SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	**CASE NO. ST-09-CR-450**
	)	
ASELMO FARRINGTON,	)	
	)	
Defendant/Petitioner.	)	
	)	

MEMORANDUM OPINION

Pending before the Court are Defendant's motion for constitutionally adequate attorney's fees,[1] omnibus motion,[2] motion for the appointment of a special prosecutor,[3] and motion for the Court to conduct an inquiry under *Codrington v. People of the Virgin Islands*,[4][5] together with various supplements and renewals. For the following reasons, Defendant's motions will be denied.

FACTUAL AND PROCEDURAL HISTORY

On September 4, 2009, Defendant was arrested for robbery,[6] and Marjorie R. Roberts, Esq., was appointed the following day to represent Defendant. Joseph A. DiRuzzo, III, Esq., of the Law Office of Marjorie Rawls Roberts, P.C., filed a demand for

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[1] Defendant filed his motion on September 20, 2011, and supplemented the motion on February 7, 2012; February 16, 2012; and August 3, 2012.

[2] Defendant filed his motion on February 23, 2012, and renewed it on May 14, 2012; the People filed a response on August 29, 2012; and Defendant filed a reply on October 2, 2012.

[3] Defendant filed his motion on May 14, 2012.

[4] 2012 WL 2949139, at *9 (V.I. 2012).

[5] Defendant filed his motion on August 3, 2012.

[6] On September 23, 2009, the People of the Virgin Islands charged Defendant with one count of robbery and two counts of grand larceny.

discovery on September 8, 2009, and performed the vast majority of the work in the case. Following a jury verdict of guilty on all counts, Defendant filed a motion for a new trial on the grounds that his Sixth Amendment right to a public trial was violated. This Court denied Defendant's motion for lack of evidentiary support,[7] and entered a Judgment of Conviction against Defendant for robbery and grand larceny.[8] The Supreme Court of the Virgin Islands affirmed the Judgment on August 23, 2011, but remanded the case instructing this Court to conduct an evidentiary hearing to determine whether Defendant's Sixth Amendment right to a public trial was violated. On September 20, 2011, defense counsel filed a "motion to require the territory to provide constitutionally adequate attorney's fees for the defense of the above-captioned trial." This Court conducted an evidentiary hearing on December 09, 2011, concerning Defendant's Sixth Amendment challenge, and found no evidence that Defendant's right to a public trial was violated.[9] The Court declined to address defense counsel's motion regarding attorney's fees for lack of jurisdiction, noting its understanding that the Supreme Court's remand was a record remand for the limited purpose of making evidentiary findings on whether Defendant's right to a public trial was violated. On January 20, 2012, the Supreme Court indicated that the August 23, 2011, remand was in fact a case remand because the Clerk of the Supreme Court had "chang[ed] the status of the case on the Virgin Islands Appellate Case Management System ("VIACMS") and Virgin Islands Supreme Court

[7] Defendant's motion was denied on May 7, 2010.
[8] The Judgment was entered on June 24, 2010.
[9] Under the impression that the Supreme Court's remand was a record remand, the Court issued an Order dated December 9, 2011, and entered December 12, 2011, that made findings of fact and proposed conclusions of law. Because the Supreme Court has subsequently made it clear that it has relinquished jurisdiction, this Court now realizes that it must draw its own conclusions of law. An Order will be issued to indicate its conclusions of law.

Filing System ("VISCEFS") to 'Closed.'"[10] As a result, the Supreme Court concluded that this Court has jurisdiction to entertain defense counsel's motion regarding attorney's fees. Subsequently, defense counsel filed a total of seven other submissions that essentially supplement his original motion for attorney's fees.

ANALYSIS

Defense counsel asserts that the Virgin Islands fee structure for appointed counsel in criminal cases "presents an unconstitutional barrier to effective representation" in Defendant's case. [11]

In *Codrington*, the Supreme Court of the Virgin Islands established that the Superior Court must inquire into a defendant's <u>pre-trial</u> complaints about his counsel's representation and "conduct specific and through questioning sufficient to elucidate counsel's degree of compliance with the applicable criteria of professional competence."[12] When the Superior Court fails to conduct an inquiry into counsel's pre-trial performance, the Supreme Court "must be convinced beyond a reasonable doubt that [the defendant's] allegations … would not have established that the representation fell below the standard set forth … in *Strickland v. Washington*, 466 U.S. 668 (1984) had the Superior Court made the inquiry."[13] To demonstrate ineffective assistance of counsel under *Strickland*, a petitioner must demonstrate: "(1) that performance of counsel fell below an objective standard of reasonableness; and (2) the errors of counsel prejudiced

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[10] *Farrington v. People of the Virgin Islands*, S. Ct. Crim. No. 2010-0030 (V.I. 2011).
[11] Defendant's motion, at page 2. Defendant's motion lacks page numbers, in which case the page references in this Opinion are approximations.
[12] *Codrington*, 2012 WL 2949139, at *9 (V.I. 2012).
[13] *Id.*

the defense."[14] The first condition obligates a petitioner to overcome the presumption that his counsel's conduct was "within the wide range of reasonable professional assistance"[15] and demonstrate that the "counsel's performance was actually deficient."[16] A court "deciding an actual ineffectiveness claim must judge the reasonableness of the counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[17] The second condition obligates the petitioner to establish that "the deficient performance prejudiced the petitioner to such a degree that there is doubt as to the accuracy of the trial or sentence."[18] If the Supreme Court can find "no basis on which the questioned attorney's conduct was constitutionally defective," the Superior Court's failure to inquire into a defendant's complaint would be considered harmless.[19]

With respect to post-trial challenges under *Strickland*, it is well established in this jurisdiction that "Sixth Amendment ineffective assistance of counsel claims ... are generally not entertained on direct appeal"[20] and "rarely, if ever, should … be decided in a motion for a new trial ...."[21] The proper forum for ineffective assistance of counsel claims is in a collateral proceeding.[22]

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[14] *Allong v. Government of V.I.*, 2012 WL 2579707, at *1-2 (D.V.I. 2012).
[15] *Strickland v. Washington*, 466 U.S. 668, 689-690 (1984).
[16] *Allong*, 2012 WL 2579707, at *1-2 (citing *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir.2001)).
[17] *Strickland,* 466 U.S. at 687–692.
[18] *Allong*, 2012 WL 2579707, at *1-2 (citing *Strickland*, 466 U.S. at 693-694).
[19] *Codrington*, at *8.
[20] *United States v. McLaughlin*, 386 P.3d 547, 555 (3d Cir. 2004).
[21] *United States v. Kennedy*, 354 Fed. Appx. 632, 637 (3d Cir. 2009); see also *Massaro v. United States*, 538 U .S. 500, 507 (2003) (few ineffective assistance of counsel claims are "capable of resolution on direct appeal").
[22] *Smalls v. Gov't of the V.I.*, 950 F.Supp. 698, 699-700 (D.V.I. 1996); see also *Whitney v. Horn*, 280 F.3d 240, 249 (3d Cir. 2002).

This proceeding is not the proper forum for the motion for attorney's fees, which raises effective representation issues post-trial. In addition, noticeably lacking in the motion is an "actual ineffectiveness claim" under *Strickland.* Instead, defense counsel contends that the fee structure "creates a *presumption* of ineffectiveness of counsel" and "an *inherent* conflict of interest;"[23] lists three "*possible* conflicts of interest;"[24] and makes the general assertion that "it is the indigent client who suffers from even *a subconscious desire* on the part of his lawyer to simply make a living"[25] (emphasis added).

Under *U.S. v. Cronic,*[26] prejudice may be presumed without inquiring into the attorney's actual performance only in certain types of cases, such as:

> (1) when the accused is denied the presence of counsel at a critical stage, resulting in the complete denial of counsel; (2) when counsel does not subject the prosecution's case to any meaningful adversarial testing; and (3) when counsel is placed in circumstances in which competent counsel very likely would be unable to render effective assistance.[27]

The third type of case is "limited to circumstances of such magnitude that the 'likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of

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[23] Defendant's motion, at page 2.
[24] Defendant's counsel contends the following: "(1) Given the absurdly low preparation fee, counsel has a strong financial interest in minimizing the time spent on his case, so he can earn more on his privately retained cases; (2) counsel has no incentive to request a continuance, even if a continuance is crucially needed, as continuances prolong the representation; [and] (3) counsel has no incentive to identify and research the issues because those issues may have to be raised before appellate courts." Defendant's motion, at page 9.
[25] *Id.*, at page 10.
[26] 466 U.S. 648, 662 (1984).
[27] *Henness v. Bagley*, 644 F.3d 308, 323 (6th Cir. 2011) (citing *Cronic, supra*).

the trial.'"[28] In general, the surrounding circumstances will "infrequently" justify a presumption of ineffectiveness."[29] The Third Circuit has applied the presumption in a "limited fashion" only "in cases where the denial of counsel would necessarily undermine the reliability of the entire criminal proceeding."[30]

At the time Defendant filed his original motion, court-appointed attorneys in the Virgin Islands earned $65.00 per hour for time expended in court and $45.00 per hour for time expended out of court. Effective October 7, 2011, the legislature of the Virgin Islands increased the minimum hourly rate for appointed counsel to $75.00 for all types of work.[31] [32] Although defense counsel challenges the fee structure for court-appointed cases, Defendant has shown no evidence that "unequivocally establishes that the surrounding circumstances completely deprived him of any meaningful opportunity to contest the [Government's] case."[33] Defense counsel adequately represented Defendant, despite counsel's complaint that the fee structure in the Virgin Islands is, in his opinion, "absurdly low"[34] preventing him from "earn[ing] a decent living."[35] Defense counsel

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[28] *Id.*, (citing *Cronic*, 466 U.S. at 659–60).
[29] *Florida v. Nixon*, 543 U.S. 175, 190 (2004).
[30] *Ditch v. Grace*, 479 F.3d 249, 256 (3d Cir. 2007).
[31] See 2011 V.I. Sess. Laws B. No. 29–0208, Act 7316, § 2(b). All appointed counsel's work after that date has been compensated at the higher rate.
[32] Defense counsel was actually paid $4,430.02 for attorney services in this matter. After counsel submitted a voucher for compensation and expenses, the Court made adjustments to remove duplicative charges and reduced compensation for work performed by paralegals. In addition, the Court authorized Defendant to expend up to $2,500.00 to retain an identification expert and $2,500.00 for an investigator. Despite the $2,500.00 limit, Defendant requested payment of $5,906.34 for the identification expert (96 hours at $250.00 per hour = $4,000.00 plus airfare, hotel and car/fuel expenses for $1,906.34). After additional submissions, the Court authorized payment to the identification expert of $4,906.34. Defendant's expense of $678.90 for an investigator was paid in full.
[33] *Minnick v. State*, 698 N.E.2d 745, 752 (Ind. 1998).
[34] Defendant's motion, at page 2.
[35] *Id.*, at page 9.

filed a plethora of substantive pre-trial motions and secured the services of an identification expert and an investigator,[36] which demonstrates the quality of his representation went far beyond that which is minimally mandated by the Constitution.

The Court also notes that defense counsel raised the issue of the fee structure for court-appointed attorneys nearly two years after Defendant's trial had ended and the Supreme Court affirmed his conviction, with the exception of a single evidentiary hearing on an issue wholly unrelated to counsel's compensation. In addition, the Court cannot find that the fee structure, either before or after Act 7316 was passed, was so inadequate that there was little likelihood that any lawyer would have provided effective assistance of counsel in this matter. As a result, the *Cronic* exception does not apply.

Moreover, because Defendant has failed to "identify the acts or omissions of counsel" that fall below the standard of reasonable professional judgment, there is no basis for this Court to conduct an evidentiary hearing under *Codrington* to determine whether defense counsel's conduct was constitutionally defective. In addition, there is no need to appoint a special prosecutor as there is no longer a case and controversy that persists in this matter. The Court will also decline to issue a new Judgment and Conviction since Defendant has already appealed the original Judgment and Conviction. As a result, Defendant's motions will be denied.

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[36] The motions defense counsel filed include: a motion to suppress suggestive post-arrest statements; a motion to dismiss the Information; a motion to suppress suggestive pre-trial identification; a motion to modify the conditions of pre-trial detention; and discovery motions. Defense counsel also filed a motion to qualify Dr. Fulero as an expert, and a motion to appoint Dr. Fulero as an expert witness and to appoint a private investigator.

An Order consistent with this Opinion shall follow.

Dated: October 29, 2012

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:
Lori Tyson
Court Clerk Supervisor 10/30/12

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS, **Plaintiff/Respondent,** **vs.** **ASELMO FARRINGTON,** **Defendant/Petitioner.**	**CASE NO. ST-09-CR-450**

ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendant's motion for constitutionally adequate attorney's fees, omnibus motion, motion for the appointment of a special prosecutor, and motion for the Court to conduct an inquiry under *Codrington v. People of the Virgin Islands* are DENIED; and it is

ORDERED that the hearing scheduled for November 8, 2012, in this matter is cancelled as the Court has disposed of all outstanding motions in compliance with the Supreme Court's remand; and it is

ORDERED that a copy of this Order and the accompanying Memorandum Opinion shall be directed to counsel of record.

Dated: October 29, 2012

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: __________
Lori Tyson
Court Clerk Supervisor 10/30/12