

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

RANDY BURKE,

Petitioner,

v.

**CALVIN HERBERT, WARDEN, VIRGIN ISLANDS
BUREAU OF CORRECTIONS,**

Respondent.

CIVIL NO. SX-15-CV-518

**PETITION FOR WRIT
OF HABEAS CORPUS**

MEMORANDUM OPINION

MOLLOY, Robert A., Judge.

THIS MATTER comes before the Court on the following motions: (1) Respondent's Motion for Appearance via Video Conference, filed on December 19, 2017; (2) the Office of the Territorial Public Defender's ("OTPD") Motion to Withdraw as Counsel, filed on January 19, 2018; and (3) Petitioner's Motion for Continuance, filed on January 19, 2018.¹

I. BRIEF BACKGROUND

On November 14, 2017, this Court issued a Writ of Habeas Corpus on Petitioner's claim for ineffective assistance of counsel. The basis for the issuance of the writ was explained in a Memorandum Opinion issued on the same date. *See Burke v. Herbert*, Super. Ct. Civ. No. SX-15-CV-518, 2017 V.I. LEXIS 156 (Super. Ct. Nov. 14, 2017). The Writ directed the following: (1) that the Respondent file a Return within 30 days of the date of the Writ; (2) that the Petitioner file a Traverse within 20 days of the Return; (3) that the OTPD be

¹ The Court previously notified the parties that it will be granting the Respondent's motion to allow petitioner to appear via video conferencing as well as continuing the February 2, 2018 hearing. The Court issues this Memorandum Opinion to set forth its reasoning in writing.

appointed to represent the Petitioner in the habeas proceedings; (4) that the OTPD be allowed until December 1, 2017 to file a motion to withdraw to the extent it believes there is a conflict of interest in the representation; (5) that Respondent transfer the Petitioner to the Territory of the Virgin Islands no later than January 26, 2018 (to the extent the Petitioner was transferred to a prison outside of the Virgin Islands); and (6) that an evidentiary hearing be held on Friday, February 2, 2018.

Thereafter, Respondent filed a twelve-page Return on December 14, 2017, with over 1,000 pages of supporting documentation. The various pending motions followed.

II. DISCUSSION

A. Motion for Appearance via Video Conference

Respondent requests that the Court allow Burke to participate in the February 2, 2018 evidentiary hearing via video conference. In support of this motion, Respondent argues that Burke is currently confined at the Wallens Ridge State Prison in Big Stone Gap, Virginia. Respondent contends that the Bureau of Corrections (BOC) continues to suffer from staffing shortages, budgetary issues exacerbated by Hurricanes Irma and Maria, and that requiring the BOC to transport Burke to the Virgin Islands to participate in the hearing would pose an undue financial burden. Respondent further argues that an evidentiary hearing is not necessary pursuant to Virgin Islands Habeas Corpus Rule 2(g)(3) and that this rule allows the Court the discretion to allow Burke to appear by video conferencing. Burke objects to this motion.

While the Court readily acknowledges that the Virgin Islands Government is experiencing significant budgetary challenges and that there are costs associated with

transporting prisoners to correctional institutions outside of the Territory, Respondent has submitted no documentation with regards to the costs associated with this endeavor. Thus, while the costs may be exorbitant, the Court cannot conclude that transporting Burke from Big Stone Gap, Virginia to St. Croix would pose an undue financial burden.

However, the Court issued the writ based on Burke's claim for ineffective assistance of counsel. Ultimately, the burden of proving this claim rests with the petitioner. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Respondent has filed a Return articulating the legal basis of Burke's confinement as well as addressing his claim for ineffective assistance of counsel. The fact that Burke has yet to file a Traverse in response to Respondent's Return is significant because Rule 2(g) of the Virgin Islands Habeas Corpus Rules authorizes the Court to exercise its discretion to allow a petitioner to appear by approved video-conference under certain conditions. Rule 2(g)(1) provides:

The Superior Court generally must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, a writ of habeas corpus has been issued, and the respondent has filed a return; *provided, however*, that an evidentiary hearing is not necessary if the submissions before the court, including any reply or traverse by the petitioner, reveal no factual disputes that are material to disposition of the issues raised in the petitioner, and the court makes written finding to that effect.

V.I. H.C.R. 2(g)(1) (emphasis in original). Moreover, as succinctly articulated by Justice Swan:

Conceivably, there will exist cases in which the Superior Court can easily examine the habeas petition, the People's return and accompanying exhibits, the petitioner's traverse (if any), and the record of the case, and soundly discern whether the habeas claims lack merit. And it is disconcerting to imagine a court having before it an ample record and materials clearly demonstrating that a petitioner's allegations are patently frivolous or false, but yet not being allowed the discretion to deny relief to that petitioner without first holding an evidentiary hearing.

Alexander v. People of the Virgin Islands, 65 V.I. 385, 398 (V.I. 2016) (Swan, J., concurring).

Rule 2(g)(3) grants the Court the discretion to “require that the petitioner appear by approved video-conferencing arrangements that provide two-way and visual connection.” The Court may do this only if the petitioner is afforded the means and opportunity for appropriate confidential consultation” with his attorney before, during, and after the proceedings. The Court is able to provide such an accommodation. Because Burke bears the burden of proving his claim for relief but has yet to file a Traverse, the Court will grant Respondent’s request to allow Burke to appear by video-conference in accordance with the rules.

B. Motion to Withdraw as Counsel

As indicated above, the Court appointed the OTPD to represent Burke in this matter. That appointment was based on 4 V.I.C. § 513(d) and 5 V.I.C. § 3524. *See Burke*, 2017 V.I. LEXIS 156, at *16-18. The OTPD seeks to withdraw from this representation for two main reasons: (1) the OTPD is better suited for those habeas corpus cases dealing with all legal issues with the exception of ineffective assistance of counsel; and (2) an attorney who currently works for the OTPD, Attorney Leslie E. Davis, worked as the law clerk for the judge who presided over Burke’s criminal trial “and researched and advised the Court on all matters pertaining thereto, including the Order ruling on the Rule 29 motion.” The Court rejects both of these arguments.

First, the OTPD presented not one scintilla of evidence, statute, or caselaw to support its assertion that that office is not capable of handling habeas cases involving ineffective assistance of counsel. The OTPD’s argument that it often provides legal advice to private counsel in other criminal cases and defending Burke in this case (or any other habeas case

where the petitioner asserts a claim for ineffective assistance of counsel) would require that office “[t]o now second guess their decisions can/may create animosity between the [OTPD] and private counsels” is of no legal or factual significance. Attorneys should not be so thin-skinned and get offended if another attorney challenges his/her conduct as part of a claim for ineffective assistance of counsel during a habeas corpus proceedings. This would elevate the feelings of counsel over the constitutional rights of a habeas petitioner. The Court finds this argument highly unpersuasive.

Second, the fact that an attorney who currently works for the OTPD was a former law clerk to the trial judge assigned to Burke’s case is also not a basis to permit withdrawal. The OTPD argues that that office “is one entity and criminal cases are discussed in the weekly attorney meeting among all of the public defenders” and that the “public defender often assists each other on cases and substitute for one another when feasible.” Mot. to Withdraw as Counsel at 2. If the court were to accept this reasoning, the OTPD would be allowed to withdraw from representing any criminal defendant if it currently employs an attorney who served as a former law clerk for the judge who presides over the criminal case. The Court is well aware that the OTPD (as well as the Virgin Islands Department of Justice) currently employs attorneys who served as law clerks for current sitting judges. The Court is unaware of any statute, rule, or regulation that would require the withdrawal of a public defender’s office simply because that office currently employs a former law clerk who actively assisted the trial judge in a case involving a criminal defendant who is currently being represented by the public defender’s office.

Moreover, although not cited, the Court has reviewed the applicable Virgin Islands Rules of Professional Conduct,² and sees no conflict with the OTPD continuing to represent Burke once adequate safeguards and screening procedures are imposed to ensure that Attorney Davis not participate in any discussions concerning this case as well as the underlying criminal case.³ See *State v. McKinley*, 860 N.W.2d 874, 887 (Iowa 2015) (“Concerns arising from prior or concurrent representations by other public defenders in the same office can be resolved through screening procedures.”). Accordingly, the Court rejects the OTPD’s argument that, under the facts and arguments presented in this matter, the disqualification of one public defender requires the automatic disqualification of the entire office. See *Asch v. State*, 62 P.3d 945, 953 (Wyo. 2003) (rejecting “automatic disqualification of assistant public defenders” because the public defender’s office is not equivalent to a firm.).

C. Motion for Continuance

Finally, Burke, through the OTPD, seeks a continuance of the February 2, 2018 hearing because the OTPD needs more time to review Respondent’s Return which that office did not receive until January 17, 2018, and contained approximately 1,127 pages.⁴ Respondent does not object to a continuance. The Court finds that Burke has demonstrated good cause and will grant the motion for continuance.

² See Virgin Islands Rules of Professional Conduct 211.1.7, 211.1.8, 211.1.9, 211.1.10, and 211.1.11.

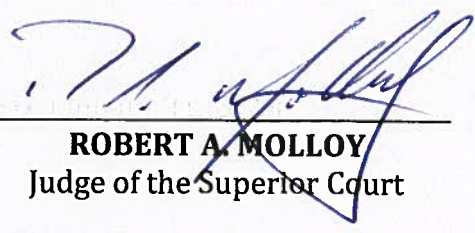
³ The Court notes that the OTPD stated in its motion that “petitioner Randy Burke has waived any conflict that might arise due to public defender Leslie E. Davis’, Esq. past employment as the trial judge’s law clerk...” Mot. to Withdraw as Counsel at 2.

⁴ The Court’s record indicates that Respondent filed a Return on December 14, 2017.

III. CONCLUSION

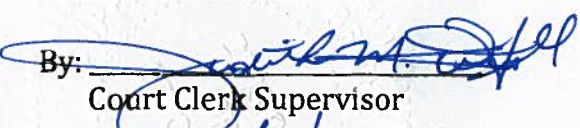
Accordingly, for the reasons stated above, the Court will grant Respondent's motion to allow Burke to appear via video conference and thus, the BOC is not required to transport him to the Virgin Islands at this time. Additionally, the Court will deny the OTPD's motion to withdraw as counsel for Burke. Finally, the Court will grant Burke's motion for continuance and will continue the February 2, 2018 hearing date to February 21, 2018. An appropriate Order follows.

DATED: January 31, 2018


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 2/1/18