For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RANDY BURKE, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2013-0014** Re: Super. Ct. Crim. No. 495/2006 (STX)

On Appeal from the Superior Court of the Virgin Islands
Argued: October 8, 2013
Filed: December 6, 2013

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

ATTORNEYS:

Carl A. Beckstedt III, Esq.
Beckstedt & Associates
St. Croix, U.S.V.I.
Attorney for Appellant,

Tiffany V. Monrose, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

ORDER OF THE COURT

SWAN, Associate Justice.

IN CONFORMITY WITH the reasons enumerated in the December 6, 2013 Opinion of the Court in the above captioned case, it is hereby:

ORDERED that there was no abuse of discretion in the Superior Court's Order Denying

Defendant's Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial or in the Order denying Defendant's Motion for a New Trial dated February 1, 2013. Therefore Burke's convictions are **AFFIRMED**; and it is further

ORDERED that copies of this Order be directed to the parties.

SO ORDERED this 6th day of December, 2013.

Dated this 6th day of December, 2013

FOR THE COURT

IVE ARLINGTON SWAN
Associate Justice

ATTEST:

VERONICA J. HANDY
Clerk of the Court

By: _____
Deputy Clerk

Dated: 12/6/2013

Copies (with accompanying Opinion of the Court) to:
Justices of the Supreme Court
Judges and Magistrates of the Superior Court
Carl A. Beckstedt III, Esq.,
Tiffany V. Monrose, Esq.,
Veronica J. Handy, Esq., Clerk of the Supreme Court
Venetia H. Velazquez, Esq., Clerk of the Superior Court
Supreme Court Law Clerks
Supreme Court Secretaries
Westlaw
Lexis/ Michie
Order Book

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
Vs.)
)
RANDY BURKE)
Defendant)

CASE NO. SX-06-CR-0000495

ACTION FOR:

NOTICE OF ENTRY OF JUDGMENT AND COMMITMENT

TO: VIRGIN ISLANDS POLICE DEPARTMENT
RICHARD PRENDERGAST, ESQ.
CORNELIUS EVANS, ESQ.
BUREAU OF CORRECTIONS

Please take notice that on April 19, 2013 a(n) JUDGMENT AND COMMITMENT dated April 19, 2013 was entered by the Clerk in the above-entitled matter.

Dated: April 19, 2013

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT

CHERYL CLARKE
COURT CLERK II

Appendix B.

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,)) **Plaintiff,**)) **vs.**)))))) **RANDY BURKE,**)) **Defendant.**))	**CASE NO: SX-06-CR-495** **CHARGE(S): MURDER IN THE FIRST DEGREE; POSSESSION OF A DANGEROUS WEAPON DURING THE COMMISSION OF A CRIME OF VIOLENCE; POSSESSION OR SALE OF AMMUNITION; RECKLESS ENDANGERMENT**

JUDGMENT AND COMMITMENT

THIS MATTER came before the Court for Sentencing on March 14, 2013. The Defendant appeared personally and with counsel, Richard Prendergast, Esquire. The People of the Virgin Islands was represented by Cornelius Evans, Esquire, Assistant Attorney General. After a trial by jury, the Defendant was found guilty of Count One, Murder in the Frist Degree, in violation of Title 14 V.I.C. § 922(a)(1) and Count Three, Reckless Endangerment, in violation of Title 14 V.I.C. §625(a).

The premises considered, it is hereby

ORDERED, ADJUDGED and DECREED that as to Count One, the Defendant be remanded to the care, custody and control of the Director, Bureau of Corrections for **a period of life imprisonment**. It is further

ORDERED, ADJUDGED and DECREED that as to Count Three, the Defendant be remanded to the care, custody and control of the Director, Bureau of Corrections for **a period of five**

(5) years. It is further

ORDERED, ADJUDGED and DECREED that these sentences shall run concurrently.

IT IS FURTHER ORDERED that the Defendant must pay court costs of Seventy-Five Dollars ($75.00).

IT IS FURTHER ORDERED that the Defendant has thirty (30) days to appeal the conviction.

IT IS FINALLY ORDERED that any bail previously posted be exonerated and all conditions previously imposed are vacated.

DATED: April 18, 2013

DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

A T T E S T:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court
By: _____
Court Clerk Supervisor
Dated: 4/19/13

CERTIFIED TO BE A TRUE COPY
This 22 day of May 20 13
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By _____ Court Clerk

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

RANDY BURKE,	)	
	)	**CIVIL NO. SX-15-CV-518**
Petitioner,	)	
	)	**PETITION FOR WRIT**
v.	)	**OF HABEAS CORPUS**
	)	
CALVIN HERBERT, WARDEN, VIRGIN ISLANDS BUREAU OF CORRECTIONS,[1]	)	
	)	
Respondent.	)	
	)	

WRIT OF HABEAS CORPUS

THIS MATTER comes before the Court on a Petition for Writ of Habeas Corpus filed by Petitioner Randy Burke ("Burke") on October 19, 2015. Also before the Court is Burke's Motion for the Appointment of Counsel filed on November 13, 2015. For the reasons stated in the accompanying Memorandum Opinion of even date, it is hereby

ORDERED that the Petition for Writ of Habeas Corpus is **GRANTED IN PART and DENIED IN PART;** it is further

ORDERED that Petitioner Randy Burke's Petition for Writ of Habeas Corpus is **GRANTED** as to his claim for ineffective assistance of counsel, but is **DENIED** in all other respects; it is further

ORDERED that, **within thirty (30) days of the date of entry of this Order,** the Respondent shall file a Return responding to the Petitioner's claim for ineffective assistance of counsel; it is further

ORDERED that, **within twenty (20) days of service of Respondent's Return,** Petitioner shall file a Traverse in response to the Return; it is further

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[1] The Petition lists Diane Prosper, Warden, in the caption as the individual sued in her official capacity. Pursuant to Virgin Islands Rule of Civil Procedure 25(d), the Court will substitute Calvin Herbert in place of Diane Prosper since he is the individual currently serving in that capacity. *See* V.I. R. Civ. P. 25(d) ("An action does not abate when a pubic officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is ending. The officer's successor is automatically substituted as a party.").

ORDERED that the Petitioner's Motion for the Appointment of Counsel is **GRANTED;** it is further

ORDERED that the Office of the Territorial Public Defender is hereby **APPOINTED** to represent Petitioner Randy Burke in this habeas proceeding; it is further

ORDERED that, to the extent the Office of the Territorial Public Defender believes a conflict of interest exists that would prevent that office from representing Petitioner, it **SHALL FILE** a motion to withdraw as counsel no later than December 1, 2017; it is further

ORDERED that an evidentiary hearing shall be held on **Friday, February 2, 2018, at 10:00 a.m., in Courtroom No. 203;** it is further

ORDERED that, if Petitioner Randy Burke has been transferred to a prison outside of the Virgin Islands, he shall be returned to the Territory of the Virgin Islands **no later than January 26, 2018**; it is further

ORDERED that copies of this Writ of Habeas Corpus and accompanying Memorandum Opinion shall be provided to the Claude Walker, Esq., Attorney General of the Virgin Islands; Samuel Joseph, Esq., Chief Territorial Public Defender; Rick Mullgrav, Director of the Bureau of Corrections; and to Petitioner Randy Burke (via certified mail).

DATED: November 14, 2017

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: _____
Court Clerk Supervisor

Dated: 11/15/17

CERTIFIED A TRUE COPY
DATE: 11.16.17
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: _____
COURT CLERK

FOR OFFICIAL PUBLICATION

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

RANDY BURKE,	)	
	)	**CIVIL NO. SX-15-CV-518**
Petitioner,	)	
	)	**PETITION FOR WRIT**
v.	)	**OF HABEAS CORPUS**
	)	
CALVIN HERBERT, WARDEN, VIRGIN ISLANDS BUREAU OF CORRECTIONS,[1]	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION

MOLLOY, Robert A., Judge

BEFORE THE COURT is a Petition for Writ of Habeas Corpus filed by Petitioner Randy Burke ("Burke") on October 19, 2015. Burke asserts six claims as his basis for habeas relief. Because the Court concludes that one of those claims asserts a *prima facie* claim, the Court will grant the writ on that basis and order the Respondent to file a return.

Also before the Court is Burke's Motion for the Appointment of Counsel filed on November 13, 2015. For the reasons stated below, the Court will grant this motion and appoint the Office of the Territorial Public Defender to represent Burke in this habeas proceeding.

I. BACKGROUND[2]

[1] The Petition lists Diane Prosper, Warden, in the caption as the individual sued in her official capacity. Pursuant to Virgin Islands Rule of Civil Procedure 25(d), the Court will substitute Calvin Herbert in place of Diane Prosper since he is the individual currently serving in that capacity. *See* V.I. R. Civ. P. 25(d) ("An action does not abate when a pubic officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is ending. The officer's successor is automatically substituted as a party.").

[2] The procedural background of this case was developed from the decisions issued by the Supreme Court in *Burke v. People of the Virgin Islands*, 60 V.I. 257 (V.I. 2013) and by the Superior Court in *People of the Virgin Islands v. Burke*, Crim. No. SX-06-CR-495, 2013 V.I. LEXIS 18 (V.I. Super. Ct. Feb. 1, 2013).

On October 23, 2006, Burke was arrested and charged with various criminal offenses stemming from the shooting death of Julius Kevin Cupid. In the Second Amended Information, the People of the Virgin Islands charged Burke with murder in the first degree (Count I), possession of a firearm during the commission of a crime of violence (Count II), and reckless endangerment (Count III).

The case proceeded to trial on December 14, 2009. After the People presented its case, Burke moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The trial court denied that motion. Burke then renewed his Rule 29 motion at the close of his case. The trial court denied the motion as to Counts I and III, but granted the motion as to Count II – possession of a firearm during the commission of a crime of violence. Counts I and III charging Burke with murder in the first degree and reckless endangerment, respectively, were submitted to the jury, which found him guilty on both counts.

After the jury rendered its verdict, Burke filed several post-trial motions which were eventually disposed of by the trial court on February 1, 2013. Burke filed an appeal with the Supreme Court of the Virgin Islands on February 22, 2013. After considering various arguments raised by Burke, the Supreme Court issued a decision on December 6, 2013, affirming Burke's convictions. Burke filed the instant petition alleging that his conviction and detention are unlawful.

II. LEGAL STANDARD

Section 1301 of Title 5 of the Virgin Islands Code provides that "every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may

prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." 5 V.I.C. § 1301. "When presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief – that is, whether it states facts that, if true, entitle the petitioner to relief – and also whether the stated claims are for any reason procedurally barred." *Rivera-Moreno v. Gov't of the Virgin Islands*, 61 V.I. 279, 311 (V.I. 2014). "A *prima facie* case is made when a petitioner states specific factual allegations which require habeas relief rather than mere conclusions of speculations." *Laudat v. Mulgrave*, 2017 V.I. LEXIS 57, *5 (V.I. Super. Ct. Mar. 22, 2017) .

If a petitioner has stated a *prima facie* case and the case is not procedurally barred, the court must grant the writ. However, "'[g]ranting the writ of habeas corpus . . . constitutes an intermediate step in the statutory procedure' – it does not address the underlying merits of the petition's allegations, nor does it entitle the petitioner to the ultimate relief sought in the petition." *Blyden v. Gov't of the Virgin Islands*, 64 V.I. 367, 376 (V.I. 2016) (quoting *Rivera-Moreno*, 61 V.I. at 311). Once the petitioner has successfully plead a *prima facie* case and the writ is granted, the respondent must then file a "return" responding to the allegations set out in the petition. *See* 5 V.I.C. § 1308. The petitioner must then file a "traverse" in response to the "return" which is analogous to an answer in a civil proceeding. *Rivera-Moreno*, 61 V.I. at 298. "Once the return and traverse are filed, the Court must hold a hearing and the body of the petitioner must be brought before the Court for the matter to be heard on the merits." *Laudat*, 2017 V.I. LEXIS, at *5-6 (citing 5 V.I.C. §§ 1309-10); *see also Blyden*, 64 V.I. at 381 ("Because [the] petition made out a prima facie case for relief that was not procedurally barred, the Superior Court was required to issue a writ of habeas corpus to the person having

custody over him, mandating [the petitioner's] production in court for an evidentiary hearing prior to addressing the merits of [petitioner's] claims.")(internal quotations omitted).

III. DISCUSSION

A. Petition for Writ of Habeas Corpus

Burke raises the following six claims in his request for habeas relief: (1) denial of due process; (2) he was convicted on insufficient evidence; (3) the trial court erred by not allowing him to impeach a witness with evidence challenging her credibility; (4) ineffective assistance of counsel; (5) the trial court erred by incorrectly instructing the jury to view circumstantial and direct evidence the same; and (6) the trial court failed to instruct the jury that he was acquitted of the charge of possession of a firearm during the commission of a crime of violence.

1. Claims that are Procedurally Barred

As noted above, even if a petitioner alleges a *prima facie* case for habeas relief, the Court must still deny the petition if the claim is procedurally barred. A claim is procedurally barred if it was raised on direct appeal to the Supreme Court and the Court rejected that claim on the merits. *See Blyden*, 64 V.I. at 377-78 ("Where a petitioner properly raised an issue on direct appeal to [the Supreme Court], and [that court] rejected it on the merits, the petitioner is procedurally barred from re-litigating that issue though a habeas petition."). The Court, however, may revisit an issue that was presented to the Supreme Court if there is "an intervening change in law or other exceptional circumstances." *Id.* at 378. Based on a review of the Petition and the Supreme Court's decision in *Burke v. People of the Virgin*

Islands, 60 V.I. 257 (V.I. 2013), this Court concludes that five of the six claims raised by Burke are procedurally barred. Additionally, there is no change in law or other exceptional circumstances that would warrant revisiting these five claims. These claims are addressed below.

a. Claims #1 and #2 - Denial of Due Process and Whether there was Sufficient Evidence to Convict Burke of Murder First Degree

First, Burke alleges that his "right to a fair due process" was violated because the trial court held that there was insufficient evidence to find that he was in unauthorized possession of a firearm during the commission of a crime of violence, but yet the charge alleging that he committed first degree murder was allowed to go to the jury. Pet. at 3-4. Burke further alleges that "[t]he court cannot find that the petitioner was not in possession of a firearm in commission of a crime of violence, then imply that the petitioner is guilty of murdering human being with a gun he was never in possession of as the evidence points out." *Id.* at 4-5. Burke also alleges:

> The actions of the court to not acquit the petitioner of murder is prejudice, because the victim's cause of death was from a gunshot wound. There is significant reasonable doubt that the petitioner could have caused the death of the victim if the evidence does not suggest the petitioner was in possession of a firearm in commission of an act of violence, that violence being a[sic] act of murder.
>
> . . .
>
> If the petitioner can not [sic] be found to be in possession of a dangerous weapon, i.e. a gun, then the petitioner can not [sic] be found to have shot a human causing death.

Pet. at 7-8.

Essentially, Burke's denial of due process argument boils down to whether there was sufficient evidence for a reasonable jury to find Burke guilty of murder in the first degree.

See Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("The due process guaranteed by the Fourteenth Amendment [mandates] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof."). This brings the Court to Burke's second claim for habeas relief.

In his second claim, Burke alleges that he was convicted of murder first degree and reckless endangerment on insufficient evidence. Burke contends that the eye witness gave inconsistent accounts during her testimony, that she "never directly said that petitioner committed any crime," and "at no time during this direct examination did the witness testify to 'ever' see[ing] the petition[er] shoot Kevin nor in his direction." Pet. at 13-15. Burke, however, presented this exact argument on direct appeal to the Supreme Court. In his appeal, Burke asserted "that there is insufficient evidence for him to be convicted on either count of the Information. Specifically, he points out that '[n]o witness testified that the Defendant, in fact, shot [Kevin].'" *Burke*, 60 V.I. at 262. The Supreme Court rejected Burke's argument providing a thorough analysis of the circumstantial evidence presented by the People in the case. *Id.* at 262-63. The Supreme Court concluded that "the circumstantial evidence in this case was more than sufficient to permit the jury to find beyond a reasonable doubt that Burke was guilty" on both Counts I (murder first degree) and III (reckless endangerment). *Id.* at 262; *see also Id.* at 263 ("Considering the entire body of evidence, it was reasonable for the jury to find Burke guilty beyond a reasonable doubt on both charges.").

Thus, Burke is procedurally barred from raising any claim that the People failed to present sufficient evidence of guilt beyond a reasonable doubt that Burke committed murder first degree.

Accordingly, the Court will deny Burke's claims that he was denied due process or that he was convicted of murder first degree without sufficient evidence.

b. Claim #3 - Whether the Trial Court Erred by not Allowing Burke to Impeach a Witness

Burke next argues that he is entitled to habeas relief because the trial court erred by not allowing his defense to impeach Beatrice Lawrence, a prosecution witness, with her prior felony conviction for drug trafficking. Pet. at 18-20. Once again, Burke presented this issue to the Supreme Court in his direct appeal. In its opinion, the Supreme Court stated the following:

> Burke asserts that the trial court committed an error when it denied his request to impeach Lawrence using her prior conviction for drug trafficking. (Appellant's Br. 25.) Burke contends that the facts of this conviction should have been admitted to demonstrate her bias and to impair her credibility. (Appellant's Br. 26). He also includes a brief discussion of the Superior Court's transition from the Uniform Rules of Evidence ("URE") to the Federal Rules of Evidence ("FRE") and correctly notes that, at the time of the present trial, the Superior Court was bound to apply the URE.
>
> . . .
>
> Burke seems to be importuning this Court to grant a new trial solely for the purpose of applying what he perceives to be the more favorable impeachment provisions applicable under the FRE. We find this argument unavailing. It is apparent that the trial court did not err in ruling on the scope of the permissible impeachment under the governing URE provision, which was 5 V.I.C. § 835.
>
> . . .
>
> Lawrence's convictions were for conspiracy to import cocaine and for possession of cocaine on board an aircraft with intent to distribute, and not for falsification of a U.S. customs form. The assertion that Lawrence falsified information on a U.S. customs form is solely Burke's assertion which is

> unsupported in the record. The trial court's ruling on this scope of impeachment issue was not an abuse of discretion.

Burke, 60 V.I. at 267-68.

Because it is clear to this Court that Burke presented this issue to the Supreme Court in his direct appeal and there being no exceptional circumstances warranting the Court to revisit that issue, the Court concludes that Burke is collaterally estopped from raising that issue in his habeas petition.

c. *Claim #4 - Whether the Trial Court Improperly Instructed the Jury on Circumstantial and Direct Evidence*

Burke alleges that during the final jury instructions, the trial court instructed the jury that it is to treat direct and circumstantial evidence the same and that the law makes no distinction between the two. Burke alleges that this instruction was "a misapplication of the law and necessary prejudice to the outcome of the case . . ." Pet. at 22-23. Burke failed to cite any case law to support this contention. In its opinion, the Supreme Court noted that the trial court included the following discussion of circumstantial evidence in the final jury instructions:

> There are two types of evidence from which you may properly find that facts in this case, one is the direct evidence, such as the testimony of an eyewitness or someone who asserts actual knowledge of facts. The other is indirect, or circumstantial evidence. Circumstantial evidence or indirect evidence consists of facts that lead to a reasonable inference of the existence or nonexistence of another fact.

Burke, 60 V.I. at 263.

There is no indication that the above instruction was an inaccurate statement of law. The Supreme Court has made clear in Burke's appellate decision, the widely held legal concept that in addition to proving guilt with direct evidence, "[t]he Government may prove

guilt based on circumstantial evidence alone." *Burke*, 60 V.I. at 262 (citing *Morton v. People*, 59 V.I. 660, 671 (V.I. 2013)). Thus, Burke has failed to allege a *prima facie* case for habeas relief on this issue and this issue is procedurally barred.

d. Claim #5 – Whether the Trial Court Erred When it Failed to Instruct the Jury that Burke was Acquitted of Count II

After the close of all the evidence in Burke's trial, the trial court granted Burke's Rule 29 motion and dismissed Count II of the Second Amended Information, the count charging Burke with possession of a firearm during the commission of a crime of violence in violation of 14 V.I.C. § 2253(a). Burke alleges in his habeas petition that the trial court failed to instruct the jury that he was acquitted of the aforementioned charge. Pet. at 25-26. On direct appeal, Burke argued "that the trial court's failure to inform the jury during final jury instructions that he was no longer charged under Count II with the offense of possession of a firearm during the commission of a crime of violence, was a fatal error because [the] granting of his motion was exculpatory." *Burke*, 60 V.I. at 266. The Supreme Court rejected this argument opining that "the purported need to advise the jury of Burke's exoneration on Count II in the Second Amended Information, the firearms possession charge, was non-existent since the instructions as given focused the jury on the only two offenses remaining." *Id.* at 267. The Supreme Court further reasoned that Burke's argument on this issue was spurious because "it became absolutely necessary to delete Count II of the charges" after the trial court granted Burke's Rule 29 motion for judgment of acquittal. *Id.* The Supreme Court further noted that the trial court explicitly informed the jurors in the final jury instructions that Burke was only on trial for acts alleged in the Third Amended Information. *Id.* Accordingly, because the

Supreme Court already addressed this issue on direct appeal, this Court will decline to address the merits of Burke's arguments as part of his habeas petition.

2. Claim Not Procedurally Barred - Ineffective Assistance of Counsel

As to his sixth and final claim, Burke alleges that his defense attorney provided him with ineffective assistance of counsel by failing to cross examine certain inconsistent statements made by Beatrice Lawrence, a material witness. Pet. at 21.

Section 3 of the Revised Organic Act – the de facto constitution of the U.S. Virgin Islands[3] – provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be represented by counsel for his defense..." 48 U.S.C. § 1561. The Supreme Court of the United States has made clear that "[t]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *see also Morton v. People*, 59 V.I. 660, 669 (V.I. 2013) ("The Sixth Amendment guarantees a right to effective counsel."). In order to prevail on a claim for ineffective assistance of counsel, Burke must prove two components: (1) that his counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first component requires Burke to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* The second component requires a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

In this case, Burke alleges that his trial counsel's representation was ineffective because "[c]ounsel failed to cross examine the inconsistencies [sic] in the witness testimony

[3] *See Fawkes v. Sarauw*, 66 V.I. 237, 247 (V.I. 2017).

showing bare minimum discredit to her credibility beyond a reasonable doubt." Pet. at 21. Burke further asserts that "failure to cross [examine] prejudiced the petitioner, since cross examination might have influenced the jury's reasonable doubt to the key witness convicting testimony." *Id.* However, "[i]t is well-established that decisions regarding how to best cross-examine witnesses presumptively arise from sound trial strategy." *United States v. Orozco*, 301 F. App'x 783, 786 (10th Cir. 2008). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690; *see also Komyatti v. Wright*, No. 93-2163, 1995 U.S. App. LEXIS 12318, at *7-8 (7th Cir. Apr. 18, 1995) ("[D]ecisions to cross-examine witnesses are a matter of trial strategy, and as a general rule, [the Court] will not second-guess them."). In order to overcome the presumption that certain actions by trial counsel with regards to cross-examination was a matter of trial strategy, a defendant must show either that: "(1) the suggested strategy (even if sound) was not in fact motivating counsel or, (2) that the actions could never be considered part of a sound strategy." *Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005).

Burke need not overcome this presumption at this stage of the litigation. At this stage, the Court is without sufficient information to determine whether Burke's allegation that his trial counsel declined to cross examine a material witness was a product of sound trial strategy or the product of incompetent counsel. This determination is a fact-intensive inquiry making it inappropriate to deny a petition for habeas corpus at this early stage. *See Blyden*, 64 V.I. at 381 (opining that the trial court demanded too much too soon of habeas petitioner by going directly to the merits of his ineffective assistance claim based only on the allegations of the petition.). Unlike Burke's five other claims for habeas relief, "a claim of

ineffective assistance of counsel will rarely be procedurally barred in a habeas proceeding since [the Supreme Court] has held that 'a claim of ineffective assistance of trial counsel is not appropriately reviewed for the first time on direct appeal . . . because the necessary facts about counsel's representation of the defendant have not been developed.'" *Blyden v. Gov't of the Virgin Islands*, 64 V.I. 367, 381 (V.I. 2016), citing *Codrington v. People*, 57 V.I. 176, 191 (V.I. 2012). Thus, the Court will issue the writ and direct that the Respondent respond to the allegations of Burke's claim of ineffective assistance of counsel.

B. Motion for the Appointment of Counsel

Burke requests that the Court appoint counsel to represent him in this habeas proceeding because he is unable to afford counsel, the issues in the case are complex, he is an off-island prisoner with "extremely limited access to the law library," is uneducated in criminal law, and he "has requested expert testimony." Mot. at 1.

On June 8, 2016, the Court issued an Order finding Burke to be indigent and permitting him to proceed *in forma pauperis.* Despite Burke's indigence, it is well settled in this jurisdiction that "[t]here is no constitutional right to court-appointed counsel in collateral proceedings, even if they stem from a criminal case." *Alexander v. People*, 65 V.I. 385, 393 (V.I. 2016) (quoting *Fontaine v. People*, 59 V.I. 1004, 1010 (V.I. 2013)). Consequently, Burke is not entitled to the appointment of counsel in this habeas proceeding.

Nonetheless, this Court has the discretion "to appoint counsel for an indigent habeas petitioner under 4 V.I.C. § 513(d), which provides that the Superior Court 'may appoint an attorney to represent any person unable to employ counsel.'" *Alexander*, 65 V.I. at 394 (quoting 4 V.I.C. § 513(d)). The most significant of the reasons asserted by Burke is his

contention that he has "extremely limited access to the law library." Although Burke does not go into much detail explaining this "extremely" limited access, "[t]he inaccessibility of legal resources implicates [a] prisoner's fundamental right to meaningful access to the courts." *Melendez v. People of the Virgin Islands*, 2014 V.I. Supreme LEXIS 35, *3-4 (V.I. June 30, 2014). Access, however, "may be effectuated by expanding the duties of the local public defender to include researching the claims of prisoners." *Id.* at *4. Section 3524 of title 5 of the Virgin Islands Code grants the Office of the Territorial Public Defender the authority to represent an indigent defendant at every stage of criminal proceeding including "any appeals or other remedies before or after conviction . . ." Burke was represented by private counsel during his underlying criminal case. The record does not indicate that the Office of the Territorial Public Defender represented Burke at any stage of his criminal proceedings. Because this Court made a determination that Burke has alleged a *prima facie* claim for ineffective assistance of counsel, the Court will appoint the Office of the Territorial Public Defender to assist him with that claim. *See Alexander*, 65 V.I. at 393-94 (providing that 5 V.I.C. § 3524 authorizes the Office of the Territorial Public Defender to represent habeas petitioners in collateral proceedings)

IV. CONCLUSION

The Court concludes that five of Burke's six claims for habeas relief are procedurally barred. With regards to his sixth claim – ineffective assistance of counsel – the Court concludes that Burke has alleged a *prima facie* claim and will issue the writ on that basis. The Court will also grant Burke's motion to have counsel appointed to represent him in this matter and will appoint the Office of the Territorial Public Defender to that end.

DATED: November 14, 2017

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: _____
Court Clerk Supervisor

Dated: 11/15/17

CERTIFIED A TRUE COPY

DATE: 11-16-17

ESTRELLA M. GEORGE
ACTING CLERK OF THE COURT

BY: _____
COURT CLERK

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

RANDY BURKE,	)	
	)	
Petitioner,	)	**CIVIL NO. SX-15-CV-518**
v.	)	
	)	**PETITION FOR WRIT OF HABEAS**
DIANE PROSPER, ACTING WARDEN OF THE BUREAU OF CORRECTIONS, et al.,	)	**CORPUS**
	)	
	)	
Respondents.	)	
	)	

ORDER

THIS MATTER came before the Court for an evidentiary hearing on March 7, 2018 on Petitioner's claim for habeas corpus relief.[1] For the reasons stated on the record, the Court finds that the Petitioner has failed to meet his burden of proof that he was provided ineffective assistance of counsel during his criminal trial.[2] Thus, after careful consideration and review and for the reasons stated on the record, it is hereby

ORDERED that the Petitioner's habeas corpus claim of ineffective assistance of counsel is **DENIED**; it is further

ORDERED that this case is **CLOSED**; it is finally

ORDERED that copies of this order shall be sent to Assistant Attorney General Royette Russell, Territorial Public Defender Amelia Joseph, and by certified mail to Randy Burke.

Dated: March 7, 2018

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
CLERK OF COURT

COURT CLERK SUPERVISOR

DATED: 3/8/18

CERTIFIED A TRUE COPY

DATE: 4-23-19
ESTRELLA H. GEORGE
CLERK OF THE COURT
BY:
COURT CLERK II

[1] Territorial Public Defender Amelia Joseph appeared on behalf of the Petitioner. Assistant Attorney General Royette Russel appeared on behalf of the Respondent. The Petitioner appeared by video conference.

[2] Attorney Carl Beckstedt and Petitioner Randy Burke testified at the evidentiary hearing.

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RANDY BURKE, Appellant/Petitioner, v. **DIANE PROSPER, ACTING WARDEN OF THE BUREAU OF CORRECTIONS, ET AL.,** Appellee/Respondents.	**S. Ct. Civ. No. 2018-0031** Re: Super. Ct. Civ. No. 518/2015 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Robert Molloy

Argued: January 15, 2019
Filed: February 13, 2019

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Randy Burke,
Bigstone Gap, VA
Pro Se,

Ian S.A. Clement, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

JUDGMENT

SWAN, Associate Justice

AND NOW, consistent with the Opinion of even date, it is hereby

Appendix C.

ORDERED that the Superior Court's March 7, 2018 judgment and commitment is affirmed. It is further

ORDERED that copies be directed to the appropriate parties.

SO ORDERED this 13th day of February, 2019.

BY THE COURT:

IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Date: 02/13/19

Copies (with accompanying Opinion of the Court) to:
Justices of the Supreme Court
Judges and Magistrate Judges of Superior Court
Randy Burke
Ian S.A. Clement, Esq.
Veronica J. Handy, Esq., Clerk of the Supreme Court
Estrella H. George, Clerk of the Superior Court
Joseph Gasper II, Esq., Superior Court Law Librarian
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book
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For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RANDY BURKE, Appellant/Petitioner, v. **DIANE PROSPER, ACTING WARDEN OF THE BUREAU OF CORRECTIONS, ET AL.,** Appellee/Respondents.	**S. Ct. Civ. No. 2018-0031** Re: Super. Ct. Civ. No. 518/2015 (STX)

On Appeal from the Superior Court of the Virgin Islands
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Superior Court Judge: Hon. Robert Molloy

Argued: January 15, 2019
Filed: February 12, 2019

Cite as: 2019 VI 6

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Randy Burke,
Bigstone Gap, VA
Pro Se,

Ian S.A. Clement, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, Associate Justice

¶1 Appellant Randy Burke seeks reversal of the Superior Court's denial of his petition for a writ of habeas corpus that alleged ineffective assistance of counsel by Attorney Carl Beckstedt based upon Beckstedt's failure to cross-examine Beatrice Lawrence, a prosecution witness, during Burke's first degree murder trial. Burke likewise propounded other secondary issues, all of which we conclude are non-meritorious. For the reasons elucidated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

¶2 This case emanates from an October 21, 2006 shooting for which Randy Burke was found guilty of first degree murder and reckless endangerment in the killing of Julian "Kevin" Cupid at the Aureo Diaz Housing Community in St. Croix, U.S. Virgin Islands. At trial, Asheba Benjamin testified that Burke, Cupid's cousin, came to the apartment she shared with Cupid and her grandmother, Christineta Benjamin, on the day of the shooting. Burke, at one time had lived in the same apartment, but returned on that day to retrieve some personal belongings and paraphernalia that still remained there. Upon arrival, Burke entered Cupid's room and inquired about the whereabouts of some of his belongings. Cupid replied that he did not have them. At that juncture, Burke exited Cupid's bedroom and entered another bedroom where some of his belongings were stored. Eventually, Burke left that room, returned to Cupid's room, and accused Cupid of taking Burke's rolling papers and leaf tobacco. Cupid denied removing the items. Therefore, an acrimonious verbal altercation immediately ensued between both men. Burke threatened Cupid by informing him "that he would lick Cupid's head off." Cupid responded by obtaining a knife, which

infuriated Burke who thought that Cupid was "playing bad." During the verbal altercation, Benjamin, a cousin of both men, inserted herself between them in an attempt to quell the altercation before it further escalated. Eventually, Burke departed the apartment, and Benjamin hurriedly locked the apartment's door following his departure.

¶3 Soon thereafter, Burke returned to the apartment, allegedly carrying a firearm. Hearing female screams outside, Benjamin rushed to the apartment's front veranda where she saw Burke walking towards the apartment building carrying an unidentifiable object in his hand. When Burke arrived at the locked door of the apartment, he furiously and repeatedly kicked the door while demanding entry into the apartment. Cupid, who had been in his room since Burke's initial departure, attempted to unlock the door, but was restrained by Benjamin who instructed him not to open the door or to go outside. Acquiescing to Benjamin's pleas, Cupid returned to his room. Eventually, Burke's unrelenting assault on the door subsided. However, as Benjamin attempted to call her mother on the phone, Cupid rushed onto the second-story front balcony. Immediately, a single gunshot was heard. Frightened and petrified, Benjamin hastily left the apartment by descending the apartment's back balcony and fled the area. She returned to find Cupid slumped on the front balcony in a pool of his blood.

¶4 Beatrice Lawrence also testified at Burke's trial. On the day of the shooting, Lawrence had allegedly informed police that she witnessed Burke point a silver, nine millimeter pistol in the air. Subsequently, Cupid was found with a gunshot wound to the head and pronounced dead on arrival at Juan Luis Hospital. However, during direct examination, Lawrence repeatedly attempted to evade answering the prosecutor's questions. Lawrence claimed she could not recall what she told police on the day of the shooting, despite reviewing her prior written statement to the police in

order to assist in refreshing her memory. She further acknowledged that, days before the trial, she met with an assistant attorney general and told the official she clearly recalled the events of that day. The People asked the court to have Lawrence treated as a hostile witness. The court agreed, and she was so designated. Under relentless questioning, Lawrence admitted to telling police that she was in her apartment on the day of the shooting. Lawrence further stated that her residence is directly underneath Benjamin's apartment. Using a photograph, Lawrence identified where she stood in relation to Burke and Cupid, which confirmed that Burke was two or three feet from her and Cupid was on the second-story porch above them.

¶6 On the day of the shooting, Lawrence heard a commotion outside her ground-floor apartment which she exited to ascertain what was happening. Once outside her apartment, Lawrence observed Burke aiming a silver, nine millimeter pistol upward into the air, but towards the porch where Cupid stood. When Burke discharged the firearm, Lawrence presumed that he shot at Cupid on the second floor porch. Instantaneously, Lawrence heard a sound, which was consistent with someone falling against the porch floor above her. Lawrence saw Burke run to a silver or white vehicle and fled the scene after discharging the shot. Lawrence had known Burke for approximately five years. They once had a very brief intimate relationship prior to the shooting.

¶7 Upon conclusion of Lawrence's direct testimony, Defense Counsel Carl Beckstedt requested a brief recess before commencing his cross-examination of Lawrence. In response, the court ordered a lunch break. Following lunch, Beckstedt informed the court that he will waive his cross-examination of Lawrence.

¶8 On December 18, 2009, a jury adjudged Burke guilty of first degree murder and first-degree reckless endangerment. On May 21, 2010, Burke filed post-trial motions in Superior Court

for a judgment of acquittal and a new trial. On February 4, 2013, the court denied Burke's motions and, on February 22, 2013, he perfected a timely appeal of his convictions. On December 6, 2013, this Court affirmed Burke's convictions in its opinion in *Burke v. People*, 60 V.I. 257 (V.I. 2013), in which additional facts in the first degree murder case are memorialized. On October 19, 2015, Burke filed a petition for a writ of habeas corpus in Superior Court, asserting an ineffective assistance of counsel claim against Beckstedt purportedly because of Beckstedt's failure to cross-examine Lawrence during trial. On March 8, 2018, the Superior Court dismissed Burke's habeas corpus petition. On March 12, 2018, Burke appealed the denial of his habeas corpus petition.

II. JURISDICTION

¶9 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, or final orders of the Superior Court." 4 V.I.C. § 32(a). "An order denying a petition for a writ of habeas corpus[1] is a final order . . . from which an appeal may lie." *Rivera-Moreno v. Gov't of the Virgin Islands*, 61 V.I. 279, 292 (V.I. 2014) (internal citations omitted). Because the Superior Court's March 8, 2018 order denied Burke's habeas corpus petition, this Court possesses jurisdiction over the appeal.

III. STANDARD OF REVIEW

¶10 This Court exercises plenary review of the Superior Court's legal determinations and evaluates its factual findings for clear error. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2014) (internal citations omitted). Moreover, the Court conducts plenary review of the Superior Court's

[1] "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." 5 V.I.C. § 1301.

denial of a habeas corpus petition. *Rivera-Moreno*, 61 V.I. at 293 (citing *Mendez v. Gov't of the V.I.*, 56 V.I. 194, 199 (V.I. 2012)).

IV. DISCUSSION

¶11 Habeas corpus is an equitable remedy employed when a person's conviction involved a constitutional violation. *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986). Allowing defendants a new trial, writs of habeas corpus afford relief to those "'persons whom society has grievously wronged' in light of modern concepts of justice." *Id.* (citing *Fay v. Noia*, 372 U.S. 391, 440-41 (1963)). Locally, section 3 of the Revised Organic Act establishes the use of writs of habeas corpus under Virgin Islands law. *Rivera-Moreno*, 61 V.I. at 293.

A. Procedurally Barred Issues

¶12 On appeal, Burke posits several arguments that were not addressed at the March 7, 2018 hearing on his habeas corpus petition[2]. Specifically, Burke argues, among other things, that Beckstedt was ineffective for not disputing jury instructions which declared that circumstantial and direct evidence were to be given the equal weight, that Beckstedt was ineffective for failing to request the court to instruct the jury on second degree murder, and that Beckstedt was ineffective for failing to inform the jury that he was acquitted of 14 V.I.C. § 2253(a) (possession of firearm during the commission of a crime of violence). Appellant's Br. 4-5, 7. Noticeably, Burke raised these identical issues in his February 2013 direct appeal and this Court fully addressed them in its December 2013 opinion—albeit on direct appeal of his first degree murder conviction and not

[2] Although he raises issues on appeal that were not probed at the March 7, 2018 hearing, Burke did raise these issues and others in his habeas corpus petition. However, the Superior Court concluded that only the ineffective assistance of counsel claim presented sufficient evidence to warrant further investigation. Appellee's Br. 7-8.

under the guise of an ineffective assistance of counsel claim. Furthermore, the issue of not informing the jury of the dismissal of the firearm possession charge is addressed in volume 60 of the V. I. Reports at page 266 of this Court's opinion adjudicating the direct appeal of Burke's convictions in the original criminal case. Although we have repeatedly stated that issues not addressed at trial or on appeal may be raised for the first time using a petition for a writ of habeas corpus, *see Rivera-Moreno*, 61 V.I. at 302, this Court has promulgated rules which state that issues rejected on direct appeal are inappropriate to be reasserted on a petition for writ of habeas corpus.[3] Moreover, in *Blyden v. Gov't of the V.I.*, 64 V.I. 367, 377-78 (V.I. 2016), this Court opined that issues previously raised on direct appeal were unsuitable to be re-litigated with a petition for a writ of habeas corpus. "This Court's rejection of an issue properly raised on direct appeal constitutes binding precedent both on this Court and the Superior Court . . . particularly with regard to raising the same issue through a collateral proceeding such as a petition for a writ of habeas corpus." *Id.* (citing *Bryan v. Fawkes*, 61 V.I. 416, 457 (V.I. 2014)). *See In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965) (stating that arguments rejected on appeal cannot be raised on a petition for writ of habeas corpus as though it were a second appeal); *In re Lessard*, 399 P.2d 39, 44 (Cal. 1965) (same); *accord Rivera-Moreno*, 61 V.I. at 303 ("[The V.I. Supreme] [C]ourt will consider as persuasive authority the decisions of the Supreme Courts of California and Puerto Rico interpreting similar statutes on which the Virgin Islands habeas provisions are based.") (citations omitted). Accordingly, Burke's contentions regarding Beckstedt's failure to challenge jury instructions concerning evidence, regarding Beckstedt's failure to inform the jury of the dismissal of the

[3] "A petitioner may not raise in a petition for a writ of habeas corpus an issue previously rejected on direct appeal to the Supreme Court of Virgin Islands unless there has been a subsequent change in the law affecting petitioner's claim." V.I. H.C.R. 2(b)(3).

firearm charge, and regarding Beckstedt's failure to request the court to give a second degree murder instruction are barred and constitute a waiver of those issues in this appeal.

B. Cross-examination of Lawrence

¶13 Next, Burke argues Beckstedt's failure to cross-examine Lawrence constituted ineffective assistance of counsel. The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (Sixth Amendment right to counsel is right to effective counsel); *Stanislas v. People*, 55 V.I. 485, 491 (V.I. 2011) (citing *Corraspe v. People*, 53 V.I. 470, 479 (V.I. 2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)).

¶14 To prevail on an ineffective assistance of counsel claim, Burke must demonstrate Beckstedt's performance fell below an objective standard of reasonableness and Becksteadt's deficient performance prejudiced Burke resulting in an unreliable or fundamentally unfair outcome in the proceeding. *Ibrahim v. Gov't of the V.I.*, S. Ct. Civ. No. 2007-76, 2008 WL 901503, at *2 (V.I. 2008) (unpublished) (citing *Strickland v. Washington*, 466 U.S. 688, 687-88 (1984)). Moreover, Burke must satisfy both prongs of the two part test. *Strickland*, 466 U.S. at 697. *See Turner v. U.S.*, 699 F.3d 578, 584 (1st Cir. 2012) (court need not address the objective reasonableness prong because defendant failed to demonstrate prejudice); *Waiters v. Lee*, 857 F.3d 466, 480-82 (2nd Cir. 2017) (court need not decide if there was a strategic reason for counsel's actions because failure to call a medical expert was not prejudicial); *See also Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 858-59 (3rd Cir. 2017) (ineffective assistance of counsel claim dismissed where defendant could not demonstrate prejudice despite demonstrating counsel's performance was unreasonable); *United States v. McCoy*, 410 F.3d 124 (3rd Cir. 2005)

(quoting *McAleese v. Mazurkiewicz*, 1 F.3d 159, 170 (3rd Cir. 1993) ("Indeed, this Court has read Strickland as requiring the courts to decide first whether the assumed deficient conduct of counsel has prejudiced the defendant."))

¶15 On the performance facet, there is a strong presumption that, under a totality of the circumstances, Beckstedt's actions or omissions fall within the wide range of professional competent assistance. *Strickland*, 466 U.S. at 690. The Strickland court stated that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent the criminal defendant." *Id.* at 688-89. *See also id.* at 689 (noting the presumption that counsel's strategy and tactics fall "within the wide range of reasonable professional assistance"); *Id.* at 689-90 (observing that a court should presume counsel's effectiveness to avoid second-guessing counsel with the benefit of hindsight"); *See also Strouth v. Colson*, 680 F.3d 596, 602 (6th Cir. 2012) (concluding that counsel's failure to present witness was not ineffective assistance because further impeachment "would have been of little value").

¶16 In this case, Burke alleges Beckstedt's failure to question Lawrence foreclosed Burke from being convicted of a lesser homicide charge such as second degree murder or manslaughter. Appellant's Br. 3. Essentially, Burke asserts that Beckstedt's decision relates to the performance prong of the *Strickland* test and the decision was not part of a sound trial strategy. In *Simon v. Gov't of the V.I.*, 63 V.I. 902, 942 (D.V.I. 2015), the appellate division stated "the determination to call a witness lies soundly with trial counsel, not the defendant." (citations omitted). "Under *Strickland*, a court presumes that, under the circumstances, a challenged action might be part of a sound trial strategy. For a defendant to overcome that presumption, the defendant must show that

either (1) the suggested strategy (even if sound) was not in fact motivating counsel, or (2) that the actions could never be part of a sound strategy." *Id.* (quoting *Thomas v. Varner*, 428 F.3d 491, 499 (3rd Cir. 2005)). The court opined that "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* (quoting *Padilla*, 559 U.S. at 371).

¶17 Although Burke's claim pertains to Beckstedt's performance, the case law precedent permits us to first address prejudice to the defendant before turning to defense counsel's alleged deficient performance, if the latter inquiry is even necessary. Burke asserts prejudice in that, if Beckstedt had cross-examined Lawrence on the issue of his gun being pointed in the air rather than at Cupid, he could have been convicted of a lesser degree of homicide. However, Lawrence testified on direct examination that Burke's gun was pointed in the air. In fact, Lawrence said, although her written statement said police asked who Burke shot at, the question police actually posed was where Burke shot at. (J.A. 0170-0171). In response to that question, Lawrence said the air. *Id.* Significantly, Lawrence further testified that "[the gun] was facing towards the porch, but it was pointed to the air." The ensuing dialogue between the prosecutor and Lawrence is edifying. It provides:

> Prosecutor: "So can you -- use the pointer and show me where Randy was standing and where he was pointing the gun."
>
> Lawrence: (Complying)
>
> Prosecutor: "Okay. And where was the gun being pointed?"
>
> Lawrence: "Towards the air."
>
> Prosecutor: "You told the officers he pointed towards the porch above you?"
>
> Lawrence: "It was facing towards the porch, but it was pointed to the air."
>
> Prosecutor: "And then you heard a shot; is that correct?"
>
> Lawrence: "Yes."

¶18 (J.A. 0178). Therefore, the jury could have concluded that Burke discharged the shot in the air towards Cupid on the porch. Importantly, at the time of the shooting, Lawrence was two or three feet from Burke, who was on the ground while simultaneously Cupid was on the second story porch. Obviously, Burke had to shoot upwards or into the air above him in order to shoot Cupid. (J.A. 0168). Therefore, any mitigation that could have been gained by Beckstedt cross-examining Lawrence on the issue of the position of Burke's gun was already in the record for the jury to consider. Notwithstanding that fact, the jury still convicted him of first degree murder. *See Harrington v. Richter*, 562 US 86, 111-13 (2011) (counsel's failure to test blood was not prejudicial because additional evidence did not directly refute state's expert testimony and circumstantial evidence of defendant's guilt); *King v. Westbrooks*, 847 F.3d 788, 798-99 (6th Cir. 2017) (counsel's delay in retaining mental health expert not prejudicial because defendant failed to show testimony would have presented evidence different from that already presented at trial). Therefore, Burke's argument is meritless.

¶19 Even if Burke was prejudiced by Beckstedt's failure to cross-examine Lawrence, Burke would still have to demonstrate that Beckstedt's decision was not part of a sound trial strategy by showing either that a sound strategy did not motivate Beckstedt's decision or the decision was not part of a sound trial strategy a reasonable attorney employs. During the March 7, 2018 hearing, Burke presented no evidence that Beckstedt's failure to cross-examine Lawrence was not motivated by a sound trial strategy. At the hearing, the court repeatedly asked Burke's attorney, Public Defender Amelia Joseph, if Beckstedt's decision not to cross-examine Lawrence was not motivated by sound trial strategy, what motivated the decision? Joseph responded that she did not

know what motivated the decision and the court ultimately proceeded to the second factor of the test. (J.A. 0084-0087).

¶20 Regarding Beckstedt's decision not being part of a sound trial strategy, Joseph contended that it was an attorney's job to test the veracity of a witness's statements and the witness's motives for testifying. (J.A. 0088). Joseph believed that challenging Lawrence on her inability to recall what she previously told police and on whether the People offered her a plea deal[4] could have caused the jury to disregard everything she said and resulted in Burke being convicted of a lesser included offense. (J.A. 89). However, Beckstedt stated that his decision not to cross-examine Lawrence was embedded in the defense theory that Burke was not at the scene or in the vicinity of the crime which he characterized as an OJ defense.[5] (J.A. 0019-0020). He intended to make the People prove every element of its case. *Id.* Beckstedt testified that he was shocked by Lawrence's testimony, by her failure to cooperate with the People, and by her inability to recall the events that occurred all of which Becksteadt characterized as a complete 180 degree turnabout that forced him to reassess his intended course of action (to cross-examine her with a scorned lover assertion). (J.A. 0043-0047). Beckstedt claimed there was nothing to be gained by cross-examining Lawrence and doing so would only have allowed the People the opportunity to rehabilitate her on redirect examination. (J.A. 0047-0050). Beckstedt also noted that Lawrence's testimony was beneficial to Burke because of her failure at trial to routinely recall what she had previously and initially told police following the crimes which was essentially that Burke had shot Cupid with a handgun. Beckstedt asserted that he had sufficient information from Lawrence's favorable testimony for his

[4] At the time of trial, Lawrence was being held on unrelated federal drug charges. (J.A. 0223).
[5] The "O.J. defense" is a clear reference to the California, high profile criminal case of the People of the state of California v. Orenthal James Simpson that occurred between January 1995 and October 1995. O.J. murder case, Wikipedia, https://en.wikipedia.org/wiki/O._J._Simpson_murder_case (last visited Jan. 28, 2019).

defense strategy. (J.A. 0053-0055). Beckstedt decided not to cross-examination Lawrence after a thorough evaluation of the case because the People were caught off guard by Lawrence's testimony or were surprised with her testimony, which was anchored in Lawrence's selective memory failure when compared to her previously signed statement to police. The Superior Court concluded, and we agree, that Beckstedt's decision not to cross-examine Lawrence was part of a sound trial strategy which entailed not cross-examining Lawrence. Beckstedt had gained all he required for his defense from Lawrence's direct testimony; therefore, he waived cross-examination of her which is a decision completely within an attorney's province. *See Ross v. Dist. Att'y*, 672 F.3d 198, 210-11 (3rd Cir. 2012) (counsel's failure to present impeachment evidence not ineffective assistance because it would not have changed the outcome); *Bahtuoh v. Smith*, 855 F.3d 868, 872-73 (8th Cir. 2017) (counsel's reversal of advice to have defendant testify not ineffective assistance because decision was strategic based on changed circumstances); *Hedlund v. Ryan*, 854 F.3d 557, 578 (9th Cir. 2017) (counsel's motion to have defendant's case moved before a different judge was not ineffective assistance because record demonstrated this was a tactical decision). Accordingly, Burke failed to meet the high burden to satisfy either prong for a successful ineffective assistance claim, and this Court will not dispute or second guess Beckstedt's professional judgment.

C. Beckstedt's Failure to Call Medical Examiner

¶21 Finally, Burke asserts, for the first time on appeal, that Beckstedt's failure to call a medical examiner to testify to the cause of Cupid's death amounts to ineffective assistance of counsel. Appellee's Br. 3. As we have already stated, a petitioner may raise an issue for the first time on appeal of a denial of a habeas corpus petition if it is not an attempt to "correct errors or irregularities

relating to the ascertainment of facts when such errors could and should have been raised by direct appeal." *Rivera-Moreno*, 61 V.I. at 303 (citing *In re Dixon*, 264, P.2d 513, 516 (Cal. 1953)).

¶22 Typically, this Court requires a party to "fairly present all issues, whether legal, procedural, evidentiary, or otherwise, to the trial court or risk forfeiting or waiving a claim of error on appeal for failing to do so." *Ubiles v. People*, 66 V.I. 572, 581 (V.I. 2017) (citing former V.I. S. CT. R. 4(h) and former V.I. S. CT. R. 22(m)). Burke did not raise during trial or on direct appeal the issue of Beckstedt's failure to call a medical examiner as a witness. We conclude that he failed to raise the issue during trial; therefore, we adjudge the issue was waived. *See* V.I. R. APP. P. 22(m) ("Issues that were . . . not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal . . . .").

¶23 However, even if we found this issue was not waived, merely asserting an undisclosed issue on appeal of the denial of a petition for a writ of habeas corpus does not mean the issue will succeed on the merits. *Blyden*, 64 V.I. at 376. Burke contends a medical examiner would have been able to refute the People's weak case concerning Cupid's cause of death. However, at trial, Jacqueline Greenwich, a paramedic and nurse of twenty-five years, and two emergency medical technicians (EMT), who treated Cupid as he was being transported to the hospital, and an emergency room (ER) physician, who treated Cupid at the same hospital, testified that Cupid had sustained a fatal gunshot wound to the head. (J.A. 0206-0207). Moreover, Dr. Jennifer Kolodchak, the ER physician, testified that Cupid was already in cardiac arrest when he arrived at the hospital and, was in fact, dead. Hospital staff administered resuscitation techniques, but were unable to obtain any vital signs (heartbeat, blood pressure, or independent breathing) from Cupid after repeated attempts to do so. Dr. Kolodchak ultimately declared him dead and signed the necessary

documents to reflect his status, which she was authorized to do. (J.A. 0131-142). Importantly, Dr. Kolodchak, a physician for many years, rendered lengthy medical details in her sworn testimony, thereby explicating the cause of Cupid's demise.

¶24 A medical examiner could not have stated anything additional to what was recounted by the EMTs, paramedic/nurse, and the ER physician. As already noted *supra* at 7, an ineffective assistance of counsel claim requires Burke to demonstrate both prejudice and Beckstedt's deficient performance. However, Beckstedt enjoys a strong presumption that his acts or omissions are within the sphere of professionally reasonable decisions. *See supra* at 8. Therefore, Beckstedt's failure to call a medical examiner could not prejudice Burke because the medical examiner would have only reiterated and confirmed what was already in the record- that Cupid suffered a gunshot and died as a result of complications associated with that wound. "Generally the choice of whether to call an expert witness is one within the attorney's discretion." *Robinson v. United States*, Civil Action No. 08-103, 2009 WL 4110319, at *8 (D.V.I. 2009) (unpublished). *See United States v. Caden*, Nos. 04-cv-4500, 98-cr-450-1, 2007 WL 4372819, at *4 (E.D. Pa. Dec. 12, 2007) (unpublished) (noting decision whether to call an expert is "fundamentally a strategic choice made [by an attorney] after a thorough investigation of the relevant law and facts") (alterations and citations omitted); *United States v. Richardson*, No. 98-5548, 1999 WL 262435, at *5 (E.D. Pa. May 3, 1999) (unpublished) ("[T]he decision whether or not to call a particular expert witness is generally a matter of trial tactics within the range of a reasonable attorney's performance.") (citing *United States v. Kirsh*, 54 F.3d 1062, 1072 (2nd Cir. 1995)). Accordingly, even if he had not waived this issue that should have been argued on direct appeal, Burke fails to assert a plausible ineffective assistance of counsel claim for Beckstedt's failure to call a medical examiner at trial. Accordingly,

Burke suffered no prejudice as a result of the omission. Moreover, the option to call a medical examiner belonged to Beckstedt.

¶25 Burke has completely and conveniently ignored compelling and pertinent facts of the case. One has only to review the uncontroverted trial testimony of Asheba Benjamin to conclude that, if there was error committed by Attorney Beckstedt, it was, at best, harmless. Benjamin's testimony unequivocally supplied the motive for Burke shooting Cupid and supplied other pertinent information about her personal intervention in the altercation between Burke and Cupid in an effort to prevent the murder.

¶26 The trial testimony of Lawrence and Benjamin disclosed facts in addition to the following: (1) Burke discharged the single shot into the air, but towards the second floor porch where Cupid was located; (2) Burke was the only person who discharged a firearm in the area; (3) Burke was observed fleeing from the crime scene immediately after the shot that killed Cupid was discharged; (4) Burke stood in proximity to the second floor porch when the fatal shot was discharged; (5) The motive for the shooting was the acrimonious altercation between Burke and Cupid which included both men engaged in a truculent posture during their escalating altercation; (6) The extensive and damning testimony of Asheba Benjamin provided the motive for Burke's dastardly deed; (7) not only did Benjamin's testimony solidify Burke's conviction but, if believed, it simultaneously made the failure to cross-examine Lawrence "harmless error"; (8) when Burke hastily departed from the grandmother's apartment, he vowed to inflict bodily harm upon Cupid, which the jury verdict confirmed that he did by murdering Cupid.

¶27 When the "totality of circumstances" that was elicited during trial is examined and considered, Burke's convictions were assured. *See Strickland*, 466 U.S. at 690.

V. CONCLUSION

¶28 For the foregoing reasons, we affirm the Superior Court's dismissal of Burke's habeas corpus petition based upon the alleged ineffective assistance of his trial counsel, Attorney Carl Beckstedt.

Dated this 13th day of February 2019

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

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