Central Brooklyn Independent Democrats
Judicial Candidate Questionnaire

Please return to richbennett12@gmail.com by February 8
. Feel free to call (7183441434) or email with any questions

A1. Candidate Name	Marva Brown
A2. Campaign Manager name/Campaign treasurer name	Manager – Moses 'Musa' Moore
A3. Campaign Contact Information: Address, Telephone, Fax, Email, Website	1655 Bedford Ave, Suite 200 Brooklyn, NY 11225 347-663-4555 info@marvaforjudge.com www.marvaforjudge.com
A4. Office for which the endorsement is requested / Jurisdiction	Kings County Civil Court (Countywide)
A5. Are you the incumbent?	No
A6. Have you been endorsed by CBID before? If so, in what year(s) and for what office(s)?	No
A7. As of now what funds have you raised to support your efforts? (b) What do you expect to spend in support of your candidacy?	$6,000 (b) $150,000
A8. What endorsements from community leaders, elected officials, political organizations or newspapers have you received thus far?	CM Lincoln Restler DLs Sarana Purcell, Akel Williams, Shaquana Boykin, Mike Boomer Unanimous Vote from Bk Chapter of WFP
A9. Is your candidacy receiving any support from the Kings County Democratic Party? If so, what type?	UNKNOWN

A10. What sitting Supreme Court Justice of the US do you most admire and why?	Justice Sonia Sotomayor bc she came from humble beginnings, worked hard as a trial attorney, and used the law as a judge to fight for affirmative action and same sex marriage.
A11. If you were President Biden who would you nominate to the US supreme Court to fill the current vacancy and why?	NYS Attorney General Leticia James because she uses the law as a sword and a shield to do protect the rights of the citizenry.

B1. Please include as a link or attachment the following documents: a). Citations for your three most significant decisions (if a judge). b). Resume c). Any published articles pertinent to the office you seek. d). Any application filled out for other organizations	**..\OneDrive\Desktop\Campaign Stuff\District Leader Resume .docx** and attached.
B2. How many trials have you participated in within the last ten years? Please include citations	6 trials: People of the State of New York v. Farrukh Afzal, 7532-2018 (Kings) 9/15/22; People of the State of New York v. Antonio Graham, 5796-2019 (Kings) 2/14/22; People of the State of New York v. Denzil Hamilton, 5941-2018 (Kings) 12/2/21; People of the State of New York v. Navindra Prasad, 2017KN067137 (Kings) 9/24/18; People of the State of New York v. Francisco Flores, 9126-2015 (Kings) 11/13/16; People of the State of New York v. Troy English, 2013KN038195 (Kings) 10/10/13,
B3. How many written motions have you made citing legal authority in last 5 years? Please provide copies of 3 most recent motions and/or memoranda	See attached.
B4. Have you had any court sanctions or disciplinary sanctions in your career? If so, please provide an explanation.	No.

B5. If you are currently serving as a Judge please list the names of the lawyers involved in the last three written opinions that you have issued.	**1) N/A** **2)** **3)**
B6. Provide citations to your last 5 published opinions. If you have less than 5, please provide copies of enough unpublished opinions to bring the total to 5. All published decision first, then fill in the balance with the most recent unpublished decisions.	**1) N/A** **2)** **3)** **4)** **5)**
C1. Are you a member of a political club? If yes, what is the name of the club? And what positions have you held? Please include dates.	No.
C2. Have you been elected to any public office or political party position? If so, please describe the office or position.	No.
C3. Have you performed any pro bono work in the past three years? Please describe the type of pro bono work you have performed.	My entire legal career is pro bono.
C4. What Civic Organizations do you belong to? Please describe that the organization does, and what role you play within the organization.	**President, Friends of Brower Park** **Board Member, Families and Friends of the Wrongfully Convicted** **Board Member, Soul2Soulz**
C5. For each Civic Organization, provide contact information for the Executive Director, CEO or organization head. If you are the	**Veronica Nero, Treasurer FOBP – 917-716-5716** **Kevin Smith, Executive Director FFWC – 347-388-7974**

executive Director or organization leader, please provide the contact information for at least one Board Member.	**Nicole Creary, Executive Director Soul2Soulz – 718-496-5300**
D1. What bar associations do you belong to? What sections or committees do you belong to? What is your role with the section or committee?	**NYC Bar Assn** **Metropolitan Black Bar Assn** **NYS Trial Lawyers Assn** **Association of Criminal Defense Attorneys** **Brooklyn Women's Bar Assn** **Kings County Criminal Bar Assn**
D2. List any CLE's that you have taught within the last three years, if any. Please provide a syllabus if one is available.	**Cardozo Intensive Trial Advocacy Program (ITAP)** **How to make a bail application** **How to Properly Document a Case File** **How to Work Traffic Shift**

1030 PARK PLACE, APT D5, BROOKLYN, NY 11213 * 518-364-9161 * MARVA.C.BROWN@GMAIL.COM

Bar Admission:

New York State, March 2007

Experience:

The Legal Aid Society, Brooklyn, NY
Staff Attorney, June 2008 – Present
Current Law Reform Unit Policy Rotator. Represented hundreds indigent felony and misdemeanor criminal defendants at all stages of criminal proceedings. Prepared clients and witnesses for Grand Jury testimony. Litigated pre-trial hearings, trials, school suspension, DMV, and OATH hearings. Appeared in Supreme and Criminal Court daily and conferenced with Assistant District Attorneys and Judges. Supervised and assisted in training interns. Coordinated with social workers and investigators to properly evaluate client history, defenses, and recommendations for the court. Interviewed potential candidates for attorney and support staff positions. Conduct trainings for newly hired attorneys.

The Legal Aid Society of Nassau County, Hempstead, NY
Staff Attorney, September 2006 – June 2008
Represented more than 150 indigent misdemeanor criminal defendants at all stages of criminal proceedings. Litigated pretrial hearings and trials. Appeared in District Court to conference cases with Assistant District Attorneys and Judges. Led a team of four attorneys in the criminal part organizing intake schedules, jail visits, and daily activities. Conducted substantive and procedural research for motions. Coordinated with social workers to arrange alternatives to incarceration for clients.

The Law Office of Labe Richman, New York, NY
Law Clerk, September 2005 – May 2006
Conducted legal research and wrote interoffice memorandum in preparation for motions to vacate convictions. Retrieved and reviewed court files and transcripts for error. Investigated cases by interviewing witnesses.

The Legal Aid Society, Federal Defender Division (E.D.N.Y), Brooklyn, NY
Legal Intern, September 2004 – May 2005
Researched and wrote memorandum of law. Interviewed clients and investigated client background. Retrieved documents and information from governmental agencies; observed various court proceedings.

Bedford Stuyvesant Community Legal Services, Income Maintenance Unit, Brooklyn, NY
Legal Intern, Summer 2004
Represented clients at social security and welfare fair hearings. Conducted intake interviews and advised clients on welfare and family law issues. Completed projects concerning child support, custody, and paternity testing.

Education:

Benjamin N. Cardozo School of Law, New York, NY, *Juris Doctor*, June 2006

Academics:	Criminal Defense Clinic, Fall 2005-Spring 2006
	Intensive Trial Advocacy Program (ITAP), 2005
Awards:	Charles H. Revson Law Students Public Interest (LSPIN) Fellowship, 2005
Activities:	Treasurer, Northeast BLSA, 2004-2006

Columbia University, New York, NY, *Bachelor of Arts* in African American Studies, May 2003

Awards:	Columbia University King's Crown Leadership Award, 2003
	Gerald and May Ellen Ritter Memorial Scholarship, 2002
Activities:	President, Activities Board at Columbia, 2002-2003
	President, Black Students' Organization, 2001-2002

Affiliations:

Brooklyn Community Board 8, *Board Member*
Families and Friends of the Wrongfully Convicted, *Board Member*
Friends of Brower Park, *President*
Soul2Soulz, *Board Member*

Writing Samples

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: CRIMINAL TERM, PART TAP1
---X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ROBERTO GONZALEZ,
Defendant.
---X

NOTICE OF MOTION TO INSPECT AND DISMISS

Ind. No. 71939-2021

PLEASE TAKE NOTICE that, upon the annexed affirmation of Marva Brown upon the indictment and all prior proceedings, the undersigned will move this Court at Part TAP1 at the courthouse located at 320 Jay Street, Brooklyn, New York 11201 on October 1, 2021, at the opening of court on that day or soon thereafter as counsel can be heard for an order:

1. Inspecting Grand Jury minutes and dismissing or reducing for insufficient evidence [C.P.L. §§ 210.20(1)(b); 210.30];
2. Dismissing or reducing Defendant's charge due to prosecution's failure to meet the requirements of Assault in the First Degree and Assault in the Second Degree [P.L. §§ 120.10 and 120.05(1)];
3. Allowing Defendant to reserve the right to make additional motions;
4. Granting such other relief as this Court may deem proper.

DATED: September 23, 2021
Brooklyn, NY

Respectfully Submitted,
Janet Sabel, Esq.
Attorney for Defendant
THE LEGAL AID SOCIETY
111 Livingston Street, 9th floor
Brooklyn, New York 11201

By: ______________________________
MARVA C. BROWN, ESQ.
Of counsel

CELL: 646-592-1449
EMAIL: mcbrown@legal-aid.org

To: ADA Eric Wells
Kings County District Attorney
350 Jay Street
Brooklyn, New York 11201

Clerk, Supreme Court
Kings County
Part TAP1

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: CRIMINAL TERM, PART TAP1
---X
THE PEOPLE OF THE STATE OF NEW YORK,

NOTICE OF MOTION TO INSPECT AND DISMISS

-against-

Ind. No. 71939-2021

ROBERTO GONZALEZ,
Defendant.
---X

MARVA BROWN, an attorney admitted to practice law in the courts of this State, hereby affirms under penalty of perjury that the following statements are true, except for those made upon information and belief, which I believe to be true:

1. I am the attorney of record for the defendant, Roberto Gonzalez. I am familiar with the facts of this case and make this affirmation in support of Mr. Gonzalez's motion. Unless otherwise specified, all allegations of fact are based upon information and belief, the sources of which include inspection to the record of the case, conversations with Mr. Gonzalez, and counsel's own investigations.

2. Mr. Gonzalez was initially charged with Attempted Murder and other charges relating to incident alleged to have occurred on May 22, 2021 at approximately 7:30am at 1789 Nostrand Avenue in the County of Kings. **Exhibit A**.

3. Mr. Gonzalez was arrested on June 1, 2021 and arraigned in Criminal Court on June 2, 2021, where bail was set. Mr. Gonzalez remains incarcerated on the instant matter.

4. On July 29, 2021, Mr. Gonzalez was arraigned on the Indictment for Assault in the First Degree and related charges. **Exhibit B.**

5. Mr. Gonzalez respectfully requests the following relief from the Court:

Motion to Inspect Grand Jury Minutes and Dismiss or Reduce Due to Insufficiency of the Evidence before the Grand Jury

6. Mr. Gonzalez requests that the Court inspect the Grand Jury minutes and all Grand Jury Exhibits and dismiss the indictment, or in the alternative, dismiss or reduce the counts thereof, pursuant to C.P.L. §§ 210.20(1)(b) and 210.30, on the ground that the evidence of identification presented to the Grand Jury was not legally sufficient to connect Defendant to the charged offense.

7. In order for a Grand Jury to return an indictment, the evidence before it must both establish all the elements of the crime and also establish reasonable cause to believe that the accused committed the charged offenses (emphasis added). C.P.L. § 190.65(1); see People v. Jennings, 69 N.Y.2d 103, 115 (1986).

8. C.P.L. §210.20(1)(b) authorizes the trial court, upon motion of Defendant, to dismiss an indictment where the evidence before the grand jury was not legally sufficient to establish the charged offense or any lesser included offenses.

9. The inquiry of the reviewing court is limited to a review of the legal sufficiency of the evidence, which is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (emphasis added). Jennings, 69 N.Y.2d at 115; see also People v. Jensen, 86 N.Y.2d 248 (1995); People v. Galatro, 84 N.Y.2d 160 (1994). The determination is made "by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury." Jennings, 69 N.Y.2d at 114.

10. Moreover, New York State indictments must be based on competent evidence, meaning evidence not subject to an exclusionary rule such as the prohibition against hearsay. See People v. Swamp, 84 N.Y.2d 725, 730 (1995); People v. Oakley, 28 N.Y.2d 309, 314 (1971).

11. Finally, (subject the limited exceptions of C.P.L. §190.30), evidence is admissible in the Grand Jury only if it would be admissible at trial. C.P.L. §190.30(1).

12. Here, based on the Grand Jury minutes disclosed to defense counsel, the evidence of identification in the grand jury was legally insufficient to connect defendant with the charged offense. In order to connect defendant with the charged offense, the prosecutor presented the demonstrative testimony of Detective Daniel Kirk identifying Mr. Gonzalez as the person in the video. Because Detective Kirk's testimony, under the circumstances of this Grand Jury presentation, was inadmissible lay opinion testimony, it was not legally competent evidence of identification.

13. Witnesses generally are not permitted to testify to their opinions; rather they testify to their personal observations. See Fisch, New York Evidence §§361-362 at 235-37 (2d ed. 1977). It is then left to the jury to draw the appropriate inferences from the evidence. See People v. Russell, 165 A.D. 327, 332 (2d Dept. 1991).

14. In People v. Coleman, 78 A.D.3d 457 (1st Dept. 2010), the First Department held that two police officers and the defendant's aunt should not have been permitted to testify at trial that the defendant was the person captured in a surveillance videotape, where the People never claimed that the defendant had changed his appearance and there were no other circumstances indicating that the witness was more capable than the jury, which had an opportunity to view the defendant, to make this determination.

15. Furthermore, even when such lay opinion testimony is admissible, it must be accompanied by an instruction to the jurors that they are free to accept or reject the opinion of the lay witness. See People v. Morgan, 214 A.D.2d 809, 811 (3d Dept. 2010).

16. Here, as these authorities make plain, the lay opinion testimony should not have been permitted. The People never claimed that the defendant had changed his appearance and there were no other circumstances indicating that the witness was more capable than the jury, who had the opportunity to view the photograph of the person who had been arrested for the crime and the video that captured the incident, to make this determination.

17. Furthermore, as these authorities make plain, even if, arguendo, such opinion testimony by non-witnesses to the incident may be admissible under certain circumstances to aid to a jury's independent assessment of a surveillance videotape, Detective Kirk's testimony was not admissible in this grand jury proceeding.

18. Since the lay, non-eyewitness, opinion testimony of Detective Kirk thus could not assist the Grand Jury in making its independent assessment, it was not admissible. Nor does it appear that the prosecutor instructed the grand jury that they were free to accept or reject Detective Kirk's opinion; although such an instruction would not have cured the error, as the Grand Jury would have had no evidentiary basis to reject the officer's opinion. In short, Detective Kirk's opinion testimony was not competent evidence of identification in the Grand Jury proceeding.

19. For all of these reasons, the evidence presented at the Grand Jury proceeding was legally insufficient to connect defendant with the charged offenses. Accordingly, the indictment should be dismissed pursuant to C.P.L. §§210.20(1)(b), 210.30.

THE EVIDENCE PRESENTED TO THE GRAND JURY WAS NOT SUFFICIENT TO ESTABLISH SERIOUS PHYSICAL INJURY

20. In order for a Grand Jury to return an indictment, the evidence before it must both establish *all the elements of the crime* and establish reasonable cause to believe that the accused committed the charged offenses. (emphasis added) C.P.L. § 190.65(1); see People v. Jennings, 69 N.Y.2d 103, 115 (1986).

21. Mr. Gonzalez is charged in count one of the Indictment with Assault in the First Degree. P.L. § 120.10(1). This statute states that an individual commits Assault in the First Degree when:

> 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument;

22. Additionally, count four of the Indictment charges Mr. Gonzalez with Assault in the Second Degree. P.L. § 120.05(1). The statute states that an individual commits Assault in the Second Degree when:

> 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person.

23. A "serious physical injury" is defined as a "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." P.L. §10.00(10). This standard has been set quite high by the legislature and the courts.

24. In this case, the defense contends, based on available information, that the evidence before the Grand Jury did not establish "serious physical injury" to complaining witness and that, therefore, the evidence before the Grand Jury was insufficient as to counts one and three of the indictment.

25. In People v. Stewart, 18 N.Y.3d 831, 939, N.Y.S.2d 273 (2011), the Court of Appeals held that numerous blows to the victim with a sharp instrument causing a six-to-seven centimeter (6-7 cm) wound on the inner forearm, which was sutured, did not constitute serious bodily harm because there was no organ damage or injury to muscle tissue, the victim only spent one day in the hospital, and had no follow up medical care except to remove the suture.

26. In People v. Minchala, 194 A.D.3d 754 (2d Dept. 2021), "serious physical injury" was not found when the victim had been stabbed multiple times, sustaining lacerations in the neck, head, chest, and abdomen, because there was no evidence of injury to the victim's internal organs.

27. In People v. Ragguete, 120 A.D.3d 717, 718 (2d Dept. 2014), the Defendant threatened to kill the complainant, stabbed and slashed her repeatedly with a knife until she lost consciousness, but "serious physical injury" was not found because the victim did not suffer serious and protracted disfigurement. See also People v. Vasquez, 134 A.D.3d 744, 745 (2d Dept. 2015) (failing to find assault in the first degree where the complainants sustained a cut on the right arm and a cut on the chest resulting in scars, which did not amount to serious disfigurement).

28. In People v. Gray, 30 A.D.3d 771, 772-773 (3d Dept. 2006), a gunshot victim had 32 pellets lodged in his arm, chest, and shoulder but his condition did not constitute "serious physical injury" sufficient to meet the requirements of a first-degree assault conviction because he never lost consciousness, none of the pellets entered his chest cavity, and he was released from the hospital within twelve (12) hours.

29. In People v. Sleasman, 24 A.D.3d 1041, 1042-1043 (3d Dept. 2005), a knife wound to the victim's neck, which resulted in an ambulance transporting her to the hospital where she received sutures and was kept overnight, did not meet the serious physical injury element of

assault in the first degree because, even though her injuries were considered having the potential to be life threatening and there was damage to her platysma muscle, she was conscious while receiving medical assistance and her internal organs were not damaged. See also People v. Horton, 9 A.D.3d 503 (3d Dept. 2004) (holding that evidence was insufficient to find that the victim, who was shot in the neck, suffered a "serious physical injury" because the medical evidence described the injury as not life threatening, and the victim was conscious and responsive in the emergency room).

30. Based on the documents received in discovery, the testimony before the grand jury alleges that Mr. Gonzalez shot complaining witness Jean Duval ("Duval") twice in his right leg on May 22, 2021 at or around approximately 7:36 a.m.

31. According to the medical records presented to the grand jury as People's Exhibit #9, Mr. Duval arrived at the Kings County Hospital Emergency Room at 8:02 a.m. that same day. **Exhibit C.**

32. Mr. Duval was not taken to the hospital in an ambulance. He presumably traveled for approximately thirty (30) minutes to the emergency room of his own volition.

33. Mr. Duval's medical complaint was of gunshot wounds to the right thigh. The report states four openings to his skin in the upper right thigh and one abrasion on the left thigh.

34. Mr. Duval's two gunshot wounds presented as two holes at the front of his right thigh and two holes on the back of his right thigh that were each approximately half a centimeter (0.5 cm) in size. The abrasion on the left thigh was also approximately half a centimeter (0.5 cm) in size.

35. The gunshot wounds did not affect any veins, arteries, or bones in Mr. Duval's leg(s).

36. The gunshot wounds created soft tissue emphaseyma, which is air in the skin, and intramuscular hematoma, which is blood collecting in the muscle and is essentially a bad bruise. Neither of these responses are serious nor permanent.

37. The medical evidence states "[y]our x-rays and CT scans of your affected areas of the body are fortunately normal without any broken bones or acute abnormal findings. You are safe for discharge given your improvement." *See* **Exhibit C -** Kings County Hospital Center Report, Discharge Instructions, Page 55.

38. Mr. Duval was conscious, alert, and responsive during his treatment.

39. Mr. Duval did not have bullet or bullet fragments in his leg(s).

40. Mr. Duval did not receive sutures or stitches for the gunshot wound(s).

41. Mr. Duval did not need surgery, or admission to the hospital.

42. Mr. Duval did not experience internal organ damage.

43. Mr. Duval did not experience injury to muscle tissue aside from bruising.

44. Mr. Duval did not experience any fractures or broken bones due to this incident.

45. Mr. Duval complained of pain and was treated with over-the-counter medication. The medical evidence states "[y]ou may take Tylenol 650mg every 6 hours and Motrin 400mg every 6 hours for the next 5 days and as needed for pain therafter." *See* **Exhibit C -** Kings County Hospital Center Report, Discharge Instructions, Page 55.

46. Mr. Duval's blood loss was minimal, and he did not experience any internal bleeding.

47. Mr. Duval was discharged on the same day at 5:29 p.m. Mr. Duval was able to walk out of the hospital without crutches, wheelchair, or any other assistance.

48. Mr. Duval was not admitted to the hospital, he did not stay in the hospital overnight, and he spent less than nine and a half (9.5) hours in the hospital for his treatment.

49. There is no evidence that Mr. Duval sought any follow-up medical care.

50. Mr. Duval did not lose consciousness at any point during his treatment.

51. Based on this evidence, the alleged injury to complainant Jean Duval did not involve a substantial risk of death or any protracted disfigurement. There was no evidence presented that Mr. Duval experience any protracted impairment of health or protracted loss of impairment of the function of any bodily organ.

52. Here, as these authorities make plain, Duval did not experience "serious physical injury" from this incident.

53. As such, counts one and three should be dismissed.

THERE WAS NO SUFFICIENT EVIDENCE PRESENTED THAT MR. GONZALEZ INTENDED TO CAUSE PHSYICAL INJURY TO JEAN DUVAL

54. A person acts "intentionally," as defined by Penal Law § 15.05(1), "when his conscious objective is to cause such result or to engage in such conduct.

55. The intent to cause serious physical injury is sometimes evidenced by threats or other statements. See People v. Hadfield, 990 N.Y.S.2d 341 (3d Dept. 2014); see also In re Theodore H., 821 N.Y.S.2d 586 (1st Dept 2006). More often, the intent must be inferred from the defendant's conduct and degree of force used in inflicting the injury. § 5:8 Intentional assaults, 6 N.Y. Prac., Criminal Law § 5:8 (4th ed.).

56. Intent was not found when a defendant shot a complainant, but merely grazed the complainant's arm and left a small mark. See People v. Tran, 729 N.Y.S.2d 851, 853 (N.Y. Sup. Ct. 2001), judgment aff'd, 308 A.D.2d 497 (2d Dept. 2003).

57. Here, there is no evidence of any alleged threats or statements made by the perpetrator prior to the shooting.

58. Additionally, the perpetrator held the weapon at a downward angle and when Mr. Duval was shot in the leg. The angle of the perpetraotr's arm when conducting the shooting reflects his lack of intent to cause serious physical harm or disfigurement. Mr. Duval's minimal injuries also indicate a lack of intent. See Tran, 729 N.Y.S.2d at 853.

59. As such, there was no evidence presented to the grand jury to substantiate a finding that the perpetrator intended to cause serious physical injury or disfigurement, as required for a finding of Assault in the First Degree. P.L. § 120.10 and other related charges.

60. As such, counts one through six (1-6) of the indictment should be dismissed.

Reservation of Rights

61. Defendant respectfully reserves the right to make additional motions if necessary.

Request for Other Relief

62. Defendant respectfully asks the Court to order such other and further relief as it may deem proper.

DATED: September 23, 2021
Brooklyn, NY

Respectfully Submitted,
Janet Sabel, Esq.
Attorney for Defendant
THE LEGAL AID SOCIETY
111 Livingston Street, 9th floor
Brooklyn, New York 11201

By: ______________________________
MARVA C. BROWN, ESQ.
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To: ADA Eric Wells
Kings County District Attorney
350 Jay Street
Brooklyn, New York 11201

Clerk, Supreme Court
Kings County
Part TAP1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART GP29

THE PEOPLE OF THE STATE OF NEW YORK -against- WILLIAM MCFARLANE, Defendant.	**Post Hearing Memorandum** Ind. No. 2232-2019 Adj. Date: August 8, 2020 Part GP29

In response to the defendant's motion to controvert the search warrant and suppress the physical evidence seized, this Court conducted an evidentiary hearing to resolve the legality of the police entry and search prior to the issuance of the search warrant. The hearing was conducted on March 5, 2020 and March 10, 2020. Defendant William McFarlane submits this brief in support of his motion as the entry into the home was illegal, the police conducted a search prior to the issuance of the search warrant, and the information upon which the search warrant was granted, as it pertained to Mr. McFarlane's unit was stale, and therefore should not have been issued. It should be noted that Sergeant Ayala's body worn camera footage was entered into evidence in its entirety at the hearing.

The police came to Mr. McFarlane's home on April 5, 2019 without a warrant. A warrantless entry into a person's home may, however, be properly undertaken by law enforcement agents if they have obtained the consent of a person authorized to give consent. *People v. Nalbanian*, 590 N.Y.S.2d 885 (1st Dept. 1992). Consent must be voluntarily given and must not be the product of overt or even subtle coercion. *People v. Flores*, 581 N.Y.S.2d 58 (1st Dept. 1992). The People must meet a heavy burden to establish that consent was voluntarily given. *People v. Gonzalez*, 383 N.Y.S.2d 216 (1976).

No Ability to Consent to search because Landlord with Tenants

When the police claim to have consent to enter the premises, it is the People's burden to show that 'consent was in fact voluntarily given, and not the result of duress or coercion, express implied. *People v. Fakoya*, 25 Misc.3d 1205(A), 4 (2009). There are a variety of factors that should be examined as *a whole* when determining the voluntariness of consent, including, 1) whether the consenter was in police custody at the time (also including such considerations as number of officers present and the extent to which they restrained the defendant), 2) the background of the consenter, including prior experiences with the police, 3) whether or not the consenter offered a resistance to the police, and 4) whether the police informed the consenter of their right to refuse consent. *Id.*

A third party's status as a landlord "calls up no customary understanding of authority to admit guests without the consent of the current occupant… a landlord does not share common authority with a tenant, and, therefore, may not consent to a search. *People v. Ruiz*, 13 Misc.3rd 1225(A) (2006).

Consent to enter was limited to Find William McFarlane

The court found that the defendant's initial refusal to consent to the search was overborne by the officer's display of authority… The officers, all wearing bullet proof vests and displaying their shields, had the defendant's home 'surrounded.' Under those circumstances, the court found the Officer's testimony that the defendant voluntarily consented to the search to be incredible, and deliberately fashioned to withstand constitutional challenge. *People v. Jimenez,* 163. Misc.2d 30, 34 (1994).

"Further, even if the consent had been properly obtained, the search exceeded the scope of the consent. Defendant's permitting the officer's to cross the threshold to 'look around' is not

tantamount to consent to a basement to attic search of the house. An invitation to enter the home cannot be reasonably construed as a broad consent of the police to wander at will throughout the entire dwelling." *People v. Jimenez,* 163. Misc.2d 30, 35 (1994).

Assuming *arguendo* that the Defendant did give voluntary consent to enter the apartment, such consent does not give the police the right to search everywhere and question whomever they please. *People v. Fakoya* at 5. Furthermore, the standard for determining the scope of consent and whether the police exceeded the scope of the offered consent is one of objective reasonableness and what would a typical reasonable person have understood the consented search to entail. *Id.*

"Permission to speak with defendant, given while downstairs in a common area of the residence, did not amount tot consent for entry into defendant's upstairs bedroom…. The fact of ownership, by itself, could not provide a sufficient objective basis for such reasonable reliance where, as here, the bedroom was occupied by a 38 –year-old stepson. *People v. Russo*, 201 A.D.2d 940, 941 (1994).

…The Police must ask the person who consents to the search enough questions to give rise toa reasonable believe on their part that the consenter has authority to authorize the search. *People v. White*, 169 Misc,2d 295, 306 (1996). … A mere landlord, did not have authority to let them enter defendant's space. *Id* at 307.

No Express Consent to Search

No allegation of smell of marijuana by Mr. McFarlane's Unit

Went with a whole team to search

If investigating a DV incident, they could have gotten an arrest warrant. But they did not because then they would have only been allowed to search the grabbable area around the arrestee. They went to the location with the intent to search that bedroom.

Custodial Interrogation

Dated: July 9, 2020
Brooklyn, New York

____
Marva C. Brown, Esq

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART MISMO

---X

THE PEOPLE OF THE STATE OF NEW YORK, : **BAIL APPLICATION**

-against- : INDICTMENT # 5796-2019

:

ANTONIO GRAHAM,

:

Defendant. :

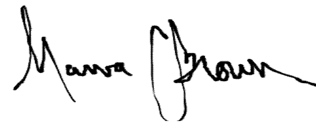
---X

PLEASE TAKE NOTICE, that upon the annexed affirmation of MARVA C. BROWN, dated June 11, 2020, the undersigned will move the Supreme Court of the State of New York, on the 12th day of June 2020, at 9:30 am or as soon thereafter as counsel can be heard, for an order releasing Mr. Graham under Supervised Release with Electronic Monitoring as provided by the Kings County Sheriff's Office, or reasonable monetary bail.

Dated: Brooklyn, New York
June 11, 2020

Yours, etc.,

JANET SABEL
NEVILLE O. MITCHELL, Of Counsel
Attorney for the Defendant
The Legal Aid Society
111 Livingston Street, 9th Fl
Brooklyn, New York 11201
646-592-1449



BY: MARVA C. BROWN, ESQ.

TO: ERIC GONZALEZ
DISTRICT ATTORNEY
COUNTY OF KINGS
ATTN: ADA Nick Ford

CLERK, MISC. MOTION
SUPREME COURT : CRIMINAL TERM
COUNTY OF KINGS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART MISMO

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THE PEOPLE OF THE STATE OF NEW YORK, : AFFIRMATION

-against- : INDICTMENT # 5796-2019

ANTONIO GRAHAM, :

Defendant. :

---X

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

MARVA C. BROWN, an attorney at law and associated with JANET SABEL and NEVILLE O. MITCHELL, the attorney of record for the defendant herein, affirms to be true under the penalty of perjury the following allegations:

That these allegations are based on information and belief, the sources of such being official court papers, investigations, and conversations with my client.

1. Mr. Graham was arraigned on the criminal court complaint on September 21, 2019 in Criminal Court. **Exhibit A.** We reserved our bail application. The Court remanded Mr. Graham.

2. On January 13, 2020 , Mr. Graham was arraigned on the indictment in Supreme Court. He plead not guilty and, again, we reserved a bail application.

3. Mr. Graham's custody status has not yet been reviewed since the Revised Bail Law went into effect on January 1, 2020. Thus, no court has made a particularized finding under the new law as to whether Mr. Graham presents a risk of flight to avoid prosecution, nor whether – if Mr. Graham does present any flight risk – remand is

the least restrictive means of ensuring his return to court. Applying the factors set forth in the Revised Bail Law, it is clear that Mr. Graham does not present a risk of flight; and to the extent the Court has any concerns about Mr. Graham's returning to court, Supervised Release with Electronic Monitoring as proposed by the defense, is more than sufficient to guarantee his appearance. *See* "Operational Directive 6/2020 Electronic Monitoring COVID-19 Procedure, effective April 20, 2020) attached as **Exhibit B.**

4. An in depth review of Mr. Graham's rap sheet shows a less than stellar history. It is permeated with substance abuse related hardship. **Exhibit C.** It is noteworthy that Mr. Graham has no history of violence. But consistent with his substance abuse he has fourteen (14) convictions for simple criminal possession of a controlled substance in the seventh degree. In the last 20 years his record is brimming with petty, theft related offenses that were certainly committed to support his drug habit. And while his record goes back more than half of his life, his only felony conviction within the last 15 years was for Criminal Sale of a Controlled Substance in the Fifth Degree.

5. The warrants that show on his rap sheet are 1. from an unindicted felony that was open at the time of his arrest on the instant matter but has since been dismissed; and 2. four warrants from the 2013 drug conviction which coincide with Mr. Graham's court mandated treatment and his subsequent relapses. We candidly concede that over the last 30 years he has warranted on about twenty percent of his cases. These instances demonstrate a man in the throws of ravaging substance abuse.

6. Further review of Mr. Graham's rap sheet evinces an unstable living situation that is mired with homelessness and recurring listings of 1322 Bedford Avenue (better known as the Bedford Men's Shelter) as a home address. It should be noted however, that Mr.

Graham has always resided in Brooklyn, NY. He has no out of state contacts. And like most sufferers of drug addiction and homelessness, he has no passport to leave the country. Mr. Graham has made a home of sorts on the streets within his community where he is known to perform odd jobs and panhandle as needed to support his addiction. Mr. Graham does not have the means to pose a risk of flight.

7. Since being incarcerated, Mr. Graham has been actively participating in Fedcap's SMART (Specialized Model Adult Re-entry Training) program where he has completed several daily workshops focusing on maintaining sobriety, repairing fractured family relationships, and becoming a productive member of society. Letter and certificates attached as **Exhibit D**. Accordingly, Mr. Graham has reunited with his brother – Tyrone Graham, as well as his niece – Ms. Tanasha Graham - who has offered to let Mr. Graham reside with her in her apartment in Brooklyn should he be released.

8. Under ordinary circumstances, part of Mr. Graham's release plan might include residential treatment, it is unlikely Mr. Graham would be able to get a bed at a residential treatment facility, in light of the COVID-19 pandemic. Proactively, Mr. Graham has already begun talks with our Legal Aid Mitigation Specialist – Latoya Woods, to connect with OASAS certified providers who can do remote counseling through telehealth. Furthermore, if Mr. Graham were to be Released Under Supervision, Brooklyn Justice Initiatives also has social work staff that would not only monitor Mr. Graham to ensure his return to court but also provide him with support towards relapse prevention.

9. The current COVID-19 pandemic poses an historically unprecedented risk for transmission to all New Yorkers. This risk is even greater in locations where large groups of individuals are held in close proximity to each other such as hospitals and jails.

10. In a letter dated March 19, 2020, the NYC Health and Hospitals Corporation - Division of Correctional Health Services, sent a letter stating that Mr. Graham is in the "highest risk group due to his age (51yo) and health status." **Exhibit E.** In so doing, Correctional Health Services is advocating for the release of Mr. Graham as he his particularly vulnerable to the transmission of the coronavirus strain COVID-19.

11. While the HHC letter does not detail Mr. Graham's specific medical conditions, the defense has obtained medical records from the NYC Department of Corrections that confirm his many ailments, most notably his being an amputee, suffering from asthma, and crack/cocaine addiction (via inhalation). Medical Records are attached as **Exhibit F**. All of his medical ailments added on to the fact that he is an amputee increases his risk also because disabled people experience violent victimization at higher rates than non-disabled people. *See* "Police, Courts, jails, all fail disabled people" https://www.prisonpolicy.org/blog/2017/08/23/disability/.

12. Notwithstanding whatever steps New York City's Department of Correction ("DOC") have taken to attempt to address this crisis, COVID-19 is tearing through the City's jails and the situation continues to deteriorate. According to data released by the New York City Board of Correction ("BOC"), as of June 4, 2020 – 343 currently incarcerated people have a confirmed positive test. Cumulatively, 1,603 DOC and Correctional Health Service staff have contracted the virus.[1] Three (3) incarcerated persons have died while in DOC custody. And as of, April 21, 2020, the Correction Officers Benevolent Association reported the death of its

1 This data comes from the New York City Board of Correction and is available at https://www1.nyc.gov/site/boc/covid-19.page (last visited June 5, 2020).

eighth officer and one captain.[2] These numbers are growing so rapidly that they will be outdated by the time you read this paragraph.

13. Though the instant criminal case is one that resulted in death, we contend that the case is a direct result of the fact that Mr. Graham is an extremely vulnerable person as an amputee. It should be noted that Mr. Graham lost his leg as the victim of a violent attack 13 years ago. Being a disabled person while homeless on the streets of Brooklyn has rendered him a target time and time again. There is substantial video evidence in this case. The decedent is shown being aggressive to Mr. Graham. Indeed it is not a stretch that Mr. Graham feared for his safety. This incident occurred in the early morning hours in a high crime area (as the 77th Precinct had officers stationed on foot about one block away from the incident) where Mr. Graham is known to frequent as he has panhandled, purchased and used crack cocaine in the vicinity for years. The decedent, while having no prior relationship to Mr. Graham, suffered from psychiatric issues and was also a documented drug abuser. It is fair to say that the intersection of these two individuals was a recipe for disaster. And while the video evidence in this case has no sound, it is clear that Mr. Graham was assaulted by the decedent first and left unable to flee as he was separated from his wheel chair. In the subsequent altercation, just minutes later, the decedent can be observed throwing his possessions down and taking a fighting stance against Mr. Graham who is in his wheelchair and attempting to wheel away backwards presumably so as to not turn his back on the decedent and leave himself open to another attack. While it is not our intent to try this case in this bail application, there are several factual elements to this case that work in Mr. Graham's favor – that the decedent was the initial aggressor and that

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2 https://www.pix11.com/news/coronavirus/faces-of-the-pandemic/8th-nyc-correction-officer-dead-from-covid-19

Mr. Graham only acted in response to the decedent's actions because he feared for his safety, therefore lessens any incentive he may have, however unlikely, to willfully flee prosecution.

14. As such, the defense respectfully requests that Mr. Graham be released to Supervised Release with electronic monitoring. The combination of these conditions will sufficiently ensure Mr. Graham's return to court, and not leave him languishing in a City jail on remand status, amidst the delay and danger of the COVID-19 pandemic, as Mr. Graham waits for what is likely to be several years for trial to begin.

WHEREFORE, your affirmant respectfully request that the application within be granted.

Dated: Brooklyn, New York
June 11, 2020

MARVA C. BROWN, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART MISMO

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THE PEOPLE OF THE STATE OF NEW YORK,	:	**MEMORANDUM OF LAW**
-against-	:	INDICTMENT # 5796-2019
	:	
ANTONIO GRAHAM,	:	
Defendant.	:	

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Standard for Bail Under the Revised Bail Law

As the Court is aware, on January 1, 2020, New York State law changed with respect to bail pending trial. As Judge Greenberg recently noted in *People v. Portoreal,* 2019 NY Slip Op 29385 (December 9, 2019), “The self-evident overarching purpose of the Revised Bail Law is to greatly reduce the number of defendants held in jail pending trial, while still assuring that defendants who are released pending trial will appear when required in court.”

Among the critical changes in the Revised Bail Law is the requirement that in every case, including cases like this in which the defendant is charged with a homicide, the defendant (“principal”) must be released pending trial on his own recognizance, “unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution.” C.P.L. § 510.10(1). Even if the court finds risk of flight, the court must still “select the least restrictive alternative and condition or conditions that will reasonably assure the principal’s return to court.” C.P.L. § 510.10(1).

This standard is so important that it is repeated twice in the bail statute – once at C.P.L. § 510.10(1) and again at C.P.L. § 510.30(1), which states:

> With respect to any principal, the court in all cases, unless otherwise provided by law, ***must*** impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to the court when required. (emphasis added)

In making its decision, the court is required to "explain its choice of release, release with conditions, bail or remand on the record or in writing." C.P.L. § 510.10(1).

Thus, although Mr. Graham in this case is charged with a "qualifying offense" on which the court "in its discretion" may release the defendant on his own recognizance or under non-monetary conditions, fix bail, or remand the defendant (C.P.L. § 510.10(4)), the court's discretion is governed by the standard set forth in C.P.L. §§ 510.10(1) and 510.30(1) – a finding that the conditions being imposed are the "least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court."

Finally, in determining whether there is a risk of flight and what are the least restrictive conditions, the court must "consider and take into account information about the principal that is relevant to the principal's return to court" including the items set forth in C.P.L. § 510.30(1)(a)-(f), and including the presumption of release on recognizance for *all* principals. The court must weigh each C.P.L. § 510.30(1) factor appropriately in consideration of the sole purpose of setting bail, which is to reasonably secure the accused's return to court. C.P.L. § 510.30(1); *Matter of Sardino v. State Comm'n on Judicial Conduct*, 58 N.Y.2d 286, 289 (1983).

Remand Is Not the Least Restrictive Condition to Assure Antonio Graham's Return to Court

Consideration of the statutory factors set forth in the Revised Bail Law, under section 510.30(1), as they apply specifically to Antonio Graham, compels the conclusion that, even if the sheer fact of a murder charge automatically raises some concern about a defendant's

appearing at future court dates, a securing order far less restrictive than remand would be adequate to assure Mr. Graham's return to court.

Section 510.30(1) lists the following factors that a court "must consider" when issuing any securing order, to the extent each is "relevant to the principal's return to court":

> (i) The principal's activities and history;
>
> (ii) The charges facing the principal;
>
> (iii) The principal's criminal conviction record if any;
>
> (iv) The principal's record of previous adjudication as a youthful offender or juvenile delinquent (if public records or fingerprints are retained pursuant to relevant provisions of the Family Court Act);
>
> (v) The principal's previous record with respect to flight to avoid criminal prosecution;
>
> (vi) If monetary bail is authorized, . . . , the principal's individual financial circumstances, and in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond[.]

We address each factor in turn.

(i) <u>Mr. Graham's Activities and History</u>

Antonio Graham is 51 years old. Born and raised in Brooklyn, NY, Mr. Graham never knew his father. While his mother was in his life, Mr. Graham and his siblings were mostly raised by his maternal aunt. Mr. Graham was in special education classes starting in junior high school due to behavioral issues. He began using crack cocaine as a young teenager. His mother died of cirrhosis

when he was in his early 20s and his drug use increased. Over the years, Mr. Graham's older brother offered him help but Mr. Graham, always independent, was adamant that he could achieve sobriety on his own.

In spite of his history of drug use, Mr. Graham still has good relationships with his brother and sister. He is also close to his niece Tanasha Graham and his aunt who raised him. Also, Mr. Graham has maintained a relationship with his longtime girlfriend for almost 15 years. And while he has no work history to speak of, Mr. Graham is excited to take advantage of the employment resources available to him through the Fedcap program. He hopes to be able to take some of the financial load off of his niece (a single mother of four) should he be released. Mr. Graham had his left leg amputated above the knee several years ago but has learned to get around quite well in his wheel chair. He is confident that his resilience, combined with assistance from the defense team mitigation specialist, will enable him to achieve his goals.

(ii) The Charges

Although Mr. Graham faces extremely serious charges, he has pleaded not guilty to this crime and is of course presumed innocent. The People are likely to argue that Mr. Graham is a risk of flight to evade prosecution because of the sheer fact of the murder charge, and because the prosecution's evidence against him is, purportedly, strong and Mr. Graham is therefore likely to face an upstate prison sentence. The legislature, however, when amending C.P.L. § 510.30, removed language from C.P.L. § 510.30, which previously directed courts to consider the weight of the evidence against the principal, the probability of conviction, and the sentence which may be imposed upon conviction. In so doing, the legislature clearly intended to discourage courts from reflexively and routinely setting bail simply because the principal faces *potential* jail time,

before the prosecution has actually proven beyond a reasonable doubt that the accused actually committed a criminal offense.

The mere fact that a defendant is facing a serious charge – even a charge of homicide – does not constitute a particularized, individualized finding that remand (or monetary bail in a high amount that the defendant and his family could not possibly afford) is the only way to ensure his return to court.

(iii) Graham Record of Criminal Convictions

While, Mr. Graham's criminal record dates back to 1986, it is predominately misdemeanor record that largely consists of criminal possession of controlled substance charges and is littered with petty theft related offenses, likely to support Mr. Graham's drug habit. Mr. Graham's last felony conviction stemmed from a 2010 arrest where he was ultimately unsuccessful at maintaining his sobriety throughout various drug treatment programs over a 3 year period prior to being sentenced to upstate prison time.

(iv) Mr. Graham's History of Youthful Offender and Juvenile Delinquent Adjudications

Mr. Graham received a youthful offender adjudication in 1987 for Grand Larceny.

(v) Mr. Graham's Previous Record of Flight to Avoid Criminal Prosecution

While Mr. Graham has had warrants on some of his criminal contacts, he has not fled to avoid criminal prosecution. Mr. Graham has resided in Brooklyn his entire life. Save for one Queens case, all of his arrests have been in Brooklyn. Mr. Graham has no passport and no means to flee.

(vi) Mr. Graham and His Family's Financial Circumstances

In setting reasonable securing conditions, the Court should account for Mr. Graham's

individual financial circumstances, and ability to post bail without posing undue hardship, as well as his ability to obtain a secured, unsecured, or partially secured bond through the help of his family.

By explicitly mandating courts to consider an individual's financial circumstances, as well as his or her ability to post bail without posing an undue hardship, the Legislature clearly intended to prevent individuals, like Mr. Graham, from being held in pretrial detention based on an inability to pay monetary bail. *See e.g.*, Governor Andrew M. Cuomo interview on WNYC with Brian Lehrer, recorded March 26, 2019, ("...you say to people we're going to set bail on how much money you have in your pocket [*sic*] and we're going to determine your liberty based on your wealth. That is not justice and we have to move away from a cash bail system to a merit based determination on flight risk of the individual.").

The available legislative history reveals that the newly enacted statutory amendments are in direct response to the Legislature's concern with the "great injustice that's been occurring with the fact that people who are in poverty or people who are poor are asked to pay to be let out of jail. . . . [and the fact that] our system of criminal justice is not supposed to be based on wealth, and yet it is." Senator Michael Gianaris, Regular Session, New York State Senate, Mar. 31, 2019, at 2624; *see also* New York State Assembly, Mar. 31, 2019 at 467-68 (Assemblywoman Catalina Cruz, explaining her vote in support of the amendments to C.P.L. § 500, noting that "there are people right now sitting in jail because they cannot afford bail[,]" and reasoning that this injustice of impoverished people held in jail because of an inability to pay bail "stops today" with the vote to pass bail reform). At least one court has already recognized that the purpose of the newly enacted law is to prohibit "[w]ealth" from "determin[ing] whether a person, accused but not convicted of a crime, will be jailed while awaiting trial." *People v.*

Steininger, 2019 NY Slip Op 29397 (S.Ct. NY Ctny. Dec. 24, 2019) (Conviser, J.) (quoting Assembly Speaker Carl E. Heastie, *SFY 19-20 Budget Includes Critical Criminal Justice Reform Legislation and Funding*, Apr. 1, 2019).

Mr. Graham, as noted, is 51 years old, and has been in custody for nearly 9 months. He has not worked consistently over the years, only doing odd jobs here and there and has no savings. His brother works full-time doing maintenance at Grand Central Station and supports four dependents with his income. His niece is a single mother who receives no child support for any of her four children and survives off of public assistance and social security benefits. And while his niece has offered her home to him, neither she or Mr. Graham's brother is able to offer any financial support towards bail.

Extreme Delay in Mr. Graham's Case and the Current COVID Pandemic Further Weigh in Favor of Release

In addition to the above, we respectfully ask that the Court take into account the extremely lengthy amount of time Mr. Graham will be sitting in jail, awaiting trial while this case proceeds, should remand continue, as well as both the added delay and danger posed by the current COVID-19 crisis.

Mr. Graham has been in custody, on remand status, for nearly nine months, while presumed innocent and awaiting trial. As this Court is well aware, murder cases in Brooklyn– and indeed in every borough – typically take a very long time to get to trial, more than two years on many occasions. Here, there is a great likelihood that considerably more time will pass before Mr. Graham's case goes to trial. The COVID-19 shutdown guarantees even more delay. Indeed, all progress in this case (as in almost all other cases) has now been halted indefinitely because of the extraordinary circumstances caused by the pandemic. There is literally no end in sight to this case

for Mr. Graham. As of this writing, it is impossible to predict when Mr. Graham can expect to see his case go before a trial jury.

Mr. Graham's remand is rendered even more concerning, and the necessity of imposing reasonable bail conditions has become even more urgent and compelling, because of the COVID-19 pandemic and the havoc it is wreaking within the City's jails. The current COVID-19 crisis poses an historically unprecedented risk for transmission to all New Yorkers. This risk is even greater in locations where large groups of individuals are in close proximity to each other such as hospitals and jails. In City jails, despite the best efforts of the Department of Corrections, it is simply impossible for inmates to practice social distancing and very difficult to practice adequate hygiene. This situation is of particular concern for Mr. Graham who has been designated "high risk" by Correctional Health Services.

On March 17th, the Board of Corrections, which sets policy for city jails, urged a rapid decrease in the population on Rikers Island and other facilities, with release for people at high risk of COVID-19 infection. "The City must drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances," the board said in a statement. https://thecity.nyc/2020/03/defenders-plead-for-rikers-parole-hearings-to-go-to-video.html. On March 21, 2020 the Board of Corrections in a letter to the five District Attorneys of New York City and Chief Justice Janet DiFiore reiterated the urgency of this situation, urging them to immediately remove from jail all people at high risk of dying of COVID-19 and rapidly decreasing the jail population. On March 22, 2020 the Daily News reported that in the last week more than 38 New York City inmates and Corrections workers had tested positive for COVID-19 and that at least another 58 were being monitored in the prison's contagious disease and quarantine units. Board of Correction interim chairwoman Jacqueline Sherman warned that cases

could skyrocket. "The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them." http://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-positive-tests-20200322-prc22op35zfmvilzvmbcthuzhy-story.html.

The Board of Corrections maintains a Daily COVID-19 Update log. As of Thursday, June 5, 2020, there are 343 currently incarcerated patients with confirmed COVID-19 out of a total population in custody of 3,940. https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Board%20of%20Correction%20Daily%20Public%20Report_5_19_2020.pdf Additionally, there are 1,603DOC and HHC staff with confirmed COVID-19. https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Board%20of%20Correction%20Daily%20Public%20Report_5_19_2020.pdf "As the coronavirus rips through prisons and jails across the United States, much of the attention has been focused on Rikers Island, the New York City jail which, with an infection rate that reached 7.8 percent as of April 13, is now responsible for the single largest concentration of coronavirus cases in the world." https://newrepublic.com/article/157292/pleading-clemency-pandemic.

The current rate of infection over the weeks, as of May 19, 2020, among inmates in City jails has risen to approximately 9.2%. That infection rate, taken from the inmate population at Rikers Island, is likely drastically under-reported due to under-testing of inmates. Even at 9.2%, the rate of infection in City jails is approximately 5 times higher than the rate among non-incarcerated residents of New York City – which itself is considered the national epicenter of the pandemic, and 30 times higher than the rate of infection nation-wide. Although the Department of Corrections has taken measures to contain the spread of COVID-19, they have been inadequate and too little too late.

Conditions in New York City jails are dangerous for inmates. Inmates report an inability to practice social distancing due to conditions of their confinement, failure of DOC staff to isolate potentially infected inmates, fear of infection from staff, a lack of basic sanitation and hygienic materials, and other issues. Moreover, as correctional medical expert Dr. Giftos has stated, following all of the CDC recommendations for prevention still cannot protect medically vulnerable people from the risk of death from this virus. "While these are the recommended steps," he writes, "even if all of them are take and executed with perfection, they still cannot effectively control the risk of transmission." See Affirmation of Dr. Jonathan Giftos, M.D. (Apr. 14, 2020), at para. 7 (available from defense on request). *See also United States v. Kennedy*, No. 18-20315, 2020 WL 1493481, at *1 (E.D. Mich. Mar. 27, 2020), *reconsideration denied,* No. 18-20315, 2020 WL 1547878 (E.D. Mich. Apr. 1, 2020) ("Even if all CDC's interim recommendations are followed...Court is concerned that such measures will prove insufficient to stem deadly outbreaks" in jails).

The unacceptably high risk of contracting the COVID-19 virus is particularly worrisome to people who, like Mr. Graham, have a history of prior respiratory illness and thus are medically vulnerable. The sheer fact of a prior serious respiratory illness raises grave concerns about Mr. Graham's exposure to the COVID-19 virus and his particular vulnerability to damage wrought by this disease.

Thus, as a result of being remanded while awaiting trial, Mr. Graham not only faces an indefinite period of confinement, he does so in the midst of a pandemic that is raging in the City jails, and that poses an unacceptable risk of long-term illness or even death to medically vulnerable inmates like him who suffered from previous respiratory illness. These circumstances weigh heavily in favor of imposing reasonable bail conditions that afford Mr. Graham the opportunity to be released yet still

provide the Court with assurances that he will return.

CONCLUSION

For all the reasons above, counsel is requesting that this Court change bail from remand status and impose the following conditions for Mr. Graham:

a. Supervised Release;

b. Electronic Monitoring as provided by the Kings County Sheriff's Office (*see* "Operational Directive 2020-05 Electronic Monitoring COVID 041720, effective April 20, 2020) (attached as Exhibit A); and/or

c. Reasonable Monetary Bail.

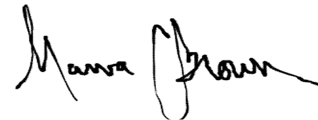
These conditions of release would provide the Court and the People with all assurances needed to guarantee Mr. Graham's return to court, and would properly account for the particularized factors, specific to Mr. Graham, that the Revised Bail Law directs courts to take into account in setting reasonable bail, and using the least restrictive means necessary to ensure return to court. Should Your Honor impose these conditions, Antonio Graham will return to court for each and every appearance as required.

Dated: Brooklyn, New York

June 11, 2020

Yours, etc.,

JANET SABEL
NEVILLE O. MITCHELL, Of Counsel
Attorney for the Defendant
The Legal Aid Society
111 Livingston Street, 9th Fl
Brooklyn, New York 11201
646-592-1449



BY: MARVA C. BROWN

TO: ERIC GONZALEZ
DISTRICT ATTORNEY
COUNTY OF KINGS
ATTN: ADA Nick Ford

CLERK, MISC. MOTION
SUPREME COURT : CRIMINAL TERM
COUNTY OF KINGS