

After a six-day jury trial, the Virgin Islands Superior Court convicted Colly Cascen on March 13, 2010, of first-degree murder, attempted first-degree murder, first-degree assault, reckless endangerment, and unauthorized possession of a firearm during the commission of a violent crime, all in relation to a shooting incident that occurred on September 7, 2008, at Estate Bethlehem on St. Croix. Petitioner subsequently filed a Motion for Judgment of Acquittal or, in the Alternative, a New Trial on March 23, 2010, which the Court denied on August 31, 2011. On December 28, 2011, the Court sentenced Petitioner to life imprisonment for the first-degree murder conviction, ten years imprisonment for the first-degree attempted murder conviction (which was merged with the first-degree assault conviction), two years imprisonment for the

third-degree assault conviction, five years imprisonment for the reckless endangerment conviction, and five years of imprisonment with a \$25,000 fine for the unauthorized possession of a firearm during the commission of a violent crime conviction.

On January 20, 2012, Petitioner filed a direct appeal with the Virgin Islands Supreme Court, asserting that multiple evidentiary and legal rulings had been made during trial that necessitated reversal, that his right to confront his accuser, as protected by the Confrontation Clause in the U.S. Constitution, had been violated, and that his right to be tried by an impartial jury had been violated at three different occasions during trial. The Supreme Court rendered an Opinion on January 8, 2014, that reversed his convictions for third-degree assault and unauthorized possession of a firearm during the commission of a violent crime and which concluded that Petitioner's first-degree murder, first-degree attempted murder, and reckless endangerment convictions were supported by sufficient evidence, that his right under the U.S. Constitution's Confrontation Clause to confront a firearm licensing witness was violated when he was not allowed to conduct a cross-examination of her at trial, and that his right to be judged by an impartial jury had not been violated at trial.

On December 9, 2014, Petitioner filed a Petition for Writ of Habeas Corpus. On March 23, 2016, he filed an Amended Petition for Writ of Habeas Corpus, raising a total of nine collateral attacks upon his conviction, each of which assert ineffective assistance of counsel claims as follows: (1) trial counsel was ineffective in failing to object to inadmissible testimony during trial;¹ (2) trial counsel was ineffective in failing to request a mistrial based on the jury's exposure to inadmissible evidence brought out by the prosecutor at sidebar;² (3) trial counsel was ineffective in failing to object to and move for a mistrial as a result of the litany of improper comments by the People during closing argument;³ (4) trial counsel was ineffective in causing the introduction of substantial inculpatory evidence;⁴ (5) trial counsel was deficient in failing to subpoena an exonerating witness;⁵ (6) trial counsel's deficient performance garnered sharp criticism and comments by the court before the jury which prejudiced the defendant;⁶ (7) trial

¹ Petnr.'s Br., at 16.

² *Id.*, at 18.

³ *Id.*, at 19.

⁴ *Id.*, at 24.

⁵ *Id.*, at 26.

⁶ *Id.*, at 27.

counsel's errors were cumulatively ineffective;⁷ (8) appellate counsel was ineffective in failing to sufficiently raise the issue of the prosecutor's improper closing argument on appeal;⁸ and (9) appellate counsel was ineffective for failing to articulate and cite any legal authority regarding the prejudice the Petitioner suffered as a result of a partial jury.⁹ Petitioner's errors will be addressed in turn.

Standard

Habeas Corpus

Section 3 of the Revised Organic Act of 1954, as amended, provides that "[a]ll persons shall have the privilege of the writ of habeas corpus and the same shall not be suspended except...as expressly provided."¹⁰ To implement Section 3, the Virgin Islands Legislature enacted Chapter 91 of Title 5 of the Virgin Islands Code to establish procedures through which habeas corpus relief can be sought.¹¹

Consistent with these provisions, the Virgin Islands Habeas Corpus Rules establish rules governing the Court's assessment of habeas corpus petitions. Rule 2(b)(1) provides that "[w]hen presented with a petition for a writ of habeas corpus . . . the Superior Court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, would entitle the petitioner to discharge or other relief—and, in its discretion, may also determine after providing the petitioner with reasonable notice and a right to be heard, whether the stated claims are for any reason procedurally or substantively barred as a matter of law."¹² "A prima facie case is made when a petitioner states specific factual allegations, which require habeas relief rather than mere conclusions or speculations."¹³ When deciding whether the petitioner makes a prima facie case which would entitle him to relief "if the factual allegations were proved, the [C]ourt must take petitioner's factual allegations as true."¹⁴

⁷ *Id.*, at 28.

⁸ *Id.*, at 30.

⁹ *Id.*, at 32.

¹⁰ 48 U.S.C. § 1561.

¹¹ See 5 V.I.C. §§ 1301-1325.

¹² V.I. R. Habeas Corpus 2(b).

¹³ *Burke v. Herbert*, 68 V.I. 144, 148 (V.I. Super. 2017).

¹⁴ V.I. R. Habeas Corpus 2(d)(1).

“If it appears that the petition states a prima facie case for relief and that the claims are not all barred as a matter of law, [the C]ourt must issue a writ of habeas corpus, requiring further proceedings on the petition” as outlined in the Virgin Islands Habeas Corpus Rules.¹⁵ “If the [C]ourt determines that the petition does not state a prima facie case for relief, or that the claims are all barred as a matter of law, the court shall enter an order denying the petition without further proceedings.” “Where a petitioner properly raised an issue on direct appeal to [the Supreme] Court, and [the Supreme C]ourt rejected it on the merits, the petitioner is procedurally barred from re-litigating that issue through a habeas petition.”¹⁶

“The role that the writ of habeas corpus plays is largely procedural...[,] does not decide the issues and cannot itself require the final release of the petitioner.”¹⁷ Accordingly, the Court’s decision whether to grant or deny a petition for writ of habeas corpus “‘constitutes an intermediate step in the statutory procedure’—it does not address the underlying merits of the petitioner’s allegations, nor does it entitle the petitioner to the ultimate relief sought in the petition.”¹⁸

“[T]here will exist cases in which the Superior Court can easily examine the habeas petition, the People’s return, and accompanying exhibits, the People’s traverse (if any), and the record of the case, and soundly discern whether the habeas claim lacks merit.”¹⁹ Therefore, if “consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, . . . the court may deny the petition without an evidentiary hearing.”²⁰

Although in the past, the Virgin Islands Supreme Court has held that “a claim of ineffective assistance of counsel will rarely be procedurally barred in a habeas proceeding,” its reasoning for so holding was that “the necessary facts about counsel’s representations of the defendant” were not properly developed.²¹ In fact, in *Blyden v. Government of the Virgin Islands*, the Supreme Court decided that the Superior Court “demanded too much of Blyden too

¹⁵ *Id.* 2(b)(5).

¹⁶ *Blyden v. Gov’t of the Virgin Islands*, 64 V.I. 367, 376 (V.I. 2016).

¹⁷ *Rivera-Moreno v. Gov’t of the Virgin Islands*, 61 V.I. 279, 312 (V.I. 2014).

¹⁸ *Blyden*, 64 V.I. at 376.

¹⁹ *Alexander v. People*, 65 V.I. 385, 398 (V.I. 2016) (*Swan, J., concurring*).

²⁰ *Id.* at 397.

²¹ *Blyden*, 64 V.I. at 381. *Accord Alexander v. People of the Virgin Islands*, 65 V.I. 385, 393 (V.I. 2016).

soon” because it addressed the merits of Blyden’s claims “based only on the allegations of [Blyden’s] petition.”²² The situation here, though, differs markedly from *Blyden* in the Court has a full trial transcript and a fully developed factual record provided by Petitioner. Since Petitioner’s ineffective assistance of trial counsel claims are premised on the asserted acts and omissions of Defense Counsel at trial and on appeal, these are issues that can be easily resolved on the record and trial transcript currently provided to the Court, such that a hearing is not required.

Ineffective assistance of counsel

The Sixth Amendment preserves an individual’s right to receive effective assistance of counsel “because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”²³ As a result, the Court is charged with judging whether a defendant has received a fair trial in the context of an ineffective assistance of counsel claim by asking “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”²⁴

In the Virgin Islands, individuals seeking to prove that they did not receive a fair trial owing to their counsel’s ineffective representation “must: (1) identify acts or omissions of counsel that are alleged to have been outside the wide range of reasonable professional judgment and competent assistance and (2) show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²⁵ A defendant must make both showings to prove his conviction resulted from a “breakdown in the adversary process.”²⁶

When pointing to acts or omissions in efforts to fulfill the first prong of *Gumbs*, the convicted defendant bears the burden of proving that his “counsel’s representation fell below an objective standard of reasonableness” as gauged “under prevailing professional norms” when considering all the circumstances and facts of the defendant’s trial “viewed as of the time of

²² *Id.*

²³ *Strickland v. Washington*, 466 U.S. 668, 685 (U.S. 1984).

²⁴ *Id.* at 686.

²⁵ *Gumbs v. People*, 64 V.I. 491, 507 (V.I. 2016).

²⁶ *Strickland*, 466 U.S. at 687.

counsel's conduct."²⁷ The Court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," necessitating that the convicted defendant must overcome this presumption.²⁸ Within this context, the U.S. Supreme Court also stated that:

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."²⁹

When fulfilling the second prong of *Gumbs*, the convicted defendant must "affirmatively prove prejudice,"³⁰ or counsel's error, even if it is professionally unreasonable, will not lead the court to set aside the judgment of a criminal proceeding.³¹ "Accordingly, the appropriate test for prejudice finds its roots in the test for materiality. . . and [requires] the defendant [to] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."³² When assessing whether prejudice resulted from the errors asserted, the Court "should presume . . . that the judge or jury acted according to law."³³ Ultimately, the question is: "is there a reasonable probability that that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."³⁴ Determinations of this question "must consider the totality of the evidence before the judge or jury."³⁵

²⁷ *Id.* at 688, 690.

²⁸ *Id.* at 689.

²⁹ *Id.* at 690-91.

³⁰ *Id.* at 693.

³¹ *Id.* at 691.

³² *Id.* at 694.

³³ *Id.* at 694.

³⁴ *Id.* at 695.

³⁵ *Id.* Strickland gives further guidance when stating: "Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways...Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

Analysis

A. Trial counsel did not fail to object to testimony as Petitioner alleges.

In his first assignment of error, Petitioner argues that trial counsel failed to object to hearsay statements, failed to move for a mistrial when speculative testimony was elicited, and failed to object to prejudicial statements made by witnesses. Petitioner's first argument is composed of numerous misstatements because the trial transcript reveals that defense counsel, in fact, raised objections to the statements now contested by Petitioner in each instance.

First, Petitioner asserts that, without objection, defense counsel allowed hearsay testimony when Yessenia Knowles, girlfriend of the victim, was allowed to testify that, two months prior to the incident in question, Petitioner told Knowles that he wanted to kill Knowles's boyfriend, Peter. The trial transcript reveals that, as Defense Counsel was winding down his cross-examination of Knowles, he asked Knowles if she got the sense from police that if she named Petitioner as a suspect that the police would then just leave her alone.³⁶ Knowles answered in the affirmative and then added: "They never protected my life. . . . How many times I asked my life be protected?"³⁷ On redirect, the prosecutor asked Knowles from whom she needed protection and then followed up by asking: "Did Colly Cascen back in July two months before this happened tell you that he was gonna to kill your boyfriend, Din Din?"³⁸ Immediately, Defense Counsel objected.³⁹ Counsel approached the bench and a sidebar conference was conducted.⁴⁰ The Court asked for a show of proof, and the prosecutor stated that he expected Knowles to testify in a manner consistent with what she told Detective Herbert, which was that two months prior to the September incident in question Petitioner warned Knowles that he was going to kill her boyfriend.⁴¹ In response, Defense Counsel argued vigorously that the line of inquiry extended beyond the scope of his questioning and focused on "whether she was afraid to testify because she was threatened; not her boyfriend."⁴² Defense Counsel continued, "The inquiry is whether she is testifying a particular way because she is scared she had been

³⁶ JA 290.

³⁷ JA 290.

³⁸ JA 291.

³⁹ JA 291.

⁴⁰ JA 292-293.

⁴¹ JA 292-293.

⁴² JA 293.

threatened by Colly Cascen; not whether her boyfriend had been threatened. Dino Herbert, the case agent, have provided the Government with a self-serving police report indicating that she says Colly Cascen told her that he is going to kill her boyfriend. It is not her boyfriend. It is she; whether she was threatened.”⁴³

Second, Petitioner argues that Estella Davis, a defense witness who was brought to testify regarding what she observed while waiting at the hospital after the incident in question, was allowed to give hearsay testimony without objection by Defense Counsel. When questioned on cross-examination, the People asked Davis if she had spoken with Detective Herbert, the lead detective of the case, during the course of the police investigation of Soto III’s shooting. Davis replied that Detective Herbert had asked her questions, in general, and that she had supplied answers, in general, to the detective in the course of the investigation.⁴⁴ The prosecutor then inquired whether Detective Herbert asked her during the investigation “whether she had heard anything regarding Colly and Yessenia?”⁴⁵ To this, Davis replied: “Yes.” Immediately thereafter, Defense Counsel objected, stating: “Your Honor, I have an objection; beyond the scope. I never ask any questions about Colly and Yessenio – I’m sorry – Yessenia.”⁴⁶ In response, the Assistant Attorney General argued that “This is cross examination and the witness can be questioned regarding bias as she can be questioned regarding any statement she made regarding this case.”⁴⁷ The Court then allowed the AAG to continue questioning Davis:

Prosecution: Do you remember telling Detective Herbert that you said Colly is sleeping with her?

Davis: No. I told him I heard.

Prosecution: Well, what is it that you heard about them?

Davis: For my – could I speak?

Prosecution: Hold on.

Davis: Okay. Go ahead.

Prosecution: You were asked a question, what is it you heard about them; and your response was that Colly is sleeping with her?

Davis: No, I did not.

Prosecution: You didn’t say that?

Davis: No, I did not. I told him the word on the street was that Colly and Yessenia had some affair.

⁴³ JA 294.

⁴⁴ JA 531.

⁴⁵ JA 531.

⁴⁶ JA 531.

⁴⁷ JA 531-532.

While the testimony was permitted by the trial court, it was done so over the objection of Defense Counsel.

Third, Petitioner argues Defense Counsel allowed speculative testimony to enter the record in that Detective Herbert testified that when he and other policemen arrived at the scene of the incident in question, they tried to obtain statements from individuals, however “they didn’t want to speak to us.” However, as above, a review of the transcript discloses that Defense Counsel, in fact, objected. Detective Herbert, a prosecution witness, was asked by the People whether he conducted an investigation of other witnesses when he was canvassing those still present at the scene of the incident on September 7, 2008.⁴⁸ The detective said some witnesses came forward.⁴⁹ The AAG then followed up by asking if any witnesses cooperated with the detective’s questions by making a statement and who cooperated.⁵⁰ In response, Detective Herbert said: “I attempted to obtain statement[s] from Leonardo Rodriguez; different individuals that Jose Soto had called their names. They didn’t want to speak with us.”⁵¹ From there, the People continued, over the objection of Defense Counsel:

Prosecution: How many people were willing to speak with you and provide you information out of everyone that was there?

Detective Herbert: Those that I took statement[s] from and some of them totally didn’t want – they wanted to say things, but they didn’t want to –

Defense Counsel: Objection to what people – I can’t cross examine, Judge. That’s hearsay, highly prejudicial to my client.⁵²

Additionally, Petitioner argues that it was an error for Defense Counsel to not be able to locate Cyril Peter, presumably because Petitioner believes that Peter would have provided exonerating testimony. Indeed, case law holds that not attempting to locate and have witnesses provide testimony which would exonerate or provide an alibi for a defendant is error. However, the trial transcript reveals that neither Prosecution nor Defense Counsel could locate Peter. The record of the prosecution’s direct examination of Detective Herbert, the lead detective on the case, shows that the People were also unable to subpoena Peter:

⁴⁸ JA 415.

⁴⁹ JA 415.

⁵⁰ JA 415.

⁵¹ JA 415.

⁵² JA 416.

Prosecution: (to Detective Herbert) Did you – prior to trial, did you have contact with Mr. Cyril Peter?

Detective Herbert: Yes.

Prosecution: What was the purpose of your contact with Mr. Peter?

Detective Herbert: I attempted to serve Mr. Peter a subpoena for this particular trial.

Prosecution: Were you able to locate Mr. Peter?

Detective Herbert: He indicated to me that he will contact me and he continued to evade me.

Prosecution: Okay. Do you know where he is now?

Detective Herbert: I have no knowledge of where Mr. Peter is.

Prosecution: Were you able to locate him?

Detective Herbert: No.

Fourth, Petitioner argues that the prosecution “sought to create a case surrounded by fear and intimidation.” Cascen further contends Defense Counsel erred in allowing a host of overly prejudicial statements into the trial record by failing to lodge proper objections. Specifically, Petitioner argues that Soto II, the victims’ father, testified that he was afraid of Petitioner and that Defense Counsel committed prejudicial error by failing to object to that testimony on three different instances. First, the AAG asked Soto II whether, after his son had gone to the hospital on the night in question, Soto II had decided to tell the police what he had seen transpire, impliedly asking Soto II whether he was going to tell police what exactly he saw and who he saw shooting. JA231. Soto II replied, “I decide [sic] I’m not going to say much because this guy that was firing the shots live very close to my house.” JA232. The prosecution followed up by asking why that was a concern for Soto II. Contrary to Petitioner’s assertion, Defense Counsel immediately raised an objection, and the Court called for a sidebar. JA232. At the sidebar, Defense Counsel presented a vigorous argument:

Defense Counsel: Counsel very well know that his witness gonna make a lot of unfounded allegations about my client, which is unduly prejudicial, about he hear that he shoot other people; basically, gun charge conduct, 404(b) evidence, which has not been noticed which is going to indicate to the Defendant he intends to use so the Defendant could have articulated a response. That is not permissible Judge. It is not relevant. Even if it is relevant, under 403 analysis, it is unduly prejudicial. It is prejudicial – it’s more than damaging than its probative effect.⁵³

⁵³ JA 232-233.

Petitioner also claims that Defense Counsel made similar mistakes when he failed to object to Soto II testifying that, when he was still at the hospital after the incident in question, the People asked Soto II if he “intentionally omitted information” and “intentionally not give [Detective Herbert] information at that time?”⁵⁴ The following exchange occurred:

Soto II: Yes.

Prosecution: Why?

Soto II: Because the guy live [sic] too close to my house and I wanted to feel secure to give the whole testimony.

Defense Counsel: Objection, Judge.

Court: All right. I will strike that last portion of your testimony because it’s speculative.

Defense Counsel: Ask the jury to disregard, Judge.

Court: And I will ask the jury to disregard the last comment of the witness.⁵⁵

Finally, Petitioner argues that allowing Detective Fred Brathwaite to testify without objection that Knowles was scared of Cascen and that Cascen wanted to kill her boyfriend, Peter, added to the “atmosphere of fear” the prosecution tried to create at trial. However, the trial transcript belies this accusation at two different junctures. Detective Brathwaite was initially called to testify by Defense Counsel, who asked questions relating to a conversation he had with Knowles at the hospital directly after the shooting incident.⁵⁶ When asked about what Knowles said to Detective Brathwaite on the night of the shooting regarding what she observed during the shooting, Brathwaite relayed that Knowles told him:

That her and her boyfriend, Cyril Peter, were in a vehicle parked by Bethlehem Village, and she was still in the – she was sitting in the passenger seat; her boyfriend, Cyril Peter, was sitting in the driver seat. Then her boyfriend got out the vehicle fast and started to run straight from the vehicle down the street. Then an individual came walking down from the driver side from behind the vehicle in a – in all black and without a mask on his face and fired shots.⁵⁷

⁵⁴ JA 234.

⁵⁵ JA 234-235.

⁵⁶ JA 602-604.

⁵⁷ JA 604.

When asked about whether Knowles indicated to Detective Brathwaite whether she was able to recognize the individual who was shooting, Brathwaite testified, “She said that the person by his walk – all she said is the person by his walk appears to be this guy name David and he hangs out with Colly.”⁵⁸

Afterwards, on cross-examination, the prosecution asked Detective Brathwaite “during that same interview, did Ms. Knowles tell you anything else about the Defendant?” When Detective Brathwaite answered in the affirmative, Defense Counsel objected arguing that the prosecution’s question was beyond the scope of his direct examination. The Court responded: “And we are talking about the statement that you already had the detective testify about and his asking about that statement so I will allow it.”⁵⁹ To this, Defense Counsel attempted to explain his objection, and the Court overruled him again.⁶⁰ The prosecutor resumed his line of questioning, and Defense Counsel objected again, stating that he wanted to make a record of the objection.⁶¹ In fact, during this sidebar, Defense Counsel foresaw the prosecution asking Detective Brathwaite about another portion of the interview he had with Knowles at the hospital on September 7, 2008, that would address Knowles’ fear of Petitioner and his warning her that he wanted to kill Peter, and Defense Counsel lodged his objection on that point.⁶² As a result,

⁵⁸ JA 604.

⁵⁹ JA 605.

⁶⁰ JA 605.

⁶¹ JA 606.

⁶² **Defense Counsel:** Objection, your Honor. I need to make a record Your Honor.

Court: Yes, come to sidebar.

Defense Counsel: Your Honor, I called this witness and ask her – ask him what happened on September 7, 2008 when he went to the hospital. He said he spoke to Ms. Knowles about the shooting at Harvey and she gave a possible identification of the person who did the shooting. That was it.

Now I understand the Government’s theory, but now what the Government is doing m, and the Court allowed them to do that already, the Government is going way back to try to bring in some evidence about the Defendant threatening her boyfriend. Judge, that is way beyond the scope and the government has brought that out already through another witness. It is not permissible, Judge. It is not concerning the question that was made on direct examination.

I remember one time when the Government called Detective Herbert they ask him question and I tried to ask him question and the Court told me that I cannot ask him because it goes beyond the scope of what they inquired into and I can call him as my witness if you want. You did not allow me to go beyond the cope, but now the Court is allowing the government to go way beyond the scope of something that I asked about some threat two months ago to her boyfriend. Your Honor, that is unduly prejudicial to my client. It’s not fair, Judge. I request that is not be allowed. The Government should not be allowed to do that.

Prosecution: Your Honor, Defense was limited in their questioning because they went into an entirely different subject area on direct examination. The Defense questioned this witness about a particular interview with a particular witness at a particular time and what was said and wants to use what helps them and exclude what doesn’t help them during the same interview. It is relevant. Its related. It was given at the same time, same place. They can’t pick and choose portions of the sentences to suit themselves.

the prosecution ceased its questioning of Detective Brathwaite and recalled him as their own witness.⁶³

It is to the prosecution's recalling and questioning Detective Brathwaite on direct that Petitioner points when asserting error. At this point, the prosecution asked Detective Brathwaite if Knowles relayed anything further to him while they were speaking at the hospital on September 7, 2008 after the shooting incident. Detective Brathwaite replied that Knowles did relay that "around July 2008, Mr. Colly approached her and told her that he was following her and her boyfriend all over the place and he told her several places they were. And then he told her he wants to kill her boyfriend."⁶⁴ The AAG then asked Detective Brathwaite if he made a report documenting this conversations, and Detective Brathwaite responded in the affirmative.⁶⁵ At this point, the prosecution handed the report, which was entered into evidence as an exhibit, to the detective. In fact, Defense Counsel objected to the prosecution handing the report to the witness, asking whether the prosecution was intending to allow the witness to refresh his recollection of the statement gathered on September 7, 2008, from Knowles or use it to impeach the detective.⁶⁶

In each of the instances relied upon by Petitioner, Defense Counsel not only objected, but his decisions to object were reasonable, i.e., within "the wide range of reasonable professional judgment and competent assistance" *Gumbs* requires. Petitioner having failed to show that the performance prong of the *Gumbs* analysis is fulfilled since Defense Counsel, in fact, objected in the instances pointed out by Petitioner, the prejudice prong does not need to be addressed, and these assignments of error do not demonstrate ineffective assistance of counsel.

B. Petitioner does not meet his burden to show that the jury heard counsel's comments during sidebar.

In his second assignment of error, Petitioner argues that Defense Counsel failed to move for a mistrial or ask for a curative instruction once the Court's marshal informed the parties that

Court: Well, I fully agree with you, but only halfway. The reality is, he is one of your investigators. You have a right to call rebuttal witnesses if you feel that what he has to offer is a rebuttal of what he has brought into evidence then you may do so. And I don't think you ought to do it this way. Simple as that.

⁶³ JA 609-610.

⁶⁴ JA 610.

⁶⁵ JA 610.

⁶⁶ JA 611-612.

the jury could hear counsel's arguments during a sidebar that discussed inadmissible hearsay statements. Specifically, Petitioner argues that the prosecution read from a statement indicating that Knowles saw Petitioner exit the black truck in question with a gun in his hand, saw him shoot Peter in the foot as Peter ran away, saw Peter fall, saw Peter run into the bush, and saw Petitioner follow Peter into the bush, after which she heard approximately nine (9) gunshots.

The trial transcript reveals that when Knowles was undergoing direct examination⁶⁷ as a prosecution witness, she testified that she and her boyfriend, Peter, went to a gathering to celebrate Soto II winning his first horse race because Knowles had the understanding that her mother was a distant relative of Soto III's mother.⁶⁸ While driving to Bethlehem Estate, Knowles noticed a black truck stop alongside their car as they slowed down to cross a speed bump.⁶⁹ After arriving at the celebration, Knowles noticed that a black truck pulled in behind their car and she did not "like the vibes . . . going on in this place."⁷⁰ Then, she testified to what she witnessed as and after shots rang out.⁷¹ Peter opened the car door and ran "for his life."⁷² When asked if she saw who committed the shooting, Knowles testified, "I can't say who it is. I think. I did not see who actually shot him."⁷³

She testified that after the shooting she helped Peter and Soto III into the car and drove them to the hospital.⁷⁴ When asked, on direct examination, if she remembered what she told police detectives that night at the hospital concerning who committed the shooting, Knowles indicated that she told police, "I could have only picked up the body language and how they walked; and it could have looked like a guy name David, but I was unsure if it was him."⁷⁵

As her direct examination continued, the prosecutor asked Knowles if she remembered speaking to Detectives Herbert and Brathwaite at the hospital after the shooting or speaking to any other ladies who would have been waiting at the hospital.⁷⁶ Then the AAG specifically asked if Knowles remembered speaking to an FBI agent, Tom Drummond, at a much later date.⁷⁷

⁶⁷ JA 248.

⁶⁸ JA 249-251.

⁶⁹ JA 249-250.

⁷⁰ JA 252.

⁷¹ JA 253.

⁷² JA 253.

⁷³ JA 255.

⁷⁴ JA 255.

⁷⁵ JA 265.

⁷⁶ JA 266-267.

⁷⁷ JA 267-268.

Knowles responded that she did not.⁷⁸ It was at this juncture that Defense Counsel objected, arguing that the prosecutor was attempting to impeach its own witness.⁷⁹ Defense Counsel then asked for a sidebar.⁸⁰ At sidebar, the prosecutor argued that:

The People had inquired as to this individual regarding who the shooter was; she's given a response. The People have inquired as to what she saw; she's given a response. The People will not continue on with that. This witness has admitted in court right now, has indicated that she did meet with Special Agent Drummond and with Detective Dino, as she calls him, after the shooting; and that she did – was asked questions by Drummond; that she did give answers and that she was saying what happened. Detective Drummond in his statement that this witness has adopted has indicated that she, the witness, saw Colly Cascen, as she named him, come out of the pickup truck as a passenger, with a gun in his hand. This witness has indicated that Cascen was walking after Peter. This witness has indicated previously that Cascen shot Peter in the leg or foot. This same witness has indicated that she saw Peter fall to the ground and then get back up and run to the nearby bushes. This witness has previously also stated that she saw Cascen follow Peter to the bush and then she heard approximately nine gunshots. This witness has indicated that she is terrified of Cascen because he's had her and Peter followed in the past. This witness –

Marshal Wong: They can hear.

Prosecution: Sorry. The witness has also indicated that she and Cascen have spoken; and this witness has also indicated that Cascen told her that he was going to kill [Peter] and the reason why he was going to kill [Peter].

Now these statements are all inconsistent with what she – these statements that she has given are all inconsistent with her testimony on the stand as she has given it, as she sworn to, given to the jury; and she should be questioned – the People should be allowed to question her regarding her prior inconsistent statement to individuals regarding what she observed, who she observed and what happened.

Court: You have a comment?

Defense Counsel: Yes. First of all, I don't believe that the Government or the People have laid the proper foundation to attempt to impeach its own witness with a prior inconsistent statement. And the Government has said something which is very interesting, that she made a statement and has adopted the

⁷⁸ JA 268.

⁷⁹ JA 269-270.

⁸⁰ JA 268.

statement. This statement was given to me on the 5th. This is not a statement the witness made.

...

[Defense Counsel continues to argue that the statement the prosecution is referring to was written by an FBI agent and is not a statement adopted by Knowles. In response, the prosecutor argues that Defense Counsel is mistaken in thinking that a statement has to be signed by a witness in order to be able to say the witness has adopted it.]

...

Prosecution: This witness has adopted this statement and this witness can be – Drummond can be put on the stand and will say this is her statement; but while she is on the stand –

Court: Is this Drummond a witness in this case?

Prosecution: Yes sir. Drummond is a witness in this case as is Herbert.

Court: So why don't you call Drummond to contradict him [sic]? Why are you going to impeach your own witness?

Prosecution: Your Honor, I am going to call Drummond regarding the statement that she made to Drummond; and we can call Herbert regarding the statement that she made while he, Herbert, was present when Drummond took these statements; but this witness, she gives testimony, that is, on the stand that's worth – testimony that inconsistent at the present time with other testimony.

Court: But there is no question her statement is inconsistent with what Drummond will testify to, so why not simply use Drummond? It seems to me somewhat inappropriate, if not unethical, to try to impeach her by simply reading from a statement that Drummond made when Drummond is available.

Marshal Wong: The jury can hear the conversation.

Court: Alright. We are going to excuse the jury again.

[After this point, the Court excuses the jury. When the trial resumes, the prosecutor resumes questioning Knowles by showing her pictures of the car she drove on the day in question.]⁸¹

Petitioner bears the burden of showing he is entitled to relief. The trial transcript included in the record shows that the marshal believed that the jury heard counsel's discussion at sidebar, as shown in the excerpt above. However, the record does not demonstrate that any juror actually heard comments at sidebar, disclose what any juror heard, or reveal that the portion any juror may have heard was in admissible or otherwise improper. The trial transcript also shows that when the judge became aware that the marshal believed the jury was hearing what was

⁸¹ JA 271-274.

spoken at side bar, the trial court excused the jury before continuing the discussion on how to best handle and present Knowles' inconsistencies. Consequently, the record does not reveal any prejudicial error on the part of Defense Counsel in this regard.

C . The record does not reveal ineffective assistance of counsel resulting from Defense Counsel's failure to object to the prosecution's improper comments during closing.

Petitioner argues that Defense Counsel was ineffective when he failed to object to the prosecution's comments during closing argument that sought to "arouse the emotion of the jury" by arguing that the jurors themselves would be would be victims of the Petitioner they failed to convict him.⁸² First, Petitioner points to the prosecution's statement that Soto II "knew this was a murder case and they could kill him or would kill him; that he didn't want to talk until he could be in a safe and secure environment." Second, Petitioner submits the People's assertion that Knowles "came to court . . . afraid to make a statement [about her life being threatened] in the Defendant's presence." Third, Petitioner highlights that the People argued that Wayne Christian did not "want to testify" and then questioned the jury "why is that?" Fourth, Petitioner assigns error to the prosecution's statement that Peter was absent, not testifying at trial "because he doesn't want to be here after being shot so many times. Why do you think that is?" Fifth, he argues the prosecution erred when stating that Leonardo Rodriguez was present at the scene when the incident occurred but claimed in his testimony at trial that he "didn't see nothing. I don't know a thing about it." Sixth, Petitioner points to the AAG's argument that: "They all know that this Defendant is a cold-blooded murder. They know him and his crew. They know if they cooperate with the police, they are dead." Finally, Petitioner asserts that is was error for the prosecution, on rebuttal, to inform the jury that "every one of the People's witnesses swore to tell the truth and did just that." After reciting this list of alleged improper comments, Petitioner claims that Defense Counsel "objected to a few of these comments, [but] the majority of them garnered not a word."

The Court's determination as to whether the prosecution made comments during closing argument which rose to the level of impropriety that necessitated an objection from Defense Counsel turns on a two-pronged inquiry.⁸³ First, the Court must assess whether the AAG's

⁸² Petnr.'s Br., at 23.

⁸³ *DeSilva v. Virgin Islands*, Case No. CRIM. 2010-0051, 2011 WL 4566431, at *6 (V.I. Sept. 29, 2011).

statements were improper. When conducting this portion of the analysis, the Court observes that a prior decision of the Supreme Court has found that it is improper for a “prosecutor to appeal to the emotions, passion, and prejudices of a jury because it diverts the jury’s attention from its duty to decide the case on the evidence...[and] invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal.”⁸⁴ Second, the Court must determine whether the comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process in light of the entire proceeding.”⁸⁵ In fact, improper comments by the prosecution during closing argument are not *per se* grounds for a new trial.⁸⁶ The comments must be assessed “in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant.”⁸⁷ The “touchstone of our inquiry is ‘not the culpability of the prosecutor’ but the fairness of the trial.”⁸⁸

The Court’s review of the trial transcript reveals that the People began its closing argument by outlining facts in evidence that were not disputed by the parties—namely that on September 7, 2008, a group of friends had gathered at Estate Bethlehem to celebrate Soto III’s first win as a jockey earlier that day and Soto II’s birthday, when a black truck pulled up and a man got out of the truck and started shooting into the crowd, resulting in Soto III receiving a fatal gunshot in the head.⁸⁹ The prosecution tied the death of Soto III to the first degree murder charge, Peter’s shooting injuries to the attempted first degree murder and first degree assault charges, Wayne Christian’s bullet grazing to the third degree assault charge, and the shooting of a firearm into a crowd of people to the reckless endangerment charge. Next, the People stated the remaining factor on which this case hinged was identifying the shooter, “And for that you have to rely on eyewitness testimony.”⁹⁰ From this point, the prosecution reviewed what witnesses present during the incident said during trial, reviewing Soto II’s testimony and using a map of the area Soto II drew to better explain a timeline of events that evening.⁹¹ Defense

⁸⁴ *Id.*

⁸⁵ *Id.* at *7.

⁸⁶ *Francis v. Virgin Islands*, Case No. S.Ct.CRIM. 2012-0072, 2013 WL 6185163, at *3 (V.I. Nov. 27, 2013).

⁸⁷ *DeSilva*, 2013 WL, at *7.

⁸⁸ *Id.*

⁸⁹ JA 679-680.

⁹⁰ JA 681.

⁹¹ JA 681-682.

Counsel objected to the prosecution's use of the map drawn by Soto II because the map had not been introduced into evidence.⁹² The Court ruled that the map, though not admitted into evidence, had been published to the jury during Soto II's testimony as a demonstrative device and, therefore, could be used during closing argument.⁹³ The prosecution continued recounting Soto II's testimony because he was the only witness who testified at trial to having seen the Petitioner exit the black truck and fire a gun into the crowd.⁹⁴ The AAG emphasized that Soto II testified to having locked eyes with Petitioner at the scene, and then made the following remarks:

Now, [Soto] didn't speak out immediately. He didn't talk about everything he'd seen in his initial report of the police, the date of the incident or the morning thereafter because he was afraid. He knows this man. He knows that this is gonna be a murder case and that his life is in danger if he cooperates and they find out about it. He didn't want to go to the police, the regular police, that word might get out that he's cooperating.⁹⁵

Defense Counsel objected, stating, "Counsel should not argue evidence that has not been admitted into evidence. There is no evidence that Mr. Soto was scared of anything. The evidence was he did not trust the police. That's why he did not report the information."⁹⁶ Upon the objection, the following exchange occurred:

Court: Well counsel, I wish you would keep your remarks to the testimony as it was stated rather than inferring certain things.

Prosecution: And that was testimony as stated, your Honor. He said he knew that this was a murder case and they could kill him or would kill him; that he didn't want to talk until he could be in a safe and secure environment. That's my recollection.

But as Judge Brady has said, ladies and gentlemen, you have to rely on your recollection of the evidence. I'm telling you the way I recall it and what I heard. If your recollection is different, by all means rely on your recollection of the evidence, but that's what I recall.

Because you remember that [Soto] said I wasn't gonna make the statement to the regular police. I wanted to go down to the Department of Justice in a confidential environment where it was secure and it wasn't going to be public knowledge because I didn't want this getting out. Why would he do that? Why would he be

⁹² JA 682.

⁹³ JA 682.

⁹⁴ JA 682-684.

⁹⁵ JA 685.

⁹⁶ JA 685.

concerned? Who is he afraid of? Draw your own conclusion why he has the fear and from who.

The statement to which Petitioner now points is from the portion of the prosecution's closing that follows the objection Defense Counsel had already lodged seeking to address the same issue. The Court instructed the People to not speak of matters that were inferred from Soto's testimony, as opposed to explicitly stated. In response, the AAG recounted the portion of Soto's testimony in which Soto relayed why he delayed in reporting important details to police after the incident. Defense Counsel committed no error here. Even if the prosecution's statements were improper, Defense Counsel had already objected to those comments.

Next, Petitioner argues that the prosecution improperly commented during closing that Knowles "came to court [but was] afraid to make [a] statement [about her life being threatened] in the Defendant's presence." The Court's review of the trial transcript reveals that, when the AAG addressed Knowles' testimony during closing argument, he recounted the fact that Knowles had identified Petitioner as the shooter on September 7, 2008, when speaking to Virgin Islands police detectives and an FBI agent whom she sought out herself after receiving anonymous phone calls relaying death threats and reports that she was under surveillance. The People also brought out that Knowles refused to identify Petitioner as the shooter when she was testifying at trial. After summarizing Knowles' trial testimony, in which she stated she did not see who the shooter was and that she only told the police detectives that Petitioner was the shooter because she thought that was what they wanted to hear so that she could go home that evening, the prosecution also summarized the testimony of Virgin Islands Police Detective Brathwaite and FBI Agent Tom Drummond who stated that Knowles had seen David Phillips driving the black truck on September 7, 2008 and that two months prior, Petitioner told her he intended to kill her boyfriend, Peter.⁹⁷ From there, the prosecution attempted to explain the discrepancy by stating "but when she came to court, she's afraid to make that statement in the Defendant's presence."⁹⁸ Immediately, Defense Counsel objected. To this, the prosecutor automatically offered to rephrase his wording and did so, stating "She refused to make an identification in the courtroom despite her prior statement."⁹⁹ With his next sentence, the

⁹⁷ JA 686-689.

⁹⁸ JA 689.

⁹⁹ JA 689.

prosecution moved on to summarize the testimony of another witness. While the prosecutor did make a statement regarding Knowles' fear of Petitioner that was not based on evidence in the record, Defense Counsel's effective objection caused the AAG to correct himself and move on to summarize another witness's testimony.

Third, Petitioner argues the prosecution improperly commented that Wayne Christian did not "want to testify" and then asked "why is that?", and fourth, Petitioner argues the prosecution improperly commented that Leonardo Rodriguez was seen at the incident but at trial only testified that he "didn't see nothing, I don't know a thing about it." The trial transcript reveals that when summarizing Christian's testimony, the People contrasted Christian's testimony that he was just passing by Estate Bethlehem when the shots were fired so he could not see who the shooter was, with Soto II's testimony that Christian was sitting in a Jeep when shots were fired and would have been able to see the shooter as a result. After this the prosecution stated: "He was sitting in that jeep. He didn't want to tell you that. He didn't want to testify. Why is that?" Regarding Rodriguez, the prosecution argued that Rodriguez's own testimony placed him a car length away from the black truck from which the shooter emerged and contrasted it with his trial testimony stating that he heard shots and ran in response. While no evidence was entered that showed that either Christian or Rodriguez was afraid to testify, that they did not want to testify, or that they would not identify Petitioner as the shooter, the prosecution did end each witness' summarization by asking the jury to consider why a gap in their knowledge existed. In doing so, ultimately, the prosecution actually pointed to a hole in the witnesses' testimonies and asked the jury to consider that gap. If this did constitute error, it was harmless when weighed against Soto II's eye-witness identification and the testimony of two different law enforcement officials regarding Knowles' prior inconsistent statements.

Fifth, Petitioner posits that error occurred when the prosecutor stated in closing that Peter did not testify at trial because "he was hiding because he doesn't want to be here after being shot so many times." After summarizing all the witnesses' testimonies, the prosecutor then mentioned Peter's "conspicuous absence" from trial and said that detectives had been in touch with him regarding the trial but ultimately could not reach or locate him for trial.¹⁰⁰ After making these statements, the prosecution made the statements objected to by Petitioner.

¹⁰⁰ JA 694.

Immediately thereafter, though, Defense counsel objected and had the following exchange with the judge:

Defense Counsel: Your Honor –

Court: Counsel this is closing argument.

Defense Counsel: I understand that, Judge, but Peter – there is no testimony from Peter. Peter is not a witness in this court Judge.

Court: This is closing argument. The jury can hear it and evaluate for themselves.

Because the record discloses that Defense Counsel actually objected to the comments, the Court finds no error here.

Sixth, Petitioner argues that the prosecution was permitted to indicate that all the witnesses knew “that this Defendant is a cold-blooded murderer. They know him and his crew. They know if they cooperate with the police, they are dead.” The prosecutor made this statement as he was wrapping up his closing argument, on the heels of addressing Peter’s absence from trial:

No cooperation. In all that the roaring silence because what you have here is four people at least had identified the defendant. You got [Soto], Yessenia Knowles, Cepeda, and Leo Rodriguez’s own statements to [Soto] at the time. You remember [Soto] testifying on the stand that Leo went down, he took off – Leo took off running, but after the shooting was over he was coming back and he said it’s Sackapoo? [a nickname for the Petitioner]

....

The only person that gave you a full account consistently was [Soto], the little man with a big heart. He lost his boy. And for that he came to court and he got called a drunk, a liar, accused of bribery, for risking his life to see justice for his son. And they all knew this. They all know that this Defendant is a cold-blooded murderer. They know him and his crew. They know if they cooperate with the police, they are a [sic] dead man. That’s why we have the roaring silence.

A broader view of the prosecution’s closing reveals that the AAG was focusing on the “roaring silence,” which, though not specifically demonstrate, could be inferred from the absence of certain evidence at trial. If these statements served to do anything, it was to emphasize that absence of evidence in the People’s case rather than serving to frighten the jury into fearing Petitioner. When viewed in light of all the evidence presented at trial and in context of the entire

closing argument, the Court finds Defense Counsel's failure to object to these specific remarks does not amount to ineffective assistance.

D. Defense Counsel did not provide ineffective assistance when producing impeachable witnesses.

In this assignment of error, Petitioner points to six instances during trial when Defense Counsel "presented witnesses that were easily impeached by the People with prior inconsistent statements." More specifically, Petitioner argues that Defense Counsel should have known when calling these witnesses to establish a certain fact that that "fact might have marginal impact for [the] defense . . . [while] other testimony could be brought out on cross that could completely overshadow any positive effect of [the] testimony."

First, Petitioner points to Defense Counsel calling Tracelyn Bradshaw, a friend of the victim's mother, to testify about her work as a nurse at the Bureau of Corrections,¹⁰¹ where she observed Petitioner in the infirmary while he was an inmate. Specifically, she testified that, during her tenure as a nurse, she had occasion to see Petitioner because he came to her infirmary wanting to reschedule a doctor's appointment made to treat a gunshot wound he received in his foot.¹⁰² That fact was used at trial to establish that Petitioner walked with a limp, had limited mobility, and moved very slowly as a result of the injury.¹⁰³ However, on cross examination, the prosecutor elicited testimony that Petitioner's need for medical attention arose from involvement in a prior shooting incident.¹⁰⁴ Since the Court must make "every effort to . . . eliminate the distorting effects of hindsight . . . and evaluate the conduct from counsel's perspective at the time . . . the [C]ourt must indulge in a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance."¹⁰⁵ Applying that standard, the Court finds no instance of ineffective assistance of counsel here.

¹⁰¹ JA 519-520

¹⁰² JA 520.

¹⁰³ JA 520-522. **Bradshaw:** "He runs on the side. Even when he is trying to catch me, Ms. Bradshaw, and he would like, side ways. We run forward, but he will skip to the side way. Actually, he drags the weaker foot. . . . he move slowly because he really can't run." JA 521.

¹⁰⁴ JA 522.

¹⁰⁵ *Strickland*, 466 U.S. at 690-91.

Second, Petitioner points to Defense Counsel calling Estelita Davis, close friend of the victim's mother and neighborhood friend of the Soto family.¹⁰⁶ When questioned on direct examination by Defense Counsel, Davis testified that, while at the hospital directly after the shooting incident on September 7, 2008 waiting with a friend of the victim's mother, Davis was sitting next to a friend that she and the victim's mother had in common, Bradshaw, when Bradshaw called Soto III's mother on Bradshaw's cell phone. During the conversation, Yessenia Knowles approached Bradshaw and asked to speak to the victim's mother on the phone. During this conversation, Davis heard Knowles state, "She said miss, I'm sorry. I'm gonna do the right thing...She said it's Dave; Dave from LaGrange."¹⁰⁷ With this questioning, Defense Counsel sought to establish that Dave, and not Petitioner, was responsible for the shooting. However, on cross-examination, Prosecution asked Davis if, when giving a statement to Detective Herbert approximately one month after the shooting, she had "heard anything regarding [the Petitioner] and Yessenia."¹⁰⁸ To this, Defense Counsel objected, arguing the question was beyond the scope of his questioning. The prosecutor argued that he could cross-examine Davis with regard to possible bias, and the Court allowed the prosecution's question. The following exchange ensued:

Prosecution: Do you remember telling Detective Herbert that you said Colly is sleeping with her?

Davis: No. I told him I heard.

Prosecution: Well, what is it you heard about them?

Davis: For my – could I speak?

Prosecution: Hold on.

Davis: Okay. Go ahead.

Prosecution: You; were asked a question, what is it you heard about them; and your response was that Colly is sleeping with her?

Davis: No, I did not. I told him the word on the street was that Colly and Yessenia had some affair.

Prosecution: Just so we are clear, you were asked the question by Detective Herbert earlier, prior to taking your statement, you were talking to me and you said you heard from the guys in Sion Farm about Colly and Yessenia, what is it you heard about them; and your answer was that Colly is sleeping with her?

Davis: That's' what I said I heard.

¹⁰⁶ JA 523-524.

¹⁰⁷ JA 525-526.

¹⁰⁸ JA 531.

Again applying the *Strickland* test, the Court notes that Defense Counsel's attempt to limit the prosecution's cross through an objection, when considered in light of the presumption that Defense Counsel's conduct is within the boundaries of reasonable professional assistance, does not lead to the conclusion that counsel was ineffective.

Third, Petitioner argues that Defense Counsel should not have re-called Jonathan Cepeda to testify regarding his statement to police about the incident. Specifically, Petitioner argues that by questioning Cepeda Defense Counsel elicited testimony that established that Soto II, the victim's father, paid Cepeda \$2,000 in return for Cepeda making a statement to Soto II's cousin, Detective Herbert.¹⁰⁹ But, on cross-examination the prosecution extracted testimony from Cepeda in which he stated that he (Cepeda) made a statement to Detective Herbert that was, in actuality, a prepared sheet listing questions to which answers had already been provided. Cepeda further testified that Detective Herbert just had him to sign that same paper as his statement.¹¹⁰ Petitioner argues that this line of questioning opened the door to the prosecution calling Detective Herbert back to the stand to introduce Cepeda's written statement, which identified Petitioner as the shooter.¹¹¹ However, the trial transcript indicates that when Detective Herbert was recalled following Cepeda's testimony, the questioning covered Detective Herbert's role as case agent,¹¹² a review of the 911 call history highlighting that the person who called in the shooting on September 7, 2008 indicated that the shooter was someone with the name David, testimony that when Petitioner was arrested he likely had his fingerprints taken and DNA samples taken, that neither Petitioner's fingerprints nor DNA were found at the scene, and that three search warrants executed in connection with the investigation of Petitioner's involvement with the September 7, 2008 shooting incident revealed no firearms, shell casings, nor DNA evidence connecting Petitioner to the scene of the shooting. Nothing in the record indicated that Detective Herbert was called to the stand to introduce the statement that Petitioner alleges

¹⁰⁹ JA 559-561.

¹¹⁰ **Cepeda:** I sign my name. Me ain't even know what been going on.

Prosecution: You telling eh ladies and gentlemen you signed your name on a piece of paper and you didn't know what was going on?

Cepeda: Yep. Because I don't know how to read. I don't know how to do nothing." JA 566-567.

¹¹¹ *Petr. v. Br.*, at 24.

¹¹² JA 569-569.

impeached Cepeda's testimony concerning being bribed for making a statement to Detective Herbert naming Petitioner as the shooter.¹¹³

Fifth, Petitioner argues that Defense Counsel erred when calling Karima Gaskin, on-and-off girlfriend of Petitioner, to testify that she was with the Petitioner on September 7, 2008, from 9:00 pm to 11:00 pm., thus presenting an alibi for Petitioner. On direct examination, Gaskin testified that she brought food to Petitioner at his house at approximately 9:00pm.¹¹⁴ After that, Gaskin testified that she and Petitioner stayed in her car in the driveway, talking, because Petitioner and his step-father did not get along well.¹¹⁵ She also testified that she stayed with Petitioner until 11:00 pm.¹¹⁶ On cross-examination, the prosecution asked whether Gaskin remembered that, when she was giving her statement to the police before trial, Detective Smith and Herbert asked Gaskin if she looked at her watch when she left Petitioner's house the night of September 7, 2008. To this, Gaskin answered: "Huh? If I watch the watch? No."¹¹⁷ The prosecution asked Gaskin, the same question again and then asked if she remembered responding to police at that time by stating "No, not that I could recall, probably, I don't know."¹¹⁸ Gaskin responded that she "could recall saying no."¹¹⁹ The prosecutor then asked Gaskin, if she did not look at her watch, how did she know that Petitioner was not at the scene of the incident at 10:48 p.m. when shots were reported as having been fired?¹²⁰ The AAG then by elicited testimony that she did not know when the shooting at Estate Bethlehem took place, and, since she did not know when the shooting took place she, therefore, could not "say where [she was] when the shooting took place?"¹²¹ In response, Defense Counsel attempted to rehabilitate Gaskin's testimony, having her reconfirm that she was with Petitioner from 9:00 pm to 11:00 pm on September 7, 2008 and that she was not at the shooting incident on September 7, 2008, therefore, she did not know what time it occurred.¹²² The prosecution then asked Gaskin a series of questions, the main thrust of which was to demonstrate that Gaskin knew the approximate time

¹¹³ JA 568-581.

¹¹⁴ JA 585.

¹¹⁵ JA 586-587.

¹¹⁶ JA 587.

¹¹⁷ JA 588.

¹¹⁸ JA 589.

¹¹⁹ JA 589.

¹²⁰ JA 589-590.

¹²¹ JA 592.

¹²² JA 596-597.

that she was with Petitioner on the night in question, but she did not know the exact time.¹²³

Ultimately, Defense Counsel elicited testimony again from her that established she was with petitioner from 9:00 pm to 11:00 pm on September 7, 2008.¹²⁴

Defense Counsel had an obligation to, and appropriately did, call a credible witness who could establish an alibi for Petitioner. The fact that the prosecution was able to blur the witness' recollection regarding the specific time she spent with Petitioner does not demonstrate inadequate representation in calling Gaskin. No error can be found by the Court in this instance.

Sixth, Petitioner argues that it was error for Defense Counsel to call Detective Fred Brathwaite to testify about a statement by Knowles relayed to Brathwaite at the hospital because it led the prosecution to cross-examine Brathwaite about another detail, implicating the Petitioner, that Knowles relayed to Brathwaite when making the same statement. In the statement Knowles made to Brathwaite, Brathwaite stated that Knowles relayed to him that she thought she recognized the shooter that evening "by his walk" and that the shooter was "this guy name David and he hangs out with" Petitioner.¹²⁵ Indeed, as Petitioner asserts, on cross-examination, the prosecution asked Brathwaite whether Knowles relayed any further information about the Petitioner to him while at the hospital that night.¹²⁶ However, Defense Counsel was quick to object when it became clear the answer was to address Petitioner and a possible motive for his being the shooter in question.¹²⁷ The judge called for a sidebar, the result of which was that the judge told the prosecution that it must recall Detective Brathwaite if it wanted to elicit the desired testimony.¹²⁸ In the sidebar exchange, Defense Counsel lodged an effective argument for limiting the scope of the prosecution's cross-examination of Detective Brathwaite to the specific topics Defense Counsel inquired about on direct examination, even though the prosecution's questions on cross-examination related to the same statement given by the same person to the same detective on the same date and time. Though the prosecution recalled Detective Brathwaite as its own witness and elicited from him the very testimony Petitioner now argues should not have been allowed by Defense Counsel, the sidebar arguments reflected in the

¹²³ JA 598-601.

¹²⁴ JA 601.

¹²⁵ JA 604.

¹²⁶ JA 605.

¹²⁷ JA 605-606.

¹²⁸ JA 605-608.

trial transcript reveal that Defense Counsel was a zealous and effective advocate in delaying the impeaching testimony. The Court finds no error in this instance.

E. Defense Counsel was not deficient in failing to subpoena a witness who the prosecution also could not locate.

Petitioner argues that Defense Counsel provided deficient representation when he failed to subpoena a witness, Cyril Peter, for trial and contends this failing was compounded by the fact that “trial counsel was in possession of an inculpatory [sic] statement from Peter indicating [Petitioner] was not the person who shot him.”

“It is a hallmark of *Strickland* that ‘counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’”¹²⁹ The right to counsel does not necessitate that defense counsel “leave no stone unturned and no witness unpursued.”¹³⁰ Nonetheless, the Sixth Amendment and its interpretation in *Strickland* “do[] require a reasoned judgment as to the amount of investigation the particular circumstances of a given case require.”¹³¹ Further, defense counsel “need not fully investigate every potential avenue if he or she has reasonable grounds for not doing so.”¹³²

When a petitioner argues that his counsel was “ineffective for failing to call potentially important exculpatory witnesses, the assessment of trial counsel’s judgement requires another layer of deference.”¹³³ The Court is “required not simply to give the attorney the benefit of the

¹²⁹ *Moore v. Sec’y of Pa. Dep’t of Corr.*, 457 Fed.Appx. 170, 181 (3d Cir. Jan. 9, 2012) (holding that it was unreasonable for trial counsel to not investigate and present a potential defense witness, who rode to a robbery with robbers, of which the defendant was allegedly one, and that it was reasonable for trial counsel to not investigate and present another potential defense witness who, according to both the defense counsel’s own investigator and the case’s prosecutor, was unavailable and had nothing to say in addition to what other witnesses already testified to at trial).

¹³⁰ *Berryman v. Morton*, 100 F.3d 1089, 1101 (3d Cir. 1996) (holding that (1) a defense counsel’s decision to not locate and present a potential defense witness was unreasonable because the potential defense witness could have testified that the victim had one or two beers while at a club from which the victim left with friends before being raped, therein rendering the victim’s identification of the defendant as a perpetrator weaker than portrayed at trial, and (2) a defense counsel’s decision to not locate and present a second potential defense witness, an alleged co-perpetrator, was unreasonable because his physical size would have contradicted the victim’s account of the rape and, more importantly, her description of the defendant and his co-perpetrators).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Branch v. Sweeney*, 758 F.3d 226, 235 (2014).

doubt, but to affirmatively entertain the range of possible reasons petitioner's counsel may have had for proceeding as he did."¹³⁴

Here, Petitioner contends that *Branch v. Sweeney* resembles the situation facing the Court on this habeas corpus petition. In *Branch*, a petitioner for federal habeas corpus relief pointed to his defense counsel's failure to call two potential witnesses in a trial involving a shooting death that resulted from a scuffle for a gun, the exact details of which scuffle were contested at trial. The Third Circuit held that it was unreasonable for the defense counsel, in that instance, to fail to produce a witness at trial who could have potentially confirmed that another individual, not the defendant, pulled out the gun used to kill the victim and that its discharge was accidental, as well as another witness who could have impeached a prosecution witness's testimony with a prior inconsistent statement, given that the jury was presented with "confusing and conflicting eyewitness accounts."¹³⁵

Here, the facts surrounding Peter's nonappearance at trial differ markedly. First, the prosecution was also unable to locate Peter to testify at trial. The trial transcript reveals that in a pretrial conference, the prosecutor stated on the record that that Peter would not be serving as a witness at trial because they "were not able to locate him."¹³⁶ The prosecution indicated to the Court that Peter failed to appear for a show cause hearing prior to trial, and added that Peter had been "in phone contact with one of [the police's] detectives, but [he] refused to identify where he was and [the prosecution was] not able to locate him."¹³⁷

Second, the Court noted during a pretrial conference that it had received information from the Virgin Islands Probation Department a week prior to trial that Peter had "absconded the territory."¹³⁸ Further, in its Memorandum Opinion written in response to Petitioner's Motion for a Judgment of Acquittal or, in the Alternative, for a New Trial, the Court noted:

Peter's probation officer reported to the Court that [Peter] had been approved to relocate to St. Thomas . . . had avoided reporting to

¹³⁴ *Id.* (brackets, quotation marks, and citations omitted) (holding that it was unreasonable for defense counsel to fail to bring forth two potential defense witnesses who could have (1) corroborated the defendant's account of events at the incident in question (a shooting) and (2) testified to evidence impeaching a prosecution witness because their testimonies (a) covered matters that were not peripheral and that were sharply disputed and critical to the trial, (b) tended to exculpate the defendant, and (c) aligned almost perfectly with the defendant's account of what happened at the incident in question).

¹³⁵ *Id.* at 230.

¹³⁶ JA 092.

¹³⁷ JA 093.

¹³⁸ JA 093.

the Probation Office, had returned to St. Croix without permission, and had absconded from this jurisdiction and was likely to residing outside the Virgin Islands. This Court issued an arrest warrant which to this date had not been executed.”¹³⁹

Third, and in sharp contrast to the import of this information, Defense Counsel, during the pretrial conference, included Peter in its witness list and stated “he is one of the witness [sic] we intend to call. We are going to search for him because we have been able to contact Mr. Peter and we have a statement from Mr. Peter which, if we cannot locate him, we gonna ask be admitted into evidence about this incident. . . . [W]e are attempting to subpoena him because we have a statement from Mr. Peter we think is highly exculpatory. And we need to use either Mr. Peter live testimony or that statement, . . . but we are trying to subpoena him.”¹⁴⁰

Fourth, Petitioner attached to his Motion for a Judgment of Acquittal or, in the Alternative, for a New Trial a statement purportedly written and signed by Peter. In it, Peter states (1) he was involved in the shooting incident forming the basis of this trial; (2) he suffered gunshot wounds as a result of this incident; (3) he arranged for his probation department to transfer him to a safe location on the mainland because his “fear for [his] life was great and [he] felt St. Croix was no longer a safe place or [him] to stay;” (4) he had not been approached to testify at trial; (5) he “can’t take part in a trial that attempts to wrongfully conduct [sic] someone of the crime;” and (6) “until [he] can once again feel comfortable to live in my own home, on St. Croix, I will have no other choice but to remain stateside, where [my] safety can be assured.”¹⁴¹ As the trial transcript and the trial judge’s Memorandum Opinion denying judgment of acquittal and a new trial reflect, the trial judge stated, “Defendant is now requesting that this Court nullify the Jury’s verdicts based on an affidavit by a fugitive from justice. Consequently, the Court rejects this flagrantly objectionable maneuver to obtain a new trial.”¹⁴²

When assessing whether it was reasonable for Defense Counsel to have failed to locate and subpoena Peter, the Court must look to the fact that a warrant for Peter’s arrest was outstanding, that the prosecution was also unable to locate or subpoena Peter themselves, and that the trial judge was told by Peter’s Probation Officer that Peter missed a probation hearing set

¹³⁹ Memorandum Opinion, *People v. Cascen*, SX-08-CR-474, Aug. 31, 2011.

¹⁴⁰ JA 095.

¹⁴¹ JA 039.

¹⁴² *Id.*, at 28.

to address revocation of his probation. When coupling this information with Peter's own statements that "until [he] can once again feel comfortable to live in [his] own home, on St. Croix, [he] will have no other choice but to remain stateside, where [his] safety can be assured," it was not ineffective assistance for Defense Counsel to fail to locate and subpoena Peter for trial.

F. The trial judge's criticism of Defense Counsel did not result in prejudice to Petitioner.

"Due process requires that the trial judge conduct a trial so that it is fair and orderly."¹⁴³ Accordingly, a "trial judge must be something more than an useless appendage to the trial. He bears the responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner...[with the] appearance of impartiality and judicious detachment . . . prevail[ing] at all times."¹⁴⁴ When assessing whether a defendant was deprived of effective assistance of counsel by the actions of his trial judge, the reviewing court must be guided by "the principle that...the...judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted."¹⁴⁵

When executing this responsibility, a trial judge "may elicit germane facts through interrogation of witnesses on his own initiative."¹⁴⁶ Yet, "this role is not without limitations. The trial judge must not abandon his proper role and assume that of an advocate."¹⁴⁷ A judge's "participation during trial – whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct—must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."¹⁴⁸

While "no absolute, rigid rule exists concerning the limitations of the trial judge's participation in this manner, the Eighth Circuit Court of Appeals has held that in order to reverse on grounds of excessive judicial intervention, the record must either disclose actual bias on the part of the trial judge or leave the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality."¹⁴⁹ In light of this, the question a reviewing court must answer is: "whether [the

¹⁴³ *U.S. v. Nobel*, 696 F.2d 981, 237 (3d Cir. 1982).

¹⁴⁴ *U.S. v. Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973).

¹⁴⁵ *U.S. v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980).

¹⁴⁶ *U.S. v. Wilensky*, 757 F.2d 594, 597 (3d Cir. 1985).

¹⁴⁷ *Wilensky*, 757 F.2d at 597.

¹⁴⁸ *Robinson*, 635 F.2d at 984.

¹⁴⁹ *Wilensky*, 757 F.2d at 598.

judge's] behavior was so prejudicial that it denied any or all of the appellants a fair, as distinguished from perfect, trial."¹⁵⁰ "When unfair judicial procedures result in a denial of due process, reversal is required."¹⁵¹

To ensure that a few isolated and allegedly prejudicial comments do not result in reversal, "a balancing process must be employed to determine whether the trial judge's comments have pervaded the overall fairness of the proceeding."¹⁵² "A trial judge must be vigilant not to let his or her tone of voice or gestures indicate the judge's view on the defendant's guilt or innocence."¹⁵³ In addition, past case law has taught that "quotations lifted out of the transcript can often fail to give a true or complete picture of the framework for and background of the allegedly prejudicial comments. Counsel, being advocates, also tend to attach excessive significance to some remarks and to overlook counterbalancing portions of the record. For these reasons, it is essential, at least where appellants brief . . . raises a substantial issue, as to the trial judge's fairness in conducting the trial, to make a close scrutiny of each tile in the mosaic."¹⁵⁴

Petitioner asserts that the Defense Counsel's performance was so deficient that the trial judge "felt the need to assume the role of advocate."¹⁵⁵ Specifically, Petitioner points to instances in which he asserts that the Court (1) admonished Defense Counsel for his deficient handling of cross-examination and objections at four different instances during trial, and (2) assumed the role of advocate during Defense Counsel's cross-examination of three separate witnesses. *In totum*, Petitioner argues that the Court's comments, taken cumulatively, "telegraphed to the jury the judge's overall recognition of [Defense] Counsel's ineffectiveness and a contempt for the Defense."¹⁵⁶

Admonishment. Petitioner contends that the Court's criticism of Defense Counsel that he was "too emotional," came as result of Defense Counsel's deficient performance.¹⁵⁷ First, it cannot be said that the Court's comment to Defense Counsel that he was "too emotional" conveyed to the jury that the trial court harbored any bias in favor of the victim or against Petitioner, since the

¹⁵⁰ *Robinson*, 635 F.2d at 984.

¹⁵¹ *Wilensky*, 757 F.2d at 598

¹⁵² *Id.*

¹⁵³ *Nobel*, 69 F.2d at 237.

¹⁵⁴ *U.S. v. Weiss*, 491 F.2d 460, 468 (2d Cir. 1974).

¹⁵⁵ Petnr.'s Br., at 27.

¹⁵⁶ *Id.*, at 29.

¹⁵⁷ Petnr.'s Br., at 28 (citing JA 194).

trial transcript reveals that the trial court's "too emotional" comment was not spoken in front of the jury but in the judge's chambers. Counsel had entered chambers, at the trial court's behest, to present argument regarding Defense Counsel's motion to have a particular juror removed.

The Court notes that the "too emotional" comment is better understood in the context of what was going at that time during trial, rather than in isolation. Doing so reveals that the exchange leading to the trial court's comment actually began prior to the in chambers arguments. Just before counsel retired to chambers, Soto II, the victim's father, was on the stand being cross-examined by Defense Counsel. Soto II said he saw Petitioner exit the suspect black truck and begin shooting. As a result, it does not surprise the Court to see in the trial transcript that a modicum of contentiousness characterized Defense Counsel's cross-examination of Soto II.

At one point, Defense Counsel was focusing on Soto II's ability to correctly perceive the events of the night in question. Namely, Defense Counsel asked Soto II if he had consumed any beer or alcohol during the day of September 7, 2008.¹⁵⁸ Soto II answered in the affirmative to multiple permutations of this inquiry. Defense Counsel then asked whether Soto II consumed any beer or alcohol during the evening of September 7, 2008.¹⁵⁹ Before Soto II could finish his response, Defense Counsel interrupted him by stating: "Well, sir, let me finish the question."¹⁶⁰ This comment from Defense Counsel lead the Court to state: "Well, let him finish the answer."¹⁶¹ Almost immediately, a juror (later identified as Juror No. 7) commented aloud: "Yes. Thank you."¹⁶² At this point, Defense Counsel asked for a sidebar to argue for removing the juror who commented, specifically positing that the juror's comment displayed that she was "predisposed to adjudicate a certain way."¹⁶³ The trial judge then announced that the proceedings would be momentarily adjourned so that both counsel could argue the merits of the juror's possible bias and recusal.¹⁶⁴

In chambers, Defense Counsel recounted that he was cross-examining Soto II about his drinking on the day in question, when Juror No. 7 made the objectionable comment.¹⁶⁵ Defense

¹⁵⁸ JA 184.

¹⁵⁹ JA 185.

¹⁶⁰ JA 185.

¹⁶¹ JA 185.

¹⁶² JA 185.

¹⁶³ JA 185-187; quote JA 187.

¹⁶⁴ JA 187.

¹⁶⁵ JA 188-191.

Counsel argued that the juror's comment showed that she was "predisposed to vote a certain way or has taken the side of one person without all of the evidence being entered."¹⁶⁶ Defense Counsel then moved for the juror to be removed or for a mistrial.¹⁶⁷ Rather than suggesting ineffective assistance, Defense Counsel's advocacy demonstrates zealous representation. The following exchange then ensued:

Prosecution: Your Honor, the juror made some kind of exclamation. It was inaudible as far as the People are concerned, but Defense Counsel was badgering the witness and the People gave him leeway to so that at the risk of alienating the jury and that's exactly what happened. The Court made the same admonition to Counsel that he is asserting the juror made, so it doesn't see a predisposition. If anything; it says they are annoyed at counsel for badgering and repetitively questioning the witness, which the People allowed to go on to a certain degree. So the Defense Counsel got what he asked for.

Court: Would you like to have a rebuttal to that?

Defense Counsel: Yes, Judge. I don't know how is "answer the question" badgering a witness. I want the jury to understand what he is saying. He say [sic] he drank a couple of beers, so I asked him what to do you mean a couple; one or two. I don't see how that is badgering the witness because I'm asking questions. Am I not supposed to ask questions? Is he not – is the witness not supposed to ask questions? Is he not – is the witness not supposed to be subjected to cross-examination, sometimes vigorous cross-examination?

This witness has given testimony that, if believed, would put my client in jail for life. And I'm not supposed to ask him questions because I may be hostile or vociferous in my questioning because I am badgering? And even if I am badgering, that's a decision for the Court to make, not for the jury to make openly.

Court: Alright. Thank you, Counsel. I do make the finding that you were badgering the witness. That was fairly clear to anybody sitting in that courtroom; that there was an animosity in your questioning and there was an animosity in his answer, and that can only lead to just the sort of thing that this led to.

And it seems to me as my recollection is that I said the very same thing that you are saying that the juror said, which is, let him answer the question; which was my ruling. And that is still my ruling and it will continue to be my ruling. You will wait until your last question is answered before you ask another question because –

¹⁶⁶ JA 191.

¹⁶⁷ JA 190; 192.

Defense Counsel: I understand that, Judge.

Court: Good.

Defense Counsel: Judge, I am a lawyer. I understand courtroom decorum.

Court: And I am a judge and I understand all that too.

Defense counsel: I would never disrespect the Court.

Court: It's not a matter of disrespecting the Court. It's you get emotional and the witness gets emotional and you just play on that. Unfortunately, it doesn't always work to your advantage.

Defense Counsel: Judge, is the court saying – let's read the questions and listen to the question I asked. I am being emotional because I asked him the question I did?

Court: Absolutely. You were being emotional. You were being emotional from the first question you asked him to the last one you asked him, but that's your choice. I am not gonna run your case for you, but you take the risk then of alienating not only counsel, but even the jury.

Defense Counsel: So I shouldn't ask any question, Judge, that what you saying, because I am emotional? Because a defense attorney ask questions [sic] with emotion or because of his client's exposure, he is not supposed to ask any questions? Is that what the Judge is saying? I don't understand I am "emotional from the first question."

Court: Listen, take my comment about your emotional as an observation I have made. It has nothing to do with your legal ability or with your legal rights. You have absolute right to ask whatever questions you want to, but you also have a right to expect reaction by both the witness and that juror and I will not excuse the juror.

I see no indication whatsoever that she shows any predisposition to convict your client or is against your client. If anything, it's a reaction to you. So perhaps you ought to be aware, more aware that you can do harm to your client by the way you conduct your examination and that should be the lesson we learn from this, but your motion is denied. I find no reason to disqualify the juror.¹⁶⁸

In the above exchange, the comments at issue were made in chambers, so they could not give the jury the impression the trial court believed the accused was guilty. The transcript fails to give the impression that the trial judge's telling Defense Counsel that he was "too emotional" evidenced bias against Petitioner. In fact, the trial court's comment was in keeping with directive stated above: "the judge is more than a moderator or umpire and has an active

¹⁶⁸ JA 192-195.

responsibility to see that a criminal trial is fairly conducted.”¹⁶⁹ By advising Defense Counsel of how he was perceived by the judge, the witness, and the jury and advising Defense Counsel that he could likely expect a reaction to how he was being perceived, the trial court took “active responsibility.” By advising Defense Counsel of his tone, emotionality, and how those were perceived, the trial court took concrete steps to ensure Petitioner’s criminal trial was fairly conducted. These steps were in keeping with the role he was to play. Moreover, a finding that Defense Counsel was badgering a witness does not amount to ineffective assistance of counsel.

Second, Petitioner assigns error to Defense Counsel’s cross-examination of Maurice Cooper because the Court “felt the need to explain to counsel that it was very clear that he [Cooper] testified he had no firearms to compare the cartridge with.”¹⁷⁰ Maurice Cooper worked with the Virgin Islands Police Department as a Forensic Science Consultant and was admitted at trial as a Firearms and Firearms Examination expert witness.¹⁷¹ Cooper testified to his examination of fired cartridge casings found at the scene of the incident. Because the investigation of the shooting did not produce a firearm believed to have been used by the shooter, Cooper conducted a characterization examination to determine what type of firearm fired the bullet casings found and whether the casings found were shot from the same gun.¹⁷² Ultimately, Cooper testified that he was able to determine that the casings found at the scene were from a forty caliber firearm and were shot from the same firearm based on the striations he found on the casings.¹⁷³ On cross-examination, Defense Counsel tried to highlight weaknesses in Cooper’s testimony by eliciting that Cooper did not have the actual firearm from which these casings were ejected and then questioning how Cooper knew these casings were fired from the same firearm.¹⁷⁴ Cooper testified at length as to how he conducted tests and studies of the striations found on cartridge casings and how those striations enabled him to determine whether the casings found at the scene were from the same firearm.¹⁷⁵ Defense Counsel continued to cross-examine Cooper, focusing on the fact that Cooper was never able to compare the casings

¹⁶⁹ *Robinson*, 635 F.2d at 984.

¹⁷⁰ *Id.* (citing JA 377).

¹⁷¹ JA 358-360.

¹⁷² JA 360-363.

¹⁷³ JA 364-365.

¹⁷⁴ JA 374.

¹⁷⁵ JA 374-377.

with the specific firearm that was used in the shooting and asking, if Cooper lacked the firearm, how he could conduct the comparisons.¹⁷⁶ After this line of questioning,¹⁷⁷ the judge stated:

Counsel, it is very clear that he has testified he had no firearm to compare the cartridges with. All he is saying is that the two cartridges were fired from the same firearm. There is no attempt to link the cartridges to any particular firearm.

By stating this, the trial court only clarified Cooper's testimony for the jury to ensure they understood the probative value of Cooper's testimony. While this Court does not have a recording to review the tone the trial judge used when making the statement, the fact that the trial judge followed up on this statement of clarification with a string of questions seeking to further elucidate Cooper's statements for the jury gives further indication that the statement pointed to above gave no indication to the jury that the trial judge believed Petitioner was guilty and didn't leave an impression with the jury that the trial judge was partial.

Third, Petitioner points to an instance in which Defense Counsel was cross-examining Detective Herbert and asked the judge to instruct Detective Herbert to respond. To this request, the judge stated "I thought he [Herbert] was responding. Maybe not responding the way you want him to, but he was responding."¹⁷⁸ The quoted excerpt must be assessed in relation to the remainder of Defense Counsel's cross-examination of Detective Herbert. Defense Counsel began his cross by showing Detective Herbert a photo array and asking whether Detective Herbert had showed Soto II the photo array when he interviewed Soto II. After a series of questions and a moment during which Detective Herbert was allowed to refresh his recollection, it became clear that Detective Herbert first interviewed Soto II at the hospital after the shooting. Detective Herbert testified that he took a written statement from Soto II at this first interview, but did not show him a photo array.¹⁷⁹ When asked why by Defense Counsel, Detective Herbert stated that "At the time when I spoke to him at the hospital . . . I saw no need to show him a photo array or attempt to show him a photo array."¹⁸⁰ Defense Counsel followed up by asking the detective if the reason he did not show a photo array that because Soto II did not identify Petitioner as the shooter? To this, Detective Herbert stated that Soto II had stated that an

¹⁷⁶ JA 374-377.

¹⁷⁷ See JA 374-377.

¹⁷⁸ *Id* (citing JA 313).

¹⁷⁹ JA 308-309.

¹⁸⁰ JA 309.

individual with the nickname “Sackapoo” had committed the shooting, and therefore, the detective “didn’t see a need to basically show him a photo array.”¹⁸¹ Following his questions addressing statements taken from Soto II, Defense Counsel asked Detective Herbert about another photo array and elicited testimony from the detective that indicated he had shown a different photo array to Cepeda when Cepeda came to give a statement at the police station on October 10, 2008.¹⁸² Defense Counsel then asked if, on October 10, Cepeda knew who committed the shooting.¹⁸³ The following ensued:

Det. Herbert: If I could recall, I did ask him in my statement.

Defense Counsel: And he tell you he wasn’t sure, right?

Det. Herbert: No, he didn’t say he wasn’t sure.

Defense Counsel: He said he probably look like somebody; that’s what he said, right?

Det. Herbert: He said it probably look like Colly.

Defense Counsel: So that indicates to you that he is not sure?

Det. Herbert: No, that didn’t indicate to me he wasn’t sure.

Defense Counsel: But he didn’t tell you with any degree of certainty, right?

Det. Herbert: I couldn’t determine in his mind as to what degree of certainty. He said it looked like Colly.

Defense Counsel: When somebody tell you “probably”, does that not indicate to you that the person isn’t sure?

Det. Herbert: Not in all instances, no. As an investigator – they can be withholding information.

Defense Counsel: Did you show him a photo array at that time?

Det. Herbert: At the end I did show him a photo array of the six individuals to see if he recognize the person that he called in his statement.

Defense Counsel: In connection to the response that it was probably him?

Det. Herbert: Oh, he also said a lot of stuff prior to the interview.

Defense Counsel: I’m not asking you –

Det. Herbert: But you need to know that.

Defense Counsel: No. Sir – Your Honor, I don’t want to have any antagonistic dialogue with the witness. Could you admonish the witness to respond to the questions I asked, Judge?

Court: I thought he was responding.

Defense Counsel: Well --

Court: Maybe not responding the way you wanted him to, but he was responding.

¹⁸¹ JA 310.

¹⁸² JA 310-311.

¹⁸³ JA 311.

Defense Counsel: Very well. Thank you, Judge.

Defense Counsel: You ask him about the person who fired the shot?

Det. Herbert: I would agree.

Defense Counsel: And he said he probably believe that it's Colly Cascen, right?

Det. Herbert: That's what he said.

Reviewing the excerpted sentence upon which Petitioner relies within the entirety of Detective Herbert's cross-examination, the Court sees no indication that the trial court was biased for or against either party. When viewed in a larger context, it becomes clear that Defense Counsel was trying to control Detective Herbert's answers—as defense attorneys are trained to do—in such a way that would benefit his client. However, the detective answered his question in such a way that attempted to explain how he, as an investigator, elicited information from individuals in a generalized, objective manner—and not necessarily specifically from Cepeda as it relates to Petitioner. Thus, as the trial judge noted, Detective Herbert was answering Defense Counsel's question, albeit in a fashion that Defense Counsel did not intend. Accordingly, the trial judge's statement relied on by Petitioner, when balanced with the remainder of Defense Counsel's cross-examination of Detective Herbert, reveals no partiality or failure on the part of Defense Counsel that engendered an inappropriate response from the judge.

Fourth, Petitioner assigns error to Defense Counsel's objections during the prosecution's closing argument. Defense Counsel's objection asserted that certain statements relied on matters Defense Counsel claimed were not in evidence, and the Court responded by telling Defense Counsel that he should object to "some legal line."¹⁸⁴ Viewing this quote within its larger context is essential when determining whether the trial court's use of these words indicates partiality. In fact, the quote pointed to by Petitioner is taken from a response to Defense Counsel's third objection lodged during the prosecution's closing argument. The first objection Defense Counsel made was towards the end of the AGG's summarization of Soto II's testimony, when the AGG was attributing Soto II's delay in reporting what he knew to Soto II's fear of the Petitioner and possibly police. The trial judge sustained the defense objection when he stated: "Well, counsel, I wish you would keep your remarks to the testimony as it was stated rather than

¹⁸⁴ *Id* (citing JA 696).

inferring certain things.”¹⁸⁵ The second objection Defense Counsel raise occurred near the end of the AGG’s summary of Knowles’ testimony. At that point, the AAG was attempting to shore up the fact that Knowles, as an eyewitness, did not identify Petitioner as the shooter on the stand. He did so by highlighting the prior inconsistent statements she gave to two different law enforcement officials between the shooting and trial, in which she indicated the Petitioner had targeted her boyfriend, Peter, and by stating “she’s afraid to make that statement in the Defendant’s presence.”¹⁸⁶ Defense Counsel then lodged his second objection, which the trial court also sustained implicitly when the AGG volunteered to correct the statement and the trial court stated “Please do.”¹⁸⁷ Therefore, when Defense Counsel made this third objection, it was after having interrupted the prosecution twice before for legitimate objections that were sustained. In this instance however, the information that Defense Counsel objected to had been entered in evidence, as shown below:

Prosecution: You remember the nurse, the prison nurse, Tracy Bradshaw, testifying about the fact that the Defendant had a bullet wound in his foot; she was still treating him when he was in detention? She said he was still limping. And the testimony was that he was limping, he was wounded, he hadn’t even healed up from his last gunshot wound out here shooting people.

Defense Counsel: Object –

Prosecution: He stumble because he was still wounded, still in pain as he chased his victims trying to dispatch –

Defense Counsel: Your Honor, where is this evidence of that in this court? I know this is closing, but where is the evidence of record that he was stumbling because he was recovering from a gunshot wound and couldn’t run? Where is the evidence of that, Judge?

Court: According to the Prosecutor, it was the Bureau of Corrections officer who testified about his injuries – to his injury to his foot and the way that he walked during his incarceration, so it is based on evidence. And I wish you would stop interrupting the argument unless it’s truly an objection that goes to some legal line.¹⁸⁸

While it appears Defense Counsel’s third objection was overruled because the information the AGG spoke of was in evidence, Defense Counsel did ground his objection in a line of legal

¹⁸⁵ JA 685.

¹⁸⁶ JA 689.

¹⁸⁷ JA 689.

¹⁸⁸ JA 695-696.

argument and authority – that which requires facts discussed during closing argument to be in evidence. While the Court cannot explain why the trial judge uttered these precise words on a subjective level, the Court can assess whether they indicate the trial court’s bias or partiality. To do so, the Court looks to *Robinson*, which provides “a judge’s participation during trial – whether it takes the form of...addressing counsel or other conduct – must never reach the point at which it appears clear to the jury that the court believes the accused is guilty.”¹⁸⁹ The trial court’s admonishment of Defense Counsel at this particular juncture, viewed in light of the fact that Defense Counsel lodged the objection after two previous sustained objections and that neither Defense Counsel’s nor the judge’s language focused on Petitioner, fails to convey to the jury a bias against Petitioner held by the judge.

Assuming the Role of Advocate. First, Petitioner contends that Defense Counsel’s ineffectiveness led the trial court to assume the role of advocate during Defense Counsel’s cross-examination of Detective Herbert regarding whether Petitioner was right-handed or left-handed. Detective Herbert’s initial response indicated that he did not ascertain whether Petitioner was right-handed or left-handed during his initial interview with Petitioner.¹⁹⁰ In response to this, Defense Counsel asked Detective Herbert: “So that just came up as an afterthought?”

Det. Herbert: During – when you do the arrest form – there is certain –

Defense Counsel: Just yes or no.

Det. Herbert: No, it’s not.

Court: Counsel, let him answer the question.

Defense Counsel: He can answer. I just want him to answer my question first, then he can elaborate.

Court: I’ll determine that.

Defense Counsel: Thank you your Honor. May I proceed/ May I proceed?

Court: Yes, you may.¹⁹¹

Defense Counsel continued to ask questions that elicited responses from Detective Herbert indicating that it is a standard question police ask a suspect because that particular piece of information is entered into the arrest report, along with other identifying information like tattoos. Defense Counsel continued to ask Detective Herbert if, when taking Petitioner’s initial

¹⁸⁹ *Robinson*, 635 F.2d at 984.

¹⁹⁰ JA 462-463.

¹⁹¹ JA 462.

statement, the detective asked whether Petitioner was right-handed or left-handed. To this, Detective Herbert stated he ascertained Petitioner was left-handed but only recorded that information on the arrest form and not in the document reflecting Petitioner's initial statement because there is a standard box on the arrest form that asks for such information.¹⁹² After Defense Counsel reiterated that he was asking the detective about the statement, the trial judge asked: "You referred to an arrest report?"

Det. Herbert: Yes, sir.

Court: Is that something, a document that you normally use in the course of your course of business?

Det. Herbert: Yes.

[Defense Counsel objects to the trial court questioning Detective Herbert and the trial court informed the Defense Counsel that he "was free to ask questions of witnesses as [he] saw fit."]

....

Court: You were referring to an arrest report?

Det. Herbert: Yeah. Once we initiate –

Court: No no. Just answer my question. Were you referring to an arrest report?

Det. Herbert: Yes sir.

Court: Is that a document you use in the course of your investigation?

Det. Herbert: Yes sir.

Court: And when a person is arrested such as this Defendant was arrested, is there a form that calls for reporting whether he is right-handed or left-handed?

Det. Herbert: Yes, your Honor.

Court: And what is that form?

Det. Herbert: That's the arrest form.

Court: Alright. And that was completed in this case by you?

Det. Herbert: Yes, sir.

Clearly, judges may question witnesses. The point of inquiry is whether that questioning leaves the jury with an impression that the judge believes the accused is guilty. Petitioner asserts that the trial judge's questioning indicated that the judge thought Defense Counsel was not providing effective counsel. But, this exchange indicates only that the trial court was simply clarifying how the police learn and record information such as the preferred hand of a suspect. The role the trial court played was one of clarification, and nothing in the judge's questioning reflected dissatisfaction with Defense Counsel or demonstrated bias of the judge.

¹⁹² JA 463.

Second, Petitioner argues that the trial judge took on the role of advocate when he *sua sponte* instructed the jury to disregard an answer a witness had given to a question posed by Defense Counsel on cross-examination. The trial transcript reveals that Defense Counsel was questioning Detective Matthew regarding his involvement in ascertaining information from witnesses while at the hospital on the night in question. Specifically, Defense Counsel's questioning centered on whether Detective Matthew remembered what Cepeda said when giving a statement to Detective Herbert that night.¹⁹³ Defense Counsel asked Detective Matthew if he remembered any questions Detective Herbert asked Cepeda, and Detective Matthew indicated he remembered a general summary.¹⁹⁴ Then Defense Counsel asked Detective Matthew if he remembered Cepeda picking Petitioner out of a photo array, and Detective Matthew indicated he remembered that because Cepeda pointed out a picture of Petitioner.¹⁹⁵ Defense Counsel asked Detective Matthew if he remembered that Cepeda said the name "Colly Cascen"?¹⁹⁶ To this, Detective Matthew stated: "Yeah, because that's the focal point of the investigation."¹⁹⁷ Defense Counsel then followed up by asking: "As a matter of fact, you all, the detective bureau has been focusing on Mr. Colly Cascen for a while, right?"¹⁹⁸ To this, Detective Matthews stated: "He has come up in several other cases."¹⁹⁹ Immediately, the Court interjected:

That answer would be stricken from the record and the jury will ignore it. He wasn't talking about any other case. He was talking about this case.²⁰⁰

Contrary to Petitioner's contention, the record demonstrates that the trial court did not "take over" questioning Detective Matthew. Instead, after the Court struck the detective's improper volunteered statement, Defense Counsel continued his cross-examination. As a result, the Court finds that the issue raised by Petitioner is not an example of the judge exercising his right to question witnesses.

Third, Petitioner argues that the trial court took on the role of advocate "when he interjected in an effort to clear up [Cooper's] prior testimony and possibly extract additional

¹⁹³ JA 446-447.

¹⁹⁴ JA 447.

¹⁹⁵ JA 447.

¹⁹⁶ JA 447.

¹⁹⁷ JA 448.

¹⁹⁸ JA 448.

¹⁹⁹ JA 448.

²⁰⁰ JA 448.

information.”²⁰¹ As stated above, a trial judge is tasked with taking an active responsibility to ensure that the accused receives a fair criminal trial, and one of the routes through which a judge may do so is by “elicit[ing] germane facts through interrogation of witnesses on his own initiative.” Accordingly, on the heels of Defense Counsel’s cross-examination of Cooper regarding the examination of the casings found at the scene, the trial judge asked a series of questions of Cooper²⁰² to elucidate how the tests Cooper ran were a reliable way to ensure that the cartridge casings found at the scene were fired from the same firearm in the absence of the firearm itself. Since the trial court was clarifying testimony that was previously, at best, opaque, he ultimately worked to ensure that the accused received a fair trial. This demonstrated neither inadequate representation by Defense Counsel nor partiality on the part of the judge.

G. Defense Counsel’s errors did not cumulatively demonstrate ineffective assistance of counsel.

A “cumulative error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.”²⁰³ Accordingly, “a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish ‘actual prejudice.’”²⁰⁴

Here, Petitioner has asserted nine errors sounding in ineffective assistance of counsel. In each of the instances of ineffective assistance of trial counsel Petitioner asserted, the record, namely the trial transcript, showed that Petitioner did not meet *Strickland*’s high burden. In each of the seven (7) instances pointed to by Petitioner regarding trial counsel, Defense Counsel’s conduct, as evidenced in the record, proved reasonable under *Strickland*’s presumption that counsel’s actions, when viewed at the time that counsel made the decision to take those actions,

²⁰¹ Petnr.’s Br., at 29.

²⁰² Instead of copying the entire transcript reflecting the trial court’s questions and Cooper’s detailed answers verbatim, the questions trial court asked of Cooper will be listed here for clarity:

1. “Just for some clarification, when you talk about striae, what are you talking about?” JA 377.
2. “Just another term for the scratches, for the scratches or microscopic imperfections?” JA 377.
3. “Now what are the parts of the firearm that make these characteristics?” JA 378.
4. “. . . the cartridge, [or do] you mean the bullet?” JA 378.
5. “And this [the process Cooper just described as to how gun interior make striations on cartridges] is peculiar to automatic weapons, is that correct?” JA 379.
6. “In this case, what type of cartridges did you recover?” JA 379.

²⁰³ *Albrecht v. Horn*, 471 F.3d 435, 468 (3d Cir. 2006).

²⁰⁴ *Id.*

as opposed to when viewed with the benefit of hindsight, fall within the boundaries of reasonable professional assistance. Further, the record shows not only that *harmless* error did *not* result from Defense Counsel's actions, but in most instances *no* error was found to have been made by Defense Counsel. Cumulative error analysis calls for the Court to weigh all errors, even harmless ones, and then determine whether the "errors identified undermined the reliability of the verdict,"²⁰⁵ or the weight of the evidence supporting the verdict.

Here, Soto II testified (1) that he saw a black truck drive towards the gathering where friends and family were celebrating Soto III's win;²⁰⁶ (2) that he saw Petitioner in the same black truck;²⁰⁷ (3) that he saw Petitioner "jump [] out of the truck and just bust a shot;"²⁰⁸ (4) that he saw Petitioner firing a chrome gun when he did so;²⁰⁹ (5) that he saw Petitioner continue to shoot as he continued walking;²¹⁰ (6) that he had known Petitioner since Petitioner was a little boy (a total of eighteen years) so he was sure it was Petitioner he saw that night;²¹¹ and (7) that he saw a black truck parked in front of Petitioner's house three days after the shooting.²¹² Knowles testified (1) that she saw the body frame and walking gate of the shooter and thought it was an individual who was known to travel with Petitioner;²¹³ (2) that she and Peter were being followed that night by a white vehicle;²¹⁴ that two months prior to September 7, 2008's shooting incident, Petitioner told her he had people following her and her boyfriend, Peter, who could relay to him (Petitioner) where Peter had been the day before and "every movement [Knowles] was doing,"²¹⁵ and in the same July conversation, Petitioner told Knowles that if Peter "came close to him to try to hurt him, he [was] going to hurt him or kill him."²¹⁶ While one witness in particular, Cepeda, appeared to recant on the witness stand, Detective Herbert of the Virgin Islands Police Department was able to confirm that on the night of September 7, just after the shooting, Cepeda gave an initial statement to the detective which showed that Cepeda saw the

²⁰⁵ *Albrecht*, 471 F.3d at 468.

²⁰⁶ JA 67-68.

²⁰⁷ JA 69-70.

²⁰⁸ JA 70.

²⁰⁹ JA 71.

²¹⁰ JA 71.

²¹¹ JA 71.

²¹² JA 67-68.

²¹³ JA 265-266.

²¹⁴ JA 247-249.

²¹⁵ JA 298.

²¹⁶ JA 298.

shooter and recognized him to be Petitioner.²¹⁷ The weight of this evidence indicating Petitioner's guilt far outweighs whatever minor error that may be found in the record concerning Defense Counsel's professional performance as legal counsel. No cumulative prejudice is present.

Ineffective assistance of appellate counsel

The Sixth Amendment "entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right."²¹⁸ An appellate counsel's performance is weighed using the same standards and in the same manner applied to trial counsel as established in *Strickland v. Washington*.²¹⁹ Concomitantly, a criminal defendant "whose lawyer does not provide him with effective assistance on direct appeal and who is prejudiced by the deprivation is thus entitled to a new appeal."²²⁰

Criminal defendants, though, do not have "a constitutional right to compel . . . counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."²²¹ Courts have "recognized the superior ability of trained counsel in the examination of the record, research of the law, and marshalling of arguments on the appellant's behalf."²²² Therefore, the professional advocate "must be allowed to decide what issues are to be pressed."²²³ Allowing the client to do so "seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation."²²⁴ Indeed, "one of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects."²²⁵ This role "has assumed greater importance in an era when oral argument is strictly limited in most courts—often to as little as fifteen minutes—and when page limits on briefs are widely imposed."²²⁶

²¹⁷ JA 302-303; 401.

²¹⁸ *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Mason*, 97 F.3d at 893.

²²⁶ *Jones*, 463 U.S. at 753.

Appellate counsel's performance, however, does not avoid scrutiny. While the Court must "engage in a pragmatic assessment of appellate counsel's work, . . . genuinely strategic decisions that were arguably appropriate at the time, but, with the benefit of hindsight, appear less than brilliant will not be second-guessed."²²⁷ On the other hand, "when appellate counsel omits (without legitimate strategic purpose) a significant and obvious issue, [the Court] will deem his performance deficient, and when that omitted issue may have resulted in a reversal of the conviction, or an order for a new trial, we will deem the lack of effective assistance prejudicial."²²⁸

Accordingly, "when a claim of ineffective assistance of counsel is based on a failure to raise viable issues, the . . . court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. . . . [O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."²²⁹

A. It was reasonable for Appellate Counsel to raise the issues of jury partiality, confrontation clause violations, and insufficiency of the evidence in place of improper closing remarks because they presented the best prospects for appellate success.

Petitioner contends that that his Appellate Counsel was ineffective in failing to sufficiently raise the issue of the prosecutor's improper closing argument on appeal. Petitioner also points out that, on its direct review of his conviction, the Supreme Court noted that the issue of improper closing arguments was waived due to appellate counsel's failure to properly brief the issue.²³⁰ Petitioner contends that the prosecution's closing argument invoked matters not entered into evidence and sought to appeal to the jury's emotions by frightening the jury into convicting Petitioner.²³¹ Specifically, Petitioner points to the following comments:

1. Soto II "knew this was a murder case and they could kill him or would kill him; that he didn't want to talk until he could be in a safe and secure environment;"

²²⁷ *Mason*, 97 F.3d at 893.

²²⁸ *Id.*

²²⁹ *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

²³⁰ Petnr.'s Br., at 30.

²³¹ *Id.* at 31.

2. Knowles “came to court [but was] afraid to make [a] statement [about her life being threatened] in the Defendant’s presence;
3. Wayne Christian “did not want to testify” and “why is that?”;
4. Peter was “hiding because he doesn’t want to be here after being shot so many times. Why do you think that is?”;
5. Leonardo Rodriquez was at the scene but testified that he “didn’t see nothing. I don’t know a thing about it;”
6. “They all know that this Defendant is a cold-blooded murderer. They know him and his crew. They know if they cooperate with the police, they are dead.”²³²

Before the Virgin Islands Supreme Court, Appellate Counsel divided his arguments into three major sections. In the first section of his brief, Appellate Counsel raised arguments concerning: (1) the trial court’s admission of testimony of a witness that violated the Confrontation Clause;²³³ (2) the trial court’s admission of a police firearms expert’s testimony about a shell casing found at the scene of the incident without entering a firearm into evidence;²³⁴ (3) the trial court’s erroneous instructions for first degree murder that allowed transferred intent to fulfill the *mens rea* requirement for premeditated murder;²³⁵ (4) the trial court’s erroneous instructions for third degree assault which lacked the element of a “deadly weapon;”²³⁶ and (5) the prosecution’s misconduct during closing argument by mentioning evidence not admitted in evidence.²³⁷ In the second section, Appellate Counsel raised Petitioner’s right to have a trial before an impartial jury and addressed three separate instances for the Supreme Court’s review.²³⁸ In the third and final section, Appellate Counsel argued it was error for the trial court to deny Petitioner’s Motion for Acquittal or, in the Alternative, a New Trial.²³⁹ Importantly, in the section of the brief in which Appellate Counsel presents his argument addressing the prosecution’s closing argument, he recounts the closing argument itself, asserts that “none of the arguments and remarks made by the prosecutor in closing arguments [sic] is supported by the

²³² *Id.* at 31.

²³³ Appellant’s Br., to the Virgin Islands Supreme Court for direct review, at 17-18.

²³⁴ *Id.* at 18-20.

²³⁵ *Id.* at 20-22.

²³⁶ *Id.* at 21.

²³⁷ *Id.* at 23-25.

²³⁸ *Id.* at 26-29.

²³⁹ *Id.* at 29-30.

evidence of record,” and ended the section by stating that the prosecutor’s conduct was intended to “inflame the passion of the jury and get a guilty verdict.” Though Appellate Counsel used the words “prosecutorial misconduct” at the beginning of the sub-section addressing the prosecution’s closing argument, he did not provide a clear legal argument based on that issue’s jurisprudence. Nor did he point to specific points in the closing argument. In fact, the title for the entire first section of the appellate brief was listed as “The Trial Court Committed Harmful Erroneous Substantive Evidentiary Rulings and Legal Rulings Which Require Appellant’s Conviction to be Reversed.”

When reading the arguments made in this section and considering them all together, the Supreme Court treated the amalgamation, which raised various legal authorities and issues, as an appeal challenging the sufficiency of the evidence for the first-degree murder, third-degree assault, reckless endangerment, and unauthorized possession of a firearm convictions.²⁴⁰ The remainder of the opinion addressed (1) a Confrontation Clause violation that occurred during trial when the trial court stopped Defense Counsel from cross-examining a police official regarding the process she used to prepare a form documenting Petitioner’s lack of a license to possess a firearm;²⁴¹ (2) Petitioner’s challenge to the jury instructions given for first-degree murder, in which the Supreme Court found no error because the instructions tracked 14 V.I.C. § 922 (a)(1);²⁴² (3) Petitioner’s challenge arguing he had a partial jury, in which the Supreme Court found no error because it found the jury exhibited no bias for or against either party; and (4) the Supreme Court’s decision to *sua sponte* order the Superior Court to correct Petitioner’s Judgement and Commitment to reflect the charges considered and decided by the jury.²⁴³ Indeed, the Supreme Court did not consider the merits of a challenge grounded on prosecutorial misconduct during closing argumentation.

Even if Appellate Counsel had separately addressed the issue of the propriety of the People’s closing as a challenge to his conviction, the Court would still be bound, upon review of Appellate Counsel’s representation under *Strickland* and *Jones v. Barnes*, to defer to Appellate Counsel’s decision on the matter of which issues should be raised on appeal. The Court’s review of the prosecution’s closing argument reveals that when the AAG danced along the edges of

²⁴⁰ *Cascen v. People of the Virgin Islands*, Case No. 2012-0007, at *6-*15 (V.I. Jan. 8, 2014).

²⁴¹ *Id* at *15-*19.

²⁴² *Id* at *19-*21.

²⁴³ *Id* at *25.

improper remarks, the trial court was poised to correct him but the prosecutor corrected himself upon Defense Counsel's objections. First, when the prosecutor summarized Soto II's testimony and Soto II's reason for not making a statement to police addressing all that he witnessed on September 7, 2008, directly after the incident and Defense Counsel objected to this summary, the AAG corrected himself by asking the jury to rely on their own recollections of Soto II's testimony regarding his decision to delay.²⁴⁴ Second, after the prosecution summarized each eyewitness's testimony addressing September 7, 2008's events, highlighted what each eyewitness's testimony included and did not include, pointed to Peter's absence, and then asked the jury to draw its own conclusions, Defense Counsel again objected. In response, the trial court implicitly overruled the objection by stating "Counsel, this is closing argument."²⁴⁵ Third, when the prosecutor addressed Petitioner's limp and Defense Counsel objected, the trial court overruled the objection and asked Defense Counsel to limit his objections to those grounded in legal authority, i.e., "some legal line."²⁴⁶ Fourth, when the prosecutor stated that only the victim's father, Soto II, had "the courage to come in and tell the truth"²⁴⁷ and Defense Counsel objected, the AAG again corrected himself.²⁴⁸ Based on these four objections that Defense Counsel made during the course of the prosecution's closing argument, based on the fact that the AAG corrected himself at two of these junctures, and based on the fact that Defense Counsel was overruled at the other two junctures, the Court cannot say that Appellate Counsel "omit[ed] (without legitimate strategic purpose) a significant and obvious issue that may have resulted in a reversal of the conviction or . . . a new trial," as *Mason* requires when finding that Appellate Counsel acted unreasonably by selecting the issues he presented for direct appellate review.²⁴⁹ The Confrontation Clause and the jury partiality challenges appeared, under the facts contained in the record, to bear greater importance and promise for success when viewing Petitioner's case at the time of appeal. It was reasonable for Appellate Counsel to winnow the issues as he did so that the Supreme Court could focus on those with the best prospects to merit reversal.

²⁴⁴ JA 685-686.

²⁴⁵ JA 694.

²⁴⁶ JA 696.

²⁴⁷ JA 696.

²⁴⁸ JA 697.

²⁴⁹ *Mason*, 97 F.3d at 893.

B. Petitioner may not raise the issue of a jury partiality because the Supreme Court addressed the issue on Petitioner's direct appeal.

When addressing his appellate representation, Defendant contends that his appellate counsel was constitutionally ineffective because he failed to sufficiently raise and address jury impartiality. In its Return, the People argue that this line of argument is procedurally barred.

“Where a petitioner properly raised an issue on direct appeal to [the Virgin Islands Supreme Court], and [the Supreme Court] rejected it on the merits, the petitioner is procedurally barred from re-litigating that issue through a habeas petition.”²⁵⁰ Accordingly, the Virgin Island Supreme Court’s “rejection of an issue properly raised on direct appeal constitutes binding precedent on both [the Supreme Court] and the Superior Court in all subsequent cases, particularly with regard to the same party raising the same issue through a collateral proceeding such as a petition for a writ of habeas corpus.”²⁵¹ In the absence of “an intervening change in the law or other exceptional circumstances, the Superior Court [is] precluded from granting relief on an issue that [the Supreme Court] already rejected on the merits as part of a direct appeal.”²⁵²

Here, Petitioner argues that his appellate counsel failed “to make any substantive argument on direct appeal or cite to any authority articulating the prejudice [he] suffered as a result of the impartiality [sic] of the jury.”²⁵³ Petitioner asserts that appellate counsel failed to articulate the prejudice created by the trial court’s decision to sequester the jury and the trial court’s decision to not dismiss a juror or declare a mistrial when the juror uttered a comment during defense counsel’s cross examination of the prosecution’s only eye-witness.²⁵⁴ However, in the brief for his direct appeal to the Virgin Islands Supreme Court, Defendant devoted an entire section to an argument sounding in jury partiality.²⁵⁵ In it, Defendant asserted that three incidents cast doubt on the jury’s impartiality during his jury trial in Superior Court: (1) when Juror Number 7 made a comment during the defense counsel’s cross-examination of the prosecution’s only eye-witness; (2) when the trial court denied Defendant’s motion to remove two jurors or to declare a mistrial when a juror reported seeing a vehicle like the one trial testimony indicated Defendant was seen exiting during the event in question parked in front of

²⁵⁰ *Blyden*, 64 V.I. at 377-78.

²⁵¹ *Id.* at 378.

²⁵² *Id.*

²⁵³ Pet’s Br., at 32.

²⁵⁴ Pet’s Br., at 32-34.

²⁵⁵ Brief for the Appellant, submitted to the Virgin Islands Supreme Court for direct appeal, at 26-29.

her house on the morning of closing arguments; and (3) when the victim's mother approached jurors from a distance as they were returning from lunch and yelled at them "something to the effect that she is looking for justice and her child was killed."

While Defendant's brief submitted by his appellate counsel to the Supreme Court failed to mention prejudice specifically, as his habeas corpus petition asserts, the Supreme Court did address the merits of Defendant's jury impartiality issue by specifically reviewing the trial court's handling of each of the three incidents listed and discussed in his brief. In its Opinion, the Supreme Court first addressed a comment made by Juror Number 7—his remarking "yes, Thank You—in response to the trial court's instructing defense counsel to allow the prosecution's witness to finish answering a question before asking the next question. The Court then reviewed the ensuing sidebar initiated by defense counsel and found that the juror showed no predisposition to convict Defendant nor that he was subject to any extraneous influence that would result in juror bias.²⁵⁶ Second, the Supreme Court addressed the incident where a juror reported seeing a vehicle like that testified to have been driven by the Defendant. The Court then reviewed the trial court's calling the juror into chambers, questioning whether the incident had an effect on the juror, finding that the juror had not expressed any bias as a result of the incident or suspected any sinister motive for the vehicle being parked there, and the trial court's decision to not strike the juror or call a mistrial.²⁵⁷ Finally, the Supreme Court addressed the incident where the victim's mother "approached jurors as they were returning from lunch and yelled 'something to the effect that she is looking for justice and her child was killed.'"²⁵⁸ The Court then noted that the trial court made an inquiry by calling the entire jury into chambers and asking if anyone had heard what the victim's mother said. From there, the Court reviewed the record of what transpired in chambers, i.e., the jurors unanimously indicating that they had not heard what the mother had said, and concluded that no evidence in the record indicated that juror bias existed.²⁵⁹

In its Opinion, the Supreme Court addressed the specific merits of Defendant's jury impartiality issues. Its holding rejected the issue on the merits, those merits have been raised in Defendant's appellate brief to the Supreme Court and now in Petitioner's habeas petition to this

²⁵⁶ *Casceen v. People of the Virgin Islands*, Case No. 2012-0007, at * 23 (V.I. Jan. 8, 2014).

²⁵⁷ *Id.*, at 24.

²⁵⁸ *Id.*, at 24.

²⁵⁹ *Id.*, at 25.

Court. As a result, the Supreme Court's decision constitutes binding precedent on this Court and its review of the same issue. Further, Defendant makes no argument that any intervening change in the law would necessitate additional review of the same issue here. Therefore, the Court finds that this issue is procedurally barred from consideration on a writ for habeas corpus review.

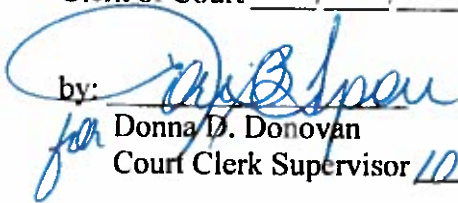
Conclusion

Because the record shows that Petitioner cannot make a prima facie case showing he is entitled to relief on his ineffective assistance of counsel claims, Petitioner's petition for a writ of habeas corpus and evidentiary hearing is DENIED.

An order consistent with this Opinion shall follow.

Dated: October 12, 2018

ATTEST: Estrella George
Clerk of Court _____

by: 
for Donna D. Donovan
Court Clerk Supervisor 10/12/18



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

A CERTIFIED TRUE COPY
DATE 10/12/2018
ESTRELLA H. GEORGE
CLERK OF THE COURT
BY 
COURT CLERK II