For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JIMMY DAVIS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2021-0023** Re: Super. Ct. Crim. No. 2020/00098 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: October 12, 2021
Filed: April 1, 2022

Cite as: 2022 VI 8

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **RENEE GUMBS-CARTY**, Designated Justice.[1]

APPEARANCES:

Robert J. Kuczynski, Esq.
Beckstedt & Kuczynski LLP
St. Croix, U.S.V.I.
Attorney for Appellant,

Kenneth R. Case, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

[1] Associate Justice Maria M. Cabret is recused from this matter; the Honorable Renee Gumbs-Carty has been designated in her place pursuant to title 4, section 24(a) of the Virgin Islands Code.

¶ 1 Appellant Jimmy Davis appeals from the Superior Court's June 17, 2021 order denying his motion for modification of bail. For the reasons that follow, we reverse.

I. BACKGROUND

¶ 2 On April 6, 2020, the People of the Virgin Islands charged Davis with numerous offenses stemming from an alleged rape of a minor in her home in St. Croix. Davis appeared for his advice of rights hearing on April 8, 2020, before a magistrate judge, who set cash bail in the amount of $1,000,000. On August 11, 2020, Davis filed a motion for modification of bail, which contended that the bail imposed at the advice of rights hearing had been excessive. The People opposed this motion on August 17, 2020, on the grounds that Davis was a danger to the community and to witnesses, as well as a potential flight risk. To support these assertions, the People noted that Davis had previously been arrested approximately 38 times and convicted for eight offenses, with many of those arrests occurring while he was on supervised release for other offenses, including the arrest in the instant case; had been involved in multiple high-speed car chases with the police, including at the time of his arrest in this case; had threatened witnesses with physical harm in connection with his other cases; and had a history of violating court orders. The Superior Court held a hearing on the motion on November 16, 2020, and, apparently believing that Davis may have been detained in connection with other outstanding criminal matters, denied the motion without prejudice.

¶ 3 Davis filed a renewed motion for modification of bail on December 1, 2020, in which he presented evidence reflecting that he was not presently detained in connection with any other matter and was currently incarcerated solely due to his inability to post the $1,000,000 bail set at the April 8, 2020 advice of rights hearing. 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 set forth in its August 17, 2020 opposition to the initial motion. After hearing arguments, the Superior Court orally denied the renewed motion, holding that the terms Davis proposed were wholly insufficient to assure his appearance at trial or to protect the community from physical harm. In issuing that decision, the Superior Court relied in part on a police report stating that Davis's grandmother—who lived next door to Davis's mother, his proposed third-party custodian—told the police that she will not allow him to live with her due to his behavior.

¶ 4 Davis filed another motion for modification of his bail on March 22, 2021. In this motion, Davis sought modification for the same reasons set forth in his previous motions, but submitted an affidavit from his grandmother averring that the statements attributed to her in the police report were false and that she has no fear or objection to Davis's presence. Again, the People did not submit a new response to this motion but advised the Superior Court that they continued to oppose modification of bail for the same reasons set forth in its August 17, 2020 opposition to Davis's original motion.

¶ 5 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 were insufficient to assure his future appearances or to protect the community. The Superior Court subsequently memorialized its denial of the motion in a written June 17, 2021 order. Davis timely filed a notice of appeal with this Court on June 22, 2021. *See* V.I. R. APP. P. 5(b)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 6 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d).

Although the Superior Court's June 17, 2021 order does not qualify as a final judgment because it does not resolve all issues between the parties, we nevertheless possess 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).

¶ 7 "We review the trial court's decisions regarding 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).

B. Denial of Bail Modification Motion

¶ 8 Davis contends that the Superior Court erred when it denied his motion for modification of bail for the reasons given at the June 14, 2021 hearing. We agree.

¶ 9 Section 3 of the Revised Organic Act of 1954 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. Consequently, the Superior Court is prohibited 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 only authorized if the proof of guilt is evident or the presumption thereof is great. *Tobal v. People*, 51 V.I. 147, 160 (V.I. 2009); *see also, 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). In other words, "a judge may not deny bail completely upon finding that the defendant presents a flight risk or a danger to the community." *Id.* at 161. Because this expansive right to bail is codified in the Revised Organic Act—the *de facto* constitution of the Virgin Islands—any statutes that purport to restrict this right are invalid. *Id.*

¶ 10 Since the People did not charge Davis with first degree murder or a capital offense, the Superior Court possessed an obligation to grant him bail. But that Davis has a right to bail does not mean that the Superior Court is precluded from imposing bail that is beyond his means. *Rieara*, 57 V.I. at 667 (citing *Galen v. County of Los Angeles*, 477 F.3d 652, 661-62 (9th Cir. 2007)). Rather, the Superior Court must impose release conditions—including the amount of bail—that represent the least restrictive means of assuring the defendant's appearance and submission to the judgment of the court. *See Bandy v. United States*, 81 S.Ct. 197, 197 (1960); V.I. R. CRIM. P. 5-1(b). Importantly, while the Superior Court may not deny bail entirely due to finding the defendant to be a flight risk or a danger to the community, "it may take those facts into consideration when determining the sufficiency of the sureties in setting bail and the conditions to be imposed in connection with the bail as established," as well as other relevant factors. *Tobal*, 51 V.I. at 161. And while the Superior Court is not precluded from imposing bail that a defendant cannot afford to post, a defendant's indigence—or great wealth—is certainly a relevant consideration in determining the amount of bail and other release conditions. *See, e.g., Ex parte Waybourne*, 8 S.W.2d 679, 679 (Tex. Crim. App. 1928); *State ex rel. Bardina v. Sandstrom*, 321 S. 2d 630, 631 (Fla. Dist. Ct. App. 1975); *Ex parte Ruef*, 96 P. 24, 25 (Cal. Dist. Ct. App. 1908).

¶ 11 These same considerations apply with equal force to a motion to modify or reduce bail as to the initial bail determination. "When the court resolves a motion to modify bail and release conditions, it must make an individualized determination in order to ensure that the bail is not excessive," and "[a]ny bail or conditions of release that are not tailored to achieve the purpose of bail are considered excessive and therefore unconstitutional." *Rieara*, 57 V.I. at 667. Moreover, a court considering such a motion must not simply defer to a prior bail determination or deny modification based on "a mere . . . recitation of relevant criteria," but rather "should clearly explain why those criteria support the ultimate bail amount or other release conditions." *Id.* (quoting *In re Pipinos*, 654 P.2d 1257, 1260 (Cal. 1982)). In other words, the Superior Court must not just make findings as to the defendant's risk of flight, danger to the community, and other relevant factors, but must "adequately explain" how those findings relate to the amount of bail ordered – for instance, why those factors "required a bail in the amount of $250,000, rather than . . . $200,000 . . . or some other amount." *Id.* at 668.

¶ 12 In this case, the Superior Court found that Davis was not a flight risk but determined that he was not likely to appear in court when instructed to do so due to his prior failures to appear and history of fleeing from the police. The Superior Court further placed heavy emphasis on Davis's lengthy criminal history, including convictions for violent offenses and threats to witnesses, including the alleged victim in this case. What the Superior Court did not do, however, is explain *how* its weighing of those factors warranted setting bail in the amount of $1,000,000. Rather, the Superior Court appeared to presume the correctness of the release conditions set by the magistrate judge at the April 8, 2020 advice of rights hearing—including setting bail at $1,000,000—in effect treating the motion for modification of bail as if it were a motion for reconsideration of the magistrate judge's bail determination. *Rieara*, 57 V.I. at 667. This is precisely the approach that this Court has rejected as insufficient. *Id.* Therefore, we reverse the Superior Court's June 17, 2021 order denying Davis's motion for modification of bail, and remand the case for the Superior Court to apply the correct legal standard on remand.[2]

III. CONCLUSION

¶ 13 The Superior Court failed to clearly articulate how its findings support setting bail in the amount of $1,000,000, and in effect presumed the correctness of the initial bail determination made at Davis's advice of rights hearing. Accordingly, we reverse the Superior Court's June 17, 2021 order and remand the case to the Superior Court for further proceedings consistent with this Opinion.

Dated this 1st day of April, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Natasha Illis
Deputy Clerk

Dated: April 1, 2022

[2] Because we conclude that the Superior Court applied the incorrect legal standard when it in effect presumed the correctness of the magistrate judge's initial bail determination and denied Davis's motion without explaining how its findings justified setting bail at $1,000,000, we decline to consider the other issues Davis has raised in his appellate brief, given the possibility that the Superior Court will change its analysis when applying the correct legal standard on remand. We note, however, that Davis argues that the Superior Court improperly based certain findings on evidence that had not been part of the record. While we express no opinion as to whether Davis is correct, we remind the Superior Court that "[i]t is so well established as not to require discussion . . . that a [trial] court . . . must base its decision on evidence actually in the record of the case and that an appellate tribunal cannot base an adjudication on items of evidence informally offered to the trial court and, though apparently read by it, not made part of the record." *In re People of the V.I.*, 51 V.I. 374, 390 (V.I. 2009) (quoting *United States ex rel. Collins v. Ashe*, 176 F.2d 606, 606 (3d Cir. 1949)).

SWAN, **Associate Justice, concurring in judgment only**.

¶ 14 Appellant, Jimmy Davis, seeks reversal of the June 17, 2021, order of the Superior Court of the Virgin Islands ("Superior Court") denying his motion for modification of the terms of his pre-trial release. While I agree with the majority's conclusion that the order should be vacated and the matter remanded to the Superior Court for further proceedings, I write separately to emphasize that, in my view, the trial judge failed to ensure the reliability of the proffered evidence underlying the order, as our jurisprudence requires. I would therefore remand with specific instructions to conduct another hearing at which proper evidence is taken to sufficiently ensure the reliability of the court's fact finding.

I. BACKGROUND

¶ 15 This criminal prosecution commenced on April 8, 2020, when a probable cause fact sheet was filed in the Superior Court, and an advice of rights hearing was held that day.[1] The Virgin Islands Police Department Arrest Log Entry that was attached to the fact sheet informs that Davis was arrested at 11:11 p.m. on April 6, 2020, and charged with "First Degree Rape," in violation of subsections 1701(2) and (3) of title 14 of the Virgin Islands Code. (Docket No. 1.) This log entry also noted that Davis was unemployed with no fixed address. Further, the log entry, under "Action of the Court," recorded "$100,000.00" (presumably the amount of bail), and there was no "10% provision."

[1] As is relevant presently, the trial court granted the People's motion to file an amended information on September 16, 2020. Upon the filing of an amended information, either as of right according to statute or court rule or as permitted by order of the court, all prior informations are withdrawn and inoperative. *See World Fresh Markets, LLC v. Henry*, 71 V.I. 1161, 1166 n.2 (V.I. 2019) ("It is well established that, ordinarily, an amended filing supersedes any prior filing." (citing *Pacific Bell Tel. Co. v. Linkline Commc'n, Inc.*, 555 U.S. 438, 456 n.4 (2009); *Merz v. Civil Serv. Comm'n*, No. C-76677, 1977 WL 199794, at *2 (Ohio Ct. Ap. Sept. 7, 1977) (unpublished))).

¶ 16 At the April 8, 2020, advice of rights hearing in the Magistrate Division, defense counsel requested bail upon the condition that Davis be in the custody of a third-party custodian, reside at a specified address, sign an unsecured bond "in the full amount of bail," and "wear a GPS monitor to track his location." The court denied this request "for an unsecured bond in the full amount" and ordered that "the defendant's bail will remain at one million dollars." It is noteworthy that this public record, the Memorandum Record of Proceeding, indicates that Davis refused to sign the document to acknowledge his receipt of a copy.

¶ 17 While the record is incomplete regarding the terms of Davis's bail, neither party has provided any order or other document stating what exactly those terms are. In various motions, Davis asserts that the court set bail at $1,000,000 with an "unsecured bond," in direct contradiction of the record of proceeding that noted the request for unsecured bond had been denied.

¶ 18 At the advice of rights hearing, counsel for Davis orally moved that Magistrate Judge Camacho recuse himself. The basis for this motion was that Judge Camacho had previously recused himself from one or more matters in which Davis had been charged with a crime. As this was a preliminary hearing and Judge Camacho was not assigned to the case beyond that hearing, the motion to recuse was denied. Following some other matters, the court addressed Davis. At this juncture, Davis said the following:

> Davis: Yea, you bias against me. Why you want to sit on my issue? You bias against me. Why you want to sit on my issue? You bias against me. I don't want to hear your mouth. Get from ya. You suppose to deal with justice. You can't give me justice. You bias.
>
> Court: Very well.
>
> Davis: You bias. I don't want to hear you. You bias. You know you bias. Shut up. I don't want to hear you. Get off my case. You know you bias. I don't want to hear it. Get off my case. You bias. Shut up. (Witness and judge over talking and arguing.)

> Court: Get him out of here, please. Hello, is BOC available. Hello, BOC?
>
> Davis: Shut up, Your Honor. You bias. You bias against me. You bias against me, straight up.

As a result of Davis's conduct, the court ordered the Bureau of Corrections to mute Davis's microphone and thereupon proceeded to read the charges to Davis. The court found probable cause that Davis violated subsections 1701(2)-(3), 1708(a)(1), 442(4), 295(3), and 475(a)(2) of title 14 of the Virgin Islands Code. Defense counsel acknowledged that Davis understood the charges. The court then specifically queried the Bureau of Corrections guard present with Davis to ensure the reading of the charges had been audible; in response, Davis said "Shut your mother— ."

¶ 19 Davis's counsel asked the court to grant pre-trial release with the posting of an unsecured bond in the amount of $1 million, the agreement of a third party custodian to supervise Davis, and house arrest with GPS monitoring. The People opposed any reduction in bond, arguing that Davis had committed the offenses charged during the very short period he was on release from a prior conviction and that he was a flight risk and danger to the community. The terms of Davis's release ultimately remained unchanged.

¶ 20 On August 11, 2020, Davis filed a motion to modify his bail conditions. On September 21, 2020, Davis filed a motion for an expedited hearing on his bail motion. The motion was granted on October 23, 2020, and the bail modification hearing was held on November 16, 2020, in the general jurisdiction division of the Superior Court before a Judge of the Superior Court.

¶ 21 On December 1, 2020, Davis filed a second motion for modification of the terms of his bail, and a hearing was held December 30, 2020. At that hearing before Judge D. Brady, the People asserted several facts in support of denying any modification of bail, including 1) the crime is a violent crime against a minor, 2) when the police endeavored to arrest Davis on these charges, he attempted to flee in a motor vehicle and led the police on a high speed chase, 3) in past cases, Davis has fled from the police when they attempted to arrest him, and 4) his past conduct, including in this case, demonstrates a lack of respect for the court and further indicates that Davis is a menace to society.

¶ 22 Initially, the court noted that Davis sought bail without having a curfew, without an ankle monitor, and without house arrest. The court specifically noted that bail without any one of those conditions was wholly insufficient to protect the community and secure Davis's attendance and participation in this case. The court further noted that, while Davis's mother had volunteered to serve as his third-party custodian, Davis's grandmother is a neighbor to Davis's mother, and his grandmother had given a statement to police informing that Davis could not be supervised and simultaneously expressed her wish that he not be placed as her neighbor. The court also noted that a federal probation officer had reported that Davis had made a statement to the effect that he would not surrender to police and that they would have to kill him.

¶ 23 However, the court also recognized that Davis was born and raised on St. Croix and had never left the island to avoid prosecution. Yet, the court acknowledged that Davis's "seeking to avoid apprehension in the past standing alone would be sufficient to deny the renewed motion." But, there were also further concerns that Davis is a danger to the community. Specifically, the court recalled that Davis had been disruptive at the last hearing and had been disrespectful to the judge in open court. Additionally, the court noted that Davis had threatened "another judicial officer in a court setting." It was acknowledged that, in the preceding 25 years, Davis had been arrested approximately 1.5 times per year, often while on bail with charges pending. Furthermore, Davis has been convicted of multiple violent crimes that involved firearms, and several of Davis's violent crimes were crimes against police officers during their efforts to discharge their duties. Finally, immediately after he raped the minor, Davis allegedly told both the victim and her brother that he would be back. The court concluded that Davis is either unwilling or unable to manage his anger, and further concluded that the proposed revised terms of bail were entirely inadequate to protect the community and inadequate to ensure that Davis would appear at future court proceedings.

¶ 24 Again, on March 22, 2021, Davis submitted a third motion to modify the terms of his bail. Judge D. Brady then held a hearing[2] on Davis's renewed motion on June 14, 2021.

¶ 25 Factually, Davis submitted an affidavit from his grandmother that directly contradicted the court's prior finding as to her desire not to have Davis living next door.[3] In its ruling, the court noted that, while the evidence would suggest there is no risk of Davis fleeing St. Croix, this finding alone does not indicate that he will appear in court. Indeed, Davis's history illustrated that he was not only unlikely to attend court dates but was also likely to put the community in general at risk (in addition to government agents) by his multiple attempts to flee from the police in an effort to avoid appearing in court. Additionally, a significant number of Davis's arrests were for conduct that occurred while he was either on bail or supervised release after conviction, indicating that supervised release was entirely ineffective in restraining Davis's conduct and entirely ineffective in ensuring his appearance in court. Further, indicating his lack of willingness to abide by court orders, the court noted that Davis had violated a court order requiring him to submit to DNA

[2] In light of the COVID-19 pandemic, the hearing was held electronically.

[3] Further, it was established that Davis had been transferred to the Bureau of Corrections' St. Thomas location because he had thrown feces at one of the staff at the St. Croix location. However, the court agreed that this was not material to the bail modification hearing.

testing. The court also noted Davis's history of convictions for violent crimes involving firearms and other deadly weapons and further noted that he had been arrested for threatening witnesses and threatening jurors.

¶ 26 The court provided additional detail about Davis's threats to a deputy clerk of the Superior Court. Davis had contacted the office of the clerk to inquire about "an outstanding warrant," and when the deputy clerk informed him that she did not have that information, Davis told her she would be "found in a body bag." The court then reiterated that the victim of the sexual assault was only fifteen and that the second victim (who had witnessed the sexual assault), whom Davis had threatened, was her eleven-year-old brother.

¶ 27 The court concluded that the entire history of Davis's conduct revealed that there was no set of less-restrictive conditions that would ensure Davis's compliance with the terms of his bail and, similarly, no set of less-restrictive conditions that would adequately ensure the safety of the community. Therefore, on June 17, 2021, the court denied Davis's requested bail modification. Davis filed his notice of interlocutory appeal on June 22, 2021.

II. DISCUSSION

A. Standard of Review

¶ 28 Davis asserts that the denial of his request for modification of the conditions of his bail was an abuse of discretion. However, Davis, throughout his argument, also challenges findings of fact, although he failed to dedicate any portion of his argument to a discussion of which facts are clearly erroneous and why he believes them to be as such. For example, Davis argues that the trial court's conclusion that he had attempted to evade arrest was clearly erroneous because the evidence instead supported the factual finding that it was "the reasonable fear of physical abuse and retaliation from the VIPD" rather than a desire to avoid "submitting himself before the justice system" that led to Davis's actions just prior to his arrest. Essentially, Davis challenges many inferential facts (based upon facts entered directly in evidence) found by the trial court but does not challenge most of the facts that were directly presented in court. Additionally, in his framing of the issue presented, Davis asserts the trial court abused its discretion when it "considered evidence outside of the record and failed to give proper weight to newly presented evidence."

¶ 29 As we rely on the substance of an argument rather than any magical words or labels in determining if an issue is Fairly Presented,[4] we treat Davis's assertions to be an argument that the trial court failed to comply with the evidentiary strictures of *Williams v. People*, 53 V.I. 514, 51-32 (V.I. 2010), which require that the court ensure reliability of the fact-finding process by insisting upon the production of underlying evidence or evidentiary sources to ensure accuracy. This argument further implicates *Browne v. People*, 50 V.I. 241, 266 (V.I. 2008) (per curiam) (citing *State v. Konigsberg*, 164 A.2d 740, 745 (N.J. 1960)), which established that factual conflicts cannot be resolved during a bail hearing, without the taking of evidence. *See People v. Armstrong*, 64 V.I. 528, 536 (V.I. 2016) (when presented with two conflicting affidavits, it is error *per se* to fail to hold an evidentiary hearing. (quoting *3RC & Co. v. Boynes Trucking Sys., Inc.*, 63 V.I. 544 (V.I. 2015))).

---

[4] *Ubiles v. People*, 66 V.I. 572, 583-85 (V.I. 2017) (defining the Fairly Presented standard and directing the court to disregard form and rely upon substance); *World Fresh Markets*, 71 V.I. at 1172 (applying Fairly Presented standard); *Balboni v. Ranger Am. of the V.I.*, 70 V.I. 1048, n.4 (V.I. 2019) ("It is well-established that it is the content and substance of an argument, rather than its form or title, that is controlling." (citing *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-12 (V.I. 2012); *Hughley v. Gov't of the V.I.*, 61 V.I. 323, 333 (V.I. 2014))); *Hughley*, 61 V.I. at 333 (noting that litigants need not use "magic words"); *see Sorenson*, 67 V.I. at 872 (acknowledging that it is the substance of a court's actions rather than the label the court applies that controls (citing *Bryan v. Fawkes*, 61 V.I. 416, 452 n.17 (V.I. 2014))); *Mosley*, 67 V.I. at 898-99 ("[C]ourts should examine, not just the nominal label (or, as here, the absence of a label), but the substance of what is requested." (citing *Jarbough v. Attorney Gen.*, 483 F.3d 184, 189 (3d Cir. 2007))); *Toussaint*, 67 V.I. at 947 (citing *Bryan*, 61 V.I. at 467 n.30; *Anthony v. FirstBank V.I.*, 58 V.I. 224, 228 n.5 (V.I. 2013); *Bertrand*, 57 V.I. at 611-12; *Joseph v. Gov't of the V.I.*, 54 V.I. 644, 648 n.2 (V.I. 2011); *Penn*, 67 V.I. at 898-99; *Jarbough*, 483 F.3d at 189)).

¶ 30 Findings of fact (whether supported explicitly by direct evidence or inferentially by circumstantial evidence) made by the trial judge are reviewed for clear error. More succinctly, we review findings of fact under the clearly erroneous standard of review. *Browne*, 50 V.I. at 247 (citing *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)); *Penn v. Mosley*, 67 V.I. 879, 892 (V.I. 2017) (citing *Rodriguez v. Bureau of Corr.*, 58 V.I. 367, 371 (V.I. 2013); *Blyden v. People*, 53 V.I. 637, 646 (V.I. 2010); *Moore v. Walters*, 61 V.I. 502, 507 (V.I. 2014)). A finding of fact is clearly erroneous if it is devoid of minimum evidentiary support displaying "some hue of credibility" or those findings bear no rational relationship to the supportive evidence. *Mosley*, 67 V.I. at 892 (citing *Rodriguez*, 58 V.I. at 371; *Blyden*, 53 V.I. at 646; *Moore*, 61 V.I. at 507). A finding of fact is devoid of any hue of credibility if either: (A) it was impossible for the witnesses to have seen and observed the events to which they testified, (B) considering the laws of nature, it was impossible for the events to which the witness has testified to have happened, or (C) the testimony was incredibly dubious, in that it was inherently improbable with a complete lack of circumstantial evidence or was coerced, equivocal, and wholly uncorroborated. *Penn*, 67 V.I. at 893-94 (citing *Rivera v. People*, 64 V.I. 540, 554 (V.I. 2016)).

¶ 31 Furthermore, we review the trial court's determination of the conditions of release, including the amount of bail, for abuse of discretion. *Rieara v. People*, 57 V.I. 659, 665-66 (V.I. 2012) (citing *State v. Briggs*, 666 N.W.2d 573, 575 (Iowa 2003); *Long v. Hamilton*, 467 S.W.2d 139, 142 (Ky. 1971); *Moore v. McCormick*, 858 P.2d 1254, 1255 (Mont. 1993); *State v. Janklow*, 678 N.W.2d 189, 191 (S.D. 2004)); *see Shoy v. People*, 55 V.I. 919, 925 (V.I. 2011). Evidentiary rulings are also reviewed for abuse of discretion. *Ubiles v. People*, 66 V.I. 572, 581 & n.3 (V.I. 2017) (citing *Rawlins v. People*, 61 V.I. 593, 606 (V.I. 2014); *Cascen v. People*, 60 V.I. 392, 409-10 (V.I. 2014)).

¶ 32 Generally, a court abuses its discretion if it acts arbitrarily or irrationally. *Alexander v. People*, 60 V.I. 486, 494 (V.I. 2014) (citing *Francis v. People*, 56 V.I. 370, 379 (V.I. 2012)). A trial court acts arbitrarily or irrationally if its ruling is founded upon "'a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact'" "or its actions were 'clearly contrary to reason and not justified by the evidence.'" *Appleton v. Harrigan*, 61 V.I. 262, 268 (V.I. 2014) (quoting *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011)).[5] Furthermore, "[i]t is axiomatic that, when a court with discretion fails to balance the pertinent factors required for it to properly exercise that discretion, such failure constitutes an abuse of discretion." *Rivera-Mercado v. Gen. Motors Corp.*, 51 V.I. 307, 330 (V.I. 2009) (Swan, J., concurring) (citing *Vinci v. Consolidated Rail Corp.*, 927 F.2d 287, 288 (6th Cir. 1991)); *see Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 719 (V.I. 2010). And of course, a court cannot "exercise its discretion" by choosing to ignore a claim or issue that was properly before it. *Bryan v. Fawkes*, 61 V.I. 416, 476 (V.I. 2014) (citing *Garcia v. Garcia*, 59 V.I. 758, 771 (V.I. 2013)).

¶ 33 Finally, to the extent the trial court's ruling is based upon a legal precept (such as an interpretation of a statute or rule) our review is plenary. *Tobal v. People*, 51 V.I. 147, 150 (V.I. 2009) (per curiam) (citing *Daniel*, 49 V.I. at 329; *V.I. Pub. Servs. Comm'n v. V.I. Water & Power Auth.*, 49 V.I. 478, 482 (V.I. June 9, 2008)); *Shoy*, 55 V.I. at 925.

B. The Superior Court Abused its Discretion When it Utilized Unreliable Evidence to Deny the Motion to Modify the Conditions of Pre-trial Release.

¶ 34 All persons in the Virgin Islands are bailable upon sufficient sureties, except in instances where the defendant is charged with First Degree Murder and "the proof is evident or the

---

[5] *See also Smith v. Gov't of the V.I.*, 67 V.I. 797, 803-04 (V.I. 2017); *Billu v. People*, 57 V.I. 455, 461-62 (V.I. 2012) (quoting *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012)); *Pelle v. Certain Underwriters at Lloyd's of London*, 66 V.I. 315, 318 (V.I. 2017); *Shoy*, 55 V.I. at 925; *Gore v. Tilden*, 50 V.I. 233, 236 (V.I. 2008).

presumption [of guilt] great." *Browne*, 50 V.I. at 247-48 (citing 48 U.S.C. § 1561); *Williams*, 53 V.I.at 532 (citing 48 U.S.C. 1561); *Tobal*, 51 V.I. at 160.[6] Additionally, pursuant to its authority granted in section 8 of the Revised Organic Act of 1954 (ROA), the Legislature has enacted section 3504a of title 5. Subsection 3504a(a) establishes that all persons accused of a crime are presumptively eligible for bail. 5 V.I.C. § 3504a(a)(1) (providing a defendant "may" be detained provided certain conditions are established); *Browne*, 50 V.I. at 248; *see also* 48 U.S.C. § 1561 (declaring all people to be bailable upon sufficient sureties).

¶ 35 To the extent subsection 3504a(a)(1) of title 5 of the Virgin Islands Code set a bail standard for First Degree Murder different from that standard set forth in section 1561 of tile 48 of the United States Code, by operation of Section Three of the Virgin Islands Organic Act, it has been held to be void, and the standard to be applied in bail determinations in cases of First Degree Murder is the standard set forth in section 1561 of title 48 of the United States Code. *Browne*, 50 V.I. at 247-48 (citing 48 U.S.C. § 1561). However, the Legislature has mandated that, when a court of competent jurisdiction invalidates any portion of any provision of the Virgin Islands Code, "such determination of invalidity shall not affect, impair, or invalidate the other provisions." 1 V.I.C. § 51.[7]

---

[6] Section 1561 of title 48 of the United States Code is the codification of section 3 of the ROA. The ROA is the functional equivalent of a Territorial constitution. *Browne*, 50 V.I. at 247 (referring to the first 22 clauses of section 1561 as the Territorial "Bill of Rights"). Additionally, clause 23 of section 3 of the ROA extends various provisions of the United States Constitution (including the Bail Clause) to the Virgin Islands. *Todmann v. People*, 57 V.I. 540, 545 n.3 (V.I. 2012); *Murrell v. People*, 54 V.I. 338, 351 n.6 (V.I. 2010); *Tobal*, 51 V.I. at 151; *Browne*, 50 V.I. at 256; *see Balboni*, 70 V.I. at 1091 nn.39-40.

[7] The full text of section 51 is as follows:

> Except as otherwise specifically provided, if any provision of this Code, of any amendment hereto, or of any Act or statute of the Virgin Islands, or the application of any such provision to any person, thing, or circumstance, is determined by any court of competent jurisdiction to be invalid, such determination of invalidity shall

¶ 36 Because "murder in the first degree" is only one item in a series, it can be deleted from section 3504a(a)(1) without affecting the coherence of the remaining language; instead, the provision is now to be read as follows, "A person charged with . . . rape in the first degree . . . ." 5 V.I.C. § 3504a(a)(1); 1 V.I.C. § 51. As such, 3504a(a)(1) remains in force to the extent it provides a framework for bail determinations in cases not involving First Degree Murder. Likewise, this Court has declared that the mandatory 60-day detention period provided for in subsection 3504a(d)(2) is void, as violative of section 1561 of title 48 of the United States Code. *Tobal*, 51 V.I. at 153; *People v. Fenton*, 62 V.I. 413, 418-19 (V.I. Super. Ct. 2015) (determining that other than the specific portions of section 3504a that were specifically declared void, the remaining portions are severable and remain operative). Again, this provision of subsection 3504a(d)(2) must be severed such that this provision now, in effect, reads "A person detained under subsection (c) shall be treated in accordance with the rules of criminal procedure for release on bail . . . whenever the judge finds that a subsequent event has eliminated the basis of such detention." 5 V.I.C. § 3504a(d)(2); 1 V.I.C. § 51. Beyond these discrete provisions, no other portion of section 3504a has been declared void, and subsection 3504a(b) has expressly been declared to still be applicable. *Williams v. People*, 53 V.I. 514, 526 (V.I. 2010). Additionally, the Superior Court has understood and applied this Court's precedent in a similar manner. *E.g.*, *Fenton*, 62 V.I. at 418-19.

> not affect, impair, or invalidate the other provisions, or the application of the other provisions, of this Code, of any amendments hereto, or of any Act or statute of the Virgin Islands which can be given effect without the invalid provision or application, and to effect this purpose the provisions of this Code, of any amendments hereto, or of any Act or statute of the Virgin Islands are severable.

1 V.I.C. § 51.

¶ 37 These provisions are reflective of the bedrock principle of our government that all people charged with a crime are presumed innocent. *United States v. Salerno*, 481 U.S. 739, 765 (1987) (Marshall, J., dissenting) ("[T]he Bail Clause plays a vital role in protecting the presumption of innocence."). At common law, the primary purpose of bail is to allow the accused (who stands unconvicted and innocent) to be free from restraint—that is to say, to allow the defendant to enjoy their right to liberty[8]—while simultaneously ensuring that the defendant: (1) appears in court and (2) does not engage in activities that undermine the integrity of the judicial process, e.g., tampering with or destroying evidence or threatening or harming witnesses or jurors. *Gov't of the V.I. v. Texido*, 35 V.I. 3, 5 (V.I. Super. Ct. 1996) (citing *United States v. Smith*, 444 F.2d 61 (8th Cir. 1971); *United States v. Kenney*, 603 F. Supp. 936 (D. Me. 1985)).

¶ 38 Even though "admission to bail always involves a risk that the accused will take flight, [t]hat is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. 1, 8 (1951).[9] Indeed, the very language of the multiple subsections of section 3504a indicate that this was a knowing policy choice by the Legislature. For example, subsection 3504a(a)(1) provides that only people charged with certain enumerated "violent" crimes, i.e., "First Degree Murder," "First Degree Rape," "First Degree Arson," "First Degree Robbery," "First

---

[8] The denial of liberty via pre-trial incarceration has the derivative consequence of denying trial rights. *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) ("The wrong done by denying release is not limited to denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal."); *e.g., People v. Rionda*, 2021 VI Super 31, at *6 (citing *Bandy*, 81 S. Ct. at 198).

[9] *See also Bandy*, 81 S. Ct. at 198 ("This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. . . . It is assumed that the threat of forfeiture of one's goods [or the goods of their loved one if a third party chooses to pledge such property] will be an effective deterrent to the temptation to break the conditions of one's release." (citation omitted)).

Degree Burglary," "Kidnapping for Ransom," and "Drug Trafficking,"[10] may be detained, but they may only be detained after a hearing. 5 V.I.C. § 3504a(a)(1); *Karpouzis v. Gov't of the V.I.*, 961 F. Supp. 841, 850 (D.V.I. App. Div. 1997) (citing 5 V.I.C. § 3504a(a)(1)).

¶ 39 By the explicit language of this provision, the Legislature limited the availability of pre-trial incarceration to people accused of one of only seven crimes, and importantly, such pre-trial incarceration can only be ordered after an evidentiary hearing. 5 V.I.C. § 3504a(a)(1). Moreover, even within the set of seven enumerated crimes that allow for pre-trial incarceration, such incarceration is only authorized upon proof of certain factual conditions. 5 V.I.C. § 3504a(a)(1). The prosecution must rebut the bailable presumption by presenting clear and convincing evidence that (1) either (a) there is no condition or set of conditions that will reasonably ensure the safety of the community (or a specific person within the community) or (b) there is no condition or set of conditions that will ensure the defendant's appearance at all court proceedings or (c) there is no condition or set of conditions that will ensure both (community safety and defendant's appearance)[11] and (2) there is a "substantial probability" that the accused did, in fact, commit the

---

[10] Notably, the Legislature chose to categorize "Drug Trafficking" as a violent crime without qualification. 5 V.I.C. § 3504a(a)(1) ("drug trafficking (which shall mean trafficking in marijuana, synthetic marijuana, hashish, cocaine, dangerous drugs, morphine or opium . . .)"). Therefore, there is no need for there to be actual violence or even for a weapon of any sort to be possessed during the commission of the actus reus. *Cf. United States v. Duncan*, 308 Fed. Appx. 601, 616 (3d Cir. 2009) (Rape is "an inherently violent crime."); *United States v. Gomez–Hernandez*, 300 F.3d 974, 979 (8th Cir.2002) (holding defendant's prior crime of unlawful sexual intercourse with a minor is a crime of violence "because there is physical contact with a victim who is incapable of lawful consent"); *Gonsalves v. People*, 70 V.I. 812 (V.I. 2019) ("Having sexual relations with [a] child is unquestionably, at a minimum, conduct that is reckless as it relates to potentially causing mental or emotional harm to the minor victim." (citing *C. Francis v. People*, 63 V.I. 724, 740 (V.I. 2015))).

[11] We have previously held that the Bail Clauses of the Territorial Bill of Rights contained in the ROA, 48 U.S.C. § 1561 (clauses 4-5), provide greater protection to the people of the Virgin Islands than their federal constitutional counterpart, the Bail Clause, U.S. Const. amend. 8. *Todmann*, 57 V.I. at 546 ("The [ROA] is the Virgin Islands' equivalent of a state constitution that serves as the basic charter of government in the Territory." (alterations and quotations omitted) (quoting *Brow v. Farrelly*, 994 F.2d 1027, 1032 (3d Cir. 1993))); *see also id*. at 545-46 (observing that while "the United States Constitution does not compel th[e] [Supreme] Court [of the Virgin Islands] to—in the absence of any other authority—grant bail pending appeal," it is nevertheless "possible for the Revised Organic Act to confer on Virgin Islanders greater protections" than those afforded by the United States Constitution). Yet, the

offense charged. 5 V.I.C. § 3504a(a)(1), (c) (requiring clear and convincing evidence); *Browne*, 50 V.I. at 248.

¶ 40 Additionally, the Legislature has further limited the applicability of the bailable presumption. Subsection 3504a(a)(2) provides that, only after an evidentiary hearing, a person charged with any Virgin Islands offense may be detained prior to trial if that person: (1) with the purpose to obstruct justice or to attempt to obstruct justice, (2)(a) threatens, (b) injuries, (c) intimidates, (d) attempts to threaten, (e) attempts to injure, or (f) attempts to intimidate (3) a witness or prospective juror. 5 V.I.C. § 3504a(a)(2), (b).

¶ 41 The determination of bail must be an individualized determination made on a case-by-case basis. *Rieara v. People***,** 57 V.I. 659, 667 (V.I. 2012); *People v. Camacho*, 47 V.I. 302 (V.I. Super. Ct. 2005). Furthermore, the standard of proof for the evidentiary hearing is clear and convincing evidence.[12]

---

provision of subsection 3504a(c) of title 5 allows for detention upon a determination that the accused is a danger to the community. Denying an innocent person's liberty for crimes not committed is unprecedented in United States jurisprudence. Moreover, the purposes of bail in U.S. common law, *Greer v. People*, 2021 VI 7 at *14 n.27 (explaining what U.S. common law is), have always been to ensure the defendant's appearance at trial and to prevent a defendant from obstructing justice. *Salerno*, 481 U.S. at 764-65 (Marshall, J., dissenting) (quoting *Stack*, 342 U.S. at 3-5; *Williamson v. United States*, 184 F.2d 280, 281 (2d Cir. 1950)). Considering the Legislative intent underlying the Territory's own bail statute and the values embodied in both the ROA and the Territory's bail provisions in light of the more expansive right to bail provided to the people of the Virgin Islands, there are legitimate arguments to be made that allowing for pre-trial incarceration because a defendant is a "danger to the community" because they are likely to commit a crime in the future is a violation of the rights conferred by the ROA upon the people of the Virgin Islands. *See generally Salerno*, 481 U.S. at 764-66 (Marshall, J., dissenting); *Cantois v. People*, 61 V.I. 257, 260 (V.I. 2014) (per curiam) (Bail "cannot be a means of punishing the defendant, nor of protecting the public." (quoting *Tobal*, 51 V.I. at 155 n.4, and citing *Vermont v. Pray*, 346 A.2d 227, 229-30 (Vt. 1975))). Nothing in today's opinion should be interpreted as deciding this issue, as the issue before the Court requires only considering of the statutory language and the application of that language to the evidence in the record.

[12] *See* 5 V.I.C. § 3504a(c) (requiring proof be by clear and convincing evidence for persons charged with all crimes except First Degree Murder); *Browne*, 50 V.I. 261, 263 (holding that the prosecution bears the burden of proof and, in cases of First Degree Murder, "the proof is evident or the presumption great" standard in subsection 3504a(a) is the equivalent of the clear and convincing evidence standard). The prosecution can prove a defendant's non-bailable qualities by providing the court with "information by proffer or otherwise." 5 V.I.C. § 3504a(b), (c); BLACK'S LAW DICTIONARY 1329 (9th ed. 2009) (defining "proffer" as the verb "to offer or tender (something esp. evidence) for immediate acceptance"); *see Williams*, 53 V.I. at 526.

¶ 42 While section 3504a and Rule 1101(d)(3) both expressly suspend the applicability of the Virgin Islands Rules of Evidence, 5 V.I.C. § 3504a(b)(3), V.I.R. EVID. 1101(d)(3), and provide that proof may be presented by proffer, 5 V.I.C. § 3504a(b)(3), (c), such a proffer must be "'evidence indicating that the thing to be proved is highly probable or reasonably certain'," "'evidence showing a high probability of truth of the factual matter at issue'," in order to satisfy the clear and convincing evidence standard of proof. *Browne*, 50 V.I. at 265 (quoting *In re Laxton*, 647 N.W.2d 784, 795 (Wis. 2002); BLACK'S L. DICT. 596 (8th ed. 2004); MERRIAM-WEBSTER'S DICT. OF LAW 172 (Collector ed. 2005)). The court is required to "'ensure the reliability of the evidence by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question.'" *Williams*, 53 V.I. at 531 (quoting *United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000)). Exclusive reliance upon hearsay evidence at a bail hearing, while not per se inadequate to satisfy the clear and convincing standard of proof, requires special scrutiny for reliability to ensure that a person's right to liberty is not violated by, in practical effect, equating a bail determination to a finding of probable cause. *Williams*, 53 V.I. at 532 (quoting *Browne*, 50 V.I. at 262).

¶ 43 The Virgin Islands Rules of Criminal Procedure reaffirm these statutory provisions and declare that, unless otherwise limited by statute, all people are bailable on conditions approved by the Superior Court. V.I. R. CRIM. P. 5-1(a).[13] Additionally, excessive bail is prohibited, and the Superior Court must impose the least restrictive conditions that will reasonably protect the community, assure the defendant's presence in court, and assure the integrity of the judicial

[13] Rule 46 is also applicable to motions seeking modification of bail conditions but only sets forth the requirement that opposing counsel confer prior to filing a motion to modify bail conditions. V.I.R. Crim. P. 46(a). In contrast, Rule 32.1 applies only to the revocation of probation, V.I.R. Crim. P. 32.1, and probation is neither bail nor pre-trial incarceration.

process. V.I.R. CRIM. P. 5-1(b). "Any bail or conditions of release that are not tailored to achieve the purpose of bail are considered excessive and therefore unconstitutional." *Rieara*, 57 V.I. at 667 (citing 48 U.S.C. § 1561; *Galen v. County of L.A.*, 477 F.3d 652, 661-62 (9th Cir. 2007)); *Cantois v. People*, 61 V.I. 257, 260 (V.I. 2014) (per curiam) (quoting *Rieara*, 57 V.I. at 667).

¶ 44 Furthermore, "a defendant's economic position" must not operate to their prejudice. *See Miller v. People*, 67 V.I. 827, 848 (V.I. 2017); *Karpouzis*, 961 F. Supp. at 851 (Bail must not "amount to 'the sub rosa use of money bond' to detain" a defendant.); *cf. United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam) (bail not necessarily excessive, though defendant unable to pay, if amount is reasonably necessary to ensure defendant's appearance). However, even though a defendant cannot satisfy a financial condition of bail, this fact does not make that condition unreasonable—because that financial condition may be reasonable to ensure the defendants appearance in court or to protect the community or both even if the defendant does not have the means to satisfy such condition. *Mantecon-Zayas*, 949 F.2d at 550-51; *United States v. McConnell*, 842 F.2d 105, 108-09 (5th Cir. 1988); *United States v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005); *United States v. Wong-Alvarez*, 779 F.2d 583, 584 (11th Cir. 1985).

¶ 45 If a financial condition is beyond a defendant's means, the practical effect is to deny bail. *People v. Rionda*, 2021 VI Super 31, at *6 ("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 [right to liberty]." (citing *Bandy v. United States*, 81 S. Ct. 197, 198 (1960))). Such circumstances warrant closer scrutiny to ensure that such a condition was, in fact, reasonably necessary to protect the community, safeguard the integrity of the trial process, ensure the defendant's appearance, or any combination or mixture thereof.[14]

1. Factors and Conditions Relevant to Pre-trial Detention

¶ 46 The Legislature has established three considerations relevant to the court's 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 (Trial Integrity). 5 V.I.C. § 3504a(a)(1)-(2).[15] Notably, these three broad considerations are not mutually exclusive even

---

[14] Indeed, without such scrutiny, any bail determination under the circumstances described would render the right to bail illusory, in effect establishing a rule that the indigent have no such right. *Bandy*, 81 S. Ct. at 198 ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.").

[15] The full text of subsections 3504a(a) is as follows:

> (a) Who may be detained:
>
> (1) Dangerous crime. A person charged with murder in the first degree, rape in the first degree, arson in the first degree, robbery in the first degree, burglary in the first degree, kidnapping for ransom, or drug trafficking (which shall mean trafficking in marijuana, synthetic marijuana, hashish, cocaine, dangerous drugs, morphine or opium as provided in Title 19, section 614a, Virgin Islands Code) may by order of the court be detained upon a hearing as provided in subsection(b) prior to trial if the government certifies by motion that, based on the person's pattern of behavior consisting of his past and present conduct, the nature and circumstances of the offense charged, the weight of the evidence presented, his family ties, employment, financial resources, character and mental condition, length of residence in the community, record of convictions, and any record of appearance at court proceedings, flight to avoid prosecution or failure to appear at court proceedings, there is no one condition or combination of conditions which will reasonably assure the safety of the community or, particularly in the case of a person charged with drug trafficking, that the person charged will appear for trial.
>
> (2) Other offenders. A person charged with any offense may by order of the court be detained upon a hearing as provided for in subsection (b) prior to trial if the person for the purpose of obstructing or attempting to obstruct justice, threatens, injuries or intimidates or attempts to threaten, injure or intimidate any prospective witness or juror.

though factors establishing one are often material to establishing another. For example, a defendant who refuses to participate in the trial process certainly undermines the integrity of the judicial process, but the Legislature has established that ensuring appearance in court is a consideration independent of actions that undermine the integrity of the judicial process, such as evidence tampering.

a. Facts Relevant to Evaluating Bailable Status of a Defendant

¶ 47 In evaluating these three considerations in light of the evidence, the court must do more than provide "a 'mere recitation of relevant criteria'; it should clearly explain why those criteria support the ultimate bail amount or other release conditions." *Rieara*, 57 V.I. at 668 (internal alterations omitted) (citing *In re Pipinos*, 654 P.2d 1257, 1260 (Cal. 1982) (en banc)). Generally, a bail determination requires consideration of the nature and circumstances of the offense, the weight of the evidence, the history and characteristics of the defendant, and the nature and seriousness of the danger to any person or the community. *United States v. Vasilakos*, 508 F.3d 401, 410-11 (6th Cir. 2007). Such material facts to be considered in evaluating the foregoing include the following: (a) the person's pattern of behavior consisting of their past and present conduct, (b) the nature and circumstances of the offense charged,[16] (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

---

5 V.I.C. 3504a(a).

[16] As a part of the consideration of the nature and circumstances of the offense charged, it is noteworthy that the greater the punishment attached to the crime charged, the more incentive a defendant has to flee from justice. *Salerno*, 481 U.S. at 765 n.6 (Marshall, J., dissenting); *see, e.g.*, *United States v. English*, 629 F.3d 311, 319 (2d Cir. 2011) (considering, inter alia, a 20-year mandatory minimum); *United States v. Abad*, 350 F.3d 793, 799 (8th Cir. 2003) (considering, inter alia, a 30-year sentence); *United States v. Cisneros*, 328 F.3d 610, 618 (10th Cir. 2003) (considering, inter alia, the seriousness of the charges).

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. 5 V.I.C. § 3504a(a)(1) & (b). Additional relevant considerations include whether the accused has violated terms of pre-trial release in the past, whether in the present case or a different case(s), and whether the defendant failed to appear in the past, whether in the present case or a different case(s). *United States v. Santos-Flores*, 794 F.3d 1088, 1093 (9th Cir. 2015); *United States v. Quartermaine*, 913 F.2d 910, 916-17 (11th Cir. 1990).

¶ 48 Factors to be considered in evaluating a person's motivation to flee (become a "fugitive from justice") include the length of potential sentence, prior use of false identities or other deceptive methods to avoid detection, risk of retaliation from others, citizenship status, employment status, history of travel, ties to the Territory, and ties to other jurisdictions (including employment, family, or property). *Rionda*, 2021 VI Super 31, at *4 (citing *Camacho*, 47 V.I. at 309; *People v. Ford*, 49 V.I. 270, 282 (V.I. Super. Ct. 2008); *People v. Cajuste*, ST-16-CR-328, 2017 WL 679328, at *4 (V.I. Super. Ct. 2017) (unpublished); *People v. Powell*, No. ST-13-SFL-0005, 2014 WL 1229662, at *4 (V.I. Super. Ct. Mar. 24, 2014) (unpublished); *People v. Rodriguez*, No. SX-17-CR-145, 2018 WL 582568, at *5 (V.I. Super. Ct. Jan. 16, 2018) (unpublished); *People v. Lesperance*, No. ST-17-CR-319, 2017 WL 5957668, at *2 (V.I. Super. Ct. Nov. 28, 2017) (unpublished); *People v. Thomas*, 49 V.I. 151, 161 (V.I. Super. Ct. 2007); *People v. Saldana*, ST-14-Cr-F187, 2015 WL 301491, at *7 (V.I. Super. Ct. 2015) (unpublished)).

¶ 49 Additional factors to be considered in evaluating whether a defendant is a danger to the community include past violent crimes, affiliations with violent criminals or criminal organizations, sexual activity with a minor (particularly engaging in such activity with knowledge of the minority status), threats to the victim, and threats to witnesses. *United States v. Tortora*, 922 F.2d 880, 885-86 (1st Cir. 1990); *United States v. Abad*, 350 F.3d 793, 798-99 (8th Cir. 2003) ("The consent or willing participation of a [child] is insignificant and hardly relevant" to a pre-trial detention determination (citing *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956); *United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002))).

b. Possible Bail Conditions

¶ 50 Just as material facts are to be assessed in context, bail conditions should be considered in light of the nature and circumstances of the offense, the weight of the evidence, the history and characteristics of the defendant, and the nature and seriousness of the danger to any person or the community. *Vasilakos*, 508 F.3d at 410-11. Possible conditions of bail include personal recognizance, an unsecured bail bond, travel restrictions, residence restrictions, third-party custody, a surety bond, a cash bail bond, or any other such appropriate condition. V.I.R. CRIM. P. 5-1(b)(1)-(7), (d). The Superior Court has applied these bail provisions and determined a non-exhaustive list of other material conditions, for example: house arrest, electronic monitoring, house arrest with electronic monitoring, reporting to the probation officer (either electronically or in person), travel restrictions, requiring the surrender of a passport or other "travel documents," prohibiting contact (either directly or by agent) with the victim, prohibiting contact (either directly or by agent) with the victim's family, prohibiting contact (either directly or by agent) with the employer of the victim or the victim's family, and requiring the defendant to pay the electronic monitoring fees. *People v. Bertheir*, 2021 VI Super 58U, *3 (quoting *People v. Dowdye*, 48 V.I. 45, 52 (V.I. Super. Ct. 2006); *People v. Saldana*, 2015 WL 301491, at *12); *see also Rionda*, 2021 VI super 31 at *3 (citing V.I.R. CRIM. P. 5-1). Furthermore, in cases of sex crimes, release may be conditioned on the submission to and cooperation in collection of a DNA sample. *See United*

States v. Mitchell, 652 F.3d 387, 411-12 (3d Cir. 2011); *United States v. Stephens*, 594 F.3d 1033 (8th Cir. 2010); *United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2011) (upholding mandatory conditions upon bail for offenders accused of crimes against minors).

¶ 51 The above discussion illustrates that the trial court did not err in the factors it considered in evaluating Davis's threat to the community (as he was charged with one of the seven violent crimes), the likelihood of him failing to appear in court, and efforts he had undertaken to obstruct justice through victim intimidation (as there was a proffer of threats to both the victim and the witness, the child who was raped and her brother). These are all provided for by statute, and likelihood of failing to appear and obstruction of justice have always been justifications for pre-trial detention at common law.

2. Evidentiary Support

¶ 52 The evidence upon which the trial court relied simply failed to meet the minimum standard of reliability because it was not "'evidence indicating that the thing to be proved is highly probable or reasonably certain'," i.e., "'evidence showing a high probability of truth of the factual matter at issue'," in order to satisfy the clear and convincing evidence standard of proof. *Browne*, 50 V.I. at 265 (quoting *Laxton*, 647 N.W.2d at 795; BLACK'S L. DICT. 596 (8th ed. 2004); MERRIAM-WEBSTER'S DICT. OF LAW 172 (Collector ed. 2005)). As we have previously observed, the use of evidence that consists of multiple lawyers of hearsay in a bail hearing generally does not provide an adequate evidentiary basis to support the trial court's bail determination when the hearsay evidence is not of the type that is considered highly reliable. *Williams*, 53 V.I. at 527-29 (quoting *United States v. Acevedo-Ramos*, 755 F.2d 206 (1st Cir. 1985), and citing *United States v. Fisher*, 618 F. Supp. 536, 538 (E.D. Pa. 1985); *United States v. Bell*, 673 F. Supp. 1429, 1431-32 (E.D. Mich. 1987)).

¶ 53 Here, the trial court heard no witnesses. Instead, a supplemental report completed by a police officer the day after the initial report of the crime was submitted to the court. This proffer of evidence is a problem in that this report did not contain the initial statements provided to the police. *See Williams*, 53 V.I. at 527-29. Rather, the probable cause fact sheet provided the statements of Officer Daniel who stated that he had interviewed both victims, the fifteen-year-old who was raped and her eleven-year-old brother who was present at the home, and it was reported that both relayed that Davis had threatened them if they told anyone what happened. This report also noted that the six-year-old sister was home when Davis entered and raped the fifteen-year-old girl.

¶ 54 While it is understandable that the prosecution may not want to re-traumatize a minor victim of an inherently violent crime by also calling them to testify at a bail hearing, the failure to present the mother's testimony is not understandable. Certainly a parent who believes a person has sexually violated her child has a motivation to assert that the defendant made threats to silence the victim, and the failure to present the victim's mother to testify deprived the court and the defendant of the opportunity to judge her credibility. Additionally, police officers and other government officials are not endowed with presumptive credibility. The failure to present the testimony of the officer who asserted he had taken the statements of the two minor victims created the same issue of unreliability as the failure to present the mother of the victims. Likewise, the trial court's reliance on the assertion that records of past conduct were in fact indicative of Davis's past conduct created an issue of unreliability, as prosecutors are not witnesses and are not endowed with presumptive credibility. *Henry v. Dennery*, 55 V.I. 986, 994 (V.I. 2011) (noting that the unsworn statements of an attorney are not evidence). Without such an evaluation, it is impossible to fathom how the trial judge could assess the reliability of the evidence.

¶ 55 Only hearsay statements within other hearsay statements were presented to establish that Davis had threatened witnesses in order to intimidate them into not reporting his behavior and testifying. While the testimony of a single witness may establish such a fact, *Gonsalves v. People*, 70 V.I. 812, 836 (V.I. 2019), there was no testimony in this case.

¶ 56 Furthermore, while the court was entitled to take judicial notice of various public records, *see generally* V.I.R. EVID. 201, the trial court never stated that it was taking judicial notice of any public record or police record of the investigation into the crimes, thus depriving the parties of the opportunity to be heard on the propriety of taking judicial notice, as required in Rule 201(e). Furthermore, a prerequisite to judicial notice under the present circumstances is that the prosecution must have provided sufficient evidence to permit a rational finding that the present defendant was the same defendant whose past acts are reported in the public records. *See generally* V.I. R. EVID. 404(b) (prior acts are relevant and admissible to prove, *inter alia*, "identity, absence of mistake, or lack of accident" but only if it can be shown that the defendant actually committed the prior acts); *People v. Fenton,* 59 V.I. 163, 171-72 (V.I. Super. Ct. 2013) (Rule 404(b) "is a rule of inclusion rather than exclusion" and permits prior act proof to be used to establish identity and to "complete the story" by showing that a defendant was involved in incidents that are similar to the one under consideration).

¶ 57 To be absolutely clear, we do not cite the Rules of Evidence as mandatory authority to be applied in bail hearings. Indeed, Rule 1101(d)(3) expressly indicates that the Virgin Islands Rules of Evidence "do not apply to . . . miscellaneous proceedings such as . . . considering whether to release [a defendant] on bail or otherwise." Rather, they are cited because they help inform our analysis of whether the trial court "selectively insisted upon the production of the underlying evidence or evidentiary sources" such that the evidence presented was sufficiently reliable to meet the clear and convincing standard of proof. *Williams*, 53 V.I. at 531 (quoting *LaFontaine*, 210 F.3d at 131). If it had been established that Davis was the same person who committed those past acts, by judicial notice (or otherwise) of either court or police records, a conclusion that he was a danger to the community and that he would not appear in court was warranted. *Fenton*, 59 V.I. at 172. However, both the prosecution and the trial judge abjectly failed to identify any facts supporting such a conclusion.

¶ 58 There was no attempt to prove Davis's identity beyond the prosecuting attorney's statement. For example, the prosecution relies on several publicly reported judicial opinions in which the defendant is identified as Jimmy Davis. However, no attempt was made to prove that the Jimmy Davis in those reported matters was the same Jimmy Davis who is currently before the court. Similarly, past police reports were referred to, again without any attempt to prove that the Jimmy Davis mentioned in those reports was the Jimmy Davis involved in the present case. It is difficult to understand how no testimony was offered in which an investigator testified that they had searched publicly available records and was unable to find another Jimmy Davis with the same birth details. Likewise, there was no testimony by anyone who had witnessed Davis's past attempts to flee from the police. Although there was a proffer asserting that Davis had fled from police in an effort to avoid arrest in this matter, Davis challenged this factual conclusion. Such a conflict must be resolved by testimony subject to cross-examination during a hearing. *See Browne*, 50 V.I. at 266 (citing *Konigsberg*, 164 A.2d at 745); *Armstrong*, 64 V.I. at 536.

¶ 59 Similarly, a police report disclosed that Davis's grandmother had stated she did not want Davis in her home or living next door to her home because of his violent behavior. In contrast, Davis's grandmother submitted an affidavit to the court contradicting this assertion. While the trial court purported to ignore the impact of this conflict, it is disconcerting how the judge could have determined the appropriateness of release conditions without examining the witness involved. Furthermore, no proposed third-party custodian was presented at any of the bail hearings. It is impossible to understand how the trial court could have evaluated the ability of such a person to control and supervise Davis without such testimony. Additionally, there was no testimony presented as to whether any family member or friend of Davis's would serve as a surety pledging their property to secure a bail bond.

¶ 60 I do not address further evidentiary issues because this Court has eschewed the prescription of any fixed or per se standard of what evidence must be presented in order to ensure the reliability and accuracy of the fact-finding process and has expressly declared that reliance exclusively upon hearsay is not per se reversible error. Thus, in the present context I would defer to the trial judge in the first instance to "selectively insist upon the production of the underlying evidence or evidentiary sources." *Williams*, 53 V.I. at 531 (quoting *LaFontaine*, 210 F.3d at 131).

3. Reasonableness of Conditions

¶ 61 There was no evidence presented that created an issue of Davis's indigence. The court had granted Davis's petition to be appointed counsel, and no evidence was presented to contradict this factual finding of indigence. Furthermore, though the record is unclear, it appears the original conditions of bail were set by the police. Subsequently, when Davis was brought in the court for his advice of rights, the Magistrate Judge was asked to reassess the terms of his bail. However, the court made no findings as to whether Davis would appear in court. Likewise, there was no finding as to whether Davis had threatened witnesses. Finally, there was no finding as to community safety. Instead, the judge simply stated that "the bond will stand at a million dollars cash." At the later hearings, before a different judge, this error was repeated.

¶ 62 Davis was born, raised, and resided on St. Croix at the time he was confined in pre-trial detention. He had no assets, and there was no evidence presented that he had any family, friends, or work connections outside the Virgin Islands. Likewise, there was no evidence presented that Davis had a passport allowing him to travel internationally, and while his affidavit of indigence indicates he had no home, the trial judge failed to make note of this fact. And, while the police records informed that Davis did not have a lease for any residence, this fact was not mentioned by the trial judge. Additionally, although there may be concerns of a defendant absconding to Vieques (or another nearby island) by boat in the dark of night, no evidence was presented indicating that Davis had any friends or family with a boat, much less a boat that could travel the distance from St. Croix to any nearby island. *See generally*, *e.g.*, *Dowdye*, 48 V.I. at 49 ("Defendant told the witness 'he was going to 'catch a boat,' implying he intended to flee the jurisdiction."). Indeed, the only evidence as to Davis's close relationships established that his family and friends were exclusively on St. Croix and that he lacked any means to leave the Territory.

¶ 63 The court failed to make the necessary ultimate finding that there was no set of circumstances under which Davis could be released that would ensure his appearance in court, protect the integrity of the judicial process, and protect the community. In subsequent prosecutions, setting bail at $1,000,000 may be appropriate and is certainly a possibility, depending on the circumstances then presented. However, on the record before this Court, a $1,000,000 secured bail to ensure an indigent defendant would appear in court, refrain from witness or evidence tampering, and not be a danger to the community was an abuse of discretion. *Cf. Karpouzis*, 961 F. Supp. 841 (holding a $2 million bail requirement excessive, even when the defendant had defrauded people of millions of dollars and had no assets or family in the Virgin Islands and had told a witness he would abscond from the Territory).[17]

III. CONCLUSION

¶ 64 Because the denial of pre-trial release was predicated upon an unreliable factual foundation, the Superior Court abused its discretion when it denied Davis's motion. The June 17, 2021 order should be vacated and the matter remanded with direction to hold an evidentiary hearing in which reliable evidence is presented.

For these reasons I concur in the judgment of the Court.

[17] To be clear, nothing in today's holding stands for the proposition that $1 million bail is unreasonable per se or even presumptively unreasonable. The disposition of this matter is reflective of the highly fact-intensive evaluation that is required to justify bail; the trial court failed to conduct such an evaluation.