

Mr. Jones testified that Ms. Gottlieb, who normally arrived at work at 7:30 a.m., was absent from her job the day of the 29th. App.143,l.22-144,l.15. When he returned home from work that day, he got a telephone call from Venus [Green], who screamed, "he killed her, he killed her, Paul, he killed her, Georgia is dead." App.147,ll.1-15. Then: "**Q** [by the prosecutor]. Do you know who she meant by, 'he killed her'? **A.** Well, she meant Mitchell Nicholas." App.147, ll.16-21.

Elba Richardson was also a co-worker of Decedent at the Virgin Islands National Park from the time Ms. Gottlieb was hired in 1990, and a "best friend." App.154,l.23-155,l.14. When asked by the prosecutor to "describe her as a person," Ms. Richardson testified that Ms. Gottlieb was a "very self-giving person. She's the only person that I've ever met like that, that she just loved to give. She lived to give, and always wanted to share whatever she had...." App.155,ll.15-16. By contrast, and with regard to Mr. Nicholas:

> I told [Decedent] on occasion that I didn't trust him because he had made advances to my sister while he was dating Miss Gottlieb. And so, I had told her about that. I told her that I didn't trust him and I told her what he had done with relation to the calls and the trying to grope on the beach and stuff like that.

App.166, ll.17-25.

Ms. Richardson was concerned that Ms. Gottlieb failed to show up for work on the 29th, so she called Venus Green, Charmaine Joseph and Marie Pinney to check up on her. App.157, ll.1-25. Ms. Richardson personally went to Ms. Gottlieb's residence at noon with her husband, but nobody responded. App.158,ll.5-19. At approximately 2:30 p.m. that day, Ms. Richardson received a call from a telephone that her own cellular phone's display screen identified as "Georgia's cell," but there was no sound; she then speed-dialed Ms. Gottlieb's phone but the call went to voicemail. App.159,ll.4-15.

At trial, Ms. Richardson tearfully related a telephone call she received from Venus Green at approximately 5:00 p.m. on the 29th, testifying that she (Ms. Green) had said, "[H]e killed her, he killed her, he killed her, he killed her." App.160,ll.1-19. And then: "**Q** [by the prosecutor]. So, what did you thought [*sic*] at that time after she made that comment to you? **A.** That Mr. Mitchell Nicholas had killed her and that she was dead." App.160,ll.10-13.

And further:

> Q. Why did you think that it was him?
>
> A. Because of on-going friction and physical contacts that were unwanted.
>
> Q. What do you mean by physical contacts?
>
> A. On the 22nd, the week before, she had put him out of the house, and my husband and I, or my husband, I bought the locks based on her request, and my husband changed the locks to her house.

App.160,ll.14-24.

Ms. Richardson further narrated the reasons she believed Defendant killed her:

> The locks to her [redacted] home, and that week of the 29th, the week that she was murdered, two mornings he was outside the house waiting for her. And so, when she came to pick me up, she was all hustled, we barely caught the boat because she said he was outside tussling with her trying to take

> him back, trying to, you know, get back into the house because he didn't have any money, not place to stay, and so, she was unshuffled by all of that, and the day before the murder, her last working day, she was just consumed with the thought of I hope I don't have to give him a ride, and that was a thought weighing on her mind before she left work that Thursday. And so, because of all of that that had been happening over probably the last six to eight months, it was building to that point.

App.,ll.1-19.

Ms. Richardson was asked if she ever observed anything unusual about Ms. Gottlieb's physical appearance, and she answered: "One time she showed me a black and blue mark on her arm where she said that they had scuffled." App.161,l.20-162,l.2. This was approximately a week before her death. App.162,ll.17-22.

Ms. Richardson testified that on one (unidentified) occasion she saw Mr. Nicholas with a black handgun that he removed from a bag in the car momentarily, but then placed it back in the bag, "along with other stuff." App.165,ll.15-22. The prosecutor asked her what her thoughts were at the time, and she said she was "kind of alarmed and wondering why did he have a gun and why did he put it—take it out and rested it on the seat." App.165,ll.15-22.

On cross-examination, with respect to the handgun, Ms. Richardson acknowledged that Mr. Nicholas was a boat captain operating a water taxi, and there would be times he would be out early in the morning or later in the evening. App.168,l.19-169,l.6.

She also acknowledged that she never observed Mr. Nicholas "act[ing] in any sort of aggressive or violent way towards Ms. Gottlieb" (but volunteered that he did give her angry looks on a specific occasion when there was a car problem). App.169,l.12-p.170,l.2.

In the two years that Ms. Richardson knew Mr. Nicholas, she had "maybe five conversations" with him, and "three would probably be about food because he used to cook." App.167,ll. 1-6.

She testified that on one occasion (never specifically established as to time) "he called to work and he told me that he was jealous of the relationship that Georgia had with a co-worker, Paul Jones, who she had known for close to 20 years at that point...." App.167,ll.6-

10. She assured Mr. Nicholas that Mr. Jones was a "gentlemanly" person and that there was "definitely nothing that [she] had seen or observed" that would suggest anything but a "brother/sister relationship." App.167,ll.10-22.

Fidel Penha, a technician, testified that on July 22nd or July 23rd, he disabled the electronic combination door lock on Ms. Gottlieb's car at the request of her co-worker Paul Jones. App.170-175. The prosecutor asked him if he had a "personal conversation" with Ms. Gottlieb, and if so what did *he* tell *her*? Mr. Penha responded that he "asked her if it was a domestic problem, a guy or something" and "that seemed to be the problem"—as he recalled it. "I guess it was an urgent matter...." App.174,l.l7-175, l.8.

Anthenia Brown, a Police Sergeant with the Virgin Islands Police Department in the firearms unit, testified that Mitchell Nicholas did not have a Virgin Islands license for a firearm for the district of St. Thomas and St. John. App.176-179. She was aware of the Virgin Islands law granting reciprocal recognition to out-of-state firearm licenses, but she did not know whether Mr. Nicholas had a valid firearms license from the State of Georgia. App.180,ll.7-21.)

Officer Karen Stout of the VIPD testified to the same information as to the district of St. Croix. App.181,l.1-183,l.25.

Andrea Francis worked as the front office manager of the Bella Vista Scott hotel in July of 2005. App.185,ll.2-6. She checked Mr. Nicholas, whom she identified in the courtroom, into the Hotel at 10:57 a.m. on July 29th. App.185,ll.7-25. He came as a "walk-in" and paid cash. App.186, ll.11-13. He gave her proper identification. App.191,l.17-192, l.10. He appeared with a young woman and a baby. App.186,ll.1-3. Mr. Nicholas asked for his brother, who had already checked in the day before. App.186,ll.1-10. Mr. Nicholas' brother arrived in the office while he was checking in, and they hugged. App.186,ll.11-24. She gave Mr. Nicholas the key to Room 205. App.186,ll.11-24.

She observed Mr. Nicholas and a boy between the ages of 6 and 7 at approximately 2:30-3:00 p.m. that afternoon going into his room. He appeared to be "hurriedly walking nervously." App.187,ll. 8-13.

Ms. Francis arrived at work the next morning (Saturday, July 30th) at 7:12 a.m. App.187,ll.17-23. Police officers were present and showed her a photograph of Mr. Nicholas, and she gave them two master keys, one for Room 205 and the other for the brother's room. App.188,ll.1-16.

Venus Green, a friend of the Decedent's, and an employee of the Department of Homeland Security, TSA, testified that she received a call from Elba Richardson on the 29th asking if she had heard from Ms. Gottlieb, which she had not since the evening before. App.198,ll.17-25. Ms. Green tried to contact Ms. Gottlieb through her cell phone and work phone, to no avail. App.199,ll.1-25.

Later that day, Ms. Green received a call from one Willis Pinney informing her of the death. And then:

> A. ... He said, "do not come, they found her body," and I started to scream and I said, "[O]h, my God, he killed her, he killed her."
>
> Q [by the prosecutor]. Meaning who he?
>
> A. And I said, "[O]h, my God, he killed her, he killed her," and I was screaming, and after I got off the phone with Willis, I dialed Elba's number and I told her that they had found—I was screaming hysterically and I told her they had found her body, he had killed her, Mitchell had killed her. And then I then I ... called Paul and I was screaming again hysterically and I told Paul, "Mitchell killed Georgia, Mitchell killed Georgia, you got to come."... I called Glenn Kwabena Davis and I repeated again, I said, "Mitchell killed Georgia, Mitchell killed Georgia," and he was on the way.

App.200, l.12-201,l.10.

Ms. Green drove to Ms. Gottlieb's residence and showed police officers her cellular telephone displaying calls that she had received from Ms. Gottlieb's phone—one placed at about 11:00 a.m.— but when informed by the police that she was dead by that time Ms.

Green told the police that it must have been Mr. Nicholas calling her with Decedent's phone. App.203,ll.14-24.

Ms. Green called her employer (TSA) and told them, "Mitchell had killed Georgia and that they [should] work to ensure that he didn't leave the island. I told them to advise customs and to advise the Coast Guard because he was a pilot of a boat." App.204,ll. 2-5.

The following day she entered the crime scene (Ms. Gottlieb's residence) and looked through personal items belonging to Mr. Nicholas, and told the jury, "[T]here were some letters from a female, love letters." App.205,ll.8-18. Also, while rummaging through his property, she found a fanny pack appearing to be a gun holster, and showing the outline of a weapon. App.205,l.8-206, l.5.

Ms. Green had a conversation with the Decedent regarding Mr. Nicolas, and the locks being changed, on July 22, 2005. App.208,ll.11-15.

> I was concerned as to her health and I told her that she needs to end the relationship. If she has to be that secured, she needed to end the relationship with Mitchell Nicholas and to get a temporary restraining order, to which she didn't at that time that I know. I don't know if she did.

App.209,l.11-210,l.4. She also, in May, had told Ms. Gottlieb she needed a restraining order because of the "weapons he had in his possession" and because of the times that Ms. Gottlieb was "inconsolable." App.210,ll.5-14.

On one occasion, Ms. Gottlieb showed Ms. Green a broken-up piece of equipment behind the head of a bed that "was a recording device plugged into the wall to monitor calls." App.210,l.15-210,l.6. The prosecutor asked how she knew it was a recording device. "**A.** Because I asked. She showed it to me and told me what it was, and I inquired more." App.212,ll.4-14.

The evening before she was killed, Ms. Gottlieb allegedly asked Ms. Green to spend the night at her home. App.216,ll.20-22. Ms. Green declined, because she had a baseball game; Ms. Green told Decedent she would call later that evening, but did not. App.217,ll.1-20.

She characterized Mr. Nicholas as "very kind of, not standoffish, but like withdrawn." App.219,ll.1-4.

With respect to Mr. Nicholas' residency, she acknowledged that after 2003 she knew Mr. Nicholas left the Virgin Islands for substantial periods of time. App.220,ll.10-22. She was aware that he was in the military (whether for training or active duty she did not know), but he went away for a while. At some point, Mr. Nicholas moved back to St. Thomas, but "I don't know if he was living in her house, [and] I don't know if it was permanent or just staying." App.220,l.19-221,l.14.

On cross-examination, Ms. Green acknowledged never having observed Mr. Nicholas strike or physically harm Ms. Gottlieb. App.222,ll.18-23. She saw Mr. Nicholas wearing a fanny pack, but had no knowledge or belief whether there was ever a gun inside. App.223, l. 121-224, l.13.

After testifying about seeing Ms. Gottlieb with Mr. Nicholas and their son at the church program the evening before her death, and stating that she thought Ms. Gottlieb was safe, the prosecutor asked:

> Q. Well, why before now didn't you tell her to get rid of this loser?
>
> A. I did tell her.
>
> Q. Something wrong with him, why didn't you really hammer that home to her?
>
> A. I did tell her to lose him, but that was only after I was informed of his possession of weapons.

App.228,ll.11-25.

Glenn Davis, a music teacher, was a friend of Ms. Gottlieb's for many years. App.231,l.l8-232,l.25. He testified that on July 29th, he received a call from Venus Green, in which she stated that "Mitch killed Georgia." App.238,ll.1-12.

On cross-examination, he acknowledged that he never saw Mitchell assault or attack Ms. Gottlieb. App. 239,ll.1-12.

Officer Derrick Matthew was dispatched to the residence at [redacted] in the afternoon of July 29, 2005. App.244,ll.1-5. He took a number of photographs of the Decedent lying on her back surrounded by blood. Exhibits 1-5; App.245,l.4-251,l.25.

He observed no signs of burglary or forced entry in the residence; everything was intact. App.251,l.23-252,l.12.

Catherine Rodriguez, an ATT employee, provided foundational testimony for the admission of Exhibit 41, Ms. Gottlieb's cell phone records for July 29, 2005. App.255,l.9-268,l.13. These showed various calls made after 8:00 a.m. to, *inter alios*, Charmaine Joseph, Elba Richardson, Venus Green, and to the Virgin Islands National Park; also calls to the voicemail facility in Puerto Rico. App.268,l.7-p.274,l.16. On cross-examination, Ms. Rodriguez stated that she had no means of identifying the person using Ms. Gottlieb's phone, and acknowledged that it could have been a child. App.277,ll.1-25.

Warrington Tyson, Jr. is a Special Officer employed by the Virgin Islands Police Department who works in cooperation with the federal government on violent federal crimes. App.280,ll.1-13. He received a call from his supervisor at 1-2:00 a.m. Saturday the 30th and was instructed to meet with other officers at the Pueblo near the Mandela Circle area later that morning. App.281,ll.1-4.

He testified at trial that officers had received, through "scientific methods," information that Mr. Nicholas was staying at the hotel in question. App.282,ll.1-4. "We had reason to believe that he had killed his wife and had fled the residenc[e] with the minor child." App.282,ll. 5-9. "Our first and only concern at that point in time for the safety of the minor child." App.282,ll.13-15.

> ...[W]e did not know the mindset of Mr. Nicholas at that point in time, and we had reason to believe that he had shot and killed his wife and took the minor child with him, and we did not know if the intent was to do bodily harm to the minor child or to use the minor child as a means of leverage to get away from law enforcement.

App.282,ll.18-25.

Special Officer Tyson described the arrest, made with the assistance of other local and federal law enforcement officers. App.283,l.1-292,l.l9.

He testified that Mr. Nicholas, awakened by the sound of a battering ram on his door, was holding a gun, but complied with officers' request that he drop it. App.291,ll.1-15. Officers found the handgun, and the Decedent's cell phone, in the hotel room. App.299,l.1-302,l.4.

Detective Mario Stout was employed with the major crimes unit of the Virgin Islands Police Department who participated in the investigation and the arrest. His testimony was redundant of that of Special Officer Tyson.

Jack Brown, manager of Midway Guns and Repairs in Midway, Georgia, testified that he sold a gun to Mitchell Nicholas on May 4, 2004 in Georgia, as reflected on Transfer of Firearms Requisite 4473. App.355,l.l6-356,l.5. In Georgia, a gun buyer was required to have a picture identification to buy a firearm; Mitchell Nicholas presented a Georgia driver's license and a Georgia federal firearms' license to Mr. Brown. App.357,ll.4-17. He had a "Georgia firearms federal license" and a "Georgia carrying permit." App.357,ll.3-6.

The gun was a Model 30 Glock, .45 caliber, serial number FXZ5320. App.359,ll.14-16. Mr. Nicholas also purchased a Bersa Thunder 380, serial number 600853. App.359,ll.17-20.

To obtain a Georgia firearm's license, an applicant must apply to a Georgia probate court, get fingerprinted, and submit to a background screening check with the Georgia Bureau of Investigations before the license is issued. App.369,ll.1-19. The application requires reporting of any felony indictment; if Mr. Nicholas had had any such criminal record he would not have qualified for a Georgia firearm license. App.374,l.13-375,l.17.

Mr. Nicholas stated in the application that he was born in the Virgin Islands (but in fact he is a naturalized U.S. citizen born in Antigua). App.380, l.20-381,l.15.

Sergeant David Monoson, head forensic officer of the VIPD in St. Thomas, testified about his homicide investigation at Decedent's residence. App.383,l.7-384,l. 20.

There was no sign of forced entry and no evidence of physical confrontation in his opinion. App.386,ll.7-24. The victim was shot in the back of the head. App.393,ll.16-23. Photos of the body taken at on the 29th at 6:30 p.m. show, based on the drying of blood and examination of the body, that she had been dead for "several hours." App.392, l.21-393,l.14. Judging by blood spatter configurations and the position of the body, the shooter "would have stood pretty much in the doorway where the blood comes all the way back. If the shooter was directly behind her, the blood would have gotten on him, and not on the floor." App.393,l.16-394,l.14. He searched extensively for a shell casing that would have been ejected automatically from a semi-automatic weapon (but not a revolver); he found no casing. App.398,ll.16-25.

Sgt. Detective Monoson subsequently photographed and examined Room 205 of the Bella Vista Hotel. Exhibits 20-28 are photographs of the room and its contents, including Defendant's wallet with two picture ID cards, containing a Virgin Islands driver's license bearing the address 35 Bordeaux, an umbrella, the room key, and a rental car key, some coins; the cell phone; and the .45 Glock handgun. App.402,l.1-410, l.17.

He sent the bullet from Ms. Gottlieb's head (removed at autopsy) and the .45 Glock handgun found in the hotel room, to the FBI for ballistics comparison-analysis. App.410, l.20-410, l.3; also App.421,ll.15-20. There were 9 round of ammunition recovered from the hotel room. (Exhibit 18.) The gun was loaded with one chambered .45 caliber cartridge; the 10-round capacity magazine contained 8 cartridges. App.424,ll.6-10. These were said by Detective Monoson to be of the same "type" recovered from Ms. Gottlieb's body. App.424, l.20-425,l.11.

Detective Monoson observed that there were remnants of a McDonald's takeout order left in the hotel room, but no clothing, toothbrushes, hair combs, or change of clothes or underwear for the child or the adult, indicating to him that there was no intent to stay for any length of time. App.432,ll.4-22.

Detective Monoson opined that the bullet from Ms. Gottlieb's head "came from this same caliber and same type of weapon as this Glock." App.441,ll.4-6. However, upon cross-examination based upon the FBI ballistics report, he acknowledged that "due to the lack of corresponding microscopic marks, it is not possible to determine if the bullet was fired from the barrel of [the Glock weapon in question]." App.445,ll.4-23. The witness rephrased his opinion to state that the bullet was "consistent with coming from a Glock." App.445,l.3-446, l.1.

Carlos Rosati, an FBI ballistics expert, testified that the slug submitted to the laboratory was a .45 caliber, copper jacketed with a hollow point, and having "polygonal rifling impressions." App.459,ll.1-25. He could not make a positive identification between the bullet and the firearm, nor could he rule it out. This was a "no-conclusion" analysis. "In other words, it's possible that the bullet could have been fired from [the gun in question], however, it's also possible that it was fired from another gun." App.461,ll20-30. A Glock has polygonal rifling characteristics. App.462,ll.1-3. The slug did not come from a revolver; revolvers do not produce the bullet characteristics that he observed. App.462, ll.4-19.

The serial number of the Glock handgun was intact with no attempt to alter or obliterate it. App.466, ll.20-22.

There are other manufacturers of .45 caliber guns that produce the same polygonal rifling. App.465, ll.4-13.) FBI expert Rosati could not "conclusively say" whether the bullet in Ms. Gottlieb's head came from the .45 Glock in question. App.464,ll.13-20.

Detective Maha Hamden "processed" the Eudora Kean High School parking lot area, where Ms. Gottlieb's champagne-colored vehicle was located. App.481,l.20-482, l.25. She found a black duffel bag, and inside it a leather female tote bag or purse. App.485,ll.19-25. Inside was Ms. Gottlieb's wallet and driver's license. App.485,ll.5-10.

Detective Hamden did a follow-up investigation of Ms. Gottlieb's residence on August 15, 2005, and found and photographed, among other things, a box for a Glock pistol, with cleaning brush. App.492,ll.9-16.

Sergeant Daphne Roush-Carty of the VIPD forensics division did a follow-up investigation of the residence, finding a fanny pack with a gun holster inside, as well as a lock for the gun. App.519,ll.11-18. Sgt. Roush-Carty acknowledged that she was admitted into the residence by a friend or relative of the family, approximately two weeks after the incident, but refused to acknowledge that the crime scene was unsecured in the meantime. App.530,l.16-531,l.9.

Officer Michelle A. Potter and **Detective Lionel Bess** testified on chain of custody issues with respect to physical evidence. App.532-549.

Marie Wright Pinney was a friend of the decedent for 30 years, and godmother to ████, who was 10 years old at the time of trial. App.550,ll.8-22. She communicated with the Decedent daily or every other day. App.550,l.23-501,l.2.

When she was told that Ms. Gottlieb was dead, she drove to the house, and asked the police where ████ was. Ms. Pinney remembers screaming, "[O]h, my God, Mitch killed her and he took ████, just like I told her, and now we're never going to find ████." App.552, ll. 6-22. The prosecutor prompted her to elaborate:

> Q. Just like you told who?
>
> A. Meaning just like I told Georgia.
>
> Q. What did you tell her?
>
> A. She was to my house that Sunday before this happened, which would have been the 24th, and she came over, we were talking and I was telling her things like we should go and make a police report and she should pick up ████ from her sister, Suzette's house, and stay with me.

App.553,l.23-554,l.7.

On that Sunday, Ms. Pinney testified, she met with Ms. Gottlieb, and she appeared unkempt and as if she had been crying. She asked the Decedent why. Ms. Pinney elaborated:

> Anyway, in our conversation, I'm telling her that we needed to contact the police so that she can make a report. We could go get her clothes and get ████'s clothes and she and ████ can stay by me and then I would go with her the next day to the AG's office and get a restraining order against Mitch....

App.555,ll.15-22. And then (after a sidebar in which the prosecutor was cautioned not to allow the witness to "repeat a statement of the Deceased," App.556, l.15-557,l.4.):

> Q. Now, Ms. Pinney, I just asked you, did you learn anything on that particular day or at any time with respect to why her appearance was that way on July 24th? So without stating anything that Ms. Gottlieb said to you, were you able to make a determination as to why she appeared that way on Sunday?
>
> A. She was at home and Mitch was to the house and she couldn't get out of her house, and that's why she wasn't answering my calls, and she pretended to go wash some clothes. *** She pretended she was going to do that and instead of doing that she snuck her bag in some wrapped up clothes like laundry and got in her car and came over by me.

App.557,l.22-558,l.15.

Ms. Pinney testified that at that time she encouraged Ms. Gottlieb to stay with her and her husband, to call 911 or the police and obtain an escort to the house to get her clothes and make sure Mr. Nicholas was not there. Ms. Pinney also offered to assist in obtaining a restraining order from the Attorney General's office. App.559, ll.1-19.

Ms. Pinney also testified that "we had a plan" where she would call and use a code that involved a fictitious reference to plane tickets. If Ms. Georgia mentioned the number 350 then she (Ms. Pinney) "knew to call the police and have them go to her place, her house, as soon as possible." App.561,ll.1-17. She did call Ms. Gottlieb using this plan, but "everything was okay." App.562,ll.2-3. She again offered to take Ms. Gottlieb to the AG's office the next day. App.562, ll. 4-16.

The prosecutor asked Ms. Pinney to describe Mr. Nicholas at social gatherings. She responded that he "would be kind of aloof," and not sitting with others "joking and laughing." He would be alone watching TV. App.567,ll.15-24. She also found his behavior "strange" during a trip to Antigua when he would never "hang out" with the guys. App.568,l.3-569, l. 2.

The prosecutor also asked whether she observed any "very unusual" behavior from Mr. Nicholas— without "tell[ing] us what she said." Ms. Pinney responded that she at one

time saw Ms. Gottlieb's entire clothing outfit to be worn for the day lying on top of the bed, and Ms. Pinney "found out" that Mr. Nicholas had picked out everything she was going to wear, "from her underwear to her jewelry." App.569,l.3-570,l.2. The prosecutor then inquired, "And what did you think of it at the time?" Ms. Pinney said that it was "kind of strange"— "a little like wow, weird," and "that's what I told her." App.570,ll. 3-12.

She related an incident in which Mr. Nicholas allegedly overspent on a shared American Express card, incurring $2-3,000, so she was no longer able to use the card. App., 1l.10-24. Ms. Pinney got her own American Express card, put Ms. Gottlieb on it, and told her not to let Mr. Nicholas use it. (*Id.*)

The prosecutor then asked whether Ms. Gottlieb was "generous." Ms. Pinney agreed with him that she was a "[v]ery generous" person." App.571,ll. 8-10.

Dr. Francisco J. Landron, Medical Examiner for St. Thomas and St. John, testified that the cause of Ms. Gottlieb's death was a gunshot to the back of the head. App.587,ll.19-22. The shot was from long range—1 ½-3 feet—based on the lack of gunpowder or black smoke on the Decedent's body. App.598,ll.3-25. The shot to the head caused "immediate unconsciousness." App.590,ll.12-14.

He described the slug he removed as a "deformed large caliber semi-jacketed slug, and it would be consistent with a hollow point." App.589,ll.11-16.

, the 10 year-old son of the Decedent and Mr. Nicholas, testified that on July 29, 2005, at 6:30 or 7:00 a.m., he was in bed and saw his mother. App.625,ll.13-23. She told him to take a bath and get dressed for summer camp. heard a loud noise (clapping his hands to demonstrate). He ran to his mother's room "to ask her what was that noise and my father came in to block me." App.625,ll.15-20. He asked his father what the noise was and he said he did not know. App.628,ll. 21-23. later asked him the same question, and said he told him that a "comforter fell." App.627,ll.17-22.

He testified that he got his mother's cell phone "so I could call Marie," because he "thought my father did something wrong to my mother." App.627,ll.14-25. This is what his mother "planned it for me to do," two weeks before she died. App.628,ll.5-10.

He and his father later drove to Vessup Beach to look for his mother on the ferryboat. App.629,ll.1-2. He saw his mother's brownish bag in the car. App.629,ll.9-13. He and his father drove to Subway to get food, then to Banco Popular to get cash, and then "he went by his job." App.631,l.17-632,l.17.

They drove to Eudora Kean High School to drop off the "gold Jeep," and Mr. Nicholas went to his job and told ████ to wait outside. App.633,ll.1-7. Mr. Nicholas made a phone call, and a woman came to pick them up and drove them to another place to pick up a "white Jeep." App.634,l.15-635,l.1. They then returned to the ferryboat dock to see if his mother was on the next boat, then to the Mafolie Hotel, where his father took a bath and ████ took a nap. App.636,ll.4-9. From there they went to the "hotel behind of Pueblo." App.636,ll.15-16. ████ watched Cartoon Network. App.636, ll.17-25.

When he awoke the next morning the saw his father on the floor "with the cops." App.641,ll.2-6. He went to the police station to "tell the cop what happened." App.640,ll. 21-24.) (Statement of child, Defense Trial Exhibit 2; see S.App.20.)

He was taken to his Aunt Charmaine Joseph's house. ████ tearfully related that Ms. Joseph took him to his mother's residence, and inside the bedroom, where he saw "blood all over the floor," which made him cry. App.642,l.22-643,l.8.

████ knew what a "weapon" was—"a gun, a knife." App.643,ll.13-18.

He testified that he saw his father with a gun a week before his mother's death, with "some strap on his waist." App.644,ll.4-10. His father was in the kitchen; his mother was lying on the couch and did not see the gun. App.645,ll.2-19. The prosecutor asked, "What kind of thoughts were running through your mind at that time? A. He was going to kill somebody." App.666,ll.1-10. And further:

> Q. Did your father at any point within the week's time of your mommy's death, did he say anything that caused you to be frightened at any time during that week?
>
> A. Yes.
>
> Q. What did he say?
>
> A. He said he feel like burning down the F-g house.
>
> Q. And what were your thoughts at that time? What did you want to do at that time, if anything?
>
> A. Lift my mother up and jump through the window.
>
> Q. And that was your way of trying to save your mommy?
>
> A. Yes.

App.647,l.25-648,l.15.

█████ understood that his role in testifying was to "tell the truth" and to "defend my mother's case." App.650,ll.8-15. He talked to attorneys but he cannot remember how many times. App.653,ll.14-17.

On cross-examination, █████ remembered telling the police (in the interview the day Mr. Nicholas was arrested) about the "pop shot." But he did not remember telling the police that he never saw his father with a gun. App.654,ll.16-24. █████, who could read, remembered speaking with the police and remembered that they wrote things down and that they had him put his name on it. App.656,ll.10-19; Defense Exhibit 2, S.App.20.

█████ acknowledged in his testimony that he told the police in his statement that he never "saw his daddy with a weapon of any kind." App.657,ll.1-25. █████ testified that he "didn't remember if I saw him with a weapon or not. So, I've been telling the attorneys yes all along because I'm thinking that I saw him with a weapon." App.657,ll.1-25.

█████ recalled telling the police that his father "didn't do nothing" on the morning of the arrest, but that was "[b]ecause I didn't know nothing before." App.663,ll.4-9.

█████ did not hear his parents arguing before he heard the "pop shot." App.661,ll.16-18. He never saw his father hit his mother; he only gave her a "massage." App.661,l.20-662,l.1.

On re-direct, the prosecutor asked [redacted], "Did you tell us a lie today"? He responded, "I don't know." App.664,l.22-665,l. 2.

ARGUMENT

1. The evidence recovered incident to Defendant's warrantless arrest should have been suppressed, where officers had an 11-hour opportunity to obtain a warrant but made no effort to do so.

Of course, the Fourth Amendment's safeguards against unreasonable searches and seizures apply in the Virgin Islands through the statutory adoption of the Bill of Rights by Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561. *Blyden v. People*, 2010 WL 2720736, *3, n.5 (V.I. 2010).[11]

It is "firmly established that searches and seizures inside a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), citing *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Further, an individual has a "reasonable expectation of privacy"—and thus a similar Fourth Amendment right to freedom and security from government intrusion—in a hotel room. *U.S. v. Coles*, 437 F.3d 361, 365 (3rd Cir. 2006), citing *Stoner v. State of Cal.,* 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) ("No less than a tenant of a house ... a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.")[12]

Probable cause is a necessary but not a sufficient condition for a warrantless arrest in the home (or, as here, a hotel room). Probable cause and exigent circumstances must *both* exist. *Steagald v. U.S.*, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Sparing v. Village of Olympia Fields,* 266 F.3d 684, 688 (7th Cir. 2001) ("[P]olice officers may not

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[11] Section 3 provides that "the first to ninth amendments inclusive" of the United States Constitution extend to the Territory. Further, and specifically, Section 3 provides: "No warrant for arrest or search shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[12] An individual in a public place has a diminished Fourth Amendment right to security and privacy, and may be arrested without a warrant upon a showing of probable cause. *Florida v. White,* 526 U.S. 559, 565, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999) ("[O]ur Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places.")

constitutionally enter a home without a warrant to effectuate an arrest, absent consent or exigent circumstances, even if they have probable cause."), citing *Payton,* supra, 445 U.S. at 585-90.

In the present case, there can be no suggestion of legally effective consent to enter Room 205 to make the arrest (and incident search). A hotel clerk cannot vicariously consent to waive the Fourth Amendment rights of a guest. *Stoner,* 376 U.S. at 488.

Thus, and even assuming that probable cause did exist, the warrantless arrest of Mr. Nicholas and search incident thereto were unlawful unless exigent circumstances are established. "The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized." *U.S. v. Rubin*, 474 F.2d 262, 268 (3rd Cir. 1973). There are well-established principles guiding that judicial scrutiny.

Exigencies justifying a warrantless entry include "hot pursuit of a fleeing felon, or imminent destruction of evidence, ... or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *Sharrar v. Felsing,* 128 F.3d 810, 820 (3d Cir.1997), quoting *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

However, police cannot avoid the requirement of a warrant—and thus circumvent the constitutional role of the judiciary as bulwark against unreasonable searches and seizures—merely because there is a perceived compelling need to arrest the suspect; the circumstances must render a warrant truly *impracticable*. Thus in *O'Brien v. City of Grand Rapids,* 23 F.3d 990 (6th Cir. 1994), where an armed suspect barricaded himself in his home, refusing to leave, but did not brandish any weapon against officers or threaten to use it against them or bystanders, the Sixth Circuit agreed with the trial court that there was no "immediate" threat sufficient to excuse the warrant requirement.

> The police categorize their engagement with O'Brien as a "critical incident," and argue that a critical incident involving a barricaded gunman is an exigent circumstance. They ask this court to adopt critical incidents as a new category of *per se*

> exigent circumstances. This would leave the decision to obtain a warrant dependent on the discretion of police officers.... * * *

Id., quoting *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); see also *Parkhurst v. Trapp*, 77 F.3d 707, 711 (3rd. Cir. 1996). Police are not the arbiters of the individual's right to privacy and security. Judges are.

The essence of the exigent circumstance exception is time. *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) ("[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant."); *U.S. v. Davis*, 461 F.2d 1026, 1030 (3rd Cir. 1972) ("The fourth amendment protects only against unreasonable searches and seizures. It, therefore, requires the police to obtain warrants only when they have time and opportunity to do so without obstructing their efforts to apprehend criminals and the evidence or fruits of their crimes."); *People v. Parker,* 417 Mich. 556, 561, 339 N.W.2d 455 (Mich. 1983) ("The essence of the exigency which would excuse the failure to obtain a warrant is the existence of circumstances known to the police which would prevent them from taking the time to obtain a warrant because to do so would thwart the arrest.")

"[T]he burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 2098, 80 L.Ed.2d 732 (1984); accord: *Parkhurst*, *supra*, 77 F.3d at 711 ("To excuse the absence of a warrant, the burden rests on the State...."); accord: *U.S. v. Lynch,* 908 F.Supp. 284, 289 (D. VI 1995) (government bears burden).

In the present case, the trial court held that exigent circumstances did exist, based on officers' information that (1) Ms. Gottlieb died by gunshot; (2) Mr. Nicholas owned a gun; (3) probable cause; (4) hotel staff verified his presence in Room 205; (5) Mr. Nicholas "could have killed his son or himself if not apprehended"; and (6) a reasonable attempt was made to enter the hotel room peaceably. *Memorandum Opinion* at 14; S.App.98. The trial court cited

Rubin case for the proposition that exigency is determined by (among other factors) the "degree of urgency involved and the amount of time necessary to obtain a warrant." *Memorandum Opinion* at p. 15. The trial court found compelling urgency due to the need to protect the Defendant's son, because Defendant had the "opportunity and motive to destroy this source of evidence." *Id.* at p.18.

There is no concrete, specific evidence supporting the dark speculation that Mr. Nicholas ever had any intent to harm his son in any way (or commit suicide). Nevertheless—and assuming that officers acted reasonably in taking these purely hypothetical contingencies into account—it still remains that (1) officers' *actual conduct* was inconsistent with any substantial fear that this child was in imminent peril; and (2) there was, in all events, *sufficient time* to obtain a warrant without interfering with this arrest and without compromising anyone's personal safety.

There was an 11-hour window. Officers acquired the essential "probable cause" information, according to the suppression hearing testimony of Special Officer Tyson, when officers learned that Mr. Nicholas was the last to leave the Decedent's residence with the and that witnesses had heard a "thumping sound" near the time of Gottlieb's death. App.200, ll.1-10. That information was acquired very promptly in the investigation of Friday, July 29th. Mr. Nicholas was arrested at approximately 7-7:30 a.m. the following day.

In the intervening period, Officers had time to prepare *written statements* signed by, *inter alios*, Erima Williams at 6:55 p.m. and by Charmaine Joseph at 7:45 p.m. on Friday. They had time to issue an APB bulletin for Mr. Nicholas. They had time to prepare a federal "Grand Jury Subpoena"—bogus and backdated though it may have been—and then to serve it upon two cellular telephone companies before midnight. They had time to review the responsive data obtained and then to follow the electronic trail to what they considered to be Mr. Nicholas' likely location.[13]

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[13] The federal Stored Communications Act, 18 USC § 2703(c)(2), authorizes disclosure of, inter alia, cell phone call history upon grand jury subpoena; but a court order, not a subpoena, is required to obtain cell phone/GPS location-tracking information of the user. *Id.,* § 2703(d). See,

And officers had time to "call it a day" when they arrived at the Buena Vista Hotel around midnight and, finding no office staff on-site, "left the hotel with the intention of coming back there first thing in the morning." *Transcript,* Suppression Hearing, S.App.242, Testimony of Detective Cpl. Lionel Bess, VIPD. As stated, there is no evidence that any officers remained on the hotel grounds overnight for surveillance, for the child's protection, or to prevent escape, or for any other reason.

There were no fewer than 8 officers involved in the investigation and arrest of Mitchell Nicholas. *Someone* could have been tasked with obtaining a warrant, without compromising the safety, efficiency, or effectiveness of this arrest.

The People made no real effort in the suppression hearing to meet their burden of demonstrating impracticability. There was no evidence of any *attempt* to obtain a warrant. The only evidence on point was the testimony of Officer Tyson, who said there was insufficient time because a warrant takes "hours or days," and the untested conclusion of another officer that judges are unavailable on Saturdays. That is not a proper showing of impracticability.

In substantially similar circumstances, the Supreme Court of Michigan held:

> [T]here was over a five-hour delay between the time the police were given a physical description of the complainant's assailant and when they arrested defendant without a warrant. The prosecution has offered no explanation whatsoever as to why a warrant was not sought during this interval. Inasmuch as the prosecutor has not proffered any countervailing circumstances which justify the failure to secure a warrant, we hold that the police did not act reasonably in entering defendant's room without a warrant, arresting him, and seizing evidence.

People v. Parker, supra, 339 N.W.2d at 563; accord: *U.S. v. Houle*, 303 F.2d 1297, 1300 (8th Cir. 1979) (holding that officers' "deliberate four hour delay from 1:50 a.m. to 6:30 a.m." precluded a finding of exigent circumstances; "[t]his is not a case involving hot pursuit.").

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generally: *In re Application of U.S. for an Order Directing a Provider of Electronic Communication*, 620 F.3d 304 (3rd Cir. 2010). As previously noted, there is no evidence whatsoever that Mr. Nicholas was the subject of any actual grand jury proceedings.

"The judges of all the courts of the Virgin Islands ... have power to issue warrants of arrest." 5 V.I.C. § 3504.[14] There were 9 sitting Superior Court judges. Each was empowered to issue an arrest warrant in this matter. Each was authorized to issue a warrant based on "information communicated by telephone or other reliable electronic means." Fed.R.Crim.P.41(c)(2); see Superior Court Rule 7.

Granted: These events occurred outside of normal court business hours, and into the weekend. A judge called upon to issue an after-hours warrant would certainly have been inconvenienced. However, the essential needs of law enforcement as well as the essential rights of a citizen were at stake. The Constitution never sleeps.[15]

Law enforcement clearly acted unreasonably and improperly in the present case by failing to obtain a telephonic warrant; and accordingly, the evidence obtained in the course of the unlawful arrest of Mr. Nicholas should have been suppressed. Among the "fruits of the poisonous tree" are the Glock handgun and the cellular telephone. Any suggestion of "harmless error" in the Superior Court's suppression ruling would be baseless.

2. The Defendant was fundamentally deprived of a fair trial due to the admission (directly or indirectly) of multiple inadmissible hearsay statements; massive amounts of impermissible "prior bad acts" and negative character evidence; substantial testimony lacking foundation as to personal knowledge; countless instances of prohibited opinion testimony that Defendant killed the Decedent; additional irrelevant and grossly prejudicial evidence; and inflammatory character attacks by the prosecutor.

a. Summary of pretrial evidentiary rulings.

The People filed a Motion *in Limine* seeking to adduce certain evidence under the catch-all, residual hearsay exception of Rule 807, Federal Rules of Evidence. *People's Motion in Limine,* S.App.1. "Several oral statements were made over several months and within a week of [Ms. Gottlieb's] death and those statements are what the People seek to introduce at trial." *Id.*

[14] Superior Court magistrates currently share that power, 4 V.I.C. § 123(a)(1), but of course the magistrate division was not in existence in 2005.

[15] Suppression issues are difficult and controversial, and may sometimes test the political courage of judges. John F. Kennedy, Jr.'s observation on judicial independence is apropos. To paraphrase: Judges must be free not to do as they wish, but rather to do as they must.

The proffered testimony (insofar as relevant to this appeal) described in the Motion was: (1) Elba Richardson's testimony of her observation of bruise marks on the Decedent's upper arm a week before her death, and the Decedent's statements to her about the bruise, which the People contended showed Mr. Nicholas' "bent of mind"; also, (2) Marie Pinney's conversations with Decedent in which Ms. Pinney told her that she was fearful of Decedent's safety and had advised her to get out of her relationship with Mr. Nicholas "based on certain events that had taken place." *Motion in Limine* at p.2-4. The People relied heavily upon *U.S. v. Donley,* 878 F.2d 735 (3rd Cir. 1989) in support of its argument that such testimony was admissible under FRE 807. This proffered evidence, and a vast amount of similar or related testimony, did come before the jury, directly or indirectly.

Defendant Nicholas, in his *Opposition*, S.App.8, emphasized that the residual hearsay exception of Rule 807 was properly invoked only "very rarely," and in "exceptional circumstances." *Id.*, at p. 2, citing, e.g., 2 WHARTON'S CRIMINAL EVIDENCE § 6:33 (15th ed. 2006 supp.) Further, "[t]he residual hearsay exception cannot be employed as a means of circumventing the requirements of other rules." *Opposition,* p. 7, citing 12A FEDERAL PROCEDURE, LAWYER'S EDITION § 33:351, and 5 Weinstein & Berger, WEINSTEIN'S FEDERAL EVIDENCE § 807.03(4). Defendant emphasized the lack of demonstrable circumstantial guarantees of trustworthiness from these witnesses, who were close friends of Decedent and not free from bias; further that the evidence was unduly prejudicial under FRE 403. *Opposition*, p.9.

The trial court ruled that evidence of Ms. Richardson's observation of the bruise was admissible, but excluded hearsay statements of the Decedent as to it source. App.40,l.13- 41, l.9.

With regard to Ms. Pinney's various conversations with Decedent in which she allegedly encouraged her to leave Mr. Nicholas "based on certain events that had taken place"; in which she offered to let her stay in her home due to safety concerns; in which she advised Decedent to obtain a TRO; in which she discussed a safety "code" system between

Decedent and Ms. Pinney; and in which she discussed the Decedent's appearance of emotional distress: The trial court ruled that Ms. Pinney's testimony of the "code system" would be allowed; that she could testify as to her observations of the Decedent's demeanor, and of her offer to Decedent of a place to stay. App.48. However, if the prosecutor intended to elicit any specific testimony about statements made by the Decedent, the Court wanted to "consider them individually." (*Id.*) The Judge specifically cautioned the prosecutor to explain to the witness the "limitations on her testimony about supposed statements made by Miss Gottlieb." App.48-49.

The People then, in chambers, described the proposed testimony concerning Mr. Nicholas "imprison[ing]" [*sic*] Decedent in the house, the locks being changed, and the tape recording of her calls—the events allegedly leading up to Ms. Pinney advising Decedent to obtain a temporary restraining order against Mr. Nicholas. App.49-50.

The Judge responded: "I've got no problem with Miss Pinney saying that she said every one of those things to Miss Gottlieb. My concern is what she's going to say Miss Gottlieb said to her." App.50,ll.7-10.

With specific reference to the alleged tape recording of Decedent's telephone conversations by the Defendant, the Court inquired: "Is she going to say that Miss Gottlieb explained to her that that was what was happening"? The Prosecutor responded that Ms. Pinney would testify that Decedent took her into the bedroom and showed her the equipment. The Court ruled, "If she drew that conclusion based upon her observations and the information available to her, she'll be permitted to say that, but I don't want her to attribute it to Miss Gottlieb." App.51-52.

However, and regardless of these preliminary rulings, there were, in reality, no meaningful restrictions whatsoever on any of this type of hearsay evidence at trial. There are several reasons. First, the Court's allowance of responsive statements made by the *recipient* of the hearsay declaration often allowed the jury either to easily infer *exactly* what the Decedent allegedly said ("backdoor hearsay") or—even worse—to prejudicially speculate on

what Decedent *might* have said. Second, the prosecution blatantly flouted the Court's evidentiary restrictions on several occasions.

And third, the witnesses for the prosecution were permitted to engage in out-of-control, stream-of-consciousness, narrative testimony containing blatant hearsay, improper references to "prior bad acts" (including irrelevant subjects such as the Defendant's prior sexual indiscretions), character/propensity evidence, opinions about Defendant's guilt, and rank speculation—all throughout this trial—throwing all rules of evidence to the wind.

b. Primacy of Uniform Rules over Federal Rules.

Many of these hearsay issues were governed not by the Federal Rules of Evidence, but instead by the Virgin Islands Uniform Rules of Evidence.

> Superior Court Rule 7 states that "[t]he practice and procedure in the [Superior] Court shall be governed by the Rules of the [Superior] Court and, to the extent not inconsistent therewith, by ... the Federal Rules of Evidence." However, the Legislature of the Virgin Islands has adopted virtually all of the 1953 version of the [Uniform Rules of Evidence], codified as 5 V.I.C. §§ 771-956, which defines hearsay and purportedly governs the admission of hearsay evidence in Virgin Islands courts. See 5 V.I.C. §§ 931-935. The URE, as adopted by the Legislature and which have not been repealed, define hearsay differently than the Federal Rules.

Phillips v. People, 2009 WL 707182, *7 (V.I.2009).

The Uniform Rules of Evidence, in the form statutorily adopted by the Virgin Islands, have no explicit residual hearsay exception. However, there is a roughly equivalent provision in 5 V.I.C. § 932(4)(c) (URE 64(4)(c)), allowing statements of unavailable declarants describing recently- (but noncontemporaneously-) perceived events upon a judicial finding that the declarant's recollection was clear and the statement was made in "good faith." Admission under URE 64(4)(c) has been interpreted, in a fashion similar to FRE 807, to require a showing of (1) necessity, (2) particularized guarantees of trustworthiness, and (3) that the evidence is more probative than "any other available evidence." *Tuff v. State,* 278 Ga. 91, 597 S.E.2d 328, 330 (Ga. 2004).

Common sense and experience does not support the idea that "relationship advice" from friends and family is always valid, nor is it necessarily based on inherently trustworthy information. People in romantic relationships—particularly at times of domestic discord—do not always provide a complete and balanced view of the issues or events involving their spouses or "significant others." Many important details may be left out of the discussion because of their intimate nature, or because they are personally embarrassing. Moreover, the person offering advice in this setting may be a wise and mature confidante, or a busybody, and is sometimes more an advocate for a friend than an unbiased observer.

The situation would be vastly different if the Decedent had sought qualified relationship advice from a licensed psychologist or counselor. Statements made in a professional and confidential mental health care setting would have had greater intrinsic reliability. In that event they would likely have been admissible under both FRE 803(4) and 5 V.I.C. §932(12)(b) (Uniform Rule 63(12)). See: *Williams v. Government of Virgin Islands*, 271 F.Supp.2d 696, 705 (D.VI App. Div. 2003) ("A statement to a social worker or counselor may ... be admissible if the reliability factors ... are shown-that is, the statements were reasonably pertinent to medical treatment and made for that purpose.")

c. Backdoor hearsay, inadmissible opinion testimony encompassing improper "prior bad acts" and character evidence; opinion of guilt.

Repeatedly, the prosecutor was allowed to indirectly elicit hearsay declarations of the Decedent by establishing, preliminarily, that the witness and the Decedent had a certain conversation, and then by asking the witness *what the witness told the Decedent.*

For example, the prosecutor asked family member/confidante Charmaine Joseph, "[W]hat, if anything, did you discuss that you told your aunt as it relates to whatever problems she was having with the defendant [*sic*]"? Ms. Joseph responded: "I asked her if you are having problems why don't you go and put a restraining order so he could stop coming by you..." App.102,ll.9-22. She told the Decedent "just go and do a restraining order" on two occasions. App.103,ll.3-9.

> While this form of question and answer does not produce hearsay in the classic or textbook sense, it is nevertheless designed to circumvent the hearsay rule and present the jury with information from unsworn, out-of-court sources. It should be called "backdoor" hearsay and should be subject to the same rules and limitations as the more common form.

Schaffer v. State, 721 S.W.2d 594, 597 (Tx. Ct. App. 1986).

The jury did not hear *verbatim* what the Decedent allegedly told Ms. Joseph. But the essential damaging content of these hearsay statements was still disclosed. Specifically, and in the above-cited testimony, it was readily apparent to the jury that the Decedent *told her* about alleged prior bad acts of Mr. Nicholas that—*in Ms. Joseph's opinion*—posed a risk to Decedent's personal safety to such a degree that it warranted a judicial restraining order. What, precisely, these acts were or were represented by Decedent to be, what the circumstances were that led to them, and whether they in fact and in law constituted grounds for issuance of TRO by a court of law under the Virgin Islands Domestic Violence statute, was left to prejudicial jury speculation—beyond the capability of defense counsel to test through any meaningful cross-examination, except by opening the door to yet further hearsay.

Indeed, this unusual and awkward form of question and answer consistently and repeatedly led to inadmissible "prior bad acts" evidence, and many other types of inadmissible evidence, including unqualified and/or speculative opinion testimony based on hearsay, and hearsay lacking intrinsic reliability at that. Even if admissible by hearsay criteria, such testimony would nevertheless be completely improper.

By adducing testimony that indirectly (yet powerfully and prejudicially) showed alleged prior misconduct by Defendant—actions that would assertedly warrant a TRO for the Decedent's personal protection—the prosecution ran afoul of FRE 404(b), as well as 5 V.I.C. § 895 (Uniform Rule 55) and 5 V.I.C. § 887 (Uniform Rule 47).

These Rules proscribe evidence of prior misconduct by a defendant "to prove the character of a person in order to show action in conformity therewith" (FRE) or, in the words

of the Uniform Rules, to "prove his disposition to commit crime" (URE 55)—both Rules having clear and specific exceptions not material herein (motive, plan, lack of mistake, etc.). Section 887(a) (URE 47) similarly provides: "[E]vidence of specific instances of conduct other than evidence of *conviction of a crime* which tends to prove the [character] trait to be bad shall be inadmissible" unless the accused first seeks to put his good character into evidence. *Brown v. People*, 2010 WL 4961740, *9 (V.I. 2010) ("[W]e we hold that the trial court abused its discretion in admitting the People's rebuttal testimony because the specific instances of bad conduct testified to by the rebuttal witnesses did not constitute evidence of *prior convictions*."); 5 V.I.C. § 887(a); *emphasis added*. There is no evidence that Mr. Nicholas was ever *convicted* of any prior crime of any nature, nor was there ever even a *civil adjudication* of any prior act of domestic violence.

In the present case, the prosecution got away with adducing classic, forbidden, "propensity" evidence, i.e., testimony designed to convince the jury that Defendant was the "type" of person to commit murder because of his prior alleged misconduct, and on many, many occasions. The prosecution, through this inadmissible testimony, effectively portrayed Defendant to the jury as a dangerous "domestic abuser"-type of character.

Evidence of prior misconduct, to be admissible, must be "probative of a material issue other than character." *U.S. v. Green,* 617 F.3d 233, 250 (3rd Cir. 2010), citing *Huddleston v. United States,* 485 U.S. 681, 686, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). The evidence of prior misconduct must fit "into a chain of logical inferences, *no link of which may be the inference that the defendant has the propensity to commit the crime charged*." *Green*, 617 F.3d at 350, quoting *United States v. Himelwright,* 42 F.3d 777, 782 (3d Cir.1994); *emphasis added.*

Testimony concerning the bruise on Ms. Gottlieb's arm allegedly observed by witness Elba Richardson was subject to these same evidentiary defects. With respect to the hearsay element of this testimony: the trial court specifically ruled that evidence of Ms. Richardson's *observation* of the bruise was admissible, but excluded statements of the Decedent as to its

source or circumstances. App.40,l.13-41,l.9. But the statements nevertheless came in. Ms. Richardson testified that a week before Decedent's death, "she showed me a black and blue mark on her arm *where she said that they had scuffled*." App.161,l.20-162,l.22; *emphasis added.* The trial court's ruling restricting hearsay was thus violated.

The resulting prejudice to Defendant had both a both procedural and substantive component. Procedurally: Defense counsel was precluded from cross-examination on this point, except at the risk of opening the door wide to even more unproved and unprovable alleged hearsay statements of the Decedent. That was a fundamentally unfair dilemma. Substantively: The jury, having heard this damning evidence, was left to speculate that perhaps Mr. Nicholas violently struck her with his fist,, when for all we know it was actually the *Decedent* that initiated the "scuffle" and Defendant restrained her by grabbing her arm. Or maybe she fell. The term "scuffle" implies a minor mutual skirmish, as opposed to the use of force by a dominant aggressor. There was, in all events, no *conviction* of any crime, and this evidence is improper. *Brown,* 2010 WL 4961740 at *9; 5 V.I.C. § 887(a).

Moreover, there is no *logical inference* based upon known facts that points to the truth, but there is definitely the danger of a prejudice-driven belief that Mr. Nicholas was the "domestic abuser"-type and therefore the likely killer. That sort of past-is-prologue deduction by a jury—inferring guilt from character judgments based on prior misconduct—is precisely the prejudice sought to be eliminated by Rule 404(b), 5 V.I.C. §§ 895 (URE 55), and 887(a) (URE 47).

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character ... , but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief.
>
> [¶] The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so

> overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.
>
> [¶] The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Old Chief v. U.S., 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), quoting Justice Jackson in *Michelson v. United States*, 335 U.S. 469, 475–476, 69 S.Ct. 213, 93 L.Ed. 168 (1948) (internal citations omitted).

The testimony of Venus Green was similarly elicited, similarly improper, and similarly prejudicial. The prosecution asked, "On July 22nd, is that a day that is significant in regards to a conversation that you may or may not have had with Georgia Gottlieb with respect to the defendant?" App.209,ll.11-14. Ms. Green's wide-ranging narrative response included the following:

> I was concerned as to her health and I told her that she needs to end the relationship. If she has to be that secured, she needed to end the relationship with Mitchell Nicholas and to get a temporary restraining order, to which she didn't at that time that I know. I don't know if she did.

App.209,l.11-210, l.4.

Just in case this Court has any doubts about whether the prosecutor actually *intended* to poison the jury's mind by forbidden character evidence:

> Q [to Ms. Green]. Well, why before now didn't you tell her to get rid of this loser?
>
> A. I did tell her.
>
> Q. Something wrong with him, why didn't you really hammer that home to her?
>
> A. I did tell her to lose him, but that was only after I was informed of his possession of weapons.

App.228,ll.11-25.

Marie Pinney's testimony was substantially similar in form and substance. She testified that on the Sunday preceding Ms. Gottlieb's death, she met with her, and she (Ms. Gottlieb) appeared unkempt and as if she had been crying. She asked the Decedent why.

Ms. Pinney elaborated (after apparently being cautioned not to explicitly recite statements of the Decedent):

> Anyway, in our conversation, I'm telling her that we needed to contact the police so that she can make a report. We could go get her clothes and get ████'s clothes and she and ████ can stay by me and then I would go with her the next day to the AG's office and get a restraining order against Mitch....

App.271,ll.15-22.[16] And then:

> Q. Now, Ms. Pinney, I just asked you, did you learn anything on that particular day or at any time with respect to why her appearance was that way on July 24th? So without stating anything that Ms. Gottlieb said to you, were you able to make a determination as to why she appeared that way on Sunday?
>
> A. She was at home and Mitch was to the house and she couldn't get out of her house, and that's why she wasn't answering my calls, and she pretended to go wash some clothes. *** She pretended she was going to do that and instead of doing that she snuck her bag in some wrapped up clothes like laundry and got in her car and came over by me.

App.273,l.22-p.274, l.15.)[17]

Ms. Pinney, who did not observe and therefore had no first-hand knowledge any of these alleged prior events, could only make these "determinations" only based on what Decedent told her. That point could not be more obvious. This, again, is backdoor hearsay.

And again, defense counsel had no effective ability to challenge or clarify the testimony without opening the door to more hearsay. For example: Did Mr. Nicholas use or threaten force on that occasion? Physically restrain her? Or did he merely beg her not to sever the relationship? Refuse, himself, to leave the premises? Attempt to rationally convince her that it was unfair to oust him on short notice, when he may have contributed to the family budget? Confront her verbally about some romantic or sexual liaison of Decedent's (real or imagined)? Was she crying because she was distraught about a painful

[16] The Court cautioned counsel in a sidebar: "[S]he can say that she understood that. [However,] I am not going to permit her to ... repeat a statement of the Deceased." App.272,l.15-p.273, l.4.

[17] The Court gave a limiting instruction that the statement was "admitted only for the purpose of demonstrating the state of mind of Georgia Gottlieb on that day. It is not evidence with regard to the Defendant's guilt of this or any other crime...." App.274,ll.16-25.

breakup? Because she was conflicted about reconciliation? Because she was worried about the emotional impact on their child, [redacted]? These are important questions, but unanswerable except by either further hearsay or rank speculation.

Ms. Pinney's testimony (and much other similar, narrative testimony) was a Pandora's Box of inadmissible opinions, adverse character testimony, and sinister speculation against the accused—all of it facilitated by backdoor hearsay, and none of it substantiated by any competent, specific evidence.[18]

d. More "prior bad acts" testimony: electronic eavesdropping and the bruise.

The evidence that Mr. Nicholas tape-recorded Decedent's telephone conversations is pure hearsay; and it is also inadmissible "prior bad acts" evidence.

Ms. Green testified that Ms. Gottlieb showed her a broken-up piece of equipment behind the head of a bed that "was a recording device plugged into the wall to monitor calls." App.210, l.15-211, l.6. The prosecutor asked how she knew it was a recording device. "A. Because I asked. She showed it to me and told me what it was, and I inquired more." App.212, ll. 4-14. This evidence was adduced in violation of the trial court's ruling.[19]

The Federal Rules of Evidence prohibit a witness from testifying as to a matter unless the witness has personal knowledge. FRE 602; *Miller v. Keating*, 754 F.2d 507, 511 (3rd Cir. 1985); accord: 5 V.I.C. § 855 (URE 17) (witness must have "personal knowledge" or "or experience, training or education if such be required"). Ms. Green's testimony was totally lacking in foundation as to personal knowledge. As reflected in Ms. Green's own testimony, her knowledge of the nature and purpose of the device was strictly based on what the Decedent told her.

[18] Compare the testimony of Charmaine Joseph: "I felt kind of funny because of the different threats she was getting..." App. 98,ll.15-24. There was no evidence of any specific threat. Ever.

[19] See Court admonition to counsel at App.114,l.18–115,l.5: "If she drew that conclusion based upon her observations and the information available to her, she'll be permitted to say that, but I don't want her to attribute it to Ms. Gottlieb."

This was no small matter. The prosecution in closing argument argued that Mr. Nicholas was taping her telephone conversations because of the "jealousy and rage within him." App.705,ll.8-13. This showed motive for murder in his view.

This evidence was also prohibited by FRE 404(b) (prior bad acts "not admissible to prove the character of a person in order to show action in conformity therewith"), 5 V.I.C. § 887(a) (URE 47(a) (prohibiting "evidence of specific instances of conduct other than evidence of conviction of a crime") and 5 V.I.C. § 895 (URE 55) (prior wrongdoing "inadmissible to prove [defendant's] disposition to commit crime").

Electronic eavesdropping on the private telephone calls of others is emphatically a prior wrong within the meaning of both the Federal and Uniform Rules. Such conduct is anathema to most people of ordinary sensibilities. It is also unlawful. It violates federal privacy laws, specifically Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510, *et seq.*; e.g., *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991) (holding that interspousal wiretapping within marital home violated Title III); same: *Kempf v. Kempf*, 868 F.2d 970 (8th Cir.1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir.1984); *U.S. v. Jones*, 542 F.2d 661 (6th Cir.1976).

In the present case this evidence was elicited to establish negative character, i.e., that Mr. Nicholas' was a distrustful, paranoid, angry man, who violated Decedent's privacy; but it did not legitimately tend to establish guilt of homicide, under the "motive" exception of Rule 404(b) or Section 895 or any other proper exception to the prohibition on prior bad acts. Part of the problem here is permitted relevancy. To come in under the "motive" exception to Rule 404(b), the "evidence must fit into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *Green*, 617 F.3d at 350.

The missing "link" here is evidence of a specific recorded conversation suggesting that Ms. Gottlieb was *actually involved* in an outside romantic or sexual relationship, and further evidence that Mr. Nicholas thereby *learned* of it, thus potentially triggering a "jealous

rage" (motive). Such evidence would have established the foundation for a proper Rule 404(b) exception. But there is no such evidence. There is (again) only speculation, and a negative character inference based upon misconduct.

Even if there were otherwise admissible evidence that Defendant tape-recorded Ms. Gottlieb's conversations—which, again, there is not—such evidence, standing alone, would prove only distrust and discord in the romantic relationship. This point was established independently by other evidence. It is undisputed that Mr. Nicholas moved out. The probative value of the tape-recording of conversations (without knowledge of the contents, and thus any basis for a reliable inference of Defendant's state of mind) is thus quite limited. Rule 403 of the Federal Rules of Evidence calls for exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice" (or where it is needless because it is "cumulative"). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief,* 519 U.S. at 117.

The evidence that Defendant tape-recorded Ms. Gottlieb's calls should not have been admitted. It lacks foundation as to personal knowledge, it is hearsay, it impermissibly brings up prior misconduct, and it is unduly prejudicial.

e. The secret code evidence.

The evidence that Ms. Pinney proposed a "code" to secretly communicate whether Decedent felt safe or not (quoting a plane ticket price at "350") and to call the police if necessary, was based on impermissible hearsay, irrelevant, and unduly prejudicial. (P.215, ll. 1-17.) At most it shows *somebody's* fear of Defendant (maybe only Ms. Pinney's), and it only potentially implicates state-of-mind hearsay exceptions. In *U.S. v. Donley*, 878 F.2d 735 (3rd Cir. 1989), for example, the deceased victim's statements to her mother that she intended to leave her husband and move out were admitted under FRE 803(3) as legitimately showing the decedent's state of mind—intent and plan to move out. This was a material fact issue

because the defendant in that case had claimed sudden "heat of passion," sustaining only manslaughter charges, that arose (he said) when he found her with another man.

Rule 803(3) of the Federal Rules of Evidence excepts from the hearsay rule

> a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but *not including a statement of memory or belief to prove the fact remembered or believed* unless it relates to the execution, revocation, identification, or terms of declarant's will.

Fed.R.Evid. 803(3); *emphasis added.* 5 V.I.C. § 932(12) (URE 63) is substantially the same.

Under this limited state-of-mind exception, there is authority that a "witness may testify that someone expressed to them fear of someone or something, but they may not testify as to that person's explanations of why they were afraid." *Apanovitch v. Houk*, 466 F.3d 460, 487 (6th Cir. 2006); *United States v. Joe*, 8 F.3d 1488, 1492 (10th Cir.1993). There is also substantial and well-reasoned authority that the expressed fear of the victim is inadmissible on relevancy/prejudice grounds—*unless* the victim's state of mind has some special relevancy because it controverts a *specific point of defense*.

Section 932(12) (URE 63(12)) allows statements of a "mental condition of [the declarant]—his or her "existing state of mind [or] emotion", but "not including memory or belief to prove the fact remembered or believed...." *Id.* The California Supreme Court discussed this rule as applied to victim fear of a Defendant:

> [The California] Evidence Code creates an exception to the hearsay rule for evidence of a declarant's statements regarding his or her then existing state of mind or emotion, when the declarant's state of mind or emotion is at issue in the case, or when the evidence is offered to prove or explain the declarant's acts or conduct. Under subdivision (b), however, evidence of a declarant's statement of memory or belief is not admissible as proof of the fact remembered or believed. As our cases have made clear, "a victim's out-of-court statements of fear of an accused are admissible ... only when the victim's conduct in conformity with that fear is in dispute. Absent such dispute, the statements are irrelevant."

People v. Ruiz, 44 Cal.3d 589, 749 P.2d 854, 864 (Cal. 1988), citing Cal. Evid. Code § 1250(a, b). See: *State v. Blades,* 225 Conn. 609, 626 A.2d 273, 286 (Conn. 1993) (observing

that victims' statements of fear are admissible where "the decedent's fear helps to rebut aspects of [an] asserted defense"), quoting 2 C. McCormick, EVIDENCE (4th Ed.1992) § 276, p. 245; *State v. Duntz*, 223 Conn. 207, 613 A.2d 224 (1992) (statements of the victim's fear of the defendant were irrelevant to the issue of the defendant's motive and intent because "the jury could not have drawn such an inference solely from the statements of the victim without resorting to impermissible speculation").

In the present case, this airfare "code" proves no specific relevant conduct or relevant state of mind of the *accused*. There is, moreover, no competent evidence that the *Decedent* ever had fears of Defendant; only that friends or family feared him.

The probative value of the "code" evidence is even more diminished in light of the fact that the only time it was employed—the evening of the 28th—Decedent communicated to Ms. Pinney that she *did not feel unsafe*.

Related evidence from the child ████—that he was to use the green button on the cell phone to call "Nenny Marie" (the same Marie Pinney) because he thought something happened to his mother and "because [his] mother planned for me to do it"—is similarly inadmissible. It may reflect the victim's state of mind, but it does not reflect the Defendant's. It is unusually prejudicial because it came from the Decedent's child in a highly emotion-charged setting.

Finally, and with respect to this child's testimony generally, the circumstances do not suggest inherent reliability for any hearsay exception. While his custodian, Charmaine Joseph, claimed at trial to have shielded the delicate emotions this child of tender years by telling him that his mother had an "accident" and "went to heaven"—thereby attempting to defuse any suggestion that his impressionable memory was later influenced by adults—this same Charmaine Joseph took the boy to the scene of the homicide to view his mother's blood all over the floor.

f. Explicit improper character evidence, character attacks by prosecutor.

As discussed, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" unless the accused puts his own character into evidence. FRE 404(a); accord, 5 V.I.C. § 887(a) and (b)(2) (URE 47(a) and (b)(2)) (evidence of character trait of accused inadmissible to prove guilt unless "the accused has introduced evidence of his good character").

There were many instances of *explicit* adverse character testimony in this trial—much of it entirely irrelevant, all of it prejudicial, and none of it admissible.

Ms. Joseph testified about Mr. Nicholas' sexually propositioning her while the Decedent was away on a cruise. App.104,ll.7-16. Ms. Green also testified that she found "some letters from a female, love letters" while rummaging through Mr. Nicholas' personal belongings (at a purportedly secure crime scene). App.105,ll.8-18. Elba Richardson testified that she "didn't trust him and I told [Ms. Gottlieb] what he had done with relation to the calls and the trying to grope on the beach and stuff like that." App.166,ll.17-25. Paul Jones described Defendant as a "standoffish" and unsociable person. Marie Pinney characterized him as an "aloof" loner. App.284,l.3-285,l.2. Then, describing an incident when Mr. Nicholas had reportedly picked out the Decedent's clothing outfit for the day, she saw his behavior as "kind of strange"— "a little like wow, weird." App.286,ll.3-12.

And Venus Green, upon being asked by the prosecutor, "Well, why before now didn't you tell her to get rid of this loser?" answered, "I did tell her." And then the prosecutor stated: "Something wrong with him, why didn't you really hammer that home to her?" App.288, ll.11-25.[20]

[20] In a good-versus-evil portrayal, the prosecution frequently juxtaposed the character of the Decedent with that of the Defendant. Paul Jones characterized Decedent as gracious and loving. App.144,l.23-145,l.21. Ms. Richardson testified that she was "very self-giving person. She's the only person that I've ever met like that, that she just loved to give...." App.155,ll.15-16. Ms. Green also testified that Ms. Gottlieb was a "very generous person." App.287,ll.8-10. The Decedent's character was completely irrelevant. Such evidence served only to generate sympathy and passion.

The inadmissible testimony at trial that Defendant was a womanizer, a loner, and a social misfit (as well as the other prior acts/character testimony damning Defendant as a domestic abuser) was compounded and exacerbated by the improper remarks of the prosecution. During the trial, he called Defendant a "loser." *Id.* During argument, he characterized Defendant as a pathologically controlling person because of the choice-of-clothes evidence; and criticized his social isolation, saying, "[T]hey show the type of person he is." App.747,ll.1-23. Also: "So, he's a liar. He's cold hearted. He's a coward. He's treacherous and calculating." App.715, ll.9-10.[21]

g. Speculation by witnesses as to Defendant's future intent.

Officer Tyson's testimony at trial that law enforcement personnel feared (but did not know) that Mr. Nicholas' "intent was to do bodily harm to the minor child or to use the minor child as a means of leverage to get away from law enforcement," App.282,ll.18-25, had absolutely no relevance *at trial* (as contrasted from the suppression hearing) and was highly prejudicial. This was improper speculation into Defendant's state of mind.

Further, the child, █████, testified that he saw his father with a gun in the kitchen a week before his mother's death, with "some strap on his waist." App.644,ll.4-10. The prosecutor asked, "What kind of thoughts were running through your mind at that time? A. He was going to kill somebody." App.646,ll.1-10. The boy (seven, at the time of his mother's death) then recited his absolutely heart-wrenching imaginary vision of rescuing his mother by lifting her up and carrying her through the window. It is difficult to overstate the prejudicial emotional impact of this improper testimony (likely a product of later influences), which was deliberately elicited from the child at trial. It was assuredly not spontaneous.

h. Prohibited opinion testimony on guilt of the accused.

On numerous occasions, the witnesses in this trial recounted either their own historical statements, or statements of other friends or family of the accused, that Defendant

[21] This is highly improper. E.g., *Washington v. Hofbauer*, 228 F.3d 689, 699-700 (6th Cir. 2000) (repeated character attacks on accused in closing summation constitute prosecutorial misconduct). For one thing, Defendant's veracity was not a legitimate issue. He never testified.

killed Ms. Gottlieb. Typical of these was the testimony of Ms. Richardson, who first recited her telephone conversation with Venus Green when she (Ms. Green) had said, "[H]e killed her, he killed her, he killed her, he killed her." App.160, ll.1-19.

The prosecutor, playing on this hearsay statement of Ms. Green's conclusion, then asked Ms. Richardson: "**Q** [by the prosecutor]. So, what did you thought [*sic*] at that time after she made that comment to you? **A.** That Mr. Mitchell Nicholas had killed her and that she was dead." App.160,ll.10-13. He then asked for *Ms. Richardson's* opinion: "Q. Why did you think that it was him? A. Because of on-going friction and physical contacts that were unwanted" (and problems that had built up over the years). App.160,ll.14-24. Ms. Richardson then elaborated her reasons by reciting inadmissible hearsay (actually, hearsay within hearsay), as well as inadmissible "prior bad acts" evidence. App.161,l.1-165,l.22.

There were an astounding *nineteen (19) additional* explicit statements by witnesses at trial—some witnesses repeating themselves (or repeating the statements of others)—that Mitchell Nicholas killed Georgia Gottlieb. Charmaine Joseph: App.100, ll. 7-23; Paul Jones: App.147,ll.16-21; Venus Green: App.200, l.12-201,l.10; Marie Pinney App.268,ll.6-22; Glenn Davis: App.238,ll.1-12. These witnesses perceived no such event.

Despite the liberalization of the "ultimate opinion rule" of FRE 704, and 5 V.I.C. § 911(4) (URE 56(4), a witness' testimony of opinion as the guilt of the accused is universally condemned as improper. E.g., 31A AM. JUR. 2d, *Expert and Opinion Evidence* § 32 ("[A] witness may not state an opinion that a person is guilty or innocent, or is criminally responsible or irresponsible...."); *Cooper v. Sowders,* 837 F.2d 284 (6th Cir. 1988) (allowing police officer to testify that "all evidence pointed to" accused fundamentally deprived defendant of a fair trial); *Schmunk v. State*, 714 P.2d 724, 735-736 (Wyo. 1986) ("Should we condone this type of opinion evidence, we could expect in the future that the State might call five witnesses to say they suspect the defendant is guilty. The defendant then would surely be permitted to call five witnesses to testify that they suspect he is innocent.")

The testimony in question was not helpful to the jury in understanding any issues (FRE 701), and indeed invaded the province of the jury. And, most importantly, this evidence was profoundly and uniquely prejudicial in the present case. The jury could very well have concluded that these witnesses were in a better position, based on their superior knowledge of the Defendant, the Decedent, and their relationship history, to make the judgment that "he killed her," and further to conclude that the killing was premeditated.

i. Argument outside the record.

The prosecutor forcefully argued that Mr. Nicholas had motive to kill because he was financially dependent on the Decedent and "desparate[ly]" angry that he lost his source of support due to the breakup. App.704,l.24-705,l.8. There is no evidence in this record that Mr. Nicholas was financially dependent upon Ms. Gottlieb. Mr. Nicholas worked as a ferryboat captain. There was no evidence regarding whether and to what extent the parties shared common expenses, or indeed any material aspects of their domestic finances. Such argument outside the record is improper. *U.S. v. Schwartz*, 325 F.2d 355, 358 (3rd Cir. 1963).

j. Quantum of prejudice.

Many of these errors at trial are so fundamental that, even standing independently, they warrant reversal. Taken together, and viewed in the aggregate, the cumulative prejudice of these innumerable errors was absolutely overwhelming. *U.S. v. Parker*, 997 F.2d 219, 222 (6th Cir. 1993) ("The combined effect of these four errors was so prejudicial as to strike at the fundamental fairness of the trial."); accord: *Gonzales v. Police Dept., City of San Jose, Cal.*, 901 F.2d 758, 762 (9th Cir.1990); *Beck v. Haik*, 377 F.3d 624, 645 (6th Cir.2004) ("Since a jury reaches its verdict in light of the evidence as a whole, it makes no sense to try to analyze errors in artificial isolation, when deciding whether they were harmless.").[22]

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[22] The Third Circuit has rejected the cumulative error doctrine applied to "plain error" issues in *civil litigation*. *SEC v. Infinity Group Co*., 212 F.3d 180, 196 (3d Cir. 2000). However, the Third Circuit has not ruled on this question in criminal cases, and the *Infinity Group* case has no *stare decisis* effect on this Court on the present issue. The better-reasoned view by far is acceptance of the doctrine in criminal cases; in fact the contrary view is unsupportable. Obviously, the overall fairness of a trial is far more likely to be compromised if there are multiple and repeated errors than an

The greatest prejudicial impact may have been on the jury's deliberations on first degree versus second degree murder, which calls for an inferential determination of Defendant's mental state. The jury was likely heavily influenced by the repeated, improperly-expressed character assessments and oft-repeated opinions of guilt, by those whom the jury may very well have felt had a better window into the mind of the Defendant then they (the jurors). That is sufficient to rule out any finding of harmless error. See, e.g., *State v. Walkup*, 220 S.W.3d 748 (Mo. 2007) (where evidence that the defendant had killed the victim was essentially uncontroverted, erroneous exclusion of evidence was still prejudicial on the issue of first or second degree; conviction reversed); *State v. Balderama*, 135 N.M. 329, 88 P.3d 845 (N.M. 2004) (trial court's evidentiary ruling was not harmless error, even though evidence that defendant killed the victim was "overwhelming," where ruling impacted issue of first versus second degree murder).

3. The evidence is insufficient, as a matter of law, to sustain Defendant's conviction of first degree murder.

This Court has approved the following definition of premeditation, a distinguishing element of first degree murder.

> To 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. It is not required, however, that the accused shall have brooded over his plan to kill or entertained it for any considerable period of time. Although the mental processes involved must take place prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill.

Brown, 2010 WL 4961740 at * 5, quoting *Gov't of the Virgin Islands v. Martinez*, 780 F.2d 302, 305 (3d Cir.1985).[23]

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isolated error here or there. Due process in a criminal trial may indeed suffer "death by a thousand cuts."

[23] Defendant would (with all due respect) request that the Court consider clarifying the above formulation because it tends to conflate the differing *mens rea* requirements of first degree murder, second degree murder, and manslaughter. [*Footnote continued next page*.]

Even assuming, *arguendo,* and solely for purposes of argument, that there were legally sufficient evidence to infer that Defendant caused this death: There was no basis for the inference of premeditation. Only speculation. There were no eyewitnesses to the incident. There was no evidence of any discussion between Defendant and Decedent that immediately preceded the death, although there may conceivably have been discussions, even contemporaneous discussions of infidelity, precipitating a pathological emotional explosion—or, to use the words of the prosecutor, a "jealous rage." A "jealous rage" is not the "cold blooded" calculation of first degree murder; it is the "hot blooded" *mens rea* that is the distinguishing and defining characteristic of second degree.

The prohibited adverse character inferences and speculative opinions of friends and family based on "prior bad acts" cannot suffice to establish first degree murder.

Defendant did not acquire the gun at or near the time of death; he had owned it for more than a year. There is no evidence of pre-planning, or deliberate consideration at all. What calculating person would shoot a victim at a time when the downstairs neighbors were all at home? When his own child was in the house? Postmeditation cannot be confused with

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The reference to "just cause of provocation," invokes the elements of *voluntary manslaughter*, 14 V.I.C. § 924(1), which is "the killing ... of a human being without malice aforethought ... [and] "upon a sudden quarrel or heat of passion." Manslaughter at common law (and under Section 924(a)) is "the act of killing, though intentional, committed under the influence of passion or in heat of blood, produced by an *adequate or reasonable provocation*, and before a reasonable time has elapsed for the blood to cool..." *Maher v. People*, 10 Mich. 212, 219 (Mich. 1862); *emphasis added*. By contrast, second degree murder entails killing with "malice aforethought." *Gov't of the Virgin Islands v. Rosa*, 399 F.3d 283, 295, n.13, citing *Virgin Islands v. Sampson*, 94 F.Supp.2d 639, 644 (D.V.I.App.Div.2000) ("[14 V.I.C. §922] retains the common law distinction between second degree murder, which requires a killing with malice aforethought, and first degree murder, which *in addition to malice aforethought* requires a killing with premeditation and deliberation"; *emphasis added.*). Second degree exists where there is hot-blooded passion without legally sufficient "provocation" as that common law term of art is defined. Moreover, stating that premeditation can take place in a "brief moment" improperly blurs the distinction between second and first degree. 2 W. LaFave and A. Scott, Jr., SUBSTANTIVE CRIMINAL LAW § 7.7(a), at p. 286 (1986) ("It is often said that premeditation and deliberation require only a 'brief moment of thought' or a 'matter of seconds,' and convictions for first degree murder have frequently been affirmed where such short periods of time were involved. The better view, however, is that to 'speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, ... destroys the statutory distinction between first and second degree murder...'.")

premeditation; subsequent conduct that does not reveal that the killing was preplanned is not probative of the *mens rea* of the accused at the moment of the act. In all events, Defendant, when he left, did not even take a change of underwear or a toothbrush. He was a boat captain, which presented many possible exit strategies, and there should have been *some evidence* of a plan to escape if this were premeditated. Instead, he checked into a local hotel with his own proper identification, accompanied by his son.

The "elements of willfulness, deliberateness and premeditation must be established ... beyond a reasonable doubt in order to bring a murder within the first degree." *Gov't v. Lake*, 362 F.2d 770, 776 (3rd Cir. 1966). Premeditation may of course be established by circumstantial evidence. *Brown*, 2010 WL 4961740, at *5. However, and as the Florida Supreme Court stated: "While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference." *Coolen v. State*, 696 So.2d 738, 741 (Fla. 1997); see also, *State v. Josephs*, 174 N.J. 44, 803 A.2d 1074, 1141 (N.J. 2002). No rational jury in the present case could infer premeditated murder in the first degree, to the exclusion of a crime of passion, without speculation, as opposed to legitimate circumstantial inference.

4. The evidence is insufficient, as a matter of law, to sustain Defendant's conviction of illegal possession ammunition.

As a matter of law, Defendant's conviction for possession of unregistered ammunition must fall because there was no evidence of any statutory or regulatory procedure in place in the Virgin Islands for registering ammunition. *U.S. v. Daniel,* 518 F.3d 205, 208 (3rd Cir. 2008) ("While Virgin Islands law criminalizes the possession of ammunition "unless authorized by law," 14 V.I.C. § 2256, it does not establish a licensing requirement for ammunition. Nor does it provide any specific procedure by which possession of ammunition may be licensed or otherwise authorized." Conviction reversed.)

5. The Defendant's conviction of unlawful possession of a firearm is invalid as a matter of law, because the Virgin Islands gun licensing statute is unconstitutional.

Defendant was convicted of violating Section 2253(a) of Title 14, which makes it a separate crime to possess—"*unless otherwise authorized by law*"—a firearm "during the commission of a crime of violence." *U.S. v. Xavier*, 2 F.3d 1281, 1288-1289 (3rd Cir. 1991) 14 V.I.C. § 2253(a); *emphasis added.* "[A]n essential element of the crime is that the person using the gun is not 'otherwise authorized by law' to carry or possess the gun. ... Therefore, the government must prove ... that the user was unauthorized to carry or possess the gun." *Id.,* citing *United States v. Ramos*, 730 F.2d 96, 98 (3d Cir.1984).

Section 454 (now "2 454") of Title 23 is the predicate statute. Section 454 provides that a firearm may be lawfully possessed and carried by

> (3) A person having a bona fide residence or place of business within the Virgin Islands, who establishe[s] to the satisfaction of the Commissioner [of the Virgin Islands Police Department] that he has good reason to fear death or great injury to his person or property, or who establishes any other proper reason for carrying a firearm, and the circumstances of the case, established by affidavit of the applicant and of at least two credible persons, demonstrate the need for such license...

23 V.I.C. § 454(3).[24]

Defendant cannot legally be found to have violated that gun-licensing statute, which is a predicate violation for 14 V.I.C. § 2253(a), because Section 454(3) is unconstitutional.

The United States Supreme Court issued the watershed decision of *District of Columbia v. Heller* during the pendency of this appeal, holding that the Second Amendment to the Constitution protects an individual's right to possess a gun in the home. *Id.*, 554 U.S. 570, 128 S.Ct. 2783, 2821-22, 171 L.Ed.2d 637 (2008). As the Court soon thereafter held, the "Second Amendment right to keep and bear arms" is "fundamental to our scheme of

[24] The statute also permits government officials or employees to have a gun, but only if a license, "in the judgment of the Commissioner, should be issued," 23 V.I.C. § 454(1); and to employees of banks common carriers, or other businesses handling cash or valuables, if the employer "shall have justified to the satisfaction of the Commissioner the need for the issuance of the license." 23 V.I.C. § 454(2).

ordered liberty" and is therefore incorporated by the Fourteenth Amendment. *McDonald v. Chicago*, --- U.S. ---, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).[25]

The plain error doctrine allows review of this issue, even though not raised at trial, because "the law at the time of trial was settled, [but] clearly contrary to the law at the time of appeal." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

The Virgin Islands gun licensing statute is patently unconstitutional. It overburdens a citizen's core Second Amendment right to possess a gun in the home by restricting that right to persons having "good reason to fear death or great injury to [their] person or property," or otherwise having a "proper reason" for gun ownership. 23 V.I.C. § 454(3). A citizen does not *need* a "proper reason" to own a gun. His or her constitutional *right* is all the reason required. Moreover, and critically, the citizen's exercise of his or her Second Amendment rights cannot be rendered dependent upon the unbridled discretion of the Police Commissioner, who is indeed vested by Section 454(3) with extremely broad administrative decision-making authority based upon highly subjective criteria.

There is absolutely no question but that reasonable (and objective) handgun licensing and registration laws remain necessary and appropriate after *Heller*. *Heller*, for example, "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill'." *McDonald*, 130 S.Ct. at 3047 (quoting *Heller*, 128 S.Ct. at 2816-17); see *Heller v. District of Columbia (Heller II),* 698 F.Supp.2d 179 (D.D.C. 2010) (upholding new, carefully-crafted, narrowly drawn gun registration regulations adopted by the District of Columbia, post-*Heller I*); *U.S. v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010) (stating that handgun ownership is subject to "presumptively lawful regulatory measures"; upholding statute prohibiting ownership of gun with effaced serial number); *U.S. v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (upholding conviction for violating 18

[25] The Second Amendment is also incorporated by statute and made applicable to the Territory by Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561.

U.S.C. § 922(g)(3), making it a felony for a habitual drug addicts to be in a possession of a gun).

The Third Circuit in *Marzzarella* held that gun laws that at least indirectly impact Second Amendment rights should not be reviewed under the deferential "rational basis" test (the Supreme Court having explicitly rejected that test in *Heller,* 128 S.Ct. at 2816 n. 27); nor, on the other hand, should they be subject to a rigorous "strict scrutiny" standard. *Marzzarella,* 614 F.3d at 96-97.

The Third Circuit instead adopted the standard of "intermediate review" of the gun law in question in *Marzzarella* (prohibiting possession of a gun with an effaced serial number), holding that the intermediate standard requires that a government regulation not overburden the exercise of the constitutional right in question, and that it "directly advance a substantial interest and be no more extensive than necessary to serve the interest." 614 F.3d at 97-98.

Importantly, the Court drew heavily from First Amendment jurisprudence in its analysis of constitutional standards of review, *id.,* stating that "the First Amendment is a useful tool in interpreting the Second Amendment." 614 F.3d at 97, n.15. In this connection, the Court specifically cited *content-neutral* "time, place and manner" regulations on free speech, which are subject to intermediate review. *Id.,* citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (upholding such restrictions if they "are justified without reference to the content of the regulated speech, ... they are narrowly tailored to serve a significant governmental interest, and ... they leave open ample alternative channels for communication of the information").

In the present case, the Virgin Islands gun licensing statute, 23 V.I.C. § 454(3), is not content-neutral because it substantively restricts the core Second Amendment right to gun ownership persons with a specific need for self-defense (or defense of property), or having some other "proper reason" to own a gun. Moreover, the Commissioner's discretion as

arbiter of a Virgin Islands citizen's Second Amendment rights is not circumscribed by clear, specific, and objective standards.

Section 454(3) is an invalid "prior restraint" on the exercise of Second Amendment rights. By clear analogy, a "prior restraint" on First Amendment rights exists when the right of free expression is conditioned upon approval by public officials. *Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61 (3rd Cir. 1990) (airport regulation gave officials of New York and New Jersey Port Authority uncontrolled discretion to allow or prohibit sale of certain printed materials; regulation stricken as an invalid "prior restraint").

Even where a law *is* content-neutral, regulating not the content but the "time, place and manner" of public speech, an intermediate standard of constitutional review applies.[26] But even under that standard, such a regulation is constitutionally invalid if it confers excessive administrative discretion on a public official in controlling or restricting the exercise of First Amendment rights. *Gannett Satellite*, 894 F.2d at 69 ("In this case, the regulation under attack ... fails adequately to set forth any standards by which the Port Authority is to exercise its discretion."); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251-1256 (11th Cir. 2004) (even under intermediate standard of review, city ordinance unconstitutional because it gave sheriff wide-open discretion as to decision whether to issue or withhold permit).

This principle is solidly established. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

In *Shuttlesworth v. City of Birmingham, Ala*., 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), the U. S. Supreme Court reviewed a local ordinance giving city commissioners the power to grant or withhold a permit for parades or other public demonstrations based

[26] In the present case, a "strict scrutiny" standard may apply. That point is unsettled, but academic because Section 454 clearly fails under the "intermediate" constitutional standard.

upon their beliefs concerning the "public welfare, peace, safety, health, decency, good order, morals or convenience." 394 U.S. at 150. The Court struck down the ordinance, stating

> This ordinance as it was written ... fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

394 U.S. at 150; *internal quotations, footnote, omitted.*

Section 454(3) similarly subjects Virgin Islands citizens' Second Amendment rights to the subjective discretion of the Police Commissioner's in deciding whether a citizen can demonstrate a real and specific need for self-protection or protection of property, or whether the citizen has some other "proper reason" to own a gun (supported by the affidavits of the applicant and of at least two other people the Commissioner finds to be "credible").

Accordingly, Defendant's conviction for violating 14 V.I.C. § 2253(a) (committing a crime of violence while possessing a gun not "authorized by law")—predicated on the failure to obtain a license pursuant to Section 454(3)—is invalid as a matter of law.

6. Conclusion.

The Superior Court erred in ruling that the warrantless arrest of Defendant was justified by exigent circumstances, when in fact the People did not meet their burden of showing an insufficient opportunity to obtain a warrant. The evidence recovered incident to Defendant's arrest should have been suppressed. Further, the evidentiary errors (and other types of legal error) at trial were so egregious in nature and so great in number that Defendant's right to a fair trial was fundamentally compromised. And in all events, the evidence at trial was insufficient, as a matter of law, to establish first degree murder. The

same is true as to failure to register ammunition because, as judicially established in *Daniel*, the Virgin Islands had no actual, existing procedure to register ammunition.

Finally, the Virgin Islands gun licensing law, 23 V.I.C. § 454(3), which is the essential predicate of 14 V.I.C. § 2253(a), unlawful possession of a firearm in the commission of a violent crime, is unconstitutional; and the Defendant was not legally bound to comply with it. The evidence is therefore insufficient to establish a violation of Section 2253(a), as a matter of law.

For the foregoing reasons, this Court should enter judgment of acquittal on first degree murder, and on the ammunition- and firearm-possession charges; and remand this case for a new trial on the charges of second degree murder and assault.

RESPECTFULLY SUBMITTED this 12th day of May, 2011.

[Electronic duplicate of hand-signed original.
Minor variations in format, pagination.]
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Certificate of Bar Membership

The undersigned certifies that he is a member in good standing of the Bar of this Court (V.I. Bar No. 834).

[Hand-signed in original.]

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Certificate of Service

The undersigned certifies that on this 12th day of May, 2011, he caused two copies of the foregoing Brief of Appellant Nicholas, together with Appendices, to be sent by United States Postal Service, postage prepaid, to:

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