

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

JIMMY DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1607

UNITED STATES OF AMERICA

v.

JIMMY DAVIS,
Appellant

On Appeal from the District
of the Virgin Islands
(D.C. Criminal No. 1-10-cr-00011-001)
District Judge: Honorable Wilma A. Lewis

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
December 14, 2017

Before: SMITH, *Chief Judge*, MCKEE, and SCIRICA, *Circuit Judges*

(Filed: September 10, 2018)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SCIRICA, *Circuit Judge*

The District Court sentenced Jimmy Davis to eight months' imprisonment for violating the conditions of his supervised release. Davis now appeals, arguing he was denied due process and that the District Court erred by finding sufficient evidence he committed another crime—disturbance of the peace by threats—in violation of his conditions of supervised release. We hold Davis was accorded all process due to him and that the District Court did not commit clear error when it found, by a preponderance of the evidence, Davis committed a disturbance of the peace by threats. We will therefore affirm.

I.¹

On August 2, 2010, Davis pled guilty to one count of being a felon in possession of ammunition and one count of being a felon in possession of a firearm, both in violation of 18 U.S.C. § 922(g)(1). [App. 7a]. He was sentenced to 33 months' incarceration and three years of supervised release, which began on November 8, 2013. [App. 7b-c]. Davis's supervised release conditions prohibited him from, among other things, committing another federal, state, or local crime. [App. 7c].

While on supervised release, Davis was arrested by the Virgin Islands Police Department on a warrant charging unlawful sexual contact in the first degree, 14 V.I.C. § 1708, and disturbance of the peace by threats, 14 V.I.C. § 622. [App. 454]. The Office of Probation issued a memorandum on August 10, 2015, informing the District

¹ We write for the parties and set forth only those facts necessary to our disposition.

Court of the arrest and alleging Davis had violated the conditions of his supervised release. [*Id.*]. Though the memorandum described the arrest warrant, it did not specify that the condition alleged to have been violated was that Davis not commit another crime. Following the Probation Office's memorandum, the District Court signed an arrest warrant for Davis for violating the conditions of his supervised release, which was executed by the United States Marshals Service on February 10, 2016. [App. 41].

At Davis's revocation hearing, the Government presented the testimony of Probation Officer Dudley Fabio, the complainant, JD (a minor female between the ages of 13 and 16), and Virgin Islands Police Department Officer Gregory Charlery Joseph. Davis cross-examined each of the Government's witnesses and presented two witnesses of his own.² Crediting JD's testimony, the District Court found that while in his car, Davis made sexual advances toward JD, touching her thighs and chest area.³ [App. 122]. When she refused these advances, Davis became agitated, yelled at her, after which Davis parked his car and showed her a picture of his penis. [App. 122; 126]. Davis then told JD he would "deal with [her] mother, [her] father, and he was going to leave [her] brother for last" if she told anyone about what he had shown her. App. 126. After the incident, Davis brought JD to his job site and, while he told her not to leave, she "panicked" and left

² Prior to the conclusion of the revocation hearing, Davis also filed a motion to dismiss the proceedings alleging the Government had failed to provide sufficient written notice of the alleged violation of the conditions of supervised release.

³ Davis does not contest these findings and only argues they are insufficient to support the District Court's conclusion he committed a disturbance of the peace.

because she knew Davis had a criminal record, he had “disrespected” and “violated her,” and she was scared. App. 127.

Based on these factual findings, the District Court found sufficient evidence Davis had committed a disturbance of the peace by threats, but insufficient evidence of unlawful sexual contact in the first degree. [*See* App. 388-391]. The District Court also found that the probation memorandum (which Davis received prior to the commencement of the revocation hearing) provided Davis sufficient written notice of the disturbance of the peace charge. [App. 391]. For violating local laws, and thus the terms of his supervised release, the District Court sentenced Davis to eight months’ imprisonment followed by twenty-eight months’ supervised release. [App. 395-406].

II.

The District Court had jurisdiction under 18 U.S.C. § 3231 and 48 U.S.C. § 1612, and we have jurisdiction under 28 U.S.C. § 1291. Our review of Davis’s due process claim is plenary. *See United States v. Barnhart*, 980 F.2d 219, 222 (3d Cir. 1992). We review the District Court’s revocation of Davis’s supervised release for abuse of discretion. *See United States v. Maloney*, 513 F.3d 350, 354 (3d Cir. 2008). Factual findings in support of the decision are reviewed for clear error, however, and questions of law are reviewed de novo. *Id.*

III.

A.

We first consider Davis’s contention that he was denied due process at his revocation hearing. Davis argues the Government provided insufficient written notice of

the alleged violations of his conditions of supervised release because the probation memorandum he received before the revocation began did not identify the specific condition of release he had violated. This argument stretches the minimum requirements of due process articulated in our case law and Federal Rule of Criminal Procedure 32.1. Accordingly, we will affirm the District Court's denial of Davis's motion to dismiss the revocation proceedings.

Hearings to revoke supervised release, like hearings to revoke parole, are not criminal prosecutions. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *United States v. Santana*, 526 F.3d 1257, 1259 (9th Cir. 2008); *United States v. Tippens*, 39 F.3d 88, 89 (5th Cir. 1994). It is, therefore, well-settled that a revocation of supervised release hearing does not trigger “the full panoply of due process rights accorded a defendant at a criminal trial.” *Carchman v. Nash*, 473 U.S. 716, 725 (1985). These proceedings do, however, affect the liberty interests of individuals and thereby entitle a defendant to limited protections under the Due Process Clause. *See Morrissey*, 408 U.S. at 484 (1972); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973). The Federal Rules of Criminal Procedure incorporate these due process rights in Rule 32.1.

As relevant here, Rule 32.1(b) requires that the defendant be provided “written notice of the alleged violation.” Fed. R. Crim. P. 32.1(b)(2)(A). But, “[a] revocation hearing need not be as rigid or as formal as a criminal trial either with respect to notice or specification of charges, fairness of the proceedings being the prime factor,” *United States v. Evers*, 534 F.2d 1186, 1188 (5th Cir. 1976) (citing *Burns v. United States*, 287 U.S. 216, 221 (1932)), and to be effective under Rule 32.1, notice “need only assure that

the defendant understands the nature of the alleged violation,” *United States v. Sistrunk*, 612 F.3d 988, 992 (8th Cir. 2010). Thus, a defendant’s right to pre-hearing notice is satisfied where he has written notice of the conduct on which his revocation is based. *See United States v. Gordon*, 961 F.2d 426, 429–30 (3d Cir. 1992).

In *Gordon*, for example, the defendant argued her drug use should not have been considered at her revocation of probation hearing because the probation violation petition had not “formally charged her” with possession of a controlled substance. *Id.* at 429. Rejecting this argument, we found the requirements of notice satisfied because the petition cited two positive urine specimens and thus the defendant “should have anticipated that she would be questioned about her drug possession at the probation violation hearing.” *Id.* Similarly, we found Rule 32.1(b)’s notice requirement satisfied in *United States v. Barnhart* where “the probation officer’s petition for revocation provided Barnhart with written notice of the alleged probation violations: the failure to report to the probation officer on three different dates.” 980 F.2d 219, 223 (3d Cir. 1992).

Like the defendants in *Gordon* and *Barnhart*, the notice Davis received prior to his revocation hearing was sufficient to ensure Davis understood the nature of the alleged violation of his conditions of supervised release and could prepare a defense. The probation memorandum explains “[o]n February 21, 2015, [Davis] was arrested on a warrant issued . . . for Unlawful Sexual Contact First Degree/Domestic Violence and Disturbance of the Peace by Threats/Domestic Violence.” App. 454. The second charge, disturbance of the peace, ultimately served as the basis for revoking Davis’s supervised

release.⁴ Particularly when coupled with the March 9, 2015, Superior Court information (which Davis also received prior to the hearing [*see* App. 42]), the probation memorandum provided adequate notice that the conduct Davis was arrested for would be the basis for the revocation of supervised release hearing. Davis questions whether he was “supposed to guess which release condition he had violated,” Appellant’s Br. at 21, but our inquiry focuses on notice of the underlying conduct at issue in the hearing *i.e.*, the conduct which must be defended against. Regardless, Davis should have anticipated the condition alleged to have been violated was that he not commit another crime.

In arguing that notice of the specific violation is required, Davis references the Ninth Circuit’s decision in *United States v. Havier*, 155 F.3d 1090 (9th Cir. 1998). *Havier* addressed the specificity of notice required regarding the underlying statute alleged to have been violated, not the specific condition of release alleged to have been violated as Davis argues here. More importantly, in *Havier*, the defendant was able to show how the lack of citation to a specific statute harmed his ability to defend against the alleged violations by altering what he chose to emphasize in his testimony and in cross-examination. *Id.* at 1094. Davis fails to demonstrate, or even argue, any specific prejudice resulting from the Government’s failure to delineate in the memorandum which specific

⁴ On January 27, 2017, the Government filed a formal notice of violation of supervised release. [App. 224]. In addition to alleging unlawful sexual contact in the first degree and disturbance of the peace by threats, this notice alleged Davis had committed unlawful sexual contact in the second degree in violation of 14 V.I.C. § 1709. The District Court found Davis did not receive adequate notice of the unlawful sexual contact in the second degree charge and the Government does not challenge this finding on appeal. [App. 393].

condition of supervised release was violated. To the contrary, Davis cross-examined the government's witnesses and presented two witnesses of his own, and his strategy of challenging the complainant's credibility was not dependent on knowing the specific condition of release he was charged to have violated. We will therefore affirm the District Court's denial of Davis's motion to dismiss.

B.

Davis also argues there was insufficient evidence to establish that he violated a condition of his supervised release by committing a disturbance of the peace by threats. Specifically, Davis argues his statement to JD that he would "deal with" her mother and father, and "leave her brother for last" is ambiguous and does not communicate any intent to commit violence. *See* Appellant's Br. at 26. Whether there is sufficient evidence to establish a violation of a condition of supervised release is a factual question reviewed for clear error. *See United States v. Poellnitz*, 372 F.3d 562, 565 n. 6 (3d Cir. 2004). We find no error in the District Court's analysis and will affirm.

To revoke a defendant's supervised release, a district court need only find "by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3). "When the condition is that the defendant not commit a crime, there is no requirement of conviction or even indictment." *Poellnitz*, 372 F.3d at 566. This is consistent with "the broad discretion" we have traditionally afforded district courts to revoke probation and supervised release when the requisite conditions are violated. *Id.* (citing *Gordon*, 961 F.2d at 429).

Regarding the underlying crime at issue here, section 622(1) of the Virgin Islands Criminal Code proscribes “maliciously and willfully disturb[ing] the peace or quiet of any village, town, neighborhood or person, by loud or unusual noise, or by tumultuous offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting.” 14 V.I.C. § 622. The Virgin Islands Territorial Court has explained that “[t]o constitute a ‘threat’ under a breach of peace statute, there need not be an immediate menace of violence or acts showing a present ability and will to execute the threat.” *Gov’t of Virgin Islands v. Stagger*, No. CRIM. 253/1976, 1977 WL 425260, at *3 (Terr. V.I. Mar. 15, 1977) (internal quotation and citation omitted). Instead, “[a] threat imports the expectation of bodily harm, thereby inducing fear and apprehension in the person threatened” and need not necessarily be “communicated directly to the threatened individuals.” *Id.*

Referencing *Stagger*, the District Court concluded Davis had “made threats against various members of JD’s family [and] those threats were made to JD to prevent her from telling anyone that defendant had shown her a picture of his penis.” App. 395. The trial judge credited JD’s testimony that she became panicked, scared, and nervous because she knew of Davis’s criminal record, and therefore found the Government had satisfied its burden of demonstrating a disturbance of the peace by a preponderance of the evidence. [*Id.*]. We find no error in this analysis. As the Government explains in its brief, the circumstances surrounding Davis’s statement are highly relevant and support a finding that his statement imported an expectation of bodily harm, thereby inducing fear and apprehension in JD: JD was young, JD had rejected Davis’s sexual advances, Davis

had become agitated and JD was in a confined area when the statements were made, and JD knew Davis had a criminal record.

Based on these circumstances, the District Court did not commit clear error when it found, by a preponderance of the evidence, Davis had committed a disturbance of the peace by threats. As such, the District Court was well within its discretion to revoke Davis's supervised release.

IV.

For the foregoing reasons, we will affirm the District Court's denial of Davis's motion to dismiss the revocation proceedings and decision to revoke supervised release.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1607

UNITED STATES OF AMERICA

v.

JIMMY DAVIS,
Appellant

On Appeal from the District
of the Virgin Islands
(D.C. Criminal No. 1-10-cr-00011-001)
District Judge: Honorable Wilma A. Lewis

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
December 14, 2017

Before: SMITH, *Chief Judge*, MCKEE, and SCIRICA, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the District of the Virgin Islands and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on December 14, 2017. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order entered March 16, 2017, be, and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszeit
Clerk

DATED: September 10, 2018

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK



UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
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September 10, 2018

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RE: USA v. Jimmy Davis
Case Number: 17-1607
District Court Case Number: 1-10-cr-00011-001

ENTRY OF JUDGMENT

Today, **September 10, 2018** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.

Certificate of service.

Certificate of compliance if petition is produced by a computer.

No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Tonya
Tonya, Legal Assistant
267-299-4938

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APPENDIX B

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DIS TRICT COURT OF THE VIRGIN ISLANDS
U.S. Probation / Pretrial Services

Larry T. Glenn
Chief U.S. Probation Officer



3013 Estate Golden Rock
Christiansted, VI 00802
(340) 718-5515
Fax: (340) 712-7185

August 10, 2015

MEMORANDUM

To: The Honorable Wilma A. Lewis
Chief District Judge

From: Dudley A. Fabio, III *DAF*
U.S. Probation Officer

Thru: Larry T. Glenn *LTG*
Chief United States Probation Officer

Re: Jimmy Davis
Docket No.: 2010-0011-01
Status Report (Warrant Request)



Jimmy Davis was convicted in the District Court of the Virgin Islands, St. Croix Division, on November 12, 2012. The defendant was sentenced by the Honorable Raymond L. Finch to a term of thirty-three (33) months imprisonment and three (3) years supervised release, for Felon in Possession of a Firearm and Ammunition. Mr. Davis was also ordered to pay a fine of \$500 and a special assessment of \$200. Mr. Davis began his term of supervised release on November 8, 2013. He was arrested on a local charge on January 22, 2014, and was ordered detained. The charges against Mr. Davis were ultimately dismissed, and offender resumed his term of supervised release on September 22, 2014.

The purpose of this memorandum is to inform the Court of an alleged violation committed by the above-mentioned offender. On February 21, 2015, the offender was arrested on a warrant issued by the Superior Court of the Virgin Islands, Division of St. Croix, for Unlawful Sexual Contact First Degree/Domestic Violence and Disturbance of the Peace by Threats/ Domestic Violence. Mr. Davis' bail was set at \$100,000. Mr. Davis remains incarcerated at the Golden Grove Adult Detention Facility.

This officer was informed by the Superior Court of the Virgin Islands, Division of St. Croix, that Mr. Davis' next court date will be held on August 24, 2015, at 9:30 a.m.


If additional information is needed regarding this matter, please contact me at your earliest convenience.

Recommendation:

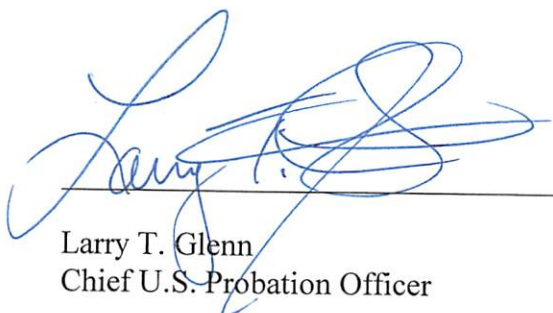
The alleged charges against the offender, Mr. Jimmy Davis, are very serious. Mr. Davis' alleged actions pose an immediate threat to the community, as it is alleged that he would seek retribution against the victim or her family for notifying the police. This office further contends that the offender poses even more risks to the community as the offender is charged with a sex offense and has a history of assaultive behavior. It should be noted that the offender has shown history of assaultive types of behavior.

With that said, this office will await the decision imposed by the Superior Court in regards to his release status. This office intends to be present at the offender's hearing on August 24, 2015, and will apprise the Court of any new developments.

At this time, we will respectfully request that a warrant be issued for Mr. Davis to appear in court to show cause why his supervised release should not be revoked.



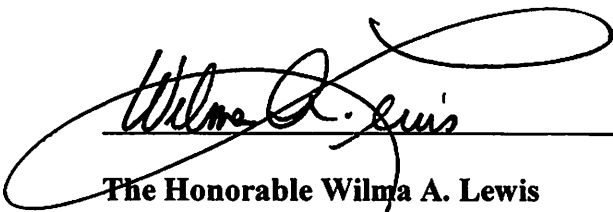
Dudley A. Fabio, III. USPO 8/11/15
Date



Larry T. Glenn 8/11/15
Chief U.S. Probation Officer Date

COURT ACTION DESIRED:

- ☒ 1. The Court shall issue a warrant for a revocation of supervised release hearing
- ☐ 2. The Court shall issue a summons for a revocation of supervised release hearing.
- ☐ 3. Other. _____
- _____


The Honorable Wilma A. Lewis
Chief District Judge

9/8/15

Date

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. 2010-11
)	
JIMMY DAVIS,)	
)	
Defendant.)	
_____)	

DEFENDANT'S MOTION TO DISMISS REVOCATION PROCEEDINGS
OR IN THE ALTERNATIVE FOR RELEASE, OR FOR
A RULING BEFORE MARCH 18, 2017

The Defendant, Jimmy Davis, by and through his counsel, Omodare Jupiter, Federal Public Defender, respectfully requests a hearing for the court to order that the pending revocation proceedings in this matter be dismissed, or for his immediate release. In the alternative, Mr. Davis requests a ruling on his revocation prior to March 18, 2017 so that he may attend his trial currently set for March 20, 2017 for his case pending in the Superior Court for the Virgin Islands while at liberty. This matter has been pending in this court since February 11, 2016. The court held a revocation hearing on January 12, 2017, and January 30, 2017. Now that the court has had this matter under advisement for thirty days, it should be dismissed, or in the alternative, Mr. Davis should be released. In support of this motion, Mr. Davis states as follows:

1. Mr. Jimmy Davis was originally charged in 2010 in this matter with firearms offenses. He pled guilty to two counts of the information on August 2, 2010

and sentenced on November 17, 2010 to serve 33 months of imprisonment and 3 years of supervised release. Upon release from serving his sentence, Mr. Davis began his term of supervised release.

2. On February 23, 2015, Mr. Davis was arrested by the Virgin Islands Police Department pursuant to an arrest warrant alleging the crime of unlawful sexual contact/domestic violence in violation of 14 V.I.C. § 1708(a)(4) and 16 V.I.C. § 91(b)(5) and disturbance of the peace by threats/domestic violence, in violation of 14 V.I.C. § 622(1) and 16 V.I.C. § 91(b)(11).
3. An information filed in Superior Court shows Mr. Davis charged with committing an offense in or about December, 2014. Mr. Davis was initially held in the local matter on a \$100,000 bail that he could not make. On June 9, 2015, a Superior Court Judge reduced his bond amount to \$20,000, requiring Mr. Davis to pay only ten per cent, or \$2,000 to secure his release. But Mr. Davis was unable to meet that amount. He filed a motion to modify this condition on August 5, 2015. The Superior Court denied this request on September 8, 2015.
4. On January 28, 2016 Mr. Davis filed another motion for modification of his conditions of release in his Superior Court case as he was still unable to post the \$2,000 bond.
5. On February 8, 2016 the Superior Court granted Mr. Davis' motion and ordered his release on his own recognizance with certain specified conditions. Mr. Davis was in local custody for 11 months.
6. After Mr. Davis' release was ordered on his local case, he was brought to this

court for his initial advice of rights hearing for the violation of his supervised release. This occurred on February 10, 2016. On February 11, 2016 the Office of the Federal Public Defender was appointed to represent Mr. Davis.

7. The court began a preliminary hearing on February 12, 2016 and continued it to February 17, 2016. On February 17, 2016, the magistrate court granted Mr. Davis' motion for release from custody. Mr. Davis was released on a \$50,000 unsecured bond, and ordered to submit to GPS monitoring.
8. Mr. Davis was charged with violating his conditions of release in this matter on September 9, 2016. A preliminary hearing and detention hearing was held on September 13, 2016. On the same day, the magistrate court found that Mr. Davis was in violation of his conditions of release and ordered that he be held without bond. Mr. Davis has been in federal custody since September 9, 2016 – approximately six months to this date when we include the days he spent in federal custody after his advisement of rights in this matter last year.
9. Mr. Davis was scheduled to go to trial in his Superior Court case on October 11, 2016. The matter was continued to March 20, 2017 after the defense raised allegations that a government agent frustrated Mr. Davis's investigator's attempt to interview a government witness.
10. The People of the Virgin Islands recently moved to continue the Superior Court trial, stating that the complaining witness was enrolled in the Job Corps program and that they did not want to take her out of that program. That motion was denied.

11. Mr. Davis has been in federal custody for six months, and in local custody for eleven months since his arrest for this allegation. Even if this court found him in violation of his supervised release, all of that time could be credited toward his federal sentence.

I. Legal Argument

A. The revocation proceedings should be dismissed.

As more fully articulated in Mr. Davis' "Amended Brief in Support of His Motion to Dismiss Revocation Proceedings" filed on January 23, 2017 (Doc. # 229), and incorporated herein, the revocation proceedings against Mr. Davis should be dismissed. The government failed to provide written notice of the violations allegedly committed by Mr. Davis and it has failed to provide sufficient evidence that Mr. Davis committed the crimes of unlawful sexual contact and disturbance of the peace – domestic violence. See Doc. # 229.

B. Mr. Davis should be released in order to attend the trial scheduled for March 20, 2017.

One of the most basic of the rights guaranteed by the confrontation clause of Sixth Amendment is the accused's right to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337 (1970). Rule 43(a) of the Federal Rules of Criminal Procedure provides:

The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

In adopting Rule 43, Congress explicitly intended to codify existing law concerning a defendant's constitutional and common law rights to be present throughout trial. Fed.R.Crim.P. 43, 1946 Advisory Committee Note, P 1. Rule 43 embodies the right to be present derived from the Sixth Amendment Confrontation Clause, the Due Process Clause of the Fifth and Fourteenth Amendments, and the common law privilege of presence. U.S. v. Alessandrello, 637 F.2d 131 (3d Cir. 1980), cert. denied, 451 U.S. 949.

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755 (1987). Indeed, freedom from custody, cherished at any time, has special importance to an individual while he is defending himself in a criminal prosecution. See Stack v. Boyle, 342 U.S.1, 8 (1951). “When a criminal trial is in actual progress there must be an accommodation between the right of a defendant to be free on bail and the inherent power of the court to provide for the orderly progress of the trial. Where release on bail poses no substantial threat to the orderly progress of the trial, the imperatives of the Constitution and the rule require that the right to preconviction bail be honored.” Carbo v. United States, 288 F.2d 282, 285 (9th Cir. 1961).

The revocation hearing was completed on January 30, 2017. Mr. Davis is awaiting the court's ruling. Mr. Davis should be released in order to attend the trial and address the Superior Court charges alleged against him. In the event that Mr. Davis is convicted of the charges, he can be taken into custody and returned to the Bureau of Corrections. In the event that he is found not guilty, the criminal justice system will avoid

adding insult to the already seventeen months that he has been in custody. Mr. Davis's revocation should be dismissed, or he should be released from custody in order to attend the trial in Superior Court.

WHEREFORE, Mr. Davis respectfully requests a hearing on this matter. He requests that this Court dismiss the revocation proceedings in this matter. Alternatively, Mr. Davis requests that he be released from custody pending the resolution of the proceeding or a ruling before March 18, 2017.

Date: March 9, 2017

Respectfully submitted,

s/ Omodare Jupiter
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E-mail: omodare_jupiter@fd.org

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on the 9th day of March, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Alphonso Andrews, Esquire
Office of the United States Attorney
1108 King Street, Suite 201
Christiansted, VI 00820
alphonso.andrews@usdoj.gov

/s/Omodare Jupiter

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

JIMMY DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX D

OMODARE JUPITER
FEDERAL PUBLIC DEFENDER
COUNSEL FOR THE PETITIONER
4094 Diamond Ruby, Suite 5
Christiansted, VI 00820
(340) 773-3585
omodare_jupiter@fd.org

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA)	Criminal No. 2010/11
)	
Plaintiff,)	
)	
vs.)	
)	
JIMMY DAVIS,)	
)	
Defendant.)	

GOVERNMENT’S NOTICE OF VIOLATION OF SUPERVISED RELEASE

COMES NOW the United States of America, through its undersigned counsel, and hereby provides government notice to defendant Jimmy Davis of an alleged violation of his supervised release conditions, imposed November 12, 2010 in the above-captioned matter, which term commenced on or about November 12, 2013. Defendant violated the condition that he not commit another federal, state or local crime by:

- 1) Committing an unlawful sexual contact first degree against a minor (J.D.) on or about December 2014 as alleged in the information and affidavit filed in the Virgin Islands Superior Court (Count One) in SX-2015-CR-65, which constitutes a violation of 14 V.I.C. § 1708(a);
- 2) Committing an unlawful sexual contact second degree against a minor (J.D.) between 13 and 16 years of age on or about December 2014 by engaging in conduct alleged in the information and affidavit filed in the Virgin Islands Superior Court (Count One) in SX-2015-CR-65, which constitutes a violation of 14 V.I.C. § 1709; and
- 3) Committing a disturbance of the peace by threats on or about December 2014 against minor J.D. as alleged in the information and affidavit filed in the Superior Court (Count Two) in SX-2015-CR-65.

USA v. Davis, Crim. No. 2010/11
Govt's Notice of Violation of Supervised Release
Page 2

The Government notes that this notice is substantially equivalent to the following previously received by Defendant:

- a. Written Notice reflected in an August 10, 2015 Status Report issued by the Office of Probation which triggered Defendant's court appearance on February 10, 2016;
- b. Oral Notice given at Defendant's advice of rights proceeding held on February 10, 2016;
- c. Oral Notice given at the preliminary hearing held in this matter on February 12, 2016;
- d. Written Notice reflected in a July 29, 2016 Status Report issued by the Office of Probation; and
- e. Written Notice given via discovery submitted to Defendant dated January 4, 2016.

DATED: January 27, 2017

RONALD W. SHARPE
United States Attorney

/s/ Alphonso G. Andrews

BY: Alphonso G. Andrews, Jr.
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of January 2017, I electronically filed the foregoing Government's Notice of Violation of Supervised Release with the clerk of the Court using the CM/ECF System, which will send a notification of such filing (NEF) to the defense counsel on record, that is, Omodare Jupiter, 1115 Strand Street, 2nd Floor, St. Croix, V.I. 00820.

/s/ Alphonso G. Andrews

Alphonso G. Andrews, Jr.
Assistant U.S. Attorney

USA v. Davis, Crim. No. 2010/11
Govt's Notice of Violation of Supervised Release
Page 3

U.S. Attorney's Office
1108 King Street, Suite 201
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No.

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APPENDIX E

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,)
) Criminal No. 2010-0011
 PLAINTIFF,)
) March 14, 2017
 v.)
) 10:50 a.m.
 JIMMY DAVIS,)
)
 DEFENDANT.)

TRANSCRIPT OF REVOCATION HEARING
VOLUME III

BEFORE THE HONORABLE CHIEF JUDGE WILMA A. LEWIS

APPEARANCES:

OFFICE OF THE U.S. ATTORNEY
1108 KING STREET, SUITE 201
CHRISTIANSTED, VI 00820
By: ALPHONSO G. ANDREWS, ESQ.,

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1115 STRAND STREET, SUITE 5073
CHRISTIANSTED, VI 00822
By: OMODARE JUPITER, FPD

VALERIE D. LAWRENCE, RPR
OFFICIAL COURT REPORTER
3013 ESTATE GOLDEN ROCK
CHRISTIANSTED, ST. CROIX 00820-4355

1 (Thereupon, court was called to order
2 at 10:56 a.m.)

3 THE CLERK: United States of America
4 versus Jimmy Davis, revocation hearing in
5 2010-CR-0011.

6 THE COURT: Good morning, everyone.
7 Counsel, may I have your appearance, please.

8 MR. ANDREWS: Good morning, Judge.
9 Alphonso Andrews for the United States.

10 MR. JUPITER: Good morning, Your Honor.
11 Omodare Jupiter on behalf of Jimmy Davis, who
12 is present.

13 THE COURT: Good morning, Attorney
14 Andrews; Attorney Jupiter, and Mr. Davis.

15 THE DEFENDANT: Good morning.

16 THE COURT: As you are aware, the Court
17 heard evidence or took evidence in this matter
18 at an evidentiary hearing on January 12th; that
19 continued to January 30th of 2017. And, at
20 this time, the Court is prepared to render its
21 ruling with regard to the alleged violation of
22 Mr. Davis' terms or conditions of his
23 supervised release, as alleged.

24 So the Court makes the following findings:
25 Based on the evidence presented, the Court

1 finds that on March 16th, 2010, Mr. Davis was
2 charged by indictment in the District of the
3 Virgin Islands with felon in possession of a
4 firearm, felon in possession of ammunition,
5 unauthorized possession of a firearm, and
6 interfering with an officer discharging his
7 duty.

8 On August 2nd, 2010, Mr. Davis pleaded
9 guilty to Count I, felon in possession of a
10 firearm, and Count II, felon in possession of
11 ammunition. On November 17th of 2010,
12 Mr. Davis was sentenced to 33 months of
13 imprisonment, and three years of supervised
14 release. One of the conditions of Mr. Davis'
15 supervised release was that he "shall not
16 commit another federal, state, or local crime."

17 Mr. Davis began his term of supervised
18 release on November 12th, 2013. And was
19 anticipated to complete that term of supervised
20 release on November 11th of 2016. The Court
21 further finds that on February 23rd, 2015,
22 Mr. Davis was arrested on a warrant, and taken
23 into custody by the Superior Court of the
24 Virgin Islands. Mr. Davis was charged with
25 unlawful sexual contact, first degree, domestic

1 violence, and disturbance of the peace by
2 threats, domestic violence. Based on the
3 testimony of Probation Officer Dudley Fabio,
4 the Court finds that Mr. Davis was on
5 supervised release in December of 2014 when the
6 interaction with JD that gave rise to the
7 aforementioned local charges took place. Based
8 on the statements made by counsel for the
9 defendant before the Court on January 30th,
10 2017, the Court finds that Mr. Davis received a
11 memorandum dated August 10th, 2015, prior to
12 the commencement of this revocation of
13 supervised release hearing, which referenced an
14 alleged violation by Mr. Davis of the
15 conditions of his supervised release, as a
16 result of his arrest for unlawful sexual
17 contact, first degree, and disturbance of the
18 peace by threats, charges that were pending in
19 the Superior Court of the Virgin Islands.

20 Based on the testimony of JD, which the
21 Court credits, the Court finds that in December
22 of 2014, JD, a minor female, was over the age
23 of 13, but less than 16. Defendant took JD in
24 his vehicle, whereupon defendant made sexual
25 advances toward her. Defendant touched JDs

1 thighs and chest area after she refused his
2 sexual advances. Defendant became agitated,
3 and yelled at JD when she pushed his hand away.
4 Defendant brought JD to a second location where
5 defendant was employed as a landscaper. Prior
6 to arriving at that location, defendant parked
7 and showed JD a picture of his penis.
8 Defendant told JD that he would "deal with her
9 mother and father, and leave her brother for
10 last," if she told anyone about what he had
11 shown her.

12 Upon arriving at his job site, defendant
13 told JD not to leave, and left her in his
14 vehicle, returning to work. And panicked,
15 scared, and nervous, JD left defendant's job
16 site, because she knew that he had a criminal
17 record, he had disrespected and violated her,
18 and she no longer wanted to be near him.

19 Those are the findings that the Court
20 makes based on the evidence that was presented,
21 and the testimony that the Court credited.
22 With regard to defendant's motion to dismiss,
23 based on failure to provide notice, the Court
24 finds that the August 2015 memo provided the
25 defendant, Mr. Davis, with sufficient written

1 notice in accordance with Federal Rule of
2 Criminal Procedure 32.1(b)(2)(A). That the
3 basis for revocation of supervised release was
4 the commission of another federal, state, or
5 local crime, specifically unlawful sexual
6 contact first degree, and disturbing the peace.

7 During the course of the proceedings, the
8 issue was raised with regard to unlawful sexual
9 contact in the second degree, which is 14
10 V.I.C. Section 1709. And that statute provides
11 that, I quote, "a person over 18 years of age
12 who engages in sexual contact with a person who
13 is over 13 but under 16 years of age is guilty
14 of unlawful sexual contact in the second
15 degree."

16 Now, there was discussion as to whether or
17 not this particular crime constituted a lesser
18 included offense to unlawful sexual contact in
19 the first degree. For a crime to be
20 included -- for a crime to be a lesser included
21 offense, it cannot require that the government
22 prove an element not included in the original
23 offense. And the Court refers to *Clarke v*
24 *People of the V.I.* 2013, Westlaw 5808159,
25 *District of the Virgin Islands*, October 28th,

1 2013.

2 Now, unlawful sexual contact second degree
3 requires proof of the age of both the alleged
4 victim and the alleged perpetrator, which is
5 not an element of unlawful sexual contact first
6 degree. Neither of those two things are
7 elements of unlawful sexual contact first
8 degree.

9 The Court finds that as conceded by the
10 government, unlawful sexual contact in the
11 second degree is not a lesser included offense
12 of unlawful sexual contact first degree. And
13 the Court concurs with defendant, that he did
14 not have notice of that charge, and such a
15 charge is not properly before the Court.

16 With regard to defendant's motion to
17 dismiss based on the sufficiency of the
18 evidence, the Court finds that for reasons that
19 I will articulate, there is sufficient evidence
20 to support a finding that defendant violated 14
21 V.I.C. Section 622, disturbing the peace, and
22 the Court finds that by a preponderance of the
23 evidence.

24 Let me first touch on unlawful sexual
25 contact first degree, which is 14 V.I.C.

1 Section 1708. It provides that it is unlawful
2 for a person to "engage in sexual contact with
3 a person when the other person is threatened or
4 placed in fear of imminent and serious bodily
5 injury."

6 14 V.I.C. Section 1699 defines sexual
7 contact as "any touching of another person with
8 genitals or any touching of the genitals, anus,
9 groin, inner thighs, buttocks, lips or breasts
10 of another person, or such touching through the
11 clothing, for the purpose of arousing or
12 gratifying sexual desire of any person."

13 The Court interprets the statutory
14 language which says that unlawful sexual
15 contact first degree prohibits engaging in
16 sexual contact with a person when the other
17 person is threatened or placed in fear of
18 imminent and serious bodily injury. The Court
19 interprets that statute to require a threat
20 made either in advance of or contemporaneous
21 with the sexual contact.

22 The evidence presented to this Court
23 showed that defendant's threat was made after
24 the contact. Based on the Court's
25 interpretation of the statute, the Court finds

1 that when viewed in the light most favorable to
2 the government, the government has not
3 presented sufficient evidence to establish
4 guilt of unlawful sexual contact first degree
5 by a preponderance of the evidence. In that
6 the evidence does not show a threat was made in
7 advance of or contemporaneous with the sexual
8 contact -- sexual contact.

9 The evidence presented to this court and
10 which the Court, as indicated before has
11 credited, is that a threat was made after the
12 sexual contact by Mr. Davis. Accordingly, the
13 defendant's motion to dismiss will be granted
14 with respect to unlawful sexual contact first
15 degree.

16 The Court has already indicated that
17 Mr. Davis did not receive notice of unlawful
18 sexual contact second degree, and it is not
19 properly before the Court because it is not a
20 lesser included offense of unlawful sexual
21 contact first degree.

22 With respect to disturbing the peace, 14
23 V.I.C. Section 622, prescribes "maliciously and
24 willfully disturbing the peace of any person by
25 threatening, traducing, quarreling, challenging

1 to fight or fighting."

2 The testimony at the hearing established
3 that the defendant made threats against various
4 members of JD's family, those threats were made
5 to JD to prevent her from telling anyone that
6 defendant had shown her a picture of his penis.
7 As a result, the evidence that the Court
8 credited was that JD became panicked, scared,
9 and nervous. The Court rejects defendant's
10 contention that a statement by Mr. Davis that
11 he would, "deal with" JD's mother and father
12 and leave her brother for last is too ambiguous
13 to constitute a threat under 14 V.I.C. Section
14 622.

15 The Court finds that Mr. Davis's conduct
16 amounts to a willful threat, which disturbed
17 the peace of another, and as such finds by a
18 preponderance of the evidence that defendant is
19 guilty of disturbing the peace.

20 There are a few cases that discuss the
21 issue of what constitutes a threat under a
22 breach of peace statute, and the Court refers
23 to Government of the Virgin Islands versus
24 Stagger, 13 V.I. 233, 239, V.I. Territorial
25 Court 1977 quoting State versus Boyer, 198

1 Atlantic 2nd, 222, 225, Circuit Court
2 Connecticut, 1963. And that speaks to the
3 issue of what constitutes a threat under a
4 breach of peace statute. That speaks about a
5 threat importing the expectation of bodily harm
6 thereby inducing fear and apprehension in the
7 person who is threatened. Here the threat was
8 made to JD regarding her family to prevent her
9 from disclosing Mr. Davis's conduct and showing
10 the picture to her.

11 Accordingly, the Court concludes by
12 finding that by a preponderance of the evidence
13 the government has sustained its burden of
14 showing that Mr. Davis committed a disturbance
15 of the peace in violation of local law, and as
16 a result, he violated a condition of his
17 supervised release by committing another local
18 crime during the course of his supervised
19 release.

20 Having found Mr. Davis violated condition
21 of his supervised release, the Court will now
22 follow the three-step process for determining
23 the appropriate sentence by first calculating
24 the applicable sentencing guidelines range;
25 second formally ruling on departure motions,

1 and third, exercising the Court's discretion by
2 considering relevant factors from 18 U.S.C.
3 Section 3553(a).

4 In accordance with guidelines Section
5 1B1.11, the Court will use the 2016 edition of
6 the Sentencing Guidelines Manual.

7 The Sentencing Commission guideline for
8 violations of conditions of supervised release
9 is found in guideline Section 7B1.3.

10 Disturbance of the Peace is a local
11 offense punishable by a term of imprisonment of
12 not more than 90 days; therefore, the Court has
13 found that defendant violated a standard
14 condition of supervision that constitutes a
15 Grade C violation, pursuant to Section
16 7B1.1(a)(3).

17 Section 7B1.1(a)(3) defines a Grade C
18 violation as conduct constituting, A, a
19 federal, state or local offense punishable by a
20 term of imprisonment by one year or less; or B
21 violation of any other condition of
22 supervision. And as indicated, the violation
23 of the statute for disturbance of the peace
24 constitutes a local offense punishable by term
25 of imprisonment of one year or less.

1 Section 7B1.3(a)(1) provides that, upon
2 the finding of a Grade C violation, the Court
3 "may either revoke probation or supervised
4 release; or extend the term of probation or
5 supervised release, and/or modify the
6 conditions of supervision."

7 Pursuant to guideline Section 7B1.4(a),
8 the criminal history category when determining
9 the Guideline range of imprisonment applicable
10 upon revocation is the category applicable at
11 the time the defendant originally was sentenced
12 to the term of supervised release. Defendant's
13 criminal history category at the time he was
14 originally sentenced to a term of supervision
15 was three.

16 The Court next turns to the sentencing
17 options which are available to the Court.

18 With respect to custody, the applicable
19 statutory term of imprisonment for a violation
20 of the conditions of defendant's supervised
21 release is not more than two years, pursuant to
22 18 U.S.C. Section 3583(e)(3), since the offense
23 that resulted in the original term of
24 supervised release was a Class C Felony.

25 Under the guidelines, pursuant to the

1 revocation table outlined in the guidelines
2 Section 7B1.4(a), the range of imprisonment for
3 a defendant convicted of violating conditions
4 of supervised release who committed a Grade C
5 violation and has a criminal history category
6 of three is five to eleven months.

7 With regard to supervised release,
8 pursuant to 18 U.S.C. Section 3583(h), when a
9 term of supervised release is revoked and the
10 defendant is required to serve a term of
11 imprisonment, the Court may impose a term of
12 supervised release after imprisonment. The
13 length of that term of supervised release shall
14 not exceed the term of supervised release
15 authorized by statute for the offense that
16 resulted in the original term of supervised
17 release, less any term of imprisonment that was
18 imposed upon revocation of supervised release.

19 As previously indicated, Mr. Davis was
20 initially convicted by plea of Felon in
21 Possession of a Firearm under 18 U.S.C.
22 Sections 922(g)(1) and 924(a)(2), and Felon in
23 Possession of Ammunition under 18 U.S.C.
24 Sections 922(g)(1) and 924(a)(2). These
25 offenses are Class C felonies. Thus, the term

1 of supervised release authorized by statute for
2 these crime is no more than three years,
3 pursuant to 18 U.S.C. Section 3583(b)(2).

4 With regard to the guidelines pursuant to
5 Guidelines Section 7B1.3(g)(2), the Court may
6 place a defendant on a term of supervised
7 release upon release from imprisonment that
8 shall not exceed the term of supervised release
9 authorized by statute for the offense that
10 resulted in the original term of supervised
11 release, less any term of imprisonment that was
12 imposed upon revocation of supervised release.
13 So the guideline provision is the same as the
14 statutory provision.

15 Does either counsel have any objection to
16 the applicable guideline provisions as I have
17 just articulated them? Attorney Andrews?

18 MR. ANDREWS: The government does not.

19 THE COURT: Attorney Jupiter?

20 MR. JUPITER: No objection, Your Honor.

21 THE COURT: Are there any objections to
22 the sentencing options that I just recited?
23 Attorney Andrews?

24 MR. ANDREWS: No objections.

25 THE COURT: Attorney Jupiter?

1 MR. JUPITER: No objection, Your Honor.

2 THE COURT: Are there motions by either
3 party for departures?

4 MR. ANDREWS: Not from the government.

5 MR. JUPITER: No, Your Honor.

6 THE COURT: Turning to the third stage,
7 then, the Court must consider the relevant
8 factors contained in 18 U.S.C. Section 3553(a),
9 and those factors include the nature and
10 circumstances of the offense and the
11 defendant's history, the need to reflect the
12 seriousness of the crime, and to adequately
13 deter criminal conduct, the available
14 sentences, the established sentencing range,
15 any pertinent sentencing policies, the need to
16 avoid sentencing disparities, and the need to
17 provide restitution to victims.

18 Attorney Jupiter, I will hear from you, if
19 you have any arguments, evidence, or witnesses
20 to offer with respect to the 3553(a) factors.

21 MR. JUPITER: Thank you, Your Honor. We
22 have no witnesses or evidence to submit to the
23 Court. We are asking the Court to sentence
24 Mr. Davis to time served. As the Court has
25 correctly pointed out, he's been found guilty

1 of an offense, which the maximum sentence he
2 would get in Superior Court on the local level
3 would be 90 days. We have outlined the history
4 in our last motion to the Court that Mr. Davis
5 has been incarcerated in this, in federal
6 custody, I think now it may be a couple days
7 over six months, and his guidelines are five to
8 eleven months. He was previously incarcerated
9 with respect to the local, the same local
10 charge for which the Court has found him guilty
11 for eleven months. And that's pertinent
12 because under 3585, 18 U.S.C. 3585, that time
13 could be credited to his, to this sentence, to
14 his federal sentence.

15 THE COURT: Did you say could be credited?

16 MR. JUPITER: It is credited. 3585(b)
17 defendant shall be given credit toward the
18 service of a term of imprisonment for any time
19 he has spent in official detention prior to the
20 date the sentence commences. (B)(2) is as a
21 result of any other charge for which the
22 defendant was arrested after the commission of
23 the offense for which the sentence was imposed.
24 That has not been credited --

25 THE COURT: Sorry, that has not been?

1 MR. JUPITER: -- credited against another
2 sentence.

3 So it says shall be. And that has not
4 been credited towards any other sentence. We
5 also, so, since that has not been credited
6 towards another sentence, if that time should
7 be credited towards this sentence.

8 Now, the other thing about it, Your Honor,
9 even if that time was not, we want to stress
10 the fact that the offense for which this Court
11 has found that Mr. Davis has committed is not
12 just a misdemeanor, it's not like a one-year
13 misdemeanor offense, it's a 90-day misdemeanor
14 offense.

15 So even if this Court were to give him,
16 what in essence would be a six-month sentence,
17 that's twice the amount that would be, that
18 could be imposed against him. The maximum
19 amount that could be imposed against him with
20 regard to, with regard to the substantive case
21 in local court.

22 THE COURT: And why is that relevant, in
23 your mind? I mean, the offense that he is
24 before this court for, the underlying offense
25 clearly is violation of the local law, which is

1 the disturbing of the peace statute. And as
2 you correctly say, and as the Court noted, the
3 sentence for that is maximum of 90 days. But
4 he's before this Court for having violated a
5 condition of release. He was sentenced to
6 incarceration, 33 months of incarceration, and
7 three years of supervised release. His
8 supervised release is subject to certain
9 conditions.

10 MR. JUPITER: Yes.

11 THE COURT: And one of those conditions
12 for him being on release is that he not commit
13 another local -- federal, local, state charge
14 offense.

15 MR. JUPITER: Yes.

16 THE COURT: So in violating that
17 condition, he has, in effect, violated an order
18 of this Court, separate and apart from having
19 committed the local offense, he was, he has
20 violated this Court's order, No. 1. And No. 2,
21 he has violated an order of the Court that is a
22 condition of him being on supervised release.

23 MR. JUPITER: Yes.

24 THE COURT: So, the fact that violation of
25 the underlying offense may be subject to only a

1 90-day term of imprisonment, why shouldn't the
2 Court view that as a benchmark from which to
3 assess what this Court is suggesting is a
4 different offense, which is the violation of
5 this Court's order, and violation of the
6 condition pursuant to which this Court said you
7 can be released from imprisonment for your
8 original offense?

9 MR. JUPITER: Because the Court, as the
10 Court stated, the Court needs to look at the
11 nature of the offense, that's one of the 3553
12 factors. So how would the Court measure the
13 nature of the offense? One of the things,
14 first of all, is it an offense? Why is it an
15 offense? It's an offense because of the Virgin
16 Islands Legislature says it's an offense. So,
17 I think the Court should look at how does the
18 Virgin Islands measure this nature, how
19 significant is the nature of this offense, the
20 Virgin Islands Legislature, which is, who is
21 the only body, not the federal court, not the
22 federal legislature, but the Virgin Islands
23 Legislature is the only one who has said that
24 this conduct constitutes a local offense. And
25 they said that anybody who commits this offense

1 shouldn't get any more than 90 days.

2 So I think the Court in determining, you
3 know, on a scale of Grade C violations, the
4 Court needs to look at, well, what did,
5 authority, the statutory authority, the
6 legislative authority, what did they accord to
7 this kind of conduct. They accorded 90 days.

8 Now, I'm not suggesting to the Court that
9 the Court only has to give 90 days. But what
10 I'm suggesting to the Court is taking all of
11 that into account, because I don't think it's
12 separate and apart. I do think it's separated,
13 but I don't think it's disconnected to the
14 nature or the measurement that the Legislature
15 gave. And what I'm saying here today is that
16 if the Court even were to look at it from the
17 standpoint of how much time he's only spent in
18 federal custody, which I don't think the Court
19 should, the same 3585, but even if the Court
20 was only looking at from the time he served
21 consistently, recently, in federal custody for
22 those six months, that's twice as much as what
23 the local legislature has said is the maximum
24 that someone should get for violating this
25 offense.

1 THE COURT: Are you discounting, okay, I
2 understand that part of the argument. What
3 about the part of the Court's argument that
4 deals with the violation of this Court's order,
5 and the fact that by violating a condition of
6 supervised release, the defendant has, in
7 effect, violated a condition upon which this
8 Court allowed him to be released. You will
9 serve 33 months in prison, and you are released
10 subject to certain conditions. You're released
11 from prison, you're put on supervised release,
12 you're going to be supervised for three years,
13 and one of those conditions of your release is
14 that you not commit another federal, state or
15 local crime.

16 And I would suggest that one of the
17 reasons why you could throw the person back in
18 jail is because it is a condition of the
19 release that has been violated. So, what
20 about, I understand the point that you have
21 made that, you know, you should take into
22 account that this isn't, this is the type of
23 crime that the local Legislature has said --
24 local Legislature has said should be penalized
25 by no more than 90 days. I understand that

1 part of the argument. How do you take into
2 account the other two aspects that I just
3 described? Or shouldn't you?

4 MR. JUPITER: Look at the guidelines. The
5 guidelines, as the Court correctly stated is
6 five to eleven months, and so, in terms of
7 where within that, those guidelines, you're
8 still talking about six months is, albeit at
9 the lower side of it, but still six months is,
10 and that's why within that guideline range,
11 once again we would look at things what I've
12 just argued, well, how does, how does the
13 Legislature, the local Legislature look at it?
14 And we're talking about an offense by the
15 complainant's account occurred on a drive in
16 the car. And I think that with the
17 government's proof, I respectfully disagree
18 with the Court's ruling, but, nevertheless,
19 what the Court found Mr. Davis guilty of, that
20 should, that type of offense, in terms of Grade
21 C violations, I think should be on the low end
22 of the guidelines.

23 THE COURT: In other words, these
24 circumstances you're saying. Not that type
25 offense, because that type of offense obviously

1 has a range from five to eleven months, right?
2 Grade C violation has a range of five to eleven
3 months, so you're saying that the circumstances
4 here should be on the low end?

5 MR. JUPITER: Yes.

6 THE COURT: That type of offense?

7 MR. JUPITER: Yes.

8 THE COURT: Okay. I understand. What
9 about the other 3553(a) factors?

10 MR. JUPITER: I think that with regard to,
11 with regard to the -- I talked about 3585 with
12 respect to --

13 THE COURT: 3553.

14 MR. JUPITER: Let me stop and slow down a
15 second. One of the things the Court has to
16 consider is the types of sentences available,
17 and I think that relates again to 3585. I
18 don't recall having, having been before this
19 Court for a Grade C violation, but it's, the
20 Court has the option in Grade C violations, and
21 it's not uncommon for someone who has a Grade C
22 violation to even get probation. Sorry, to not
23 be revoked, to be just returned without any
24 further incarceration.

25 I think the last time I came before the

1 Court I believe was, there was a Grade C
2 violation where my client had willfully,
3 willfully violated his conditions basically as
4 a political statement. And he was not, where
5 he was not reporting. That was the case of
6 Jerome Blyden where the Court did find that he
7 no longer needed to be incarcerated.

8 So I think he certainly hadn't been
9 incarcerated anywhere near the amount of time
10 that Mr. Davis has. So in terms of looking at
11 parity, I think that that was probably the most
12 analogous situation I've had before this Court
13 in terms of people violating their conditions
14 of release that actually went to a hearing.
15 We've had other instances where they would
16 result without a hearing, where you had Grade C
17 violations. But I don't recall another time
18 being before this Court on a Grade C violation.

19 THE COURT: That, the Jerome Blyden case,
20 was not committing another crime, was it?

21 MR. JUPITER: No, but it was a Grade C
22 violation.

23 THE COURT: Understood. It was a Grade C
24 violation. But as you said, Grade C violation,
25 there is a range, in terms of the guidelines.

1 MR. JUPITER: Certainly.

2 THE COURT: That particular Grade C
3 offense, if I am remembering correctly, dealt
4 with reporting to probation, which obviously is
5 important, I'm not in any way suggesting that
6 that's not an important condition, but it
7 didn't involve committing another crime.

8 MR. JUPITER: Correct. But it involved
9 willful behavior. And so, just in terms of
10 finding another analogous situation where we
11 were actually before the Court on a Grade C
12 violation, the only other one I can think of
13 didn't actually end up going to hearing. The
14 hearing resolved and the Court agreed with the
15 parties' recommendations, to continue, I
16 believe, Mr. Loomis. Those are the only
17 others. All the others I can think of before
18 this Court involved high grades. So I think
19 those would be the most closely analogous.
20 And, you know, so just in terms of Grade C
21 violations, I think it's not, any sentence at
22 the low end of the guidelines is certainly not
23 disproportionate. So with respect to, touching
24 on the nature and circumstances of the offense,
25 with respect to Mr. Davis background, he is in

1 criminal history category three. We're not
2 asking for that, Court to vary one way or
3 another that's right in the middle of the
4 guidelines. And I think that that's, so I
5 think the guidelines, being, there is nothing
6 indicating that he, he is either
7 underrepresented or overrepresented. So he's
8 not at the low end. He's not at the high end.
9 Right in the middle of the guidelines.

10 But with respect to the other factors that
11 I touched upon, and then with respect to
12 deterrence, someone who has served this amount
13 of time in prison, that is certainly a
14 deterrent to anyone who is on supervision,
15 understanding after they serve the 33 months
16 prison, then they serve 11 months in local
17 custody, and then they serve another six months
18 in federal custody, even before they're able to
19 go to trial. I think that that is more than
20 sufficient deterrence to the public, to
21 Mr. Davis, and to anyone who is contemplating
22 engaging in this kind of conduct.

23 THE COURT: Let me ask you a bit about the
24 history of this particular case involving this
25 particular defendant, Mr. Davis. Initially,

1 when Mr. Davis was brought before Magistrate
2 Judge Cannon, he was released on bond, correct,
3 with certain conditions?

4 MR. JUPITER: Yes. Yes, Your Honor.

5 THE COURT: And then he was brought back
6 in on a charge that he was violating those
7 conditions, right?

8 MR. JUPITER: Yes, Your Honor. Well, that
9 he was, that he was violating the conditions of
10 his release.

11 THE COURT: The conditions of his release
12 on bond?

13 MR. JUPITER: Exactly.

14 THE COURT: And there was a probable cause
15 hearing with respect to that. And the
16 Magistrate Judge found that he, probable cause
17 to believe that he had, in fact, violated his
18 conditions, release on bond, correct?

19 MR. JUPITER: Yes.

20 THE COURT: And that's when he became,
21 that's when he was detained, correct?

22 MR. JUPITER: Correct.

23 THE COURT: Is sort of the history of this
24 case, including that aspect, not something that
25 the Court should consider as well?

1 MR. JUPITER: I don't think the Court
2 should consider it with respect to, you know,
3 you could make, say, under the 3553 factors the
4 history of, you say the history of the
5 defendant.

6 THE COURT: Correct.

7 MR. JUPITER: I suppose the Court could
8 consider it under that factor. What I would
9 say is that that was, that's tied into the
10 amount of time that Mr. Davis has served with
11 respect to this case. So all of that time, the
12 fact that he was taken off his conditions of
13 bond, then he lost that privilege with respect
14 to being released for these hearings.

15 THE COURT: But it also suggests, does it
16 not, that this is somebody who doesn't seem to
17 be able to follow conditions that the Court
18 imposes, does is it?

19 MR. JUPITER: Or that the Court gave the
20 conditions were too onerous, because he was
21 required to be on, be on, basically, like a 24
22 hour, he was basically on home detention, and
23 under these circumstances, there were a number
24 of problems, as the Court can see from the
25 history of the case, with respect to obstacles

1 he had to overcome to comply, and he failed to
2 comply.

3 THE COURT: Didn't you make, you made that
4 argument before, didn't you?

5 MR. JUPITER: Yes, Your Honor.

6 THE COURT: What happened?

7 MR. JUPITER: And Judge Cannon did not
8 agree with it.

9 THE COURT: He didn't agree that his
10 conditions were too onerous?

11 MR. JUPITER: Too onerous, he did not.
12 But it's a different court.

13 THE COURT: Try again, right?

14 MR. JUPITER: Try again. But yes, Your
15 Honor, I think -- I don't think, so, therefore,
16 he was not able to be at liberty. And he
17 wasn't completely at liberty, to be honest with
18 you, but certainly he had the benefit of not
19 being incarcerated at that time.

20 THE COURT: Let me ask you this: If a
21 defendant represented by counsel -- he was
22 represented by counsel, at that time, right?

23 MR. JUPITER: Yes, Your Honor.

24 THE COURT: The defendant represented by
25 counsel has an order that the defendant or

1 counsel in representing the defendant believes
2 is too onerous, there is a process, is there
3 not?

4 MR. JUPITER: I'm not denying that there
5 is a process, yes, Your Honor. Yes.

6 THE COURT: There is a process?

7 MR. JUPITER: Yes.

8 THE COURT: And the process does not
9 include the defendant violating the conditions
10 and then coming in and arguing that they're too
11 onerous. The process, I would suggest, would
12 be for some sort of motion to be filed with the
13 Court.

14 MR. JUPITER: Yes.

15 THE COURT: With an argument that these
16 conditions are too onerous because of the
17 particular circumstances that exist.

18 MR. JUPITER: Yes.

19 THE COURT: That didn't happen here, did
20 it?

21 MR. JUPITER: That there was no motion
22 filed?

23 THE COURT: That did not happen here, did
24 it? Did it happen in this case?

25 MR. JUPITER: We filed motions, motions

1 were not granted, but yeah, we filed motions
2 saying that they were too onerous.

3 THE COURT: In advance? In advance of the
4 violation?

5 MR. JUPITER: Sure.

6 THE COURT: Yeah. You filed several
7 motions in advance of the violation?

8 MR. JUPITER: Well, let me put it -- I
9 mean, I would have to go back and see
10 everything that we filed. We filed motions for
11 numerous different accommodations in advance,
12 some of those accommodations were granted, some
13 of them weren't. And we also did file, you
14 know, at least filed before he was revoked, we
15 did file the motions to have the conditions
16 dropped.

17 THE COURT: Okay. So, in other words, you
18 followed the process that said if you don't
19 agree, or you think they're too onerous, you
20 file a motion with Court, right, and you ask
21 for relief?

22 MR. JUPITER: Yes. Yes.

23 THE COURT: And if the Court doesn't grant
24 you that relief, and in this instance it was
25 the Magistrate Judge, is there a further

1 process?

2 MR. JUPITER: Yes. To have it reviewed by
3 the District Court.

4 THE COURT: Did that happen?

5 MR. JUPITER: Not until, not until the
6 last ruling.

7 THE COURT: And what was the last ruling?

8 MR. JUPITER: I would say, I would say no,
9 that did not happen, no. That did not happen
10 until before he was locked up.

11 THE COURT: Instead, the process that you,
12 your client took was to violate it. The Court,
13 you went to the Court, you said this is too
14 onerous, the Court granted some relief, as
15 you've indicated, denied other relief, so he
16 was still subject to some relief, and he didn't
17 appeal it to the District Court.

18 Instead, the client chose to violate it
19 instead. And now you argue, well, he violated,
20 well, it was too onerous, but you didn't follow
21 the process to bring it to this court before.
22 You agree with that, right?

23 MR. JUPITER: Yeah. Well, Your Honor, I
24 can tell I've done that to the District Court
25 before, and the District Court doesn't rule on

1 those for a lengthy period of time.

2 THE COURT: Did you bring this one?

3 MR. JUPITER: No, I didn't. Not until
4 after he was locked up.

5 THE COURT: So your choice was, you don't
6 have the argument that you brought it to Court,
7 and the Court didn't rule on it, do you?

8 MR. JUPITER: No, I don't have that.

9 THE COURT: So the choice that was taken
10 was that your client violated the conditions
11 instead?

12 MR. JUPITER: I don't agree that, we
13 dispute the fact that he violated it. I know
14 that has been the finding.

15 THE COURT: The finding of the Court. All
16 right. Okay. Is there anything further?

17 MR. JUPITER: No, Your Honor.

18 THE COURT: Okay. Thank you, counsel.
19 Attorney Andrews.

20 MR. ANDREWS: So, Judge, it appears that
21 the range that's before the Court now is five
22 to eleven months. The government advocates for
23 a sentence in the middle of the range. I would
24 like to briefly explain why. You sort of have
25 two violations here. You have the defendant

1 being found in violation of Virgin Islands law,
2 which is disturbance of the peace. As the
3 Court pointed out, you also have him violating
4 an order of this Court.

5 So, if we look at the factors, here is
6 what we have: The defendant commences period
7 of incarceration, he's released November 12,
8 2013, or at least that's when he commences his
9 supervised release. And that period is
10 supposed to run for three years. Within that
11 time, the Court had required that he not commit
12 any further crimes. Yet, within a year, he
13 violated that. This offense is happening
14 somewhere around December of 2014. We believe,
15 Judge, that this offense, when the Court is
16 looking at punishment, rehabilitation, the
17 nature of the offense, deterrence, should
18 consider relevant conduct as well. And that's
19 what the rules provide. And in our minds, the
20 Court's finding established relevant conduct of
21 unlawful sexual conduct second degree. Because
22 this Court found that the defendant sometime in
23 December of 2014, as testified to by the JD,
24 which this Court said the Court credited, that
25 he made sexual advances, that he touched her

1 thighs and breast area, and the Court found
2 that that in and of itself did not constitute
3 unlawful sexual conduct first degree, because
4 of the absence of the element of
5 contemporaneous threat. But you don't need
6 that contemporaneous threat to constitute an
7 unlawful sexual contact second degree. And the
8 Court determined that that offense was not
9 before it because it wasn't charged in the
10 Superior Court. And I assume, I don't think
11 the Court cited that somehow he didn't have
12 notice of that particular offense.

13 THE COURT: That was the Court's ruling.

14 MR. ANDREWS: Right. But, notice or not,
15 that doesn't change the fact that, one, by this
16 Court's finding, he committed at least that,
17 because the evidence shows that the age range
18 fits, he was older than 18 years when that
19 incident occurred, the victim was between the
20 age of 13 and 16 when the sexual contact
21 occurred, at least the touching of the thighs.
22 And so in the government's mind, that's
23 relevant conduct. And as the Court is aware,
24 you can consider relevant conduct even if the
25 defendant is acquitted of it. But we're not

1 talking about that, acquitted or not charged.
2 So here, for sake of the government's argument,
3 you can say, okay, well that was not a charged
4 offense or charged conduct. But we think it's
5 relevant because that conduct of the unlawful
6 sexual contact was part and parcel of this
7 entire event. This is all part of him picking
8 up the minor, driving to his job site, then
9 there is the issue of the threats. You may
10 recall that the defendant's own witness
11 testified that the distance from where she
12 lives to Harbor View is like five minutes. So
13 I say that to say that this whole incident is
14 occurring in a pretty short time, which is
15 relevant to the Court's determination as to
16 whether or not it is relevant. But even beyond
17 that, you have the victim's testimony. This is
18 an ongoing event, the picking up, the driving,
19 the sexual advances, the culminating in the
20 showing of this picture of his penis,
21 continuing with the threats, what would happen
22 to her and her family if she was to disclose
23 what he showed her.

24 So in the government's mind, all that is
25 essentially all one event. And the Court

1 should consider it. Even though the Court is
2 not considering it as unlawful sexual contact
3 first degree, he still engaged in unlawful
4 sexual contact. And we think that should
5 factor into all of these factors. How much
6 time should be imposed or punished on him; the
7 nature of the offense, that's part of it; his
8 respect for the law. And, of course, the
9 nature of that offense. And we think that to
10 be important, because the nature of the offense
11 now, this is not just a disturbance of the
12 peace, as such. This is a threat where you
13 have a victim, and an offense for which you
14 have a victim, not just a victim, but a victim
15 that is a minor. A victim that was not only
16 threatened as the Court found, with respect to
17 the disturbance of the peace, but a victim upon
18 which, or upon whom sexual advances were made.
19 And it's the government's view that all of that
20 should be considered in the fashioning of a
21 sentence. The Court should also consider the
22 defendant's history and characteristics. He's
23 a category three. That alone tells you
24 something about his criminal past. Beyond
25 that, he was arrested in this case, as we know,

1 released, went to Superior Court, brought over
2 before Judge Cannon in February of last year
3 for this violation, had a hearing, and was
4 released, in February. And I can tell you,
5 Judge, if you look through the records, you'd
6 see that that, as counsel indicated, there is a
7 whole bunch of motions that were filed between
8 February and August when the Court revoked his
9 release. All of them initiated by the
10 defendant. Because the defendant always had
11 some reason, some problem with the condition
12 that it needed to be adjusted. And it was a
13 whole variety of things. He needed to come off
14 of being at his residence so he could look for
15 a job, at one point. Another time, he needed
16 to assist his father with taking care of horses
17 and feeding them. And that was such that he
18 needed to be out all day, according to him, he
19 needed to take care of the horses all day, so
20 he wanted to be out all of the time. He had,
21 there were instances where he was permitted to
22 go to the hospital to seek medical treatment.

23 He ended up being revoked, Judge, as the
24 record will show, because the Court made a
25 finding that he was not where he was supposed

1 to be. That's why the Court revoked his
2 release. It was an area in St. Croix where he
3 was not supposed to be, according to his
4 release conditions.

5 Put another way, Judge, because we're not
6 here to litigate that, but obviously, the Court
7 found that he violated his, let's call it,
8 release pre-revocation hearing. And that's why
9 he was incarcerated as of August of whatever it
10 is last year.

11 So I say that to make sure that the Court
12 should consider this defendant seems to have a
13 problem respecting the law or respecting court
14 orders. Even after he was arrested for
15 violating the supervised release conditions.

16 So, plus, and I'm saying, because of his
17 history, Judge, because of the nature of the
18 offense, or offenses, a sentence in the middle
19 of the range would more serve the deterrent
20 factor, particularly for him. That's our
21 position. We believe that, I know counsel
22 talked about how much time he served, and
23 credit for time served and whatnot, our
24 position is, Judge, that the issue of how much
25 time he served is not an issue for this Court.

1 Certainly this Court can say he should get
2 credit for time served. I don't have an issue
3 with that. But I don't think it's within this
4 Court's duty to try to count days. We know
5 that he was arrested initially for the
6 supervised release here in February of last
7 year. And he probably spent a week or less in
8 jail, then he was released. And he was picked
9 up again, detained again from August when he
10 was revoked, that's what counsel is parceling
11 out this six months thing from, last year to
12 the present. But he's still also throwing out
13 some eleven-month issue, for maybe time he had
14 served or was incarcerated before when he was
15 initially arrested and went to the Superior
16 Court. And I agree, there is a provision in
17 the statute that would allow him to receive
18 credit for that time if it hasn't been
19 attributed to any offense. Well, we don't know
20 that yet. We know as we stand here now, yes,
21 it has not been attributed or credited to any
22 offense. But we would say that the Court
23 should not even entertain that, because this
24 defendant is scheduled to have his trial next
25 week in Superior Court on this same unlawful

1 sexual contact. Sure, if, if he is acquitted,
2 if the case is dismissed, then it will be easy.
3 Then he can make his pitch to Bureau of
4 Corrections, who would then be required to give
5 him credit for the time that he was
6 incarcerated.

7 On the other hand, if he's convicted, we
8 have to wait, see what sentence he gets, and
9 then we can talk about how much of that time
10 that he served before would be credited to that
11 sentence.

12 But I say all that, Judge, to say that
13 that's not before the Court, and I don't think
14 the Court should factor that in in determining
15 what is the appropriate sentence. That's not
16 one of the 3553 factors, how much time he
17 served.

18 All that said, we ask that the Court
19 impose a sentence in the middle of the
20 guideline range, which is approximately eight
21 months.

22 THE COURT: Attorney Jupiter, do you have
23 anything further?

24 MR. JUPITER: No, Your Honor.

25 THE COURT: Let me ask you about one of

1 the arguments that Attorney Andrews made, and
2 that's with respect to, sort of, considering
3 the, he describes it as relevant conduct. So
4 the entirety of the situation, including other
5 findings that the Court made, but as you know,
6 found with regard to second degree that there
7 wasn't notice of that. What is your response
8 to that? Because it seems that his argument is
9 that you should consider all of the factors
10 associated with this entire event, although you
11 only found the violation of the disturbance of
12 the peace statute.

13 MR. JUPITER: If we followed that logic,
14 Your Honor, then why have different violations,
15 different grades of violations based on
16 different types of offenses? And different, in
17 other words, why is there a distinction between
18 in the grades of violations, between a Grade A,
19 Grade B, Grade C, based on the type of felony,
20 based on the type of conduct?

21 THE COURT: Well, if it were a Grade A and
22 Grade B, we would likely be falling in a
23 different guideline range, though, right?

24 MR. JUPITER: Yes, Your Honor.

25 THE COURT: So, the way I understand the

1 argument is that obviously we're in Grade C.

2 MR. JUPITER: Yes.

3 THE COURT: And you're in a range below
4 what you would be in if it was a Grade A or
5 Grade B, but in considering where within the
6 range of Grade C here, what, four to eleven
7 months, in considering that range, where within
8 that range you should fall, you should consider
9 the other conduct.

10 MR. JUPITER: Well, Your Honor, I think
11 for the same reasons, though, is what I'm
12 saying is the reason why you should not,
13 because the government did not prove, they did
14 not prove that, that he committed the other
15 offenses. So they did not, I guess, within the
16 bounds of the rules. So in any particular
17 instance, any particular proceeding you have,
18 when the government fails to follow the proper
19 rules with respect to not only with respect to
20 proving the offense, but also with respect to
21 procedure and giving notice, if they can
22 violate those rules, then, at the time of the
23 sentencing, they could still argue to the
24 Court, well, you still should treat it, even
25 within the guideline range, as if he committed

1 a higher offense. Therefore, give him more
2 time, when the Court has not found Mr. Davis
3 guilty of that, then I think it raises the same
4 problems that it would raise with them, would
5 raise with them, with respect to proving those
6 offenses for any, for any particular reason.

7 So I think the stronger consideration, the
8 correct consideration, I should say, is the
9 Court to look at it for what the Court has
10 found to have violated. Not to what the
11 government is now arguing, well, he actually
12 made, violated these things as well.

13 THE COURT: Are you suggesting that the
14 Court should ignore some of the findings that
15 the Court made? Because the Court certainly
16 made findings related to the fact that, that
17 Mr. Davis made sexual advances, he made sexual
18 advances toward JD, that he touched her thighs
19 and her chest area, the Court made findings
20 with respect to, to those issues, for example.
21 Although the Court found that, one, with regard
22 to sexual unlawful sexual contact second
23 degree, there wasn't notice, but the underlying
24 findings are still there. And with regard to
25 unlawful sexual contact first degree, based on

1 the Court's reading of the statute, the actual
2 threat was not made until after the, the actual
3 sexual contact. So are you suggesting that
4 because the Court did not find a violation of
5 those two statutes for the reasons expressed
6 that the Court should ignore the findings that
7 it made, the underlying findings that it made
8 with respect to the defendant's conduct?

9 MR. JUPITER: I can't say to you that the
10 Court has to ignore factual findings. I mean,
11 the Court is going to look at the facts of a
12 case in determining what is the proper
13 sentence. So, in terms, but in terms of the
14 argument being couched as, well, in actuality,
15 Your Honor, you found, you made findings, you
16 may sufficiently find him guilty of this higher
17 grade, and therefore, that's the reason why, I
18 think that would be in error.

19 THE COURT: Okay. So let me re-couch the
20 argument, then, and maybe I re-couched it in my
21 own mind, or heard him differently. The
22 argument would be the Court has made findings
23 with regard to the fact that, you know, this
24 was a minor, he made sexual advances toward
25 her, he touched her in her thighs and her chest

1 area, she refused his sexual advances, he, you
2 know, he became agitated, and yelled at her
3 when she pushed his hands away, all separate
4 and apart from, but as part of the findings
5 leading up to the actual violation that the
6 Court found. Given that backdrop, should the
7 Court not consider all of that in the context
8 of fashioning the appropriate sentence?

9 MR. JUPITER: The Court has to consider
10 that. I think the Court also has to consider
11 the fact Mr. Davis has a trial that he has to
12 go to so he doesn't have all of the protections
13 to put on his case. I mean, he would be, you
14 know, he could, theoretically, put on his case,
15 and then give the government a preview, but he
16 has a trial coming up that he needs to focus on
17 in local court. So he basically has to make
18 strategic decisions, and Court only has to make
19 a finding here by a preponderance of the
20 evidence.

21 We, we submit that there were numerous
22 things that even if the Court were to find
23 that, you know, the minimal amount of conduct
24 occurred here for a disturbance of the peace,
25 or even if the Court were to find out that the

1 government had proper notice that there would
2 be a misdemeanor sexual contact, this is still
3 an incident, I think, that has numerous
4 contradictions by the victim, with respect to
5 she came to court and said that he only rubbed
6 her legs and then rubbed her shoulder going
7 down to her breast. She said in the statement
8 that he actually felt her breast. There was
9 numerous contradictions with respect to the
10 account that she gave before and after, account
11 that she gave before and after. And quite
12 frankly, this was something that occurred two
13 years ago. And even, even, and also, she was
14 contradicted, I think, in terms of this whole
15 business of he parked, he then --

16 THE COURT: You're rearguing the case. I
17 already made the finding. I found by a
18 preponderance of the evidence that I credited
19 certain testimony, and I made certain findings.
20 You're rearguing the case.

21 MR. JUPITER: Well, Your Honor, true.
22 But, I think that we kind of get, it's kind of
23 hard for me to just say, well, Court, should
24 the Court consider those things, and not say
25 how the Court consider it. I think it goes

1 back to the same, the same problem in terms of
2 what we're looking at relevant conduct outside
3 of what the Court has found him guilty of, in
4 terms of how does the Court measure those
5 facts, and how does the Court measure those
6 facts in terms of what, what's the punishment
7 that is appropriate, but not more than
8 necessary to meet the 3553 factors.

9 So it's kind of hard for me not to
10 compartmentalize how the Court should treat
11 those facts. How the Court should treat those
12 findings, at this stage.

13 In terms of whether or not the Court can
14 take into account the nature of the those
15 facts, the findings that it's made, the Court
16 can do that. Obviously, the Court can do that.

17 THE COURT: And that's what's normally
18 done in the context of relevant conduct, right?

19 MR. JUPITER: Yes.

20 THE COURT: All right. Thank you,
21 counsel.

22 MR. JUPITER: Your Honor.

23 THE COURT: Yes.

24 MR. JUPITER: Mr. Davis is trying to wait,
25 but really needs to use the restroom.

1 THE COURT: Okay. Why don't we take
2 ten-minute recess.

3 (A brief recess was taken.)

4 THE COURT: Okay, Attorney Jupiter, and
5 Mr. Davis, please step to the podium.

6 Attorney Jupiter, are there any reasons
7 why sentence should not be imposed, at this
8 time?

9 MR. JUPITER: No, Your Honor, we're ready.

10 THE COURT: I will now impose sentence as
11 follows: Pursuant to the Sentencing Reform Act
12 of 1984, it is the judgment of the Court that
13 the defendant, Jimmy Davis, is hereby committed
14 to the custody of the Bureau of Prisons to be
15 imprisoned for a term of eight months.

16 The defendant shall receive credit for
17 time served in detention for the violations at
18 issue today. Following his term of
19 imprisonment, Mr. Davis shall be placed on
20 supervised release for a term of 28 months.
21 Within 72 hours of release from the custody of
22 the Bureau of Prisons, Mr. Davis shall report
23 in person to the probation office in the
24 district to which he is released.

25 While on supervised release, Mr. Davis

1 shall not commit another federal, state or
2 local crime. Mr. Davis shall also comply with
3 the standard conditions of supervised release
4 as recommended by the United States Sentencing
5 Commission, which have been adopted by this
6 Court, and will be included in the judgment and
7 commitment order.

8 As a further condition of his supervised
9 release, Mr. Davis shall be prohibited from
10 possessing a firearm or other dangerous device,
11 and shall not possess a controlled substance.

12 Additionally, Mr. Davis shall submit to
13 random drug testing, at the direction of the
14 probation office.

15 Mr. Davis shall be referred to inpatient
16 or outpatient substance abuse counseling and
17 treatment, as directed by the probation office.

18 This sentence is imposed after
19 consideration of each of the factors set forth
20 in 18 U.S.C. Section 3553(a), and those factors
21 support your sentence as follows:

22 The instant sentence stems from
23 Mr. Davis's violation of the condition of
24 supervised -- of supervision that provides
25 "defendant shall not commit another federal,

1 state or local crime." The Court has found by
2 a preponderance of the evidence, that defendant
3 committed such a state or local crime,
4 specifically, Disturbance of the Peace.

5 Defendant's actions evince a disregard for
6 the conditions of his supervised release, which
7 he was bound, by order of this Court, to obey.

8 Defendant's continued involvement with the
9 criminal justice system while on supervised
10 release demonstrates defendant's recalcitrant
11 attitude regarding the conditions of his
12 supervised release and this Court's orders.

13 As part of the Court's consideration here,
14 the Court also notes that the Magistrate Judge,
15 Magistrate Judge Cannon, found there was
16 probable cause to believe that defendant had
17 violated his conditions of release on bond
18 pending his revocation hearing, and as a result
19 of that, defendant was detained. For purposes
20 of the history of the defendant, the Court
21 takes that finding by Judge Cannon and the
22 circumstances there into consideration as well.

23 In sum, the violation of conditions of
24 supervised release found by this Court in its
25 ruling today suggests that defendant is

1 resistant to abiding by the conditions imposed
2 by this Court, and the finding by Judge Cannon
3 regarding the violation of his conditions of
4 release, of release on bond simply adds to the
5 Court's finding in that regard.

6 As to the need for the sentence imposed to
7 protect the public from further crimes, deter
8 further criminal conduct, reflect the
9 seriousness of the defendant's actions, promote
10 respect for the law, and provide just
11 punishment, the Court is determined that a
12 sentence within the guideline range is
13 appropriate, because based on consideration of
14 all the relevant facts, the Court finds that
15 the sentence imposed is sufficient but not
16 greater than necessary to satisfy the purposes
17 of sentencing.

18 The Court certainly considers this
19 violation a serious one. Notwithstanding that
20 as counsel for defendant has argued the
21 Legislature of the Virgin Islands has
22 determined that the penalty for disturbance of
23 the peace is no more than 90 days, the Court
24 considers the fact that there has been not only
25 a violation of that local statute, but in so

1 doing Mr. Davis has violated an order of this
2 court by violating the conditions of his
3 supervised release, the conditions upon which
4 he is released.

5 The Court also considers the nature of the
6 violation here. It involved a minor. It
7 involved sexual advances made by Mr. Davis that
8 was part of the findings of this Court. The
9 Court found that Mr. Davis had made sexual
10 advances toward this minor, had touched her
11 thighs and chest area, that he became very
12 agitated and yelled at the minor when she
13 pushed his hands away. As sort of the
14 background leading up to the actual violation
15 that the Court found. While the Court did not
16 find, for the reasons expressed, either a
17 violation of unlawful sexual contact second
18 degree, or a violation of unlawful sexual
19 contact first degree, the Court nonetheless
20 made certain findings that believes it's
21 appropriate to consider in the context of
22 imposing a sentence. And those findings, as
23 the Court indicated, include the fact that
24 Mr. Davis made sexual advances toward JD, that
25 he touched her thighs and chest area,

1 therefore, sexual advances were made. That is
2 in addition to the fact of the crime actually
3 found by the Court, which is that the crime of
4 disturbance of the peace where the Court found
5 that Mr. Davis had threatened Miss JD's family
6 if she revealed his conduct toward her,
7 specifically, the showing of this photograph of
8 his penis.

9 So the, all of the circumstances here
10 suggest to the Court that there is a need to
11 deter the defendant from further criminal
12 conduct. There is a need to protect the public
13 from further crimes in that JD, another, a
14 member of the public, was involved in
15 Mr. Davis's criminal activity. There is a need
16 to promote respect for the law on the part of
17 Mr. Davis. There is a need to provide just
18 punishment for this type of crime, as I have
19 described, and the type of conduct that
20 preceded the crime found by the Court. And
21 there is a need to reflect the seriousness of
22 the offense committed by Mr. Davis as well as
23 the conduct referred to as the relevant
24 conduct, that is part and parcel of the
25 circumstances surrounding the crime.

1 Accordingly, the Court finds that the
2 sentence imposed will help protect the public
3 from further crimes, deter further criminal
4 conduct of Mr. Davis, reflect the seriousness
5 of the supervised release violation, and the
6 circumstances of Mr. Davis's conduct in
7 connection with or as a precursor to that
8 violation, and promote respect for the law.

9 For these reasons, the Court finds that
10 the sentence imposed is, is just punishment
11 under the circumstances here.

12 The Court previously detailed the
13 statutory and guideline options which are
14 available in this instance. The Court has
15 chosen a term of imprisonment within the
16 guideline range for the reasons previously
17 articulated. Court finds that an eight-month
18 sentence, followed by 28 months of supervised
19 release, would be most appropriate in this
20 circumstance, given the available sentencing
21 options that the Court has.

22 The Court finds that the guidelines
23 provide a fair gauge of the amount of
24 imprisonment and supervised release that are
25 appropriate for the punishment, eight months

1 imprisonment, coupled with 28 months of
2 supervised release, is sufficient but not
3 greater than necessary to comply with the
4 statutory purposes of sentencing. And the
5 Court is satisfied that the sentence is
6 appropriate.

7 The Court is unaware of any facts and
8 circumstances which suggest that this sentence
9 would cause an unwarranted disparity between
10 the sentence imposed here, and sentences
11 imposed for similar crimes under similar
12 circumstances.

13 Now, Mr. Davis, I should advise you that
14 under some circumstances, defendant has the
15 right to appeal the sentence that is imposed.
16 If you cannot afford the cost of an appeal, you
17 have the right to request to proceed with your
18 appeal in forma pauperis. The Clerk of the
19 Court will prepare and file a notice of appeal
20 upon your request. With very few exceptions,
21 any notice of appeal must be filed within 14
22 days of the entry of this judgment. Do you
23 understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: If you have any further

1 questions regarding your rights to appeal or
2 any other matters related to this matter, you
3 can refer them to your counsel, Attorney
4 Jupiter. Do you understand that?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: The parties have anything
7 further to address with the Court?

8 MR. ANDREWS: The government does not.

9 MR. JUPITER: No, Your Honor.

10 THE COURT: Okay. Mr. Davis, you're
11 remanded to the custody of the U.S. marshals.

12 We stand adjourned.

13 Mr. Davis, you may leave after I leave.

14 (Thereupon, court adjourned at

15 12:52 p.m.)

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C-E-R-T-I-F-I-C-A-T-E

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I, Valerie Lawrence, certify that the foregoing is a
correct transcript from the record of proceedings in
the above-entitled matter this 5th day of May, 2017.

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Valerie Lawrence, RPR

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

JIMMY DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX F

OMODARE JUPITER
FEDERAL PUBLIC DEFENDER
COUNSEL FOR THE PETITIONER
4094 Diamond Ruby, Suite 5
Christiansted, VI 00820
(340) 773-3585
omodare_jupiter@fd.org

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA

v.

JIMMY DAVIS

JUDGMENT IN A CRIMINAL CASE

(For **Revocation** of Probation or Supervised Release)Case Number: **1:10-CR-00011**USM Number: **04778-094****Omodare B. Jupiter**

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	admitted guilt to violation of condition(s)	of the term of supervision.
<input checked="" type="checkbox"/>	was found in violation of condition(s)	after denial of guilt.

The defendant is adjudicated guilty of these violations:

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
1	Committing another federal, state or local crime, to wit Disturbing the Peace	2/23/2015

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The defendant has not violated the condition of **not committing another federal, state, or local crime, to wit Unlawful Sexual Contact First Degree** and is discharged as to such violation.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Last Four Digits of Defendant's Soc. Sec. 1445

Defendant's Year of Birth: 1978

 City and State of Defendant's Residence:
 Christiansted, Virgin Islands
March 14, 2017

Date of Imposition of Judgment

Signature of Judge

Wilma A. Lewis, Chief Judge

Name and Title of Judge

Date

DEFENDANT: JIMMY DAVIS
CASE NUMBER: 1:10-CR-00011-WAL-GWC(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Eight (8) months. Defendant shall receive credit for time served, as such time relates to the violation of supervised release at issue here.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant shall be housed in a facility where he is allowed to participate in the Federal Bureau of Prisons' Drug Abuse Education program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JIMMY DAVIS
CASE NUMBER: 1:10-CR-00011-WAL-GWC(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Twenty-eight (28) months.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

DEFENDANT: JIMMY DAVIS
CASE NUMBER: 1:10-CR-00011-WAL-GWC(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JIMMY DAVIS
CASE NUMBER: 1:10-CR-00011-WAL-GWC(1)

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall participate in inpatient or outpatient substance abuse counseling and/or treatment as directed by the Probation Office.