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)

REPLY BRIEF OF APPELLANT

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Right to liberty

> "The principles of equal protection and substantive due process converge in the money bail context. The accused retains a fundamental constitutional right to liberty."
>
> *United States v. Salerno*, 481 U.S. 739, 750 (1987)
> *In re Humphrey,* 1482 P.3d 1008, 1018 (2021)

REPLY

A. Merely reducing bail from $1,000,000.00 to $250,000.00 because it's *enough* is the wrong standard.

The standard for setting bail is not "enough."[1] The Appellee's heading for Point I and argument that $250,000.00 is enough to ensure community safety is specious. The same could be said for $1,000,000.00 or $5,000,000.00. Notably, both sums are excessive. With respect, $250,000.00 *cash* is not the "least restrictive" bail by any measure. Common sense and basic math dictate that a tenth of this amount is more than enough to ensure Jimmy Davis remains in pretrial custody.

The standard of proof for an evidentiary hearing is "clear and convincing." *Davis* at ¶41. Contrary to Appellees' argument the testimony did not support by "clear and convincing" evidence that a high *cash* bail is necessary.

[1] Appellee's Brief. Pg 14.

By the Appellee's count Davis has been arrested and charged a remarkable thirty-one (31) times; with two (2) convictions in Superior Court.[2] This may say more about long term aggressive policing towards Davis as an individual than risk to the community. Commander Joseph testified basically that if you push him, he pushes back. [JA 105]

1. Flight Risk

First, at every stage and opportunity the Superior Court has found that *Davis is not a flight risk*. E.g., Memorandum Opinion JA118, JA 126, *Davis,* ¶ 12. Thus, the appellees argument counselling that flight risk is one of the factors justifying a high cash bail is desultory.[3]

2. Motions to Withdraw

Next, the appellee argues that the court properly found that a high cash bail was "needed" because several "appointed" attorneys moved to withdraw.[4] The Appellee's brief reproduces attorney complaints to support a claim that Davis is a danger to the community.

However, Appellee failed to address the issue of whether attorney and staff representative are a class based on a "special relationship" and

[2] Appellee Brief Pg. 16
[3] Appellee Brief Pg. 15
[4] Appellee Brief Pg. 19

not representative of the community. All of the withdrawn attorneys were appointed by the Court and as such are extensions of the judiciary. Therefore, a special relationship exists.

For instance, in negligence, *See Pena v. Greffet*, 922 F. Supp. 2d 1187, 1226 (D.N.M. 2013) (elucidating "[a] special relationship exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual (e.g. prisoner or mental patient and pretrial detainee); *See also Donastorg v. Daily News Publ'g Co.,* 63 V.I. 196, 307 (V.I. Super. Ct. 2015), (in these cases, the plaintiff and defendant enjoy a special relationship, beyond the general relationship that strangers share with each other).

The principle described in *Donastorg* is *akin* to the relationship between an indigent defendant and appointed counsel. This special relationship is beyond the general relationship that strangers share with each other.

Davis argues that the attorney client relationship cannot be fairly extrapolated to the community. His conduct with appointed counsel – to include present counsel – is circumscribed by this relationship. There is no evidence that Davis telephonically harassed the public at large.

If the Superior Court's use of one or more withdrawal motion to set bail is found to be inappropriate – *such as the attorney complaint that Davis called daily* – severability is not possible. There is no way for this Court to ascertain how much weight the Superior Court placed on any particular or aggregate of attorney complaints. Therefore, all the motions to withdraw should be excluded from bail or release considerations.

3. The Bail Chart should not be an "anchor."

Bail schedules (chart) are the anti-thesis of the *individualized assessment*. A California Court observed that bail charts/schedules undermine judicial discretion necessary for individualized bail determinations, and are based on inaccurate assumptions such as defendants charged with more serious offenses are more likely to flee, and reoffend. Bail schedules enable the detention of poor defendants and release of wealthier ones who may pose greater risks. *In re Humphrey*, 228 Cal. Rptr. 3d 513, 540 (2018).

Bail schedules/charts provide standardized money bail amounts based on the offense charged and prior offenses, regardless of other characteristics of an individual defendant that bear on the risk he or she currently presents.

The Appellee advocates that the Bail Chart is the starting point for setting bail; then add more bail money with each additional charge. [5]

Appellee's argument below flies in the face of this Court's decision in *Moran v. People*, 2022 VI 9, ¶ 1 (2022). Incredulously, even today the Appellee advocates bail should be set depending on the prosecutor's charging decision. The Appellee argues:

> "[i]f 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." [6]

This is the exact sort of "totalitarian-like" bail setting process *Moran* warned us against.

In *In re Humphrey,* 1482 P.3d 1008, (2021) the bail initially ordered was the bail schedule amount which was also the *anchor* for the later reduced bail order. *Humphrey* at 1013. However, the bail chart should have not be used as an *anchor* or *reference* point when setting bail.

The Superior Court's reliance on the bail chart, even for "comparison" purposes, without consideration of Davis' inability to pay violates Davis' right to due process and equal protection. *See Pugh, infra.*

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[5] Appellee Brief Pg. 18
[6] *Id.*

Moreover. the use of the bail chart for "comparison" is inapposite because it does not ensure the protection of the community. See *Schultz v. State*, 330 F. Supp. 3d 1344, 1364 (N.D. Ala. 2018):

> *"[T]he bail schedule does nothing to secure public safety*. A defendant with financial means who is charged with assault can go home within two hours of his arrest if he can post a … bond while an indigent defendant charged with fourth degree possession of a forged instrument who cannot afford to post a bond remains in custody awaiting a hearing…dangerous defendants charged with identical crimes are treated differently based on their financial status…"
> {Emphasis added]

The Court found that the bail schedule system discriminatory. Not all criminal defendants who pose a real and present danger to the public are indigent. The police detain only indigent criminal defendants believed to be dangerous. Whereas *dangerous defendants with means* enjoy pretrial liberty. Even the use of the bail chart as a comparison tool poses the question of whether the process entails comparing the facts of this case to the facts of another rape cases without knowing the facts of the latter.

The use of the bail chart/schedule for *any judicial purpose* is impermissible because the practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.

Lastly, and likely dispositive*, on its face the bail chart is limited to non-judicial officers.*[7] [8] [JA 172] Davis found no statutes, or legislation that provides the bail chart is intended to be the standard, starting point, or comparison tool for a defendant's pretrial individualized assessment for bail or pretrial release.

4. Indigency should not be determinative of freedom.

A cash bail of $250,000.00 will undoubtedly keep Davis, a lifetime indigent person, in custody. This may be what the Appellee meant by exclaiming this amount is "enough" money to protect the public (euphemism for "keep him in jail"). *See In re Humphrey*, 482 P.3d 1008, 1018 (2021) (California Supreme Court elucidated that other jurisdictions have similarly concluded that detaining arrestees solely because of their indigency is fundamentally unfair and irreconcilable with constitutional imperatives). The Fifth Circuit stated:

> "The incarceration of those who cannot [afford bail], *without meaningful consideration of other possible alternatives,* infringes on both due process and equal protection requirements"]

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[7] The Appellee states that the Court noted the bail chart for rape. Appellee Brief, Pg. 17

[8] The Superior Court Bail chart referenced in Appellee's brief, Pg. 18, is filed as an exhibit. [JA 172]

Pugh v. Rainwater 572 F.2d 1053, 1057, (5th Cir. 1978)

The Appellee argues that the Superior Court properly imposed a sufficient bail "despite his indigency;" and "the defendant's indigency would supersede the court's duty to protect the public;" [9] and courts "would be precluded from imposing any cash bail" for an indigent defendant.[10]

Davis is indigent and proposes that if cash is required it should primarily be no more than necessary to ensure he appears for trial and also to mitigate risk of danger to the community.

With respect to protecting the public from indigent defendants the Appellee curiously relies on *Stevens v People* 55 VI 550, 556 (2011) and *St. Thomas- St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (2007).

Stevens involved an agreement between the defendant and government related to early release from prison in exchange for testimony and whether there was a *Brady* violation. *Stevens* is distinguished in that it did not involve pretrial release. With respect to *Daniel* the issue was whether laches barred Daniel from challenging the

[9] Appellee Brief Pg. 23
[10] Appellee Brief Pg. 22

Board's refusal to certify him as a delegate. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (2007).

Lastly, on this point the Appellee argues that evidence supported the decision that the $100,000.00 "*standard"* could not protect public. In other words, the bail chart standard amount is insufficient but $250,000.00 would make sure that he remains in jail.

First, what does this mean? How would $100,000.00 bail *not* keep an indigent defendant in custody so as to justify a $250,000.00 bail?

5.. Twenty-four-hour Electronic Home Monitoring Detention is a viable least restrictive condition.

Apparently confused as to which party bears the burden of proof the Appellee argues, "*Davis has not proven that electronic home monitoring will keep him at home*."[11] The Appellee bears the burden of proving that electronic home monitoring would not keep him at home. *Davis v. People*, 76 V.I. 514, 533, 2022 VI 8 FN 12 (2022) citing *Browne v. People of Virgin Islands,* 50 V.I. 241, 260, 263 (2008).

There is no evidence that Davis ever tampered with or in any way tried to disable or escape an electronic home monitoring device. ("EHM")

[11] Response Brief Page 21.

On the other hand, Davis' sister, Jacqueline Wathey Davis, testified that she was willing to assume the responsibilities of a third-party custodian [JA 94]; that she employed by the Governor's office [JA 97]; that she would install and pay for a telephone land line for the electronic devise [JA 94-95] [JA97]; and that she has never seen Davis be violent with her or other family members. [JA 96] She testified that Davis has a big mouth but that he does not follow through. [JA 99] Wathey responded that no one could "track" Davis when she was at work, but that she would report if he violated the terms of his release. [JA 98] [JA 99] Frankly, that is the function of the electronic monitoring device.

6. Highspeed chase

The Appellee hyperbolics that Davis is minimizing the danger of his high-speed chase(s) posed and thankfully no one was killed. The VIPD Commander Joseph ("Joseph") testified that she recalls three police chases [JA 103]. She testified about one that involved the instant offense, that she did not witness. [JA 107] Joseph does not testify to injury or property damage. The Appellee warns of highspeed chases by citing a statistic that 5000 people have been killed in police car chases since 1979.

First, the dangers of police chases are obvious and need not be

embellished or exaggerated to make a point. With respect to danger to this community Joseph failed to testify, nor was she asked, why or how Davis was allegedly being chased; where it occurred; what was the weather and road conditions; what time of day or night did the chase(s) occur; were there any pedestrians or even other vehicles present?

On cross examination Joseph volunteered that there were three (3) police chases; by car and on foot. [JA 106] The alleged chase related the underlying offense was by car. So, the other two chases, based on Joseph's testimony, could have been by foot. Joseph did not testify that she witnessed or was involved in the alleged chases, but she did testify that Davis called the police and "turned himself in". [JA107]

A condition prohibiting driving may alleviate police car chase fears.

B. The Court should have compelled BOC to produce evidence (records) that support its claim that Davis' transfer to CJC was not retaliatory.

The Appellee states that the Court accepted the testimony of Warden Ben Adams of the Bell facility ("Adams") and Assistant Director Kiel Faulkner ("Faulkner") that Davis was in danger from other inmates that the Bell facility and that his transfer was not retaliatory. This was an error because the factual testimony of Adams and Faulkner show

otherwise.

The *error* is evident by a *plain* reading of the hearing transcript and as a consequence of the error Davis' *substantial* right to access to his counsel on St. Croix has been violated by a retaliatory transfer to a different island. See *Ledesma v. Gov't of Virgin Islands,* 72 V.I. 797, 814, 2019 VI 31, ¶ 25 (2019) (defendant has the burden of establishing (1) error (2) that is plain, and (3) that affects a substantial right). [12]

Furthermore, the Court's finding that Davis was at risk of harm by inmates, and denial of his motion to compel evidence is not supported by Adams and Faulkner's factual testimony. A careful reading of Faulkner and Adams testimony reveals the true reason Davis was transferred from Bell to the CJC; not because of potential harm by other inmates.

No evidence, records or reports have been produced that Davis was ever disciplined for altercations with Bell inmates. The "other inmate risk" claimed by BOC is not a verity. The question then becomes why. It is reasonable to infer that agencies may be motivated to avoid being impugned for its conduct. BOC may not want to admit that Davis was

[12] Generally, deference is given to the fact-finding judge. Deference should not be given if the findings do not comport with the testimony.

transferred to retaliate against him because of his "unruly" conduct towards correction officers.[13] It is safe to assume that BOC executive staff know that retaliation against an inmate is not a recognized penological purpose.

Faulkner and Adams' testimony:

> **Faulkner** testified that Davis was transferred because his "disruptive and unruly behavior created a situation that made his continued presence there a risk to himself." [JA 64]

This descriptive would be of Davis' conduct *vis a' vis* corrections officers rather than inmates. There is no evidence that inmates set or enforced the rules of at Bell. BOC sets the rules and correction officers enforce them. Davis would be "unruly" from the perspective of his overseers, not his peers.

> **Adams** testified that he was in St. Thomas, not St. Croix when Davis was transferred and he understood (was told) the concern was harm to Davis from inmates. He testified that "there is an agreement to do Mr. Davis harm should he return to St. Croix'."

Adams *did not* testify that the agreement was between inmates.

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[13] "Unruly" defined, not readily ruled, disciplined, or managed. https://www.merriam-webster.com/dictionary/unruly; "Unruly" means not submissive or cooperative, ungovernable, unmanageable, disorderly. Webster's College Dictionary (1991)

In addition, and to the point:

> **Adams** testified when asked by the Court would segregating Davis from the general population alleviate the concern Adams answered, "No sir, it is my understanding that it would not." [JA 74]

It is reasonable to infer from Adams' testimony that inmate segregation would not alleviate the risk of harm to Davis *because keep separate orders do not apply to correction officers.*

After the feces was thrown BOC was stuck between a rock and a hard place, retaliate or appease; and chose to appease the Bell employees who likely had an agreement to harm Davis if he was returned to Bell.

1. Witness credibility

The Appellee correctly recognizes that this Court is disinclined to *usurp* the credibility findings of the fact finder.[14] However, credibility of witnesses is not the issue. The issue here is whether the findings comport with the testimony. Davis submits that the testimony by Adams and Faulkner is true. A finding that Davis was transferred to CJC because of risk of harm by inmate(s) does not comport with the transcribed record.

[14] Appellee Brief Pg 24

2. Separation of Powers

The Appellee references the Judge noting "that it *was not its place* to dictate how the BOC administers the prison."[15] Davis posits that if not the courts, then who does he look to for redress. The answer is the courts.

Notably, BOC is already under court supervision. *See United States v. Territory of Virgin Islands*, 2021 WL 2117372, at *1 (D.V.I. May 25, 2021) (Consent Decree since 2009).

The Appellee argues that ordering BOC to conduct an investigation is beyond the Court's purview. Davis disagrees. His motion was to *compel* to BOC produce evidence; or *order* an investigation for evidence that Davis was at risk of harm by inmates. See *Cardona v. Taylor*, 828 F. App'x 198, 199–200 (5th Cir. 2020) (court ordered the attorney general to investigate pursuant to a claim under the Prison Litigation Reform Act). The Superior Court recently ordered BOC to show cause, *in writing*, why Davis' CJC records cannot be produced.[16]

BOC claiming separations of powers in response to inmate seeking relief from the courts is not new. Decades ago, Judge Young lamented:

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[15] *Id.*

[16] See Superior Court Docket Clerk filed in this Court, Page 17.

> "I would have preferred that our prison never to have reached a situation where this Court is constitutionally obligated to become involved. Even then I am extremely reluctant to interfere. I have great reverence for the separation of powers doctrine. I have always attempted to exercise great caution not to act outside the judicial sphere.
>
> My greatest fear now is that the real issue, the prison, will be lost in some embroiled controversy over separation of the powers. I am hopeful that other government officials will not hide behind this subsidiary issue and ignore their responsibility to consider the problems of the prison.
>
> If we had a constitutionally adequate prison in St. Croix, I would, of course, leave the problems of its operation to the responsible officials, where they should properly be. If local officials had advised me that the Virgin Islands government is economically and otherwise unable to run a prison which accords with constitutional dictates, I would be satisfied to have all sentenced offenders sent to mainland institutions. This, unfortunately, was not the case."

Barnes v. Gov't of Virgin Islands, 13 V.I. 122, 149–50 (D.V.I. 1976)

This commentary still rings true.

C. Davis' emergency motion for transfer should have been granted.

Appellee argues that Davis' emergency motion for transfer should have been denied based on separations of powers and broad discretion to administer the prison.[17] Davis is not challenge the import of separation of powers or broad discretion. *It's just that neither of these legal concepts*

[17] Appellee Brief Pg. 26

outweigh the fact that retaliation is not a valid penological purpose and Davis has shown that there can be no confidence that he would have attorney-client confidentiality on St. Thomas and that he would have sufficient contact to prepare his defense with his attorney on St. Croix.

Appellee sardonically claims that transferring Davis back to Bell would not solve any constitutional "infraction."[18] This is not accurate. This matter arose (remains) when Counsel was unable to confidentially communicate with Davis telephonically, by mail, or videoconferencing.

Appellee argues Davis failed to show BOC testimony was materially false.[19] The testimony of Adams and Faulkner was not false, other than perhaps their unsupported conclusions and opinions. *The truth is in what they did not intend to say, but did.*

Moreover, impeding Davis' access to the Court through his counsel is not an "infraction." Governmental impediment to preparing Davis' defense is likewise not a constitutional infraction, if such offense exists.

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[18] *Id.*

[19] Appellee Brief Pg. 29

CONCLUSION

For the reasons set forth above, the decisions of the Superior Court addressed above must be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this Reply brief complies with the type-face, type-volume, type-style requirement, does not exceed 3,900 words (contains 3388 words), and that it is printed in proportionally-spaced 14-point font.

2. I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

3. I hereby certify that a virus detection program was performed on this electronic brief/file, and that no virus was detected.

CERTIFICATE OF SERVICE

I certify that an original and six copies of this Reply Brief were filed with the Court with electronic service upon AAG Ian Clement, Esq. using the Court's electronic service system on March 15, 2023,

And that two copies of the Reply brief and served on the AAG Clement via hand delivery U.S. Priority Mail, postage prepaid within the time period set by rule.

/s/ Howard L Phillips
Howard L Phillips
As to the above Certifications

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISIONS OF ST. CROIX, ST. THOMAS, AND ST. JOHN

IN RE:	
AMENDED ORDER MODIFYING THE SETTING OF BAIL IN THE ABSENCE OF A JUDGE	**SX-2020-MC-00024**

AMENDED ORDER MODIFYING THE SETTING OF BAIL IN THE ABSENCE OF A JUDGE

WHEREAS, Rule 5(e)(1) of the Virgin Islands Rules of Criminal Procedure authorizes the Clerk of Court or the Chief of Police to admit to bail a person charged with a criminal offense who has not yet appeared before a Judge or Magistrate Judge of the Superior Court of the Virgin Islands; and

WHEREAS, Rule 5(e)(2) permits the setting of bail in fixed amounts in order to guide the discretion of the Clerk of the Court and the Chief of Police in admitting persons to bail pursuant to Rule 5(e)(1); and

WHEREAS, there is a need to modify the bail schedule to account for changes in the law, including the codification of new criminal offenses;

NOW, THEREFORE, IT IS HEREBY ORDERED that accordance with Rule 5(e)(1)-(2) of the Virgin Islands Rules of Criminal Procedure, in the absence of a Superior Court Judge or Magistrate Judge and before appearance before a Judge or Magistrate Judge, the Clerk of the Superior Court or the Chief of Police, or their respective designees, may admit to bail a person arrested the following offenses and in the following amounts:

CRIME	**BAIL**
Aggravated Rape in the 1st Degree	$ 150,000.00
Aggravated Rape in the 2nd Degree	$ 75,000.00
Arson 1st Degree	$ 75,000.00
Arson 2nd Degree	$ 35,000.00
Assault 1st Degree	$ 75,000.00
Assault Second Degree	$ 50,000.00
Assault Third Degree	$ 25,000.00
Assault Simple	$ 5,000.00
Assault and Battery Aggravated	$ 1,000.00
Attempted Murder	$ 100,000.00
Bomb Hoax	$ 50,000.00
Bombs Placing and detonating	$ 125,000.00
Burglary 1st Degree	$ 75,000.00
Burglary 2nd Degree	$ 50,000.00

Burglary 3rd Degree	$ 25,000.00
Child Neglect	$ 50,000.00
Child Abuse	$ 60,000.00
Child abuse (Aggravated)	$ 100,000.00
Embezzlement	$ 35,000.00
Escape from Custody of jail or officer	$ 25,000.00
False Imprisonment and Kidnapping	$ 75,000.00
Firearm -Carrying an unlicensed	$ 50,000.00
Firearm Carrying or using an unlicensed during a Crime of violence	$ 100,000.00
Grand Larceny	$ 20,000.00
Harassment by telephone, telegraph and written communication	$ 1,000.00
Incest	$ 50,000.00
Kidnapping for ransom	$ 150,000.00
Loitering	$ 200.00
Manslaughter, Involuntary	$ 50,000.00
Manslaughter, Voluntary	$ 125,000.00
Murder 1st Degree	$1,000,000.00
Murder 2nd Degree	$ 200,000.00
Possession of Narcotics-Simple (except marijuana)	$ 1,500.00
Possession with Intent to DistributeMarijuana	$ 7,500.00
Possession with Intent to Distribute Crack or Cocaine	$ 15,000.00
Property Destruction of	$ 1,000.00
Property, Buying or Receiving Stolen	$ 25,000.00
Rape in the 1st Degree	$ 100,000.00
Rape in the 2nd Degree	$ 75,000.00
Reckless Endangerment (felony)	$ 30,000.00
Reckless Endangerment (misdemeanor)	$ 2,500.00
Retaliating against or threating a witness	$ 50,000.00
Robbery in the 1st Degree	$ 75,000.00
Robbery in the 2nd Degree	$ 50,000.00
Robbery in the 3rd Degree	$ 25,000.00
Stalking	$ 10,000.00
Unlawful Sexual Contact in the 1st Degree	$ 35,000.00
Unauthorized Presence on School Property	$ 2,500.00
Unauthorized Use of a vehicle	$ 25,000.00
Weapon Carrying or using a dangerous	$ 25,000.00
Weapon Carrying or using a dangerous weapon/CV	$ 50,000.00
Vehicular Homicide	$ 25,000.00

MISDEMEANORS AND FELONIES NOT LISTED

Misdemeanors----major (over six months)	$ 1,000.00
Misdemeanors—minor (under six months	$ 500.00

Driving under the Influence (First Offense)	$ 1,000.00 (or license in lieu of bail)
DUI (following a prior conviction)	$ 1,500.00 (cash)
Felonies (non- violent)	$ 5,500.00
Felonies Violent	$ 7,500.00

When a person is charged with multiple offenses, the person shall post bail at the highest amount.

NOTE: ONLY A JUDGE OR A MAGISTRATE JUDGE IS AUTHORIZED TO ALLOW A PERSON TO POST A 10 PERCENT OR SET CONDITIONS OF RELEASE OR CASES INVOLVING DOMESTIC VIOLENCE.

DONE and so ORDERED this 23rd day of March 2020.

ATTEST:
Tamara Charles
Clerk of the Court

By: _____
Court Clerk Supervisor

Dated: 3/24/2020

Harold W.L. Willocks
Presiding Judge of the Superior Court