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VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RODNEY E. MILLER, SR.,

Appellant/Defendant,

v.

PEOPLE OF THE VIRGIN ISLANDS,

Appellee/Plaintiff.

) **S. Ct. Crim. No. 2020-0010**
) Re: Super. Ct. Crim. No. 425/2008 (STT)
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On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston

Considered and Filed: October 6, 2021

Cite as: 2021 VI 18

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
CURTIS V. GOMEZ, Designated Justice.¹

APPEARANCES:

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Appellate Public Defender

St. Thomas, U.S.V.I.

Attorney for Appellant.

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OPINION OF THE COURT

PER CURIAM.

¶ 1 This matter comes before the Court pursuant to a document filed by Appellant Rodney E.

¹ The Honorable Ive Arlington Swan is recused from this matter. The Honorable Curtis V. Gomez, a former judge of the United States District Court of the Virgin Islands, sits by designation pursuant to title 4, section 24 of the Virgin Islands Code.

Miller, Sr., on September 30, 2021, captioned “Motion for Designated Justice to Withdraw Consent for Appointment or to Recuse.”² Although the motion requests that Designated Justice Curtis V. Gomez recuse himself from this appeal for various reasons,³ Miller also asserts that the panel assigned to this appeal is illegally constituted since Justice Gomez purportedly lacks the statutory qualifications to serve as a Designated Justice.

¶ 2 As a threshold matter, it is a well-established practice in appellate courts that the decision of a Justice to recuse or not recuse himself or herself from a case is a personal decision that is not reviewable by his or her colleagues. *See, e.g., Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980) (Rehnquist, J.) (“[G]enerally the Court as an institution leaves such [recusal] motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer. . . .”); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 897, 897-98 (Jackson, J., concurring) (“There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.”); *State v. Henley*, 802 N.W.2d 175, 184 (Wis. 2011) (“[The movant’s] assumption that a majority of this

² Although Miller filed the motion on September 30, 2021—approximately one week before the scheduled oral argument in this appeal—the order appointing Justice Gomez as a Designated Justice in this case had been entered on April 26, 2021, with the Virgin Islands Judiciary Electronic Case Management System updated to reflect his appointment to the panel. The appointment of Designated Justice Gomez had also been reflected on the oral argument calendar that had been served on Miller’s counsel on September 10, 2021. Rule 19 of the Virgin Islands Rules of Appellate Procedure requires that a party notify this Court “promptly . . . in writing” after discovering grounds for potential judicial disqualification. Because the basis for seeking to disqualify Justice Gomez should have been known to Miller well before he filed his September 30, 2021 motion, he has failed to “promptly” notify this Court as required by Rule 19. Nevertheless, we exercise our discretion to consider the motion, given that Miller has called into question the legality of Justice Gomez’s designation without any legal basis. *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 568 n.6 (V.I. 2012).

³ Designated Justice Gomez, in an order entered on October 6, 2021, declined to recuse himself from this case.

court has the power to disqualify a judicial peer who has denied a motion to withdraw from a pending matter is without legal foundation.”); *Tighe v. Crosthwait*, 665 So.2d 1341, 1348-49 (Miss. 1995) (holding that a state supreme court, sitting en banc, lacks the authority to force a co-equal [J]ustice to recuse himself or herself from a case); *State ex rel. Cohen v. Manchin*, 336 S.E.2d 171, 175 (W. Va. 1984) (“[W]here a motion is made to disqualify or recuse an individual [J]ustice of this Court, that question is to be decided by the challenged [J]ustice and not by the other members of this Court.”); *In re Estate of Carlton*, 378 So.2d 1212, 1216 (Fla. 1979) (“[E]ach [J]ustice must determine for himself [or herself] both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.”). This same principle, however, does not extend to claims that the panel has been illegally constituted because one or more Justices fails to satisfy the constitutional or statutory requirements to serve. *See Hennington v. State*, 144 S.W.3d 42, 43 (Tex. App. 2004); *accord, Nguyen v. United States*, 539 U.S. 69 (2003). Therefore, while the decision to recuse or not recuse from this appeal is vested exclusively in the discretion of Designated Justice Gomez and is not subject to review by this Court, we will address the question of whether the designation of Justice Gomez to serve as a Designated Justice of this Court for purposes of this appeal is authorized by law.

Title 4, section 24 of the Virgin Islands Code provides, in pertinent part, that

In addition to the [J]ustices appointed under subsection 22(a), the Chief Justice may appoint any judge of a court of record in the Virgin Islands or any senior or retired [J]ustice to sit as a [D]esignated [J]ustice of the Supreme Court of the Virgin Islands. A retired judge may also be appointed as a [D]esignated [J]ustice of the Supreme Court, but only with the judge's consent. An appointment as a [D]esignated [J]ustice shall be for any specific cases that a regular [J]ustice of the Court is unable to hear for any reason, including illness, absence, or a conflict of interest. The [D]esignated [J]ustice shall sit as assigned by the Chief Justice, and while sitting shall have all the powers of an [A]ssociate [J]ustice.

4 V.I.C. § 24(a). Pursuant to this provision, the Chief Justice designated Justice Gomez—who

served as a Judge of the United States District Court of the Virgin Islands from 2005 to 2020—to sit on the panel assigned to hear this case after the recusal of Associate Justice Ive Arlington Swan.

¶ 3 Miller argues that section 24 does not permit a retired Judge of the District Court to serve as a Designated Justice of this Court. While the second sentence of section 24 expressly authorizes appointment of a “retired judge” to serve as a Designated Justice, Miller contends that Designated Justice Gomez is not a “retired judge.” According to Miller, because the first sentence permits the appointment of “any judge of a court of record in the Virgin Islands” as a Designated Justice, a “retired judge” must also have served on “a court of record in the Virgin Islands.” Miller asserts that the Superior Court of the Virgin Islands and the Supreme Court of the Virgin Islands are the only “court[s] of record in the Virgin Islands,” and that therefore Justice Gomez, as a retired judge of the United States District Court of the Virgin Islands, cannot serve.

¶ 4 We disagree that the phrase “court of record in the Virgin Islands” excludes the District Court. As a threshold matter, the Revised Organic Act expressly provides that

The judicial power of the Virgin Islands shall be vested in a court of record designated the “District Court of the Virgin Islands” established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

48 U.S.C. § 1611(a). Even if we were to assume, without deciding, that this characterization of the District Court exercising the judicial power of the Virgin Islands has been implicitly repealed by Congress, *see Edwards v. HOVENSA, LLC*, 497 F.3d 355, 359 (D.V.I. 2007), for much of the period in which Designated Justice Gomez served as an active judge of the District Court, that court, through its Appellate Division, exercised appellate jurisdiction to review decisions of the Superior Court of the Virgin Islands. *See* 48 U.S.C. § 1613a. The United States Court of Appeals for the Third Circuit has expressly held that the Appellate Division of the District Court is “a court

of the Virgin Islands.” *V.I. Conservation Soc’y, Inc. v. V.I. Bd. of Land Use Appeals*, 10 F.4th 221, 231 (3d Cir. 2021).

¶ 5 In any event, courts have repeatedly recognized the difference between language referring to a “court of” a jurisdiction and a “court in” a jurisdiction. As the United States Court of Appeals for the Ninth Circuit succinctly explained,

The clause’s use of the preposition “of”—rather than “in”—is determinative. Black’s Law Dictionary defines “of” as a term “denoting that from which anything proceeds; indicating origin, source, descent, and the like. . . .” BLACK’S LAW DICTIONARY 1080 (6th ed. 1990). Thus, courts “of” Virginia refers to courts proceeding from, with their origin in, Virginia—i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their origin in, the federal government.

Doe 1 v. AOL, LLC, 552 F.3d 1077, 1081-82 (9th Cir. 2009). See also *Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 926 (10th Cir. 2005) (interpreting “Courts of the State of Colorado” to mean Colorado state courts; the clause “refers to sovereignty rather than geography”); *Dixon v. TSE Int’l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003) (interpreting “Courts of Texas, U.S.A.” to mean Texas state courts; “[f]ederal district courts may be in Texas, but they are not of Texas”); *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to “the law, and in the courts, of the Commonwealth of Massachusetts” to designate the state courts of Massachusetts; “the word ‘of’ as it appears in the phrase in question must have been intended to restrict the meaning of both ‘law’ and ‘courts’ to those that trace their origin to the state”). Since section 24 permits the designation of a retired judge of “a court of record in the Virgin Islands,” as opposed to “a court of record of the Virgin Islands,” and the District Court is unquestionably a court of record that is in the Virgin Islands, Justice Gomez is unquestionably

eligible to serve as a Designated Justice.⁴

¶ 6 Miller argues, in the alternative, that section 24 is unconstitutional to the extent it permits Justice Gomez to serve as a Designated Justice of this Court. First, Miller maintains that section 24 is inconsistent with the United States Constitution in that it purportedly enlarges the jurisdiction of judges of the District Court beyond that determined by Congress.⁵ As a threshold matter, this cannot be the case with Designated Justice Gomez, in that he is a retired judge who no longer serves on the District Court. But in any case, it is well-established that “jurisdiction is conferred on courts, not judges.” *McKinzy v. Murguia*, 370 Fed.Appx. 960, 961 (10th Cir. 2010); *see also* 48A C.J.S. *Judges* § 15 (“[J]urisdiction is possessed by the courts, not judges, since a judge is merely an officer of the court and not the court itself.”). As such, a judge of the District Court who sits on this Court as a Designated Justice does not exercise the judicial power of the District Court but that of this Court, and the jurisdiction of the District Court is no more enlarged than the jurisdiction of the United States Court of Appeals for the Ninth Circuit is enlarged when its judges sit by designation on the High Court of American Samoa. *See* Adam C. Clanton, *How to Transfer*

⁴ Miller also contends in his motion that this Court should consider that judges of the District Court—retired or otherwise—are not amongst the individuals included in the enumerated list found in section 24(b). However, section 24(b) is unrelated to section 24(a), in that section 24(b) identifies which judicial officers may be “recalled . . . for temporary service” anywhere within the Judicial Branch of the Virgin Islands, while section 24(a) addresses the designation of an individual to serve as a Designated Justice in a specific case that a regular Justice is unable to hear.

⁵ In making this argument, Miller appears to imply that the Legislature cannot under any circumstances enlarge or reduce the jurisdiction of the District Court, much like a state legislature cannot do so with respect to a federal district court sitting within its state. However, Congress has, in fact, granted the Legislature the authority to determine at least some aspects of the District Court’s jurisdiction. *See V.I. Conservation Soc’y*, 10 F.4th at 231 (holding that the Virgin Islands Legislature determined the jurisdiction of the Appellate Division of the District Court). Nevertheless, as we shall explain, the authority of the Legislature with respect to the jurisdiction of the District Court is ultimately irrelevant, since Designated Justice Gomez is not exercising the jurisdiction of the District Court when serving on this Court.

Venue when You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa, 29 U. HAW. L. REV. 325, 349-50 (2007).

¶ 7 Miller further argues that section 24 violates the separation of powers principles inherent in the Revised Organic Act by permitting the Chief Justice to appoint an individual to serve on the Supreme Court of the Virgin Islands who has not been nominated by the Governor of the Virgin Islands and confirmed by the Legislature of the Virgin Islands. Miller ignores, however, that the power to nominate or appoint a judicial officer is not an inherent power of the Executive Branch but may only be exercised by a governor if expressly authorized by constitution or statute. *See* 48A C.J.S. *Judges* § 28 (collecting cases). The Revised Organic Act does not set forth how particular judicial officers are appointed or specify the qualifications to hold judicial office. Rather, it provides that “[t]he rules governing the practice and procedure of the courts established by local law and those prescribing the qualifications and duties of the judges and officers thereof, oaths and bonds, and the times and places of holding court shall be governed by local law or the rules promulgated by those courts.” 48 U.S.C. § 1611(c). This Court is a court established by local law, and the Legislature exercised this power by enacting section 24 to authorize the Chief Justice to appoint a Designated Justice and to permit a retired judge of the District Court to serve as a Designated Justice if so appointed. Moreover, this Court has similarly exercised its authority under the Revised Organic Act to enact rules endorsing and implementing section 24. *See* V.I.S.Ct.R. 104.1; V.I.S.Ct. I.O.P. 10.3. Consequently, section 24 is wholly consistent with the Revised Organic Act.⁶

⁶ Miller also asserts that section 24 violates the Supremacy Clause of the United States Constitution. However, it is well-established that “the Supremacy Clause has no direct role in a conflict between federal law and territorial law” because the Virgin Islands draws its sovereignty from Congress under Article IV of the United States Constitution and exercises powers that have

¶ 8 For these reasons, we conclude that Justice Gomez is qualified to serve as a Designated Justice of this Court for the purpose of hearing the instant case. Accordingly, we deny the motion with respect to its claim that the panel is not properly constituted.⁷

Dated this 6th day of October, 2021.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: 

Deputy Clerk

Dated: 10/6/2021

been directly delegated to it by Congress. *Bryan v. Fawkes*, 61 V.I. 416, 438 (V.I. 2014); *see also* *Lewis v. Alexander*, 685 F.3d 325, 346 n.18 (3d Cir. 2012); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-87 (9th Cir. 1985); Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX LAW. 1223, 1246-47 (2010).

⁷ As noted earlier, the decision of a Justice of this Court to recuse or not recuse himself or herself from a particular case is vested exclusively in that Justice and is not subject to review by this Court. We therefore express no opinion on whether Justice Gomez should or should not recuse himself for the reasons given in Miller's motion or for any other reason.