IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

BASSELL S. HALL,
Defendant-Appellant.

Supreme Court Case No.: CRA02-003
Superior Court Case No.: CF0165-96

OPINION

Filed: July 5, 2004

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Appeal from the Superior Court of Guam
Argued and submitted on June 27, 2003
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
B. Ann Keith
Assistant Attorney General
Office of the Attorney General
General Crimes Div.
Ste. 2-200E, Guam Judicial Ctr.
120 W O'Brien Dr.
Hagåtña, Guam 96910

Appearing for the Defendant-Appellant:
Ladd A. Baumann, Esq.
L.A. BAUMANN & ASSOCIATES
Ste. 903, 238 Archbishop Flores St.
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; RICHARD H. BENSON, Justice *Pro Tempore*; PETER C. SIGUENZA, JR., *Justice Pro Tempore*[1]

CARBULLIDO, CJ.:

[1] Defendant-Appellant Bassell S. Hall appeals from the trial court's judgment of conviction on two charges of Aggravated Murder (As a First Degree Felony), one charge of First Degree Robbery (As a First Degree Felony), and three Special Allegations of Possession and Use of a Deadly Weapon in the Commission of a Felony. Specifically, Hall argues that (1) the trial court lost jurisdiction by reason of a four and one-half year delay in entering judgment after the return of the jury verdict; (2) the trial court violated his statutory and constitutional rights to a speedy sentencing and a speedy appeal; (3) the trial court improperly admitted the prior consistent statement of a witness; and finally (4) he received ineffective assistance of counsel. We hold that: (1) the trial court properly pronounced judgment in accordance with the requirements of Title 8 GCA § 120.14; (2) the trial court had jurisdiction to enter the August 6, 2002 judgment against Hall; (3) Hall's statutory and constitutional rights to a speedy sentencing and speedy appeal were not violated; (4) the trial court erred in admitting the prior consistent statement of a witness, but such error is not reversible error. Finally, we decline to reach a resolution on the issue of ineffective assistance of counsel, which we find to be more appropriate in a petition for writ of habeas corpus.

I.

[2] On April 18, 1996, Defendant-Appellant Bassell S. Hall ("Hall") was indicted by the grand jury on charges stemming from the death of Victor Lobdell. He was charged with: (1) Aggravated Murder (As a 1st Degree Felony); special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; (2) Aggravated Murder (As a 1st Degree Felony); special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; and (3) First Degree Robbery (As a 1st Degree Felony); special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony. Appellant's Excerpts of Record, tab B (Indictment).

[1] Retired Chief Justice Benjamin J.F. Cruz was appointed to this appeal as Justice *Pro Tempore*. After the oral argument, Justice Cruz became disqualified from participating in this proceeding and Retired Chief Justice Peter C. Siguenza, Jr. was appointed Justice *Pro Tempore* to replace him.

[3] On April 24, 1996, Attorney John F. Tarantino ("Tarantino") was appointed as counsel for Hall. Record on Appeal, tab 28 (Notice of Court Appointment of Counsel).

[4] On January 30, 1998, the jury trial commenced and on February 13, 1998, the jury returned a verdict of guilty on all charges against Hall. Record on Appeal, tab 200 (Verdict Forms).

[5] On April 9, 1998, a presentence investigation report was submitted to the trial court. Record on Appeal, Docket Sheet, p. 24, seq. 221.

[6] On May 4, 1998, Hall, along with Tarantino, appeared in the trial court for sentencing. Hall was sentenced to life without parole plus 75 years. No written Judgment was entered at this time. Record on Appeal, tab 227 (Clerk's Minutes).

[7] On March 22, 1999, Tarantino was appointed Acting Attorney General of Guam. *People v. Hall*, Supreme Ct. Case No. CRA02-003, Order (filed June 10, 2003).

[8] On July 31, 2002, the People submitted a judgment in the trial court, which was signed and filed on August 5, 2002. Appellant's Excerpts of Record (Judgment).

[9] On August 15, 2002, the Judgment was entered in the docket. Record on Appeal, Docket Sheet, p. 24, seq. 251. Hall's appeal followed. Record on Appeal, tab 248 (Notice of Appeal).

II.

[10] This court has jurisdiction to hear this appeal from a final judgment pursuant to Title 7 G.C.A. §§ 3108(a) and 3107(b) (1994).

III.

[11] Hall raises several issues on appeal. Hall argues that the delay in the entry of judgment violated the requirements of Title 8 GCA § 120.14, resulted in the trial court's loss of jurisdiction, and infringed upon his statutory and constitutional rights to a speedy sentencing and a speedy appeal. With respect to claimed errors during trial, Hall contends that the trial court improperly admitted the prior consistent statement of witness Justin Atoigue. Finally, Hall claims that he received ineffective assistance of counsel. We examine each claim of error in turn.

A. Title 8 GCA § 120.14

[12] The first issue we address is whether the trial court properly complied with the requirements imposed by Title 8 GCA § 120.14. That section, entitled "Judgment of Guilty: Time for Sentencing," provides:

> (a) After a . . . verdict of guilty against the defendant, the court shall . . . appoint a time for pronouncing judgment, which must be 21 days after the . . . verdict.
>
> (b) Notwithstanding Subsection (a), the court may extend the period provided in Subsection (a);
>
> . . .
>
> (2) For such period as is necessary to permit preparation of the presentence report . . . .

Title 8 GCA § 120.14 (1994) (emphasis added).

[13] The language of section 120.14 expressly requires that the trial court timely "pronounce" judgment, but does not address the formal entry of such judgment. *See* 8 GCA § 120.14. The term "pronounce" means "to announce formally." BLACK'S LAW DICTIONARY (8th ed. 2004). Further, the term "sentence" is defined as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer." BLACK'S LAW DICTIONARY (8th ed. 2004). Hall argues that the formal entry of judgment is required to satisfy section 120.14. However, a similar argument was considered and rejected by the appellate court in *McInoway v. State*, 294 N.E. 2d 803 (Ind. 1973), where the defendant argued that although he was sentenced shortly after the return of the verdict, excessive delay in the entry of judgment violated a statute which required the timely pronouncement of judgment. *Id.* at 806. The court held, in construing a statute with terms similar to section 120.14, "the terms [judgment and sentence] are synonymous within this context and [thus] the decree sentencing the defendant is a 'judgment' within the meaning of" the statute. *Id.*

[14] In this case, the jury returned a verdict of guilty on February 13, 1998. Almost two months later, on April 9, 1998, a presentence investigation report was submitted to the trial court. On May 4, 1998, Hall appeared before the trial court for sentencing, wherein the court imposed a sentence of life without parole plus 75 years. Although the formal entry of judgment did not occur until August 6, 2002, applying the above authorities, we find that the court pronounced judgment and sentence, within the meaning of section

120.14, on May 4, 1998, approximately three months after the return of the jury verdict and one month after receipt of the presentence report.

[15] While it is clear that the three month period exceeds the twenty-one day rule prescribed by section 120.14(a), the same statutory provision grants the trial court the discretion to postpone the imposition of sentence pending the preparation of a presentence report. *See* 8 GCA §§ 120.14(a) and (b). Therefore, we hold that the trial court pronounced judgment in accordance with the requirements of Title 8 GCA § 120.14.

B. Loss of Jurisdiction

[16] The next issue we address is whether the trial court lost jurisdiction prior to its entry of judgment on August 15, 2002. Specifically, Hall asserts that the four and one-half year delay between the return of the jury verdict and the entry of judgment resulted in the trial court's loss of jurisdiction. We disagree.

[17] First, jurisdictions which have discussed the loss of jurisdiction principle focus on the trial court's delay in the imposition and/or pronouncement of sentence. In those jurisdictions, "it is the duty of the court to *pronounce* judgment promptly . . . . If *sentence* is indefinitely suspended, the court loses jurisdiction, and a judgment subsequently entered is void." *People v. Penn*, 135 N.E. 92, 95 (emphasis added). As stated previously, the trial court properly complied with the requirements of Title 8 GCA § 120.14, and thus, there was no delay in the pronouncement of judgment.

[18] Second, and more importantly, the "failure to pronounce judgment within the time specified is *not jurisdictional*." *People v. Williams*, 151 P.2d 244,245-46 (Cal. 1944) (emphasis added). "Title 8 GCA § 120.14 is derived from § 1191 of the California Penal Code." *People v. Santos*, Crim. No. 67F-80, 1982 WL 30547, *1 (Dist. Ct. App. Div. 1982); 8 GCA § 120.14 cmt. Therefore, we find the California case law persuasive absent a compelling reason to deviate. *See Fajardo v. Liberty House*, 2000 Guam 4, ¶ 17. Accordingly, we hold that the trial court had jurisdiction to enter judgment against Hall on August 6, 2002.[2]

[2] We note that the court in *People v. Williams* recognized that although a delay in the pronouncement of judgment is a procedural matter, "[a] judgment so pronounced may not be reversed on appeal unless the delay results in a miscarriage of justice, for the reason that the pronouncing of judgment is a mere matter of procedure. . . ." *Williams*, 151 P.2d at 246. We need not consider whether a miscarriage of justice has occurred in this case, as such inquiry is

C. Speedy Sentencing

[19] The next issue we address is whether, under the procedural facts of this case, Hall's speedy sentencing rights were violated. In *Pollard v. United States*, 352 U.S. 354, 361, 77 S. Ct. 481, 486 (1957), the United States Supreme Court assumed, but did not decide, that sentencing was "part of the trial for purposes of the Sixth Amendment." As a result of *Pollard*, "a number of state and federal appellate courts either have held or have assumed that the Speedy Trial Clause of the Sixth Amendment applies to sentencing . . . . The weight of this authority is highly persuasive and holds that a defendant has a right to a speedy trial and to a speedy sentencing under the Sixth Amendment . . . ." *Perdue v.Commonwealth*, 82 S.W.3d 909, 911-12 (Ky. 2002) (citation omitted).

[20] We again reject Hall's application of the speedy trial/sentencing factors delineated in the above cases to the four and one-half year delay in entry of judgment. The cases upon which Hall relies address excessive delay between conviction and sentencing and thus we do not extend their application to the delay in entering judgment in this case. *See Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3rd Cir. 1987) ("[T]he Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged, up through the sentencing phase of prosecution."); *Burkett v. Fulcomer*, 951 F.2d 1431, 1438 ("[T]he Sixth Amendment right to a speedy trial applies from arrest through sentencing."); *Trotter v. State*, 554 So.2d 313, 316 (Miss. 1989) ("[T]he imposition of sentence is part of the trial for sixth amendment purposes").

[21] Thus, consistent with the Court in *Pollard*, we assume without deciding that the Sixth Amendment right to a speedy trial includes the right to a speedy sentence. *See Pollard*, 352 U.S. at 361, 77 S. Ct. at 486. To determine whether a speedy sentencing violation has occurred, we turn to the speedy trial balancing factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182 (1972), which are: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. *Id.* at 530, 92 S. Ct. at 2192. Applying these factors to the three month period between the return of the jury verdict and sentencing, we find no violation of Hall's right to a speedy

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triggered only by a delay in the pronouncement of such judgment. *See id.* (stating that, where a delay occurs in the pronouncement of judgment, a conviction will not be reversed "unless the delay results in the miscarriage of justice.").

sentence. First, the length of delay between the return of the jury verdict and imposition of Hall's sentence is three months, which we find is not unreasonably excessive. Second, the delay was for the purpose of preparing the presentence report, a delay which is anticipated and allowed pursuant to Title 8 GCA § 120.14, and therefore, reasonable. Third, it is unclear from the record whether Hall asserted his right to a speedy trial or a speedy sentence. Fourth, Hall has failed to show that he was prejudiced by the three month delay in his sentencing.

[22] In sum, assuming for the sake of argument that the Sixth Amendment right to a speedy trial encompasses the right to a speedy sentence, upon application and weighing of the *Barker* factors to the circumstances of this case, we hold that Hall's right to a speedy sentence was not violated.

D. Due Process

[23] The next issue we consider is whether Hall's due process rights were violated through the trial court's four and one-half year delay in entering judgment against him. The United States Supreme Court has held, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 839 (1985). In other words, "[w]hile the Constitution does not require a state to provide a system of appeals, . . . if a state chooses to do so, the appeal, too, must accord with the basic requirements of due process" *Perdue*, 82 S.W. 3d at 911 (brackets omitted)*; Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980). Consequently, courts have acknowledged that "extreme delay in the processing of an appeal may amount to a violation of due process." *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir.), *cert. denied*, 498 U.S. 963, 111 S.Ct. 398 (1990); *see United States v. Pratt*, 645 F.2d 89, 91 (1st Cir.), *cert. denied*, 454 U.S. 881, 102 S. Ct. 369 (1981); *Cody v. Henderson*, 936 F.2d 715, 719 (2nd Cir. 1991); *Burkett v. Cunningham*, 826 F.2d at 1221-22 (3rd Cir. 1987); *Rheuark*, 628 F.2d at 302-03; *DeLancy v. Caldwell*, 741 F.2d 1246, 1247-48 (10th Cir. 1984) (per curiam).

[24] In evaluating due process claims in the appellate context, we examine four areas of inquiry. *See United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993). They include: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to appeal; and (4) the prejudice to the

defendant." *Id.* (citing *Antoine*, 906 F.2d at 1382). The last of these inquiries, the determination of prejudice, "is most important: 'a due process violation cannot be established absent a showing of prejudice to the appellant.'" *Tucker*, 8 F.3d at 676 (quoting *Antoine*, 906 F.2d at 1382).

[25] Hall relies on *People v. Olsen*, 462 F.Supp. 608, 613 (D. Guam App. Div. 1978), in support of his argument that prejudice need not be proven in a claim for violation of the right to a speedy appeal. However, the *Olsen* holding is contrary to the law as stated by the Ninth Circuit as well as other jurisdictions. We recognize that in the situation where an appellate court affirms a defendant's conviction on the merits, the issue of prejudice suffered through an inordinate delay in his appeal is a difficult one. "Some courts have said, in effect, that affirmance of a conviction nullifies a due process claim on the basis of a delayed appeal." *State v. Crabtree*, 625 S.W.2d 670, 674 (Mo. Ct. App. 1981). "At the other extreme is language from opinions suggesting that undue delay in and of itself warrants discharge of the defendant." *Id.* (citing *Olsen*, 462 F.Supp. at 613). The *Crabtree* court rejected the *Olsen* case as a measure "far too drastic where, as here, no trial error appears." The court thus observed:

> The mere passage of time between the filing of a notice of appeal and the completion of the trial transcript should not void a conviction, unless it clearly appears that the delay in some way impairs a defense which would otherwise be available to the defendant where a new trial is ordered for trial error.

Crabtree, 625 S.W. 2d at 674 (citing *Rheuark*, 628 F.2d at 303 n.8); *See also Doescher v. Estelle*, 477 F.Supp. 932, 935 n.3 (N.D. Tex. 1979) (mem. opinion) ("This court's research has uncovered no other case in the nation [aside from *Olsen*] where a delay in the processing of an appeal has entitled the prisoner to a writ of habeas corpus and immediate release from prison[,]" "with no showing of prejudice being necessary."), *overruled on other grounds*, 616 F.2d 205.

[26] This court may reject the analysis posited by the Appellate Division if it is "not supported in the law or well reasoned." *Borja v. Bitanga*, 1998 Guam 29, ¶ 17 ("While we will not disturb precedent that is well supported in law and well reasoned, we clearly are within our authority to modify those interpretations previously addressed by federal courts. . . . When choosing to make such changes, we will use our own independent and reasoned analysis of the issues before us.") (internal quotation marks and citation omitted); *see also People v. Palomo*, 1998 Guam 12, ¶ 6 (recognizing that in *People v. Quenga*, 1997 Guam 6, this court determined that the Appellate Division opinions "are only persuasive and not controlling on this

court's interpretation of the law."). Accordingly, we reject the *Olsen* case and hold that prejudice is required in order to succeed on a claim of a denial of a speedy appeal. *See Antoine*, 906 F.2d at 1382.

[27] Turning now to the relevant inquiries, first, in assessing the length of the delay, we look to the period between the time of sentencing and the entry of judgment, as the failure to enter judgment impeded Hall's ability to file an appeal with this court. *See* Guam R. App. P. 4(a).[3] In this case, the delay amounts to approximately four and one-half years, which is a significant amount of time. Second, with respect to the reason for the delay, we find that the delay is attributable to the trial court's failure to enter judgment on the docket after sentencing Hall on May 4, 1998. Third, with respect to whether Hall asserted his right to appeal, we find that upon the trial court's entry of judgment, Hall filed his notice of appeal on August 13, 2002 and thus, timely asserted his right to appeal. Thus, the first three inquiries weigh in favor of Hall.

[28] The fourth and most important inquiry we must address is the prejudice suffered by Hall. Although the first three inquiries weigh in favor of Hall, the "evaluation of the fourth factor is more difficult. . . . [A] due process violation *cannot* be established absent a showing of prejudice." *Antoine*, 906 F.2d at 1382 (emphasis added).

[29] To determine the existence of prejudice, we look for "three categories of potential prejudice stemming from a delayed appeal: (1) oppressive incarceration pending appeal, (2) anxiety and concern of the convicted party awaiting the outcome of appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial." *Id.* (citing *Rheuark*, 628 F.2d at 303 n.8).

[30] Considering the first category of potential prejudice,"[w]hether . . . incarceration is unjustified and thus oppressive depends upon the outcome of his appeal on the merits." *Id.*; *see also Tucker*, 8 F.3d at 676 ("[I]ncarceration was not oppressive because [defendant's] appeal is meritless."). As will be discussed *infra*, upon review of the merits of Hall's appeal, we find no reversible error, and thus, Hall's

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[3] Guam R. App. P. 4(a) states, in relevant part:

> The time within which an appeal may be taken in a criminal case shall be ten (10) days from the date of entry of judgment. . . . A judgment or order is entered within the meaning of this subdivision when it is entered in the civil or criminal docket and notice is given to the parties of this entry by the Clerk of the Superior Court.

incarceration is not oppressive as such term is defined by the Ninth Circuit. Furthermore, we disagree with Hall that he suffered prejudice in the form of oppressive incarceration as a result of being held in close confinement. Even assuming for the sake of argument that Hall was improperly held in close confinement, it is well established that prisoners do not have a due process liberty interest in their classification while incarcerated. *See Moody v. Daggett*, 429 U.S. 78, 88 n.9, 97 S.Ct. 274, 279 n.9 (1976); *Wilson v. Budney*, 976 F.2d 957, 958 (5th Cir.1992); *Solomon v. Benson*, 563 F.2d 339, 339-40 (7th Cir. 1977). This is because prisoner classification implicates "no legitimate statutory or constitutional entitlement sufficient to invoke due process." *Moody*, 429 U.S. at 88 n.9, 97 S. Ct. at 279 n.9. Accordingly, we find no due process violation with regard to Hall's classification; therefore, his incarceration cannot be viewed as oppressive.

[31] With respect to the anxiety and concern of the convicted party awaiting the outcome of appeal, Hall claims that he has experienced psychological distress because of the delay in the appellate process. "He has not alleged, however, any particular anxiety suffered here that would distinguish his case from that of any other prisoner awaiting outcome of an appeal." *Antoine*, 906 F.2d at 1383. Therefore, as in *Antoine*, "we do not conclude that this factor is particularly compelling." *Id.*

[32] Finally, addressing the third category of potential prejudice, namely, the impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial, courts have held that "where an appeal lacks merit, "the third concern is not implicated because the delay has not impaired [the defendant's] grounds for appeal or impaired his defense in the event of retrial. . . . Had [the defendant] received a timely decision of his appeal, he still would not have succeeded." *Tucker*, 8 F.3d at 676. Here again, the merits of the appeal determine whether the delay impaired Hall's grounds for appeal or the viability of his defense if his case were to be retried. As will be discussed, we find that the trial court committed no reversible error, and therefore, we hold that the delay did not impair Hall's grounds for appeal, nor did it impair the viability of his defense if the case were to be retried.

[33] Thus, because Hall has suffered no prejudice, his claim of a due process violation cannot stand. We hold that Hall's due process right to a speedy appeal was not violated. *See Tucker*, 8 F.3d at 676; *Antoine*, 906 F.2d at 1382.

E. Admission of Prior Consistent Statement

[34] We now consider whether the trial court erred in admitting the prior consistent statement of witness Justin Atoigue ("Atoigue"). Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent prejudice affecting the verdict. *See People v. Fisher*, 2001 Guam 2, ¶ 7. "In the context of an evidentiary ruling, abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made regarding admission of evidence." *People v. Santos*, 2003 Guam 1, ¶ 29 n.6. While Hall did not specifically reference the portion of the transcript where the "prior consistent statement" was admitted into evidence, the following emphasized portion of the transcript, occurring during the People's direct examination of Atoigue, is likely the subject of his contention:

MR. RAPADAS:	You did speak to the officers afterwards, though?
ATOIGUE:	Yes.
MR. RAPADAS:	When you spoke to them, you provided some written statements? Well, actually, you spoke to them...
MR. TARANTINO:	Objection, Your Honor. I would question the relevance at this point.
THE COURT:	Mr. Rapadas?
MR. RAPADAS:	Your Honor, this goes to his credibility. He's made several statements. Well, let me ... He's made several statements regarding this case, like, two or...you know, one...several statements. And he needs to explain the circumstances surrounding...
THE COURT:	I'll overrule the objection.
MR. RAPADAS:	Now, you initially spoke to police officers. Is that correct?
ATOIGUE:	Yes.
MR. RAPADAS:	Okay. And what did you tell them the first time?
ATOIGUE:	That I had nothin' to do with it.
MR. RAPADAS:	That you had nothing to do with what?
ATOIGUE:	The homicide, or murder, that was committed.
MR. RAPADAS:	Okay. And when you told them you had nothing to do with it, did you write out a written statement to that effect?
ATOIGUE:	Yes.
MR. RAPADAS:	Okay. Why did you deny it initially?
ATOIGUE:	I was – I was scared. And...
MR. RAPADAS:	Did you have any other – any conversations with Bassell about what to say?
ATOIGUE:	Yes.
MR. RAPADAS:	And what was that conversation?
ATOIGUE:	He told me I need to just say that we were kicking on the football field and that we were drinking; and we heard two gunshots; and we saw a brown Sentra leaving the scene.
MR. RAPADAS:	And that you weren't involved?
ATOIGUE:	Yes.
MR. RAPADAS:	When did he tell you this?

ATOIGUE: When we were at Bassell's house after - - after Vic was shot.
MR. RAPADAS: *Okay. At some point in time, you did speak to the officers again?*
ATOIGUE: *Yes.*
MR. RAPADAS: *And you told them of your involvement. Correct?*
ATOIGUE: *Yes.*
MR. RAPADAS: *Okay. And what you told them is essentially what you told the Jurors today. Right?*
ATOIGUE: *Yes.*

Transcript, vol. II of IX, pp. 62-64. (Jury Trial, Feb. 2, 1998) (emphasis added).

[35] Hearsay is defined by the Guam Rules of Evidence, Rule 801(c), as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Title 6 GCA § 801(c). With respect to statements that are not hearsay, Rule 801(d) reads, in relevant part:

> A statement is not hearsay if--
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

Title 6 GCA § 801(d) (1994).

[36] For a statement to be admitted as a prior consistent statement under GRE Rule 801(d)(1)(B), the following requirements must be met: (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. *See United States v. Beltran*, 165 F.3d 1266, 1269-70 (9th Cir. 1999) (articulating requirements under the identical federal rule).

[37] Atoigue's prior consistent statement clearly does not fall within the nonhearsay definition of a prior consistent statement because it fails (2) above. A review of the record reveals that there was no "express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony," to be rebutted. 6 GCA § 801(d)(1)(B). The testimony was elicited on direct examination by the People in their case-in-chief. Prior to this testimony, there was no express or implied charge against Atoigue of recent fabrication or improper influence or motive. Therefore, we hold that the trial court abused its discretion

by improperly admitting the prior consistent statement of Atoigue. *See United States v. Lowe*, 65 F.3d 1137, 1144 (4th Cir. 1995) ("[C]orroborative testimony consisting of prior, consistent statements is ordinarily inadmissible unless the testimony sought to be bolstered has first been impeached."); *United States v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976) ("When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless . . . . [s]uch evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.").

[38] Despite the trial court's error in admitting Atoigue's prior consistent statement, this court observed in *People v. Palisoc*, 2002 Guam 9, ¶ 31:

> [N]on-constitutional errors by the trial court only require reversal 'if it is more probable than not that the erroneous admission of the evidence materially affected the jurors' verdict.' If 'other, properly admitted evidence of the defendant's guilt is overwhelming,' then it is more likely than not the erroneous admission did not materially affect the jurors' verdict."

Id. (citation omitted).

[39] Upon a thorough review of the record, we find that other, properly admitted evidence of Hall's guilt is overwhelming and that it is more likely than not that the erroneous admission of the witness' prior consistent statement did not materially affect the jurors' verdict. *See id.* Specifically, the following evidence provides overwhelming support for Hall's guilt:

> (1) Justin Atoigue testified that Hall told Eddie Seman ("Seman") that in order to be initiated into the gang, he would have to rob and kill someone. While with Lobdell (the victim), Hall retrieved his shotgun from his truck and told Atoigue to shoot Lobdell, but Atoigue refused. He then told Seman, who had Hall's handgun pointed at Lobdell, to shoot Lobdell, but Seman also refused. Hall then shot Lobdell twice with the shotgun. Transcript, vol. II of IX, pp. 43, 51, 53;
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> (2) Eddie Seman testified as follows: Hall told Seman and Atoigue that they would rob and kill someone for Seman's gang initiation. While Lobdell lay face down on the ground, Seman had a handgun pointed at him. Hall walked toward them with a shotgun and told Seman to shoot Lobdell. Lobdell stood silent. Hall shot Lobdell twice in the head with the shotgun. Transcript, vol. IV of IX, pp. 19-20;
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> (3) Officer Joseph R. Meno, who interviewed Hall and took his written statement, testified that he informed Hall that a shotgun was found in his truck. He also testified that he informed Hall that a firearm was located at Hall's residence. Officer Meno testified that the firearm was taken to the crime lab and was found to match the murder weapon. Transcript, vol. V of IX, pp. 23-24;
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> (4) Regina Hemmerling, a friend of Hall's, testified that she was with Hall when a guy named Johnny dropped off a black shotgun, measuring about two feet long. Transcript, vol. VI of IX, pp. 7-8;

(5) Officer John S. Tyquiengco, Firearms Identification Examiner with the Guam Police Department Crime Laboratory, testified that lab tests conducted on the shells found in the bed of Lobdell's vehicle, and on the ground next to the vehicle, were fired from the same shotgun retrieved from Hall's residence. Officer Tyquiengco further testified that the shells found at the scene were of the same type as the shells found with the shotgun retrieved from Hall's residence. Transcript, vol. VI of IX, pp. 32-35; and

(6) Dr. Aurelio Espinola, Chief Medical Examiner, testified that Lobdell's cause of death was a shotgun wound to the head. Transcript, vol. VI of IX, pp. 67-68.

[40] In light of our finding that the properly admitted evidence of Hall's guilt is overwhelming and that it is more likely than not that the erroneous admission did not materially affect the jurors' verdict, we hold that the trial court did not commit reversible error in admitting Atoigue's prior consistent statement.

F. Ineffective Assistance of Counsel

[41] The final issue we address is Hall's claim for ineffective assistance of counsel. Specifically, Hall argues that a conflict of interest arose when trial counsel continued to be counsel of record for Hall, while serving as the Attorney General of Guam. Hall also contends that trial counsel violated several ethical rules found in Title 7 GCA, Appendix F.

[42] "Although an ineffective assistance of counsel claim may be heard on direct appeal," we have previously held that "it is more properly brought as a writ of habeas corpus." *People v. Ueki*, 1999 Guam 4, ¶ 5 (footnote omitted). This is especially true in this case, where such claims often require "an evidentiary inquiry beyond the official record." *Id.*; *see also People v. Haynes*, 164 Cal.Rptr. 552, 555 (Cal. Ct. App. 1980) (stating that because "[t]he record before us is silent on counsel's reasons for the conduct complained of [thus the] . . . situation serves as an example of the benefits that could have been derived by use of the petition for habeas corpus . . . ."); *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003) (stating that "the record on direct appeal will generally 'not be sufficient to show that counsel's representation was so deficient . . . as '[t]he reasonableness of counsel's choices often involves facts that do not appear in the appellate record' . . . [and t]hus an application for a writ of *habeas corpus* is the more appropriate vehicle") (citation omitted); *People v. Pope*, 590 P.2d 859, 867 (Cal. 1979) ("Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus [where] . . . there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the

manner complained of."), *overruled on other grounds by People v. Berryman*, 864 P.2d 40, 60 n.10 (Cal. 1993), *overruled on other grounds by People v. Hill*, 952 P.2d 673, 684 n.1 (Cal. 1998).

[43] Because the alleged action or inaction complained of by Hall calls for an examination of facts which are beyond the trial court record, we find that such claim is more appropriate in a petition for a writ of habeas corpus before the Superior Court of Guam. *See People v. Ueki*, 1999 Guam 4, ¶ 5; Title 8 GCA, Chapter 135. Accordingly, we decline to reach the issue of ineffective assistance of counsel.

IV.

[44] We hold that the trial court properly pronounced judgment in accordance with the requirements of Title 8 GCA § 120.14 and had jurisdiction to enter the August 6, 2002 judgment against Hall. Moreover, we hold that Hall's statutory and constitutional rights to a speedy sentencing and speedy appeal were not violated. While we find that the trial court erred in admitting the prior consistent statement of a witness, we hold that such error is not reversible error. Finally, we decline to reach the issue of ineffective assistance of counsel, which we find to be more appropriate in a petition for writ of habeas corpus. The Judgment of the trial court is hereby **AFFIRMED**.