Case No. S. Ct. Civ. No. 2015-0007

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: JUSTIN K. HOLCOMBE, ESQ.,

Appellant;

PEOPLE OF THE VIRGIN ISLANDS,

Appellee/Plaintiff/Interested Party;

v.

RALPH EDWARDS TITRE, JR.,

Appellee/Defendant/Interested Party.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Super. Ct. Crim. 488/2012 (STT)

BRIEF OF *AMICUS CURIAE* VIRGIN ISLANDS BAR ASSOCIATION (AMENDED)

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[1] *Amicus curiae* Virgin Islands Bar Association adopts and incorporates, to the extent necessary and appropriate herein, the following from the Brief of Appellant Holcombe: Statement of Jurisdiction, Issues Presented for Review, Standard of Review, Statement of Related Cases, Statement of the Case, and Statement of the Facts.

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ARGUMENT

"Every problem is an opportunity in disguise." This quote, commonly (but questionably) attributed to John Adams, fully applies to this case. The present case draws into focus the long-standing, systemic problems in the way private lawyers are appointed to represent indigent criminal defendants in the Superior Court. That system of appointments is indeed deeply flawed, administered without regard to the requirements of statute, fundamentally unfair to both the accused and counsel, and in urgent need of reform.

This Court, as the repository of the "supreme judicial power of the Territory," 4 V.I.C. § 21, and in the exercise of its supervisory jurisdiction, has an ideal opportunity to effect such reform. It has the opportunity to substantially improve the administration of justice in the Virgin Islands.

1. THE CONSTITUTIONAL FRAMEWORK.

Two celebrated United States Supreme Court cases, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 799 (1963), establish the right of the indigent accused to counsel at the expense of the government.

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon, 372 U.S. at 344, 83 S. Ct. at 796-97.

Another seminal Supreme Court case, *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984), establishes the corollary principle that an accused has the constitutional right to *adequate* representation by counsel. The attorney's representation must satisfy an objective standard of "reasonableness." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065. The Sixth Amendment's right to counsel presupposes "the legal profession's maintenance of

standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.*[1]

2. THE STATUTORY FRAMEWORK

Title 5, Section 3503 of the Virgin Islands Code, codifies the Sixth Amendment right of any person accused of a felony, or of any misdemeanor in which "imprisonment may be imposed," to be represented by counsel, who "will be appointed to represent him if he is financially unable to obtain same." 5 V.I.C. § 3503(a).[2]

Section 3503(a) further provides that the Court "shall refer such defendant to the Office of the Public Defender, which Public Defender shall represent him at every stage of the proceeding…." *Id.* However, when "circumstances warrant" in the judgment of the court, the court may "assign other counsel to represent the defendant at every stage of the proceedings...." 5 V.I.C. § 3503(a).

When it comes to the appointment of private counsel, Section 3503 has a number of critical provisos:

> **[1]** Such counsel are to be appointed from a "*panel* of private attorneys maintained by the Superior Court for this purpose," *id.* (*emphasis added*);
>
> **[2]** Private attorney appointments may take place "in no more than 15 percent in cases of defendants who by reason of indigence, are unable to obtain counsel," *id.*;

[1] The Organic Act of 1954, 48 U.S.C. § 1561, incorporates the Sixth Amendment and essentially all other individual rights and liberties of the Bill of Rights. *Id.*; *In re Brown*, 439 F.2d 47, 50–51 (3rd Cir. 1971) (Section 1561 "expresses the congressional intention to make the federal Constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory.").

[2] Indeed, the Virgin Islands, to its credit, recognized the right of the indigent accused to counsel (in felony cases) well before either *Powell* or *Gideon*. Chapter 6, Section 3 ½ of the 1921 Code provided: "If the charge in the information is for a felony and the defendant is unable to employ counsel, the court must assign counsel to defend him."

[3] Private attorneys so appointed are to receive "reasonable compensation for their services in carrying out their assignments" (plus "allowable expenses"), 5 V.I.C. § 3503(b);

[4] The amount of compensation to the attorney "shall, in each case, be fixed by the court," *id.*; and

[5] The attorney's "compensation and expenses shall be paid out of money appropriated for that purpose by law." *Id.*[3]

3. THE COURT RULE FRAMEWORK.

a. VISCR 210.1: Supreme Court Appellate Appointments

The Supreme Court, in order to "effectuate" the provisions of 5 V.I.C. §3503, adopted Supreme Court Rule 210.1, which provides, in pertinent part:

> **PANELS OF ATTORNEYS.**
>
> **(a) Establishment of Attorney Panel**. The Clerk of the Supreme Court, at the direction of the Supreme Court and under the supervision of the Chief Justice, shall prepare and maintain a panel of regularly admitted members of the Virgin Islands Bar who are eligible to practice law in the Virgin Islands and who have volunteered, been recommended, or otherwise selected to provide representation to indigent defendants on a recurring basis.
>
> **(b) Selection of Attorneys to Serve on Panels.** The Chief Justice may add or remove attorneys from the panel at any time as he or she sees fit, based on the qualifications and availability of those attorneys and subject to review by the entire Supreme Court. The Clerk of the Supreme Court shall accept applications and receive recommendations for designation to the panel, and submit these names to the Chief Justice for consideration and final approval. The attorneys designated on the panel may be identified by their primary Judicial Division of the Superior Court to facilitate appointments to cases originating in either Judicial Division.
>
> **(c) Absence or Insufficiency of Attorney Panel**. In the event a panel has not been established, or the number of attorneys who have voluntarily applied to join the panel is insufficient to provide adequate representation to all litigants eligible for court-appointed counsel on appeal, the Clerk is authorized to appoint, on a rotating

[3]Minors facing delinquency proceedings have a similar right to appointed counsel in indigency cases. 5 V.I.C. § 2505 ("If the child and his parent, or other person responsible for his care is financially unable to obtain adequate representation, the child shall be entitled to have counsel appointed for him in accordance with the rules established by the court.")

> basis, any regularly-admitted member of the Virgin Islands Bar who is eligible to practice law in the Virgin Islands.

VISCR 210.1 (adopted Sept. 23, 2010, eff. Oct. 1, 2010; amended Oct. 31, 2011, eff. Nov. 2, 201; *subheadings in bold added for convenience*).[4]

b. Lawyer's Duty to Accept Appointments, Sanctions for Refusal

Former Supreme Court Rule 203(p)—carrying forward the earlier Territorial/Superior Rule 303(p), adopted by the Superior Court in in furtherance of its then-existing general regulatory powers over Bar members—provided, in pertinent part, as follows:

> **(p) Attorneys Who Fail to Accept Indigent Appointments.** Any attorney who refuses to accept an indigent appointment or is unavailable for two or more appointments in a calendar year shall be subject to the contempt powers of this court and such other disciplinary action for misconduct as might be recommended by the Virgin Islands Bar Association. Members of the Committee of Bar Examiners and the Ethics and Grievance Committee shall be exempt from indigent appointments. * * *

VISCR 203(p) (adopted Nov. 27, 2007; amended July 1, 2011; repealed December 4, 2014).

Current Rule 210 does not explicitly discuss contempt or professional discipline as sanctions for a lawyer's refusal to accept a court appointment, but those threats unquestionably still exist. Courts have inherent contempt powers to enforce compliance with an order appointing counsel. 4 V.I.C. § 281 (judicial power to compel obedience to lawful orders); 17 Am. Jur. 2d, Contempt § 67; 36 A.L.R.3d 1221 (1971) (collecting cases on contempt for refusal of appointment); accord, e.g., *Smith v. State,* 118 N.H. 764, 768, 394 A.2d 834, 837 (1978); *People v. Hutchinson,* 38 Mich. App. 138, 139, 195 N.W.2d 787, 788 (1972). Refusing an appointment without "good cause" also violates VISCR 211.6.2/Model Rule 6.2, and subjects a lawyer to

[4] But cf., VISCR Rule 210.3 ("Any attorney appointed to represent a defendant in the Superior Court pursuant to 5 V.I.C. § 3503 shall continue to represent that litigant on appeal unless expressly relieved by order of the Superior or Supreme Court.").

discipline. Thus, with or without the sanction provisions of the former court rules, a Virgin Islands lawyer who declines an appointment risks severe, career-threatening consequences.

c. Rule Proposed by Virgin Islands Bar Association.

At the present time, there is no existing Superior Court rule, or any known formal written internal operating procedure, that comprehensively implements the indigent appointment provisions of 5 V.I.C. § 3503 on the trial court level. That glaring void, the Bar submits, largely explains the dysfunctionality of the indigent appointment system (*infra*).

The Virgin Islands Bar Association, for its part, has devoted considerable time and effort over the years to solving the problem. The Bar has sought to formulate specific measures for reform, through the efforts of a number of *ad hoc* committees, the Board of Governors, and several Presidents.

In 2013 the Bar submitted its Revised Proposal for Improvement of the Indigent Defense Appointment System ("Proposed Rule"), approved by the Board of Governors, to Presiding Judge Dunston. **Exhibit A** to Motion for Amicus Appearance. That Proposed Rule (the Bar respectfully submits) reflects a reasonable accommodation of the interests of the indigent accused, the rights and duties of individual bar members, and the fiscal interests and obligations of the Territory; and it seeks to faithfully implement the legislative mandates of Section 3503.

In salient part, the Proposed Rule would require the creation of a *panel* of attorneys. (5 V.I.C. § 3503(a).) The proposed "Indigent Defense Panel" would consist of "three tiers of attorneys who volunteer to serve on the panel," those tiers corresponding to the gravity of the charged offense in a manner tracking the Superior Court's Differentiated Case Management System. *Id.*, ¶ 1.

Prospective Panel members may volunteer for a specific Tier, but the Superior Court must first independently evaluate that attorney's "level of criminal defense experience" in deciding his or her placement. *Id.* The Superior Court would also take an important, proactive role in

promoting quality of indigent legal representation: "The Superior Court shall coordinate training on an annual basis that shall be provided at no cost to all members of the Indigent Defense Panel. The training shall offer no less than 12 Continuing Legal Education (CLE) credits, including 2 ethics credits." Proposed Rule, ¶ 4. (Such training is similarly made freely available to Virgin Islands federal private CJA Panel members through the auspices of the Federal Public Defender's Office.)

Only if there is a shortage of volunteer Panel attorneys would the Superior Court resort to appointments on a "rotating basis pursuant to the indigent appointment list and procedure currently utilized" by the Court. *Id.*, ¶ 2. An attorney so appointed would have the right to freely delegate his duties to other counsel by private arrangement. *Id.*[5]

The Proposed Rule seeks to implement a schedule of "reasonable compensation" for appointed attorneys (5 V.I.C. § 3503(b)), with Tier I cases (the least serious) paying $50 per hour, Tier II $75 paying per hour, and Tier III $100 per hour. *Id.,* ¶ 3.[6]

The Bar does not presume that its Proposed Rule is the only answer, but respectfully submits that it is a good answer. In all events, the Bar believes that there must be *some* very definitive institutional reform of the appointment procedures of the Superior Court, which are not currently prescribed by any clear or comprehensive written rule, and which clearly appear in many cases to be administered in an arbitrary, unpredictable and (occasionally) inequitable manner.

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[5] Cf., *In re Temp. Care of R.F.*, No. 31/1996, 2005 WL 3178027, at *6 (V.I. Super. Sept. 20, 2005) (holding that compulsory appointment in family law matter imposed a personal, non-delegable professional duty). The Bar respectfully disagrees with this trial court ruling, which is non-precedential. *In re Q.G.,* 60 V.I. 654, 2014 WL 807875, at *4, n.8 (V.I.2014*)* (decision of a single trial judge not binding on other trial judges).

[6] Cf., 5 V.I.C. § 3503(b) (compensation "shall, in each case, be fixed by the court"); and cf., *WDC Miami Inc. v. NR Elec., Inc.*, No. CV 2013-048, 2015 WL 127852, at *4 (D.V.I. Jan. 8, 2015) ("reasonable hourly rate in this jurisdiction spans from $125 to $300 per hour").

The Bar further submits that the appointment practices of the Superior Court must brought into full and faithful compliance with Section 3503 by appropriate rule.

There are compelling policy concerns at stake in this matter. There are also compelling rights and interests in play—those not only of the indigent accused, but also of the attorneys appointed to represent them. These are of the most fundamental kind, and indeed of constitutional gravity. There must be a fair, equitable, and pragmatically-workable accommodation of these rights and interests. For the most part, that balancing function has already been performed by the legislature in adopting Section 3503. Quite ably so.

4. CORE REQUIREMENTS OF SECTION 3503

As stated, Section 3503 codifies the right to the indigent accused to appointed counsel (in any criminal case involving potential imprisonment); requires that if the Territorial Public Defender's office cannot serve, the appointment be made from a "panel"; requires the Public Defender to assume a primary role, with private appointments limited to 15% of cases; mandates that appointed counsel be "reasonably compensated"; and promises that the costs of private defense "shall be paid out of money appropriated for that purpose by law." 5 V.I.C. § 3503.

Section 3503 is a valid exercise of legislative discretion and authority. E.g., *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 424-25, 72 S. Ct. 405, 408, 96 L. Ed. 469 (1952) (legislature has "broad and inclusive" powers to enact laws for the general welfare, and to allocate the corresponding financial burdens). Moreover: "[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *United States v. Lovett*, 328 U.S. 303, 319, 66 S. Ct. 1073, 1080, 90 L. Ed. 1252 (1946) (Frankfurter, J., concurring), quoting *Missouri, K. & T. Ry. Co. of Texas v. May*, 194 U.S. 267, 270, 24 S. Ct. 638, 639, 48 L. Ed. 971 (1904) (Holmes, J.).

For the most part, the Bar as *amicus curiae* seeks nothing more than the statute requires. But nothing less.

5. THE STATUTORY REQUIREMENT OF A "PANEL"

a. "Panel" Means Select Subset of Attorneys.

This Court observes the basic, "plain meaning" maxim of statutory construction. "In interpreting a statute, we commence with the plain language of the statute. If the language is clear and unambiguous, there is no need to resort to any other rule or statutory construction." *Shoy v. Virgin* Islands, 55 V.I. 919, 926 (V.I. 2011), citing *In re Adoption of Sherman*, 49 V.I. 452, 468 (V.I.2008) ("In interpreting a statute, the court looks first to the statute's plain meaning and, if statutory language is facially unambiguous, its inquiry comes to an end").

"Panel" is a commonly used and well-understood term. E.g., *Merriam-Webster Dictionary* ("panel" a "group of people with special knowledge, skill, or experience who give advice or make decisions").[7]

The legislature in enacting Section 3503 did not say that *all* private attorneys were to be appointed to represent indigent criminal defendants; it said that appointments are to be made from a "panel." 5 V.I.C. § 3503(a). It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001), quoting *Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). The word "panel" as used in the statute cannot be rendered "superfluous."

[7] Available online at http://www.merriam-webster.com/dictionary/panel (*last visited 7/22/15*). The term "panel" may also of course refer to a "group of people who are chosen to be jurors." *Id.* The etymologic derivation of the term "panel" is consistent: "Vulgar Latin *pannellus*, diminutive of Latin *pannus* 'piece of cloth'…. Anglo-French legalese sense of 'piece of parchment (cloth) listing jurors' led by late 14c. to meaning 'jury.' General sense of 'persons called on to advise, judge, discuss,' etc. is from 1570s." Online Etymology Dictionary, http://www.etymonline.com/index.php?term=panel *(last visited 7/22/15).*

It is an essential component of the legislature's indigent defense scheme. It can no longer be ignored by the Superior Court.

b. Panel Means Attorneys with Criminal Law Expertise.

In this context, the term "panel" connotes attorneys with "special knowledge, skill, or experience" in criminal law. That intent can clearly be understood by reference to the parallel federal Criminal Justice Act of 1964—enacted one year after *Gideon*—which Act requires (in pertinent part) that "[c]ounsel furnishing representation under the plan [adopted by the district court] shall be selected from a panel of attorneys designated or approved by the court…." 18 U.S.C.A. § 3006A(b). The United States Judicial Conference, in its "Model Plan," sets forth suggested minimum qualifications for CJA Panel members (basic knowledge of the Federal Rules of Evidence, Rules of Criminal Procedure, Sentencing Guidelines, etc.), with local district courts being free to adopt more detailed and specific qualifications for panel membership. *Guide to Judiciary Policy,* Vol. 7A, Appx. 2B.[8]

This Court in Supreme Court Rule 210.1—which "effectuate[s]" the requirements of 5 V.I.C. § 3503—similarly requires appellate appointments from a "panel." *Id.* Attorneys apply for membership on the panel. VISCR 210.1(b). The Supreme Court screens attorney applicants for sufficiency of qualifications. *Id.* Once the panel is in place, the Supreme Court Clerk is not to appoint ordinary private attorneys *unless* and to the extent that "the number of attorneys who have voluntarily applied to join the panel is insufficient to provide adequate representation to all litigants eligible for court-appointed counsel on appeal." VISCR 210.1(b).

This Court has elsewhere clearly suggested that appointing attorneys from a "panel" is legally required. *In the Matter of V.I. Bar Association's Petition to Amend Bylaws*, 60 V.I. 269,

[8] See http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch02.pdf (*last visited 7/22/15*).

281 n.7 (V.I. 2013) ("[I]f a conflict exists that precludes the Public Defender's representation, an appointment [is to be made] from a panel of attorneys."), citing VISCR 210.1, 210.3(b); 5 V.I.C. § 3503(a).

The Proposed Rule of the Virgin Islands Bar Association similarly requires the Superior Court to create and constitute a "panel" of attorneys who volunteer for membership and who have demonstrated proficiency in criminal law as measured by standards to be adopted and promoted by the Court. The Bar's Proposed Rule (like VISCR 210.1(b)) would permit indigent criminal appointments from the general pool of private practitioners only if the panel membership proves insufficient to meet the need.

Aside from the point that a "panel" is required by statute—which could actually be both the starting point and the valid ending point for the entire analysis—there are overwhelming policy reasons supporting the requirement of a panel, and particularly a *voluntary* panel.

c. Requirement of Adequate Criminal Defense is Mandatory, Not Aspirational.

Lawyers have a *constitutional duty* to render an adequate criminal defense. In order to give the accused what the Sixth Amendment requires, attorneys have a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, citing *Powell v. Alabama*, 287 U.S., at 68–69, 53 S.Ct., at 63–64; *Wiggins v.* Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003) (lawyer's professional performance for 6th Amendment purposes to comply with "objective standard of reasonableness"), citing *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.

Lawyers also have an *ethical duty* to provide competent representation—to possess the requisite "legal knowledge [and] skill" to undertake the task at hand. Model Rule 1.1.[9] A lawyer,

[9] The ABA Model Rules were adopted as the Virgin Islands Rules of Professional Responsibility in 2014. VISCR 211. Model Rule 1.1 is denominated VISCR 211.1.1.

before undertaking a legal matter, must do a critical self-assessment, with due regard to the "complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, [and] the preparation and study the lawyer is able to give the matter…." VISCR 211.1.1, ABA Comment [1].[10]

An appointed lawyer also has the *common law duty*—once he or she undertakes representation—to comply with prevailing professional standards of competency, and may face tort liability for legal malpractice for a breach of that duty. E.g., *Hill v. Thorne*, 430 Pa. Super. 551, 561, 635 A.2d 186, 191 (1993). The standard of professional care owed to the client is an *objective* one that takes no account of the lawyer's personal extenuating circumstances or good intentions. *Meyer v. Wagner*, 429 Mass. 410, 424, 709 N.E.2d 784, 793-94 (1999) ("[A] subjective good faith exercise of judgment or an honest belief will not protect an attorney from an otherwise negligent act or omission.").[11]

The lawyer who represents a criminal defendant without possessing and applying the requisite knowledge and skill thus violates the Constitution, the Virgin Islands Rules of Professional Responsibility, and the common law. It is no legal excuse that the lawyer undertook the representation under court compulsion.

d. Adequate Criminal Defense Requires Special Knowledge and Skill.

Although the Virgin Islands, unlike other jurisdictions, does not officially certify any type of legal specialization, the undeniable fact is that lawyers *do* specialize on a *de facto* basis, or at least concentrate on some areas of expertise at the expense of other areas. This is inevitable. Lawyers cannot possibly attain reasonable competence, simultaneously, in all areas of law. The

[10] See further discussion of legal ethics, *infra*.

[11] Virgin Islands statutes confer no tort immunity upon appointed counsel. Cf., *Powell v. Wood Cnty. Comm'n,* 209 W. Va. 639, 643, 550 S.E.2d 617, 621 (2001), citing W. Va.Code § 29–21–1, *et seq*. (granting statutory immunity to appointed counsel); 18 U.S.C. § 3006A(d)(1) (providing qualified indemnification rights).

law is too vast, too complex. "Simply because one has a license to practice law does not make one competent to practice in every area of the law." *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987). No one would expect a criminal defense lawyer to draft a sophisticated estate plan, advise an individual on an esoteric income tax issue, or advise a union on the requirements of federal labor law. Nor would one reasonably expect the converse to be true. But unfortunately, it is true. As the appointment system is now administered, an estate planning lawyer, a tax attorney, or a labor lawyer may be called upon to defend a person accused of the most serious crimes. This is an empirical reality. See 2014 State of the Judiciary report (characterizing the appointment system as "antiquated," and may result in a "bankruptcy attorney" with no trial experience being called upon to represent a person accused of first degree murder), quoted in Supplemental Brief of Appellant, p.5, n. 2.[12]

To overstate the obvious: A lawyer who has been out of law school for years and who does not do trial work cannot be expected to achieve "on demand" competency in substantive criminal law, relevant constitutional principles, criminal procedures, the rules of evidence, the unique challenges of cross-examining a forensic expert, or related responsibilities by taking a few CLE courses before a major criminal trial. See *Zarabia v. Bradshaw*, 185 Ariz. 1, 3, 912 P.2d 5, 7 (1996) ("We do not share Respondent's optimism that an [estate planning] attorney … who has no trial or criminal experience, can become reasonably competent to represent a defendant … charged with a very serious crime….").

[12] Unfortunately, there is no evidentiary record consisting of the actual data of appointments in the Superior Court. When the undersigned served as Chairman of the *Ad Hoc* Committee of Indigent Criminal Appointments in 2012, the Committee informally requested that information from the Superior Court, but was unable to obtain it. Nevertheless, the 2102 Committee received *numerous* complaints from attorneys who were appointed against their wishes to defend persons accused of serious crimes, and who believed that such representation was clearly outside the scope of their professional competence. These occurrences are so "generally known" in the Virgin Islands legal community as to warrant judicial notice. Fed.R.Ev. 201(b)(1).

A reasonably proficient criminal defense lawyer must be prepared to make well-informed, *on-the-spot,* strategic decisions at trial. He or she must also know how to marshal the evidence, how to effectively cross-examine witnesses, how and when to make legally-valid objections, how to make or respond to motions during trial, and how to effectively advocate for a client in arguments to the jury. Not every lawyer has the training or expertise to do those things.

e. Harm to Accused from Bad Lawyering at Trial May Be Irremediable

Sometimes an indigent criminal defendant receiving free representation gets what he pays for, and pays for what he gets. The client receiving substandard representation is often stuck with that lawyer's mistakes and shortcomings. In that respect a jury trial (with limited exceptions) is like a duel: you only get one shot. Post-trial and appellate review of a jury verdict of guilt is of course available, but the scope and depth of that review is limited.

False convictions do occur, and they sometimes occur because of ineffective counsel (which itself often goes unremedied on appeal or otherwise). See *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association Standing Committee on Legal Aid and Indigent Defendants (December 2004) (noting that 2004 Innocence Project lists 154 defendants serving time for crimes they did not commit)[13]; Donald A. Dripps, Up from Gideon, 45 Tex. Tech L. Rev. 113, 132, n. 46 (2012), citing Emily M. West, Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals, Innocence Project 1 (Sept. 2010) ("A review of published appeals among the DNA exonerations reveals that 54 exonerees … raised claims of ineffective assistance of counsel and courts rejected these claims in the overwhelming majority of cases.").[14]

[13] Available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html (*last visited 7/23/15*).

[14] As an aside: According to the Vera Institute of Justice survey of 40 state prison systems cited in the New York *Times*, the average annual per capita cost of incarcerating a defendant—

On appeal, considerable deference is given to a jury verdict of guilt; review is not *de novo*. The role of the appellate court is "not to sit as a 'thirteenth juror' and re-weigh the evidence." *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998); *Mendoza v. People*, 55 V.I. 660, 667 (V.I. 2011) (evidence of guilt legally sufficient if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Nicholas v. People*, 56 V.I. 718, 2012 WL 2053537, at *4 (V.I. 2012) ("When reviewing a challenge to the sufficiency of the evidence supporting a conviction, we view all issues of credibility in the light most favorable to the People.").

Objections or motions at trial that should have been made by the trial attorney but were not are generally deemed waived or forfeited, unless the defendant can meet the very substantial burden of showing that the essential integrity of the proceedings was compromised. *Nicholas,* at * 4 (discussing requirements of "plain error" doctrine), citing *Francis v. People*, 52 V.I. 381, 390 (V.I. 2009). By contrast, if the attorney is sufficiently skilled to detect and raise the error at trial by objection or motion, the burden is upon the *prosecution* to show that it was "harmless error." *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993), citing Fed.R.Crim.P. 52(b). Procedurally and substantively, the appellate standards are significantly more stringent for the defendant whose lawyer neglected to recognize the error during trial.

And on a more general level: *Even if* a defendant can overcome the "strong presumption" of adequate representation by showing that his attorney was clearly incompetent, the burden is upon him to *further* show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Suarez v. Gov't of the Virgin Islands*, 56

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including, necessarily, any wrongfully-convicted defendant—is over $31,000 a year, or about the same as tuition and board at a good college. http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?_r=0 (*last visited 7.24/15*). If the Virgin Islands Government can afford to imprison a defendant, and if it can afford to prosecute him, the Government should not be heard to complain that it lacks the funds to pay for his defense.

V.I. 754, 2012 WL 2288434, at *2 (V.I. 2012); *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068 (identical standard).

Thus, "the indigent criminal defendant may become the victim rather than the beneficiary of the … method of providing defense counsel." *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 821, 227 S.E.2d 314, 323 (1976). The harm may be profound and irreparable.

f. Unqualified Appointed Counsel Face Ethical Quandary

As stated, Model Rule 1.1 (VISCR 211.1.1) imposes a duty on a lawyer to apply sufficient "legal knowledge [and] skill" to competently represent a client on the matter at hand.

However, "ought implies can." This familiar moral axiom rejects as unfair the idea of imposing an affirmative obligation on someone who is in fact incapable of fulfilling it.[15]

Under VISCR 211.1.1, a lawyer may accept representation when "the requisite level of competence can be achieved through reasonable preparation," *id.,* ABA Comment [4]. However, a lawyer may properly *avoid* a court appointment when it is "likely to result in violation of the Rules of Professional Conduct," VISCR 211.6.2(a)—here, the baseline ethical requirement of competence. Accord: VISCR 211.6.2/Model Rule 6.2, ABA Comment [2] ("Good cause exists [to decline an appointment] if the lawyer could not handle the matter competently….").

Some authority holds that a lawyer not only can, but should decline an appointment if he or she is incapable of providing adequate representation. ABA 10 Principles of a Public Defense Delivery System, Principle 6, *cmt.* ("Counsel … is obligated to refuse appointment if unable to provide ethical, high quality representation."); ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op.* 06-441 (2006) (lawyers should refuse representation of indigent defendants if caseload precludes "competent and diligent" defense); NLADA Performance Guidelines for Criminal Defense Representation, Guideline 1.3(a) ("Before agreeing to act as counsel or accepting

[15] Heidi M. Hurd, What in the World Is Wrong?, 1994 J. Contemp. Legal Issues 157, 169 (1994).

appointment by a court, counsel has an obligation to make sure that counsel has … sufficient … knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.").

Mainstream secondary authority also establishes that a judge should not compel a lawyer to take on a case exceeding his or her capabilities. ABA 10 Principles of a Public Defense Delivery System, Principle 6, *cmt.* ("Counsel should never be assigned a case that counsel lacks the experience or training to handle competently…."). However, in the Virgin Islands, this principle is not followed in practice (or at least not uniformly followed). Judges frequently—even in the most serious criminal case—appoint counsel who clearly lack commensurate expertise. Protests from such attorneys may prove unavailing, and the attorney must serve on pain of contempt (*supra* herein, at p. 4-5).

Thus, under the current system, an appointed lawyer who *conscientiously believes* that he or she cannot provide competent representation, but faces possible contempt for refusing the appointment, is placed in an ethical "double bind."[16]

g. Panel System Promotes Quality of Criminal Defense

The interests of the Territory, the judiciary, the Bar on an organizational level, the individual practitioner, and the indigent criminal defendant all converge and coalesce at a single point: All share a compelling interest in assuring a fundamentally fair trial for every person accused of a crime, regardless of his or her financial standing. "This noble ideal cannot be realized

[16] Trial court judges also face a dilemma. If they allow exemptions from mandatory appointment in this setting, they will necessarily deviate from the alphabetical rotation requirement of former Superior Court Rule 303(p)—by all appearances still *generally* followed on a *de facto* basis, even though that rule was superseded and supplanted by VISCR 203(p) (now repealed)—and also necessarily impose a disproportionate and inequitable burden on the more qualified lawyers.

if the poor man charged with crime has to face his accusers without a lawyer to assist him," *Gideon*, 372 U.S. at 344, 83 S. Ct. at 796-97. It also cannot be realized if the "poor man" receives inadequate counsel.

The Bar's proposed panel system seeks to achieve that "noble ideal" by assuring that appointed lawyers (particularly in the more serious cases) meet baseline standards of proficiency in criminal law through individual judicial scrutiny of panel members' credentials. See ABA 10 Principles of a Public Defense Delivery System, Principle 6, cmt. ("Counsel should never be assigned a case that counsel lacks the experience or training to handle competently…."). By way of comparison, the Virgin Islands District Court's CJA Panel is comprised of attorneys who apply for membership and are screened and approved by a "standing committee" under the following criteria: "1. Competence and knowledge (including training); 2. Interest and motivation; [and] 3. Willingness to make the commitment to the panel and provide the quality of representation deemed necessary."[17] The Bar's Proposed Rule goes a step further in requiring free continuing legal education in criminal law and ethics.

In sum, Section 3503's requirement of a "panel" is supported by the compelling public interest in promoting more qualified defense services to the indigent, and avoiding substandard care. The panel system is, in all events, mandated by statute.

h. Voluntary Panel System Promotes Lawyers' Workload Management, Basic Financial Interests, Quality of Life

VISCR 211.1.3 requires that a lawyer attend to the needs of his clients with "reasonable diligence"; and to give "commitment and dedication to the interests of the client." *Id.,* ABA Comment [1]. Even assuming that a given lawyer possesses the knowledge and skill to handle a

[17] Appendix II, PLAN FOR THE COMPOSITION, ADMINISTRATION, AND MANAGEMENT OF THE PANEL OF PRIVATE AITORNEYS UNDER THE CRIMINAL JUSTICE ACT, available online at http://www.vid.uscourts.gov/criminal-justice-act-info (*last visited 7/23/15*).

particular case, that lawyer falls short in his ethical obligations if his or her existing commitments are such that he lacks the *time* to do so. "A lawyer's work load must be controlled so that each matter can be handled competently." *Id.,* Comment [2]. Over-commitment is also a fertile source of professional liability. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 Vand. L. Rev. 1657, 1718 (1994) ("Many lawyers in solo or small firm practice--those who make up the majority of lawyers--could avoid malpractice by merely creating a situation that allows for more time spent on each client and each case.").

Model Rule 1.3 is thrown out the window when an already-maxed out lawyer is conscripted by the court to take on a major criminal case. The lawyer in this circumstance is deprived of the ability to autonomously manage his or her caseload, and is forced to either relinquish (or inappropriately compromise) his or her responsibilities on existing matters, or decline the court appointment at the risk of contempt. Cf., ABA *Formal Op.* 06-441, s*upra* (lawyers should refuse representation of indigent defendants if caseload precludes "competent and diligent" defense).

An unplanned and unwanted appointment to a major criminal case can cause absolute chaos in the personal and professional life—as well as the basic financial security—of a private practitioner. The Bar, and the various *ad hoc* committees, have received countless complaints from distraught civil practitioners attesting to that point. A recent letter from a local attorney is only one of many:

> My practice consists mainly of real estate work, insurance defense litigation, and small business formation and advice, NOT criminal law. I am a sole practitioner and have no staff other than a person who comes in part-time to help with closings and bookkeeping. Nevertheless, in addition to a number of family cases, I presently have THREE MAJOR FELONY CASES, all court-appointed, in my office. They are all serious … cases…. At least one of them is likely to take WEEKS to try—… the government has listed NINETY-NINE witnesses who they say they intend to call to testify.

> How am I going to run my small practice if I am required against my will to spend a month in trial? In just ONE case? BEFORE getting paid a nickel?
>
> In order to survive, I have to make enough money to pay the rent, the insurance, the electric bill, the computer and A/C guy, the copier lease, the accountant, a myriad of governmental fees and taxes, employees if I can afford to have them, someone to clean the office now and then, office supplies, parking, gas, and the list goes on, and I have to pay these bills BEFORE I make any money to feed, clothe, shelter, and otherwise care for myself. In order to do this, I have to charge a certain minimum amount of money for what I do, do it satisfactorily and efficiently, and get paid promptly. I need to be able to prioritize my cases and clients and how my days and months and even years are organized so that I can maximize my efforts without getting overextended.
>
> Mandatory court appointments throw a huge financial and organizational monkey-wrench in this…

Letter to Attorney Edward Barry, April 30, 2015 (*name withheld*).

The burdens are not strictly economic. Many Virgin Islands lawyers wish to faithfully honor their moral duty to do *pro bono* work. Rule 6.1 (VISCR 211.6.1); *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 310, 109 S. Ct. 1814, 1823, 104 L. Ed. 2d 318 (1989) ("[I]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest."). Some lawyers consider such service not only a professional priority but a life-enriching endeavor. When too much of a lawyer's time is officially demanded by the courts through mandatory appointments, that lawyer is deprived of his or her moral autonomy. The lawyer is effectively deprived of a choice in his or her charitable or public service work.

Excessive compulsory appointment burdens may also seriously interfere with a lawyer's ability to balance his or her professional life with his family life, or personal needs. "Most lawyers feel that they do not have sufficient time for themselves or their families." Deborah L. Rhode, Balanced Lives for Lawyers, 70 Fordham L. Rev. 2207, 2210 (2002). Unmanageable caseloads are also a key cause of lawyer burnout. E.g., generally, Workaholic Lawyers, Psychological Type

and Job Satisfaction Among Practicing Lawyers in the United States, 29 Cap. U. L. Rev. 979, 1078 (2002). The Bar has a very legitimate interest in its members' quality of life. Lawyers are human beings. Lawyers matter.

6. LIMITATIONS ON APPROPRIATION OF ATTORNEY SERVICES

The Bar most emphatically recognizes its members' general duty to accept appointments.

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have, by virtue of their license, a monopoly on the provision of such services. Attorneys who have the privilege of practicing before the court have a correlative obligation to be available to serve the court.

United States v. Accetturo, 842 F.2d 1408, 1413 (3d Cir. 1988); *Powell v. Alabama,* 287 U.S. at 73, 53 S.Ct. at 65 ("Attorneys are officers of the court, and are bound to render service when required by such an appointment."); Model Rule 6.2 (VISCR 211.6.2) ("lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause").[18]

Nevertheless, there must be fair and rational limits on that duty. The legislature has recognized this policy concern by capping the *aggregate* obligation of the private Bar at 15% of the overall number of indigent criminal defense cases in the Territory. 5 V.I.C. § 3503. A Superior Court rule should faithfully reflect that limitation, but should also recognize defined limits on the *individual* lawyer's obligations.

The voluntary method of appointment through a panel system, if effectively implemented and funded, should substantially mitigate, if not obviate, those concerns. The number and

[18] The statutory and policy arguments herein against unrestricted compulsory criminal defense appointments would seem to rarely, if ever, apply to indigent appointments by the Family Court in cases of dependency and neglect, and/or termination or parental rights, for example. 5 V.I.C. § 2505(a) (parent's right to appointed counsel in neglect or abuse cases), § 2505(b) (child's right to appointed counsel serving as guardian *ad litem*).

frequency of compulsory indigent criminal defense appointments should be reduced considerably. Yet, inevitably, there will still be a need. Demand will exceed supply.

As to those residual involuntary appointments, the Superior Court must prescribe clear and prospectively-operative standards that scrupulously avoid excessive and unfair impositions on individual lawyers.

7. SUPERIOR COURT MUST ADMINISTER MANDATORY APPOINTMENTS IN A CONSISTENT, EQUITABLE AND NON-ARBITRARY MANNER.

"The appointment process should never be *ad hoc*, but should be according to a coordinated plan…." ABA 10 Principles of a Public Defense Delivery System, Principle 2, *cmt.*

A common thread among the countless complaints by lawyers that the Bar has received (including those that the 2012 Committee members received) expressed the belief that they were receiving more appointments than others with no apparent rhyme or reason. These attorneys uniformly protested—with all apparent justification—that they were being called upon to do a great deal more than their fair share. This issue of disproportionate allocation of the burden commands the attention of the Court. It is a matter of basic fairness. *Zarabia v. Bradshaw*, *supra,* 912 P.2d at 7 (noting Arizona rule that appointments "shall be made in a manner fair and equitable to the members of the bar").

Essential fairness also requires defined, reasonable *quantitative* limits on the individual lawyer's burden. That point was well-stated by the Arizona Supreme Court:

> [N]othing we say here should be interpreted as limiting a judge's inherent authority to achieve justice by appointing a particular lawyer to represent a defendant or litigant in a particular case, even if the appointment is pro bono or causes financial hardship to the appointed lawyer… There is a stark distinction, however, in requiring a lawyer to handle one case or a few and in conscripting lawyers to regularly handle all cases regardless of their ability or willingness to do so. We do not believe the court's inherent authority can extend so far. Whatever appointment process a court adopts should reflect the principle that lawyers have the right to refuse to be drafted on a systematic basis and put to work at any price to

> satisfy [the government's] obligation to provide counsel to indigent defendants.

Zarabia, 912 P.2d at 8. Many lawyers consider the *occasional* appointment to be an honor and a privilege. Some perform that duty without charge. Lawyers have special affirmative duties to the judicial system and to society at large. But there is a line that must be drawn. Private lawyers are officers of the court. Not employees of the court.

Section 3503 does not contemplate the institutionalized economic exploitation of private counsel, or the wholesale shifting of the *societal* economic burdens of indigent criminal defense to the private Bar. Far from it. The Virgin Islands legislature has mandated that the primary duty lies with the Territorial Public Defender's office (separately funded), and has placed a 15% cap on private appointments. *Id.* It has called for a "panel" system of lawyers to be "reasonabl[y] compensate[ed]," further committing to appropriation of funds for that purpose. 5 V.I.C. § 3503

Under the circumstances, there is no need to reach the issue of whether counsel have constitutionally-protected rights in this setting. Nevertheless, it should be noted that a fair number of courts have held that there are limits to a lawyer's civic duties and that extreme burdens may constitute a violation of the Takings Clause (at least in the absence of "just compensation").[19]

[19] E.g., *State ex rel. Partain*, 227 S.E.2d at 319 ("W]here the caseload of appointments is so large as to occupy a substantial amount of the attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law … the requirements must be considered confiscatory and unconstitutional."); accord, *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("While we agree with the district court that some *pro bono* requirements do not constitute a 'taking,' we think it equally clear that an unreasonable amount of required uncompensated service might so qualify."; *dictum*); *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 440-41 (Alaska 1987); *Arnold v. Kemp*, 813 S.W.2d 770, 775 (Ark. 1991); *Sholes v. Sholes*, 760 N.E.2d 156, 163-64 (Ind. 2001); *State ex rel. Stephan v. Smith*, 747 P.2d 816, 842 (Kan. 1987) ("We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection."); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (indigent defendant must be given a "competent attorney whose service does not unconstitutionally deprive him of his property without just compensation."); *Bias v. State*, 568 P.2d 1269, 1272 (Okla. 1977) (concluding that forced provision of "extraordinary professional services" to indigent clients without just compensation would take a lawyer's private property); *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968). But cf., e.g., *Scheehle v. Justices of Supreme Court of Ariz.*, 508 F.3d 887, 892 (9th Cir. 2007) (no "regulatory taking" of lawyer's services as a matter

Whether or not strictly true from constitutional law standpoint, individuals *do* have something akin to property rights in their own labor. Quoting the Seventeenth Century English philosopher John Locke: "Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his." Locke, *Two Treatises of Government, Second Treatise* (1690).[20] And as Abraham Lincoln famously said: "A lawyer's time and advice are his stock in trade."

The Bar lacks the actual statistics to empirically prove that the system is administered in an arbitrary fashion. However, the absence of a comprehensive and definitive rule, by definition, invites an *ad hoc* approach. Common experience of the bench and bar bears this out.

In the present case, for example, it does appear that Defendant Titre may have received his succession of appointments in alphabetical rotation—in the beginning, anyway (Attorneys Francois-then Major-then Naji)—but the Court later apparently deviated from the alphabetical order and jumped from "Nagi" to "Holcombe." What was the basis for that out-of-sequence appointment?

Appellant Holcombe has also pointed out that in a now-pending, unrelated criminal case, a judge of the Superior Court took the anomalous step of giving a defendant the *carte blanche* prerogative of naming three attorneys who were satisfactory to her, with the Court picking one from that list. See Appellant's Supplemental Appendix. This extraordinary action shows that, in

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of law, when lawyer complained of mandatory service as arbitrator under Arizona law; further observing that "the economic impact of the imposition on [the lawyer] is negligible"); *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490, 493 (1976) ("The professional obligation to respond to the call of the court is an incident of the privilege to practice law, and does not offend constitutional commands.").

[20] See, generally, Mary Ann Glendon, Philosophical Foundations of the Federalist Papers: Nature of Man and Nature of Law, 16 Harv. J.L. & Pub. Pol. 23 (1993) (discussing influence of Locke and other European Enlightenment political theorists on Hamilton, Madison, and Jay).

the absence of a fixed and equitable scheme of appointments, the burdens may arbitrarily fall on individual practitioners—here, a lawyer who might justly protest that it was not "his turn" to be appointed. And make no mistake: Representing a defendant—any defendant—in a serious criminal case is a very substantial burden.

There are also anecdotal reports of some nonresident attorneys being granted a *de facto* exemption from service. The 2012 Committee debated this controversial issue long and hard, recognizing the special hardships on nonresident attorneys, as counterbalanced by the consequent increased burdens on local attorneys that would result from exempting nonresident attorneys.[21] This substantive issue is beyond the scope of this appeal; it is not a question properly before the Court. However, these reports (unverified by Superior Court data) may further reflect the lack of clarity and consistency in the administration of the appointment system.

The same problem of uncertainty and lack of uniformity exists on the question of the delegability of lawyers' appointment duties, at least when it comes to local counsel. Cf., *In re Temp. Care of R.F.*, supra, 2005 WL 3178027, at *6 (non-precedential, trial court opinion prohibiting delegation of guardian *ad litem* duties). Some judges freely permit delegation by local counsel; some forbid it.

8. MOOTNESS, JUSTICIABILITY, AND SUPERVISORY JURISDICTION

The Bar concurs with Appellant Holcombe's position regarding mootness. Appellant's Supplemental Brief at p.10.

The constitutional "case" or "controversy" restrictions on justiciability, applying to federal courts under Article III, do not apply to the Virgin Islands courts. *Bryan v. Fawkes*, No. S.CT.CIV. 2014-0066, ——V.I. ——, 2014 WL 5409110, at *23 (V.I. Oct. 24, 2014), citing *Benjamin v. AIG*

[21] See *Barnard v. Thorstenn*, 489 U.S. 546, 557, 109 S. Ct. 1294, 1302, 103 L. Ed. 2d 559 (1989) (stating that "state can require nonresidents to share in the burden of representing indigent criminal defendants as a condition for practice before the Bar").

Ins. Co. of P.R., 56 V.I. 558, 564 (V.I.2012) (overruling prior cases characterizing standing, mootness, ripeness, and related doctrines stemming from Article III's cases and controversies requirement as jurisdictional as applied to Virgin Islands courts); and citing 5 V.I.C. § 423 (authorizing advisory opinions if the parties certify that the "controversy is real, and the proceeding is taken in good faith to determine the rights of the parties").

Nevertheless, the Court has "recognized those doctrines as judicially-imposed restraints on our authority…." *Benjamin*, 56 V.I. at 564, citing *Vazquez v. Vazquez,* 54 V.I. 485, 489 n.1 (V.I.2010) ("[T]his Court's general practice of not considering a moot appeal on the merits is not jurisdictional, but an exercise of judicial restraint…."). Mootness principles, even if not jurisdictional, are recognized in Virgin Islands courts as "a matter of judicial policy." *Haynes v. Ottley*, No. S.CT.CIV. 2014-0071, ——V.I. ——, 2014 WL 6750660, at *3 (V.I. Dec. 1, 2014).

Federal courts too recognize "prudential" mootness, even when jurisdiction is not strictly precluded under Article III. The "central question of all mootness problems"—whether jurisdictional or prudential—is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *In re Surrick,* 338 F.3d 224, 229-30 (3d Cir. 2003) (*internal citations, quote marks, omitted*). Indeed, the ability to render "meaningful relief" *vel non* lies at the heart of mootness principles. *Cnty. of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001) ("The mootness doctrine is centrally concerned with the court's ability to grant effective relief."); *Int'l Bhd. of Boilermakers v. Kelly*, 815 F.2d 912, 914–16 (3d Cir.1987).

Here, the specific and limited dispute concerning Appellant Holcombe's duty to represent Defendant Titre in this case has been resolved. But the institutional problems remain. Issues involving compulsory appointments will inevitably arise again and again. (The recent criminal case in which a trial judge *sua sponte* adopted a novel choice-of-lawyer approach perfectly illustrates the point. See Appellant's Supplemental Appendix at p. 4.)

Proactive, administrative reform by this Court would represent an eminently proper exercise of its supervisory jurisdiction. *McNabb v. United States,* 318 U.S. 332, 340, 63 S.Ct. 608, 612, 87 L.Ed. 819 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining … standards of procedure …."); *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973) (stating that an "appellate court will, of course, require the trial court to … follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution"); accord, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 289, 128 S. Ct. 1029, 1046, 169 L. Ed. 2d 859 (2008) (stating in *dictum* that the Supreme Court has "ample authority to control the administration of justice in the federal courts—particularly in their enforcement of federal legislation"); *Bartone v. United States*, 375 U.S. 52, 54, 84 S.Ct. 21, 22, 11 L.Ed.2d 11 (1963) (*per curiam*) (appellate courts have "broad powers of supervision" over proceedings).

9. CONCLUSION

The absence of a comprehensive, detailed and principled Superior Court rule governing indigent criminal appointments has resulted in a failure to comply with the statutory mandates of 5 V.I.C. § 3503; prejudice to the constitutional rights of the accused; irreconcilably-conflicting ethical and legal obligations imposed on appointed lawyers who lack criminal law expertise; inequitably-apportioned and quantitatively excessive burdens on some individual lawyers; and in general an *ad hoc,* unpredictable, and unfair administration of the system.

This Court can grant very meaningful and effective relief by requiring the Superior Court to adopt an appropriate rule, or by itself promulgating a rule specifying Superior Court indigent appointment protocol. See former VISCR 203(p) ("Chief Justice may provide for alternative methods of appointment").

The Bar has struggled with the problems in the indigent appointment system for many years, but has lacked the power to do anything more than recommend reform. This Court, by contrast, has full authority to solve these problems. This Court has an opportunity to substantially improve the administration of the criminal justice system in this Territory.

RESPECTFULLY SUBMITTED this 11th day of August, 2015.

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Certificate of Bar Membership

The undersigned certifies that he is a member in good standing of the Bar of this Court (V.I. Bar No. 834).

Edward L. Barry

Certificate of Service

The undersigned certifies that on 8/13/15, he shall cause two copies of the foregoing Amicus Brief (amended), to be sent by United States Postal Service, postage prepaid, to:

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