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

KAMAL THOMAS,	)	Case No: ST-16-MC-45
	)	
Petitioner,	)	
vs.	)	HABEAS CORPUS
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
RICK MULLGRAV, Director of the V.I. Bureau Of Corrections,	)	
	)	
Respondents,	)	
	)	

MEMORANDUM OPINION

Presently before the Court is Kamal Thomas' petition for habeas corpus relief pursuant to 5 V.I.C. § 1302. Thomas initially raised five grounds for relief. On reviewing Thomas' petition, the Court found that Thomas' alleged *Brady* violations were without merit but found Thomas had established a prima facie case for relief on the other grounds and issued a writ.

An evidentiary hearing on the merits was conducted on August 7, 2018. During the hearing, Thomas asserted an additional ground for relief, that his sentence does not comply with 5 V.I.C. § 3672(a). Thomas filed supplemental briefing on the issue of an impartial jury and the Government responded to that briefing. The remaining grounds upon which Thomas seeks relief are:

1. Lack of impartial jury due to pretrial publicity and ineffective voir dire;
2. Ineffective assistance of counsel;
3. Insufficient evidence to sustain a conviction;
4. Improper sentence in violation of 14 V.I.C. § 104; and
5. Improper sentence in violation of 5 V.I.C. § 3672(a).

For the reason's set forth below, the Court will deny relief based on grounds one through three, and grant relief based on grounds four and five.

FACTS

On or about the night of June 19, 2007, on St. John, U.S. Virgin Islands, James Cockayne was beaten and killed. In connection with his murder, Kamal Thomas, Petitioner, was arrested and arraigned on multiple murder- and assault-related charges. On October 10, 2008, after a four-day jury trial, a jury returned a verdict and found Thomas guilty of third degree assault, using a dangerous weapon during a crime of violence, and simple assault.

Thomas filed a Motion for New Trial on August 31, 2009, following the discovery of certain payments by Cockayne's family to witnesses in connection with the trial. After a hearing on the motion, the trial court ordered a new trial for Thomas and his co-defendant, Anselmo Boston.

On March 1, 2010, the People of the Virgin Islands filed a Second Amended Information charging Boston with three counts (Counts I through III) and Thomas with five counts (Counts IV through VIII) in connection with the assault on Cockayne.[1] The counts against Thomas were: IV, Third Degree Assault, in violation of 14 V.I.C. §§ 297(2), 11(a); V, Using a Dangerous Weapon During a Third Degree

[1] The November 19, 2010 Judgment and Commitment erroneously stated that Counts IV through VIII were lodged against Kamal Thomas on November 23, 2009, instead of March 1, 2010.

Assault, in violation of 14 V.I.C. §§ 2251(a)(2)(B), 11(a); VI, Simple Assault, in violation of 14 V.I.C. §§ 299(2), 11(a); VII, Threatening a Witness, in violation of 14 V.I.C. § 1510(a)(1); VIII, Threatening a Witness, in violation of 14 V.I.C. § 1510(a)(2).

Jury selection began the morning of March 22, 2010 and Thomas' second trial began later that day. The Court and the jury heard closing arguments two days later, on March 24. The jury deliberated and returned a verdict that evening, finding Thomas guilty on all counts.

Two days after the verdict, on March 26, 2010, Thomas filed a motion for a new trial. In his supplement to his motion, he alleged that certain juror misconduct had deprived him of his right to a fair trial and requested a hearing on the matter.[2] The trial court denied Thomas' request for an evidentiary hearing. On appeal, the Supreme Court found the trial court's denial was an abuse of discretion and remanded for the trial court to conduct an evidentiary hearing on the matter. *Thomas v. People of the V.I.*, 56 V.I. 647 (2012). After conducting an evidentiary hearing, the

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[2] On Thomas' appeal, the Supreme Court summarized his allegations as follows:

> In Thomas's supplement to his motion for a new trial, he alleges that juror misconduct deprived him of his constitutional right to fair and impartial jury. To support this allegation he attached the affidavit of Attorney Michael A. Joseph — his legal counsel at the time — which states that one of the jurors, who Attorney Joseph refers to as "Juror A," contacted Attorney Joseph after the trial and informed him that "[t]he jurors had their minds made up from the time we went back in the jury room right after being selected." (J.A. 80-81.) According to Attorney Joseph, Juror A stated that one of the other jurors in the case had informed the members of the jury that "[t]hose guys killed the [w]hite boy and got away with it and we have to teach them a lesson." Juror A further stated that every time there was a break during the trial other jurors would openly discuss how the defendants had killed the white boy, and that they were going to convict the defendants. Juror A informed Attorney Joseph that she wanted to talk to the judge about these events, but did not want to write a letter. Based on this information, Thomas requested that the trial court hold an evidentiary hearing to determine whether this alleged juror misconduct warranted a new trial.

Thomas v. People of the V.I., 56 V.I. 647, 652-53 (2012).

trial court found that no juror misconduct had occurred prior to deliberations, and the Supreme Court upheld that finding. *Thomas v. People of the V.I.*, 60 V.I. 688 (2014).

Thomas filed the instant petition for habeas corpus on July 11, 2016, at first acting *pro se*, but obtaining counsel prior to the evidentiary hearing. After an evidentiary hearing on the matters raised in his petition, Thomas' counsel submitted supplemental briefing on the issue of jury impartiality. Thomas acting *pro se* submitted additional argument on the violation of 14 V.I.C. § 104 he alleges. The Government in its response addressed the additional argument and also responded to Thomas' assertion at his evidentiary hearing that his sentence violates 5 V.I.C. § 3672(a). The Government agrees that Thomas' sentence should be adjusted to be made compliant with 14 V.I.C. § 104 and 5 V.I.C. § 3672(a). The Court now proceeds to consider the issues Thomas raises.

STANDARD OF REVIEW

Pursuant to the Virgin Islands Habeas Corpus Rule 2, "[a]ny person who believes he or she is unlawfully imprisoned or detained in custody, confined under unlawful conditions, or otherwise unlawfully restrained of his or her liberty, may file a petition for a writ of habeas corpus to seek review of the legality of that imprisonment or detention." "A petitioner may be awarded a discharge -- or another form of redress, such as a new sentencing hearing, that remedies the violation alleged -- if any of the seven conditions set forth in 5 V.I.C. § 1314 are met, or if relief is

warranted to remedy a constitutional or statutory violation, even if the right to that remedy is not expressly set forth in a statute." V.I. H.C.R. Rule 2(b)(2). The seven conditions set forth in 5 V.I.C. § 1314 are:

(1) When the jurisdiction of such court or officer has been exceeded.
(2) When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.
(3) When the process is defective in some matter of substance required by law rendering such process void.
(4) When the process, though proper in form, has been issued in a case not allowed by law.
(5) When the person having custody of the prisoner is not the person allowed by law to detain him.
(6) Where the process is not authorized by any order, judgment or decree of any court, nor by any provision of law.
(7) Where a party has been committed on a criminal charge without reasonable or probable cause.

ANALYSIS

I. Impartial Jury Due to Pretrial Publicity and Ineffective *Voir Dire.*

a. The Court finds no presumption of jury prejudice.

Though neither Thomas nor the Government touched on the issue, the Court finds it must first determine whether a presumption of juror partiality arises in this case, before considering Thomas' *voir dire* complaints.

"A criminal defendant can demonstrate that his jury was biased, and therefore that his trial was fundamentally unfair, in two ways: (1) by proving that 'media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process,' in which case prejudice

to the defendant is presumed; or (2) by demonstrating 'actual prejudice—that is, a juror unable to render a fair and impartial verdict based solely on the evidence. . . .'" *Laird v. Wetzel*, 2016 U.S. Dist. LEXIS 110545, *25 (E.D. Pa.) (quoting *Rock v. Zimmerman*, 959 F.2d 1237, 1252-53 (3d Cir. 1992), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 619 (1993); *see also Skilling v. United States*, 561 U.S. 358 (2010) (considering actual prejudice after concluding that the facts did not warrant a presumption of prejudice); *United States v. Casellas-Toro*, 807 F.3d 380, 385 (1st Cir. 2015) ("A fair-trial claim based on venue encompasses two questions: first, whether the district court erred by failing to move the trial to a different venue based on a presumption of prejudice and, second, whether actual prejudice contaminated the jury which convicted him.").

The Sixth Amendment of the United States Constitution provides that an "accused shall enjoy the right to . . . trial by an impartial jury." U.S. Const. amend. VI.[3] "The theory of our trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Skilling*, 561 U.S. at 378 (citation and internal quotations omitted). The U.S. Supreme Court has on multiple occasions overturned a "conviction obtained in a trial atmosphere that was utterly corrupted by

[3] The Sixth Amendment is expressly made applicable to the Virgin Islands by virtue of section 3 the Revised Organic Act of 1954. V.I.C. Rev. Org. Act of 1954 § 3; 48 U.S.C. § 1561 ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States ... the first to ninth amendments inclusive[.]").

press coverage." *Id.* at 380 (quoting *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975) (alterations omitted)). The Supreme Court has made clear however that its line of decisions, "'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.'" *Id.* "Prominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance.* Jurors are not required to be 'totally ignorant of the facts and issues involved[.]'" *Id.* at 381 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "[S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722.

The U.S. Supreme Court has noted that its "'decisions have rightly set a high bar for allegations of juror prejudice due to pretrial publicity.'" *Chao Lin Feng v. Bartkowski*, 2012 U.S. Dist. LEXIS 18844 (quoting *Skilling*, 561 U.S. at 399 n.34). "News coverage of civil and criminal trials of public interest conveys to society at large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented." *Skilling*, 561 U.S. at 399 n.34. Following from that assumption is the presumption that, "'pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial.'" *Skilling*, 561 U.S. at 384 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)". Accordingly, "[a] presumption of prejudice . . . attends only the extreme case." *Skilling*, 561 U.S. at 381.

When determining whether prejudice may be presumed based upon pretrial publicity, courts look to a variety of factors, including but not limited to:

> (1) the "size and characteristics of the community in which the crime occurred," (2) the extent of the media coverage surrounding the case and whether the stories contained a confession or "other blatantly prejudicial information of the type readers or viewers could not reasonabl[y] be expected to shut from sight," (3) the amount of elapsed time between the alleged conduct and trial, and (4) the jury verdict, and whether it acquitted or found the defendant not guilty of any counts, implying [the jury] was not predisposed to a finding of guilt, no matter the evidence.

Rivera v. People of the V.I., 64 V.I. 540, 568 (V.I. 2016) (listing the factors the Supreme Court considered in *Skilling*, 561 U.S. at 382-83) (alterations added); *see also, e.g.*, *United States v. Diehl-Armstrong*, 739 F. Supp. 2d 786, 793 (W.D. Pa. 2010) (citing *Skilling* et cetera, and listing: the size and characteristics of the community; the general content of the news coverage; the timing of the media coverage relative to the commencement of the trial; and whether there was any media interference with actual courtroom proceedings).

The content of the pretrial publicity is a crucial consideration in determining whether the publicity has engendered juror impartiality. *See, e.g.*, *Skilling*, 561 U.S. at 644 ("[A]lthough news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. . . . No evidence of the gun-smoking variety invited prejudgment of his culpability."); *id.* at 445 (Sotomayor, J., dissenting) ("[M]edia coverage of the case, while ubiquitous and often inflammatory, did not . . . contain a confession by Skilling or similar 'smoking-gun' evidence of

specific criminal acts.") (citation omitted); *Rock v. Zimmerman*, 959 F.2d 1237, 1253 (3d Cir. 1992) ("Nothing in the record suggests that . . . news accounts were unfair or sensationalistic."); *United States v. Hueftle*, 687 F.2d 1305, 1310 (10th Cir. 1982) ("Also, when publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact.") (cited with approval in *Skilling*, 561 U.S. at 384 n.17); *United States v. Savage*, 2012 U.S. Dist. LEXIS 87339, *16 (E.D. Pa.) ("[M]ost of the news stories are predominantly factual in nature in that they report about the Coleman murders, updates in the 2005 drug conspiracy case or the instant case.").[4]

Moving to consider Thomas' trial, the Court notes that the Virgin Islands is decidedly "a small jurisdiction with a small population from which to select a jury."[5] *Rivera*, 64 V.I. at 569 (citing *Hayes v. Ayers*, 632 F.3d 500, 509 (9th Cir. 2011) (noting that the small size of a county of 190,000 people weighed in favor of defendant's pretrial publicity claim). The potential for even limited media coverage to permeate the community is stronger in the Virgin Islands than in a jurisdiction of millions of

[4] *See also, e.g., Commonwealth v. Laird*, 632 Pa. 332, 347 ("The existence of pretrial publicity does not alone justify a presumption of prejudice, but prejudice will be assumed where the defendant shows that the publicity: was sensational, inflammatory, and slanted toward conviction, rather than factual or objective; revealed the defendant's prior criminal record (if any) or referred to confessions, admissions, or reenactments of the crime by the defendant; or was derived from official police and prosecutorial reports. Even if the accused proves one of these factors, a change of venue is not required unless he also shows, inter alia, that the pretrial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it.") (citations omitted).

[5] In *Skilling*, the trial was held in Houston, "the fourth most populous city in the Nation" at that time, a city of "more than 4.5 million individuals eligible for jury duty;" the Supreme Court noted the "large, diverse pool of potential jurors." 561 U.S. at 382. In contrast, the entire population of the U.S. Virgin Islands is approximately just over 100,000 people.

people. The size and characteristics of a small community invariably carry a higher risk of press coverage leading to juror prejudice.

However, other factors weigh against the Court finding a presumption of prejudice in Thomas' trial. Thomas provided the Court with four news articles from the period that predates Thomas' first trial. Of those, two do not even mention Thomas: one from July 2007 describes briefly how police in St. John were investigating the homicide of Cockayne; the other, a CNN article, details Cockayne's family's frustrations with the Virgin Islands police force and its ongoing investigation into Cockayne's murder. A third article, from August 6, 2007, describes Thomas' arrest in connection with the murder of Cockayne, and his detention on charges of first-degree murder and assault pending his upcoming trial. The fourth article, from August 8, 2007 describes the arrest of Ryan Meade for witness intimidation connected to the Cockayne murder. None of the articles goes into any expansive or lurid detail on the events surrounding Cockayne's death. The two articles that do mention Thomas are largely fact-based.

Thomas also provided four articles from 2009 and 2010, all published after the trial court's ordering of a new trial for Thomas (a turn of events that one article described as, "Judge Brenda Hollar threw those verdicts out after evidence came to light which had not previously been shared with the defense."). Three of the four briefly mention the allegation by Thomas' fellow prison inmate that Thomas admitted that he stabbed Cockayne. However, none of them asserts that this allegation was given any weight, only that it was not appropriately turned over by the prosecution

to the defense, and all mentioned it only once. None of the 2009 and 2010 articles states that Thomas was accused of murdering Cockayne (as by that time the charges against him had been reduced to assault-related charges). Two of the articles describe how in Thomas' first trial, "[Judge] Hollar adjusted the counts against" Thomas and Boston, "reducing one of the third-degree assaults to simple assault for each of them, which resulted in one set of weapons charges being dismissed." That information could reasonably be interpreted as favorable to Thomas.

Also, none of the articles described Thomas' criminal history or impugned his character. *See, c.f.*, *Irvin v. Dowd*, 366 U.S. at 725-26 (jury pool tainted by reporting on, among other things, the defendant's extensive criminal history in unrelated matters). The articles were predominantly factual in nature, reporting principally on the investigation into Cockayne's murder, trial proceedings against defendants in the first round of trials, or circumstances surrounding the ordering of a new trial and updates on Thomas' second trial. None of the news accounts was sensational, and none contained inflammatory or blatantly prejudicial information "of the type readers could not reasonably be expected to shut from sight." To echo the U.S. Supreme Court, none contained evidence of the "gun-smoking variety" inviting prejudgment of Thomas culpability. Finally, it is significant that between Cockayne's murder and Thomas' second trial, nearly three years had elapsed: the second trial was held at a time when assuredly "publicity was greatly diminished and community sentiment had softened." *Patton v. Yount*, 467 U.S. 1025, 1032 (1984).

The Court's weighing of these factors demands the conclusion that this is not that "extreme case" that gives rise to presumption of prejudice; the Court finds none.

b. **The Court finds no actual prejudice after reviewing Thomas' *voir dire* complaints.**

In the absence of a showing of presumed prejudice, Thomas, "in order to demonstrate a violation of his right to an impartial jury, must establish that those who actually served on his jury lacked a capacity to reach a fair and impartial verdict based solely on the evidence they heard in the courtroom." *Zimmerman*, 959 F.2d at 1252 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963)). Thomas' *voir dire* challenge essentially concerns, "whether the procedure used for testing impartiality created a reasonable assurance that [actual] prejudice would be discovered if present." *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972).

Thomas argues that, "[t]he speedy and abbreviated *voir dire* conducted during" his second trial, "when viewed in the context of the notoriety and pre-trial publicity surrounding the murders of James Cockayne and the news coverage of the first trial, was inadequate to permit the discovery of biased jurors.[6] He argues that the *voir dire* was insufficient because the entire jury selection process took less than one day; and because the trial judge did not conduct an individualized *voir dire* of jurors exposed to publicity, to determine the source of the information, the nature of the information,

[6] Supplemental Briefing 1.

where the information was received, or whether the jurors ever formed an opinion as to the case or Thomas' guilt.

There are several ways a court may overcome prejudicial publicity to ensure a trial by an unbiased jury, among them *voir dire*. Though *voir dire* is a tool a court may use to dig up and weed out the effects of pretrial publicity on a prospective jury, "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*." *Skilling*, 561 U.S. at 386 (citing *United States v. Wood*, 299 U.S. 123, 145-46 (1936)). Jury selection, the U.S. Supreme Court has "repeatedly emphasized, is particularly within the province of the trial judge." *Skilling*, 561 U.S. at 386 (citations and internal quotations omitted). "The Court's cases have stressed wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas that might tend to show juror bias." *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991).

"Particularly with respect to pretrial publicity . . . primary reliance on the judgment of the trial court makes good sense," as the trial judge, "sits in the locale where the publicity is said to have had its effect and brings to [her] evaluation of any such claim [her] own perception of the depth and extent of news stories that might influence a juror." *Id.* Reviewing courts, "making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judge." *Skilling*, 561 U.S. at 386. They are "properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of

factors impossible to capture fully in the record--among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* (citation omitted). "In contrast to the cold transcript received," by a reviewing court, "the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service." *Id.* at 386-87.

Appreciating the better vantage point that a trial judge occupies, the Supreme Court has held that in reviewing claims of juror impartiality, deference to a trial court is "at its pinnacle," *Skilling*, 561 U.S. at 396, and that "[a] trial court's findings of juror impartiality may 'be overturned only for 'manifest error.'" *Mu'min*, 500 U.S. at 429-30 (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)).

The judicial officer considering this habeas corpus petition was not the trial judge and did not oversee jury selection. Indeed, the local Habeas Corpus Rules prohibit the trial judge from deciding a habeas petition. V.I. H.C.R. Rule 2(a)(9). Therefore, this Court does not have the in-the-moment experience that the trial judge had to assess a venire member's fitness for jury service. Nevertheless, a review of the trial court's *voir dire* does not support a finding of manifest error. Admittedly, a procedure like the one employed by the trial court during this jury selection *might* prove problematic in some other, future case. For one, the court asked only one, roughly the same, general question to all jurors who indicated they had heard about the case:

> Would you be able to set that aside, listen to the evidence and render a decision solely on the evidence?

The trial court then accepted at face value jurors' answers to the question without probing any further. In several instances, the court didn't even need to ask the question—jurors simply cut out the judge's inquiry and proclaimed, in one form or another, "I have read about it and it's been discussed and I could be impartial."[7] "'Had the trial court . . . been confronted with [a] 'wave of public passion' engendered by pretrial publicity . . . the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors'" than was undertaken. *Skilling*, 561 U.S. at 444-45 (quoting *Mu'Min*, 500 U.S. at 429). In such circumstances, a court should hesitate to accept at face value a juror's promise of impartiality. Due process might compel the court to more "closely scrutinize the reliability of their assurances of fairness." *Skilling*, 561 U.S. at 441 (Sotomayor, J., dissenting) ("To ensure an impartial jury in such adverse circumstances, a trial court must carefully consider the knowledge and attitudes of prospective jurors and then closely scrutinize the reliability of their assurances of fairness.").[8] The necessity springs from the fact that, "[t]he juror is poorly placed to make a determination as to

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[7] E.g., 23:11-13; 23:16-18; 23:21-23; 24:1-4.

[8] Justice Sotomayor explained this need to be cautious: "The Court has recognized that when antipathy toward a defendant pervades the community there is a high risk that biased jurors will find their way onto the panel. The danger is not merely that some prospective jurors will deliberately hide their prejudices, but also that, as part of a community deeply hostile to the accused, they may unwittingly be influenced by the fervor that surrounds them." *Skilling*, 561 U.S. at 441 (citations and internal quotations omitted).

his own impartiality." *United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978). "Instead, the trial court should make this determination." *Id.*

Here, however, the Court finds no evidence that the trial court was "confronted with such a 'wave of public passion engendered by pretrial publicity' as to cast doubt upon the prospective jurors' own indications of impartiality." *United States v. Edmond*, 52 F.3d 1080 (quoting *Mu'Min*, 500 U.S. at 429). Thomas' second trial occurred nearly three years after the events that led to his charges, and two years after his first trial. The news articles that Thomas provided to the Court are largely factual and display no disparaging characterizations of Thomas or sensational descriptions of the events surrounding Cockayne's death, and no smoking guns. Of the jurors that indicated they had heard about the case through word-of-mouth or pretrial publicity, none indicated any strong feelings regarding the case.[9] Of the jurors who had heard of the case and made it onto the jury, all indicated that they could set aside what they had heard and make an impartial decision. The Court also notes that the trial court repeatedly admonished jurors to base their decisions on trial evidence alone.

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[9] Thomas argues that, "courts have consistently hold [sic] that a court must, ***at the very least***, determine, in particular, what each juror hear or read and how it affected his attitude toward the trial, and then determine whether any juror's impartiality has been destroyed." Supplemental Briefing 7. Thomas cites to several cases from U.S. Circuit Courts of Appeal in support of that argument, but no similar rule exists for the Virgin Islands, and this Court hesitates to adopt one. For one thing, the cases to which Thomas cites do not all stand for such a rule. Furthermore, all those cases came before the Supreme Court's decisions in *Mu'Min* and *Skilling*. Those latter decisions guide the Court's analysis here, and neither suggests to the Court that it would be appropriate to adopt such a rule. The Court declines to.

In sum, questions about the content of the publicity to which jurors were exposed might be necessary in some cases, to adequately assess whether those jurors can be impartial, but this trial did not demand such questions. "To be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must [have rendered] the defendant's trial fundamentally unfair." *Mu'Min*, 500 U.S. at 425-26 (citation omitted). The Court does not find that to be the case here. And the Court has no reason to find that the trial judge, bringing to bear her own judgment and perception of the depth and extent of news stories that might influence the jurors, erred in finding that the jury empaneled was impartial.

The Court finds no manifest error and affirms the trial court's findings of juror impartiality. Thomas has failed to prove actual prejudice. His jury impartiality claim fails.

II. Ineffective Assistance of Counsel.

In order to make a showing of ineffective assistance of counsel, Thomas must "prove that his trial counsel's performance fell below an objective standard of reasonableness." *Suarez v. Gov't of the V.I.*, 56 V.I. 754, 759-60 (V.I. 2012) (citations and internal quotations omitted). In reviewing such a claim, a court must, "indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* at 760 (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002)) (internal quotations omitted). A court's, "scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Consequently, proving ineffective assistance of counsel "presents a high bar." *Suarez*, 56 V.I. at 759. "The benchmark . . . must be 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." *Strickland*, 466 U.S. at 671; *see also United States v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989) ("It is . . . only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.") (citing *Strickland*, 466 U.S. 689-90). "Tactical decisions about which a client or fellow counsel might disagree do not qualify as objectively unreasonable." *Ibrahim v. Gov't of the V.I.*, 2008 V.I. Supreme LEXIS 20, *5 (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002)).

a. The Court does not find Thomas' counsel was ineffective for failing to subpoena Cockayne's family members.

Thomas alleges that his counsel was ineffective because he did not subpoena members of Cockayne's family to elicit testimony that they had paid certain witnesses, in particular Kenneth Rawlins, in Thomas' first trial.

Generally, whether or not to call a particular witness is, "a tactical decision and, thus, a matter of discretion for trial counsel.'" *Warren v. Brunell*, 1997 U.S. Dist. LEXIS 1558, *12 (W.D.N.Y.) (quoting *United States v Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986), *cert. denied*, 479 U.S. 836 (1986)); *Jenkins v. Ballard*, 2016 W. Va. LEXIS 264, *85 ("[C]ounsel's decision not to interview or call witnesses is a tactical decision.") (citing *Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977)).

The record clearly demonstrates that it was a reasonable decision for Thomas' attorney to not subpoena and examine Cockayne's family regarding payments to witnesses. The record also clearly shows that the adversarial process was not undermined by that decision. At numerous times during the trial, it was made abundantly clear to the jury that Cockayne's family had made payments to key witnesses. From the very onset, during opening statements, Thomas' counsel informed the jury:

> For Kenny Rawlins will be the only man that is going to try and implicate Mr. Thomas, but that same Kenny Rawlins-- we have stipulated so we can avoid calling the Attorney General office -- took five thousand dollars from Ms. Cockayne and did not tell the prosecutor that he had gotten paid. It all came to light after couple months pass. Wait. That is not the end of the story.
>
> That Ms. Iris Kern and Ms. Cockayne were e-mailing each other about paying Kenny but don't tell anybody. Iris Kern is a member of the Attorney General office, and you paying a witness and don't tell nobody. Wrong people sitting in that chair. The wrong man is sitting in that chair right there. I dare say this is a stipulation that is admitted into evidence and it had come into evidence.[10]

Moments later, counsel for Boston made his opening statement and again mentioned a payment to Rawlins:

> Now, you heard [Thomas' attorney] talk about Mr. Rawlins; Mr. Rawlins who received $5,000 for his testimony.

During cross-examination of Rawlins, Thomas' counsel grilled him at length about his interactions with Cockayne's family and the payment the family made to Rawlins:

> (Counsel)
> Q: Now do you know Mr. and Ms. Cockayne?
> (Rawlins)

[10] Trial Tr. Vol. 1, 22:10-23:3.

A: Only when they came to the Virgin Islands.
Q: And you had lunch with them during the trial; am I correct?
A: A-hem, yes.
Q: And you took $5,000 from them; am I correct?
A: When?
Q: Whenever?
A: Excuse me.
Q: Beg your pardon? You never took $5,000 from them?
A: They gave me $5,000 after the first trial was over, not beginning, after the trial. They told me that it was a reward. I had already done my part up here and that was after the trial was completely over. I had no idea about that money.
Q: And isn't it a fact, Sir, that you spend time with them on a daily basis during the trial?
A: And in the witness room.
Q: And in the corridors?
A: Yes. I believe if I'm sitting in the same room, I'm pretty sure we can walk down the corridor together.
Q: And maybe you got $5,000?
A: No. No.
Q: You wouldn't take $5,000 from me?
A: No, for what? You're not going to be bribing me.
Q: So that wasn't a bride from the Cockaynes?
A: So why did you say that?
Q: Because you took it?
A: That was at the end of the trial. They tell me that it was a reward.
Q: Oh, yes?
A: Yes.
Q: That is what they told you?
A: Yes.
Q: When day did they say that?
A: After the trial was completely over.
Q: What day?
A: I don't know what day it was. You have to ask him to check.
Q: I have to ask them?
A: Yes. That was a couple years ago.
Q: And you returned the $5,000 or kept it?
A: I kept it. That certainly wasn't for my testimony.[11]

[11] *Id.* 68:20-70:22.

Later in the trial, Thomas' counsel read into the record a Stipulation Regarding Financial Benefits, agreed to by the People and Thomas and Boston, which further detailed financial payments by the Cockayne's to Rawlins and other witnesses at the time of the first trial:

> 1. That Iris Kern, Domestic Violence Policy Advisor to the Attorney General and the Police Commissioner, communicated with the deceased victim's mother, Jean Cockayne prior to November 14, 2008, to facilitate a payment of $5000 to witness Kenneth Rawlins, without the knowledge and approval of the Attorney General or the Assistant Attorney Generals.
> 2. A check was made payable to witness, Rawlins and executed by William Cockayne in the amount of $5,000 after the final trial's conclusion in October of 2008.
>
> . . . .
>
> 9. A statement of William Cockayne Merrill Lynch cash management transactions documented that a potential witness, Daryl Martens received some $1,300 in in-kind payments about a year before trial.
> 10. That the Cockayne family documented evidence that witness Aaron Ferguson received payments before and after his testimony at trial in this matter.[12]

Thus, the jury was manifestly presented with copious reference to payments by the Cockayne family to witnesses, including Rawlins. Whether or not those witnesses' testimony warranted belief based on those facts was a question exclusively for the jury, and not open for the Court's review. *See Woodrup v. Gov't of the V.I.*, 2018 V.I. LEXIS 64, *19 ("Any final determination regarding the believability of witnesses at trial and the weight to be accorded such testimony, is within the sole province of the jury.") (citations omitted).

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[12] Trial Tr. Vol. 2, 191:18-192:7, 193:18-194:3.

There were ample references to payments by Cockayne's family made during the trial. Therefore, the Court finds it well within reason that Thomas' counsel chose not to subpoena members of Cockayne's family to testify. Doing so would appear to the Court to have been superfluous; and the decision not to do so did not unfairly prejudice Thomas. The fact that Thomas' counsel did not call members of the Cockayne family to testify about earlier payments to witnesses did not constitute ineffective assistance of counsel.

In addition, the record shows that Thomas' attorney was harassed and physically threated by members of Cockayne's family. It shows also that the trial judge had received additional complaints concerning inappropriate behavior by Cockayne's family; that Thomas' attorney had been provoked by Cockayne's family during the first trial; and that an attorney for the Attorney General's office advised Cockayne's family at the direction of the trial court to, "refrain from any further incidents, saying anything, stay away from [Thomas' attorney], that the Judge is taking it very seriously and that [Thomas' attorney] wants assurance that there would be no further incidents, and that you would stay away from him . . . ."[13] This experience with the Cockayne family strengthened Thomas attorney's decision to not call any member of the Cockayne family to testify regarding the payments. However, even if Thomas' attorney had not been the subject of threats, calling members of the

[13] *Id.* 109:3-129:2.

Cockayne family to testify would have been superfluous, and Thomas suffered no prejudice by them not being called as witnesses.

b. The Court does not find Thomas' counsel was ineffective for failing to object to the admission of certain witness testimony.

Thomas also alleges that his counsel improperly allowed the introduction of the statements of certain witnesses who were not present at trial or available for cross examination.

Ordinarily, under the rule against hearsay, a statement made by a declarant is inadmissible if not made while the declarant is testifying as a witness at the current trial. *See* V.I. R. E. Rule 801(c), 802. However, there are exceptions to this rule. One exception is where the declarant is unavailable as a witness at the current trial, and the statement was given while the declarant was a witness at a previous trial. V.I. R. E. Rule 804(b)(1).[14]

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[14] At the time of Thomas' trial, Virgin Islands courts followed the 1953 Uniform Rules of Evidence adopted by the American Bar Association. Those rules were repealed in April 2010 and have been replaced by the Virgin Islands Rules of Evidence. The Uniform Rule on "hearsay evidence excluded", as adopted in the Virgin Islands, read:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and is impermissible except:
>
> (3) *Depositions and prior testimony.* Subject to the same limitations and objections as though the declarant were testifying in person . . . (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with the law for use as testimony in the trial of another action, when . . . (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered.

5 V.I.C. § 932 (repealed 2010). That rule and the current rules are sufficiently similar that the Court's analysis does not change by referring to the current rules instead of the old rules.

Thomas objects that testimony by Leann Oquendo, made during Thomas' first trial, was allowed into evidence during the second trial even though Oquendo was not available at the second trial. However, Thomas' counsel objected to the admission of Oquendo's testimony, claiming that all attempts to get in touch with Ms. Oquendo had not been exhausted.[15] The trial court disagreed. It recorded counsel's objection but noted that Oquendo had been unsuccessfully subpoenaed, and then declared her an unavailable witness. It instructed the jury on its reasons for allowing the testimony, and the process for reading Oquendo's testimony into the record, and then allowed the government to do so. Therefore, Thomas' counsel did properly object to the admission of the statement, but the objection was unsuccessful.

Thomas also argues that his trial counsel should have objected to the admission of testimony of Officer Earl Mills from Thomas' first trial. Thomas argued at his evidentiary hearing in this matter that his counsel's failure to object was highly prejudicial to his case. The Court disagrees. Like with Oquendo, the trial court admitted the testimony of Mills as testimony of an unavailable witness. Prior to trial, the People had filed a Motion to Admit Transcript Testimony, wherein the People reported that Mills was sick, under medical care off island, and unavailable for trial. The trial court based its determination on these facts.[16] The court almost certainly would have admitted Mills' testimony despite an objection from Thomas' attorney, and the court's decision to admit the testimony was not in error. What's more,

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[15] Trial Tr. Vol. 1, 91:9-13.
[16] *Id.* 145:1-5.

Thomas' counsel did object to the testimony while it was being read into the record.[17] Also, the testimony that was admitted was not highly prejudicial to Thomas: as the People noted in their Motion to Admit, the defense had full opportunity to cross-examine, and in fact did cross-examine Mills in the first trial. Thomas' counsel had the opportunity to read portions of that cross-examination into the record during the second trial, and he did so.[18]

Thomas has failed to prove that his trial counsel's performance fell below an objective standard of reasonableness, or that his counsel's conduct undermined the proper functioning of the adversarial process. He has failed to show that he had ineffective assistance of counsel.

III. Insufficient Evidence to Sustain a Conviction.

Thomas argues that there was insufficient evidence at his trial to show that he was at the actual location where Cockayne was attacked.[19] Thomas argues also that there was insufficient evidence that he participated in the assault of Cockayne. Without sufficient evidence that Thomas was at the location where Cockayne was assaulted, or that he participated in the assault, the Court obviously would be unable

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[17] *Id.* 155:11-15.
[18] *Id.* 158:22-163:13.

[19] Respondent asserted in its Opposition to Petitioner's Petition for Writ of Habeas Corpus and Incorporate Memorandum of Law that Thomas already raised a sufficiency-of-the-evidence challenge in a prior habeas corpus proceeding that was dismissed on June 14, 2016, and that he may not re-litigate that same issue again. Although Respondent presented no case number or court decision that evidences such a dismissal, the Court takes judicial notice that it entered a decision on June 14, 2016 in *Kamal Thomas v. Dwayne Benjamin, Director of Bureau of Corrections*, Case No. ST-15-CV-334. However, the Court will again analyze Thomas' arguments and expand on its earlier decision.

to uphold a jury's finding that Thomas participated in that assault. However, the Court finds there was sufficient evidence for a reasonable jury to place Thomas at the scene and to find him guilty of the assault charges.

When a petitioner challenges the sufficiency of the evidence presented at trial, "'it is well established that, in a review following conviction, all issues of credibility within the province of the jury must be viewed in the light most favorable to the government.'" *Francis v. People of the V.I.*, 57 V.I. 201, 210 (V.I. 2012) (quoting *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990)). On such a challenge, a highly deferential standard of review will be given to the jury's verdict. *Castillo v. People of the V.I.*, 59 V.I. 240, 277 (V.I. 2013) (citing *Castor v. People of the V.I.*, 57 V.I. 482, 488 (V.I. 2012). "The jury's verdict will be upheld if there is substantial evidence from which a reasonable trier of fact could find, beyond a reasonable doubt, the essential elements of the crime." *Id.* (citing *Christopher v. People*, 57 V.I. 500, 514-15 (V.I. 2011)). However, in making this determination a court does not judge the credibility of a witness nor weigh the evidence. *Tyson v. People of the V.I.*, 59 V.I. 359, 539 (V.I. 2013) (citation omitted). Sufficiency challenges are not a forum to rehash credibility arguments that were unpersuasive to a jury. *Christopher v. People of the V.I.*, 57 V.I. 500, 514 (citation omitted). A reviewing court is, "not at liberty to substitute [its] own credibility determinations for those of the jury." *Id.* (quoting *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990) (internal quotations omitted).

In a direct appeal following trial, the Virgin Islands Supreme Court reviewed a challenge by Boston to the sufficiency of the evidence to convict him. The Supreme

Court, acting as a reviewing court, considered the testimony from the trial and "recapitulate[d] the facts in the light most favorable to the People." *Boston v. People of V.I.*, 56 V.I. 634, 636 (2012). This Court in doing the same must rely on that identical testimony and thus finds the Supreme Court's summary—portions of which are relevant to this Court's analysis—to be a safe reprisal of the facts.[20] The Supreme Court's summary was as follows:

> Kenneth Rawlins testified that on June 18, 2007, after finishing work, he went to a nearby bar on St. John to relax and have a beer. While at the bar, Rawlins overheard Boston telling another individual that he was going to beat Cockayne up for kicking his girlfriend's jeep earlier that day. Rawlins told Boston and Kamal Thomas, who was with Boston at the bar, that beating someone up for kicking Boston's girlfriend's jeep was ridiculous, and that they should leave the situation alone. Rawlins then went outside to sit down and relax. While outside, Rawlins saw Cockayne enter the bar. Moments later he heard a loud commotion and what sounded like a fight coming from inside the bar, and then he saw Tom Debelek, the bartender, bring Cockayne outside. Rawlins went back inside the bar and saw Boston holding a broken pool cue in his hand. He told Boston that he was acting ridiculous and to leave Cockayne alone. He told Boston that Cockayne had left the bar and offered to buy Boston a drink if he would forget about Cockayne. Boston replied that he was going to get even with Cockayne and "kick his ass." Boston then left the bar. Rawlins followed him outside, pleading with him to leave the situation alone. Once outside, Rawlins saw Thomas pick up a wooden stick, and then he saw Thomas and Boston run up the road in the direction Cockayne had headed.
>
> Lionel Sprauve testified that as he was leaving the fire station around 11:00 p.m. — which was around the same time as Boston and Cockayne's altercation in the bar — he saw Thomas and another individual who he could not identify chasing Cockayne down the street. Additionally, Leann Oquendo testified that at some point between 11:00 p.m. and 11:30 p.m., while driving in the same general area where Sprauve testified he saw Thomas and another individual chasing Cockayne down

[20] To be certain, the Court searched the docket for Boston's appeal before the Supreme Court and confirmed that the Supreme Court did rely on the same testimony.

> the street, she saw three black males running up the road in the direction of a white male. She further stated that one of the individuals running up the road was carrying a stick, and that when the three individuals reached the white male, they surrounded him in the street. The individual holding the stick then went to hit the white male with the stick, but stopped because Oquendo blew her car horn. After looking around, he went to strike him again but stopped because Oquendo, again, blew her car horn. After blowing her horn twice, Oquendo drove off to alert the authorities, leaving the white male in the street still surrounded by the three other individuals. Approximately twenty minutes after Thomas and Boston ran up the road in the direction Cockayne had headed, Boston returned alone to the bar where the initial altercation had occurred. According to Rawlins, when Boston returned to the bar his shirt was covered in dirt, he was sweating heavily, and he was acting shaky and nervous.
>
> Later that evening, at approximately 12:20 a.m., a stabbing incident was reported to have occurred on St. John. Officer Earl Mills responded to the report and discovered the body of a white male. Although it was not clearly established at trial, it appears that the deceased was later identified as Cockayne and that he died as the result of stab wounds. Dr. Francisco Landron, the forensic pathologist and medical examiner who examined Cockayne's body, testified that an external examination of the body revealed that Cockayne had sustained a substantial number of blunt force injuries. These injuries manifested themselves in the form of contusions and abrasions, and were visible on Cockayne's face, arms, neck, shoulder, and legs. Dr. Landron further stated that these injuries were consistent with the type of injuries a person could have gotten from being struck with a stick or a piece of wood.

56 V.I. at 637-38.

To convict Thomas of simple assault under title 14, section 299(2), the People were required to prove that he committed an "assault or battery". "Assault is defined as an attempt to commit a battery or 'a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery.'" *Boston*, 56 V.I. at 642 (quoting 14 V.I.C. § 291). "Additionally, 'assault and battery' is defined as 'any unlawful violence upon the person of another with the intent to injure him.'" *Id.*

(quoting 14 V.I.C. § 292). The People alleged that Thomas violated section 299(2) by committing an assault and battery on Cockayne. Accordingly, the People needed to prove that Thomas used unlawful violence upon Cockayne with the specific intent to injure him.[21]

Thomas also was convicted of third-degree assault (with a deadly weapon) under title 14, sections 297(a)(2) and 11(a)[22], and using a deadly or dangerous weapon during a third-degree assault under title 14, sections 2251(a)(2)(B) and 11(a). In order to convict Thomas of both of these additional charges, the People were required to prove additionally that Thomas used a deadly weapon during the assault of Cockayne or aided and abetted another in doing so.[23]

The V.I. Supreme Court has held that a deadly weapon is:

> [O]ne which, from the manner used, is calculated or likely to produce death or serious bodily injury. Thus whether a weapon is deadly depends upon two factors: (1) what it intrinsically is and (2) how it is used. If almost anyone can kill with it, it is a deadly weapon when used in a manner calculated to kill. Thus the following items have been held to be deadly weapons in view of the circumstances of their use: ... iron bars, baseball bats, bricks, rocks, ice picks, automobiles, and pistols used as bludgeons.

Francis v. People of the V.I., 57 V.I. 201, 212 (2012).

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[21] The People charged Thomas with simple assault under 14 V.I.C. §§ 299(2), 11(a), which allowed the People to either prove that he personally committed the assault or that he aided and abetted another in committing an assault. *See Boston*, 56 V.I. at 641 n.9.

[22] The criminal information identified the charge as a violation of 14 V.I.C. § 297(2). However, third degree assault with a deadly weapon, the charge against Thomas, falls under § 297(a)(2).

[23] Section 2251(a)(2)(B) criminalizes the use of a "dangerous or deadly weapon" "during the commission or attempted commission of a crime of violence (as defined in section 2253(d)(1) [of title 14])". Assault is a crime of violence as defined in 14 V.I.C. § 2253(d)(1). *See* 23 V.I.C. § 451(g).

In determining the sufficiency of the evidence, the Court must view the evidence in the light most favorable to the People. *Boston*, 56 V.I. at 642 (citation omitted). If the Court concludes that a rational jury could have found these elements beyond a reasonable doubt, then there was sufficient evidence to affirm Thomas' assault-related convictions. *See id.*

Rawlins testified that while at the bar, he cautioned both Thomas and Boston against beating up Cockayne. Rawlins testified that Boston later told him he was going to get even with Cockayne and "kick his ass," that Boston then left the bar, and that once Rawlins followed Boston outside the bar, he saw Thomas pick up a wooden stick. Rawlins then saw Thomas and Boston "run up the road in the direction Cockayne had gone.

Another witness, Sprauve, testified that he was leaving the fire station when he saw Thomas and another individual chasing Cockayne down the street. This was around the same time of Boston's altercation with Cockayne in the bar. A third witness, Oquendo, testified that at about that same time in the same area, she also saw three black males running up the road in the direction of a white male. "She further stated that one of the individuals running up the road was carrying a stick, and that when the three individuals reached the white male, they surrounded him in the street." Oquendo then saw the individual holding the stick almost strike the white male twice, each time blowing her horn to stop him.

Approximately 20 minutes after that, Boston returned to the bar alone, covered in dirt, sweating heavily, and shaky and nervous. Cockayne was found dead later

that night, having sustained multiple blunt force injuries. The blunt force injuries were consistent with the type of injuries a person might get from being struck with a stick or piece of wood.

From these facts, the Court is satisfied that a rational jury could have found beyond a reasonable doubt the elements necessary to convict Thomas on all three assault-related charges. Rawlins and Sprauve both testified to seeing Thomas chase Cockayne down the street with another individual. Oquendo testified to seeing Thomas chase a white male down the street. Rawlins testified to seeing Thomas pick up a wooden stick. Oquendo saw one of three individuals preparing to hit a fourth, white male with a stick as they stood surrounding him. Cockayne was later found with multiple blunt force injuries that were consistent with injuries from being beaten with a stick or wooden object. A rational jury could have concluded that Thomas, after grabbing a stick, ran after Cockayne, and then assaulted Cockayne with the stick or aided and abetted another in assaulting Cockayne. A rational jury could also have concluded that, because of the manner in which the stick was used, it was a deadly weapon.

The Court concludes there was sufficient evidence to sustain Thomas' convictions for the assault charges.

IV. Improper Sentence in Violation of 14 V.I.C. § 104 and 5 V.I.C. § 3672.

To recap, Thomas was convicted of the following charges: Count IV, Third Degree Assault, in violation of 14 V.I.C. §§ 297(2), 11(a); Count V, Using a Dangerous Weapon During a Third Degree Assault, in violation of 14 V.I.C. §§ 2251(a)(2)(B),

11(a); Count VI, Simple Assault, in violation of 14 V.I.C. §§ 299(2), 11(a); and Count VII, Threatening a Witness in violation of 14 V.I.C. § 1501(a)(1).[24] Thomas was sentenced on all four counts. The court ordered that the sentence for Count VI—simple assault—run concurrently with the sentences on the other charges, and that the sentences on Counts IV, V, and VII run consecutively.

Thomas argues that this sentence is improper under 14 V.I.C. § 104. He argues that the trial court should have stayed his sentence for the third-degree-assault charge. The Government agrees that Thomas' sentence was improper and argues that the "remedy for this error is for defendant to be re-sentenced in conformance with section 104."[25] The Government doesn't agree however on which sentence should be stayed. It argued during the evidentiary hearing that the punishment for the count of simple assault, Count VI, should be modified from concurrent with Counts IV, V, and VII, to stayed.

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution states that no person shall, "be subject for the same offence to be twice put in jeopardy of life or limb." Like the Fifth Amendment, the Revised Organic Act of the Virgin Islands provides that, "no person for the same offense shall be twice put in jeopardy of punishment[.]" 48 U.S.C. § 1561. Additionally, Title 14, section 104 of the Virgin Islands Code provides:

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[24] Thomas was also convicted of Count VIII, Threatening a Witness in violation of 14 V.I.C. § 1501(a)(2), but after trial the court dismissed that count as unconstitutional. Thomas was not sentenced on that count.

[25] Respondents' Oppo. to Petitioner's Petition for Writ of Habeas Corpus 3.

> An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Hence like the Fifth Amendment, Virgin Islands law, "protects against multiple punishments for the same offense." *Whalen v. United States*, 445 U.S. 684, 700 (1980) (citation omitted). The Virgin Islands Supreme Court has interpreted section 104 to provide that, "notwithstanding the fact that an individual can be charged and convicted of violating multiple provisions of the Virgin Islands Code, an individual may only be punished for one of the offenses arising out of a single act. If more than one conviction is based on a single act, the trial court must 'stay the execution' of punishment for all but one of those convictions." *Estick v. People of the V.I.*, 62 V.I. 604, 622-23 (2015) (citation omitted). If a trial court orders two such sentences to run concurrently instead of staying one of the sentences, that constitutes impermissible punishment under the Double Jeopardy Clause. *See Williams v. People of the V.I.*, 56 V.I. 821, 832-33 (V.I. 2012) (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985)).

The trial court sentenced Thomas for both third degree assault and simple assault, and then ordered the sentence for simple assault (Count VI) to run concurrent to the sentence for third degree assault (Count IV). Hence, the sentence for Count VI runs afoul of the Double Jeopardy Clause of the Fifth Amendment and 14 V.I.C. § 104.[26] The Court therefore agrees with the Government that Count VI is

[26] Since the Government doesn't contest Thomas' argument that his sentence violates § 104, but only disagrees as to which of the assault charges should have been stayed, the Court assumes for this

the one that must be stayed on resentencing. The Court will modify Thomas' sentence to reflect that change.

Thomas also argues that his sentence fails to comply with 5 V.I.C. § 3672, in that it fails to specify when each of his consecutive sentences begins and ends, or stated differently, which sentence shall be served first, second, and third. Here too the Government agrees. The Government argues however that this error was harmless and can be remedied easily by the Court. It argues that, "[l]ike the Section 104 issue in this case, the court needs only to alter the language [of Thomas' sentence] to accurately reflect the statute," and that it may do so by altering Thomas sentence so that, "the mandatory minimum sentence for the weapons charge would be served first and then the other two charges."[27] The Government points out that Thomas' requested change will not serve as grounds to alter the amount of time that Thomas will serve for this conviction.

The parties are correct in their section 3672 arguments. Title 5, section 3672 of the Code provides that, "[a] judgment imposing a sentence of imprisonment shall specify whether the sentence is to be served concurrently with or consecutively to any other sentence imposed at the same time or prior thereto. If the sentences are to be served consecutively, the judgment shall specify when each sentence is to begin with reference to the termination of any other sentence." To make Thomas' sentence

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decision that both Thomas' assault charges were based on a single act and that Thomas' sentence thus implicates § 104 concerns.

[27] Respondents' Response to Petitioner's Supplemental Briefing 4.

compliant with statute, it must additionally be modified to reflect when each of Thomas consecutive sentences begins and ends with relation to the other. The Court shall do so.

Contemporaneous with entry of this Order, the Court will enter an order in the underlying criminal case to re-sentence Thomas to reflect these changes, although the actual term of the sentences on the various charges will not be altered.

CONCLUSION

Thomas has not shown that he received an unfair trial because of an impartial jury, that he received ineffective assistance of counsel, or that his conviction was based on insufficient evidence to sustain a conviction.

However, Thomas' sentence was improper in that it violates 14 V.I.C. § 104; and 5 V.I.C. § 3672(a). The Court will enter an order in the underlying criminal case to formally stay Count VI and to specify when each remaining sentence begins with reference to the termination of each other sentence.

DATED: November 13, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
DONNA DONOVAN
Court Clerk Supervisor 11/13/2018