For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

EDWIN ENCARNACION, Appellant/Petitioner, v. **WYNNE TESTAMARK,** Appellee/Respondent.	**S. Ct. Civ. No. 2020-0118** Re: Super. Ct. Misc. No. 40/2020 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: July 12, 2022
Filed: September 8, 2023

Cite as: 2023 VI 10

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

APPEARANCES:

Edwin Encarnacion
Oakwood, VA
Pro se,

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

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Edwin Encarnacion appeals the Superior Court's denial of his petition for writ of habeas corpus. For the reasons that follow, we reverse the judgment of the Superior Court.

I. BACKGROUND

¶ 2 The People of the Virgin Islands charged Encarnacion in connection with two separate murders, which were initiated as two separate criminal prosecutions and assigned to two separate judges. In the first criminal case, docketed as Super. Ct. Crim. No. 472/2010 (STX) (hereafter "Case No. 472") and assigned to the Honorable Darryl Dean Donohue, Sr., the People charged Encarnacion with several offenses related to the death of David Martin. In the second criminal case, docketed as Super. Ct. Crim. No. 551/2010 (STX) (hereafter "Case No. 551") and assigned to the Honorable Julio A. Brady, the People charged Encarnacion with several offenses related to the death of Jorge Parilla. In both cases, Encarnacion was represented by the H. Hannibal O'Bryan, Esq., an attorney employed by the Office of the Territorial Public Defender.

¶ 3 On September 21, 2012, the People and Encarnacion informed the Superior Court that they had agreed to a global plea agreement to govern both cases. Pursuant to that global plea agreement, Encarnacion agreed to plead guilty to voluntary manslaughter in Case No. 472 and to second-degree murder in Case No. 551 in exchange for the dismissal, with prejudice, of all other counts in both cases. The Superior Court accepted the global plea agreement, and the matter was set for a November 26, 2012 sentencing hearing before Judge Brady to impose a sentence for both cases.

¶ 4 At the November 26, 2012 sentencing hearing, Judge Brady initially inaccurately stated that Encarnacion had pled guilty to one count of voluntary manslaughter and one count of arson (instead of second-degree murder), and sentenced him to 10 years on each count, to run consecutively. However, after a sidebar discussion, Judge Brady acknowledged the error of mistakenly mentioning arson, but again reiterated that he was imposing a sentence of 10 years on each homicide count, to run consecutively. On November 29, 2012—the day before his last day of service as a Superior Court judge—Judge Brady signed a judgment and commitment

memorializing that sentence, which was subsequently entered by the clerk on December 2, 2012.

¶ 5 Before issuance of the written judgment and commitment, the People filed a "Motion for Clarification and Modification of Sentence" on November 29, 2012. In that motion, the People asserted that the sentence imposed by Judge Brady had been too lenient and contended that Judge Brady may have been confused and issued a more lenient sentence than intended on the second-degree murder charge. Attorney O'Bryan, however, did not file a response to the People's motion. On August 28, 2013, Judge Donohue granted the motion,[1] noting that there had been "some confusion regarding the second count [Encarnacion] pleaded guilty to" and that there were "discrepancies" between Judge Brady's ten-year sentence for second-degree murder and his description of the murder as "particularly heinous" and stating that Encarnacion had "no place in society." Judge Donohue also noted that a ten-year sentence for second-degree murder was shorter than sentences imposed for second-degree murder in twelve other unrelated cases involving different defendants. Consequently, Judge Donohue issued an amended judgment and commitment on the same day which increased Encarnacion's sentence for second-degree murder from ten years to twenty years, again to run consecutively with his ten-year sentence for voluntarily manslaughter. Attorney O'Bryan did not file any documents in response to either the August 28, 2013 order or the amended judgment and commitment, and did not file a notice of appeal with this Court.

[1] As noted earlier, while Case No. 472 had been assigned to Judge Donohue, Case No. 551—in which Encarnacion pled guilty to second-degree murder—had always been assigned to Judge Brady and never previously assigned to Judge Donohue. While a judge ordinarily lacks the authority to issue a dispositive order in a case assigned to another judge, *see Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 575 (V.I. 2015), we assume that Judge Donohue, in his capacity as Presiding Judge, elected to reassign Case No. 551 to himself after Judge Brady retired. *See* 4 V.I.C. § 72b(a).

¶ 6 Nearly seven years later, on April 27, 2020, Encarnacion, acting *pro se*, filed a petition for writ of habeas corpus with the Superior Court. In his petition, Encarnacion asserts a claim of ineffective assistance of counsel against Attorney O'Bryan, based on his failure to respond to the People's "Motion for Clarification and Modification of Sentence." In a November 13, 2020 opinion and order, the Superior Court denied the petition without ordering a response from the government or holding a hearing, concluding that Encarnacion had failed to make a prima facie showing of ineffective assistance of counsel. Encarnacion timely filed a notice of appeal with this Court on December 3, 2020. *See* V.I. R. APP. P. 4(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 7 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's November 13, 2020 opinion and order resolved all of the claims between the parties, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 8 This Court exercises plenary review over all questions of law, and reviews factual findings only for clear error. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I 2014).

B. Ineffective Assistance of Counsel

¶ 9 As this Court has previously explained, "[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 V.I., 64 V.I. 367, 376 (V.I. 2016) (quoting *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 311 (V.I. 2014)). "Instead, issuing the writ and serving it on the Government respondents simply requires the Government to file a return responding to the petition and to produce the petitioner in court for a hearing on the merits of his allegations." *Id.* To determine whether to grant the writ and hold a hearing, the Superior 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." *Id.*

¶ 10 In his appellate brief, Encarnacion maintains that he established a prima facie case of ineffective assistance of counsel. As this Court has previously explained,

> The Sixth Amendment guarantees a right to effective counsel. The landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984) outlines the standard that must be applied for an ineffective assistance of counsel claim to be established. First, [the petitioner] must identify acts or omissions of counsel that are alleged to have been outside the wide range of reasonable professional judgment and competent assistance. *Id.* at 690. Second, [the petitioner] "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Morton v. People, 59 V.I. 660, 669 (V.I. 2013).

¶ 11 The Superior Court determined that Attorney O'Bryan's complete failure to file any response to the People's "Motion for Clarification and Modification of Sentence" likely constituted a failure to exercise reasonable professional judgment that satisfies the first *Strickland* factor. We agree that Encarnacion not only set forth a prima facie case with the first *Strickland* factor but, indeed, in fact established it. This Court has emphasized that "[m]embers of the Virgin Islands Bar . . . must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments." *Antilles School, Inc. v. Lembach*, 64 V.I.

400, 428 n. 13 (V.I. 2016). The complete failure of counsel to file any response to a prosecution motion seeking to increase a sentence already imposed could not possibly serve the interest of the client, have any tactical basis, or otherwise in any way constitute the exercise of reasonable professional judgment. *See, e.g., Martin v. McCotter*, 796 F.2d 813, 821 (5th Cir. 1986). The same, of course, is also true of the complete failure to then appeal from an order granting such a motion and imposing a substantially longer sentence. *See, e.g., Peters v. People*, 60 V.I. 479, 485 n.3 (V.I. 2014) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000)).

¶ 12 Nevertheless, the Superior Court found that Encarnacion failed to establish the second *Strickland* factor: prejudice. We disagree.[2] In its November 13, 2020 opinion, the Superior Court emphasized that Encarnacion could never prove prejudice because the failure to respond to the People's motion did not "result[] in a fundamentally unfair outcome." (J.A. 13.) But *Strickland* does not require that counsel's deficient performance result in a "fundamentally unfair outcome," but only that "the result of the proceeding would have been different." 446 U.S. at 694. It is thus irrelevant whether a 20-year sentence for second-degree murder is a fair or unfair outcome; rather, the pertinent analysis is whether there is a reasonable probability that the original 10-year sentence for second-degree murder announced by Judge Brady at the sentencing hearing and later

[2] We note that the Superior Court held Encarnacion to a higher evidentiary standard than required at this stage of the proceeding. This Court has emphasized that a petitioner is "not required to establish his ultimate entitlement to habeas relief" in the initial habeas petition. *Blyden*, 64 V.I. at 376. Moreover, in the specific context of a habeas petition asserting a claim of ineffective assistance of counsel, this Court expressly held that "by going directly to the merits of [the petitioner's] claims based only on the allegations of his petition, the Superior Court demanded too much of [the petitioner] too soon." *Id.* at 381. However, as we shall soon explain, this is the rare case where a petitioner has, in fact, actually established his ultimate entitlement to habeas relief, in that Judge Donohue lacked the authority to issue the August 28, 2013 amended judgment and commitment to increase the sentence for second-degree murder that had been determined by Judge Brady and had already become final.

memorialized in the December 2, 2013 judgment and commitment would have stood if Attorney O'Bryan had filed an opposition to the People's motion or taken some other appropriate action.

¶ 13 We conclude that it is not only reasonable, but virtually certain, that the outcome of the proceeding would have been different if a competent attorney, after engaging in even the most basic legal research, filed an opposition to the People's motion or took an appeal from the order granting it. This Court has repeatedly emphasized that our adversarial system of justice is premised on the parties presenting facts and legal arguments before a neutral and relatively passive judge, and that it is extraordinarily disfavored for courts to forsake their roles "as arbiters of legal questions presented and argued by the parties before them" and instead "sit as self-directed boards of legal inquiry and research." *See, e.g., Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 536-37 (V.I. 2015); *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 336 (V.I. 2007). Our justice system, however, is undermined perhaps the most by what occurred in this case: the Superior Court receiving legal arguments from only the prosecution. That behavior not only undermines the adversarial system but requires the court to make a Hobson's choice between either relying on a biased and one-sided presentation of the law and the facts or creating arguments for the absent defendant.

¶ 14 The dangers of this approach are reflected by what occurred in this case. The sole authority cited by the People in its November 29, 2012 motion and relied on by Judge Donohue in the August 28, 2013 order granting that motion is then-applicable Superior Court Rule 136, which provided, in full, that

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after any order or other mandate issued upon affirmance of the judgment or dismissal of the appeal, received by the court

> has become final by reason of the expiration of the time limited for further appeal or review.

Former SUPER. CT. R. 136 (repealed Feb. 15, 2019). Superior Court Rule 136, by its own terms, only permitted the Superior Court to "correct" an "illegal sentence" or "a sentence imposed in an illegal manner." But the Superior Court made no attempt to determine whether the People's motion was in fact cognizable under Rule 136. This Court has held, even before the People filed their November 29, 2012 motion, that a sentence is illegal if it is not authorized by law, such as when the sentence imposed is greater than the statutory maximum, *see, e.g., Dunlop v. People*, S. Ct. Crim. No. 2008-0037, 2009 WL 2984052, at *6 (V.I. Sept. 15, 2009) (unpublished), or contains components that are unauthorized by or inconsistent with Virgin Islands law. *See, e.g., Hightree v. People*, 60 V.I. 514, 532 (V.I. 2014). Likewise, this Court has held that a sentence is imposed in an illegal manner, even if it is otherwise authorized by law, if the Superior Court orders a harsher sentence for an improper purpose, such as to punish the defendant for exercising his constitutional right to proceed to trial or for taking an appeal. *See, e.g., Brown v. People*, 56 V.I. 695, 701-02 (V.I. 2012) (citing *Gov't of the V.I. v. Walker*, 261 F.3d 370, 376 (3d Cir. 2001)).

¶ 15 Here, the ten-year sentence for second-degree murder announced by Judge Brady at the sentencing hearing and later memorialized in the December 2, 2013 judgment and commitment was certainly not illegal, in that it was within the permissible range authorized by law as punishment for that offense, *see* 14 V.I.C. § 923(b), and it certainly had not been imposed in an illegal manner. In this context, the People's motion—which was predicated solely on an allegation that Judge Brady had somehow been confused and did not intend to impose that ten-year sentence—was not cognizable under former Superior Court Rule 136.

¶ 16 Even if the Superior Court interpreted the phrase "a sentence imposed in an illegal manner"

beyond its plain text, such that it would permit post-hoc correction of a sentence by a purportedly "confused" judge, a reasonably competent attorney would have noted the following in an opposition to the People's motion: First, not only did Judge Brady orally state at the November 26, 2012 hearing, after being advised of his mistaken reference to arson, that he intended for a ten-year sentence for the second-degree murder charge, but he also memorialized the ten-year sentence for second-degree murder in the December 2, 2012 judgment and commitment. Second, he signed that judgment several days after orally announcing that same sentence at the November 26, 2012 hearing. That is extraordinarily powerful evidence that Judge Brady was not confused, but rather that he specifically intended to impose this particular sentence. *See United States v. Love*, 593 F.2d 1, 10 (D.C. Cir. 2010) (holding that every federal appellate court to consider the question has held that the written judgment should be used to clarify any ambiguities or uncertainties in an oral sentence) (collecting cases); *United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir. 1987) (en banc) ("This is the purpose of the written order: to help clarify an ambiguous oral sentence by providing evidence of what was said from the bench.").

¶ 17 A reasonably competent attorney, however, would certainly discover an even more fundamental problem with the People's motion than it not being cognizable under former Rule 136. The Supreme Court of the United States has long held that while a court, subject to the constraints of substantive law and procedural rules, may permissibly amend a judgment to decrease a defendant's sentence–as was specifically allowed by former Superior Court Rule 136—it is violative of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution[3]

[3] The Double Jeopardy prohibition found in the Fifth Amendment to the United States Constitution expressly applies to the Virgin Islands by virtue of section 3 of the Revised Organic Act. 48 U.S.C. § 1561.

for a court to ever amend its judgment to increase a defendant's sentence after it has become final:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'

United States v. Baez, 282 U.S. 304, 307 (1931); *see also Ex Parte Lange*, 85 U.S. 163, 175 (1873) ("[C]an the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offence. He is not only put in jeopardy twice but put to actual punishment twice for the same thing.").

The Supreme Court of the United States has since recognized a very important exception to the rule announced in its *Baez* and *Lange* decisions: when the legislature vests a higher court with jurisdiction to permit the government to appeal a sentence imposed by a lower court, and the government takes such an appeal, the higher court may grant relief to the government and require or permit imposition of a higher sentence on remand. *United States v. DiFrancesco*, 449 U.S. 117, 138 (1980). The reason for this exception is simple: when the legislature permits the government to appeal a sentence, "there can be no expectation of finality in the original sentence" until such appeals are fully exhausted. *Id.* at 139.

¶ 18 A reasonably competent attorney would have quickly recognized that the *DiFrancesco* exception did not apply to this case. This Court held, well before the sentencing in this case, that the Legislature has not provided the People with the right to directly appeal a criminal sentence. *See People v. Pratt*, 50 V.I. 318, 323 & n.2 (V.I. 2008).

¶ 19 Of perhaps even greater significance, though, is that the People did not appeal

Encarnacion's sentence to a higher court. In its November 13, 2020 opinion, the Superior Court repeatedly refers to the August 28, 2013 order signed by Judge Donohue as having been issued by "the reviewing court." (J.A. 12-14.) But the People filed the motion in the Superior Court as part of the same Superior Court case. While this Court takes judicial notice that Judge Donohue served as the Presiding Judge of the Superior Court when he ruled on the People's motion, the position of Presiding Judge is an administrative one, and the judge serving as Presiding Judge lacks the authority to independently review the substantive legal decisions of other Superior Court judges. *See In re Fleming*, 56 V.I. 460, 468 (V.I. 2012) (citing *Gov't of the V.I. v. Thomas*, 341 F.Supp.2d 531, 534 (D.V.I. App. Div. 2004)). In other words, the Presiding Judge is not "the 'boss' of his fellow judges," but rather the "first among equals." *Raymond v. Assefa*, 69 V.I. 953, 960 (V.I. 2018). Consequently, when Judge Donohue issued the August 28, 2013 order granting the People's motion, he did not do so as an appellate judge reviewing Judge Brady's sentencing order, but as the trial judge assigned to Case No. 551 after Judge Brady's retirement.

¶ 20 Accordingly, based on the interpretations of the Double Jeopardy Clause adopted by the United States Supreme Court in its *Baez*, *Lange,* and *DiFrancesco* decisions, as well as this Court's decision in *Pratt*, the relief requested by the People in their motion was unconstitutional. The Superior Court violated Encarnacion's constitutional right to be free from double jeopardy when it granted that unconstitutional relief and ordered his sentence for second-degree murder increased to twenty-years more than nine months after he had already been sentenced to ten-years for the same offense.

C. Remedy

¶ 21 For the reasons given above, we conclude that the Superior Court erred when it held that Encarnacion failed to establish a prima facie case of ineffective assistance of counsel. Under

ordinary circumstances, this would require this Court to reverse the Superior Court's November 13, 2020 order, direct it to grant Encarnacion's petition and issue a writ of habeas corpus, and then hold an evidentiary hearing on the merits of Encarnacion's ineffective assistance of counsel claim. *See Blyden*, 64 V.I. at 382. "An evidentiary hearing, however, is not necessary if the parties' filings reveal absolutely no factual disputes" or "the primary issue of disagreement involves a pure question of law." *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 314 (V.I. 2014).

¶ 22 Here, the record reflects that Encarnacion did more than only establish a prima facie case for ineffective assistance of counsel but, rather, incontrovertibly proved both *Strickland* factors. While in most cases the ineffective assistance of counsel cannot be established without an evidentiary hearing to inquire whether counsel's actions were the result of strategy or negligence, *see Cascen v. Gov't of the V.I.*, 74 V.I. 512, 522 (V.I. 2021), the Supreme Court of the United States has recognized that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Chronic*, 406 U.S. 648, 658 (1984). The quintessential example of such a circumstance is precisely what occurred in this case: counsel, while ostensibly representing the defendant, did absolutely nothing during a critical stage of the prosecution such that the proceeding became akin to "a sacrifice of unarmed prisoners to gladiators." *Id.* at 657, 659. While we do not know why Attorney O'Bryan failed to either respond to the People's motion or to take any action after the Superior Court issued its August 28, 2013 order increasing Encarnacion's sentence, "[the] silent record clearly indicates [that] no reasonable attorney could have made such trial decisions, [and] to hold such counsel ineffective is not speculation." *Green v. State*, 191 S.W.3d 888, 894 (Tex. App. 2006). And as set forth earlier, the prejudice Encarnacion suffered is clear, in that even the most basic legal research by a minimally competent attorney would have uncovered authorities—including binding

precedent from this Court and the Supreme Court of the United States—that would have mandated the denial of the People's motion and left Encarnacion's sentence undisturbed.

¶ 23 Consequently, we conclude that the appropriate remedy in this case is not simply reversing the November 13, 2020 order and remanding the case for an evidentiary hearing. Rather, because this case involves no material factual disputes, but only pure legal questions which we resolve in favor of Encarnacion, we direct the Superior Court on remand to grant the habeas corpus petition and immediately provide post-conviction relief in the form of vacating the August 28, 2013 order and amended judgment and commitment and reinstating the original December 2, 2012 judgment and commitment that sentenced Encarnacion to ten years of incarceration on the second-degree murder charge.

III. CONCLUSION

¶ 24 The Superior Court erred when it held that Encarnacion failed to establish a prima facie case of ineffective assistance of counsel. Attorney O'Bryan's complete failure to respond to the People's motion or to otherwise take action after the Superior Court increased Encarnacion's sentence nine months after issuance of the December 2, 2012 judgment and commitment was "outside the wide range of reasonable professional judgment and competent assistance," *Morton*, 59 V.I. at 669, and the result of the proceeding would certainly have been different if Encarnacion had the actual assistance of a minimally competent attorney. Accordingly, we reverse the Superior Court's November 13, 2020 order and direct that, on remand, it grant the habeas corpus petition and immediately provide post-conviction relief in the form of vacating the August 28, 2013 order and amended judgment and commitment and reinstating the original December 2, 2012 judgment and commitment.

Dated this 8th day of September, 2023.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: September 8, 2023