

**Not for Publication.**

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

<b>JOHNNY MARTINEZ,</b>	)	<b>S. Ct. Civ. No. 2011-0014</b>
Appellant/Petitioner,	)	Re: Super. Ct. Civ. No. 568/2003
	)	
v.	)	
	)	
<b>IVER A. STRIDIRON and</b>	)	
<b>GOVERNMENT OF THE VIRGIN</b>	)	
<b>ISLANDS,</b>	)	
Appellees/Respondents.	)	
	)	

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On Appeal from the Superior Court of the Virgin Islands

**BEFORE:** **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.<sup>1</sup>

**ORDER OF THE COURT**

**PER CURIAM.**

**THIS MATTER** is before the Court pursuant to Appellant Johnny Martinez’s January 15, 2011 notice of appeal, which this Court received on February 25, 2011.<sup>2</sup> In his notice of appeal, Martinez requests that this Court reverse the Superior Court’s December 10, 2010 Order denying Martinez’s motion for a certificate of probable cause or, if this Court lacks jurisdiction,

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<sup>1</sup> Associate Justice Maria M. Cabret, having recused herself from this matter on March 1, 2011, took no part in the decision herein.

<sup>2</sup> Pursuant to Supreme Court Rule 4, “[t]he Clerk of the Superior Court shall transmit forthwith a copy of the notice of appeal and a certified list of the docket entries to the Clerk of the Supreme Court, whether or not motions are pending.” V.I.S.C.T.R. 4(d). This Court, however, had no knowledge of Martinez’s January 15, 2011 notice of appeal until February 17, 2011, when the Clerk of the Superior Court forwarded a copy of a February 15, 2011 Order which, in a footnote, referenced the fact that Martinez had appealed the December 10, 2010 Order to the Supreme Court. Importantly, the Clerk of the Superior Court did not transmit Martinez’s notice of appeal until this Court, after reviewing the February 15, 2011 Order, expressly directed that the notice of appeal be transmitted. As this Court has indicated to the Clerk of the Superior Court in other cases, *see, e.g., Brown v. People*, S.Ct. Crim. No. 2007-0063, 2010 WL 4962907 (V.I. Sept. 27, 2010), *Vazquez v. Vazquez*, S.Ct. Civ. No. 2008-0108, 2010 WL 4961735 (V.I. Oct. 15, 2010), the Clerk of the Superior Court possesses a ministerial duty to timely transmit documents to this Court, and that the failure to timely perform this ministerial duty prevents this Court from effectively performing its duties.

to clarify which appellate court has appellate jurisdiction. Since the Appellate Division of the District Court retains appellate jurisdiction over the underlying habeas corpus proceeding, this Court dismisses the instant appeal for lack of jurisdiction.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

On January 14, 2003, Martinez filed a petition for writ of habeas corpus in the Superior Court, as well an amended petition for writ of habeas corpus on November 24, 2004, both of which the Superior Court denied in October 2004. After the Superior Court denied his motion for reconsideration, on March 3, 2005 Martinez timely filed a notice of appeal to the Appellate Division, which, prior to this Court's assumption of appellate jurisdiction on January 29, 2007, possessed appellate jurisdiction over all appeals from the Superior Court. *See Maynard v. Gov't*, 392 Fed.Appx. 105, 111 n.8 (3d Cir. 2010). In an April 16, 2005 Order, the Appellate Division granted the Government of the Virgin Islands's motion to remand the matter to the Superior Court so that the Superior Court could determine whether Martinez was entitled to the certificate of probable cause required by Rule 14(b) of the Appellate Division's Rules of Appellate Procedure.<sup>3</sup> However, the Superior Court, in a December 22, 2005 Opinion, refused to comply with Rule 14(b) on the grounds that "[Rule] 14(b) is a substantive rule of law and not a rule of procedure," and that "[t]he Appellate Division has exceeded its rulemaking authority by promulgating a substantive rule of law." *Martinez v. Stridiron*, Super. Ct. Civ. No. 568/2003, 2008 WL 3662459, at \*2 (V.I. Super. Ct. 2008).

Although Martinez did not file a new notice of appeal, on January 11, 2006 he filed a

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<sup>3</sup> Rule 14(b) provides, in pertinent part, that "[a]n appeal by the applicant from the order of the Superior Court denying the writ of habeas corpus may not proceed unless the adjudicating judge of the Superior Court issues a certificate of probable cause. If the Superior Court judge declines to issue the certificate, the judge shall state the reasons why such a certificate should not be issued."

motion for certificate of probable cause with the Appellate Division, which is also authorized by the Appellate Division's rules. *See* V.I. R. App. P. 14(b) ("If . . . the [Superior] Court judge has denied the certificate, the notice of appeal shall be considered as a request to the Appellate Division for a certificate . . ."). However, rather than grant or deny a certificate of probable cause, the Appellate Division, in a February 27, 2008 Opinion, "remand[ed] th[e] matter with instruction that the Presiding Judge of the Superior Court shall assign [Martinez]'s request for a certificate of probable cause to a Superior Court Judge or consider th[e] matter himself," and that "if a Superior Court Judge declines to issue a certificate of probable cause, that judge shall provide a reason based on the record for his or her refusal to issue such certificate." *Martinez v. Stridiron*, D.C. Civ. App. No. 568/2003, 2008 WL 5632265, at \*2 (D.V.I. App. Div. 2008).

While Martinez filed several documents in the Superior Court after the Appellate Division entered its February 27, 2008 Opinion, nearly two and a half years passed without the Presiding Judge taking any action with respect to Martinez's request for certificate of probable cause. Thus, on June 22, 2010, Martinez filed a *pro se* petition for writ of mandamus with this Court, which requested that this Court issue a writ of mandamus compelling the Presiding Judge to comply with the Appellate Division's February 28, 2008 Opinion by either ruling on the request for a certificate of probable cause or assigning the matter to another judge. However, in an August 24, 2010 Order, this Court dismissed Martinez's petition because the Appellate Division, having ordered the record remand, was responsible for ensuring compliance with its own order. *In re Martinez*, S.Ct. Civ. No. 2010-0044, slip op. at 2-3 (V.I. Aug. 24, 2010).

After receiving this Court's order, Martinez then filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit, which requested that the Third Circuit issue a writ of mandamus directing the Appellate Division to take action with respect to

his motion for a certificate of probable cause. However, while Martinez's petition was pending, the Presiding Judge referred his request for a certificate of probable cause to a Superior Court Magistrate, who, on August 16, 2010, recommended that a certificate of probable cause be denied. Therefore, the Third Circuit, in a November 4, 2010 Opinion, denied Martinez's petition because, although "there has been a lengthy delay in the Superior Court proceedings . . . [t]he delay has not risen to the level of an extraordinary circumstance such that the Appellate Division of the District Court has a duty to interfere in the Superior Court's resolution of Martinez's pending request for a certificate of probable cause." *In re Martinez*, No. 10-3708, 2010 WL 4358781, at \*1 (3d Cir. Nov. 4, 2010).

But the day before the Third Circuit denied Martinez's petition for writ of mandamus, the Appellate Division, in an order entered by a single judge, *sua sponte* considered the issue of whether the Appellate Division retained jurisdiction over Martinez's appeal. In its November 3, 2010 Order, the Appellate Division recognized that its February 28, 2008 Opinion was a record remand, and thus "[o]rdinarily, we would retain jurisdiction over this remanded matter and once the record had been satisfied and the remand fulfilled, we would convene to hear this matter on the full record." The Appellate Division further noted that "during the pendency of this original appeal, the Supreme Court of the Virgin Islands assumed exclusive jurisdiction over appeals arising out of the Superior Court of the Virgin Islands," and that "January 29, 2007 is the clear line of demarcation dividing when the Supreme Court assumed jurisdiction." However, the Appellate Division then found that there is "conflicting authority" that "makes the bright line less clear where our continued jurisdiction over our record remands is concerned." Specifically, the Appellate Division stated that

the Supreme Court of the Virgin Islands has made it clear that the District Court's

appellate division continues to exercise jurisdiction over our post-January 29, 2007 record remands. *See Hypolite v. People of the Virgin Islands*, S.Ct. Crim. No. 2007-135, 2009 WL 152319, at \*2 (V.I. 2009) (the Appellate Division retains jurisdiction over record remands). On the other, in contrast to the Supreme Court's position, the Third Circuit Court of Appeals has held that, the Supreme Court of the Virgin Islands exercises exclusive jurisdiction over all post January 29, 2007 appeals arising from the Superior Court. *See Hodge v. Bluebeard's Castle, Inc.*, 2010 U.S. App. LEXIS 18081, at \*25 (3d Cir. Aug. 27, 2010) (unpublished) (in record remand context, "because the Virgin Islands Supreme Court was created during the pendency of this appeal, any subsequent appeal from the Superior Court after remand must be taken to the Virgin Islands Supreme Court"). While the Supreme Court and the Third Circuit appear to hold differing opinions concerning this Court's jurisdiction over record remands, both appellate Courts agree that, "the Virgin Island Supreme Court, [possesses] an authoritative voice on matters of Virgin Islands law" . . . . As such, in deference to the Supreme Court of the Virgin Islands' interpretation of local law, we conclude that we do indeed continue to exercise jurisdiction over this matter.

*Martinez v. Stridiron*, D.C. Civ. App. No. 2005/052, slip op. at 4-6 (D.V.I. App. Div. Nov. 3, 2010) (emphases removed). The next day, the Appellate Division issued an order directing the parties to brief the issue of whether Martinez's appeal could proceed given the Superior Court Magistrate's recommendation, and subsequently placed the appeal on the February 18, 2011 calendar. Notwithstanding the Appellate Division's decision to take jurisdiction over the case, the Presiding Judge, in a December 10, 2010 Order, accepted the Superior Court Magistrate's August 16, 2010 Recommendation and entered an order denying Martinez's request for a certificate of probable cause. However, on January 4, 2011, the Presiding Judge of the Appellate Division, apparently acting in his capacity as a single judge, entered an order which reads, in its entirety, as follows:

It is hereby **ORDERED** that the Order entered on November 3, 2010, which held that this Court may exercise jurisdiction over this appeal post-remand, and further ordered that the Clerk of the Court reopen this matter, is **VACATED**.

*Martinez v. Stridiron*, D.C. Civ. App. No. 2005/052, slip op. at 1 (D.V.I. App. Div. Jan. 4, 2011).

On January 15, 2011, Martinez filed a notice of appeal of the Presiding Judge's

December 10, 2010 Order, which, although referencing this Court in its caption, stated that he “has been placed in a jurisdictional quagmire due to the Appellate Division” and that he would be satisfied if “this Honorable Court legally construe[d] this Notice, to whatever ground(s) or destination(s) that is required for this Notice, that [Martinez] may simply Appeal to whatever Court of Appeals is proper.” On January 18, 2011, Martinez also filed a notice of appeal of the Appellate Division’s January 4, 2011 Order, and on March 1, 2011 also filed a second petition for writ of mandamus, both of which remain pending in the Third Circuit. However, notwithstanding Martinez’s January 15, 2011 notice of appeal, the Presiding Judge, in a February 15, 2011 Order, vacated the December 10, 2010 Order because Martinez had timely filed an objection to the Superior Court Magistrate’s August 16, 2010 Recommendation that the Clerk of the Superior Court had failed to reflect on the docket, and that additional time was necessary to consider Martinez’s arguments. Finally, on March 3, 2011, the Appellate Division entered an order placing Martinez’s case on its May 2011 calendar, although the order did not indicate whether the Appellate Division has decided to accept jurisdiction over the matter.

## **II. DISCUSSION**

Prior to considering the merits of an appeal, this Court must first determine if it has appellate jurisdiction over the matter. *V.I. Gov’t Hosp. and Health Facilities Corp. v. Gov’t*, 50 V.I. 276, 279 (V.I. 2008). Although this Court notes that the Superior Court’s February 15, 2011 Order may moot Martinez’s appeal, this Court has previously held that “because no statute . . . prohibits this Court from considering moot appeals,” the Supreme Court’s “general practice of not considering a moot appeal on the merits is not jurisdictional, but an exercise of judicial restraint that, as with other judicially-created doctrines, is subject to waiver.” *Vazquez v. Vazquez*, S.Ct. Civ. No. 2008-0108, 2010 WL 4961734, at \*2 (V.I. Oct. 15, 2010). Moreover,

pursuant to Supreme Court Rule 5, the Superior Court lacks jurisdiction to *sua sponte* make substantive changes to an order that has been appealed to the Supreme Court. *See* V.I.S.C.T.R. 5(a)(5). Therefore, because the Superior Court was prohibited from *sua sponte* vacating the December 10, 2010 Order one month after Martinez had filed a notice of appeal, this Court is still required to consider the issue of whether this Court or the Appellate Division possesses jurisdiction to review the December 10, 2010 Order.

Having exhaustively reviewed the record in all related proceedings, this Court concludes that the Appellate Division possesses appellate jurisdiction over all proceedings relating to Martinez's appeal of the denial of his petition for writ of habeas corpus, including the issue of whether he is entitled to a certificate of probable cause. As a threshold matter, this Court notes that the Third Circuit's November 4, 2010 Opinion denied Martinez's petition for writ of mandamus on the merits on the grounds that the "delay ha[d] not risen to the level . . . such that the Appellate Division of the District Court has a duty to interfere in the Superior Court's resolution of Martinez's pending request for a certificate of probable cause." *In re Martinez*, No. 10-3708, 2010 WL 4358781, at \*1 (3d Cir. Nov. 4, 2010). Significantly, it is not clear how the Appellate Division could have possessed any power to interfere with the Superior Court's consideration of the certificate of probable cause issue if it did not continue to possess jurisdiction over Martinez's appeal.

Likewise, although Martinez's notice of appeal and the Appellate Division's November 4, 2010 Order reference a "conflict" between this Court's decision in *Hypolite* and the Third Circuit's decision in *Bluebeard's Castle*, this Court cannot conclude that any such conflict exists. As this Court explained in *Hypolite*,

In a record remand, [an appellate] court retains jurisdiction over the case, i.e.,

jurisdiction over the case remains with [the] court, but the record is returned to the trial court. In those circumstances, the trial court may be directed to clarify or amplify some portion of the record, to make additional findings, to hear further testimony, or to explain a ruling. The point of such a remand is to give the trial judge the opportunity to complete or clarify the record so that this court will have an adequate basis for review of the trial court's rulings. The trial court does not, however, have the authority to amend the ruling that is on appeal. . . . A “case” remand, on the other hand, returns the case to the trial court for all purposes. [The appellate] court retains no jurisdiction over the case and the appeal is terminated. If, after a case remand, a party is dissatisfied with the action of the trial court, the only course available to obtain review in [the appellate] court, is to file a new notice of appeal, once a final order or judgment is entered. That appeal is a new appeal, separate from the previous appeal that was terminated when the case was remanded.

2009 WL 152319, at \*2. Although the Appellate Division’s November 4, 2010 Order stated that the *Bluebeard’s Castle* appeal arose in the “record remand context,” the underlying Appellate Division decision that had been the subject of the Third Circuit’s *Bluebeard’s Castle* opinion did not mandate additional factual findings, and—in fact—expressly reversed the Superior Court. *See Bluebeard’s Castle, Inc. v. Hodge*, D.C. Civ. App. No. 2002-154, 2009 WL 891896, at \*11 (D.V.I. App. Div. Apr. 1, 2009) (“We are especially loath to do so here given the absence of definitive Virgin Islands law on the establishment of a public road. Under these circumstances, we find that *reversal and remand* are appropriate.”) (emphasis added). Moreover, the Appellate Division’s opinion further stated that how to proceed after remand was being left “to the sound discretion of the trial court,” and that it could do several things on remand, including holding a new trial. *Id.* at \*11 n.15. But perhaps most significantly, this Court notes that after it issued its *Bluebeard’s Castle* opinion, the Appellate Division—unlike the *Hypolite* and *Martinez* appeals—issued a mandate and closed the case on June 5, 2009, which is consistent with a case remand and not a record remand:

There is little doubt that the Appellate Division's remand represents a “record” remand. The plain text of the Appellate Division's remand order states that the

matter is remanded “for further proceedings because the factual record is insufficient to determine the sole issue raised on appeal.” Furthermore, although more than four years have elapsed since the remand order was entered, Appellant's appeal remains open in the Appellate Division. Had the Appellate Divisions' remand order been a “case” remand that resulted in the Appellate Division's complete abdication of its jurisdiction over the matter, the Appellate Division would have closed the case rather than allow it to remain open for so many years after the order.

*Hypolite*, 2009 WL 152319, at \*2. *See also Bright v. United Corp.*, S.Ct. Civ. No. 2007-0080, 2009 WL 321344, at \*1 (V.I. Jan. 28, 2009) (“A mandate brings the proceedings in a case on appeal to a close and removes it from the jurisdiction of the appellate court, returning it to the trial court.”). Finally, this Court notes that the Third Circuit’s *Bluebeard’s Castle* opinion cited to *Hypolite*, yet the Third Circuit did not state that it was rejecting the holding of *Hypolite* or otherwise imply that it disagreed with its reasoning. Therefore, under these circumstances, this Court concludes that only the Appellate Division possesses jurisdiction over the December 10, 2010 Order and any other orders entered in the underlying habeas corpus proceeding.<sup>4</sup>

### III. CONCLUSION

Since the Appellate Division retains jurisdiction over Martinez’s appeal of the denial of his petition for writ of habeas corpus, this Court lacks jurisdiction to review the Superior Court’s December 10, 2010 Order. Accordingly, the premises having been considered, it is hereby

**ORDERED** that the instant appeal is **DISMISSED FOR LACK OF JURISDICTION**;  
and it is further

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<sup>4</sup> In addition, this Court notes that accepting jurisdiction over the December 10, 2010 Order would lead to absurd results. Notably, on December 22, 2010, this Court issued Promulgation Order No. 2010-0003, which amended Supreme Court Rule 14(b) to eliminate the certificate of probable cause requirement on the grounds that the rule “ha[d] the effect of unnecessarily limiting this Court’s jurisdiction.” Accordingly, if the December 10, 2010 Order was appealable to this Court, this Court would be placed in the unusual situation of reviewing whether the Superior Court erred in applying a rule that applies to proceedings in the Appellate Division but does not apply to proceedings in the Supreme Court.

**ORDERED** that Johnny Martinez's March 7, 2011 motion for appointment of counsel is  
**DENIED AS MOOT**; and it is further

**ORDERED** that copies of this Order be served on the parties.

**SO ORDERED** this 22nd day of March, 2011.

**ATTEST:**

**VERONICA J. HANDY, ESQ.**  
Clerk of the Court