IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JIMMY DAVIS, Appellant/Defendant, vs. PEOPLE OF THE VIRGIN ISLANDS, Appellee/Plaintiff.	**SCT- CRIM-2022-0115** Superior Court Case No. SX-2020-CR-00098

On Appeal from the Superior Court
of the Virgin Islands,
Division of St. Croix,
Case No. 2020-CR-00098 (STX)

OPENING BRIEF OF APPELLANT

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Statement of Appellate Jurisdiction

This Court has jurisdiction under 4 V.I.C. § 33(d)(4) as this is an appeal of an Order entered in the Superior Court imposing excessive bail, denying the defense motions for production of material evidence and to be transferred from CJC on St. Thomas to the Bell facility on St. Croix.

Statement of Issues Presented

1. Whether the Superior Court abused its discretion when on remand the Court required an excessive bail of $250.000.00, cash only.

2. Whether the Superior Court abused its discretion by considering attorneys motions to withdraw and staff complaints of unwanted telephonic contact with Davis when determining the risk of danger to the community at large.

3. Whether the Superior Court abused its discretion by reducing to the bail requirement to a *de facto* "no bail."

4. Whether the Superior Court erred by denying Davis' Motion to Compel BOC to Produce Evidence supporting the agency's representation that Davis was not transferred to CJC for

retaliation or for punishment purposes; but rather because of potential harm to Davis *by other inmates.*

5. Whether the Superior Court erred when it denied Davis' Motion for an Order Directing BOC to transfer Davis from CJC to the Bell facility on St. Croix when his attorney is located on St. Croix; and when the *confidential* attorney-client relationship has been substantially impaired by CJC procedures and actual practice.

Standards of Review

This Court exercises plenary review of the Superior Court's application of law, including questions of statutory construction. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I.2007); *Bryan v. Ponce*, 51 V.I. 239 (2009), 2009 WL 586733, (2009).

To the extent the trial court's ruling is based upon a legal precept (such as an interpretation of a statute or rule) the review is plenary. *Davis v. People*, 76 V.I. 514, 528, 2022 VI 8, ¶ 33 (2022)

To the extent that challenges to the sufficiency of the evidence leading to defendant's continued detention, the trial court's findings are reviewed *de novo. Browne v. People of Virgin Islands*, 50 V.I. 241, 247

(2008) citing *United States v. Delker,* 757 F.2d 1390, 1394–1399 (3d Cir.1985) ("While we are not free to ignore the trial court's reasoning, we may amend or reverse a detention or release decision, if our review of the record compels a different result.").

The trial court's determination of the conditions of release, including the amount of bail, is reviewed for abuse of discretion. *Rieara v. People*, 57 V.I. 659, 665-66 (V.I. 2012); *Davis v. People,* 2022 VI 8, ¶ 31 (2022)

Statement of Related Cases

Jimmy Davis ("Davis") is not aware of any related cases or proceedings at this time.

Statement of the Case

On or about April 6, 2020 the People of the Virgin Islands charged Davis with 2 counts of Rape in the First Degree, 14 V.I.C. §1701 (2)(3); Unlawful Sexual Contact in the First Degree, 14 V.I.C. §1708 (a)(1); Burglary in the First Degree, 14 V.I.C. §442 (4); Assault in the First Degree, 14V.I.C. §295 (3); and Home Invasion, 14 V.I.C. §476 (a).

Davis is indigent and has no monies, financial assets or other resources.

Statement of Facts

St. Croix is the situs of the offenses alleged. Appointed counsel practices on St. Croix. Davis was initially held at the Bell Detention facility on St. Croix ("Bell"). He was transferred to the St. Thomas Criminal Justice Center ("CJC") after an incident involving throwing feces.

During their initial meeting Davis was unaware this Counsel was appointed to represent him because he had not received the Order of Appointment and Notice of Appearance sent to him by U.S mail some time prior to the interview. A CJC employee advised Counsel that to ensure Davis received his mail timely Counsel should send correspondence to Davis by using a BOC email address. [JA 000009, ¶10]

During a videoconference with counsel shortly after appointment Davis intentionally unexpectedly opened the door to the interview room and a uniformed corrections officer was seen moving quickly away from the door. A camera could be seen mounted in an upper corner of the room used for attorney client video conferences. [JA 000011]

As a result, Davis filed an Emergency Motion on October 4, 2022 to be returned to the Bell facility. The motion was founded on the First Amendment and Sixth Amendment constitutional right to confidential access to his attorney and his right to effective assistance of counsel outweighed BOC employees' personal objections to his return to the Bell facility.

1. Pertinent Facts related to Excessive Bail.

On remand a hearing on Davis' motion for a bail reduction was held on October 26, 2022. [JA000137] The motion was granted to the extent that bail was reduced from one million dollars ($1,000.000.00) to two hundred fifty thousand dollars ($250,000.00) *cash*.

When determining the appropriate bail, the Court considered attorneys motions to withdraw because of prior bad experiences with Davis. For example, a nearly all-female office staff were worried about dealing with Davis as a client; [JA000120] attorney represented Davis in the past; [JA000121] Davis called daily and sometime more than once making threatening remarks. [JA000120].

The Court listed additional attorneys who were assigned to represent Davis in this case who moved to withdraw for various reasons

to include attorneys, Kuczynski, McChain; Moorhead.; Jurek; Henry; Otto; and Moorhead regarding threats to his brother Judge Molloy. [JA 000121]

2. Pertinent Facts related to Transfer and Production of Evidence

On October 4, 2022 Davis filed an Emergency Motion to Return to St. Croix because his return was necessary to have confidential communication with Counsel. [JA 000013] Davis proffered evidence that practices at the CJC impeded the attorney-client relationship so as to deny confidential oral and written communication between Davis and his assigned counsel.

BOC alleged that Davis threw feces an employee. [JA 000072] No charges were brought for this alleged conduct. [JA000043]

Davis moved for production of any records indicating he was at risk of harm by inmates because BOC claimed that there was a risk that Davis would be harmed by inmates; and that his transfer was not in retaliation or punishment for being irascible with officers and throwing feces at a medical staff member. The motions were denied. [JA 000130]

3. October 26, 2022 Hearing

At the October 26, 2022 hearing Davis moved to be released on his

own recognizance or, alternatively, for bail to be set at an amount that he as an indigent defendant would be able to make. [JA000082]

Davis' sister, Jacqueline Davis Wathey, testified as a potential third party custodian. [JA 000094] Wathey testified that Davis had never been violent with her or her family, and emphasized that he "just talks a lot" [JA000098] [JA000099] and that she had no concerns about him living with her. [JA000098] She testified that Davis was able to follow their parents' rules growing up. [JA000097] She indicated her belief that Davis needs counseling which she agreed to try to arrange for if Davis were released into her third-party custody. [JA000098] Lastly, she emphasized that their mother is very sick, and that she is the only one to care for her. [JA000096] [JA000098] Wathey conceded, however, that if Davis were to be released, she would not be at home to supervise him while she was at work. [JA 000097] (But Davis would be on electronic monitoring in her absence) Davis' sister testified that even if he helps with their Mother she would turn him in if he violates any terms of his release. [JA000097-JA000098]

The People called Virgin Islands Police Commander Naomi Joseph. Joseph testified that she would be concerned to community safety based

on the instant matter. [JA000102] She testified about prior high speed chases to catch Davis and that the VIPD does not have the resources to chase him down. [JA000105]

Joseph testified that Davis had been "charged" with assaulting police officers, on more than one occasion. But even though she has known Davis since he was a juvenile, she had never witnessed him being violent with police. [JA 000104] [JA000107] Joseph testified that Davis has no convictions for assaulting a police officer because they are dismissed by the Attorney Generals' office. [JA000107] Joseph testified without supporting evidence that his "[s]ister ain't going to have no control over Jimmy." She volunteered that "if you put resistance on him, he fights. [JA 000105]

On cross-examination Joseph testified that the police chased Davis; but admitted that Davis called the police and turned himself in. [JA 000107] [JA 000109:] She explained Davis has no convictions for assaulting the police because the cases were dismissed by the government, not the police. [JA 000107]

Joseph testified that Davis does not follow any Court's orders. [JA000104] On cross examination she testified that a district court judge

put Davis in chains and gag to keep him quiet. [JA 000108] When asked whether Davis had violated any release conditions [JA000108] Joseph testified without giving a time frame that one time Davis was supposed to stay with his grandmother but went "somewhere else." [JA 000108]

Joseph testified on cross-examination that she knows of no instances where Davis was ordered to remain on St. Croix but left. [JA 000109] Joseph also volunteered, with no supporting evidence, that Davis stayed on St. Croix as ordered by the Court and "terrorized" it. [JA 000109]

Jimmy Davis filed a timely Notice of Appeal on December 13, 2022.

Summary of Arguments:

A. The Superior Court Judge abused its discretion imposing excessive bail and failing to reduce bail to the "*least restrictive"* amount necessary to assure Davis appears for trial. (no trial date has been set) V.I. R. CRIM. P. 5-1

B. The Superior Court abused its discretion by considering motions to withdraw by attorneys who have or would have a "special relationship" with Davis that is unrelated to the risk of danger to the community at large.

C. The Superior Court, cognizant of Davis' indigency erred by reducing bail to $250,000 cash only.

D. The Superior Court erred by denying Davis' Motion to Compel BOC to produce material documentary evidence (inmate records) supporting its representation that Davis was not transferred to CJC for retaliation or for punishment; but rather because of a risk of harm to Davis *by other inmates.*

E. The Superior Court erred when it denied Davis' Motion for an Order Directing BOC to transfer him from CJC to the Bell facility when his attorney is located on St. Croix and the confidential attorney-client relationship has been indisputably disrupted by CJC's procedure and actual practice.

ARGUMENT

A. The Superior Court abused its discretion by requiring excessive cash bail.

On remand the Court conducted an individualized assessment to determine the appropriate bail for Davis and ordered a reduction without a difference. Reducing bail from $1,000,000.00 to $250,000 for a lifetime indigent is still excessive and tantamount to Davis having *no bail* at all.

It is the equivalent of a now impermissible straight detention order. See *Karpouzis v. Gov't of the Virgin Islands*, 36 V.I. 132, 147–48 (D.V.I. 1997)

Consequentially the question becomes what amounts to "no bail" and excessive given the purpose of bail is to ensure Davis appears for trial, without harming others. See *Tobal v People ,* 51 V.I. 147, 156-57 (collecting cases) (In many jurisdictions "[J]udges may consider the risk of flight, danger to society, or both when setting conditions on bail, *but may not use such considerations to deny bail entirely*.").

A $250,000.00 cash only bail for a known life-long indigent defendant should trigger *a closer scrutiny* by this Court to ensure that a quarter million dollars cash is not excessive and reasonably necessary to ensure Davis appears for court without harming anyone. *Davis* at ¶45.

The burden of proof for establishing facts related to bail under §3 of the Revised Organic Act ("ROA") lies with the People. *Browne v. People of Virgin Islands,* 50 V.I. 241, 260 (2008) The standard of proof for the evidentiary hearing is clear and convincing. *Davis v. People*, 76 V.I. 514, 533, 2022 VI 8, ¶ 41 (2022)

It is axiomatic that bail must not be excessive and the conditions imposed must be the "*least restrictive"* conditions necessary to assure

Davis appears for trial. Here 24-hour electronic home monitoring and a telephone prohibition are sufficient to ensure Davis' appearance and the safety to the community. The issue is the excessive bail.

This Court has promulgated three considerations that are relevant to the determination of bail:

> (a) "there is no one condition or combination of conditions which will reasonably assure the safety of the community" (Community Safety) or (b) "the person charged will appear" (Court Appearance) or (c) the person has taken actions that attempted to undermine the integrity of the judicial process, e.g., witness tampering, evidence tampering
>
> *Davis* at ¶ 46.

Here, a) there are conditions, such as a tailored phone use prohibition and 24-hour electronic home monitoring that would mitigate any risk to the safety of the community alluded to in the Memorandum (phone rudeness and threats); (b) there was no evidence presented at the evidentiary hearing that Davis has a history of failing to appear for any court proceeding. The Judge has long and consistently acknowledged that Davis is not a flight risk; (c) while the VIPD witness testified that Davis eluded the police in attempt to arrest him on the instant offense, Joseph admitted under cross examination that Davis contacted the police and

turned himself in. And there was no evidence presented of Davis witness or evidence tampering.

In *Davis* this Court promulgated a list *of* material facts to be considered in making a bail assessment:

> (a) the person's pattern of behavior consisting of their past and present conduct;
> (b) the nature and circumstances of the offense charged;
> (c) the weight of the evidence presented;
> (d) the person's family ties;
> (e) their employment;
> (f) their financial resources;
> (g) their character;
> (h) their mental condition;
> (I) their length of residence in the community;
> (j) their record of convictions;
> (k) any record of their appearance at court proceedings as a criminal defendant;
> (l) flight to avoid prosecution;
> (m) failure to appear at court proceedings;
> (n) whether, directly or through an agent, they threatened, injured, or intimidated witnesses or jurors in order to obstruct justice.
> (o)whether the accused has violated terms of pre-trial release in the past; and
> (p) whether the defendant failed to appear in the past.

Davis v. People, 76 V.I. 514, 536, 2022 VI 8, ¶ 47 (2022)

These "material facts" are applicable to Davis as follows:

(a) The Court extensively recounted complaints of Davis' past belligerent conduct with attorneys, court staff and employees;

(b) The nature of the offense, sexual activity with a minor with

knowledge of the minority status, must be considered with *People v Moran* in mind;

(c) The weight of the evidence for the instant offense must also be considered consistent with *People v. Moran* in mind;

(d) Davis has multi-generational family ties on St. Croix who without equivocation support his release (third party custodian);

(e) Davis has no employment due to his incarceration;

(f) Davis financial resources should not prejudice him, *infra.*;

(g) Davis' character may depend on the perspective of the perceiver;

(h) Davis has no mental condition, other than irascibleness;

(i) Davis is a life-long resident of St. Croix;

(j) The NCIC record of convictions is unreliably inaccurate, *infra.;*

(k) Davis has many appearances in court as a criminal defendant;

(l) He has no history of flight to avoid prosecution;

(m) Davis has no failures to appear at court proceedings;

(n) There is no evidence in the record that Davis directly or through an agent, attempted to obstruct justice;

(o) There was no evidence presented that Davis has violated terms of pre-trial release in the past. Joseph testified that Davis failed to timely report to a U.S. Probation as directed upon his post-conviction release from federal custody.

(p) See (m) above.

V.I. R. CRIM. P. 5-1(a) requires that *all persons* not convicted of the offense *shall* be bailable and excessive must not be required. Specifically, rule 5-1(b) provides in pertinent part:

> (b) Forms of Bail or Release Conditions. *Excessive bail shall not be required.*

Whether a form of bail is adequate is based on whether it ensures the presence of the accused at trial, protects the community from risk of physical harm, and assures the integrity of the judicial process, all by the least restrict means necessary.

Davis moved to be released on personal recognizance. First, where the court finds unsecured personal recognizance inadequate the court may order the accused's release upon his posting of an *unsecured* bail. V.I. R. Crim. P. 5-1(b)(2). Second, a court may order the accused to post a *secured* bail bond in exchange for his release. V.I. R. Crim. P. 5-1(b)(5). *Third, if the Court finds that a secured bail bond is inadequate, then the Court may order the accused to post a cash bail bond*. V.I. R. Crim. P. 5-1(b)(6), *People v. Rionda*, 2021 VI SUPER 31, ¶ 7.

§ 3 of the ROA mandates that Virgin Islands judges grant bail in sufficient sureties to all defendants other than those charged with first degree murder. *Tobal at* 160.

1. Excessive Bail

The United States Supreme Court has held that the excessive bail clause of the Eighth Amendment to the United States Constitution does not guarantee a right to bail in all cases. *See U.S. v. Salerno,* 481 U.S. 739, 752–54, (1987). Insufficient funds to pay bail "does not automatically render the bail amount excessive or unconstitutional." *People v. Rionda,* 74 V.I. 258, 267, 2021 VI SUPER 31, ¶ 10.

However, Congress evidenced an intent to ensure that Virgin Islands defendants were also guaranteed an explicit right to bail. Revised Organic Act (ROA) § 3, provides in pertinent part.

> "[a]all persons shall be bailable by sufficient sureties in the case of criminal offenses…"

Browne v. People of Virgin Islands, 50 V.I. 241, 256–57 (2008); *Tobal v. People of Virgin Islands*, 51 V.I. 147, 154–55 (2009)

A defendant may no longer be detained without bail. A judge may not deny bail completely upon finding that the defendant presents a flight risk or a danger to the community. The judge may take those facts into consideration when determining the sufficiency of the sureties in setting bail. *Tobal* at 161 (2009)

Importantly, determining the excessiveness of bail is not based on a finding that the amount set is beyond the defendant's means, but rather that the amount set is "greater than necessary to achieve the purposes for which bail is imposed." *People v. Cajuste*, 2017 WL 679328, at *2 (V.I. Super. Ct. Feb. 15, 2017).

Davis submits that $250,000.00 bail – essentially operates as no bail at all *and* given Davis has no history of nonappearance, not a flight risk and risk of harm to the community articulated by the court can be eliminated with appropriate conditions – is excessive.

It is long held that the prohibition against excessive bail requires that bail is set at an amount sufficient to ensure the defendant's appearance at trial. *See Reynolds v. U.S.*, 80 S.Ct. 30, 32 (1959) ("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."); *Stack v. Boyle*, 342 U.S. 1, 3 (1951) citing *U.S. v. Motlow*, 10 F.2d 657 (1926) (finding that bail set at an amount higher than to assure the defendant's presence at trial is excessive); *Cartois v. People*, 61 V.I. 257, 260 (V.I. 2014) (quoting *Tobal v. People*, 51 V.I. 147, 155 n. 4 (V.I. 2009) ("The purpose of bail ... is to assure the defendant's attendance in court, *and it cannot be a means of punishing*

the defendant.); *People v Simmonds,* 48 V.I. 320, 324 (V.I. Super. Ct. 2007) (finding that the purpose of bail has always been to "ensure that the [d]efendant will stand trial" and never to punish the defendant).

2. Flight Risk

Because the primary purpose of bail is to assure the Defendant's appearance at trial, *determining the flight risk of the Defendant is the most important factor* in setting bail where the offense or offenses charged are statutorily non-dangerous. *United States v. Himler,* 797 F.2d 156, 160 (3d Cir.1986).

Here, with respect to Davis the Court found no risk of the "most important factor." *This weighs in favor of finding $250,000.00 cash only bail to be excessive*. Furthermore, the Superior Court had before it that facts that Davis was born and raised on St. Croix and after many arrests never left the island to avoid prosecution. *Davis v. People,* 2022 VI 8, ¶ 23 (2022)

Logic dictates the lesser the risk the lesser the bail requirement should be, otherwise the bail is excessive.

B **The Superior Court abused its discretion by considering attorney's motions to withdraw that do not reflect the community at large.**

The Memorandum included several pages recounting attorneys' motions to withdraw as counsel for Davis. Some attorneys moved to withdraw because staff didn't want telephonic contact with Davis. Other attorneys moved to withdraw because of prior representation and Davis requested that they withdraw [JA000120] – [JA000122]. No attorney moved to withdraw because of a threat of imminent or actual violence.

Attorney motions to withdraw along with staff and clerk's complaints do not justify excessive bail. Davis' use of the telephone to call his former attorneys and staffs can be readily proscribed by a condition prohibiting telephone use with a few exceptions. In addition, Davis has no reason to contact his former attorneys or their staff.

In determining the history and character of a defendant, a court may consider the defendant's family ties to the community, employment, his criminal record, his mental and physical condition, and financial resources. Attorney motions to withdraw do not fit in this rubric.

The attorney-client relationship is a "special" one requiring sometime close contact and necessarily communicating in high stress situations. The relationship also requires trust and a comfort level with

one another that is not reflected in Davis and the community at large. Attorney motions to withdraw are inapposite to the bail determination.

C. The Superior Court, cognizant of Davis' indigency denied bail *de facto*.

With respect to a bail determination this court has recently noted that "a defendant's economic position" must not operate to their prejudice. *Davis at* ¶ 4, citing *Miller v. People*, 67 V.I. 827, 848 (V.I. 2017); *Karpouzis v. Gov't of the Virgin Islands*, 36 V.I. 132, 143 (D.V.I. 1997) (Bail must not "amount to 'the *sub rosa* use of money bond' to detain" a dangerous defendant.). *If a financial condition is beyond a defendant's means, the practical effect is to deny bail*. *Davis v. People,* 2022 VI 8, ¶ 45 (2022).

Cash bail is appropriate after no other forms of bail is adequate.

> (6) *Cash Bail Bond. Where none of the foregoing forms of bail is found adequate* by the court to assure the presence of the defendant for trial, protect the community from risk of physical harm to persons, or assure the integrity of the judicial process…

Bail is excessive when it is set at an amount more than necessary to ensure the defendant's appearance at court proceedings. *See Cartois* at 2601; *Tobal* at 156-57. That is the case here.

Where the defendant's ability to pay matters under the Eighth Amendment *is the point at which bail becomes so high that it guarantees the denial of his freedom*. *Bandy,* 81 S.Ct. 197, 198 (1960) (citing *Stack,* 342 U.S. at 72). For the case of an indigent defendant, "the fixing of bail in even a modest amount may have the practical effect of denying him release." *Id.* The consequences of such are not only the denial of the defendant's freedom, but also the deprivation of his trial rights. *Bandy,* 81 S.Ct. at 198 ("Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel..."). As such, the imperative for courts is to set bail at an amount that achieves the purposes of bail, *without going beyond them*. A quarter million dollars **cash** bail is far beyond what is necessary to ensure Davis' appears for trial without harming anyone, Davis' bail remains excessive.

D. The Superior Court erred denying Davis' Motion to Compel BOC to produce evidence (inmate records) that would support the claim that Davis was not transferred to CJC for retaliation or for punishment; but rather because a risk of harm *by other inmates.*

The Superior Court should have ordered the BOC to produce evidentiary proof of its claim that Davis was not moved to the CJC in *retaliation* for throwing feces on a medical staff person or for *punishment*

to mollify corrections officers. This is important because BOC represented to the court that Davis was transferred because a risk of harm by other inmates. Assistant Director Faulkner testified that there was an agreement to harm Davis if he is returned to Bell without stating that the agreement was between inmates. *See infra.* Bell Warden Adams testified that is his understanding that separating Davis from other inmates will not resolve the problem. Their testimony raises a reasonable inference that the risk of harm at Bell is from Bell employees, not other inmates. The chagrin of Bell employees makes it more likely that Davis was transferred in retaliation and to punish him.

On November 15, 2022 Davis filed an Emergency Motion for an Order Directing Production of Evidence or implement Investigation. If BOC transferred Davis to the CJC for an impermissible reason(s) this weighs in favor of granting his motion to be returned to St. Croix where he can have confidence that he could have confidential communication as his attorney, and importantly better positioned to assist preparing his defense. Davis ability to cooperate with his counsel has been sorely hampered by the CJC and there is no reason to believe that the conduct

of the offending CJC officers will change based on the bare, unenforceable representations of the BOC administration.

Without evidence a Court cannot *find* a fact. This includes the allegation that Davis' safety would be in jeopardy from other inmates if he is returned to St. Croix. BOC should produce material evidence solely held by the agency.

Courts should not rely solely on the veracity of governmental agency representations. Such reliance in this instance, without evidence, has resulted in blatant and intentional violations of Davis' right to confidentiality and due process. See *United States v. Pileggi*, 361 F. App'x 475, 480 (4th Cir. 2010) citing *United States v. Carr,* 66 F.3d 981, 983 (8th Cir.1995) (per curiam). ("A due process violation is established if the defendant shows that the court relied on *materially false information* and that the information was demonstrably the basis for the challenged sentence.").

BOC has the burden of showing, not just proclaim, that the decision to transfer was not punishment or in retaliation for Davis' "disruptive" and "unruly" behavior (such as throwing feces). Faulkner's assertion that

Davis was transferred because of disruptive and unruly behavior points directly at BOC employees. [1]

The Court recognized the BOC as "an independent bureau within the executive Branch of Government" which has significant discretion over management over its internal affairs and facilities" [JA000132]

Here BOC is asking the Court to take its word as a naked verity that Davis's safety would be in jeopardy by inmates if he is returned to St. Croix. Davis does not agree and is confident no such evidence of inmate risk exist.

BOC is not shielded from judicial oversight. See *Simon v. Mullgrav,* 2018 WL 4562767, at *9 (V.I. Super. Ct. Sept. 19, 2018) ("Prison officials are not free to promulgate regulations or engage in practices that unreasonably deny an inmate unmonitored access to his attorney…") BOC practices are subject to the rational basis test. The question is whether the action of the agency, transferring Davis to the CJC, is "reasonably related to a legitimate penological interest."

[1] Correction: Counsel erroneously proffered that Davis threw the feces because he didn't want the medication, but Davis threw the feces because the medical staff person had thrown medication at him.

The court made a factual error. Warden Rivera did not testify that materials could be provided for facility security reasons. His testimony was limited to that he was the CJC Warden and his name. [JA000062]

Assistant Director Faulkner ("Faulkner"), however, testified that Davis's "disruptive behavior" and "unruly behavior" at Bell created a situation that made his continued presence a risk to himself. [JA00064] Faulkner testified that Davis was transferred from St. Croix to St. Thomas out of a legitimate concern for his safety, as well as the safety and well-being of the facility and other *inmates at the facility*. [JA000064] He testified that there is credible information, which he did not want to disclose as that would "jeopardize the security of this facility." [JA00074] He also testified that that there is an agreement to do Davis harm should he return to St. Croix. [JA00074] Faulkner *did not* testify that the agreement to harm Davis was between inmates because of Davis' "disruptive" and "unruly" behavior.

In response to the Court's query as whether Davis could be segregated at Bell and that would solve the issue. Bell facility Warden Adams answered, "No, sir. It is my understanding that it would not." [JA000074] A reasonable inference can be made that segregation from

other inmates will not solve the problem *because the inmates are not the problem*.

The motion was necessitated because BOC claimed that Davis was not transferred to the CJC because of retaliation or punishment. Retaliation and punishment should be disfavored non-penological reasons to transfer Davis to a location which has been deleterious to the attorney-client relationship,

The agency decision to transfer would ordinarily be inconsequential. But, Davis' detention on St. Thomas while his attorney is on St. Croix has substantially impacted attorney-client already. So much so that Davis has no confidence that he will be able to confer with counsel in confidence at the CJC. The Bell facility and practices are designed to insure attorney client confidentiality where the CJC does not.

Davis has reason to believe that what BOCs represented to the Court is mendacious. He is not at risk of harm by an inmate at the Bell facility because he does not have antagonistic relations with any Bell inmate. There is no record from 1996 to 2022 that he does. On the other hand, it is well documented that Davis has had many antagonistic relationships with some Bell employees for years.

E. **The Superior Court erred when it denied Davis' Motion for an Order Directing BOC to return him to the Bell facility.**

Davis submits that confidentiality is a cornerstone of the attorney-client relationship and that every form of communication between Davis and his counsel; U.S. mail; online and telephone communication have been compromised by conduct such as eavesdropping, requiring timely mail to be sent through BOC email account; and a ceiling camera in the inmate online interview room.

Inarguably the attorney-client relationship between Davis and his Counsel has been unduly hampered by his detention at the CJC.

1. Mail

A prisoner's right to receive mail is long held protected by the First Amendment. *Pell v. Procunier,* 417 U.S. 817, 822 (1974). Corrections officials may impose restrictions on incoming mail that are "reasonably related" to the prison's security needs or other "legitimate penological objectives." *Turner v. Safley,* 482 U.S. 78, 87, (1987). In order to justify an intrusion into the attorney-client correspondence corrections officials must "put forth legitimate reasons for interfering with a prisoner's incoming mail." *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992)

Corrections officials may require that all legal mail be clearly marked as such before receiving special treatment. *Wolff* at 576

Here counsel was advised by a CJC officer that to ensure timely mail delivery (and presumably any written material) may be sent to Davis by email by using a BOC email address. [2]

2. Sixth Amendment – Intrusion

The Sixth Amendment safeguards the attorney-client relationship from unwarranted intrusion. *Wolff v. McDonnell,* 418 U.S. 539 (1974). The Supreme Court of the United States has long recognized that the Sixth Amendment protects the attorney-client relationship from intrusion in the criminal setting. *Wolff* at 576 This protection is a development stemming from an inmate's fundamental right to unfettered access to the courts, without which all other rights of an inmate are illusory.

The CJC legal mail policy/practice, as expressed by a CJC employee, requiring that if timely delivery is wanted legal mail should be sent to Davis through a BOC email address, utterly fails to reasonably protect Davis' right to confidential legal mail. This practice does not pass

[2] *See* Declaration of Counsel [JA000008 – JA00009]

constitutional muster because it is not "reasonably related to legitimate penological interests." *See Turner v. Safley*, 482 U.S. 78, 89, (1987) (when a prison policy or practice impinges on an inmates' constitutional rights, the regulation is valid only if it is reasonably related to legitimate penological interests).[3]

Here, there is no penological reason to justify attorney-client correspondence and case material be sent to Davis through a BOC email; there is alternative housing location for Davis; a transfer would have no impact on other inmates; guards (except perhaps the medical staff who allegedly had feces thrown at him in response to throwing medication at his patient); or allocation of resources.

3. Confidential Video and Telephone

Davis' oral communications with his counsel must be confidential. Davis' *right to access to the court* is denied if he is not allowed to privately communicate with his attorney. In *Ching v. Lewis,* 895 F.2d 608, 610 (9th Cir.1990) the court held that the *right of access to the courts includes contact attorney visitation*. *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir.

[3] The BOC did promise that it would do better but Davis has no trust that the CJC employee will continue intruding in his attorney client relationship notwithstanding assurances by the BOC administration.

1993) (An inmate's ability to communicate with his lawyer is protected by the constitutional right of access to the courts and may implicate the Sixth Amendment right to assistance of counsel in criminal proceedings) *See also Richardson v. Superintendent Coal Twp. SCI*, 905 F.3d 750, 764 (3d Cir. 2018) ("The Supreme Court has recognized that the Sixth Amendment guarantees a 'right to counsel at all critical stages of the criminal process.'") Thus, any practice that permits monitoring (or eavesdropping intentionally or inadvertently) of a defendants' phone calls or video conferences with his attorney must be reasonably related to a legitimate penological interest in order to be valid. *See Turner* at 89.

The Bell facility has an attorney interview room, with a metal door that is specifically designed for attorney client-contact. [JA000010] Based on counsel's experience CJC does not appear to have the same. At least with respect to the area where Davis has been directed to use to communicate with his attorney by phone and video. While on Zoom counsel could hear others talking *outside the room*; an employee was very likely intentionally listening to Davis' talking with counsel and appeared to quickly move from the door when it was unexpectedly opened by Davis. [JA 000011] Additionally, there is at least one camera-like monitoring

device located in an upper corner of the room near the ceiling as would be used to videotape interviews. [JA 000011]

There can be no confidence that despite representations by an agency representatives CJC employees will honor those assurances.

CONCLUSION

For the reasons set forth above, the decision of the Superior Court of the Virgin Islands must be reversed.

Respectfully submitted,

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Dated: January 23, 2023 By: s/ Howard L Phillips

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned attorney, Howard L. Phillips, certifies he is regularly admitted to the Virgin Islands Bar under Supreme Court Rules 201-201 and is therefore a member of the Bar of the Supreme Court.

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1. I certify that this brief complies with the type-face, type-volume, type-style requirement, does not exceed 7,800 words (contains 6775 words), that it is printed in proportionally-spaced 14-point font.

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CERTIFICATE OF SERVICE

I certify that an original and six copies of this brief and the appendix were filed with the Court pursuant to Rule 22 and that two copies of the brief and one copy of the appendix were served via hand delivery and electronic mail on January 23, 2023 upon Amie Simpson.

/s/ Howard L Phillips
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As to the above Certifications