

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: QUINCY G. McRAE,
Appellant.

S. Ct. Civ. No. 2020-0024

Re: Super. Ct. Civ. Nos. 174/2017, 175/2017,
189/2017 (STX); Misc. No. 21/2020 (STX)

Consolidated Cases:

S. Ct. Civ. No. 2020-0022

S. Ct. Civ. No. 2020-0024

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

Considered: May 11, 2021

Filed: May 27, 2021

Cite as: 2021 VI 10

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

APPEARANCES:

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

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Quincy G. McRae, Esq., and the People of the Virgin Islands appeal from the Superior Court's February 18, 2021 opinion and order holding McRae in civil contempt and directing him to either pay a \$250 fine or to develop and implement a formal plan to ensure that the Department of Justice promptly notifies the Superior Court of changes in assistant attorney general case assignments. They also appeal its March 13, 2020 order soliciting certain private attorneys and the Office of the Territorial Public Defender to provide it with input and feedback on that proposed

formal plan. For the reasons that follow, we affirm the finding of civil contempt and the assessment of the \$250 fine but vacate the portions of the February 18 and March 13, 2021 orders permitting McRae to develop and implement a formal plan in lieu of paying the \$250 fine.

I. BACKGROUND

¶ 2 The People charged Jerris T. Browne, Gregory Christian, and Syed Gilani with numerous offenses stemming from an alleged scheme to defraud the government of approximately \$2,000,000 in grant money awarded to the Virgin Islands Bureau of Motor Vehicles (“BMV”). Assistant Attorney General John E. Tolud, Esq. initially appeared as counsel for the People, although Assistant Attorneys General Alexandra Bynum, Esq. and Damon Watson-Willis, Esq. appeared at certain pretrial conferences without entering notices of appearance.

¶ 3 Although the Superior Court directed that discovery be concluded by October 27, 2017, and for jury selection and trial to commence on May 14, 2018, it extended those deadlines due to the impact of Hurricanes Irma and Maria on the Virgin Islands. On January 4, 2018, Gilani filed a motion, which his co-defendants joined, requesting that the people re-produce discovery that it had purportedly “dumped” in “a large box full of documents, none of which were Bates stamped, marked or identified in any other manner.” (J.A. 10.) The Superior Court granted the motion, directed the People to re-produce discovery in an orderly format and to allow the defendants to inspect all physical and intangible items, including computer hardware, by May 30, 2018, and correspondingly continued jury selection and trial to December 10, 2018.

¶ 4 On June 1, 2018, Gilani filed a motion to conduct a site visit of the BMV offices on St. Croix to view the current state of the computer hardware. The People did not oppose the motion, but instead offered to facilitate the site visit. As a result, the Superior Court ordered the People to provide it with a date certain for the site visit by July 10, 2018. The People, however, did not do

so. Therefore, the Superior Court issued an order on July 16, 2018, directing the People to comply.

¶ 5 McRae, the Chief of the Criminal Division of the Department of Justice for the District of St. Thomas-St. John, entered his notice of appearance on July 18, 2018, and filed an informational motion on that same day stating that the People could not yet comply with the July 16, 2018 order, but representing that he would discuss all outstanding issues with Tolud and subsequently provide the Superior Court with the location and date of the site visit. McRae filed another informational motion on July 25, 2018, which represented that all attorneys were available for a site visit on August 9, 2018, at a time to be set by the Superior Court. As a result, the Superior Court officially scheduled the site visit for 10 a.m. on August 9, 2018.

¶ 6 Nevertheless, on August 8, 2018, Assistant Attorney General Tiffany A. McLean, Esq. entered a notice of appearance in the matter, and on the same day Assistant Attorney General Joseph Ponteen—who did not file a notice of appearance—filed an objection to the site visit, purportedly on behalf of McRae. The Superior Court overruled the objection and directed the parties to proceed with the site visit. It also ordered the People to clone the BMV computer file servers and provide the defendants with copies of the cloned servers by August 31, 2018.

¶ 7 On the August 31, 2018 deadline, McLean filed a motion for extension of time with the Superior Court, which represented that Bynum had coordinated with the Federal Bureau of Investigation (“FBI”) to clone the servers, but that the FBI would not be able to send agents to the Virgin Islands until September or October 2018, would take a week to clone the servers and an additional two weeks to provide copies to the defendants, and then would need another six to twelve months to complete a forensic analysis. The Superior Court granted the motion and held a status conference on October 9, 2018, during which it ordered the People to notify it in writing as to how it intended to proceed.

¶ 8 The defendants filed motions to dismiss the information for lack of a speedy trial, and the People moved to continue the December 10, 2018 trial date. The Superior Court, in a December 6, 2018 order, granted the People's motion, but stated that its decision to continue the trial did not constitute a ruling on the speedy trial motion, and scheduled a hearing on that motion for January 29, 2019. The Superior Court further ordered the People to file a notice advising of when the FBI would complete its forensic analysis and to provide a date certain by which the People would be ready to proceed to trial.

¶ 9 On December 14, 2018, McRae filed a notice on behalf of McLean which simply reiterated that the FBI would complete the forensic analysis within six to twelve months and did not provide a date for when the People would be ready for trial. That same day, the Superior Court issued an order directing McLean to show cause as to why she should not be held in contempt and scheduled the show cause hearing for January 29, 2019, together with the hearing on the motion to dismiss. In a second order issued on December 14, 2018, the Superior Court rescheduled jury selection and trial for March 9, 2020.

¶ 10 McLean did not appear at the January 29, 2019 show cause hearing. Instead, McRae appeared, and stated that McLean had been out on medical leave, and that he would assume responsibility for prosecuting the cases. The Superior Court continued the show cause hearing, heard arguments on the motion to dismiss, orally denied the motion without prejudice, and directed McRae to file a report every two months regarding the status of the completion of the FBI's forensic analysis. These oral orders were subsequently memorialized in a February 1, 2019 order, which further directed that the People file its first status report on February 15, 2019. McRae filed a status report on February 14, 2019, and McLean then filed a second status report on March 4, 2019. However, the People did not file any subsequent status reports.

¶ 11 The Superior Court, in a January 10, 2020 order, scheduled a status conference for January 30, 2020. Neither McLean nor McRae appeared at the status conference; instead, Ponteen appeared without entering a formal notice of appearance and stated that -- although he was not the prosecutor assigned to these cases -- the People would be ready for trial on March 9, 2020. Later that day, the Superior Court issued an order directing McLean and McRae to show cause in person on February 7, 2020, as to why they should not be held in contempt for not filing the bimonthly status reports, reinstating the December 29, 2018 show cause order directed to McLean, and further directing McLean to show cause for her failure to appear.

¶ 12 After receiving a courtesy copy of the show cause order by e-mail after it was signed but before it was entered by the clerk, McRae filed a motion to withdraw as counsel on January 30, 2020 and directed that all correspondence involving the case be sent to the St. Croix office of the Department of Justice. On February 5, 2020, McRae moved to reconsider and quash the show cause order, which the Superior Court denied on February 6, 2020. McRae appeared at the February 7, 2020 hearing personally and with Solicitor General Pamela R. Tepper, Esq. as counsel, but McLean did not appear. During the hearing, the Superior Court was advised that McLean had resigned her employment with the Department of Justice on January 2, 2020 and had relocated to the United States mainland. The Superior Court did not address any matters pertaining to McLean because she was not present to defend herself but proceeded with the hearing with respect to McRae. After hearing arguments, the Superior Court orally found McRae in civil contempt and fined him \$250. McRae orally moved for reconsideration, asking that the Superior Court hold the People in contempt instead of him personally, and the Superior Court stated it would take that motion under advisement.

¶ 13 On February 14, 2020, the People filed a motion to dismiss the case against the three

defendants without prejudice, which the Superior Court granted. The Superior Court subsequently memorialized the portion of its oral decision holding McRae in civil contempt in a February 18, 2020 opinion and order. However, the Superior Court purported to grant McRae’s oral motion for reconsideration, and stated that it would,

hold the \$250[] sanction in abeyance, *provided* that Attorney McRae, as a supervisory attorney with the Virgin Islands Department of Justice, works with the other supervisors within the Department of Justice to develop and implement a formal plan, which may take the form of a recommendation to the Advisory Committee on Rules to propose a rule to the Supreme Court of the Virgin Islands for promulgation . . . to ensure what occurred here—several public attorneys “disappeared” without notice and without designating successor counsel—does not happen again.

(J.A. 21.) The Superior Court directed McRae to advise it within 14 days as to whether he intended to pay the \$250 fine or instead develop and implement a formal plan, and to inform it of the formal plan 28 days after providing such notice, failing which the fine would be automatically reinstated. In a separate order, the Superior Court directed the clerk to create a separate civil miscellaneous case for the purpose of docketing any future filings pertaining to the alternative to the monetary fine if it were elected.

¶ 14 On March 2, 2020, the People and McRae filed a notice of consent in which the People stated, on behalf of McRae, that consent is given to the terms and conditions of the February 14, 2020 order and that such a plan would be submitted within 28 days. However, the People and McRae filed a notice of appeal of the February 18, 2020 opinion and order with this Court on March 13, 2020. *See* V.I. R. APP. P. 5(a)(1).

¶ 15 On the same day that the People and McRae filed their notice of appeal, the Superior Court issued an order which reiterated that the clerk should open a new civil miscellaneous case under the caption *In re: Quincy G. McRae*. However, the Superior Court further directed Pamela L.

Colon, Esq., H. Hannibal O’Bryan, Esq., and Martial A. Webster, Sr., Esq.—counsel for the three defendants—to

strongly CONSIDER participating as *amicus curiae* on a pro-bono basis, or obtaining consent from substitute counsel to such participation, to advise the Court as to the “plan . . . [to] be submitted outlining the process and procedures to notifying the Superior Court when an Assistant Attorney General of record in a case is substituted by another Assistant Attorney General or is no longer associated [w]ith the Virgin Islands Department of Justice This Court . . . and the Supreme Court of the Virgin Islands have all expressed “concern regarding mismanagement in the Attorney General’s office which prejudices the defendants or interferes with the administration of justice.” Having representation from the Office of the Territorial Public Defender and the private bar, civil and criminal, provide input on the plan Attorney McRae will propose—including whether it should be memorialized as a rule of procedure . . . to reduce the likelihood that “mismanagement” will resurface under successor attorneys general—is vital to ensuring the administration of justice runs more smoothly. Accordingly, the Court hereby **DIRECTS** Attorney Pamela L. Colon, Attorney H. Hannibal O’Bryan, and Attorney Martial A. Webster, Sr. to **SERVE and FILE** a notice in the civil miscellaneous case within ten (10) days from the date of entry of this Order whether they will (1) provide input and feedback on a pro bono basis as *amici curiae*, (2) designate a successor amicus who consents, or (3) give notice declining to participate as *amicus* or designate a successor *amicus*. Successor *amicus*, if any, must consent in advance to participating on a pro bono basis and the notice shall so state.

(J.A. 30-31 (emphasis in original and internal citations omitted).) The People and McRae filed an amended notice of appeal with this Court on March 24, 2020, which stated that they also wished to appeal from the March 13, 2020 order.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 16 “This 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); *see also* 48 U.S.C. § 1613a(d). Because the underlying criminal cases against all three defendants have been dismissed, both McRae and the People may appeal from the February 18 and March 24, 2020 orders. *See In re Rogers*, 56 V.I.

325, 334 (V.I. 2012).

¶ 17 The standard of review for our examination of the Superior Court's application of law is plenary, while the trial court's findings of fact are reviewed for clear error. *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). However, the Superior Court's decision to hold an individual in contempt is reviewed only for abuse of discretion. *In re Najawicz*, 52 V.I. 311, 328 (V.I. 2009). The Superior Court abuses its discretion when it makes a decision that “rests upon a clearly erroneous finding of fact, an errant conclusion of law[,], or an improper application of law to fact.” *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012) (quoting *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009)).

B. Civil Contempt

¶ 18 “[T]he Superior Court has both statutory and inherent power to compel obedience to its orders by way of contempt.” *Rogers*, 56 V.I. at 334 (citing 4 V.I.C. §§ 243(4), 281; *In re Kendall*, 55 V.I. 888, 897 (V.I. 2011)). A contempt sanction may be either civil or criminal in nature. A civil contempt sanction is “intended to enforce the rights of private parties [and] to compel obedience to orders and decrees,” whereas the purpose of a criminal contempt sanction is “the vindication of the dignity and authority of the court.” *Najawicz*, 52 V.I. at 326 (quoting *U.S. Steel Corp. v. Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1273 (3d Cir. 1979)). “A party may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” *In re McIntosh*, S. Ct. Civ. Nos. 2012–0013, 0025, 2013 V.I. Supreme LEXIS 11, at *11, 2013 WL 991250 (V.I. Mar. 14, 2013) (unpublished) (quoting *In re Burke*, 50 V.I. 346, 352 (V.I. 2008)).

¶ 19 McRae and the People argue that the evidence failed to establish either that the failure to

comply was clear and unambiguous or that there was no diligent attempt to comply in a reasonable manner. They further argue that even if all of the elements of civil contempt are satisfied under the circumstances of this case, the Superior Court nevertheless lacked the authority to hold McRae in civil contempt pursuant to the separation of powers doctrine. Each claim is addressed in turn.

1. Clear and Unambiguous Order

¶ 20 McRae and the People maintain that the February 1, 2019 order was not clear and unambiguous because it provided “that the People of the Virgin Islands shall, every two months, beginning on February 15, 2019, file with the Court, a notice on the status of the completion of the report on the forensic analysis of the servers.” (J.A. 353.) Specifically, they argue that “the People, not Attorney McRae specifically, were given a directive to provide a status update on February 15, 2019, and every two months after that,” and that “[w]hile it is clear here what the Court wanted to accomplish, it is unclear who would be held responsible for failure to comply with the Order.” (Appellants’ Br. 18-19.)

¶ 21 We disagree. Title 3, section 114(a)(3) grants the Attorney General the power “to prosecute in the name of the People of the Virgin Islands, offenses against the laws of the Virgin Islands.” However, “the People of the Virgin Islands is a ‘legal fiction’ in that, the residents, or the people, of the Virgin Islands do not appear *en masse* and charge individuals with committing crimes.” *People v. Melendez*, 69 V.I. 108, 116 (V.I. Super. Ct. 2017). Rather, the “People of the Virgin Islands” is not a separate legal entity but is in effect a pseudonym for the Attorney General and the Assistant Attorneys General to whom the duty to prosecute may have been delegated pursuant to Title 4, section 113 of the Virgin Islands Code. Consequently, “[w]hen the party is the [government], acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless.” *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993).

¶ 22 In any case, even if there were a meaningful distinction between the “People of the Virgin Islands” and the Attorney General and Assistant Attorneys General who represent it, “with respect to the pertinent law governing civil contempt, a court order directed to a lawyer’s client is generally binding upon the lawyer as long as the lawyer has notice of the order.” *Loewinger v. Stokes*, 977 A.2d 901, 916 (D.C. 2009) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 105, cmt. d (2000)). See also *In re Carter*, 691 F.2d 390, 391-92 (8th Cir. 1982) (affirming imposition of civil contempt sanctions against a lawyer who filed a lawsuit on behalf of a client despite being aware that the client was prohibited from bringing the lawsuit due to a bankruptcy stay); *D.D. v. M.T.*, 550 A.2d 37, 50 (D.C. 1988) (“Even a stranger can be held in contempt for violation of a court order if he or she has notice of it and acts in concert or privity with the party against whom the order is directed.”). The record in this case reflects that McRae entered his notice of appearance on July 18, 2018 and made no attempt to withdraw that appearance until January 30, 2020. The February 1, 2019 order expressly states that the “[t]he People of the Virgin Islands were represented by and through Assistant Attorney General Quincy G. McRae,” and directed that the order be served on McRae. (J.A. 352-53.) Moreover, McRae clearly recognized that he remained counsel to the People and was aware of the February 1, 2019 order as well as his obligation to comply with its terms, in that he filed the first required status report on February 14, 2019.¹ Therefore, we hold that the February 1, 2019 order was clear and unambiguous in that

¹ In our recent opinion affirming the Superior Court’s decision to dismiss the criminal charges against the defendants without prejudice, we noted that “[a]pparently, after McClean’s removal and the transfer of the case to the DOJ’s St. Croix office, no Assistant Attorney General was assigned to the case before Assistant Attorney General Joseph Ponteen became attorney of record in approximately January 2020.” *Browne v. People*, 2021 VI 9 ¶ 37. The assignment referenced in that opinion, however, was the internal assignment within the Department of Justice, and not an appearance before the Superior Court.

McRae was aware that its terms applied to him as counsel to the People.

2. Diligence

¶ 23 McRae and the People further argue that the evidence failed to establish that McRae did not diligently comply with the February 1, 2019 order in a reasonable manner. According to them, “McRae’s involvement ceased a year before the show cause and last orders of the Court,” in that the record reflected that McLean had entered a notice of appearance on August 8, 2018, and thereafter “assumed the management of the case,” and that after McLean’s resignation the Deputy Attorney General decided to transfer the case to the St. Croix Division of the Department of Justice, with Ponteen assuming responsibility. (Appellant’s Br. 20-21.)

¶ 24 Again, we disagree. It is well-established that when a second attorney files a notice of appearance on behalf of a party, it does not—standing alone—effectuate the withdrawal of the first attorney from the matter, but rather obligates both attorneys to represent the party. *In re Morgan*, 2020 VI 1U ¶12. Although McLean entered her appearance on August 8, 2018, McRae did not concurrently move to withdraw as counsel or otherwise take any action to notify the Superior Court that he did not intend to have any further involvement in the matter. On the contrary, even after McLean entered her appearance, McRae continued to actively participate as counsel in the matter, including filing the December 14, 2018 notice, appearing at the January 29, 2019 hearing, and filing the February 14, 2019 status report.

¶ 25 In their appellate brief, McRae and the People cite to the non-binding decision of the Superior Court in *Joseph v. Public Employees Relations Board*, 68 V.I. 425, 430 (V.I. Super. Ct. 2018), for the broad proposition that an assistant attorney general may withdraw from a case without court approval “because counsel of record is the Virgin Islands Department of Justice” and not an individual assistant attorney general. The *Joseph* court reached that conclusion based

on its understanding that “[w]hen an attorney who is associated with or is a member of a law firm makes an appearance in a case, it is the law firm who appears as attorney of record for the party, not the individual attorney working on the case.” *Id.* However, to support that proposition, the *Joseph* court cited to no legal authority other than a law review article, which itself does not stand for that proposition in that it only states that “[c]orporate clients who hire outside counsel usually understand that they are represented by the law firm, not any one individual lawyer within the firm.” *Id.* (quoting Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes–Oxley*, 49 VILL. L. REV. 725, 750 (2004)). Not only is there absolutely no basis in Virgin Islands law for a doctrine that it is law firms and not individual attorneys who enter appearances on behalf of clients in litigation, but all pertinent court rules, statutes, and precedents of this Court universally stand for the opposite proposition: that it is individual attorneys, and not law firms, that represent clients. *See, e.g., Morgan*, 2020 VI at ¶ 12; V.I.S.CT.R. 201-204 (providing for admission of attorneys to the Virgin Islands Bar); V.I.S.CT.R. 211.1.1 (“A lawyer shall provide competent representation to a client.”); 211.1.2(b) (“A lawyer’s representation of a client”); 211.1.2(c) (“A lawyer may limit the scope of the representation”); 211.1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client”); 211.1.7(a) (“[A] lawyer shall not represent a client if”); 211.1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” except in certain prescribed circumstances); 211.1.16 (“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if. . . .”); V.I. R. CRIM. P. 2 (“‘Attorney for the government’ means . . . the Attorney General of the United States Virgin Islands or an authorized assistant” or “any other attorney authorized by law to conduct proceedings under these rules as a prosecutor”); V.I. R. APP. P. 36(a)

(“All persons admitted to the Virgin Islands Bar . . . may appear before the Supreme Court and are subject to all conditions of practice as recognized in the Supreme Court).

¶ 26 Indeed, even if we were to assume *arguendo* that McRae could withdraw as counsel for the People without leave of court, obtaining court approval is only one of several prerequisites to withdrawing representation. As the Superior Court correctly recognized, providing notice to the court of an intent to withdraw as counsel is a separate and distinct requirement from obtaining approval to withdraw from the court. (J.A. 16-17.) Moreover, Rule 211.1.16 of the Virgin Islands Rules of Professional Conduct requires that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests.” V.I.S.Ct.R. 211.1.16(d).

¶ 27 Here, the Superior Court not only found that McRae never provided it with notice, but that he also took no steps to ensure that the People continued to meet their obligations under the February 1, 2019 order or otherwise, and simply absolved himself of them after the case had been internally reassigned. This is particularly egregious given that McRae, as Chief of the Criminal Division, was a supervisory attorney who was required to make reasonable efforts to ensure that the Department of Justice “has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” V.I.S.Ct.R. 211.5.1(a); *accord*, *United States v. Sarcinelli*, 667 F.2d 5, 6 (5th Cir. 1982) (“[T]he district judge could have cited the prosecutor for civil contempt and put her in jail The court could have called the United States Attorney to task as well; for, after all, he bears the ultimate responsibility for ensuring that his lawyers conduct themselves in conformance with the law.”). Consequently, the Superior Court committed no error when it found that McRae did not attempt to comply with the February 1, 2019 order with reasonable diligence.

3. Separation of Powers

¶ 28 McRae and the People further argue that even if the evidence is sufficient to sustain a finding of civil contempt, the Superior Court nevertheless lacked the authority to sanction McRae. Specifically, they maintain that the Superior Court, by holding McRae in civil contempt, committed “a clear violation of the Separation of Powers doctrine, which commands that it is the Attorney General’s role to hold Assistant Attorneys General accountable for their actions, if necessary.” (Appellant’s Br. 25-26.)

¶ 29 We reject this argument. It is certainly true that the Revised Organic Act of 1954, as the *de facto* constitution of the Virgin Islands, “implicitly incorporate[s] the principle of separation of powers into the law of the territory.” *Gerace v. Bentley*, 65 V.I. 289, 301 (V.I. 2016) (quoting *Kendall v. Russell*, 572 F.3d 126, 135 (3d Cir. 2009)). Pursuant to the Revised Organic Act, the Judicial Branch of the Virgin Islands possesses the same inherent authority and powers as the courts of the fifty states. *Balboni v. Ranger American of the V.I., Inc.*, 70 V.I. 1048, 1087-89 (V.I. 2019). This includes not just the inherent power of this Court to regulate the practice of law in the Virgin Islands, *see In re Campbell*, 59 V.I. 701, 709 (V.I. 2013), but the authority of all judicial officers in all courts of the Virgin Islands to regulate the proceedings before them and to compel obedience to their lawful orders by way of contempt or other sanctions. *See, e.g., In re Moorhead*, 63 V.I. 689, 693 (V.I. 2015).

¶ 30 Despite this overwhelming and well-established authority, McRae and the People maintain that “the separation of powers doctrine . . . prevents the Court from disciplining an individual [assistant] attorney general . . . despite the Court’s general contempt power” because doing so constitutes an “administrative decision.” (Appellant’s Br. 27.) It is true that both courts and individual judicial officers may exercise certain non-judicial powers incidental to fulfilling their

judicial duties, which are often characterized as administrative, such as hiring and firing court staff, promulgating court rules, and participating in the internal governance of the Judicial Branch. *See, e.g., Forrester v. White*, 484 U.S. 219, 228 (1988); *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980); *United States v. Ferreira*, 54 U.S. 40 (1851); *Scheehle v. Justices of the Supreme Court of the State of Arizona*, 120 P.3d 1092, 1107-08 (Ariz. 2005), *New York State Ass’n of Criminal Defense Lawyers v. Kaye*, 744 N.E.2d 556, 560-61 (N.Y. 2000); *State ex rel. Hash v. McGraw*, 376 S.E.2d 634, 636-38 (W.Va. 1988); *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979); *Ex Parte Farley*, 570 S.W.2d 617, 623 (Ky. 1978); *Barger v. Block*, 535 S.W.2d 337, 342 (Tenn. 1976). To determine whether an act done by a court or judicial officer constitutes a judicial power or an administrative or otherwise non-judicial act, relevant factors to consider include whether,

- (1) the precise act is a normal judicial function;
 - (2) the events occurred in the judge’s chambers;
 - (3) the controversy centered around a case then pending before the judge;
- and
- (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity.

Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir. 1999).

¶ 31 McRae and the People, however, cite to absolutely no legal authority to support their claim that a court is exercising an administrative or otherwise non-judicial power when it holds an attorney in civil contempt. Nor could they, given that every court to consider the question has emphatically held that “a judge’s act with respect to the issuance of a contempt order . . . patently involves a judicial function.” *Giron v. Chaparro*, 167 Fed.Appx. 716, 720-21 (10th Cir. 2006); *see also Figueroa v. Blackburn*, 208 F.3d 435, 443 (3d Cir. 2000) (determining “[t]here can be little doubt that holding an individual in contempt is an act normally performed by a judge”);

Crooks v. Maynard, 913 F.2d 699, 700 (9th Cir. 1990) (concluding that a judge’s contempt order, even against a non-litigant, is clearly a judicial act); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985) (stating that “[t]here is no question” the judge’s acts, including contempt sentence, are “judicial acts”); *Patten v. Glaser*, 771 F.2d 1178, 1179 (8th Cir. 1985) (affirming decision that judge who issued contempt sentence performed function normally performed by a judge acting in his judicial capacity and therefore, it constituted a judicial act); *Dean v. Shirer*, 547 F.2d 227, 230 (4th Cir. 1976) (determining that judge who imposed a contempt sanction performed a judicial act). Consequently, the separation of powers doctrine did not preclude the Superior Court from holding McRae in civil contempt for his failure to comply with the February 1, 2019 order.²

C. Submission of Formal Plan in Lieu of Fine

¶ 32 Finally, McRae and the People argue that the Superior Court erred when in its March 13, 2020 order it invited counsel for the three co-defendants to contribute to the formal plan and advise the Superior Court as purported *amicus curiae*. This arrangement, they contend, constituted a

² In their brief, McCrae and the People cite to *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984), for the proposition that “the Third Circuit Court of Appeals suggested when the government violates court discovery orders it, and by extension, the United States Attorney and Assistant United States Attorneys may be immune from court discipline.” (Appellant’s Br. 23-24.) However, the cited language in the *Starusko* opinion not only constitutes dicta but stands for precisely the opposite proposition – that attorneys representing the government are not immune from contempt sanctions even if the government itself may be immune:

A litigant who refuses to obey a direct order of the court ordinarily may be cited for contempt. Here, however, the litigant is the United States of America, and although we do not decide, we are not at all confident that the government, *qua* the government, as distinguished from a specific officer, agency, or precise identifiable unit of that government, may be subject to penalties of fine or imprisonment—the normal sanctions for civil and criminal contempt.

Starusko, 729 F.2d at 263 (emphasis added).

substantive change to the February 18, 2020 order which negated their March 2, 2020 consent, in that they did not contemplate that the Superior Court would review or approve the plan or that two private attorneys and an attorney from the Office of the Territorial Public Defender would have the opportunity to influence the internal affairs and management of the Department of Justice to such an extent.

¶ 33 We agree. As a threshold matter, the Superior Court erred in even offering McRae the option of submitting a plan in lieu of paying the \$250 fine. “[T]he purpose of a civil contempt sanction is to either compel obedience or to compensate for disobedience.” *In re Meade*, 63 V.I. 681, 687 (V.I. 2015). Had the underlying litigation remained ongoing, providing McRae with the option to develop and implement a formal plan in lieu of paying a fine could have potentially facilitated continued compliance with the February 1, 2019 order. But, by the time it issued its February 18, 2020 opinion and order—in which it, for the first time, offered McRae the option of filing a formal plan in lieu of paying the \$250 fine—the Superior Court had already granted the People’s motion to dismiss all charges against all defendants without prejudice, and thus there was no longer any need to compel obedience to the February 1, 2019 order since dismissal of all charges necessarily eliminated the need for the People to provide bimonthly status reports on the progress of the FBI’s forensic analysis or to otherwise advise the Superior Court on its readiness for a trial which would never take place. Therefore, at that point, the Superior Court could only hold McCrae in civil contempt to compensate it for the costs associated with his earlier non-compliance, such as holding the show cause hearing. By providing McRae the option to dispense with a \$250 fine payable to the Superior Court in favor of developing and implementing a formal plan, the civil contempt sanction “los[t] its compensatory nature.” *Meade*, 63 V.I. at 687.

¶ 34 The civil contempt sanction became even further divorced from the legitimate purpose of

compensation when the Superior Court in effect modified the terms of the February 18, 2020 order through its March 13, 2020 order when it expressly invited counsel for the defendants to appear as purported *amicus curiae* in the miscellaneous civil matter created for purposes of filing the plan to “provide input” and make a recommendation as to “whether it should be memorialized as a rule of procedure.” (J.A. 31.) The February 18, 2020 order holding McRae in civil contempt gave him the option of not paying the \$250 fine contingent upon him “instead meet[ing] and confer[ing] with other supervisors within the Virgin Islands Department of Justice to develop and implement a formal plan” and for him to “inform[] the Court . . . of the formal plan” by the stated deadline. (J.A. 6-7.) Although the Superior Court stated that the formal plan “may take the form of a recommendation to the Advisory Committee on Rules to propose a rule to the Supreme Court of the Virgin Islands for promulgation,” it never mandated that the plan take this form. (J.A. 6.) And while the Superior Court, in a second order entered on February 18, 2020, ordered the clerk to create a miscellaneous civil case for purposes of accepting the plan, it directed that the clerk notify McRae of the case number, and made no mention of providing such notice to counsel for the defendants. (J.A. 30.) Thus, at no point did either of the February 18, 2020 orders give any indication (1) that the Superior Court intended to review or otherwise evaluate the plan; (2) that the attorneys representing the three defendants would even have access to the plan, let alone have the opportunity to critique and evaluate it; or (3) that the plan may be converted into a proposed rule of procedure even if it did not originally take that form.³ In fact, the Superior Court expressly

³ In fact, it is not clear why such a rule would even be necessary, given that Rule 211.1.16 of the Virgin Islands Rules of Professional Conduct already requires that “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation,” V.I.S.Ct.R. 211.1.16(c), and “shall take steps to the extent reasonably practicable to protect a client’s interests” upon terminating representation. V.I.S.Ct.R. 211.1.16(d).

stated in its March 13, 2020 order that it was imposing these additional conditions out of its “concern regarding mismanagement of the Attorney General’s office,” thus eliminating even the pretense that this alternative sanction was being imposed for a compensatory purpose. (J.A. 31.) Consequently, we vacate the March 13, 2020 order and the portion of the February 18, 2020 order authorizing the filing of a plan as an alternative to the \$250 fine, and instead direct that McRae pay the \$250 fine as a sanction for his civil contempt. *See Meade*, 63 V.I. at 688 (modifying civil contempt sanction which permitted the contemnor to pay a fine to either the court or a charitable organization so that the fine could only be paid to the court).⁴

III. CONCLUSION

¶ 35 The Superior Court committed no error when it held McRae in civil contempt, in that its February 1, 2019 order was clear and unambiguous and McRae failed to diligently comply with it in a reasonable manner. Moreover, the Superior Court possessed the authority to hold McRae in

⁴ In its appellate brief, McRae and the People contend that the March 13, 2020 order violated the separation of powers doctrine because “the Attorney General is charged with the sole responsibility for the management of the Department of Justice and its staff.” (Appellant’s Br. 31 (citing 3 V.I.C. §§ 113-14).) It is not necessary for this Court to consider this constitutional issue given that the Superior Court exceeded its authority fashioning a sanction wholly divorced from the permissible purposes of the civil contempt power. *See Azille v. People*, 59 V.I. 215, 227 (V.I. 2012) (adopting the doctrine of constitutional avoidance). However, it bears repeating that the power of the Attorney General to administer the Department of Justice is not absolute and cannot be exercised in a manner that infringes on the authority of the other two branches of government. For instance, the Attorney General cannot administer the Department of Justice in a manner that is inconsistent with laws duly enacted by the Legislature, *see* 3 V.I.C. § 114(a)(12), and cannot hire personnel to prosecute cases or otherwise practice law who have not been admitted by this Court to the Virgin Islands Bar, *see Campbell*, 59 V.I. at 712-13. While it may very well be the case that the Superior Court’s March 13, 2020 order placed such an undue burden on the authority of the Attorney General so as to constitute constitutional error, the fact that a court may have taken some action which in some way impacts some aspect of the management of an Executive Branch agency is not, without more, sufficient to violate the separation of powers doctrine. *See Mistretta v. United States*, 488 U.S. 361, 381 (1989); *United States v. Sczubelek*, 402 F.3d 175, 187 (3d Cir. 2005); *United States v. Neyens*, 831 F.2d 156, 161-62 (7th Cir. 1987).

civil contempt notwithstanding his employment as an Assistant Attorney General since the power to hold an attorney in contempt is a quintessential judicial power. Nevertheless, the Superior Court erred when it granted McRae the option to develop and implement a formal plan in lieu of paying a \$250 fine, in that this alternative sanction bore no relation to the legitimate purpose of compensating the Superior Court for the costs associated with McRae's non-compliance with the February 1, 2019 order. Accordingly, although we affirm the portion of the February 18, 2020 opinion and order holding McRae in civil contempt and imposing a \$250 fine, we vacate the March 13, 2020 order and the portion of the February 18, 2020 opinion and order permitting McRae to develop and implement a formal plan as an alternative to paying the \$250 fine.

Dated this 27th day of May, 2021.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Natasha Illis
Deputy Clerk

Dated: May 27, 2021