IN THE SUPREME COURT OF THE VIRGIN ISLANDS
SCT-CRIM-2022-0115

JIMMY DAVIS,
Appellant/Defendant,

-v-

PEOPLE OF THE VIRGIN ISLANDS,
Appellee/Plaintiff.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
Re: SX-2020-CR-00098

APPELLEE'S BRIEF

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STATEMENT OF JURISDICTION

The Appellee concurs that jurisdiction lies with this Court under 4 V.I.C. § 34(d), 48 U.S.C. § 1613a(d), and the collateral order doctrine. *Davis v. People of the V.I. ("Davis I")*, 76 V.I. 514, 517 (V.I. 2022).

STATEMENT OF RELATED CASES OR PROCEEDINGS

Appellee is unaware of any related cases or proceedings.

STATEMENT OF THE ISSUES

1. Whether the Superior Court abused its discretion by reducing Appellant's bail from $1,000,000.00 to $250,000.00 on remand from the Supreme Court.[1]
2. Whether the Superior Court abused its discretion in denying Appellant's motion to compel the production of information about the basis of the threat posed to Appellant at the John Bell Correctional Facility in St. Croix based on testimony from the Bureau of Corrections ("BOC") Assistant Director and wardens that established that Davis's transfer to the Criminal Justice Complex ("CJC") in St. Thomas was not retaliatory.
3. Whether the Superior Court abused its discretion in denying Appellant's motion for an order directing the BOC to return Appellant to the Bell facility.

[1] Responds to Appellant's Issues One – Three.

SUMMARY OF THE ARGUMENT

This Court should affirm the orders of the Superior Court because it did not abuse its discretion to impose a $250,000 cash bail or deny Davis's motions to compel and for transfer. The evidence showed that Davis was a danger to the community. Also, his inability to adhere to territorial or court authority and the lengthy prison term he faces if convicted shows he is a flight risk. Thus, on remand, the Court was justified in reducing his bail from $1,000,000 to $250,000, $150,000 more than the standard $100,000 on charges of rape, despite Davis's indigency.

Further, the Court properly denied Davis's additional motions to persuade the Court to order the BOC to transfer him back to the John Bell facility in St. Croix from the Criminal Justice Complex in St. Thomas. The separation of powers doctrine mandated that the Superior Court deny Davis's motions to compel and for transfer. To do otherwise would have caused the court to invade the purview of the BOC about its administration of the prisons. That would have violated the doctrine of separation of powers since the Legislature has granted the BOC wide discretion to administer the prisons. Plus, even if Davis could show that the complained-of singular incidences constituted constitutional violations, Davis failed to show that those singular alleged unconstitutional violations of his Sixth Amendment

right to counsel constituted BOC policy, such that would warrant court intervention. Also, Davis's alleged constitutional violations bear no rational relationship to his request for transfer back to John Bell. Thus, this Court should affirm the Superior Court's orders and dismiss this appeal.

STATEMENT OF THE CASE AND FACTS

A. The Court's Ruling on Davis's Bail

Davis had been in federal custody but was mistakenly released on March 27, 2020.[2] The Virgin Islands Police Department arrested Davis on April 6, 2020, for rape in the first degree, among other charges. *People of the V.I. v. Davis*, 2022 V.I. LEXIS 83, at *2-3. Davis's bail was originally set at $100,000 according to the Amended Order Modifying the Setting of Bail in the Absence of a Judge (SX-2020-MC-00024) ("Bail Chart"), signed March 23, 2020, by then Presiding Judge Harold W.L. Willocks, which sets bail for first-degree rape at $100,000. *Id.* at *2 n.22 "At his advice of rights hearing on April 8, 2020, the People objected to Davis being released on bail, proffering that he was a flight risk and a danger to the community." *Id.* The People also claimed that Davis committed the rape after he was released from

[2] According to Davis he was in federal custody from February 26, 2018, until March 27, 2020. A warrant was issued for Davis by the U.S. District Court magistrate judge on March 31, 2020, for failure to report to probation within 72 hours of being released. *People of the V.I. v. Davis*, 2022 V.I. LEXIS 83, at *2 n.4 (Super. Ct. Nov. 29, 2022).

federal custody. *Id.* At the April 8, 2020, initial hearing, the magistrate judge ordered that Davis's bail would "remain at $1,000,000."[3]

Davis first moved to reconsider bail on August 11, 2020, arguing that $1,000,000 was designed only to punish and that he was not a flight risk. *Id.* at *2-3. The People opposed because Davis has a history of being a danger to the community—noting several high-speed chases with police on St. Croix—and his contempt for authority, including incidences of open disrespect and contempt of the court. *Id.* at *28. Thus, the People argued that Davis was a flight risk. *Id.*

Davis filed a renewed motion for modification of bail on December 1, 2020, in which he presented evidence that he was incarcerated because he could not post the $1,000,000 bail. *Davis*, 76 V.I. at 517 The Superior Court held a hearing on the renewed motion on December 30, 2020, where the People orally stated that it continued to oppose modification of bail for the same reasons outlined in its opposition to the initial motion. *Id.* "After hearing arguments, the Superior Court orally denied the renewed motion,

[3] The WebEx recording of this hearing, conducted without a court reporter, is unavailable and no transcript exists. Therefore the Superior Court was without the benefit of any findings that were made by the magistrate judge about the bail amount. Further, the Superior Court was without the knowledge from the available record whether the magistrate judge in fact increased Davis's bail from $100,000 to $1,000,000 at that hearing or, if not, when the bail was increased. *Id.* at *2 n.5.

holding that the terms Davis proposed were wholly insufficient to assure his appearance at trial or to protect the community from physical harm." *Id.*

Davis filed another motion to modify his bail on March 22, 2021. *Id.* In this motion, based on the same grounds as the initial motion, but submitted an affidavit from his grandmother that she has no fear or objection to Davis's presence in her home. The People again opposed it because Davis endangered the community and could not conform to authority. *Id.*

The Superior Court held a hearing on June 14, 2021, at which it orally denied the motion, again concluding that the terms proposed by Davis could not assure his future appearances or protect the community, and subsequently memorialized its denial of the motion in a written June 17, 2021, order. *Id.*

Davis appealed the Superior Court's June 17, 2021, order to this Court, which reversed the Superior Court in an April 1, 2022, Opinion. *Id.* This Court found that the Superior Court abused its discretion to deny Davis's bail motion because it relied on an unreliable factual foundation. *Id.* at 543. This Court vacated the Superior Court's order, remanded the case to the Superior Court, and directed the Superior Court to hold an evidentiary hearing. *Id.*

During the pendency of the evidentiary hearing, the Virgin Islands Bureau of Corrections transferred Davis from the John Bell Correctional

facility on St. Croix to the Criminal Justice Center facility on St. Thomas. (A9-A32) Davis then filed an Emergency Motion for Transfer back to John Bell on October 4, 2022, with which his counsel filed a declaration. (*Id.*) He later moved to compel the BOC to provide information about the threat to his safety.

The Superior Court held the evidentiary hearing via Zoom on October 26, 2022. (A33-A115)[4] Before the hearing, Davis filed an Addendum to Motion for Release ("Addendum"). (A143-A151) In the Addendum, he argued that under this Court's recent decision in *Moran v. People of the V.I.*, 76 V.I. 544 (V.I. 2022), the Superior Court should not factor in his "scant" record of high-speed chases with the police on St. Croix, nor his admitted lengthy and contentious 25-year history with the police when considering his motion to reduce bail. (*Id.*; A113-A115)

At the evidentiary hearing, Davis asked to be released on his own recognizance or for cash bail to be set at an amount that he, as an indigent defendant, could realistically be able to post. *People of the V.I. v. Davis*, at *17. (A84-A95) Davis offered his sister, Jacqueline Davis Wathey, who appeared and gave testimony, as a potential third-party custodian. *Id.* (A95-A102)

[4] The People were not consulted about the formation of the Appendix.

In opposition, VIPD Commander Naomi Joseph testified that, in her opinion, if Davis were to be released, she would be concerned for the community's safety. *Id.* at *18-19; (A103-A108). She testified to her knowledge of prior high-speed chases involving Davis, stated that he does not follow court orders and that she has heard about, but not witnessed, incidents in which Davis was violent toward police officers. *Id.* (A103-A108) She testified that she does not know Davis's sister, although she has met his mother, grandmother, and brother, and his family has no control over Davis. *Id.* (A103-A108) She also testified to the VIPD's current lack of resources needed to capture Davis again. *Id.* (A103-A108) Asked on cross-examination whether she could provide examples of Davis's failure to comply with court orders or release conditions, Commander Joseph replied that Davis needed to be restrained during a District Court proceeding to keep him quiet and his refusal to remain at a designated location after his release. *Id.* (A103-A108) Davis also acknowledged that as of the date of that hearing, his sister did not possess a landline at home, which is necessary for home monitoring. (A85)

In its November 29, 2022, Opinion, the Superior Court found that the then-present bail set at $1,000,000 was excessive and granted Davis's renewed motion to reduce bail. *Id.* at *31 By separate order, the Court

reduced the bail to $250,000 with accompanying conditions for pretrial release. *Id.*; (A136-A137).

B. The Court's Ruling on Davis's Motion for Transfer

Davis's counsel declared that an introductory letter he sent to Davis on August 30, 2022, was not received by Davis until around two weeks later (A9). He also stated that a BOC employee advised him to send correspondence to Davis via a BOC email address. (A9-A10) Additionally, Davis's counsel declared that while on a Zoom call with Davis, it appeared to him that a BOC employee was eavesdropping on their call. (A10) When Davis opened a door, a BOC employee appeared to move away from the other side of the door quickly. (A10-A12)

Davis argued that the BOC's "policy" of routing mail through a BOC email address violated his Sixth Amendment right to counsel. (A8-A10; A26-A27) Davis also argued that the BOC monitored his video communications with counsel at CJC. (A10-A12; A24-A29) Davis also argued that these singular incidences constituted impermissible BOC policies that warranted the Court issuing an order of transfer back to John Bell. And he argued that the BOC transferred Davis to CJC in retaliation for his throwing feces at the staff of John Bell several times rather than as a safety measure for Davis. (A27-A29)

The Court also took testimony from Riel Falkner, BOC Assistant Director for Administration and Compliance, Ben Adams, BOC Warden of the John Bell facility, Hector Rivera, BOC Warden of CJC, and Davis, during the evidentiary hearing about Davis's emergency motion for transfer and a motion to compel production of information about the source of the threat to Davis's safety. (A64-A86)

Assistant Director Faulkner testified that the BOC transferred Davis from John Bell to CJC due to its legitimate concern for Davis's safety and the safety of other inmates and staff. (A64) Davis's unruly behavior at John Bell made his continued presence there a risk to himself, while the BOC has taken all appropriate measures to ensure his safety at CJC. (*Id.*) About Davis's access to counsel, Assistant Director Faulkner testified that the BOC mail policy forbids any BOC employee from opening legal mail of an inmate. (*Id.*) Any BOC employee who communicated an alternative method of contact to Davis's counsel misspoke. (*Id.*) As for calls with his attorney, BOC personnel may not be in the room with Davis, with his attorney. (A65) The BOC views the inmates' contact with their counsel as "sacrosanct." (A66) But because of Davis's behavior, he is on lockdown and cannot be allowed free access through the facility without leg irons and chains. (*Id.*) Additionally, when

Davis is on a call or visiting with his attorney, a guard must be nearby but not close enough to eavesdrop on their conversation. (A65).

Assistant Director Faulkner testified that Davis had thrown his feces at staff members at John Bell several times. (A72). Yet the BOC's concern for Davis's safety at John Bell stems from retaliation from other inmates and not from BOC staff. (*Id.*) Warden Adams then concurred with Assistant Director Faulkner. (A73-A74). Davis maintained that he would sign a liability waiver for the BOC in return for a transfer to John Bell (A40). Davis also moved to compel the BOC to provide written proof of the threat to him from other inmates instead of BOC staff.

On November 29, 2022, the Court also issued an order denying Davis's Emergency Motion for Transfer (A132-A135). The Court noted that it was not its place to dictate how the BOC—which retains general control over persons arrested, detained, or sentenced by a court of law under 5 V.I.C. § 4503(a); and 3 V.I.C. § 375(a)—manages its affairs. (A132). The Court took the BOC's proffers at the hearing at face value. (*Id.*) The Court specifically noted that the BOC was adamant that communications between the inmates and their counsel are "sacrosanct" and that the BOC acknowledged an employee telling Davis's counsel to submit legal mail via a BOC email address was an unfortunate miscommunication, not an intentional attempt to deprive Davis

of confidential communications with his attorney. (*Id.*) Besides, Davis's counsel admitted that the issues he raised about CJC could occur at John Bell. (A132-A133). But because the BOC assured the Court that no constitutional deprivations would occur, the BOC's decision to transfer Davis in the interest of safety outweighed Davis's desire to return to John Bell. (A133)(citing *Simon v. Mullgrav*, 2018 V.I. LEXIS 97 at *30 (Super. Ct. Sep. 19, 2018))(security for inmates and BOC staff is clearly a legitimate penological interest).

C. The Court's Ruling on Davis's Motion to Compel

The Court also noted in its Order accompanying its Opinion that at the October 26, 2022, hearing, it ordered counsel to confer with each other about evidence of the source of the threats to Davis's safety before a second hearing set for November 9, 2022.[5] (A79) Before the November 9, 2022 hearing, Davis moved to compel the BOC to produce any evidence showing that Davis's safety would be in jeopardy if he returned to John Bell or, in the alternative, investigate the same. (A131) The Court summarized the testimony at the November 9, 2022, hearing thus:

> At that hearing, Davis's counsel questioned Warden Rivera about alleged incidents that took place between Davis and various corrections officers at Farrelly Both Warden Rivera and Assistant Director

[5] Davis's Motion to Compel and any responses were not included in the Appendix.

> Faulkner acknowledged that Davis has raised various issues regarding staff and has filed multiple incident reports Counsel reiterated Davis's position that he is being retaliated against, agreed that the concerns Davis raised could take place at either Bell or Farrelly, and argued that the existence of such similar circumstances in each facility weighs in favor of returning Davis to Bell Davis's counsel proffered that the issues Davis has continued to experience with corrections officers are impacting his ability to communicate with counsel, and that he and Davis have barely been able to discuss the case itself because "all [they] talk about is what the officers are doing to him " The Court advised the parties that it relied upon the veracity of the sworn testimony of BOC representatives regarding assuring the confidentiality of attorney-client communications. The Court also advised that it would be favorably inclined to grant any forthcoming request of counsel to travel to St. Thomas to meet personally with Davis.

(A132)

In its November 29, 2022, Order, the Court denied Davis's motion to compel, noting that for the Court to order BOC to conduct an internal investigation would contradict BOC's well-established autonomy and basic separation of powers principles. (A135).

STANDARD OF REVIEW

Although the Superior Court's November 29, 2022 order does not qualify as a final judgment because it does not resolve all issues between the parties, this Court still possesses jurisdiction under the collateral order doctrine, in that an order denying a motion for modification of bail (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3)

is "effectively unreviewable on appeal from a final judgment." *Rieara v. People*, 57 V.I. 659, 664-65 (V.I. 2012) (collecting cases).

" [This Court reviews] the trial court's decisions [about] the amount of bail and other release conditions for abuse of discretion." *Id.* The Superior Court abuses its discretion when its "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011) (internal citations omitted). About the clearly erroneous standard, "[T]he appellate court must accept the factual determination of the fact finder unless that determination 'either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'" *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (2007)(*quoting Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91-92 (3d Cir. 1992)).

ARGUMENT

POINT I

THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION TO REDUCE APPELLANT'S BAIL FROM $1,000,000 TO $250,000 BECAUSE IT FOUND THE FORMER BAIL WAS EXCESSIVE AND WITHOUT EVIDENTIARY SUPPORT, AND THE LATTER BAIL WAS ENOUGH TO ENSURE THE SAFETY OF THE COMMUNITY BASED ON EVIDENCE ADDUCED AT THE EVIDENTIARY HEARING

In Davis's previous appeal, this Court found that Section 3 of the Revised Organic Act of 1954, as amended ("ROA"), guarantees that "[a]ll persons shall be bailable by sufficient sureties in the case of criminal offenses, except for first-degree murder or any capital offense when the proof is evident or the presumption great." 48 U.S.C. § 1561. So the ROA prohibits the Superior Court from denying bail or ordering the pretrial detention of a criminal defendant who is not charged with first-degree murder or a capital offense — and even in that limited circumstance, pretrial detention is authorized only if the proof of guilt is evident, or its presumption is great. *Davis*, 76 V.I. at 518 (citing *Tobal v. People*, 51 V.I. 147, 160 (V.I. 2009); *and, e.g., Turco v. Maryland*, 324 F. Supp. 61, 65 (D. Md. 1971) ("noting that under the common law, the judge determining the bail application, i.e., the *nisi prius* judge, possesses the discretionary power 'to determine whether the proof of the defendant's guilt of a capital crime was evident or the

presumption of his guilt of a capital crime was great,' and that bail could appropriately be denied in these circumstances")).

The Superior Court must impost in succession bail conditions listed under Rule 5-1(b)(1)-(5) if they will "reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial or assure the integrity of the judicial process." V.I.R. Crim. P. § 5-1(b). The court may impose a cash bail bond where personal recognizance, unsecured bail bond, travel or residence restriction, custody of a designated person, or surety bond are inadequate. V.I.R. Crim. P. § 5-1(b)(6).

The Superior Court may impose bail beyond Davis's means if that bail represents the least restrictive means of assuring his appearance and submission to the court's authority. *Id.* at 519 (citing *Bandy v. United States*, 81 S. Ct. 197, 197, 5 L. Ed. 2d 218 (1960); *Rieara*, 57 V.I. at 667 (citing *Galen v. County of Los Angeles*, 477 F.3d 652, 661-62 (9th Cir. 2007)); *and see*, V.I. R. Crim. P. 5-1(b). Also, the Superior Court may consider in its bail determination Davis's risk of flight, danger to the community, and other relevant factors if it adequately explains "how those findings relate to the amount of bail ordered — for instance, why those factors "required a bail [for] $250,000, rather than ... $200,000 ... or some other amount. "*Davis*, 76 V.I. at 519-20.

1. The Superior Court adequately found that $250,000 bail was needed to protect the community from Davis.

First, the Superior Court noted the litany of counsel who have withdrawn from representing Davis. *People of the V.I. v. Davis*, 2022 V.I. LEXIS 83, at *10. Davis went from Attorney Kuczynski to Attorney Lockwood, Attorney Rohn, Attorney Kye Walker to Attorney D'Andrade, Attorney Jerry Evans, Attorney Dwayne Henry to Attorney Jurek to Attorney McChain, Attorney Moorhead, to Attorney Otto, and finally to his current counsel. *Id.* at *10-15. All the former counsel moved to withdraw—some for innocuous breakdowns in communications, but others, as discussed below—because of fear of violence. *Id.*

Second, the Court noted Davis's history of arrests and convictions for violent offenses and defying authority. *Id. at* *20 Davis has been arrested 31 times, including:

> three separate charges for aggravated assault and battery upon an officer, three charges for assault, one charge for attempted murder, one charge for burglary, one charge for contempt of court, three charges for possession of controlled substances, one charge for grand larceny, one charge for operating without a license, five charges related to unauthorized firearm possession and transport, one charge for rape, two charges for reckless endangerment, eight charges for robbery, including one for kidnapping, one charge for threatening a witness, one charge for unauthorized use of a vehicle, and one charge for unlawful sexual contact.

Id.

And six of Davis's arrests resulted in convictions, four of which were in federal court. *Id.* The Court noted:

> On August 14, 2002, Davis was convicted of attempted murder and sentenced to 30 years imprisonment. *Id.* On January 28, 2013, Davis was convicted of assault on a federal corrections officer and sentenced to 12 months imprisonment. *Id.* Davis was charged on March 4, 2013, with simple assault on a correctional officer, convicted, and sentenced to 12 months incarceration. *Id.* at *20-21 On March 16, 2017, Davis was found to have violated the terms of his probation, and his supervised release was revoked in connection with his conviction of unlawful transport of firearms. *Id.* at *21 Lastly, on April 12, 2019, Davis was convicted of simple possession of cocaine and aggravated assault and battery and sentenced to two years imprisonment. *Id.*

Id. at *20-21.

Third, the Court noted that the evidence supported a higher bail amount than the $100,000 noted on the bail chart for charges of rape. *Id.* at *28 The Court found that other courts' previous orders to Davis to attend anger management, participate in inpatient or outpatient substance abuse counseling, and be referred for mental health treatment while incarcerated supported a higher bail amount because they showed the courts' concern about Davis's propensity for violence. *Id.* The Court also found that the

number and types of arrests and convictions for violent offenses satisfied a higher amount. *Id.*

Finally, the Court found Davis's arguments in his Addendum to his modification motion to be of no moment. *Id.* at *29-30. But the Court agreed that without evidence of gun violence, weapon, or carjacking as in *People of the V.I. v. Rodriguez*, 2018 V.I. LEXIS 5 (Super. Ct. Jan. 16, 2018), or risk of flight, the $1,000,000 bail was excessive. *Id.* at 31.

On remand, the Superior Court properly applied the facts to the law as pronounced by this Court in *Davis I*. The Court noted, "the potential sentence for a first-degree rape conviction is significant, ranging from 10 to 30 years, creates the risk that Davis would not appear. Based on Davis's lengthy and violent criminal history, he is a danger to the citizens of St. Croix. *Id.* at *24-25. If the bail chart supports a bail of $100,000 for a single charge of rape, the other charges of unlawful sexual contact in the first degree, burglary in the first degree, assault in the first degree, and home invasion warrant a higher bail. Thus, the People rebutted the presumption of release on non-monetary conditions. So, the Superior Court's imposition of $250,000 cash bail was not clearly erroneous based on the facts adduced at the evidentiary hearing.

2. The Superior Court properly considered the appointed counsels' motions to withdraw for fear of Davis.

Davis is a violent threat to everyone he encounters, including those charged with representing him. Attorney Rohn moved to withdraw from representing Davis because her almost all female staff feared representing Davis. *Id.* at *11. The Court quoted Attorney Rohn's motion:

> Defendant, Davis, is known to be violent and a threatening human being with violent tendencies. Undersigned has an all-female staff, except one male, who are all worried about having to deal with Jimmy Davis as a client. That staff previously dealt with Defendant when he was represented by Attorney [Mary Faith] Carpenter, and he was combative and difficult to deal with. The undersigned and her office staff are fearful of the defendant. *Id.*

Id.

Similarly, Attorney Kye Walker filed an ex parte motion to withdraw because of fear of Davis. *Id.* at *11-12. The Court also excerpted Attorney Walker's motion:

> The undersigned's staff already feels harassed and threatened by Davis. In addition, a key member of the undersigned's litigation team had prior interactions with Davis when she worked at another office, and Davis was similarly abusive and threatening to the staff of that office …
> …
> … Finally, a close friend … who interacted with Davis through his employment at the Superior Court, consulted with the undersigned with regard to a situation in which Davis was considered a possible threat to him and his family … The undersigned does not feel safe having any interactions with Davis and

> needs to shield and protect her staff from any further abusive phone calls and threats. *Id*. at 2.

Id.

Finally, Attorney Moorhead, the brother of then Superior Court Judge Molloy, moved to withdraw because of threats sent via text from jail to a Superior Court employee about Judge Molloy. *Id*. at 14-15. The Court quoted Attorney Moorhead's motion:

> In his threats, Defendant indicated that he knew exactly where Judge Molloy resided. Defendant's threats were taken very seriously, and extra security had to be provided to Judge Molloy and his family by the Superior Court before Defendant was transferred to jail on St. Thomas. Upon learning about the threats, the undersigned immediately contacted Defendant in jail and engaged in a heated conversation with him during which disrespectful and inappropriate language was used by Defendant … the undersigned has NO DESIRE to ever see Defendant again, much less represent him in this or any other matter. *Id*.at 1-2 (emphasis in original).

Id.

While the representations of counsel are not conclusive of Davis's violent propensities, they are a factor that the Superior Court was entitled to consider. Particularly, the Court properly considered that not one but three attorneys withdrew because their fear for themselves, their colleagues, their staff, and their families prevented them from representing Davis.

Davis argued, on the contrary, that he is not a violent threat and that home monitoring with his sister could ensure he appears in court.(A21-A22; A68-A72) But Jimmy Davis has not proven that electronic home monitoring will keep him at home. He has violated release conditions previously while under federal custody. He committed the instant offenses when he was mistakenly released from federal custody. Besides, the testimony of the BOC showed that Davis would not follow BOC rules while under BOC direct custody – so much so that the BOC had to move Davis from John Bell to CJC. Thus Davis presented no facts suggesting that he would comport himself per the Court's conditions of release while out on his own recognizance. Davis also tries to minimize the danger his high-speed chases pose to the community. Thankfully, no one was killed or injured because of his reckless behavior.[6]

Although Davis has not previously fled the territory, he poses a flight risk because of the lengthy prison term he faces should he be convicted of the

[6] "More than 5,000 bystanders and passengers have been killed in police car chases since 1979, and tens of thousands more were injured as officers repeatedly pursued drivers at high speeds and in hazardous conditions, often for minor infractions, a USA TODAY analysis shows." See *High-speed police chases have killed thousands of innocent bystanders,* Thomas Frank, USA Today July 30, 2015, https://www.usatoday.com/story/news/2015/07/30/police-pursuits-fatal-injuries/30187827/, last accessed February 10, 2023.

instant charges. The possible prison term, coupled with Davis's propensity to disregard court or territorial restrictions at every turn, means that a substantial risk exists that he will flee the territory even though he has not fled before.

Davis's willingness to lead the police on high-speed chases on the island when he does not appear in court increases the danger for the citizens of St. Croix. And in the words of Commander Naomi Phillips, who testified at the evidentiary hearing, he terrorizes the people of St. Croix—amplifying the danger Davis poses to the citizens of St. Croix. (A109). Thus, an equally important factor that the Superior Court considered was Davis's real and localized danger to the citizens of St. Croix. And having considered the evidence of Davis's flight risk, propensity for violence, and danger to the community and that no lesser form of bail was adequate, the Court properly found that a cash bail of $250,000 was warranted.

3. The Superior Court properly weighed Davis's danger to the community against his indigency.

While Davis is indigent, the Court properly imposed a sufficient bail to protect the community despite his indigency. *Davis*, 76 V.I. at 519(citing *Tobal*, 51 V.I. at 161). Based on Davis's argument, a Court would be precluded from imposing any cash bail on an indigent defendant charged with rape (let alone his other charges), not even the $100,000 standard bail from the bail

chart. In such a situation, the defendant's indigency would supersede the court's duty to protect the public. *Stevens*, 55 V.I. at 556; *Daniel*, 49 V.I. at 329. But here, the evidence supported the Court's decision that the $100,000 standard could not protect the public. And the Court's raising of that bail by $150,000 was rationally related to the evidence adduced. *Id*. Thus the Superior Court did not abuse its discretion, and this Court should affirm its decision to impose $250,000 cash bail.

POINT II

THE COURT CORRECTLY DENIED DAVIS'S MOTION TO COMPEL THE BOC TO PRODUCE EVIDENCE OF THE SOURCE OF THE THREAT TO DAVIS'S SAFETY BECAUSE THE BOC ESTABLISHED AT THE EVIDENTIARY HEARING THAT THE TRANSFER WAS NOT RETALIATORY AND ON SEPARATION OF POWERS GROUNDS

Davis argued that his transfer to CJC was retaliation from the BOC employees at John Bell for throwing feces at the staff. Davis moved that the court compel the BOC to produce evidence to support its claim that the source of the threat to Davis was from other inmates or compel it to investigate the same. But the Court accepted the testimony of Warden Adams and Assistant Director Faulkner that Davis was in danger from the other inmates at John Bell, and his transfer was not retaliatory.[7] (A64; A130-A131)

[7] Additionally, Warden Rivera testified similarly at the November 9, 2022, hearing. (A131-A132).

The Court also accepted the testimony of Assistant Director Faulkner that based on that information in the BOC's judgment, it is best if Davis is confined at CJC. (A132-A133.) The Court properly denied Davis's motion to compel on separation of powers grounds because to do otherwise would be to compel the BOC to investigate, which would be beyond the Court's purview. (A132-A133.)

It is well-settled that this Court will not usurp the credibility findings of the fact finder, whether the jury or the judge. *See Ledesma v. Gov't of the V.I.*, 72 V.I. 797, 809 (V.I. 2019)(citing *Moore v. Walters*, 61 V.I. 502, 508 (V.I. 2014) (explaining that "on appeal, the court must defer to the credibility decision made by the factfinder, whether it be the judge or the jury"); *James v. People*, 60 V.I. 311, 328 (V.I. 2013) ("We cannot usurp the role of the [factfinder] by re-analyzing, re-evaluating, or re-weighing the evidence presented at trial, or by determining the credibility of the witnesses."); *John v. People*, 63 V.I. 629, 646 (V.I. 2015) (explaining that we do not "re-weigh the credibility of witnesses") (quoting *Morton v. People*, 59 V.I. 660, 671 (V.I. 2013)); *but see Carty v. People of the V.I.,* 76 V.I. 345, 372 (V.I. 2022).

And the Court properly noted, based on the doctrine of separation of powers, that it was not its place to dictate how the BOC administers the prisons. (A132) This Court reinforced its commitment to the separation of

powers doctrine in *Sekou v. Moorhead*, 72 V.I. 1048, 1075 (V.I. 2020) when it said:

> The separation of powers doctrine lies at the heart of our constitutional structure of government. In establishing the three branches of government, the Legislative, the Executive, and the Judicial, the Framers conferred separate and distinct powers on each, together with correlative checks and balances, as a safeguard against the encroachment or aggrandizement of one branch at the expense of another." *United States v. Scott*, 688 F. Supp. 1483, 1488 (D. N.M. 1988) (citing *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)). Moreover, the Constitution's Framers believed independence between the branches of government was pivotal to the preservation of liberty and that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective may justly be pronounced [as] the very definition of tyranny. *Id.* at 1487-88.
>
> Importantly, the separation of powers principle applies to the Virgin Islands through the Organic Act. "[T]he doctrine of separation of powers applies with respect to the coordinate branches of government in the Virgin Islands. The Organic Act of the Virgin Islands created three branches of government in the Virgin Islands. *See* 48 U.S.C. § 1571 (legislative branch); *id.* § 1591 (executive branch); *id.* § 1611 (judicial branch). Congress, therefore implicitly incorporated the principle of separation of powers into the law of the territory." *Smith v. Magras*, 124 F.3d 457, 465, 37 V.I. 464 (3d Cir. 1997) (citing *Springer v. Gov't of the Philippine Is.*, 277 U.S. 189, 199-202, 48 S. Ct. 480, 72 L. Ed. 845 (1928)).

Id.

Here, the Legislature has granted the BOC broad discretion to administer the prisons. Title 3 of the Virgin Islands Code, Section 375, subsection (a) states: "[T]he Bureau [of Corrections] shall exercise general control over persons arrested, detained, or sentenced by a court of law in accordance with the laws applicable to correctional institutions or rules properly promulgated." 3 V.I.C. § 375. Title 5 of the Virgin Islands Code, Section 4503, subsection (a) maintains that the BOC is an independent bureau within the Executive branch. 5 V.I.C. § 4503(a). The Court noted these provisions in its Order. (A132) Thus, the Court did not abuse its discretion by accepting the testimony of the BOC and not usurping the purview of the BOC. So the Court properly denied Davis's motion to compel, and this Court should affirm the Court's order.

POINT III

THE COURT PROPERLY DENIED DAVIS'S EMERGENCY MOTION FOR TRANSFER BASED ON THE EVIDENCE ADDUCED AT THE EVIDENTIARY HEARING AND ON SEPARATION OF POWERS GROUNDS

Similarly, the Court properly denied Davis's Emergency Motion to Transfer on separation of powers grounds. As stated above, the BOC is granted broad discretion to administer the prisons. *See Bradshaw v. Carlson*, 682 F.2d 1050, 1051 (3d Cir. 1981)(noting the V.I. Code tit. 5, § 4501

(Supp. 1976) granted broad discretion to the Director of the Bureau of Corrections to transfer inmates to federal prison facilities and affirming the district court's dismissal of petitioner's habeas corpus petition). Thus taking at face value Warden Adams's testimony that Davis is in danger from other inmates at John Bell and Assistant Director Faulkner's testimony that the BOC has determined that considering the safety of Davis, other inmates, and BOC staff, Davis should be held at CJC it was proper for the Court to deny Davis's motion. To do otherwise would interpose the Court into the administration of the prisons.

Davis argues that his alleged constitutional violations at CJC warranted the Superior Court grant his motion to transfer to John Bell because those singular incidences constituted impermissible BOC policies instituted at CJC. Davis argues that the singular communication with a BOC employee about his communications with his attorney and a single incident where he thought that a BOC employee was eavesdropping on his conversations established unconstitutional policies by the BOC. But these singular incidences by non-supervisory BOC staff do not satisfy Davis's burden to show that the BOC engaged in any unconstitutional policies that would warrant court intervention. But putting aside the fact that even if what Davis alleges were true, transferring him back to John Bell would not solve

any constitutional infraction, he has not even shown that these singular incidences constituted BOC policy.

Borrowing from 28 U.S.C. § 1983 jurisprudence, this Court follows the precedent set forth by the Supreme Court in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) about liability for employee allegedly unconstitutional actions that fall short of official policy. Following *Monell*, the Third Circuit has held that a plaintiff can establish in two ways municipal liability under § 1983: policy or custom. *Watson v. Abington Twp.*, 478 F.3d 144, 155-56 (3d Cir. 2007)

> Under *Monell*, a plaintiff shows that a policy existed "when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986))).
>
> A plaintiff may establish a custom, on the other hand, "by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Id.* (citing *Andrews*, 895 F.2d at 1480). In other words, custom may be established by proving knowledge of and acquiescence to a practice. *Fletcher v. O'Donnell*, 867 F.2d 791, 793-94 (3d Cir. 1989).

Id.

Here, Assistant Director Faulkner testified that the BOC views the communications between inmate and attorney as sacrosanct and that the mistaken instruction from one BOC employee to counsel was unfortunate. What is more, because Davis is on lockdown, a BOC employee must be close enough to Davis to ensure safety but not so close that they overhear Davis's communications with counsel. That delicate balance would exist at either CJC or John Bell. The Court was satisfied with the testimony of Assistant Director Faulkner that the mistaken instruction was not BOC policy and the assurance from Assistant Director Faulkner that any miscommunication from a BOC staff member would be rectified.

Thus, Davis has failed to show that a decision-maker has sanctioned any unconstitutional policy about attorney-inmate communications at the BOC, whether written or verbal. Davis has also failed to so that the decision-makers at the BOC have allowed a pervading and permanent unconstitutional policy. And the Court properly found that Davis failed to meet his burden to show that the testimony proffered by the BOC under oath was materially false. (A133) (citing *Simon v. Mullgrav*, 2018 V.I. LEXIS 97 at *30). Besides, even if Davis had successfully shown that the BOC promoted policies that violated his Sixth Amendment right to counsel, he failed to show how a transfer to John Bell would cure any alleged constitutional infraction.

The Court thus did not abuse its discretion by denying Davis's motion for transfer, and this Court should affirm the Court's order.

CONCLUSION

This Court should affirm the orders of the Superior Court here because Davis has not satisfied his burden to show that the Court abused its discretion to impose a $250,000 cash bail or deny Davis's motions to compel and transfer. Thus, this Court should dismiss this appeal.

Respectfully submitted,

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Dated: February 22, 2023

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CERTIFICATE OF BAR MEMBERSHIP

IAN S.A. CLEMENT, Counsel for the Appellees, certifies that he is a member in good standing of the bar of the Supreme Court of the Virgin Islands.

/s/ Ian S.A. Clement

CERTIFICATE OF FILING AND SERVICE PURSUANT TO V.I.R. App. P. Rule 15(d)

I certify that on February 22, 2023, the undersigned caused a true, correct copy of the preceding Appellees' Brief to be efiled according to the Rules of the Virgin Islands Supreme Court and served via VIJECMS on Howard L. Phillips Esq., counsel for Appellant.

/s/ Ian S.A. Clement

CERTIFICATE OF WORD COUNT PURSUANT TO V.I. R. App P. Rule. 22(f)

I certify that the foregoing brief does not violate the 7800-word limit. The word count for the herein brief is 6,733 words.

/s/ Ian S.A. Clement