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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| TYRESE BURROUGHS,<br><br>Defendant—Below,<br>Appellant<br><br>v.<br><br>STATE OF DELAWARE<br><br>Plaintiff—Below,<br>Appellee. | ) | No. 144, 2022 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Rules**



**Other Authority**

## NATURE AND STAGE OF PROCEEDINGS

On November 25, 2020, Tyrese Burroughs was arrested for the offences of Possession of Firearm During Commission of a Felony (PFDCF), Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Carrying a Concealed Deadly Weapon, two counts of Drug Dealing, and Possession of Marijuana. A67. Burroughs was initially held on a $110,501 cash bail. A Court of Common Pleas (CCP) judge reduced his bail to $34,000. A27-32. Despite his inability to afford the $34,000, a different CCP judge returned his bail to $110,501 when Burroughs exercised his right to a preliminary hearing the next week. A60.

Burroughs challenged the constitutionality of his bail, relying on both the State and Federal Constitutions. A62-102, 165-94, 287-306, 317-320. The State denied Burroughs' claims. A103-65, 244-86, 307-16. A Superior Court commissioner held oral argument (A375-402) and an evidentiary hearing (A403-538) before denying his motion.[1] Burroughs filed a Motion to Review the Commissioner's Order (A332-71), which was denied on April 13, 2022.[2] On April 14, 2022, Burroughs pled to PFDCF and Drug Dealing and was sentenced to three years in prison.[3] This is Burroughs' Opening Brief to his timely notice of appeal.

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[1] Commissioner's Order, Exhibit A.

[2] *See* Reviewing Judge's Order, Exhibit B at n.1 (referring to "Commissioner's" Order for purpose of clarity, notwithstanding former Commissioner Mayer's appointment as Judge of the Court of Common Pleas).

[3] Sentencing Order, Exhibit C.

## SUMMARY OF ARGUMENT

1. When a state—action deprives an individual of a fundamental interest, due process requires the State to show clear and convincing evidence that the state—action is necessary and the least restrictive means of achieving a compelling State interest. Burroughs established that his pretrial liberty was a fundamental right, that detention *via* unaffordable bail is legally indistinguishable from a direct detention order, and that, therefore, that unaffordable money bail is unconstitutional unless the State satisfies heightened scrutiny.

The Reviewing Judge was correct to apply heightened scrutiny, but erred in finding, without support, that high cash bail was the only means of addressing the significant risk to public safety it claimed Burroughs presented. There is no evidence, let alone clear and convincing evidence, that suggests money bail would be more effective than non-monetary conditions. The record shows the opposite: Burroughs retained an expert who established that money bail is no more effective at addressing risks to public safety or court attendance than non-monetary conditions. Despite it being the State's burden to do so, it State failed to put on any evidence regarding the efficacy of money bail.

The Reviewing Judge's assessment of Burroughs' risk is similarly unsupported by the record. The Reviewing Judge relied on nothing more than the pending charges and ignored the risk assessment and the expert testimony. There is

simply no individualized basis for the Court's apparent fear of Burroughs; its reasoning – unaffordable high cash bail is necessary for Defendants who "demonstrate[] a disregard of Delaware law" – if applied broadly, would allow pretrial detention in every case.

2. The United States Supreme Court has consistently held that freedom from restraint is a fundamental right, and that procedural due process requires clear and convincing evidence to justify the deprivation of such rights. Burroughs was deprived of his pretrial liberty by unaffordable bail. The Commissioner erred in ruling that clear and convincing evidence was not required, and the Reviewing Judge erroneously affirmed this legal ruling.

3. A long line of United States Supreme Court Precedent has applied the Federal Constitution's Equal Protection Clause in holding that the absolute deprivation of liberty resulting from an inability to pay is subject to heightened scrutiny. Although the United States Supreme Court cases are focused on post-conviction confinement, the same principle applies with even more force to pretrial detainees like Burroughs, who are presumed innocent. The Reviewing Judge erred in leaving this precedent unaddressed and applying rational basis scrutiny to Burroughs' equal protection claim.

4. Burroughs' bail was deliberately set at an unaffordable amount because of the State and Commissioner's view that Burroughs presented risks to public safety, and

of flight, so severe that he "must" be incarcerated. This view is not supported by the record, but even if it were, deliberately unaffordable bail violates the Delaware Constitution's Sufficient Sureties clause ("the Clause") even in such circumstances.

The Clause provides a broad right to bail. Its only exception is capital crimes. The historical understanding of bail as a mechanism for release, and the well-established recognition that deliberately unaffordable bail orders are *de facto* detention orders compel this Court to find that the Clause prohibits deliberately unaffordable bail.

The Reviewing Judge denied Burroughs' Sufficient Sureties claim based on its finding that the Commissioner complied with statutory law; however, this reasoning is unresponsive, and insufficient on its face. Compliance with statutory law does not preclude a constitutional violation, and Burroughs has not argued the governing statutes are facially unconstitutional.

## STATEMENT OF FACTS

### A. The Basis of Burroughs' Arrest

Wilmington Police Department Officer Akquil Williams ("Williams") claimed that on November 25, 2020 he saw an unknown black male and white female engage in a hand-to-hand transaction, which he believed involved drugs. A48. As he approached them in his marked vehicle and they immediately separated. A50. Williams decided to pursue the black subject, whom he later learned was Tyrese Burroughs (Burroughs). A50. Williams got out of his car, Burroughs fled, but the officer caught up to him. After some struggle, he took Burroughs into custody. A41.

Police found 1.5 grams of heroin, 3.3 grams of marijuana, and a handgun on Burroughs' person. A44. After he was taken into custody, Burroughs was compliant. In fact, even before he was "mirandized" he admitted the heroin was not for personal use. A44. And, during a formal post-*Miranda* interview, he admitted to possessing the gun and drugs, and to selling drugs "a little bit." A46. There are no recordings of Burroughs' supposed statements, and no witnesses other than Williams. A54-55.

### B. Despite His Presumption of Innocence and Low Risk, Tyrese Burroughs' Pretrial Liberty was Conditioned on Unaffordable Bail

At the time of his arrest, Burroughs was a 21—year—old graduate of Hodgson Vocational Technical High School. A25. He had a stable home with his parents in Bear, Delaware and a steady job as a detailer at an automobile garage in Wilmington. A25, 28. Burroughs' only prior conviction was for Drug Dealing, for which he was

sentenced to probation and discharged early because of his compliance. A25, 27. Burroughs has never missed a court date. In part for these reasons, Delaware's Pretrial Risk Assessment Tool identified Burroughs as a low risk of both failing to appear and new criminal activity. A362-63.

The State never contested that if issued an affordable bail, Burroughs would have returned to his parents' home and previous job. A25. Nonetheless, a J.P. Magistrate conditioned Burroughs' release on payment of the unaffordable bail amount of $110,501 cash, without even ordering pretrial supervision (suggesting the amount was intended to incarcerate). A25, 28. On December 14, 2020, a CCP judge reduced his bail to $34,000 cash, which Burroughs was still unable to post. A29. On December 21, 2020, after exercising his right to a preliminary hearing, a different CCP judge inexplicably reverted his bail back to $110,501 cash. A26-27.

Through subsequent filings, Burroughs explained that his unaffordable bail was unconstitutional because the State failed to establish clear and convincing evidence that it was necessary and the least restrictive means of achieving a legitimate and compelling State interest. Through an expert witness, Professor Jennifer Copp (Prof. Copp), Burroughs established that money bail is no more effective than non-financial conditions at addressing risks to public safety or court attendance. Because those non-financial conditions are less restrictive than unaffordable bail, the latter cannot satisfy heightened scrutiny.

The Reviewing Judge applied strict scrutiny, but erroneously found that the State met its burden, despite its failure to present any evidence on key issues.

## I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND, CONTRARY TO THE FACTS IN THE RECORD, THAT THE STATE PRESENTED CLEAR AND CONVINCING EVIDENCE THAT THE THREAT OF FORFEITING HIGH CASH BAIL WAS THE ONLY MEANS OF ADDRESSING THE STATE'S SAFETY CONCERNS.

### *Question Presented*

Whether the trial court abuses its discretion when it finds clear and convincing evidence that the threat of forfeiting high cash bail is the only means of addressing a risk to public safety, when the record does not support such a conclusion? A335.

### *Scope of Review*

This Court reviews factual findings to determine whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[4]

### *Merits of Argument*

In addressing Burroughs' due process claims,[5] the Reviewing Judge applied heightened scrutiny,[6] and required the State to present clear and convincing evidence

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[4] *Holden v. State*, 23 A.3d 843, 846 (Del. 2011).

[5] *See* U.S. Const. amend. V.

[6] Burroughs persuasively established that pretrial liberty is a fundamental right, which, when deprived by unaffordable bail, is subject to heightened scrutiny review for clear and convincing evidence that money bail is necessary and the least restrictive means of addressing a compelling interest. A77-82, 176-92. Despite the Reviewing Judge's decision to bypass the legal analysis, the Order's treatment of pretrial liberty as a fundamental right (Exhibit B at 15) has the impact of a finding because the "assumption" does not rest on any particularized facts that would distinguish this case from other instances of unaffordable bail. Outside of the

that "the threat of forfeiting a high cash bail was the only tool available to . . . achieve the State's compelling interest in preventing" Burroughs from acting on "an identified and articulable threat to an individual or the community." Exhibit B at 17—18. The overwhelming evidence in this case establishes Burroughs as a low risk of reoffending, and more significantly, the record unequivocally establishes that the threat of forfeiting money bail is not more effective than non-financial conditions. Thus, the Reviewing Judge abused its discretion by ignoring this evidence and finding the State met its heightened burden. Rather than applying strict scrutiny as required, the Reviewing Judge simply "purport[ed] to apply strict scrutiny . . . [with a] brand of narrow tailoring [] quite unlike anything found in [the Supreme Court of the United States'] precedents."[7]

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Reviewing Judge's "assumption," the Court separately recognized that the United States Supreme Court's *Salerno* decision is applicable to unaffordable bail (Exhibit B. at n. 58). This recognition on its own – which was not an "assumption" for this case – shows that the heightened scrutiny applied in *Salerno* is required for unaffordable bail as well. *See* 481 U.S. 739 (1987).

Any other treatment of the Reviewing Judge's avoidance of the legal analysis would problematically leave out a "standard to guide the process of defining the right." *Hutchins v. D.C.*, 188 F.3d 531, 556 (D.C. Cir. 1999) (Rogers, J. concurring). Leaving the right at issue – which Burroughs contends is pretrial liberty – "abstractly [] define[d]" would allow for arbitrary judgments in which "[f]avored conduct will be integrated with similar cases that have protected analogous rights, while disfavored conduct will be relegated to unprotected isolation." *Id.*

[7] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743–44 (2007) (critiquing dissent for failure to consider alternatives, or actual analyze how the action is tailored to the interest).

### A. The State woefully failed to establish that money bail would more effectively address safety risks than non-monetary conditions.

All the evidence on the efficacy of money-bail stands for the proposition that it is no more effective at achieving public safety than non-monetary conditions. While it was the State's Burden on this point, it was Burroughs, and not the State, that presented extensive evidence including an expert report (A209) and supplement (A216) of Prof. Jennifer Copp (Prof. Copp), a statistician and criminologist with specific expertise in pretrial release mechanisms and risk assessment. A195.

Prof. Copp is an associate professor at the College of Criminology and Criminal Justice at Florida State University. She has a PhD in criminology and quantitative studies, which in part, involves "producing generalized findings" so that specific research conclusions can be extended beyond given samples. A410. Prof. Copp also directs the university's Jail Policy Research Institute, which partners with "local, state, and federal agencies to try and engage in research or practitioner partnerships to improve the functioning of different agencies with respect to jails." A411. Her research interests include bail, and pretrial risk assessment. She has published extensively on those topics in law review articles, book chapters, and the top journals in her field. A196-205. Finally, Prof. Copp has been qualified as an expert on these issues in two federal cases and testified before the State of Michigan's task force on jail and pretrial incarceration. A415-16.

For purposes of this case, Prof. Copp surveyed the extant literature and applied her expertise in order to address the question of whether money bail is more effective than other release mechanisms at addressing risks to court appearance or community safety. A209, 216, 418. She established that

> [1] *money bail is no more effective at ensuring court appearance than unsecured bonds or other non-financial release options* . . . [and 2] *money bail is no more effective than unsecured bonds or other non-financial conditions of release at ensuring public safety* . . . A211, 213.

The Professor made clear that these conclusions applied across all risk levels, to Delaware as a whole, and to Tyrese Burroughs in particular. A431-33. To establish that the research she relied on was rigorous and methodologically sound, She highlighted a few exemplary studies, which she reviewed in her report and regarding which she was cross examined. A439-55. Importantly, her opinions are not just her own, and are not radical, but rather reflective of a broad consensus in what has been a heavily researched area for decades. A426. These findings have been reproduced in rural and urban jurisdictions around the country. A426. Accordingly, numerous courts have found these same conclusions and the underlying research to be reliable and persuasive.[8] Prof. Copp's opinions have in

[8] *Schultz v. State*, 330 F. Supp. 3d 1344, 1362–64 (N.D. Ala. 2018) (relying on many of same studies as Prof. Copp to conclude "there is no statistically significant difference between the rates at which criminal defendants released on secured and unsecured bail are charged with new crimes"); *ODonnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052, 1131–32 (S.D. Tex. 2017), *aff'd*, 892 F.3d 147 (5th Cir. 2018)

fact played out in the Delaware experience in which "monetary conditions of bond are among the least useful tools to actually manage the risks."[9]

Despite the trial court specifically allotting time for the State to retain an expert, it failed to do so. A228-30. This failure is arguably dispositive given the State's burden. Without affirmative evidence to contradict Prof. Copp's research and opinions, the State resorted to baseless and unsupported challenges to the underlying studies' applicability to Delaware, and Prof. Copp's understanding of her own expertise. A258-60. The State's and Commissioner's arguments about Prof. Copp's reports and testimony were entirely rebuffed and not relied upon by the Reviewing Judge. A297-98, 338-47.

**B. The Reviewing Judge's conclusion is not supported by the record.**

The Reviewing Judge *initially* recognized that the State had entirely failed to identify clear and convincing evidence and that its claims were conclusory and unexplained. A551. Accordingly, the Reviewing Judge asked the State to supplement its argument, which it attempted to do, but once again failed to identify any evidence suggesting money bail was more effective than argued by Burroughs. A553-54. Nonetheless, the Reviewing Judge inexplicably reversed course in the

("credible evidence in the record from other jurisdictions shows that release on secured financial conditions does not assure better rates of " pretrial success).

[9] Chief Magistrate J. Alan G. Davis, *Bail Considerations in 21st-Century Delaware*, DEL. LAW., SUMMER 2014, at 8, 12.

Order to erroneously conclude the State had established clear and convincing evidence of the necessity of monetary bail. The Reviewing Judge's attempt to support that claim was limited to a footnote:

> *The Defendant already was prohibited by law from possessing a firearm, but nonetheless was arrested with one allegedly in his possession. Non-monetary conditions alone therefore were unlikely to deter him from doing so again. In contrast, the threat of forfeiting a high cash bail was the only tool available to the Commissioner to achieve the State's compelling interest in preventing such conduct*. Exhibit B, n. 69.

The Reviewing Judge's decision requires support for two propositions (*discussed below*): **(1)** Burroughs presents a significant risk to public safety, and **(2)** "the threat of forfeiting a high cash bail" is the only solution to that risk. Here, the former is not supported by clear and convincing evidence, and the latter is not supported by any.

### 1. *There is not clear and convincing evidence that Burroughs presents a significant and identifiable risk to public safety. The Reviewing Judge's claim is greatly overstated.*

With almost no evidence, the State made the hyperbolic claim, which the trial court apparently accepted, that Burroughs is "simply [one] individual[] the State must incarcerate pretrial." A276. Instead of presenting evidence to make its point the State offered the inflammatory analogy of Burroughs (who has never even been accused of a colloquially violent crime or an attempt at one) to the man responsible for the most horrific pattern of victimization in our State's history Earl Bradley. A272-76. This is fear mongering, not reasoned analysis. It also flies in the face of

the State's willingness, as part of a plea agreement, to drop four felony charges and recommend the minimum sentence on the remaining charge. Exhibit C.

While Burroughs' prior Drug Dealing conviction suggests some nominal risk of reoffending, the State's interest is not in *eliminating* all risk.[10] The United States Supreme Court recognized that "[a]dmission to bail always involves . . . a calculated risk which the law takes as the price of our system of justice."[11] The real interest, as recognized by the *Salerno* Court, is the elimination of significant, identifiable threats.[12]

As to the level of risk posed by Burroughs, the record contradicts the Reviewing Judge's findings. Delaware's risk assessment tool classifies Burroughs as a low risk of reoffending. A362-63. Prof Copp described him as low to moderate risk. A437. The Reviewing Judge acknowledged that risk assessment falls squarely within Prof. Copp's areas of expertise, yet the Judge chose to ignore her testimony

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[10] The Reviewing Judge's description of Burroughs' record is technically accurate but extremely misleading. For instance, noting "his most recent [drug dealing] conviction was in 2019," implies there were prior convictions, when in fact there were not. Burroughs' 2019 drug dealing conviction is his only prior conviction other than for Title 21 offences. Similarly, pointing out that Burroughs' "previous [sets of drug dealing] charges included some [] violent felonies" implies the drug dealing charges were accompanied by violent felonies, when in fact, the only "violent" felony charge Burroughs ever faced is drug dealing. *See* Exhibit B at 17, A27.

[11] *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

[12] 481 U.S. at 750.

on this exact issue. Exhibit B at 21. The risk assessment tool may not be dispositive, but the record shows it to be the best predictor. A452-53.

According to the Reviewing Judge's rationale, because Burroughs committed an act "prohibited by law," "non-monetary conditions alone … [are] unlikely to deter him from doing so again." Exhibit B, n. 69. Applying this reasoning, money bail would be required for anyone charged with a crime. An "act prohibited by law" is the definition of crime itself and there is no evidence that people charged with person prohibited offences are more likely to reoffend than those charged with any other crime (nor did the reviewing Judge, or State, make this claim). This rationale falls significantly short of the requisite clear and convincing evidence.[13] Further, applying this rationale broadly would result in a system that unquestionably violates heightened scrutiny's "over-inclusivity" prohibition by detaining far more people than necessitated by the State's interest in public safety.[14]

[13] *See Mayor and Council of City of Dover v. Kelley*, 327 A.2d 748 (1974) (noting absence of evidence and refusing to take judicial notice that disputed weighted voting provision was necessary to achieve compelling interest of growth of cities).
[14] *See Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating durational residency requirement in voting for over-inclusivity of excluding "too many people who should not, and need not, be excluded").

### 2. *Nothing in the record supports the Reviewing Judge's decision that the threat of forfeiting a high cash bail is the only solution to any risk to public safety Burroughs may present.*

The Reviewing Judge's reasoning for affirming the Commissioner's Order and upholding the unaffordable bail is that "the threat of forfeiting high cash bail" would mitigate public safety risk more effectively than non-monetary conditions, which the Judge claimed would be ineffective. This proposition is in direct conflict with the Commissioner's finding that "monetary bail is virtually meaningless" unless it is unaffordable. Exhibit A at 43. Instead, it recognizes that Burroughs' risk to public safety is manageable (and contrasts the State's claim that it was not). Thus, the question becomes: whether there is clear and convincing evidence that "the threat of forfeiting high cash bail" would mitigate that risk more effectively than non-monetary conditions. If not, then the Court is required to impose the less restrictive (non-monetary) conditions.

While applying its heightened scrutiny review, the Reviewing Judge's analysis suggest it improperly presumed the constitutionality of Burroughs' bail. There is no evidence whatsoever, let alone clear and convincing evidence, which supports the claim that the threat of forfeiting cash bail was the only means of addressing the risk. The Judge did not cite to any such evidence, and not even the State – until prompted by the Reviewing Judge to do so – seriously contended (still, without evidence) that the threat of forfeiting cash bail was more effective. A551.

Not only did the State fail to identify any affirmative evidence to satisfy its burden to prove narrow tailoring, but the Reviewing Judge failed to recognize the substantial amount of evidence that ran directly counter to the State's unsupported position. This is especially ill-fitting for heightened scrutiny. Beyond Prof. Copp's testimony, Burroughs' minimal record, and early successful completion of probation, provide individualized support for the view that pretrial monitoring would be effective. A368. The Commissioner failed to consider pretrial monitoring, and Burroughs specifically raised this point in his Motion to Review. A333. Nonetheless, the Reviewing Judge not only failed to make the requisite substantive finding – that pretrial monitoring would be insufficient – it does not appear to have considered it.[15]

The Reviewing Judge's refusal to rely on the Professor's opinion is neither justified "by the record, [nor] the product of a logical and orderly reasoning process."[16] A fact finder "cannot totally ignore facts that are uncontroverted and against which no inference lies,"[17] but that is unquestionably what occurred here. Prof. Copp's credentials are extensive (A195-208), her expertise unchallenged (A407, Ex at 20), and her conclusions – "[s]ecured money bail is no more effective

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[15] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013) ("[C]onsideration of . . . alternatives is of course necessary, but it is not sufficient to satisfy strict scrutiny") (addressing race based admissions).
[16] *State v. Smith*, 2006 WL 1644059, at *3–4 (Del. Com. Pl. June 14, 2006) (finding J.P. magistrate abused discretion and committed plain error by relying on personal knowledge and opinions) (citing *Fawcett v. State,* 697 A.2d 385, 388 (Del.1997)).
[17] *Haas v. Pendleton*, 272 A.2d 109, 109–10 (Del. Super. Ct. 1970).

than other release mechanisms, including unsecured bond and release on non-financial conditions, at ensuring public safety" (A213)– are obviously applicable to the question of whether or not "the threat of forfeiting a high cash bail was the only tool available" to address the safety concern.

Despite the direct relevance of the Professor's conclusions, the Reviewing Judge did not consider them in its analysis of Burroughs' claims and tellingly confined reference to them to a postscript section of the order. That the Reviewing Judge ignored these conclusions, rather than determined them refuted, is clear from the Reviewing Judge's comment that Prof. Copp's conclusions were persuasive enough to "suggest[] Delaware may need to reevaluate provisions in its bail statute." Ex. at 20.

### 3. *The Reviewing Judge's ruling is inconsistent with Delaware statutory law.*

Significantly, the Reviewing Judge chose not to address[18] Burroughs' argument that, even if there were evidence that the threat of forfeiture of money bail can theoretically achieve these results, in practice, it cannot do so in our State. Statutorily, money bail can only be forfeited for a missed court appearance. The controlling statute, 11 *Del. C.* § 2113(b), is unambiguous:

[18] *See Holden v. State*, 23 A.3d 843, 846–47 (Del. 2011) (noting failure to supply legal rational can be an abuse of discretion); *see* A87, 165-66, 355.

> *Notwithstanding any law to the contrary, no property, cash, surety or other assets shall be forfeited except upon failure of the accused to appear as required by any court*.[19]

However, if this Court were to find some ambiguity and look to legislative history it would find further proof that that the legislature intended that bail is not forfeited upon the commission of a new crime. Discussions by the legislature make clear, there was a brief period of a year where the law allowed such forfeitures, but it was amended at the behest of the bail lobby who felt "it was not bail bondsmen's jobs to prevent crime" and they should not lose money as a result of such crimes. A665.[20]

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[19] *See In re Humphrey*, 19 Cal. App. 5th 1006, 1029 (2018) ("Money bail . . . has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes.").

[20] Audio from June 30, 2003, 142nd Senate's Discussion of House Bill 235 (1:30-2:50) ("This bill is [] a response to a bill last year where if you committed another offense they could forfeit the bond. And this bill says no . . . if you do appear, no forfeiture . . ."); Audio from June 17, 2003, 142nd House Discussion of House Bill 235 (0:40-1:11) (Representative Williams) ("The only reason we can forfeit the bail is if they don't show up to court."). A665.

## II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT THE PRINCIPLES OF PROCEDURAL DUE PROCESS ALLOWED UNAFFORDABLE BAIL AND THE DEPRIVATION OF BURROUGHS' FUNDAMENTAL RIGHT TO LIBERTY WITHOUT ANY EVIDENTIARY STANDARD AT ALL.

### *Question Presented*

Whether a trial court commits legal error by ruling that procedural due process allows unaffordable bail and the resulting deprivation of the fundamental right to pretrial liberty without any evidentiary standard at all? A328.

### *Scope of Review*

This Court reviews questions of law and constitutional questions *de novo.*[21]

### *Merits of Argument*

The principles of Procedural Due Process required the lower court to place a clear and convincing evidence burden on the State to justify the deprivation of Burroughs' fundamental right to pretrial liberty.[22] Yet, while the Reviewing Judge recognized it was addressing a fundamental right, it erroneously adopted the Commissioner's conclusion that no evidentiary standard was required and incorrectly concluded that Burroughs' procedural due process rights were satisfied

[21] *Williams v. State*, 141 A.3d 1019, 1032–33 (Del. 2016).
[22] *See* U.S. Const. amend. V.

through other protections, such as the right to counsel, and a hearing in front of a neutral decision maker. Exhibit A at 45-46; Exhibit B at 18-19.

Contrary to the lower court's conclusions, an evidentiary standard is one of the protections which is *always* required. And there can be no doubt that the Reviewing Judge's recognition of the fundamental right at issue (Exhibit B at 18) requires the application of a clear and convincing standard. The minimum procedural protections required by the federal constitution are not diminished by providing alternative protections required by court rule.[23]

## A. A standard is always required.

Standard of proof is a required element of procedural due process in proceedings affecting protected "liberty" or "property" interests.[24] The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[25] If the standard of proof reflects "the degree of confidence our society thinks we should have in the correctness of factual conclusions for a particular type of adjudication,"[26] then surely the absence of such a standard cannot be justified. A finding made under a low burden by a neutral decision maker – even with the assistance of counsel – means something

[23] *Vitek v. Jones*, 445 U.S. 480, 491 (1980).
[24] *Spence v. Gormley*, 387 Mass. 258, 274 (1982) (citing *Santosky v. Kramer*).
[25] *Addington v. Texas,* 441 U.S. 418, 423 (1979).
[26] *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

substantially different than that same finding under a high burden.[27] A Federal District Court in Alabama recently addressed the imposition of money bail without a precise evidentiary standard and found that "without a specific degree of confidence that detention is necessary offends a fundamental principle of justice."[28]

**B. Clear and convincing evidence is the proper standard.**

The United States Supreme Court has "mandated" the "clear and convincing evidence" standard "when the individual interests at stake are both 'particularly important' and 'more substantial than mere loss of money."[29] Pretrial liberty satisfies those criteria because, as the Reviewing Judge recognized, it is a fundamental right.[30] Exhibit B at 18. So too, every court – other than the court below – to rule on the issue has held clear and convincing evidence is the proper standard.[31]

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[27] *Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("burden of proof . . . [is] rarely without consequence and frequently may be dispositive").
[28] *Schultz v. State*, 330 F. Supp. 3d 1344, 1371–72 (N.D. Ala. 2018).
[29] *Santosky v. Kramer*, 455 U.S. 745, 755–56 (1982).
[30] *Reno v. Flores*, 507 U.S. 292, 302 (1993) (explaining *Salerno* concerned "fundamental liberty"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint . . . is at the core of . . . the Due Process Clause"); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (pretrial release is a "vital liberty interest").
[31] *Addington*, 441 U.S. 418; *Santosky*, 455 U.S. at 756 (clear and convincing evidence in termination of parental rights); *Foucha*, 504 U.S. at 82–83 (clear-and-convincing-evidence to confinement of acquitted on basis of insanity in criminal trials); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282–83 (1990) (explaining clear and convincing standard used in proceedings involving denaturalization, civil commitment and other important rights); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (pretrial detention).

## III. THE COURT BELOW ERRED AS A MATTER OF LAW BY REFUSING TO APPLY HEIGHTENED SCRUTINY TO BURROUGHS' EQUAL PROTECTION CLAIM BASED ON HIS ABSOLUTE PRETRIAL DEPRIVATION OF LIBERTY CAUSED BY HIS INABILITY TO AFFORD BAIL.

### *Question Presented*

Whether a trial court commits legal error when it applies rational basis to an absolute deprivation of liberty occasioned by wealth? A356.

### *Scope of Review*

This Court reviews questions of law and constitutional questions *de novo.*[32]

### *Merits of Argument*

The Equal Protection[33] right against wealth-based detention is well established, and unquestionably implicated by unaffordable bail. The United States' Department of Justice has acknowledged that the United States Supreme Court precedent "has repeatedly held that the government may not incarcerate an individual solely because of inability to pay a fine or fee."[34] Justice Douglas framed the issue as follows:

> *To continue to demand a substantial bond which the defendant is unable to secure raises considerable*

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[32] *Williams v. State*, 141 A.3d 1019, 1032–33 (Del. 2016).
[33] U.S. Const. amend. XIV.
[34] U.S. Dept. Justice, March 14, 2016, Dear Colleague Letter 3 (applying *Bearden* to pretrial detention), *available at* https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf (describing "due process and equal protection principles").

> *problems for the equal administration of the law . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom*?[35]

**A. The absolute deprivation of liberty occasioned by wealth – i.e., unaffordable bail– is subject to heightened scrutiny. The Reviewing Judge erred by applying rational basis review.**

Generally, money—based discrimination does not reflect a suspect classification in an equal protection analysis, and thus only triggers a rational basis review; however, heightened scrutiny applies to "an absolute deprivation" of liberty based on access to money.[36] Applying this exception to a line of cases involving post—conviction detention, beginning with *Griffin v. Illinois* and culminating in *Bearden v. Georgia*, the United States Supreme Court established a general rule: a state cannot condition a person's liberty on a monetary payment she cannot afford unless no alternative measure can meet the state's needs.[37] Although

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[35] *Bandy v. United States*, 81 S. Ct. 197, 197–98 (1960) (Douglas, J., in chambers).
[36] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 20—22 (1973) (addressing equality in education) (emphasis added).
[37] *Williams v. Illinois*, 399 U.S. 235, 236–37 (1970) (addressing Illinois law permitting confinement after expiration of sentence in lieu of paying fine); *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding "Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) ("Only if alternate measures are not adequate to meet the State's interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay."); *see Griffin v. Illinois*, 351 U.S. 12 (1956) (addressing prisoners who lacked funds to procure necessary transcripts); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding California violated Fourteenth Amendment by limiting indigent access to appellate counsel).

*Bearden* and the criminal cases upon which it relied addressed post-conviction detention, its driving principles apply "with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent."[38] Numerous courts have held as much, and applied *Bearden's* heightened scrutiny to challenges just like these.[39]

The Reviewing Judge's Order did not reject *Bearden's* applicability but instead ignored the argument. The Order does not even mention *Bearden* in its Equal Protection analysis (Exhibit B at 9-13), and the closest the Order comes to distinguishing *Bearden*'s ruling is by implication:

> *Cases where courts have struck down criminal penalties as unconstitutional under equal protection involved indigents who were incarcerated* "*simply because of their inability to pay a fine*." Ex. at 12

The Order seems to suggest that the cases to which it refers are distinguishable because it somehow found Burroughs was not incarcerated "because of" an inability

[38] *Buffin v. San Francisco*, 2018 WL 424362 at *9 (N.D. Cal. Jan. 16, 2018).
[39] *Id.; In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021) ("detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests."); *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) ("indigent misdemeanor arrestees [] unable to pay secured bail . . . sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration"); *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) ("[Pretrial] imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.").

to pay.[40] This is a misreading of the pertinent (but uncited) United States Supreme Court precedents which are clearly concerned with inability to pay as a *but for* cause of detention, not with the type of causal relationship in which individuals are targeted for harsher treatment because of their indigence. The *Williams* Court, which addressed the conversion of an unaffordable fine into incarceration, recognized "the sentence was not imposed upon [the] appellant because of his indigency but because he had committed a crime." Nonetheless Williams' sentence "works an invidious discrimination *solely because* he is unable to pay the fine."[41] Likewise, in *Tate v. Short*, the Court described the petitioner, imprisoned because he could not pay fines accumulated from nine convictions, as "imprisonment *solely because* of [] indigency."[42] Finally, in *Bearden*, the Court described the challenged practice of "revoking an indigent defendant's probation for failure to pay a fine and restitution" as "impermissibility of imprisoning a defendant *solely because* of his lack of financial resources." There is no question that Burroughs was incarcerated "solely because of his lack of financial resources," as that phrase is used in the controlling precedent, in that, had he paid his bail, he would have been released.

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[40] However, the Attorney General has in fact acknowledged that "Delaware's cash-bail system incarcerates people for simply being poor." https://www.facebook.com/KathyJenningsDE/videos/184147758963887/?extid=NS-UNK-UNK-UNK-IOS_GK0T-GK1C-GK2C&ref=sharing.

[41] *Williams*, 399 U.S. at 242 (emphasis added).

[42] *Tate*, 401 U.S. at 398.

## B. Even if rational basis were appropriate, the Reviewing Judge erred by failing to consider the harms of the state action.

Assuming, arguendo, rational basis was the proper standard, the Reviewing Judge erred in the manner of its application. Even when government conduct is rationally related to the interest it seeks to achieve, the challenged practice still fails rational basis review if it causes a public harm far greater than any plausible public benefit.[43] Thus, as argued below, and unaddressed in the Order, rational basis review of Burroughs' claims must account for the undisputed harms that result from unaffordable money bail. A87-89, 303-05.

Burroughs established that he and similarly situated defendants - those incarcerated because of their inability to post bail – suffer a host of harms. Pretrial detention incentivizes guilty pleas, which Burroughs did after nearly seventeen months of pretrial incarceration. A214-15. Pretrial detainees are more likely to lose jobs, homes, and custody of their children; some studies have suggested that pretrial detention is itself criminogenic. A423. These harms are undisputed, and especially significant for two reasons. First, they are inseparable from the State interests (safety and appearance) in that once a person is released from pretrial incarceration (as they

[43] *See Plyler v. Doe,* 457 U.S. 202, 207-230 (1982) (rejecting argument that denying education to children of undocumented immigrants could save money, as benefit was "wholly insubstantial in light of the costs involved to these children, the State, and the Nation."); *James v. Strange*, 407 U.S. 128, 141–42 (1972) (holding state funds saved by denying indigent defendants exceptions to enforcement of debt judgments was grossly disproportionate to harms inflicted on debtors).

inevitably are) they are left more at risk for reoffending and missed court appearances. The Attorney General has recognized that the "attempt to incarcerate ourselves to safety [in part, via the 'cash bail system'] has been a failed policy."[44] As described by Prof. Copp, although pretrial detention can be

> *an effective means at ensuring court appearance and public safety, the research suggests that this is only true in the immediate term. In particular, although pretrial detention corresponds to slight reductions in failure to appear and rearrest (attributable to defendants' incapacitation), these reductions are completely offset by increases in postadjudication recidivism.* A216.

This conclusion tracks the requirement to consider "family ties of the defendant, the defendant's employment, [and] financial resources" when setting bail.[45] Pretrial incarceration has a negative impact on these exact considerations. A216.

And second, reduction of these harms is one of the purposes of bail in Delaware, and to ignore them would ignore statutory intent

> *to reduce the unnecessary pretrial incarceration of defendants who do not have sufficient means to pay money bail, as well as reduce the resulting loss in employment, the pressure to plead guilty, the economic toll . . . and other substantial harm that results from excessive use of money bail.*[46]

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[44] https://www.facebook.com/149727352405928/posts/pfbid0339NiGVtdeijECUA6eLMN9M9Z6KWKCs7cDB7tHnNg3D1TtptvydK7mdDYfMyPHL4ol/?d=n.
[45] 11 *Del. C.* § 2105(b).
[46] *In re Implementation of the Bail Reform* Act, December 13, 2018 Order of the Supreme Court of the State of Delaware, *available at* https://courts.delaware.gov/rules/pdf/InterimSpecialRulePretrialReleaseOrders.pdf.

## IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT BURROUGHS' DELIBERATELY UNAFFORDABLE MONEY BAIL NECESSARILY COMPLIED WITH THE STATE CONSTITUTION'S SUFFICIENT SURETIES CLAUSE BECAUSE IT WAS SET IN ACCORDANCE WITH STATUTORY AND ADMINISTRATIVE CRITERIA.

### *Question Presented*

Whether the court commits legal error when it rules that deliberately unaffordable money bail necessarily complies with Delaware's constitution if it complies with Delaware statutory and administrative criteria? A351.

### *Scope of Review*

This Court reviews questions of law and constitutional questions *de novo.*[47]

### *Merits of Argument*

The Reviewing Judge recognized that the State's interest in unaffordable money bail must be both "*legitimate* and compelling." Exhibit B at 15 (emphasis added). Prevention of violent crime is unquestionably a compelling interest, but it becomes illegitimate when pursued by means which violate Delaware's Constitution. Exhibit B at 15. The State conceded that the Delaware Constitution's *Sufficient Sureties* Clause[48] ("the Clause") prohibits pretrial detention orders in these

[47] *Williams v. State*, 141 A.3d 1019, 1032–33 (Del. 2016).
[48] DE Const., Art. 1, § 12.

circumstances, but in addressing Burroughs' Fourteenth Amendment claims it argued his bail was constitutional precisely because it detained him. A273-76.

In other words, the State's position is that, even though the Clause prohibits a pretrial detention order directed at Burroughs, it is entirely unconcerned with *deliberately* achieving that exact same pretrial detention through a detention order styled as an unaffordable bail order. The State's goal, pretrial detention, is transparently seen in its claim that Burroughs is "simply [one] individual[] the State must incarcerate pretrial." A276. Every court to address the issue has recognized unaffordable bail orders are *de facto* detention orders and legally synonymous with

their more explicit counterpart.[49] The State's interpretation would render our State constitutional provision a meaningless technicality and must be rejected.[50]

## A. The Court's legal reasoning is flawed.

According to the Reviewing Judge, Burroughs' bail could not violate the Clause because it was set in accordance with the [statutory and administrative] criteria the Court was required to consider." Exhibit B at 19. This reasoning is flawed

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[49] *See e.g. Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (unattainable money bail "is the functional equivalent of an order for pretrial detention, and the . . . same due process requirements [apply]"); *Hill v. Hall*, 2019 WL 4928915, at *19 (M.D. Tenn. Oct. 7, 2019) (acknowledging "setting of bail at $150,000, with full knowledge that the defendant would be unable to post . . . clearly amounted to a *de facto* detention order"); *Schultz v. State*, 330 F. Supp. 3d 1344, 1358, 1366 (N.D. Ala. 2018) ("unattainable bond amounts [] serve as *de facto* detention orders"); *Weatherspoon v. Oldham*, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (treating unaffordable bail as "functional equivalent" to "pretrial detention."); *Coleman v. Hennessy*, 2018 WL 541091, at *1 (N.D. Cal. Jan. 5, 2018) (holding court violated due process by "failing to consider whether its bond order amounted to a de facto order of pretrial detention"); *Commonwealth v. Hamborsky*, 75 Pa. D. & C. 4th 505, 521 (Pa. C.P. Fayette 2005) ("setting bond at $200,000 would be equivalent to denying bail altogether"); *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cnty. of Clark,* 460 P.3d 976, 987 (Nev. 2020) ("when bail is set in an amount that results in continued detention, it functions as a detention order, and accordingly is subject to the same due process requirements"); *Humphrey*, 482 P.3d at 1018 (requiring court to determine "whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order."); *ODonnell*, 251 F. Supp. 3d at 1067 ("[A]n order imposing secured money bail is effectively a pretrial preventive detention order only against those who cannot afford to pay.").

[50] *See State v. Miller*, 2003 WL 231612, at *1 (Del. Super. Ct. Jan. 31, 2003) ("[t]he framers of the Delaware Constitution obviously had more in mind when they added § 12 mandating bail in all but certain capital cases.").

on its face because "[t]he Legislature cannot by statute supersede the plain language of the Constitution of this State, granting the right to bail."[51]

> *It is axiomatic that the State cannot ignore our Constitution . . . statutes and regulations . . . must comply with our Constitution.*[52]

Moreover, assuming the relevant rules and statutes comply with the Clause, does not address Burroughs' "as applied" challenge.

## B. The Clause prohibits deliberately unaffordable bail.

The Reviewing Judge correctly described the Clause as establishing "except for certain capital offenses, *all* citizens are entitled to *bail* upon 'sufficient sureties.'" Exhibit B at 6. Accordingly, the Clause must be interpreted alongside the purpose of "bail" as it was historically understood[53] – to incentivize pretrial success of released defendants.[54] A290-92. At the founding, bail was a mechanism of release meaning "delivery" of a person to his "sureties" in exchange for some pledge—not a

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[51] *Id.*

[52] *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 653 (Del. 2017).

[53] *Id.* at 642 ("the significance of knowing the original text, context and evolution of any phrase that appears in the present Delaware Constitution."). This Court reviewed some of the historical backdrop in *In re Steigler*. 250 A.2d 379, 381 (Del. 1969).

[54] *See Holland v. Rosen*, 895 F.3d 272, 290 (3d Cir. 2018) (discussing history of bail as "a means of achieving pretrial release from custody conditioned on adequate assurances"); T. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6 (2018); T. Schnacke, *Smart Pretrial Demonstration Initiative, Delaware Legal Analysis* at 14 (May 4, 2015) ("the true nature of a right to bail" such as Delaware's, as a "right to release or a right to freedom before conviction."). A618.

deposit.[55] The Clause "is *a right not to be intentionally detained*."[56] This reading is consistent with how our legislature defines bail in statute,[57] and how other states interpret their own constitutional right to bail.[58] Similarly, Justice Holland, described a proposed constitutional amendment to the Clause as broadening the list of offences where "pretrial release on bail may not be available," as opposed to offences where bail may not need "to be set"– a technical requirement.[59]

The Clause clearly identifies capital offences as its one and only exception,[60] and this Court has recognized that "bail is an unconditional right in . . . [non-capital]

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[55] *See Walker v. City of Calhoun*, Georgia, Brief of Amici Curiae Law Professors of Criminal, Procedural, and Constitutional Law in Support of Petitioner 2019 WL 411363 (U.S.) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769)); *State v. Briggs*, 666 N.W.2d 573, 583 n.6 (Iowa 2003) (noting Delaware's "sufficient sureties clauses [was] drafted *before* commercial bonding emerged") (emphasis in original).

[56] Timothy R. Schnacke, *Determining the Meaning of a State's Constitutional Right to Bail Clause for Purposes of the Uniform Pretrial Release and Detention Act*, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, at 2 (April 28, 2021) (emphasis in original), *available at* http://www.clebp.org/images/State_Right_to_Bail_and_the_Uniform_Pretrial_Release_and_Detention_Act.pdf.

[57] 11 *Del. C.* § 2102(2) ("'[b]ail' means the pretrial release of a defendant from custody upon the terms and conditions specified by an order of the court"); § 2104(a) ("[a]ny person who is arrested and charged with any crime other than a capital crime shall be released upon execution of" a conditions of release bond).

[58] *State ex rel. Corella v. Miles,* 303 Mo. 648, 652 (Missouri 1924) ("bond must be fixed with a view to giving the prisoner his liberty. . . If, in order to keep him in custody, [unaffordable] bond is ordered . . . [it] violates [the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is.").

[59] Justice Randy Holland, *The Delaware State Constitution*, 2d ed., 84 (2017).

[60] *Expressio unius est exclusio alterius* - The expression of one thing indicates the exclusion of another. *Brown v. State*, 36 A.3d 321, 325 (Del. 2012).

cases."[61] There is no exception for "dangerous" defendants.[62] To interpret it otherwise would lead to absurd results.[63] First, the State could completely avoid the proof positive requirement in capital cases by, instead of seeking to have bail denied, simply seeking unaffordable bail. Second, it not only allows deliberately unaffordable bail, but also the imposition of impossible conditions without legitimate purpose other than detaining; for example, setting an unsecured bond with release conditioned on running a marathon in 30 minutes. These absurd results are only avoided by requiring bail conditions to be intended to promote pretrial success of released defendants.

This Court cannot "permit the use of [unafforded money bail] to accomplish indirectly that which may not be done directly; [] to do so would . . . permit a circumvention of the constitutional limitation."[64] But that is exactly what the State

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[61] *In re Steigler*, 250 A.2d 379, 383 (Del. 1969).

[62] *See Simms v. Oedekoven*, 839 P.2d 381, 385 (Wyo. 1992) (describing state constitutional sufficient sureties clause and noting "[t]here is a clear exception for capital offenses . . . and there is no indication that there is an exception to be found with respect to the right to bail if the only sufficient surety is detention.").

[63] "[I]nterpretations which yield mischievous or absurd results are to be avoided." *Spielberg v. State,* 558 A.2d 291, 293 (Del.1989).

[64] *See Hodsdon v. Superior Court In & For New Castle Cnty*., 239 A.2d 222, 224–25 (Del. 1968) ("We may not permit the use of the writ of prohibition to accomplish indirectly that which may not be done directly; for to do so would be to permit a circumvention of the constitutional limitation."); *Collins v. Foster*, 698 P.2d 953, 956 (Or. 1985) ("'release [] upon whatever additional reasonable terms and conditions the court deems just' do not include the setting of a security amount which the person in custody cannot meet. To hold otherwise would allow the court to do indirectly that which it cannot do directly.").

sought to do (A272-78), what the Commissioner implicitly acknowledged by claiming "monetary bail is virtually meaningless . . . [when set] in an amount a defendant can afford," (Exhibit A at 42) and what the CCP Judge did by increasing Burroughs' bail five-fold despite already being unaffordable. A58.

## CONCLUSION

For the reasons and upon the authorities cited herein, the Reviewing Judge's Order must be reversed.

Respectfully submitted,

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