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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ALEJANDRO VELAZQUEZ,	)	S. Ct. Civ. No. 2025-0014
Appellant/Plaintiff,	)	Re: Super. Ct. Civ. No. 384/2017 (STX)
	)	
v.	)	
	)	
GOVERNMENT OF THE VIRGIN	)	
ISLANDS,	)	
Appellee/Defendant.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Yvette Ross-Edwards

Considered: November 12, 2025
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BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice;
 and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Martial A. Webster, Sr., Esq.
Law Office of Martial A. Webster, Sr.
St. Croix, U.S.V.I.
Attorney for Appellant,

Lauren M. Boudreaux, Esq.
United States Virgin Islands Department of Justice
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Alejandro Velazquez (“Velazquez”) appeals from the February 14, 2025 order of the Superior Court denying his petition for habeas corpus. For the reasons stated below, we affirm the judgment of the Superior Court.

I. BACKGROUND

¶ 2 In the early hours of June 18, 2012, Wilberto Bennett (“Bennett”) and Hector Osorio (“Osorio”) were in the parking lot of a bar getting ready to leave when they were approached by another man. Bennett heard Osorio acknowledge the man as “Alejandro.” When Bennett heard this, he glanced at the man Osorio was talking to and recognized Velazquez. When Osorio reached his right hand out to shake the man’s hand, the man began to raise his own hand, which was holding a gun. Bennett then saw the man fire the gun at Osorio, striking him in the right hand. Bennett froze, and he and the man stared at each other until the man finally fired at and struck Bennett, causing Bennett to fall to the ground. While Bennett was on the ground, the man approached him and nudged him with his foot. This prompted Bennett to open his eyes and look at the man, whom Bennett again recognized as Velazquez. The man then fired at Bennett again, striking him twice more before fleeing.

¶ 3 Police Officers Kirk Frank and Juan Concepcion responded to the scene. Bennett told them that the man who shot him was a friend from high school by the name of Alejandro Gonzalez. He gave them a physical description of the man, noting the scar on the right side of his face, and he told them that the man lived in a white duplex next to a different bar.¹ He was then transported to the hospital.

¶ 4 The officers went to the duplex Bennett had described and met Velazquez, who had a different last name but fit the physical description Bennett gave, including the scar on the right side of his face. They asked Velazquez for identification, Velazquez gave them his passport photo,

¹ Bennett testified that, a few months before the shooting, he and Velazquez were involved in an altercation where he punched Velazquez in the face several times. Bennett was wearing multiple rings on each hand, and the rings sliced Velazquez’s face, leaving a noticeable scar on the right side.

and they took it with them to the hospital. Officer Frank showed Bennett the photo, and Officer Concepcion asked Bennett if the man in the photo was the man who shot him. Bennett told them that it was the man who shot him, but he indicated to the officers that he believed the photo was old because, in the photo, Velazquez did not have a scar on the right side of his face.

¶ 5 Velazquez was arrested the same day of the incident, on June 18, 2012, for the shooting and injury of Bennett and Osorio and later charged with eight felony offenses.² His trial on these charges began on February 17, 2015. After trial ended on February 20, 2015, the jury found him guilty on all charges. On July 27, 2015, the trial court³ sentenced Velazquez, and entered its judgment and commitment on August 17, 2015.

¶ 6 On October 19, 2015, Velazquez filed a direct appeal with this Court claiming that (1) the evidence was insufficient to support convictions for attempted first-degree murder, possession or use of a firearm, and failure to report a firearm, (2) the testimony identifying him as the individual who shot the victims was insufficient and unreliable, and (3) the trial court committed error when it failed to give a jury instruction on the lesser included offense of attempted first-degree murder. We rejected these claims on the merits and affirmed Velazquez's convictions. *Velazquez v. People*, 65 V.I. 312, 324 (V.I. 2016).

² Velazquez was charged with the following felony offenses: (1) attempted first degree murder (in violation of 14 V.I.C. § 922(a)(1) & 331(1)); (2) first degree assault (in violation of 14 V.I.C. § 295(1)); (3) unauthorized possession of a firearm during the commission of a crime of violence (in violation of 14 V.I.C. § 2253(a)); (4) first degree assault (in violation of 14 V.I.C. § 295(1)); (5) unauthorized possession of a firearm during the commission of a crime of violence (in violation of 14 V.I.C. § 2253(a)); (6) possession of ammunition (in violation of 14 V.I.C. § 2256(a)); (7) failure to report firearms obtained outside or brought into the Virgin Islands (in violation of 23 V.I.C. § 470(a)); and (8) first degree reckless endangerment (in violation of 14 V.I.C. § 625(a)).

³ "Trial court" refers to the tribunal that presided over Velazquez's trial while "Superior Court" refers to the tribunal that presided over Velazquez's habeas corpus proceedings.

¶ 7 Just over a year after the decision in his direct appeal, Velazquez filed a petition for a writ of habeas corpus on August 29, 2017. On March 19, 2021, the Superior Court⁴ decided that Velazquez made out a *prima facie* case for habeas relief on all claims except one—that the evidence was insufficient to sustain his convictions—because the Superior Court found this claim had already been rejected by this Court on direct appeal and was therefore procedurally barred. On May 28, 2021, the Government filed a corrected return, and on February 11, 2022, Velazquez filed his traverse. Velazquez did not request an evidentiary hearing, and the Superior Court rendered its decision on the petition, return, traverse, and trial transcript. On February 14, 2025, the Superior Court denied habeas relief. Velazquez timely filed his notice of appeal with this Court on March 14, 2025, pursuant to Virgin Islands Rule of Appellate Procedure 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 8 The Virgin Islands 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 is a final order . . . from which an appeal may lie.” *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 292 (V.I. 2014) (quoting *Suarez v. Gov't of the V.I.*, 56 V.I. 754, 759 (V.I. 2012)). Because the Superior Court’s February 14, 2025 order denied Velazquez’s petition for writ of habeas corpus, it is a final order and this Court has jurisdiction to hear this appeal. “[T]his Court exercises plenary review over the dismissal of a habeas corpus

⁴ The Honorable Jomo Meade was originally assigned to Velazquez’s case, and he issued the writ of habeas corpus. At the end of Judge Meade’s term, the Honorable Yvette Ross-Edwards was assigned to his caseload. She later rendered the decision denying habeas relief.

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)).

B. Denial of Petition for Habeas Corpus

¶ 9 In his petition, Velazquez alleged ineffective assistance of counsel in violation of the Sixth Amendment because his trial counsel failed to adequately investigate the charges, witnesses, and evidence against him. The Superior Court did not hold an evidentiary hearing; rather, it based its decision on the documentary record.⁵ See V.I. H.C.R. 2(g)(1). After considering the record and Velazquez’s arguments, the Superior Court determined that Velazquez failed to make out a claim for ineffective assistance of counsel and that he failed to show that the trial court made erroneous evidentiary rulings.

C. Ineffective Assistance of Counsel

¶ 10 Velazquez raises two claims that trial counsel violated his Sixth Amendment right to effective assistance of counsel. First, he argues that his trial counsel’s failure to challenge the out-of-court identification conducted by Officer Concepcion at the hospital on the night of the shooting was a violation of this right. Second, he argues that his trial counsel’s failure to impeach Bennett with his initial misidentification of the shooter was also a violation of this right.⁶

⁵ “In general, the Superior Court ‘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.’” *Cascen v. Gov't of the V.I.*, 74 V.I. 512, 517 (V.I. 2021) (quoting V.I. H.C.R. 2(g)(1)). “However, the right to an evidentiary hearing is not absolute and 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 petition, and the court makes a written finding to that effect.’” *Id.* (quoting V.I. H.C.R. 2(g)(1)). The Superior Court in this case did not make a written finding that the submissions before it revealed no factual disputes that are material to disposition of the issues raised in the petition. This oversight was an error, but it was harmless because the record reveals no material factual dispute.

⁶ Velazquez also argues that Bennett’s testimony was unreliable because, when testifying at trial, Osorio did not recall the shooter’s identity because he was under the influence of drugs and alcohol at the time of the shooting. While it is true that Osorio’s testimony did not corroborate Bennett’s, this Court has held that the testimony of a single witness may be sufficient to sustain a conviction. See, e.g., *Percival v. People*, 62 V.I. 477, 487 (V.I. 2015); *Connor v. People*, 59 V.I. 286, 290-91 (V.I. 2013); *Francis v. People*, 57 V.I. 201, 211-12 (V.I. 2012).

¶ 11 We evaluate Velazquez’s claims of ineffective assistance of counsel under the Supreme Court’s two-prong test articulated in the landmark case of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Williams v. People*, 78 V.I. 691, 700 (V.I. 2024); *Burke v. Prosper*, 70 V.I. 866, 874 (V.I. 2019); *Corraspe v. People*, 53 V.I. 470, 479-80 (V.I. 2010); *see also St. Louis v. People*, No. 2007–086, 2008 WL 5605712, at *4 (V.I. Oct. 10, 2008) (unpublished); *Ibrahim v. Gov’t of the V.I.*, No. 2007–76, 2008 WL 901503, at *2 (V.I. Jan. 18, 2008) (unpublished). In *Strickland*, the Supreme Court held that to prove ineffective assistance of counsel, a defendant must show: (1) unreasonableness—that their trial lawyer’s conduct fell below an objective standard of reasonableness; and (2) prejudice—that there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the criminal proceeding would have been different. 466 U.S. at 687, 692-94. Additionally, when evaluating whether there was prejudice under *Strickland*, a reasonable probability—that, but for counsel’s unprofessional errors, the outcome of the criminal proceeding would have been different—“is a probability sufficient to undermine confidence in the outcome.” 466 U.S. at 694. However, it is well established that “[t]actical decisions about which competent counsel might disagree do not qualify as objectively unreasonable.” *Cascen v. Gov’t of the V.I.*, 74 V.I. 512, 519 (V.I. 2021) (quoting *Suarez*, 56 V.I. at 760). When scrutinizing trial counsel’s performance, “we must ‘indulge a “strong presumption” that counsel’s conduct falls within a wide range of reasonable professional assistance.’” *Suarez*, 56 V.I. at 760 (quoting *Bell v. Cone*, 535 U.S. 685, 702 (2002)).

1. Out-of-Court Identification

¶ 12 Velazquez argues that his trial counsel provided ineffective assistance because he failed to challenge the out-of-court identification conducted by Officer Concepcion, who, instead of using a photo array, used a single photo obtained from Velazquez to show Bennett. The Superior Court

did not address this argument in its February 14, 2025 order because it characterized it as a new claim. However, the Superior Court should have addressed this claim, as it was not a new claim.

¶ 13 In his *pro se* “Motion For Amend to Habeas Corpus,” filed well before the writ was granted, Velazquez argued that:

[T]he reliability of the identification procedure must be examined Petitioner claim [sic] that the identification photo display process was unfair because the police officer expert had shown to the victim one old photo id that was in petitioner [sic] wallet. The police had supposed to process photos or smaller grouping of “six packs,” to show to the victim. The police officer expert are [sic] also supposed to keep record of which photographs are shown to victim, and the order in which they are shown

The Superior Court should have construed this language liberally. As we have previously indicated, courts are to give *pro se* “litigants ‘greater leeway in dealing with matters of . . . pleading.’” *Lake v. Gov’t of the V.I.*, 69 V.I. 843, 850 (V.I. 2018) (quoting *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (2011)). “[C]laims pled by such litigants are to be read liberally, so as to make the strongest arguments that they suggest.” *Lake*, 69 V.I. at 850; see *Moorhead v. Mapp*, 62 V.I. 595, 601 n.6 (V.I. 2015) (observing that the “Superior Court is required to apply a more liberal pleading standard” to documents filed by a *pro se* litigant to “determine what claims are actually being asserted”). Because the Superior Court failed to apply a liberal pleading standard to the *pro se* petition Velazquez filed, it failed to recognize the out-of-court identification claim when Appellate counsel refined it in the traverse as follows: “Police Officer Concepcion testified that he and Officer Frank went to Defendant’s home without a warrant and obtained his identification card and presented it to Bennett for identification purposes. Bennett identified Petitioner from that single ID. Trial counsel never challenged the out of court identification.” Although the Superior Court incorrectly characterized it as a new claim, the claim was not new when it was raised in the traverse, and the Superior Court should have addressed it in its decision.

¶ 14 Despite the Superior Court's failure to address this claim, we will not remand because this is a legal issue and it is in the interest of judicial economy for this Court to address the issue on appeal rather than require additional time and scarce judicial resources for it to be addressed by the Superior Court on remand. *See Rivera-Moreno*, 61 V.I. at 314 (“When, on appeal, this Court applies a plenary standard of review to the underlying Superior Court decision, it can . . . overlook the Superior Court's procedural error and analyze the legal issue for the first time on appeal.”); *see also Suarez*, 56 V.I. at 759 (“[I]neffective assistance of counsel[] is a legal issue and thus our review is plenary.”).

¶ 15 Velazquez argues that his trial counsel “allowed testimony on an improper pretrial identification without challenging the out of court identification in court.” Out-of-court identification procedures create a substantial likelihood of misidentification, and thus violate a defendant's due process rights, when those procedures are (1) unnecessarily suggestive and (2) unreliable. *Richards v. People*, 53 V.I. 379, 388-89 (V.I. 2010) (“show-up” in which defendant was the only person who met witness's description of assailant's hairstyle was unnecessarily suggestive); *see Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537 (1982). The burden was on Velazquez initially to show that the out-of-court identification was impermissibly suggestive. *See Ostalaza v. People*, 58 V.I. 531, 549 (V.I. 2013).

¶ 16 Here, the police officers showed Bennett a lone photo of Velazquez, whom Bennett then identified as his shooter. The practice of showing a suspect singly, rather than in a group, to a witness “has been widely condemned” because of the likelihood of misidentification. *Richards*, 53 V.I. at 385 (quoting *Stovall*, 388 U.S. at 302); *see Biggers*, 409 U.S. at 195, 199 (where the police,

purportedly unable to find anyone who resembled the defendant for a lineup, called the victim to the police station and had the defendant walk past the victim and say “shut up or I’ll kill you”); *Nassar v. Vinzant*, 519 F.2d 798, 801 (1st Cir. 1975) (observing that “[s]ingle photo identifications do, indeed, present so serious a danger of suggestiveness as to require that they be given extremely careful scrutiny”). When “we conclude that the identification procedure was suggestive, we must next determine whether the suggestive procedure was necessary under the circumstances of this case.” *Richards*, 53 V.I. at 389-90 (discussing whether emergency or exigent circumstances existed that made it impractical for law enforcement to conduct a less suggestive identification procedure). In *Manson v. Brathwaite*, while rejecting a strict exclusionary rule for unnecessarily suggestive out-of-court identifications and concluding that there was no due process violation, the Supreme Court accepted that a police procedure was suggestive and unnecessary where only one photo was shown to the witness for identification in the absence of an emergency or exigent circumstances. 432 U.S. at 109, 116.

¶ 17 In this case, the officers showing Bennett only the photo of Velazquez and asking him if the person in the photo was the person who shot him was impermissibly suggestive because the officers encouraged Bennett to identify Velazquez as his shooter by singling him out as the person that they suspected of the crime. *See Simmons v. United States*, 390 U.S. 377, 383 (1968) (“[The danger of misidentification] will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.”). Moreover, the record does not disclose any urgency justifying the officers in disregarding the need to prepare a photo array. The circumstances here are similar to those in

Brathwaite where officers failed to put together a photo array although there were no exigent circumstances which prevented them from doing so. 432 U.S. at 108-09.

¶ 18 Nevertheless, although an identification procedure may be unduly suggestive and unnecessary such as the one here, the testimony at trial about the identification itself may not violate due process if the identification is nevertheless reliable. *Richards*, 53 V.I. at 391 (out-of-court identification was reliable and, therefore, not violative of due process despite being unnecessarily suggestive). “As the Supreme Court stated in *Brathwaite*, ‘reliability is the linchpin in determining admissibility of identification testimony.’” *Id.* at 390-91 (quoting *Brathwaite*, 432 U.S. at 114). Some of the factors a court must consider to determine whether the identification possessed sufficient indicia of reliability such that, under the totality of the circumstances, its admission did not violate Velazquez’s due process rights are those set forth in *Biggers*:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of the witness’ prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

Richards, 53 V.I. at 386 (quoting *Biggers*, 409 U.S. at 199-200).

¶ 19 Applying the first *Biggers* factor to the facts in this case, Bennett had the opportunity to view Velazquez when he first saw Osorio greet Velazquez just before Velazquez shot Osorio. Bennett’s degree of attention weighs in favor of reliability. When Bennett fell to the ground after Velazquez shot him, he had another opportunity to see Velazquez’s face and recognized him when Velazquez got close enough to him to nudge him with his foot. The accuracy of Bennett’s prior description also weighs in favor of reliability. Although Bennett initially identified his shooter as Alejandro Gonzalez instead of Alejandro Velazquez, Velazquez fit the description that Bennett gave to officers at the scene, including the scar on the right side of his face and his residence being

a white duplex next to a bar. Bennett identified Velazquez with certainty. Immediately upon seeing the photo, he told officers that the person in the photo was the person who shot him, but that he believed the photo was old because Velazquez lacked the identifiable scar on his face in the photo. Finally, Bennett made the identification while the incident was still fresh in his mind. Only a few hours passed between the shooting and the identification, as the photo identification occurred later in the morning after the shooting occurred. Since Bennett had known Velazquez since school, previously had been in a fight with Velazquez where Bennett left a distinctive, permanent scar on his face, accurately described the physical characteristics of Velazquez to Officers Concepcion and Frank, and correctly indicated where Velazquez lived, the identification was reliable independent of Bennett making the out-of-court identification based on the photo. Thus, although the identification procedure using the photo was unnecessarily suggestive, Velazquez's argument nevertheless fails because the identification was reliable due to Bennett's opportunity to view Velazquez at the time of the shooting, his degree of attention, the accuracy of his prior description of Velazquez, his certainty when he made the identification, and the relatively brief amount of time between the shooting and the identification. Because Bennett's identification of Velazquez was reliable under the totality of the circumstances, the out-of-court identification did not violate Velazquez's right to due process.

¶ 20 Additionally, Velazquez's argument fails because trial counsel's cross-examination of Officer Concepcion did not fall below the standard of reasonable assistance. "[R]eview of counsel's performance is generally highly deferential, as there is a presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" *Powell v. People*, 59 V.I. 444, 453 (V.I. 2013) (quoting *Strickland*, 466 U.S. at 689). Velazquez does not contest the

government's assertion that Velazquez's trial counsel "is an experienced trial attorney ."⁷ While trial counsel did not move to suppress the admission of the out-of-court identification before trial or object to it during the direct examination of Officer Concepcion, counsel did cross-examine Officer Concepcion about the identification procedure and his failure to use a photo array rather than a single photo. The colloquy went as follows:

Q: Mr. Velazquez voluntarily gave you a picture of him . . .

A: Yes.

Q: -- so that you could go with it?

A: Yes.

Q: All right. So you took the picture to the hospital.

A: Yes, I did.

Q: And you showed it to Mr. Bennett?

A: Officer Frank did.

Q: You were there?

A: Yes.

Q: Okay. So you and Officer Frank showed the picture to Mr. Bennett.

A: Yes.

Q: You asked him if that's the person who shot him.

A: Yes.

Q: Did you show him any other pictures?

A: No, I didn't.

Q: Now, you are aware of photo arrays. You've seen those in the course of your . . . employment; correct?

A: Yes.

Q: And you are also aware that the preferable method for someone to identify someone is to put them in a photo array; correct?

A: Yes.

Q: All right. That wasn't done in this case.

A: No.

Q: You just handed him one picture and said, is that the guy?

A: Yes.

Q: And you were aware that he -- he's known Velazquez for years.

A: Yes.

Q: And when you brought him that photo, he instantly knew that was Alejandro Velazquez.

A: Yes.

⁷ According to Virgin Islands Habeas Corpus Rule 2, "[a]ny material allegation of the respondent's return not contested in the petitioner's traverse is deemed admitted for purposes of the proceeding." V.I. R.H.C. 2(f).

(*Id.*).

¶ 21 Trial counsel may reasonably have thought it was unnecessary to try to exclude the out-of-court identification because even if a motion to suppress would have been successful, Bennett might still have been permitted to identify Velazquez at trial due to his various independent recollections about Velazquez since Bennett went to school with Velazquez, previously got into a fight with Velazquez in which he permanently scarred Velazquez's face, and knew where Velazquez lived. *See Pittman v. Warden, Pontiac Corr. Ctr.*, 960 F.2d 688, 691 (7th Cir. 1992) (trial counsel's decision not to object to admission of out-of-court identification testimony was within range of professional competence because witnesses would probably have been allowed to testify about their eyewitness identification of defendant even if the objections to lineup testimony had been sustained). Trial counsel could have reasonably concluded that, rather than trying to prevent the admission of the out-of-court identification, attacking the officer's procedures—as he did—would be an effective defense. *See Hawkins v. Sec'y, Fla. Dep't of Corr.*, 219 Fed. Appx. 904, 907 (11th Cir. 2007) (*per curiam*) (trial counsel's decision that it was defendant's best defense to allow out-of-court identifications to come in and then attack procedures used by detective was not ineffective assistance where counsel believed that out-of-court identifications were overly suggestive and likely inadmissible but that in-court identifications were admissible based on witness's independent recollections of offender at time of crime). Thus, trial counsel's representation did not fall below the objective standard of reasonable professional assistance under *Strickland*.

¶ 22 Velazquez's argument that trial counsel did not provide effective assistance by failing to prevent the out-of-court photo identification from being admitted also fails because he has not shown that there is a reasonable probability that, but for counsel's performance, the result of his

trial would have been different. The trial result would not have changed because Bennett's in-court identification was sufficient to identify Velazquez under the *Biggers* reliability factors. Bennett told the police officers that his shooter lived in a white duplex next to a bar and that he had a notable scar on his face. This information was confirmed by the police officers and, along with Bennett seeing Velazquez before and during the shooting, would have been enough to reliably identify Velazquez. The outcome of the trial would not have changed even if trial counsel had been able to further undermine the out-of-court identification or have it excluded because Bennett likely would have been permitted to make an in-court identification based on his independent recollections of the shooting and his knowledge of Velazquez based on their prior relationship. *See Amador v. Quarterman*, 458 F.3d 397, 415 (5th Cir. 2006) (defendant not prejudiced where suggestive out-of-court identification did not render subsequent in-court identification inadmissible). *Compare Brown v. Burt*, 65 Fed. Appx. 939, 942-43 (6th Cir. 2003) (counsel's failure to move to suppress victim's out-of-court identification of defendant was not prejudicial where victim had independent basis to make in-court identification of defendant because of nature and duration of time that victim spent observing defendant before shooting), *with Cossel v. Miller*, 229 F.3d 649, 654-56 (7th Cir. 2000) (counsel's failure to move for exclusion of evidence about suggestive out-of-court procedures and victim's in-court identification of defendant was ineffective assistance because there was reasonable probability that result of trial would have been different since the in-court identification was not reliable and the objections would have been sustained).

¶ 23 Thus, Velazquez's claim that his trial counsel provided ineffective assistance by not taking steps to have testimony about the out-of-court identification excluded fails because counsel's decision to cross-examine Officer Concepcion about the out-of-court identification procedure was

reasonable, and Velazquez has not demonstrated that there is a reasonable probability that, but for trial counsel's performance, the result of his trial would have been different.

2. Bennett's Statement Misidentifying the Shooter

¶ 24 Velazquez also argues that his trial counsel provided ineffective assistance because counsel failed to impeach Bennett with his initial misidentification of the shooter. In its February 14, 2025 order, the Superior Court ruled that this claim was procedurally barred because it was already addressed on direct appeal by this Court. The Superior Court was incorrect because Velazquez raised the misidentification in a different context on direct appeal than he did in his habeas petition.

¶ 25 We have held that an issue raised and addressed on the merits on direct appeal by this Court is procedurally barred from being raised again in a petition for writ of habeas corpus. *Blyden v. Gov't of the V.I.*, 64 V.I. 367, 379-80 (V.I. 2016). In *Blyden*, we held that the petitioner's argument that a firearm was not properly authenticated at trial, which was addressed and rejected on direct appeal before this Court, was procedurally barred, while his argument that the government intentionally fabricated the firearm evidence, which was not raised on direct appeal, was not procedurally barred. *Id.* For an issue to be procedurally barred from being raised through a habeas petition because it has already been raised on direct appeal, the issue must have been raised in the same context in both proceedings. *See id.* at 377-80 (barring the petitioner's claim that a firearm was not properly authenticated, which had been raised and rejected on direct appeal, while permitting his claim that the same firearm evidence was intentionally fabricated, which had not been so raised); *cf. id.* at 377 n.5 (explaining that *Rodriguez's* bar of a sufficiency challenge "must be understood in [the] context" of the sufficiency issue having been decided on direct appeal).

¶ 26 In his direct appeal, Velazquez argued that the evidence against him was insufficient in part because Bennett initially incorrectly identified the shooter as Alejandro Gonzalez rather than

Alejandro Velazquez. *Velazquez*, 65 V.I. at 322. While we decided, on the merits, the issue of Bennett's initial misidentification of the shooter as it relates to sufficiency of the evidence, Velazquez did not previously raise the issue as an ineffective assistance of counsel claim. *Id.* Additionally, this Court has held that:

[A] claim of ineffective assistance of counsel will rarely be procedurally barred in a habeas proceeding, since this 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, 64 V.I. at 381 (quoting *Codrington v. People*, 57 V.I. 176, 191 (V.I. 2012)).

¶ 27 Because the issue was not raised in the same context in both proceedings, Velazquez's claim that his trial counsel provided ineffective assistance by failing to impeach Bennett with his initial misidentification is not procedurally barred. Thus, the Superior Court erred in determining that the claim was procedurally barred, and that court thus should have decided the issue on the merits.

¶ 28 "Ordinarily, when the Superior Court enters judgment on one basis, but fails to consider alternative arguments that were raised by the parties, this Court will decline to address those alternate issues in the first instance and instead direct the Superior Court to do so on remand." *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 541 (V.I. 2015). The Superior Court's error, however, does not necessarily require a remand. "When, on appeal, this Court applies a plenary standard of review to the underlying Superior Court decision, it can, 'in the interests of judicial economy, exercise [its] discretion' to overlook the Superior Court's procedural error and analyze the legal issue for the first time on appeal." *Rivera-Moreno*, 61 V.I. at 314. The issue of ineffective assistance of counsel is a legal issue. *Suarez*, 56 V.I. at 759. It is in the interest of judicial economy for this Court to address this on the present appeal rather than remanding it to the Superior Court because

it raises only a legal issue, the Superior Court's failure to address it ultimately resulted in denial of Velazquez's petition, and remand will unnecessarily require more of the parties' and this Court's resources and time.

¶ 29 Velazquez's first claim of ineffective assistance of counsel is premised on trial counsel's "total[] fail[ure] to cross-examine the prosecution's key witness, Bennett, with his prior inconsistent statement[]" identifying the shooter. This is factually inaccurate. Velazquez's trial counsel, during his cross-examination of Bennett, specifically asked about the inconsistency in identification:

Q: Now, you also told the police that the person who shot you was Alejandro Gonzalez.

A: Yes. I made a mistake, because I have a father-in-law with that same last name and with the same first name. My father-in-law before.

Q: So you identified your father-in-law.

A: I identified his last name being that, because I had forgotten his last name.

Q: Despite the fact that you've known Alejandro Velazquez for years.

A: Basically, yes.

¶ 30 Contrary to Velazquez's contention, his trial counsel did cross-examine Bennett about the misidentification for the purpose of impeaching his testimony. The cross-examination on that issue was brief, but trial counsel is not required to spend any prescribed amount of time trying to impeach a witness. There is also no prescribed method of cross-examination. Indeed, a cross-examination technique that works for one lawyer may be totally unsuccessful for another. *See generally Ford v. United States*, 917 F.3d 1015, 1024 (8th Cir. 2019) (cross-examination techniques generally entrusted to the professional discretion of counsel); *Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir. 2002) ("Decisions about 'whether to engage in cross-examination, and if so to what extent and in what manner, are . . . strategic in nature' and generally will not support an ineffective assistance claim.") (quoting *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987)). Ultimately, it is

up to the jury to determine the credibility of the witness on the stand. *Ventura v. People*, 64 V.I. 589, 606-607 (V.I. 2016). Here, the record establishes that trial counsel asked Bennett about the inconsistency and elicited what was presumably the response Velazquez wanted—that Bennett had initially told the police that someone by the name of Alejandro Gonzalez was the shooter.

¶ 31 Although we need not reach the *Strickland* analysis because Velazquez's argument is factually incorrect, trial counsel's decision to conduct a brief cross-examination of Bennett to impeach him would have been a tactical decision that fell within the broad range of reasonable professional assistance. Even if it were not, Velazquez has failed to meet his burden of showing that there is a reasonable probability that, but for trial counsel's performance, the result of his trial would have been different. Despite Bennett initially giving police officers the wrong last name, the other information he supplied to them about Velazquez, like the location and description of his place of residence and his physical description, would have been sufficient to show that Bennett could reliably identify him. Bennett also later corrected himself and explained the initial misidentification. He misidentified Velazquez only once, and the misidentification happened in the immediate—and no doubt shocking—aftermath of the shooting. Thus, Velazquez's first claim of ineffective assistance of counsel falls flat because there was no failure on trial counsel's part to impeach Bennett with his statement misidentifying the shooter, and even if there was, Velazquez does not prove that his trial representation was deficient under the standards set forth in *Strickland*.

D. Admission of Evidence

¶ 32 In addition to the ineffective assistance of counsel claims, Velazquez raises evidentiary arguments that a bloody shirt and shorts admitted into evidence were unduly prejudicial under

Federal Rule of Evidence 403⁸ and that the trial court improperly permitted Reynold DeSouza (“DeSouza”) to testify as an expert witness after the Government’s late disclosure. These claims were not raised on direct appeal, and the Superior Court addressed the claims in its opinion.⁹

¶ 33 To determine whether Velazquez’s challenges to the trial court’s evidentiary rulings are cognizable on habeas corpus review, we first consider whether the claimed errors are constitutional in nature. This Court has recognized that there are two types of constitutional errors: structural and trial. *Rivera-Moreno*, 61 V.I. at 319. Structural errors are constitutional defects so egregious that they obviously affect the entire conduct of the trial and therefore ““can never be treated as harmless error.”” *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)); *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 336-37, 344-45 (1963)) (total deprivation of the right to counsel); *id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 515, 523 (1927)) (the case being presided over by a biased judge); *id.* (citing *Vasquez v. Hillery*, 474 U.S. 254, 262-66 (1986)) (unlawful exclusion of members of a certain race from a jury). Trial errors are errors implicating constitutional rights that occur during the presentation of the case to the jury ““and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether

⁸ Both Velazquez and the People improperly cite to Virgin Islands Rule of Evidence 403 rather than Federal Rule of Evidence 403. At the time of Velazquez’s trial, Superior Court Rule 7 read: “The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Evidence.” The Federal Rules of Evidence, therefore, governed at the relevant proceedings. We have, however, since adopted the Virgin Islands Rules of Evidence, *In re Adoption of Virgin Islands Rules of Evidence*, No. 2017-002, 2017 WL 1293843, at *1, *4-5 (V.I. Apr. 3, 2017), and repealed Superior Court Rule 7, *In re Amendments to Rules Governing the Superior Court of Virgin Islands*, No. 2019-003, 2019 WL 718966, at *1 (V.I. Feb. 15, 2019). Because the federal and local rules are virtually identical (the only change being added bullets for listed items in Virgin Islands Rule of Evidence 403), the analysis does not change.

⁹ While we ultimately agree with the Superior Court’s decision that the trial court did not err in admitting the bloody clothing, the Superior Court’s analysis of the issues relating to the bloody clothing was less than thorough. The Superior Court failed to separately analyze Velazquez’s habeas claims that the trial court: (1) erred in admitting the bloody clothing without confirming its relevance and authenticity; and (2) erred in admitting the bloody clothing over defense counsel’s objections under Rule 403 that the risk of unfair prejudice substantially outweighed the evidence’s probative value.

[the error] was harmless beyond a reasonable doubt.” *Rivera-Moreno*, 61 V.I. at 319 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)) (trial errors include “the wrongful admission of an involuntary confession or other evidence that should have been suppressed”); *see Roberts v. People*, 76 V.I. 555, 578-81 (V.I. 2022) (Fed. R. Crim. P. 16(a)(1)(E)(i) or *Giglio* violation was ultimately harmless).

¶ 34 On direct review, this Court has repeatedly affirmed rulings in cases involving various non-constitutional errors at trial, which are typically violations of procedural or evidentiary rules that do not rise to the level of violations of constitutional protections. *See Gonsalves v. People*, 70 V.I. 812, 851-53 (V.I. 2019) (prosecutor’s solicitation of irrelevant testimony from the victim’s mother was not a constitutional error); *Frett v. People*, 66 V.I. 399, 408-11 (V.I. 2017) (prosecutor’s improper comments about the presumption of innocence during rebuttal closing did not amount to constitutional error); *Woodrup v. People*, 63 V.I. 696, 719-20 (V.I. 2015) (error in admission of impermissible hearsay was not constitutional); *Fahie v. People*, 62 V.I. 625, 635-38 (V.I. 2015) (Superior Court’s error in giving an anti-CSI effect instruction was non-constitutional); *Simmonds v. People*, 59 V.I. 480, 502-03 (V.I. 2013) (admission of a prior inconsistent statement in violation of Federal Rule of Evidence 801(d)(1)(A) was a non-constitutional error); *Connor v. People*, 59 V.I. 286, 300 (V.I. 2013) (prosecutor’s improper solicitation of testimony about compromise attempt under Federal Rule of Evidence 408 was a non-constitutional error); *Ritter v. People*, 51 V.I. 354, 367-70 (V.I. 2009) (improper admission of expert opinion testimony from a doctor who was never qualified as an expert under 5 V.I.C. § 911 was a non-constitutional error).

¶ 35 Here, Velazquez does not argue that the trial court committed constitutional errors in either evidentiary ruling. He does not even attempt to frame these claims in terms of due process or any

other constitutional violation. Rather, he argues that the bloody clothes were improperly admitted under Rule 403 and that DeSouza should not have been permitted to give expert testimony because the Government failed to provide timely notice, which prejudiced Velazquez. He at no point explains how—or even if—either of these evidentiary rulings were violative of his constitutional rights. If these were errors, they were non-constitutional errors akin to the improper admission of the prior inconsistent statement in *Simmonds*, 59 V.I. at 502-03, and the improper admission of expert testimony in *Ritter*, 51 V.I. at 367-70.

¶ 36 We now turn to the question of whether challenges to non-constitutional evidentiary rulings are cognizable on habeas corpus review. The Virgin Islands habeas corpus statute does not impose harsh procedural bars on petitioners, and we have rejected the argument “that a habeas corpus petition is not a substitute for a direct appeal and cannot be used as a vehicle to litigate issues that could have been, but were not, previously raised.” *Rivera-Moreno*, 61 V.I. at 302. Under our habeas corpus rules, petitioners are not categorically barred from raising claims during habeas proceedings that could have been raised on direct appeal. *See id.*

¶ 37 But when this Court has reviewed claims raised in habeas proceedings that could have been brought on direct appeal, they have been claims alleging constitutional errors or those implicating the fundamental fairness of the trial process. For example, in *Blyden*, we held that a habeas petition may “challenge[] . . . the sufficiency of the evidence when not otherwise procedurally barred, since a conviction based on insufficient evidence presents an error of constitutional dimension that must be remedied.” 64 V.I. at 376-77. We also held that a habeas petition may raise the claim that the government fabricated evidence against the defendant because such fabrications are violations of due process despite the claim not being raised before on direct appeal. *Id.* at 380. In *Rivera-Moreno*, we held that a petition may raise, for the first time, the issue that the empanelment of a

biased juror violated the petitioner's constitutional right to an impartial jury. 61 V.I. at 301-04, 318. And in *Bryan*, this Court considered the petitioner's argument, raised for the first time on appeal from a habeas decision, that his guilty plea before the Superior Court violated his right to due process. *Bryan v. Gov't of the V.I.*, 56 V.I. 451, 457-58 (V.I. 2012).

¶ 38 While we have not yet considered the issue of whether non-constitutional evidentiary errors are cognizable in a habeas proceeding when the petitioner did not pursue the claims on direct appeal, we are not left without guidance. When the Virgin Islands Legislature adopts a statute that is identical or similar to one in effect in another jurisdiction, Virgin Islands courts typically adopt the source jurisdiction's construction of the statute that prevailed at the time of its adoption. *Rivera-Moreno*, 61 V.I. at 295-96. As discussed in *Rivera-Moreno*, "there is some uncertainty as to whether the Virgin Islands habeas corpus statute was modeled after the Puerto Rico or California habeas corpus statutes. . . ." *Id.* at 296. We went on to explain that "in the absence of any evidence that the Virgin Islands Legislature borrowed our habeas corpus statute from a particular jurisdiction, this Court considers as persuasive authority decisions of both the Supreme Court of Puerto Rico and the Supreme Court of California." *Id.* Notably, in 1947—a decade before our habeas corpus statute took effect—the Supreme Court of California held that habeas corpus is not "an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial." *Ex Parte Lindley*, 177 P.2d 918, 927 (Cal. 1947); *see also Ex parte Dixon*, 264 P.2d 513, 516 (Cal. 1953) (questions of alleged admission of irrelevant evidence and prosecutorial misconduct were not reviewable in a habeas corpus proceeding but were instead matters for consideration upon direct appeal). Puerto Rico similarly did not permit mere non-constitutional errors to be raised during habeas corpus petitions. *Ex parte Thomas*, 12 P.R. Dec. 370, 373 (1907) (writ of habeas corpus

cannot have the effects of an appeal and mere procedural irregularities or errors of law committed during trial cannot be examined through this procedure) (collecting cases); *see People v. Burgos*, 18 P.R. Dec. 72, 74 (1912); *Ex parte Huertas*, 22 P.R. Dec. 524, 527 (1915).

¶ 39 Beyond the case law from our statute's source jurisdictions, some courts have held that claims of mere errors in evidentiary rulings at trial are not generally cognizable in habeas proceedings. *See generally Philyaw v. Kelley*, 477 S.W.3d 503, 506 (Ark. 2015) (holding that a challenge to the admissibility of evidence is not cognizable in habeas proceedings); *Cammon v. Brigano*, 802 N.E.2d 656, 657 (Ohio 2004) (per curiam) (claim that "other acts" evidence was erroneously admitted at trial was not cognizable in a habeas proceeding). Other jurisdictions permit petitioners to raise evidentiary claims when they allege violations of constitutional magnitude. *See generally Hatcher v. McBride*, 650 S.E.2d 104, 110 (W. Va. 2006) ("[E]videntiary rulings respecting the admission of evidence are cognizable in habeas corpus only to the extent they violate specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair and thereby violate due process under the Fourteenth Amendment."); *People ex rel. Keitt v. McMann*, 220 N.E.2d 653, 655 (N.Y. 1966) ("[H]abeas corpus is available to test a claim that the introduction of certain evidence violate[s] . . . due process and the privilege against self incrimination.").

¶ 40 Additionally, our discussion in *Roebuck v. Government of the Virgin Islands* indicates that, to prevail in a habeas proceeding, a petitioner must prove that an otherwise non-constitutional error so infected the entire trial that the resulting conviction violated his constitutional rights. 75 V.I. 260, 263 n.2, 266, 271 (V.I. 2021). Although *Roebuck* concerned jury instructions rather than evidentiary rulings, and although we assumed cognizability there without deciding it, our approach was consistent with the principle reflected in the authorities discussed above: claims of error that

are not constitutional in themselves are reviewable in habeas, if at all, only through the constitutional guarantee of a fundamentally fair trial.¹⁰ See *Estelle v. McGuire*, 502 U.S. 62, 67-70 (1991) (habeas review unavailable for evidentiary rulings unless the error rendered the trial fundamentally unfair); *Hatcher*, 650 S.E.2d at 110.

¶ 41 Accordingly, to reconfirm the application of the principles discussed above, a petitioner is only permitted to challenge evidentiary rulings in a habeas corpus petition when they are made in violation of the petitioner's constitutional rights. Because Velazquez does not put forward an argument that the evidentiary rulings he challenges resulted in a violation of his constitutional rights, we will not entertain his evidentiary claims in this habeas review.

III. CONCLUSION

¶ 42 The Superior Court did not err when it denied Velazquez's petition for habeas corpus based on ineffective assistance of counsel claims because his trial counsel's conduct in not trying to prevent the out-of-court photo identification and Bennett's initial statement misidentifying the shooter from being admitted into evidence was reasonable. Additionally, the Superior Court did not err in its denial based on Velazquez's evidentiary claims because he did not make any claim or argument that the challenged evidentiary rulings amounted to constitutional violations. Accordingly, we affirm the Superior Court's February 14, 2025 order denying Velazquez's petition for habeas corpus.

¹⁰ While Velazquez preserved his evidentiary objections at trial, unlike the petitioner in *Roebuck*, he similarly failed to raise these claims on direct appeal. *Velazquez*, 65 V.I. at 325.

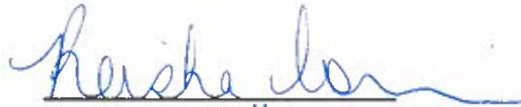
Dated this 21st day of August 2026.

BY THE COURT:



MARIA M. CABRET
Associate Justice

ATTEST:
DALILA E. PATTON, ESQ.
Clerk of the Court

By: 
Deputy Clerk //

Dated: 8/21/2026