Civil No. 13-1247

UNITED STATES COURT OF APPEALS
FOR THE THIRD JUDICIAL CIRCUIT

UNITED INDUSTRIAL, SERVICE, TRANSPORTATION, PROFESSIONAL AND GOVERNMENT WORKERS OF NORTH AMERICA SEAFARERS INTERNATIONAL UNION, ON BEHALF OF ERNEST BASON,

Appellant/Defendant

v.

GOVERNMENT OF THE VIRGIN ISLANDS, DEPARTMENT OF JUSTICE,

Appellee/Plaintiff

On Petition for a Writ of Certiorari to the Supreme Court of the Virgin Islands
S. Ct. Civ. No. 2011-0115
Super. Ct. Civ. Nos. ST-11-CV-308 and ST-11-CV-364

PETITION FOR REHEARING AND REHEARING EN BANC

LAW OFFICES OF PEDRO K. WILLIAMS

Pedro K. Williams, Esq.
Amos W. Carty, Jr., Esq.
Namosha Boykin, Esq.
Attorneys for Appellant
5212 Wimmelskafts Gade, Ste. 200
St. Thomas, U.S. Virgin Islands 00802-6404
Telephone: (340) 774-2100
Facsimile: (340) 774-2750
Email: pedro_k_williams@hotmail.com
VIRGIN ISLANDS BAR No. 362
VIRGIN ISLANDS BAR No. 439
VIRGIN ISLANDS BAR No. 1169

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the United Industrial, Service, Transportation, Professional and Government Workers of North America, AFL-CIO ("UIW-SIU") makes the following disclosure: the UIW-SIU is a subsidiary of the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters, AFL-CIO. The UIW-SIU is not a public company and no publicly held company owns 10% or more of its stock.

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STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States, such *as United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and its progeny, which hold that "those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review. . . . The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. Consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

I express a belief, based on reasoned and studied professional judgment that this appeal involves a question of exceptional importance: whether an appellate court can dismiss a petition for certiorari as moot due to a party's death without vacating the decision for which certiorari was sought.

/s/ Namosha Boykin
Namosha Boykin, Esq.
VIRGIN ISLANDS BAR No. 1169

ARGUMENT

When an Appeal is Dismissed on Grounds of Mootness Due to Death the Decision Appealed From Must be Vacated

The entire November 26, 2012 Decision of the Supreme Court of the Virgin Islands and those portions of the December 13, 2011 decision of the Superior Court of the Virgin Islands that address the issue of reinstatement must be vacated with instructions to remand for further proceedings on the issue of back pay. On March 19, 2014 this Court "dismiss[ed] the Union's certiorari petition as moot." (Opinion at 40.) The Court found that the petition was moot due to Attorney Bason's death, which occurred on or about September 3, 2013. (*Id.* at 39.) A dismissal due to mootness under such circumstances is said to have the effect of preventing review through happenstance. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). Therefore, in order to preserve the rights of all parties, "the *duty* of the appellate court" is to vacate the decision below and remand with a direction to dismiss. *Id.* (emphasis added).

A. The March 19, 2014 Opinion of this Court Requires Vacatur of the Lower Court Decisions on the Issue of Reinstatement

The "duty of the appellate court" it is said, "in dealing with a civil case from a court in the federal system which has become moot while on its way [there] or pending . . . decision on the merits is to reverse or vacate the judgment below and

remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). By carrying out this duty, appellate courts "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40. Moreover, this safeguard operates "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

The March 19, 2014 Opinion dismissed the Union's certiorari petition as moot, but provided no binding direction to the lower courts that their decisions on reinstatement must be vacated. This omission is inconsistent with decades of Supreme Court precedent. *See, e.g., Munsingwear, supra*; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 80 (1997); *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 73 (1983); *Murphy v. Hunt*, 455 U.S. 478 (1982) (finding case moot, vacating court of appeals' decision and remanding with instruction to dismiss complaint); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) ("Because the fact of mootness is clear, and indeed is relied upon by the Court of Appeals as its reason for dismissing petitioner's appeal, and because the law as laid down by this Court in *Duke Power Co., supra,* and *United States v. Munsingwear, Inc., supra,* is

equally clear, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals with direction to vacate the District Court's judgment and to remand the case for dismissal of respondent's complaint."); *County of Los Angeles v. Davis*, 440 U.S. 625, 627 (1979) ("We now find that the controversy has become moot during the pendency of this litigation. Accordingly, we vacate the judgment of the Court of Appeals and direct that court to modify its remand so as to direct the District Court to dismiss the action."); *cf. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (citing *Karcher v. May*, 484 U.S. 72, 82-83 (1987)) (refusing to apply *Munsingwear* Rule where case did not become moot through happenstance).

The failure to direct the vacatur of the reinstatement decisions below will effectively cloud the Union's ability to challenge any future wrongful discharge of an Assistant Attorney General by leaving intact the Supreme Court of the Virgin Islands' preliminary judgment. *See Munsingwear*, 340 U.S. at 40; *see also Monzillo v. Biller*, 735 F.2d 1456, 1464 (D.C. Cir. 1984) ("Appellants have expressed concern that the district court's judgment has placed a cloud on their authority to commit the Union to any major real estate agreement. Any such cloud will be removed with the issuance of our decision today directing the district court

to vacate its judgment and order."). This unintended consequence is precisely the type of evil that the *Munsingwear* Rule sought to protect against.

B. The *Munsingwear* Rule is Not Limited to Cases From Courts in the Federal System

The *Munsingwear* Rule is not restricted to appeals from cases that arose in the federal system. Importantly, the Supreme Court of the United States has applied *Munsingwear* vacatur to appeals from decisions of the highest state courts. *See, e.g., Massachusetts v. Oakes*, 491 U.S. 576, 585 (1989) ("When the sole question on which we granted certiorari has become moot, our usual course, in cases coming to us from state courts when part of the dispute remains alive, is to vacate the judgment below and remand for further proceedings."); *see also DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974); *see also Bus Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 416, 418 (1951). Moreover, in revisiting *Munsingwear* forty-four years later, the Supreme Court of the United States addressed the broader issue of "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 20 (1994). There can be no doubt that the Supreme Court of the Virgin Islands is a subordinate court to the Third Circuit. (*See* Opinion at 33 n.3.) Accordingly, if ever there was a notion that *Munsingwear* was limited

to district court decisions, that notion was dispensed with by the Supreme Court of the United States in *U.S. Bancorp Mortgage Co.* In so doing, the Court recognized that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25. The forced acquiescence that the Court sought to prevent in *U.S. Bancorp* is precisely the ill that will result here if the Court fails to vacate the reinstatement decisions below. The Court in *U.S. Bancorp* aptly found that such cases, those that become moot by happenstance, should be entitled to vacatur as a matter of right. *Id.* at 25 n.3. Therefore, the Union does nothing more that respectfully request that this Court apply the well-established precedent as set forth in *U.S. Bancorp Mortgage Co.*

C. The Twin Considerations of Fault and Public Interest Weigh in Favor of Vacatur

Even if the Court finds that this case belongs to the category where vacatur is not applied as a matter of right, there can be no doubt that the "twin considerations of fault and public interest" weigh in favor of vacatur. *See Khodara Environmental, Inc. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001). Fault for the unfortunate death of Attorney Bason cannot be attributed to the Union. Unlike voluntary settlement, Attorney Bason's death brought about an involuntary loss of the Union's legal remedies. "Congress has prescribed a primary route, by appeal

as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. . . . *Munsingwear* establishes that the public interest is best served by granting relief when the demands of 'orderly procedure' . . . cannot be honored." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 27. There is no doubt that the demands of orderly procedure cannot be honored in this case with respect to the reinstatement of wrongfully discharged Assistant Attorneys General.

The Union filed its Petition for Certiorari seeking review of the specific issue of whether title 24, section 374(a) of the Virgin Islands Code is harmonious with title 3, section 113(a) of the Virgin Islands Code. The Supreme Court of the Virgin Islands explicitly found that those two provisions are not harmonious. Instead of reaching the merits of the Union's petition, this Court dismissed the petition, finding that it was mooted by Attorney Bason's death. In so doing, the Court concluded that, "[g]iven the critical role that reinstatement played in the Virgin Islands Supreme Court's disposition, we do not see how we could reach the merits of its decision at this juncture." (Opinion at 39.) This conclusion, by failing to vacate the reinstatement decisions below, has the unintended effect of affirming the decision of the Supreme Court of the Virgin Islands by leaving it intact as binding precedent despite the Union's filing of a certiorari petition seeking review of that precise issue. This conclusion also fails to resolve the issue of whether Assistant Attorneys General who are represented by an exclusive representative

can be discharged without cause by the Governor. Even if this case returns to the Court following the proceedings on remand, Attorney Bason will remain deceased and the issue for which the Union sought review will remain unreviewable. The Union, having been denied a full and fair opportunity to litigate the reinstatement issue due to no fault of its own, should not forever be bound by the Supreme Court of the Virgin Islands' decision on that issue.

There is no doubt that vacatur is in the public interest where, as here, orderly procedure has been foreclosed. Nor will "[t]he public interest in a robust corpus of judicial precedent" be compromised by vacatur. *See Khodara Environmental, Inc.*, 237 F.3d at 194. The Union did not voluntarily forfeit its legal remedy. Yet, in addition to remaining a published decision available for public consumption, the decision of the Supreme Court of the Virgin Islands also unnecessarily and detrimentally retains its precedential value. Vacating the reinstatement decisions below will not remove them from the public domain and will not deprive either party of the normal legal remedies. The sole effect of vacatur in this case will be relieving the Union from the decision of the Virgin Islands Supreme Court where the normal legal remedies for review have been rendered unavailable through happenstance.

Because the decision from which the Union sought review has become unreviewable due to no fault of the Union, the public interest is best served by

vacatur, which will provide relief from "a decision which in the statutory scheme was only preliminary." *Munsingwear, Inc.*, 340 U.S. at 40. The Supreme Court of the United States has concluded in no uncertain terms that, "[w]e thus stand by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25 n.3. This Court can, and under the facts of this case must reach the same conclusion.

CONCLUSION

WHEREFORE, for the foregoing reasons the Union prays the Court to clarify its March 19, 2014 Opinion to explicitly direct that the entire November 26, 2012 Decision of the Supreme Court of the Virgin Islands and those portions of the December 13, 2011 decision of the Superior Court of the Virgin Islands that address the issue of reinstatement be vacated, with instructions to remand for further proceedings on the issue of back pay, and such other relief as the Court deems just and proper.

Respectfully Submitted,

LAW OFFICES OF PEDRO K. WILLIAMS

Dated: April 2, 2014

/s/ Namosha Boykin

Namosha Boykin, Esq.
Pedro K. Williams, Esq.
Amos W. Carty, Jr., Esq.
Attorneys for Appellant
5212 Wimmelskafts Gade, Ste. 200
St. Thomas, U.S. Virgin Islands 00802-6404
Telephone: (340) 774-2100
Facsimile: (340) 774-2750
Email: pedro_k_williams@hotmail.com
VIRGIN ISLANDS BAR No. 1169
VIRGIN ISLANDS BAR No. 362
VIRGIN ISLANDS BAR No. 439

CERTIFICATE OF BAR MEMBERSHIP

I, NAMOSHA BOYKIN, Attorney for Appellant, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Judicial Circuit.

/s/ Namosha Boykin
Namosha Boykin, Esq.
VIRGIN ISLANDS BAR No. 1169

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This petition for rehearing and rehearing en banc complies with the type-volume limitation of Fed. R. App. P. 32(c)(2) and 35(b)(2) because it contains 15 pages or less, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(2).

2. This petition for rehearing and rehearing en banc complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

3. Pursuant to 28, U.S.C. § 1746 I certify under penalty of perjury that the foregoing is true and correct.

/s/ Namosha Boykin
Namosha Boykin, Esq.
Attorney for Appellant
Dated: April 2, 2014
VIRGIN ISLANDS BAR No. 1169

CERTIFICATE OF VIRUS CHECK

1. I caused the electronic version of this brief to be checked for computer viruses using Norton AntiVirus. No computer virus was found.

2. Pursuant to 28, U.S.C. § 1746 I certify under penalty of perjury that the foregoing is true and correct.

/s/ Namosha Boykin
Namosha Boykin, Esq.
Attorney for Appellant
Dated: April 2, 2014
VIRGIN ISLANDS BAR No. 1169

CERTIFICATE OF SERVICE

It is hereby certified that on this 2nd day of April 2014, one copy of the foregoing ***Petition for Rehearing and Rehearing En Banc*** was filed with the Clerk of the Court by using the CM/ECF System, which will send a notice of electronic filing to the following:

Joss N. Springette, Esq.
Office of Collective Bargaining
Assistant Attorney General – Labor
GERS Bldg., 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, U.S. Virgin Islands 00802
Telephone: (340) 774-6450
Facsimile: (340) 777-4622
Email: joss.springette@ocb.vi.gov

/s/ Namosha Boykin