

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GENT MOSBY, No. 1177618

Petitioner,

v.

RICK MULLGRAV, ACTING DIRECTOR OF
THE VIRGIN ISLANDS BUREAU OF
CORRECTIONS,¹

Respondent.

CASE NO. ST-15-MC-63

In re: Government v. Gent Mosby
Super. Ct. Case No. ST-96-CR-F1

GENT MOSBY, NO. 1177618, *Pro Se*
Kean Mountain Correctional Center
P.O. Box 860
Oakwood, VA 24631
Petitioner

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: October 29, 2015)

Presently before the Court is the "Petition for Writ of Habeas Corpus" filed by Petitioner Gent Mosby ("Petitioner" or "Mr. Mosby"). For the reasons set forth below, the Court will deny the petition and dismiss this case with prejudice.

I. Procedural Background.

Petitioner currently is serving a sentence of life in prison without the possibility of parole, after being convicted of first degree murder and related charges in connection with the homicide of Virgin Islands Police Department Officer Stephen Hodge. Mr. Mosby filed his 15-page petition on August 12, 2015, although it was notarized on February 5, 2015. Therein, he asks this tribunal "...to vacate or set aside sentence (sic) imposed in Government of the Virgin Islands v. Mosby..., "² and to "grant a writ of habeas corpus vacating or setting aside petitioner's unlawful

¹ Petitioner named Julius Wilson, as the Director of the Bureau of Prisons, as Respondent in the caption of this matter. However, there is no Bureau of Prisons in the Virgin Islands Government. The proper entity is the Virgin Islands Bureau of Corrections. V.I. CODE ANN. tit. 3, §§ 371-75; 5 V.I.C. §§ 4502-12. The Court, therefore, amends the caption to remove "Bureau of Prisons" and insert in lieu thereof "Virgin Islands Bureau of Corrections" pursuant to SUPER. CT. R. 8. Further, Julius Wilson is no longer the Director of the Virgin Islands Bureau of Corrections, and Rick Mullgrav was recently appointed to serve as the Acting Director of that entity. Therefore, the Court substitutes Rick Mullgrav for Julius Wilson pursuant to SUPER. CT. R. 7 and 8, and FED. R. CIV. P. 25(d).

² Petition at p. 1.

conviction may it pleases (sic) this honorable Court.”³ The petition is sworn as required by Virgin Islands law.⁴ Reading the petition liberally because Petitioner is proceeding *pro se*,⁵ the Court concludes that he only meets one of the three statutorily-required averments for an application for a writ of habeas corpus. Notably, Mr. Mosby does not expressly state where he is being confined, or who is restraining him, both of which are required to be articulated in a habeas corpus application under Virgin Islands law.⁶ Nevertheless, the Supreme Court of the Virgin Islands has determined that the requirements of Section 1302 are non-jurisdictional and not fatal, by themselves, to an application for a writ of habeas corpus.⁷ But, the Court refrains from directing Petitioner to amend his petition to correct these shortfalls. Rather, upon reviewing the substance of his request, the Court finds that Mr. Mosby fails to present a sufficient claim to warrant the issuance of a writ of habeas corpus.

II. Standard of Review.

At this point, the Court must determine whether to issue the requested writ. The applicable legal standard is imposed by statute, and the trial court should look favorably on the petition when “...it appears that the writ ought to issue.”⁸ A writ “ought to issue” when the petitioner alleges “...facts that, if true, entitle the petitioner to relief...,” unless the claims are procedurally barred.⁹ In conducting its assessment of a petition, the trial court may take judicial notice of the documents of other related proceedings.¹⁰ In this case, Petitioner attaches to his application the September 16, 2011, opinion of the Appellate Division of the District Court of the Virgin Islands (“Appellate Division”) in a case which involved one of his co-defendants, Pedro Harris.¹¹ The Court takes that opinion into consideration in reaching its decision. Unlike an appeal, the purpose of a habeas corpus proceeding “...is not to determine guilt or innocence, or to weigh the evidence submitted at trial, or to determine the strength of the prosecutor’s case...,”¹² but “...to safeguard a person’s freedom from detention in violation of constitutional guarantees.”¹³ Thus, while a court sitting as an appellate tribunal may affirm, modify, reverse, or vacate a final order, or any interlocutory order from the trial court, based upon finding factual or legal error, in a habeas corpus proceeding, the court may only offer relief when the movant shows an entitlement to discharge, or that his restraint is unlawful.¹⁴

³ Petition at p. 15.

⁴ See, 5 V.I.C. § 1302(3).

⁵ See, e.g., *Constr. Technicians v. Zurich Am. Ins. Co.*, 61 V.I. 153, 157 n. 3 (V.I. 2014).

⁶ 5 V.I.C. §§ 1302(1). While he states his conviction is unlawful, see, 5 V.I.C. § 1302(2), Mr. Mosby also does not refer to the period of his detention anywhere in the petition.

⁷ See, *Rivera-Moreno v. Gov’t of the V.I.*, 61 V.I. 279, 300-01 (V.I. 2014) (holding that the verification requirement of 5 V.I.C. § 1302(3) is a claims-processing rule).

⁸ 5 V.I.C. § 1304.

⁹ *Rivera-Moreno v. Gov’t of the V.I.*, 61 V.I. 279, 311 (citing *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994)).

¹⁰ See, *Mendez v. Gov’t of the V.I.*, 56 V.I. 194, 205-06 (V.I. 2012) (citations omitted).

¹¹ The case is officially reported as *Harris v. Gov’t of the V.I.*, 55 V.I. 1102 (D.V.I. App. Div. 2011).

¹² *Rodriguez v. Bureau of Corrs.*, 58 V.I. 367, 376 (V.I. 2013).

¹³ *Rivera-Moreno*, 61 V.I. at 302 n. 8 (citations and internal quotation marks omitted).

¹⁴ Compare, 4 V.I.C. § 32(c) with 5 V.I.C. §§ 1311, 1312.

III. Legal Discussion.

Petitioner avers that a writ of habeas corpus should issue on four articulated grounds: 1) prosecutorial misconduct; 2) violation of due process; 3) structural error; and 4) perjury. He also asks for a plenary hearing in light of "...the complexity of the circumstances...."¹⁵ However, each of his arguments center on the testimony of one witness, referred to as "Sorhaindo" in *Harris*. Mr. Mosby characterizes that testimony as false or perjured. Petitioner essentially contends that because the Appellate Division found the testimony of this witness to be false as to his co-defendant, Pedro Harris, vacated Harris' conviction, and directed a new trial, the same result should occur in this case. However, the result in *Harris* does not warrant the same conclusion in this case for two reasons.

First, while Mr. Mosby is before this Court requesting a writ of habeas corpus, *Harris* involved a direct appeal to the Appellate Division. As discussed above, the authority of a habeas corpus court is more limited than the power of an appellate tribunal hearing a direct appeal. This significant legal distinction illuminates that, contrary to the clearly-implied contention of Petitioner, the fact that his co-defendant's conviction was reversed by the Appellate Division in *Harris*, does not require that he obtain favorable consideration of his present habeas corpus application in this Court.

Second, Mr. Mosby is foreclosed from raising the arguments he presents under applicable habeas corpus principles. Immediately following *Harris* in volume 55 of the Virgin Islands Reports is the Appellate Division's opinion arising out of Petitioner's own direct appeal.¹⁶ In his direct appeal, Mr. Mosby raised, and the Appellate Division addressed, certain issues with respect to the Sorhaindo testimony. Specifically, Petitioner challenged the credibility and reliability of Sorhaindo's statements, his identification of Mr. Mosby as a participant in the crime, contested the denial of his motion to suppress the statements and identification of Sorhaindo, and disputed the propriety of reading only a portion of Sorhaindo's testimony to the jurors, at their request, during the deliberations. Here, Petitioner contends that Sorhaindo's testimony was false or perjured, which he did not argue on his direct appeal – at least not in those exact terms.

Now, our Supreme Court has held that a habeas corpus petitioner may not pursue factual challenges which could have been, but were not, raised on direct appeal; but, he may raise and argue legal issues for the first time in the habeas corpus setting.¹⁷ Importantly, though, if the claims raised in support of the habeas corpus request are procedurally barred, the petition is properly dismissed.¹⁸ There are two procedural bars which impede Petitioner's present claims.

An issue raised in an application for a writ of habeas corpus is procedurally barred when it was presented and rejected during the petitioner's direct appeal.¹⁹ Here, Mr. Mosby repeatedly recites the following facts in support of his claim that the Government knowingly used false or

¹⁵ Petition at p. 15.

¹⁶ *Mosby v. Gov't of the V.I.*, 55 V.I. 1138 (D.V.I. App. Div. 2011), *aff'd*, 512 F. Appx. 253 (3d Cir. 2013).

¹⁷ *Rivera-Moreno*, 61 V.I. at 303 (quoting *In re Dixon*, 264 P.2d 513, 516 (Cal. 1953)).

¹⁸ *Id.* at 311.

¹⁹ See, e.g., *In re Thompson*, S036090, 1994 Cal. LEXIS 4395 at *2-4 (Cal. Aug. 10, 1994) (citations omitted); *Thompson v. Stinson*, 611 S.E.2d 29, 30-31 (Ga. 2005) (citations omitted).

perjured testimony to secure his conviction: 1) Sorhaindo initially told law enforcement that he did not view the faces of the men he saw on the night in question;²⁰ 2) the attackers wore stockings over their faces;²¹ and 3) Sorhaindo initially did not identify Petitioner in open court at trial.²² From these facts, he concludes that the prosecution knew, or should have known, Sorhaindo's testimony against him was false,²³ and there was no corroboration of Sorhaindo's identification.²⁴ However, these are the same underlying facts Mr. Mosby raised in his direct appeal to the Appellate Division when he challenged the constitutionality and reliability of Sorhaindo's identification and statements, and his credibility as a witness.²⁵ The Appellate Division determined that Sorhaindo's testimony, as against Petitioner, met the necessary constitutional and evidentiary criteria, and found no error in its use against Mr. Mosby.²⁶ Although he styles his present arguments under the guise of "false" or "perjured" testimony, his quarrel is essentially the same as his dispute on appeal. Petitioner is reminded that a habeas corpus proceeding is not a vehicle for revisiting issues which were raised and decided on direct appeal.²⁷ Because the Appellate Division actually addressed and rejected the bases underlying Mr. Mosby's present attack on his convictions, he is procedurally barred from raising them in this proceeding.

In addition, claims which are considered to be trial errors must be raised on direct appeal, and, if not, are procedurally barred from being used in a habeas corpus proceeding, unless extenuating circumstances are presented which explain why the petitioner was unable to address them on the appeal.²⁸ Federal and state court precedents maintain that an assertion of false or perjured testimony, which Petitioner now argues, is a claim of trial error.²⁹ Even if one could separate his present claims of false testimony and perjury from the underlying facts already adjudicated by the Appellate Division, and affirmed by the United States Court of Appeals for the Third Circuit ("Third Circuit"), Mr. Mosby failed to raise these "new" issues on his direct appeal. And, he does not present any compelling reasons why he was unable to impart these arguments to the Appellate Division and the Third Circuit during the appellate process. This omission results

²⁰ Petition at p. 3.

²¹ Petition at p. 5.

²² Petition at p. 4.

²³ Petition at pp. 5, 8, 10, 11.

²⁴ Petition at p. 8, 10.

²⁵ *Mosby*, 55 V.I. at 1165-70.

²⁶ *Id.*

²⁷ *See, Rodriguez*, 58 V.I. at 376-77 (citations omitted).

²⁸ *See, e.g., Robinson v. State*, 913 So.2d 514, 524 n. 9 (Fla. 2006) ("The trial court properly denied claim (4) as procedurally barred because Robinson is arguing trial court error that should have been raised on direct appeal...") (citation omitted); *Thompkins v. State*, No. 99,541, 2009 Kan. App. Unpub. LEXIS 396 at * 7-8 (Kan. Ct. App. Apr. 3, 2009) (citation omitted); *Kelsey v. State*, 283 N.W.2d 892, 893-94 (Minn. 1979) ("We have no hesitancy in holding that the district court properly dismissed the petition in File No. 49256, which basically was an attempt by petitioner to use habeas corpus as a means of obtaining review of trial errors. Direct appeal and the post-conviction remedy -- both of which petitioner has used -- are available for that purpose and the need for another means of raising the claim of trial error is therefore not apparent.")

²⁹ *United States v. Clay*, 720 F.3d 1021, 1026 (8th Cir. 2013) ("We hold that a false testimony claim falls within the category of trial error, rather than structural error."); *Robinson v. Arvonio*, 27 F.3d 877, 883-84 (3d Cir. 1994), *vacated and remanded on other grounds*, 513 U.S. 1186 (1995); *Blackwell v. State*, CR 98-456, 2002 Ark. LEXIS 40 at * 3-4 (Ark. Jan. 24, 2002) ("In another allegation of trial error, petitioner contends that the State elicited false testimony from witnesses at trial..."); *Ex Parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) ("The knowing use of perjured testimony is a trial error that is subject to a harmless error analysis.").

Ghent Mosby v. Rick Mullgrav
Case No. ST-15-MC-63
Memorandum Opinion

in these arguments being procedurally barred at this time. Therefore, Petitioner's habeas corpus request is fatally deficient on this basis as well.

IV. Conclusion.

After reviewing Mr. Mosby's habeas corpus petition, the Court concludes that he has taken issues previously decided against him on direct appeal, and re-submitted them to this Court under different legal monikers. This is not a proper use of the habeas corpus proceeding. Moreover, the bases asserted for the writ of habeas corpus are procedurally barred for the reasons set forth above. Therefore, based on the rationale above, Mr. Mosby has not established that a writ of habeas corpus ought to issue, and his requested relief will be denied in an order of even date.

Dated: October 29, 2015

ATTEST:
Estrella George
Acting Clerk of the Court

By: [Signature]
for Donna D. Donovan
Court Clerk Supervisor 10/30/15

[Signature]
Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY
DATE 10/30/15
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY Raysa Rogers-Huggins
COURT CLERK