For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RANDY BURKE, Appellant/Petitioner, v. **DIANE PROSPER, ACTING WARDEN OF THE BUREAU OF CORRECTIONS, ET AL.,** Appellee/Respondents.	)	**S. Ct. Civ. No. 2018-0031** Re: Super. Ct. Civ. No. 518/2015 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Robert Molloy

Argued: January 15, 2019
Filed: February 12, 2019

Cite as: 2019 VI 6

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

APPEARANCES:

Randy Burke,
Bigstone Gap, VA
Pro Se,

Ian S.A. Clement, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, Associate Justice

¶1 Appellant Randy Burke seeks reversal of the Superior Court's denial of his petition for a writ of habeas corpus that alleged ineffective assistance of counsel by Attorney Carl Beckstedt based upon Beckstedt's failure to cross-examine Beatrice Lawrence, a prosecution witness, during Burke's first degree murder trial. Burke likewise propounded other secondary issues, all of which we conclude are non-meritorious. For the reasons elucidated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

¶2 This case emanates from an October 21, 2006 shooting for which Randy Burke was found guilty of first degree murder and reckless endangerment in the killing of Julian "Kevin" Cupid at the Aureo Diaz Housing Community in St. Croix, U.S. Virgin Islands. At trial, Asheba Benjamin testified that Burke, Cupid's cousin, came to the apartment she shared with Cupid and her grandmother, Christineta Benjamin, on the day of the shooting. Burke, at one time had lived in the same apartment, but returned on that day to retrieve some personal belongings and paraphernalia that still remained there. Upon arrival, Burke entered Cupid's room and inquired about the whereabouts of some of his belongings. Cupid replied that he did not have them. At that juncture, Burke exited Cupid's bedroom and entered another bedroom where some of his belongings were stored. Eventually, Burke left that room, returned to Cupid's room, and accused Cupid of taking Burke's rolling papers and leaf tobacco. Cupid denied removing the items. Therefore, an acrimonious verbal altercation immediately ensued between both men. Burke threatened Cupid by informing him "that he would lick Cupid's head off." Cupid responded by obtaining a knife, which

infuriated Burke who thought that Cupid was "playing bad." During the verbal altercation, Benjamin, a cousin of both men, inserted herself between them in an attempt to quell the altercation before it further escalated. Eventually, Burke departed the apartment, and Benjamin hurriedly locked the apartment's door following his departure.

¶3 Soon thereafter, Burke returned to the apartment, allegedly carrying a firearm. Hearing female screams outside, Benjamin rushed to the apartment's front veranda where she saw Burke walking towards the apartment building carrying an unidentifiable object in his hand. When Burke arrived at the locked door of the apartment, he furiously and repeatedly kicked the door while demanding entry into the apartment. Cupid, who had been in his room since Burke's initial departure, attempted to unlock the door, but was restrained by Benjamin who instructed him not to open the door or to go outside. Acquiescing to Benjamin's pleas, Cupid returned to his room. Eventually, Burke's unrelenting assault on the door subsided. However, as Benjamin attempted to call her mother on the phone, Cupid rushed onto the second-story front balcony. Immediately, a single gunshot was heard. Frightened and petrified, Benjamin hastily left the apartment by descending the apartment's back balcony and fled the area. She returned to find Cupid slumped on the front balcony in a pool of his blood.

¶4 Beatrice Lawrence also testified at Burke's trial. On the day of the shooting, Lawrence had allegedly informed police that she witnessed Burke point a silver, nine millimeter pistol in the air. Subsequently, Cupid was found with a gunshot wound to the head and pronounced dead on arrival at Juan Luis Hospital. However, during direct examination, Lawrence repeatedly attempted to evade answering the prosecutor's questions. Lawrence claimed she could not recall what she told police on the day of the shooting, despite reviewing her prior written statement to the police in

order to assist in refreshing her memory. She further acknowledged that, days before the trial, she met with an assistant attorney general and told the official she clearly recalled the events of that day. The People asked the court to have Lawrence treated as a hostile witness. The court agreed, and she was so designated. Under relentless questioning, Lawrence admitted to telling police that she was in her apartment on the day of the shooting. Lawrence further stated that her residence is directly underneath Benjamin's apartment. Using a photograph, Lawrence identified where she stood in relation to Burke and Cupid, which confirmed that Burke was two or three feet from her and Cupid was on the second-story porch above them.

¶6 On the day of the shooting, Lawrence heard a commotion outside her ground-floor apartment which she exited to ascertain what was happening. Once outside her apartment, Lawrence observed Burke aiming a silver, nine millimeter pistol upward into the air, but towards the porch where Cupid stood. When Burke discharged the firearm, Lawrence presumed that he shot at Cupid on the second floor porch. Instantaneously, Lawrence heard a sound, which was consistent with someone falling against the porch floor above her. Lawrence saw Burke run to a silver or white vehicle and fled the scene after discharging the shot. Lawrence had known Burke for approximately five years. They once had a very brief intimate relationship prior to the shooting.

¶7 Upon conclusion of Lawrence's direct testimony, Defense Counsel Carl Beckstedt requested a brief recess before commencing his cross-examination of Lawrence. In response, the court ordered a lunch break. Following lunch, Beckstedt informed the court that he will waive his cross-examination of Lawrence.

¶8 On December 18, 2009, a jury adjudged Burke guilty of first degree murder and first-degree reckless endangerment. On May 21, 2010, Burke filed post-trial motions in Superior Court

for a judgment of acquittal and a new trial. On February 4, 2013, the court denied Burke's motions and, on February 22, 2013, he perfected a timely appeal of his convictions. On December 6, 2013, this Court affirmed Burke's convictions in its opinion in *Burke v. People*, 60 V.I. 257 (V.I. 2013), in which additional facts in the first degree murder case are memorialized. On October 19, 2015, Burke filed a petition for a writ of habeas corpus in Superior Court, asserting an ineffective assistance of counsel claim against Beckstedt purportedly because of Beckstedt's failure to cross-examine Lawrence during trial. On March 8, 2018, the Superior Court dismissed Burke's habeas corpus petition. On March 12, 2018, Burke appealed the denial of his habeas corpus petition.

II. JURISDICTION

¶9 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, or final orders of the Superior Court." 4 V.I.C. § 32(a). "An order denying a petition for a writ of habeas corpus[1] is a final order . . . from which an appeal may lie." *Rivera-Moreno v. Gov't of the Virgin Islands*, 61 V.I. 279, 292 (V.I. 2014) (internal citations omitted). Because the Superior Court's March 8, 2018 order denied Burke's habeas corpus petition, this Court possesses jurisdiction over the appeal.

III. STANDARD OF REVIEW

¶10 This Court exercises plenary review of the Superior Court's legal determinations and evaluates its factual findings for clear error. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2014) (internal citations omitted). Moreover, the Court conducts plenary review of the Superior Court's

[1] "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." 5 V.I.C. § 1301.

denial of a habeas corpus petition. *Rivera-Moreno*, 61 V.I. at 293 (citing *Mendez v. Gov't of the V.I.*, 56 V.I. 194, 199 (V.I. 2012)).

IV. DISCUSSION

¶11 Habeas corpus is an equitable remedy employed when a person's conviction involved a constitutional violation. *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986). Allowing defendants a new trial, writs of habeas corpus afford relief to those "'persons whom society has grievously wronged' in light of modern concepts of justice." *Id*. (citing *Fay v. Noia*, 372 U.S. 391, 440-41 (1963)). Locally, section 3 of the Revised Organic Act establishes the use of writs of habeas corpus under Virgin Islands law. *Rivera-Moreno*, 61 V.I. at 293.

A. Procedurally Barred Issues

¶12 On appeal, Burke posits several arguments that were not addressed at the March 7, 2018 hearing on his habeas corpus petition[2]. Specifically, Burke argues, among other things, that Beckstedt was ineffective for not disputing jury instructions which declared that circumstantial and direct evidence were to be given the equal weight, that Beckstedt was ineffective for failing to request the court to instruct the jury on second degree murder, and that Beckstedt was ineffective for failing to inform the jury that he was acquitted of 14 V.I.C. § 2253(a) (possession of firearm during the commission of a crime of violence). Appellant's Br. 4-5, 7. Noticeably, Burke raised these identical issues in his February 2013 direct appeal and this Court fully addressed them in its December 2013 opinion—albeit on direct appeal of his first degree murder conviction and not

[2] Although he raises issues on appeal that were not probed at the March 7, 2018 hearing, Burke did raise these issues and others in his habeas corpus petition. However, the Superior Court concluded that only the ineffective assistance of counsel claim presented sufficient evidence to warrant further investigation. Appellee's Br. 7-8.

under the guise of an ineffective assistance of counsel claim. Furthermore, the issue of not informing the jury of the dismissal of the firearm possession charge is addressed in volume 60 of the V. I. Reports at page 266 of this Court's opinion adjudicating the direct appeal of Burke's convictions in the original criminal case. Although we have repeatedly stated that issues not addressed at trial or on appeal may be raised for the first time using a petition for a writ of habeas corpus, *see Rivera-Moreno*, 61 V.I. at 302, this Court has promulgated rules which state that issues rejected on direct appeal are inappropriate to be reasserted on a petition for writ of habeas corpus.[3] Moreover, in *Blyden v. Gov't of the V.I.*, 64 V.I. 367, 377-78 (V.I. 2016), this Court opined that issues previously raised on direct appeal were unsuitable to be re-litigated with a petition for a writ of habeas corpus. "This Court's rejection of an issue properly raised on direct appeal constitutes binding precedent both on this Court and the Superior Court . . . particularly with regard to raising the same issue through a collateral proceeding such as a petition for a writ of habeas corpus." *Id*. (citing *Bryan v. Fawkes*, 61 V.I. 416, 457 (V.I. 2014)). *See In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965) (stating that arguments rejected on appeal cannot be raised on a petition for writ of habeas corpus as though it were a second appeal); *In re Lessard*, 399 P.2d 39, 44 (Cal. 1965) (same); *accord Rivera-Moreno*, 61 V.I. at 303 ("[The V.I. Supreme] [C]ourt will consider as persuasive authority the decisions of the Supreme Courts of California and Puerto Rico interpreting similar statutes on which the Virgin Islands habeas provisions are based.") (citations omitted). Accordingly, Burke's contentions regarding Beckstedt's failure to challenge jury instructions concerning evidence, regarding Beckstedt's failure to inform the jury of the dismissal of the

[3] "A petitioner may not raise in a petition for a writ of habeas corpus an issue previously rejected on direct appeal to the Supreme Court of Virgin Islands unless there has been a subsequent change in the law affecting petitioner's claim." V.I. H.C.R. 2(b)(3).

firearm charge, and regarding Beckstedt's failure to request the court to give a second degree murder instruction are barred and constitute a waiver of those issues in this appeal.

B. Cross-examination of Lawrence

¶13 Next, Burke argues Beckstedt's failure to cross-examine Lawrence constituted ineffective assistance of counsel. The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (Sixth Amendment right to counsel is right to effective counsel); *Stanislas v. People*, 55 V.I. 485, 491 (V.I. 2011) (citing *Corraspe v. People*, 53 V.I. 470, 479 (V.I. 2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)).

¶14 To prevail on an ineffective assistance of counsel claim, Burke must demonstrate Beckstedt's performance fell below an objective standard of reasonableness and Becksteadt's deficient performance prejudiced Burke resulting in an unreliable or fundamentally unfair outcome in the proceeding. *Ibrahim v. Gov't of the V.I.*, S. Ct. Civ. No. 2007-76, 2008 WL 901503, at *2 (V.I. 2008) (unpublished) (citing *Strickland v. Washington*, 466 U.S. 688, 687-88 (1984)). Moreover, Burke must satisfy both prongs of the two part test. *Strickland*, 466 U.S. at 697. *See Turner v. U.S.*, 699 F.3d 578, 584 (1st Cir. 2012) (court need not address the objective reasonableness prong because defendant failed to demonstrate prejudice); *Waiters v. Lee*, 857 F.3d 466, 480-82 (2nd Cir. 2017) (court need not decide if there was a strategic reason for counsel's actions because failure to call a medical expert was not prejudicial); *See also Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 858-59 (3rd Cir. 2017) (ineffective assistance of counsel claim dismissed where defendant could not demonstrate prejudice despite demonstrating counsel's performance was unreasonable); *United States v. McCoy*, 410 F.3d 124 (3rd Cir. 2005)

(quoting *McAleese v. Mazurkiewicz*, 1 F.3d 159, 170 (3rd Cir. 1993) ("Indeed, this Court has read Strickland as requiring the courts to decide first whether the assumed deficient conduct of counsel has prejudiced the defendant."))

¶15 On the performance facet, there is a strong presumption that, under a totality of the circumstances, Beckstedt's actions or omissions fall within the wide range of professional competent assistance. *Strickland*, 466 U.S. at 690. The Strickland court stated that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent the criminal defendant." *Id*. at 688-89. *See also id*. at 689 (noting the presumption that counsel's strategy and tactics fall "within the wide range of reasonable professional assistance"); *Id*. at 689-90 (observing that a court should presume counsel's effectiveness to avoid second-guessing counsel with the benefit of hindsight"); *See also Strouth v. Colson*, 680 F.3d 596, 602 (6th Cir. 2012) (concluding that counsel's failure to present witness was not ineffective assistance because further impeachment "would have been of little value").

¶16 In this case, Burke alleges Beckstedt's failure to question Lawrence foreclosed Burke from being convicted of a lesser homicide charge such as second degree murder or manslaughter. Appellant's Br. 3. Essentially, Burke asserts that Beckstedt's decision relates to the performance prong of the *Strickland* test and the decision was not part of a sound trial strategy. In *Simon v. Gov't of the V.I.*, 63 V.I. 902, 942 (D.V.I. 2015), the appellate division stated "the determination to call a witness lies soundly with trial counsel, not the defendant." (citations omitted). "Under *Strickland*, a court presumes that, under the circumstances, a challenged action might be part of a sound trial strategy. For a defendant to overcome that presumption, the defendant must show that

either (1) the suggested strategy (even if sound) was not in fact motivating counsel, or (2) that the actions could never be part of a sound strategy." *Id*. (quoting *Thomas v. Varner*, 428 F.3d 491, 499 (3rd Cir. 2005)). The court opined that "[s]urmounting *Strickland*'s high bar is never an easy task." *Id*. (quoting *Padilla*, 559 U.S. at 371).

¶17 Although Burke's claim pertains to Beckstedt's performance, the case law precedent permits us to first address prejudice to the defendant before turning to defense counsel's alleged deficient performance, if the latter inquiry is even necessary. Burke asserts prejudice in that, if Beckstedt had cross-examined Lawrence on the issue of his gun being pointed in the air rather than at Cupid, he could have been convicted of a lesser degree of homicide. However, Lawrence testified on direct examination that Burke's gun was pointed in the air. In fact, Lawrence said, although her written statement said police asked who Burke shot at, the question police actually posed was where Burke shot at. (J.A. 0170-0171). In response to that question, Lawrence said the air. *Id*. Significantly, Lawrence further testified that "[the gun] was facing towards the porch, but it was pointed to the air." The ensuing dialogue between the prosecutor and Lawrence is edifying. It provides:

> Prosecutor: "So can you -- use the pointer and show me where Randy was standing and where he was pointing the gun."
>
> Lawrence: (Complying)
>
> Prosecutor: "Okay. And where was the gun being pointed?"
>
> Lawrence: "Towards the air."
>
> Prosecutor: "You told the officers he pointed towards the porch above you?"
>
> Lawrence: "It was facing towards the porch, but it was pointed to the air."
>
> Prosecutor: "And then you heard a shot; is that correct?"
>
> Lawrence: "Yes."

¶18 (J.A. 0178). Therefore, the jury could have concluded that Burke discharged the shot in the air towards Cupid on the porch. Importantly, at the time of the shooting, Lawrence was two or three feet from Burke, who was on the ground while simultaneously Cupid was on the second story porch. Obviously, Burke had to shoot upwards or into the air above him in order to shoot Cupid. (J.A. 0168). Therefore, any mitigation that could have been gained by Beckstedt cross-examining Lawrence on the issue of the position of Burke's gun was already in the record for the jury to consider. Notwithstanding that fact, the jury still convicted him of first degree murder. *See Harrington v. Richter*, 562 US 86, 111-13 (2011) (counsel's failure to test blood was not prejudicial because additional evidence did not directly refute state's expert testimony and circumstantial evidence of defendant's guilt); *King v. Westbrooks*, 847 F.3d 788, 798-99 (6th Cir. 2017) (counsel's delay in retaining mental health expert not prejudicial because defendant failed to show testimony would have presented evidence different from that already presented at trial). Therefore, Burke's argument is meritless.

¶19 Even if Burke was prejudiced by Beckstedt's failure to cross-examine Lawrence, Burke would still have to demonstrate that Beckstedt's decision was not part of a sound trial strategy by showing either that a sound strategy did not motivate Beckstedt's decision or the decision was not part of a sound trial strategy a reasonable attorney employs. During the March 7, 2018 hearing, Burke presented no evidence that Beckstedt's failure to cross-examine Lawrence was not motivated by a sound trial strategy. At the hearing, the court repeatedly asked Burke's attorney, Public Defender Amelia Joseph, if Beckstedt's decision not to cross-examine Lawrence was not motivated by sound trial strategy, what motivated the decision? Joseph responded that she did not

know what motivated the decision and the court ultimately proceeded to the second factor of the test. (J.A. 0084-0087).

¶20 Regarding Beckstedt's decision not being part of a sound trial strategy, Joseph contended that it was an attorney's job to test the veracity of a witness's statements and the witness's motives for testifying. (J.A. 0088). Joseph believed that challenging Lawrence on her inability to recall what she previously told police and on whether the People offered her a plea deal[4] could have caused the jury to disregard everything she said and resulted in Burke being convicted of a lesser included offense. (J.A. 89). However, Beckstedt stated that his decision not to cross-examine Lawrence was embedded in the defense theory that Burke was not at the scene or in the vicinity of the crime which he characterized as an OJ defense.[5] (J.A. 0019-0020). He intended to make the People prove every element of its case. *Id*. Beckstedt testified that he was shocked by Lawrence's testimony, by her failure to cooperate with the People, and by her inability to recall the events that occurred all of which Becksteadt characterized as a complete 180 degree turnabout that forced him to reassess his intended course of action (to cross-examine her with a scorned lover assertion). (J.A. 0043-0047). Beckstedt claimed there was nothing to be gained by cross-examining Lawrence and doing so would only have allowed the People the opportunity to rehabilitate her on redirect examination. (J.A. 0047-0050). Beckstedt also noted that Lawrence's testimony was beneficial to Burke because of her failure at trial to routinely recall what she had previously and initially told police following the crimes which was essentially that Burke had shot Cupid with a handgun. Beckstedt asserted that he had sufficient information from Lawrence's favorable testimony for his

[4] At the time of trial, Lawrence was being held on unrelated federal drug charges. (J.A. 0223).
[5] The "O.J. defense" is a clear reference to the California, high profile criminal case of the People of the state of California v. Orenthal James Simpson that occurred between January 1995 and October 1995. O.J. murder case, Wikipedia, https://en.wikipedia.org/wiki/O._J._Simpson_murder_case (last visited Jan. 28, 2019).

defense strategy. (J.A. 0053-0055). Beckstedt decided not to cross-examination Lawrence after a thorough evaluation of the case because the People were caught off guard by Lawrence's testimony or were surprised with her testimony, which was anchored in Lawrence's selective memory failure when compared to her previously signed statement to police. The Superior Court concluded, and we agree, that Beckstedt's decision not to cross-examine Lawrence was part of a sound trial strategy which entailed not cross-examining Lawrence. Beckstedt had gained all he required for his defense from Lawrence's direct testimony; therefore, he waived cross-examination of her which is a decision completely within an attorney's province. *See Ross v. Dist. Att'y*, 672 F.3d 198, 210-11 (3rd Cir. 2012) (counsel's failure to present impeachment evidence not ineffective assistance because it would not have changed the outcome); *Bahtuoh v. Smith*, 855 F.3d 868, 872-73 (8th Cir. 2017) (counsel's reversal of advice to have defendant testify not ineffective assistance because decision was strategic based on changed circumstances); *Hedlund v. Ryan*, 854 F.3d 557, 578 (9th Cir. 2017) (counsel's motion to have defendant's case moved before a different judge was not ineffective assistance because record demonstrated this was a tactical decision). Accordingly, Burke failed to meet the high burden to satisfy either prong for a successful ineffective assistance claim, and this Court will not dispute or second guess Beckstedt's professional judgment.

C. Beckstedt's Failure to Call Medical Examiner

¶21 Finally, Burke asserts, for the first time on appeal, that Beckstedt's failure to call a medical examiner to testify to the cause of Cupid's death amounts to ineffective assistance of counsel. Appellee's Br. 3. As we have already stated, a petitioner may raise an issue for the first time on appeal of a denial of a habeas corpus petition if it is not an attempt to "correct errors or irregularities

relating to the ascertainment of facts when such errors could and should have been raised by direct appeal." *Rivera-Moreno*, 61 V.I. at 303 (citing *In re Dixon*, 264, P.2d 513, 516 (Cal. 1953)).

¶22 Typically, this Court requires a party to "fairly present all issues, whether legal, procedural, evidentiary, or otherwise, to the trial court or risk forfeiting or waiving a claim of error on appeal for failing to do so." *Ubiles v. People*, 66 V.I. 572, 581 (V.I. 2017) (citing former V.I. S. CT. R. 4(h) and former V.I. S. CT. R. 22(m)). Burke did not raise during trial or on direct appeal the issue of Beckstedt's failure to call a medical examiner as a witness. We conclude that he failed to raise the issue during trial; therefore, we adjudge the issue was waived. *See* V.I. R. APP. P. 22(m) ("Issues that were . . . not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal . . . .").

¶23 However, even if we found this issue was not waived, merely asserting an undisclosed issue on appeal of the denial of a petition for a writ of habeas corpus does not mean the issue will succeed on the merits. *Blyden*, 64 V.I. at 376. Burke contends a medical examiner would have been able to refute the People's weak case concerning Cupid's cause of death. However, at trial, Jacqueline Greenwich, a paramedic and nurse of twenty-five years, and two emergency medical technicians (EMT), who treated Cupid as he was being transported to the hospital, and an emergency room (ER) physician, who treated Cupid at the same hospital, testified that Cupid had sustained a fatal gunshot wound to the head. (J.A. 0206-0207). Moreover, Dr. Jennifer Kolodchak, the ER physician, testified that Cupid was already in cardiac arrest when he arrived at the hospital and, was in fact, dead. Hospital staff administered resuscitation techniques, but were unable to obtain any vital signs (heartbeat, blood pressure, or independent breathing) from Cupid after repeated attempts to do so. Dr. Kolodchak ultimately declared him dead and signed the necessary

documents to reflect his status, which she was authorized to do. (J.A. 0131-142). Importantly, Dr. Kolodchak, a physician for many years, rendered lengthy medical details in her sworn testimony, thereby explicating the cause of Cupid's demise.

¶24 A medical examiner could not have stated anything additional to what was recounted by the EMTs, paramedic/nurse, and the ER physician. As already noted *supra* at 7, an ineffective assistance of counsel claim requires Burke to demonstrate both prejudice and Beckstedt's deficient performance. However, Beckstedt enjoys a strong presumption that his acts or omissions are within the sphere of professionally reasonable decisions. *See supra* at 8. Therefore, Beckstedt's failure to call a medical examiner could not prejudice Burke because the medical examiner would have only reiterated and confirmed what was already in the record- that Cupid suffered a gunshot and died as a result of complications associated with that wound. "Generally the choice of whether to call an expert witness is one within the attorney's discretion." *Robinson v. United States*, Civil Action No. 08-103, 2009 WL 4110319, at *8 (D.V.I. 2009) (unpublished). *See United States v. Caden*, Nos. 04-cv-4500, 98-cr-450-1, 2007 WL 4372819, at *4 (E.D. Pa. Dec. 12, 2007) (unpublished) (noting decision whether to call an expert is "fundamentally a strategic choice made [by an attorney] after a thorough investigation of the relevant law and facts") (alterations and citations omitted); *United States v. Richardson*, No. 98-5548, 1999 WL 262435, at *5 (E.D. Pa. May 3, 1999) (unpublished) ("[T]he decision whether or not to call a particular expert witness is generally a matter of trial tactics within the range of a reasonable attorney's performance.") (citing *United States v. Kirsh*, 54 F.3d 1062, 1072 (2nd Cir. 1995)). Accordingly, even if he had not waived this issue that should have been argued on direct appeal, Burke fails to assert a plausible ineffective assistance of counsel claim for Beckstedt's failure to call a medical examiner at trial. Accordingly,

Burke suffered no prejudice as a result of the omission. Moreover, the option to call a medical examiner belonged to Beckstedt.

¶25 Burke has completely and conveniently ignored compelling and pertinent facts of the case. One has only to review the uncontroverted trial testimony of Asheba Benjamin to conclude that, if there was error committed by Attorney Beckstedt, it was, at best, harmless. Benjamin's testimony unequivocally supplied the motive for Burke shooting Cupid and supplied other pertinent information about her personal intervention in the altercation between Burke and Cupid in an effort to prevent the murder.

¶26 The trial testimony of Lawrence and Benjamin disclosed facts in addition to the following: (1) Burke discharged the single shot into the air, but towards the second floor porch where Cupid was located; (2) Burke was the only person who discharged a firearm in the area; (3) Burke was observed fleeing from the crime scene immediately after the shot that killed Cupid was discharged; (4) Burke stood in proximity to the second floor porch when the fatal shot was discharged; (5) The motive for the shooting was the acrimonious altercation between Burke and Cupid which included both men engaged in a truculent posture during their escalating altercation; (6) The extensive and damning testimony of Asheba Benjamin provided the motive for Burke's dastardly deed; (7) not only did Benjamin's testimony solidify Burke's conviction but, if believed, it simultaneously made the failure to cross-examine Lawrence "harmless error"; (8) when Burke hastily departed from the grandmother's apartment, he vowed to inflict bodily harm upon Cupid, which the jury verdict confirmed that he did by murdering Cupid.

¶27 When the "totality of circumstances" that was elicited during trial is examined and considered, Burke's convictions were assured. *See Strickland*, 466 U.S. at 690.

V. CONCLUSION

¶28 For the foregoing reasons, we affirm the Superior Court's dismissal of Burke's habeas corpus petition based upon the alleged ineffective assistance of his trial counsel, Attorney Carl Beckstedt.

Dated this 13th day of February 2019

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court