



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRESE BURROUGHS,)
)
 Defendant – Below,)
 Appellant,)
)
 v.) **No. 144, 2022**
)
 STATE OF DELAWARE,)
)
 Plaintiff – Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On November 25, 2020, police arrested Burroughs and charged him with Possession of a Firearm During the Commission of a Felony, Possession of a Firearm By a Person Prohibited, Possession of Ammunition By a Person Prohibited, Carrying a Concealed Deadly Weapon, two counts of Possession of a Controlled Substance with intent to Deliver, and Possession of Marijuana. A-1. Burroughs' original bail was set at \$110,501 cash.¹ After a preliminary hearing in December 2020, the court reset the bail to the original amount - \$110,501 cash² and transferred Burroughs' case to the Superior Court; Burroughs thereafter filed a Motion for Non-Financial Conditions.³

At a Superior Court bail hearing in January of 2021, Burroughs argued that his age, educational background, performance on probation, self-employment, and his prior attendance at court proceedings warranted removal of the financial conditions of his bail.⁴ While his bail motion was pending, a New Castle County grand jury indicted Burroughs for PFDCF, PFBPP, PABPP, two counts of Drug Dealing, CCDW, and Resisting Arrest. A8; A15-17. At a July 2021 Superior Court bail hearing, Burroughs argued that Delaware's bail system violated his right

¹ A1. At his initial appearance in the Court of Common Pleas, the court reduced Burroughs' bail to \$20,000 cash and \$14,501 secured. *State v. Burroughs*, 2022 WL 1115769, at n.12 (Del. Apr. 13, 2022).

² A1; *Burroughs*, 2022 WL 1115769, at *1 n.1.

³ A2.

⁴ *Burroughs*, 2022 WL 1115769, at *2.

to (1) equal protection; (2) substantive due process; (3) procedural due process; and (4) sufficient sureties.⁵ A Superior Court commissioner denied the motion and Burroughs sought review of the commissioner's decision.⁶ After a review of the record, a Superior Court judge again denied Burroughs' Motion for Non-Financial Conditions.⁷

Burroughs thereafter petitioned this Court for a writ of prohibition, requesting that his bail "be modified to an amount without financial conditions."⁸ While his petition was pending in this Court, Burroughs pled guilty to Possession of a Firearm During the Commission of a Felony and Illegal Possession of a Controlled Substance, and the Superior Court sentenced him to an aggregate three years of incarceration followed by probation.⁹ Burroughs has appealed. This is the State's Answering Brief.

⁵ A11; Exhibit A to Opening Brief.

⁶ A10-11; Exhibit A to Opening Brief; Exhibit B to Opening Brief.

⁷ A12.

⁸ No. 107, 2022. As of the filing of this brief, Burroughs' petition is still pending.

⁹ A12; Sentence Order.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Burroughs' request for bail without financial conditions. The court applied strict scrutiny to Delaware's bail statute and correctly determined that money bail was the least restrictive means to satisfy the State's compelling interest in public safety given the facts of Burroughs' case.

II. Appellant's argument is denied. The Superior Court did not violate Burroughs' right to procedural Due Process. The court held a hearing that afforded Burroughs an opportunity to present expert testimony in support of his request for non-monetary bail. The court evaluated the evidence within the framework of Delaware's bail statute and applicable administrative rules, and applied the clear and convincing evidentiary standard when it decided Burroughs' motion.

III. Appellant's argument is denied. The Superior Court correctly denied Burroughs' Equal Protection claim. Burroughs' inability to afford money bail did not place him in a protected class. As a result, the court applied a rational basis review when it considered his Equal Protection claim. Delaware's bail statute, which provides for financial conditions of bail, is rationally related to the State's compelling interest in public safety.

IV. Appellant's argument is denied. The Superior Court did not violate the Sufficient Sureties clause of the Delaware Constitution by setting money bail in

Burroughs' case. The court followed Delaware's bail statute and administrative rules when it set money bail. There is no record support for Burroughs' claim that the court "deliberately" set bail in an unaffordable amount for the purpose of keeping Burroughs incarcerated.

STATEMENT OF FACTS

On November 25, 2021, Officer Akquil Williams (“Ofc. Williams”) of the Wilmington Police Department (“WPD”) was driving a police car on routine patrol when he saw a man, later identified as Burroughs, engage in a hand-to-hand drug transaction in the 2200 block of Pine Street in Wilmington. A38-40. According to Ofc. Williams, Burroughs began to quickly walk away once he observed the police presence. A40. Ofc. Williams circled the block and reencountered Burroughs on East 23rd Street. A41. While still in his patrol vehicle, Ofc. Williams asked to speak with Burroughs, who responded that he was a juvenile and continued walking westbound on 23rd Street. A41. Ofc. Williams got out of the patrol car and Burroughs immediately fled. A41. After a brief foot pursuit, Ofc. Williams caught up to Burroughs, who apparently ran into a parked car and fell to the ground. A42. Ofc. Williams attempted to place Burroughs into custody, but Burroughs struggled, pulling his arms away from Ofc. Williams. During the struggle, Ofc. Williams observed a bulge in Burroughs’ waistband, which he believed was consistent with a firearm. A42.

Ofc. Williams eventually placed Burroughs into custody and searched him. A42. During the search, Ofc. Williams discovered a loaded firearm in Burroughs’ waistband and 58 bags of heroin in a jacket pocket. A43. Burroughs told Ofc. Williams that he possessed additional drugs located under his testicles. A43. Ofc.

Williams recovered a clear knotted plastic bag containing 1.5 grams of a chalky substance that field tested positive for crack cocaine. A44. Ofc. Williams also found a knotted plastic bag containing 3.3 grams of a green plant-like substance that field tested positive for marijuana among Burroughs' property. A44.

While at the scene, Burroughs told Ofc. Williams that he did not use crack cocaine or heroin. In a post-*Miranda* interview at the police station, Burroughs acknowledged that he possessed a firearm, heroin, crack cocaine, and marijuana. A46. When asked whether he sold drugs, Burroughs responded that he "does a little bit on 23rd Street." A46. During a DELJIS inquiry, Ofc. Williams learned that Burroughs was a person prohibited from possessing a firearm because of a prior Superior Court conviction for manufacture/delivery of a controlled substance. A46.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BURROUGHS' REQUEST FOR NON-MONETARY BAIL.

Question Presented

Whether the Superior Court abused its discretion when it denied Burroughs' request for non-monetary bail after a hearing.

Standard and Scope of Review

This Court reviews the Superior Court's bail determination for an abuse of discretion.¹⁰ "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice."¹¹

Merits of the Argument

On appeal, Burroughs claims the Superior Court abused its discretion when it denied his request for non-monetary bail. Burroughs contends; (1) the State was required to establish that "money bail would more effectively address safety risks than non-monetary conditions;"¹² and (2) the Superior Court's conclusion regarding bail was not supported by the record. He is wrong. In addition to the

¹⁰ *Boo'ze v. State*, 2004 WL 691903, at *5 (Del. Mar. 25, 2004) (citing *State v. Flowers*, 330 A.2d 146 (Del. 1974)).

¹¹ *Wright v. State*, 25 A.3d 747, 752 (Del. 2011) (quoting *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999) (internal quotation marks omitted)).

¹² Op. Brf. at 10.

expert testimony presented at the hearing held on Burroughs' bail motion, the court considered statutorily designated factors and administrative rules in assessing his request for non-monetary bail and the record supports the court's bail determination.

Under Delaware law, the Superior Court “has discretion to set bail and to modify bail conditions for a defendant charged with noncapital felonies.”¹³ When determining bail, 11 *Del. C.* § 2107(a) instructs the court to set “such bail as reasonably will assure the reappearance of the accused, compliance with the conditions set forth in the bond *and the safety of the community.*”¹⁴ Subsection (c) of section 2107 provides that for a person charged, *inter alia*, with a violation of 11 *Del. C.* § 1447A or 11 *Del. C.* § 1448(a)(1), “the presumption is that the court will set conditions of release bond guaranteed by financial terms in an amount within or above the guidelines published by the Delaware Sentencing Accountability Commission (SENTAC) for that offense and secured by cash only.”¹⁵ Such was the case here. Additionally, section 2107(a) directs the court to consider the criteria set out in 11 *Del. C.* § 2105(b) when determining whether a defendant is

¹³ *Boo'ze*, 2004 WL 691903, at *5.

¹⁴ 11 *Del. C.* § 2107(a) (emphasis added).

¹⁵ 11 *Del. C.* § 2107(c).

likely to appear as required and that the defendant does not pose a substantial risk of safety to the community.¹⁶ The factors to be considered include:

- the nature and circumstances of the crime charged
- whether a firearm was used or possessed
- the possibility of statutory mandatory imprisonment
- the family ties of the defendant
- the defendant's employment, financial resources, character and mental condition
- the defendant's record of convictions
- custody status at time of offense
- history of amenability to lesser sanctions
- history of breach of release
- record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.¹⁷

The court can only grant a defendant a conditions of release bond not guaranteed by financial terms “when the court is satisfied from all the circumstances and the criteria set forth in subsection (b) of this section that it is reasonably likely that the defendant will appear as required before or after conviction of the crime charged and that there is no substantial risk to the safety of the community in permitting such unsecured release.”¹⁸

Here, the Superior Court “assume[d] the attachment of an unaffordable bail that results in detention implicates a defendant's fundamental right of liberty,

¹⁶ 11 *Del. C.* § 2107(a).

¹⁷ 11 *Del. C.* § 2105(b).

¹⁸ 11 *Del. C.* § 2105(a).

triggering a strict scrutiny standard of review of Delaware’s bail statute.”¹⁹ As such, the court employed the clear and convincing evidentiary standard when it considered whether “no less restrictive alternative other than the cash bail assigned to Defendant would satisfy the government’s compelling interest in protecting the public.”²⁰ The Court found:

This is a case in which setting a significant monetary bail, in accord with SENTAC guidelines, satisfies a compelling government interest of public safety and is narrowly tailored to achieve that interest. Defendant demonstrated a disregard of Delaware law and this Court’s instructions by carrying a firearm.

As the Supreme Court has held, “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.” No other means exist that would be less restrictive to ensure Defendant does not possess another firearm while in public other than setting a high monetary bail.²¹

The Court did not abuse its discretion when it made its bail determination.

Burroughs’ chief complaint appears to be that the court “ignored” evidence, purportedly established by his expert, that “the threat of forfeiting money bail is not more effective than non-financial conditions.”²² However, that was not the

¹⁹ *State v. Burroughs*, 2022 WL 1115769, at *6 (Del. Super. Ct. Apr. 13, 2022). While Burroughs argues that “unaffordable bail” implicates a fundamental right, the Superior Court left open the question of “whether unaffordable bail implicates a fundamental right by law for another day.” *Id.* at *6 n.59.

²⁰ *Burroughs*, 2022 WL 1115769, at *6.

²¹ *Burroughs*, 2022 WL 1115769, at *6-7 (emphasis added) (citations omitted).

²² Op. Brf. at 9.

issue to be considered by the court. Rather, the court had to determine whether monetary bail was the least restrictive means to ensure Burroughs “[did] not possess another firearm while in public”²³ in light of the evidence presented at the hearing on Burroughs’ bail motion. While the Superior Court order affirming the Order of the Commissioner did not address Burroughs’ expert at length, the Commissioner’s Order did. Indeed, the Commissioner determined that there are “some evident gaps [in the expert’s report] that dissuade the Court from over-valuing the opinions.”²⁴ The “gaps” identified by the Commissioner were: (1) the studies the expert relied upon are from a small category of cases and a small number of (non-Delaware) counties, largely insignificant with the overall country;” (2) the expert admitted that monetary bail is more effective at assuring court appearances for high risk defendants, “but then unilaterally categorizes Burroughs as “low [or moderate] risk and seems to ignore the events leading to his arrest and his confession;” (3) her opinion is almost entirely based upon the literature and the DELPAT risk assessment tool, with little analysis of whether the tool should be determinative;” (4) the results of the studies cannot be a dispositive predictor of violent behavior without a more specific analysis of the more serious offenses; (5) the studies did not seem to find a statistically significant increase in the individuals that otherwise would have been held or released pretrial; and (6) the expert did not

²³ *Burroughs*, 2022 WL 1115769, at *7.

²⁴ Ex. A to Op. Brf. at 33.

review Delaware’s Bail Reform Act, which she said had no bearing on her conclusions that were based on literature.²⁵ It is clear that the Commissioner gave little credit to several of the expert’s conclusions, but the court agreed “with respect to the most fundamentally important analysis of [the] issue – the Court is required to consider the least restrictive alternative to a defendant’s ability to pay.”²⁶ As the Commissioner noted, Burroughs’ expert was under the “mistaken belief that [the analysis] did not occur here.”²⁷

Under Burroughs’ theory, the Commissioner was required to accept his expert’s opinion and conclusions because the State did not present its own expert in rebuttal. The Commissioner, however, acting as fact-finder, was entitled to assess the credibility of the expert and the reasonableness of her conclusions.²⁸ Consequently, the court could give credit to any portion of the expert’s testimony it found credible and discount or disregard that portion her testimony it did not find credible or reasonable.²⁹ Such was the case here. The Commissioner did not “ignore” the expert’s testimony or report. Rather, the court employed a thoughtful and detailed analysis of the expert’s testimony, report, and conclusions – the court simply disagreed with several of the expert’s conclusions.

²⁵ Ex. A to Op. Brf. at 33-35.

²⁶ Ex. A to Op. Brf. at 38.

²⁷ Ex. A to Op. Brf. at 38.

²⁸ *Cruz v. State*, 12 A.3d 1132, 1136 (Del. 2011).

²⁹ *Id.*

The Superior Court judge who decided Burroughs' appeal from the Commissioner's Order likewise did not "ignore" the expert's testimony or report. Indeed, the court determined:

[The expert's] research suggests Delaware may need to reevaluate provisions in its bail statute. Even so, the State provided clear and convincing evidence under the current bail statute that the cash bail imposed upon Defendant was narrowly tailored to serve a compelling government interest. Although the expert testimony did not ultimately "carry the day," the Court appreciates the diligence of all counsel in advocating their positions.³⁰

The court considered the expert's testimony and report and nevertheless concluded the State had satisfied its burden. The fact that the court's decision did not align with the expert's conclusions does not amount to an abuse of discretion.

Burroughs also contends the Superior Court's decision affirming the Commissioner's Order was not supported by the record. He is wrong. The court cited to specific facts in the record and explained how those facts related to the court's decision:

Here, the State presented *clear and convincing evidence*, as required by Delaware's bail statute, that no less restrictive alternative other than the cash bail assigned to Defendant would satisfy the government's compelling interest in protecting the public.

* * * *

³⁰ *Burroughs*, 2022 WL 1115769, at *8.

The State presented evidence that Defendant ignored his “Person Prohibited” classification and possessed a firearm while in the community. Defendant’s charges are his third set of drug dealing charges, his most recent conviction was in 2019, and those previous charges included some classified as violent felonies. His current charges include a signal offense. As the State pointed out, and as the Commissioner emphasized, the State’s testimony at the preliminary hearing provided strong probable cause evidence. Most significantly, when Defendant committed the alleged offenses, the State demonstrated he already was classified as a “Person Prohibited” from possession of a firearm, but that he nonetheless carried a firearm while in public in direct violation of the law.³¹

Burroughs largely ignores the above facts and claims that the court “overstated” the risk he posed. When Burroughs was arrested, he possessed drugs (after police observed him engage in a hand-to-hand transaction) and a loaded firearm that he was prohibited from possessing because of his prior conviction for Drug Dealing. As the court noted, Burroughs ignored his person prohibited status and “demonstrated a disregard of Delaware law and [the] [c]ourt’s instruction by carrying a firearm.”³² The instant charges represent his third set of Drug Dealing charges. The other two occurred in 2019, when Burroughs was arrested on February 17, 2019, released, and arrested five days later on a new set of Drug Dealing charges. The court did not “overstate” its reasons for affirming the

³¹ *Burroughs*, 2022 WL 1115769, at *6-7. The court also found persuasive the State’s argument that Burroughs’ behavior was escalating, noting that his prior crimes did not involve a firearm in contrast to the instant charges. *Id.* at *7 n.65.

³² *Id.* at *7.

Commissioner's finding that Burroughs posed a substantial risk to the safety of the community.

In sum, Burroughs ignores the fact that the court considered all of the evidence before it within the appropriate statutory framework and decided the issue based on its assessment of the record evidence. Unsurprisingly, he simply disagrees with the court's conclusion and attempts to challenge it by claiming the court either failed to apply or misapplied the correct standard. As is evident from the plain language of the order, the Superior Court applied the clear and convincing evidence standard to Burroughs' claim and cited support for its determination that monetary bail was the least restrictive means by which to ensure public safety in his case.

II. THE SUPERIOR COURT DID NOT VIOLATE BURROUGHS' RIGHT TO PROCEDURAL DUE PROCESS BY SETTING MONEY BAIL, AFFORDING HIM A HEARING ON THE ISSUE, AND ULTIMATLEY EVALUATING THE EVIDENCE UNDER THE CLEAR AND CONVINCING STANDARD.

Question(s) Presented

Whether the Superior Court violated Burroughs' right to procedural due process by setting his bail in a monetary amount in accordance with Delaware law after a hearing.

Standard and Scope of Review

This Court reviews alleged constitutional violations *de novo*.³³

Merits of the Argument

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”³⁴ When considering a procedural due process claim, courts determine first whether there is a liberty or property interest at stake, which may stem from the Federal Constitution or state constitution or laws.³⁵ Once a court determines such an

³³ *Benson v. State*, 2020 WL 1909206, at *2 (Del. Apr. 20, 2020) (citing *Boyer v. State*, 985 A.2d 389, 2009 WL 3841973, at *1 (Del. Nov. 16, 2009)).

³⁴ *Monceaux v. State*, 51 A.3d 474, 477 (Del. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (quotation marks omitted)).

³⁵ *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001).

interest is at issue, “the analysis shifts to a determination of whether the procedures afforded to the individual... are constitutionally sufficient.”³⁶

Constitutional sufficiency looks to the *Eldridge* factors: (i) the private interest affected; (ii) the government’s interest; and (iii) the risk of an erroneous deprivation of rights based on the procedures used.³⁷ This analysis recognizes that “not every potential loss of liberty requires the full panoply of procedural guarantees available at a criminal trial.”³⁸ Rather, “due process is flexible,”³⁹ and the protections it requires “depend on the rights and interests at stake in a particular case.”⁴⁰ Courts, as a consequence, look to all of the following: (i) notice to the person affected; (ii) a reasonable opportunity to defend against the charges; (iii) a reasonable opportunity to cross-examine adverse witnesses; (iv) a reasonable opportunity to present evidence; (v) representation by counsel; and (vi) an impartial decisionmaker.⁴¹

In the bail context, the United States Supreme Court identified the evidentiary standard used to determine bail:

³⁶ *Id.*

³⁷ *Goldberg v. City of Rehoboth Beach*, 565 A.2d 936, 942 (Del. Super. Ct. 1989) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

³⁸ *Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018).

³⁹ *Eldridge*, 424 U.S. at 333.

⁴⁰ *Grimaldi v. New Castle County*, 2018 WL 3435019, at *4 (Del. Super. Ct. July 13, 2018).

⁴¹ *Orville v. Div. of Family Servs.*, 759 A.2d 595, 598 (Del. 2000).

When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.⁴²

Burroughs argues that the Superior Court judge who affirmed the Commissioner's Order "erroneously adopted the Commissioner's conclusion that no evidentiary standard was required and incorrectly concluded that Burroughs' procedural due process rights were satisfied through other protections."⁴³ Burroughs misapprehends the record.

The Superior Court judge determined that Burroughs' procedural due process rights were not violated, noting:

To afford a defendant their procedural due process rights, some course of action must be in place to allow the defendant a chance to be heard. Notice to the defendant and a hearing in front of a neutral-decision maker are examples of such rights. The Court followed Superior Court Criminal Rule 5 in setting Defendant's monetary bail. Under that Rule, a defendant must be informed of the complaint and any probable cause affidavit against them. The defendant has a right to counsel with reasonable time and opportunity to consult with them. Additionally, during a preliminary hearing, if the defendant is in custody, probable cause must exist to believe the defendant committed the offense, and the defendant may introduce evidence on their own or cross-examine the State's witnesses.

In summary, Defendant was represented by competent counsel, his proceedings took place in open court before a neutral decision-maker, and he was provided notice of the charges.⁴⁴

⁴² *United States v. Salerno*, 481 U.S. 739, 751 (1987).

⁴³ Op. Brf. at 20-21.

⁴⁴ *Burroughs*, 2022 WL 1115769, at *8 (citations omitted).

In addition to identifying the procedural due process safeguards present in Burroughs' case, the Superior Court judge, after a *de novo* review of the record, identified and applied the clear and convincing standard when they considered the evidence presented at the bail hearing. Indeed, the court found:

Here, the State presented *clear and convincing evidence*, as required by Delaware's bail statute, that no less restrictive alternative other than the cash bail assigned to Defendant would satisfy the government's compelling interest in protecting the public.

As the Supreme Court has held, “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.” No other means exist that would be less restrictive to ensure Defendant does not possess another firearm while in public other than setting a high monetary bail.⁴⁵

Even if the Superior Court commissioner erred by failing to include the clear and convincing evidentiary standard in the court's procedural due process analysis, any such error was harmless. That is because the Superior Court judge came to the same conclusion after applying the evidentiary standard Burroughs suggests is required to comport with his procedural due process rights. This claim fails.

⁴⁵ *Burroughs*, 2022 WL 1115769, at *7 (citing *Salerno*, 481 U.S. at 751) (emphasis added).

III. THE SUPERIOR COURT, ANALYZING THE CLAIM UNDER THE CORRECT STANDARD, DID NOT ERR WHEN IT DENIED BURROUGHS' EQUAL PROTECTION CLAIM.

Question(s) Presented

Whether the Superior Court erred as a matter of law when it determined that strict scrutiny review did not apply to a claim that did not involve a suspect class. Whether the Superior Court correctly applied a rational basis review to Burroughs' claim.

Standard and Scope of Review

This Court reviews alleged constitutional violations *de novo*.⁴⁶

Merits of the Argument

Burroughs claims the Superior Court erred when it applied a rational basis review to his Equal Protection claim. He acknowledges that “money-based discrimination does not reflect a suspect class,” and with no direct support, argues “heightened scrutiny applies to ‘an absolute deprivation’ of liberty based on access to money.”⁴⁷ Burroughs' claim lacks merit.

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects against arbitrary and capricious classifications and

⁴⁶*Dahl v. State*, 926 A.2d 1077, 1081 (Del. 2007) (citing *Filmore v. State*, 813 A.2d 1112, 1116 (Del. 2003)).

⁴⁷ Op. Brf. at 24.

requires similarly situated persons to be treated equally.”⁴⁸ “Equal Protection does not require the identical treatment of all individuals within a class but, rather, when distinctive treatment for individual class members does occur, there must be a reasonable basis for the distinction.”⁴⁹ Where the government creates a suspect classification, the court engages in a strict scrutiny analysis.⁵⁰ And where the classification does not involve a suspect class, the court engages in a rational basis analysis.⁵¹ Burroughs has the burden of proving the liberty interest he seeks is so fundamental that it must be protected by heightened scrutiny analysis.⁵² He fails to meet his burden.

When the Superior Court judge considered Burroughs’ Equal Protection claim, the court determined that inability to afford bail was not a suspect class:

Inherently suspect classifications include race, color, religion, or ancestry. The Supreme Court of the United States repeatedly has held that poverty, standing alone, is not a suspect classification. The Delaware Supreme Court similarly has held economic classifications do not implicate suspect classification. And Defendant himself agrees poverty is not a suspect classification. Because indigency is not a protected suspect class under equal protection, strict scrutiny does not apply to Defendant’s equal protection claim. 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.*” No court has held that fines must be structured to reflect each defendant’s ability to pay in order to avoid

⁴⁸ *Sisson v. State*, 903 A.2d 288, 315 (Del. 2006).

⁴⁹ *Id.* (quoting *Hughes v. State*, 653 A.2d 241, 247 (Del. 1994)).

⁵⁰ *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 666 (Del. 2014).

⁵¹ *Stratton v. Travis*, 380 A.2d 985, 987 (Del. Super. 1977).

⁵² *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008).

disproportionate burdens. The equal protection clause “at least where wealth is involved ... does not require absolute equality or precisely equal advantages.” Because Defendant is not part of a suspect class, strict scrutiny does not apply to his equal protection claim. The equal protection claim therefore appropriately is analyzed under a rational basis theory.⁵³

The court’s determination was correct.

Rational Basis is the Appropriate Standard of Review

Burroughs attempts to frame the applicable class as people who are indigent and unable to post bail. He presumes that this is the accurate framing of the class at issue. It is not.

Under Delaware’s bail laws and procedure, indigency has no bearing on whether an arrestee is held pretrial. That is by design. Interim Special Rule of Criminal Procedure for Pretrial Release (“Interim Rule 5.2”) directs courts to decide whether financial conditions are appropriate *before* conducting an ability to pay analysis.⁵⁴ Only after deciding that a financial condition should be imposed do courts conduct an ability to pay analysis.⁵⁵ This type of financial consideration can

⁵³ *Burroughs*, 2022 WL 1115769, at *5 (citing *Turnbull v. Fink*, 668 A.2d 1370, 1379-80 (Del. 1995) *Harris v. McRae*, 448 U.S. 297, 323 (1980); *Maher v. Roe*, 432 U.S. 464, 471 (1977) *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3d Cir. 2001)).

⁵⁴ Interim Rule 5.2(1) (explaining that courts should not rely on financial condition when determining whether to impose cash bail but once a “court decides to impose monetary conditions of release, equity requires the court to consider the defendant’s wealth and ability to satisfy those monetary conditions of release”) (attached as Exhibit A).

⁵⁵ *Id.*

only help an indigent and was designed to benefit them.⁵⁶ The rule sets out a framework that aids the indigent and ensures an even application of pretrial detention across both the indigent and the affluent. Because indigency thus has no bearing on pretrial incarceration, this court should reject Burroughs' framing of the class.

Assessing a similar Equal Protection claim, the Tenth Circuit rejected a plaintiff's framing and reframed the class consistent with the alleged harm. In *Vasquez v. Cooper*, Vasquez challenged the denial of credit time for time spent incarcerated pre-sentence.⁵⁷ Vasquez framed his argument as an Equal Protection challenged based on indigency, claiming that due to his poverty he was denied a benefit that wealthy individuals could obtain.⁵⁸ Namely, wealthier individuals could have posted bail and obtained more favorable credit time allocation while an indigent person such as himself was denied that benefit.⁵⁹ The court rejected Vasquez's framing of his class as one based on indigency and explained as follows:

⁵⁶ *Commentary to Interim Rule 5.2* at 35 (“In particular the Act was intended to prevent defendants from being subjected to excessive financial conditions of release, traditionally referred to as money bail. By this means, the Act sought to reduce the unnecessary pretrial incarceration of defendants who are not wealthy enough to pay money bail, as well as reduce the resulting loss in employment, the pressure to plead guilty, the economic toll on non-affluent defendants and their families....”).

⁵⁷ *Vasquez v. Cooper*, 862 F.2d 250, 251 (10th Cir. 1988).

⁵⁸ *Id.* at 251-52.

⁵⁹ *Id.*

As a theoretical matter, one need not be indigent to be unable to post bail. The judge setting bail considers each defendant individually to determine the level of bail deemed necessary to satisfy the state's regulatory interest in ensuring a defendant's presence at trial. A person could have considerable assets, and yet be unable to post the level of bail that a judge has determined necessary to prevent flight... The proper definition of the affected class in this case is persons who were subject to pretrial confinement because they could not post bail, and who were denied credit against their sentence for such pretrial confinement. Vasquez has not shown that as a member of this class he was denied credit and thereby served a longer sentence solely due to indigence, because nonindigents subject to pretrial are theoretically also members of this class.⁶⁰

The reasoning of *Vasquez* applies here. Burroughs is unable to post bail, not because he is indigent, but because the court after particularized consideration of him, his case, and his background, including his financial resources, set bail at \$110,501 secured by cash. Having bail set in an amount one cannot pay is borne by the indigent and non-indigent alike. Individuals who are unable to post bail do not comprise a suspect class, and rational basis therefore applies.

Even if Burroughs' framing of the class were accurate, his claim is still not subject to strict scrutiny. Burroughs argues a line of cases ending with *Bearden v. Georgia*⁶¹ established a rule requiring strict scrutiny in wealth-based discrimination when liberty is at stake. This argument fails because the great weight of case law applies rational basis review to wealth-based discrimination in the bail context.

⁶⁰ *Id.* at 252.

⁶¹ 461 U.S. 660 (1983).

The United States Supreme Court has repeatedly held that wealth-based classifications do not involve a suspect class and thus require only a rational basis review. For example, in analyzing whether Social Security's failure to pay for nontherapeutic abortions violated Equal Protection, the court unequivocally rejected the argument that indigency created a suspect class:

An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.⁶²

And when the Court has had occasion to reassess whether indigency creates a suspect class, it has affirmed that wealth-based classifications are not suspect and thus not subject to heightened scrutiny. It did so in *Harris v. McRae* when assessing the Hyde Amendment: "Here, as in *Maher*, the principal impact of the Hyde Amendment falls on the indigent. But that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone is not a suspect classification."⁶³ Supreme Court jurisprudence is replete with examples.⁶⁴

⁶² *Maher*, 432 U.S. at 470-71 (citing cases).

⁶³ *Harris v. McRae*, 448 U.S. 297, 323 (1980).

⁶⁴ See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458-59 (1988). (rejecting application of strict scrutiny to Equal Protection challenge imposing

The Supreme Court has applied the general view that disparities based on wealth do not create a suspect class to challenges involving bail. In *McGinnis v. Royster*, plaintiffs challenged a New York statute on Equal Protection grounds because it effected differences between those who could post bail and those who could not post bail.⁶⁵ Specifically, plaintiffs argued that the New York statute governing the calculation of sentences included time spent incarcerated pretrial but did not allow for the accumulation of good time for that time.⁶⁶ The consequence was that defendants unable to afford bail were incarcerated for longer periods of time than those who posted bail.⁶⁷ The Supreme Court rejected the request to apply strict scrutiny despite the disparate impact imposed on the indigent for this inability to pay bail under this framework, and found it satisfied rational basis.⁶⁸

Here, Burroughs asserts a classification based on wealth. The great weight of Supreme Court precedent holds distinctions based on monetary wealth or lack thereof do not create a suspect class and do not trigger heightened scrutiny, including in the bail context. Consistent with this extensive and longstanding

disparate impact on the indignant in connection with busing fees); *Lewis v. Casey*, 518 U.S. 343, 373-74 (1996) (“After *Rodriguez*, it was clear that wealth discrimination alone [does not] provid[e] an adequate basis for imposing strict scrutiny.”) (additions in original; quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973)).

⁶⁵ *McGinnis v. Royster*, 410 U.S. 263, 265-66 (1972).

⁶⁶ *Id.* at 266-68.

⁶⁷ *Id.*

⁶⁸ *Id.* at 275-76

precedent, Burroughs is not a member of a suspect class and rational basis is the applicable standard to assess his Equal Protection challenge.

Burroughs recognizes that the weight of Supreme Court case law stands against the position he advocates.⁶⁹ Nonetheless, Burroughs seeks application of strict scrutiny based on a line of cases beginning with *Griffin v. Illinois*⁷⁰ and culminating in *Bearden v. Georgia*.⁷¹ Burroughs acknowledges that the Supreme Court has never applied this *Bearden* rule in the pretrial context.⁷² Burroughs attempts to divine from *Bearden* and its related cases the broad proposition that strict scrutiny applies whenever a state conditions liberty on a monetary payment. Burroughs' argument in support of this rule is found in parenthetical citations in footnotes.⁷³ These parentheticals quote or summarize the cases without context. An actual review of those cases demonstrates that the cases within the *Bearden* line, and *Bearden* itself, do not support Burroughs' broad pronouncements regarding when a state can condition a person's liberty on a monetary payment.⁷⁴

⁶⁹ Op. Brf. at 24.

⁷⁰ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁷¹ *Bearden v. Georgia*, 461 U.S. 660 (1983).

⁷² Op. Brf. at 25.

⁷³ Op. Brf. at 24-25 nn.37-39.

⁷⁴ The cases Burroughs cites in support of his *Bearden* argument are: *Williams v. Illinois*, 399 U.S. 235, 241 (1970) (holding the Constitution does not permit an indigent to be imprisoned longer than the statutory maximum for failure to pay a fine, with no reference to strict or heightened scrutiny); *Bearden*, 461 U.S. at 667 (holding the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot

Likewise, none of the cases applied strict scrutiny, and *Bearden* itself expressly rejected the Strict Scrutiny and Rational Basis dichotomy.⁷⁵ Further distinguishing the *Bearden* line of cases is that the fact that all deal with post-conviction issues, rendering those cases further removed from the case at hand. In sum, the *Bearden* line of cases does not bear the weight Burroughs places upon it.

The Superior Court Correctly Applied Rational Basis Review

Burroughs claims that even if rational basis review is the appropriate standard, the Superior Court erred in its application. He contends the Superior Court failed to consider “the undisputed harms that result from unaffordable money bail.”⁷⁶ Burroughs’ claim is unavailing.

Under a rational basis standard of review, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”⁷⁷ “In determining whether a statutory classification, not involving a suspect class or fundamental right, violates the equal

forthwith pay the fine in full,” and declining to analyze the claim under strict scrutiny); *Griffin*, 351 U.S. at 15-16 (holding a state could not deny an appeal to the indigent because of an inability to pay for a transcript when other individuals had the ability to pay for these transcripts, without reference to the level of scrutiny); *Douglas v. California*, 372 U.S. 353, 355 (1963) (holding the denial of appellate counsel to an indigent individual effectively denied the individual an appeal while providing an appeal to an individual who could afford counsel, with no reference to the level of scrutiny applied to the claim).

⁷⁵ See *Bearden*, 461 U.S. at 666-67.

⁷⁶ Op. Brf. at 27.

⁷⁷ *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

protection [or due process] clause, [this Court] presume[s] that the distinctions so created are valid. ‘A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it.’”⁷⁸

Burroughs couches his argument in terms of “undisputed harms,” and concludes that money bail violates the Equal Protection clause.⁷⁹ However, the analysis conducted by a court performing a rational basis review posits the question of whether the law is rationally related to a legitimate state interest. Such was the case here. The Superior Court determined that Delaware’s bail statute meets the rational basis standard:

Delaware’s bail statute, as applied to Defendant, is rationally related to ensuring public safety, which is not only a *valid* state purpose, but a compelling one. Removing an ease of release by imposing a high monetary bail rationally relates to protecting the public from violent offenders.⁸⁰

As the Superior Court Commissioner noted in the court’s Order, “the General Assembly recognized the State’s compelling interest in protecting the public, setting sufficient bail for defendants committing signal offenses, and addressing the significant concern that violent offenders receive insufficient bail.”⁸¹ The

⁷⁸ *Marine v. State*, 607 A.2d 1185, 1207 (Del. 1992) (quoting *Traylor v. State*, 458 A.2d 1170, 1177 (1983)).

⁷⁹ While Burroughs argues that the court misapplied the rational basis standard, he fails to engage in the analysis to reach his sweeping conclusion.

⁸⁰ *Burroughs*, 2022 WL 1115769, at *6 ((citations omitted)).

⁸¹ Exhibit B to Op. Brf. at 32-33.

Superior Court correctly concluded that money bail is rationally related to the State's interest in public safety.

IV. THE SUPERIOR COURT DID NOT VIOLATE THE SUFFICIENT SURETIES CLAUSE BY SETTING BAIL IN ACCORDANCE WITH DELAWARE’S BAIL STATUTE AND THE COURT’S ADMINISTRATIVE CRITERIA.

Question(s) Presented

Whether the Superior Court violated the Sufficient Sureties clause of the Delaware Constitution when it set bail using statutorily mandated and administrative criteria?

Standard and Scope of Review

This Court reviews alleged constitutional violations *de novo*.⁸²

Merits of the Argument

Burroughs claims the Superior Court violated the Sufficient Sureties clause when it set his bail. Having previously conceded that the Sufficient Sureties clause can be satisfied even when the amount of bail “happens to be an unaffordable amount,”⁸³ Burroughs now claims, with no record support, that the Superior Court “*deliberately*”⁸⁴ set his bail in an unaffordable amount, thus violating the Sufficient Sureties Clause. In advancing his claim, Burroughs misrepresents the State’s position and misapprehends the Superior Court judge’s decision. In any event, Burroughs’ claim is meritless.

Article I section 12 of the Delaware Constitution states:

⁸² *Dahl*, 926 A.2d at 1081.

⁸³ Petition for a Writ of Prohibition at 6-7.

⁸⁴ Op. Brf. at 30.

All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great; and when persons are confined on accusation for such offenses their friends and counsel may at proper seasons have access to them.⁸⁵

The preceding constitutional provision is implemented by trial courts through Delaware's bail statutes found in Chapter 21 of Title 11. The purpose of Delaware's bail law can be found in section 2101, which states, in part:

The various courts of this State are empowered and encouraged to make individualized decisions about terms and conditions of pretrial release. Each court shall utilize a system of pretrial release imposing reasonable nonmonetary conditions of release when those conditions adequately provide a reasonable assurance of the appearance of the defendant at court proceedings, the protection of the community, victims, witnesses and any other person, and to maintain the integrity of the judicial process.⁸⁶

Sections 2101, 2104, 2105, and 2107 clearly set forth the framework for imposition of monetary and nonmonetary conditions. Section 2107 specifically addresses determining the amount of bail:

(a) In determining the amount of bail to be required to be posted as surety under § 2105 of this title or to be required for a conditions of release bond not guaranteed by financial terms, the court shall not require oppressive bail but shall require such bail as reasonably will assure the reappearance of the defendant, compliance with the conditions set forth in the bond, and the safety of the community. In fixing the amount, the court shall also take into consideration the criteria set forth in § 2105(b) of this title.⁸⁷

⁸⁵ Delaware Constitution, Art. I, § 12.

⁸⁶ 11 *Del. C.* § 2101.

⁸⁷ 11 *Del. C.* § 2107(a).

When determining the amount of bail, the court considers the criteria set forth in section 2105, which states, in part:

(b) In determining whether the defendant is likely to appear as required and that there will be no substantial risk to the safety of the community the court shall, on the basis of available information, take into consideration the nature and circumstances of the crime charged, whether a firearm was used or possessed, the possibility of statutory mandatory imprisonment, whether the crime was committed against a victim with intent to hinder prosecution, the family ties of the defendant, the defendant's employment, financial resources, character and mental condition, the length of residence in the community, record of convictions, habitual offender eligibility, custody status at time of offense, history of amenability to lesser sanctions, history of breach of release, record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.⁸⁸

Additionally, at the time the court set Burroughs' bail, Superior Court Interim Criminal Rule 5.2 (Interim Rule 5.2) was in place and provided guidance for setting bail. As the Superior Court explained:

Rule 5.2 allowed offenders to be released without monetary conditions. Exceptions, however, exist. For example, an offender should not be released without monetary conditions if the individual is a risk to public safety. Certain identified "signal offenses" recognize potential risk to public safety. If a defendant is charged with a signal offense, a court may exercise its discretion, after consideration of the entire record, and require conditions of release bond necessary to reasonably assure protection of public safety.⁸⁹

⁸⁸ 11 *Del. C.* § 2105(b).

⁸⁹ *Burroughs*, 2022 WL 1115769, at *3.

In Burroughs case, the court considered his Sufficient Sureties argument and concluded:

In Delaware, monetary bail should be set at an amount that considers risk of flight and ensures public safety. If the State admitted its only interest for setting bail was in preventing Defendant's flight, the bail would need to be set at a sum designed to ensure that goal, and no more. But here, the Court properly was concerned with the public's safety if Defendant were to be released. To reiterate, Defendant, was classified as a "Person Prohibited" from possessing a firearm, and the State nevertheless presented evidence he carried one on his person when arrested. The bail imposed fell within the SENTAC guidelines and met the requirements of Delaware's constitutional bail statute.⁹⁰

The court also noted that Burroughs had been charged with a signal offense, which required special consideration under Interim Rule 5.2.⁹¹

Burroughs' contention that the Superior Court "deliberately" or "intentionally" set bail in an amount he could not afford simply to keep him incarcerated is without merit or support in the record. The court considered his request for nonmonetary conditions and, contrary to Burroughs' assertion, assessed it against some of the statutory criteria listed in the Chapter 21 statutes. The court ultimately determined that nonmonetary conditions were not appropriate when weighed against several of the criteria meant to assure the safety of the public.

The Superior Court did not violate Article I, section 12 of the Delaware Constitution. The court properly considered Burroughs' bail motion, held a

⁹⁰ *Burroughs*, 2022 WL 1115769, at *8 (citation omitted).

⁹¹ *Id.*

hearing, and, citing to record evidence, declined to grant him nonmonetary bail -
applying the criteria set forth in Chapter 21.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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DATE: August 29, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRESE BURROUGHS,)
)
 Defendant – Below,)
 Appellant,)
)
 v.) No. 144, 2022
)
 STATE OF DELAWARE,)
)
 Plaintiff – Below,)
 Appellee.)

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.
2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 7,681 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: August 29, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE IMPLEMENTATION OF §
THE BAIL REFORM ACT §

ORDER

This 13th day of December 2018, it appears to the Court that:

WHEREAS, the General Assembly enacted legislation in 2018 to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”);

WHEREAS, as codified in Chapter 21, Title 11 of the Delaware Code, the Bail Reform Act encourages the use of non-monetary conditions of release when those conditions reasonably assure the defendant’s appearance at court proceedings, public safety, and the integrity of the judicial process;

WHEREAS, the Bail Reform Act was intended to prevent defendants from being subjected to excessive financial conditions of release, traditionally referred to as money bail;

WHEREAS, the Bail Reform Act seeks 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 on non-affluent defendants and their families, and other substantial harm that results from the excessive use of money bail;

WHEREAS, the Bail Reform Act reflects that the risk that the defendant will fail to appear is different from the threat that a defendant will commit harm if released pending trial;

WHEREAS, the Bail Reform Act takes effect on January 1, 2019, requiring the Judiciary to put in place an implementing rule by January 1, 2019 for an important systemic reform;

WHEREAS, the Bail Reform Act requires the development of information to enable monitoring of the success of pretrial reform and the pretrial assessment instrument, and the refinement of approaches to implementation to improve the efficiency and equity of both the process to implement the Bail Reform Act and the outcomes generated by the Bail Reform Act;

WHEREAS, the implementing rule is therefore deemed an interim one that will be subject to revision and improvement based on experience using it, the data developed in conformity with it, and feedback from constituents and judges who will work with it;

WHEREAS, the Bail Reform Act directs that its implementation and the procedure for pretrial release shall be as provided by the Rules of the Superior Court, but the procedure for pretrial release must apply across multiple courts, specifically the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, this Court and the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court agree that the unique, cross-court nature of the procedure for pretrial release means that the Interim Special Rule of Criminal Procedure for Pretrial Release, attached as Exhibit A, should be adopted by the Supreme Court to establish the procedure for pretrial release in the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court.

NOW THEREFORE, IT IS ORDERED THAT:

1. Interim Special Rule of Criminal Procedure for Pretrial Release is adopted to implement the provisions of the Bail Reform Act and to establish the procedure for pretrial release.
2. Beginning January 1, 2019, the Superior Court, as set forth in Exhibit B, the Family Court, as set forth in Exhibit C, the Court of Common Pleas, as set forth in Exhibit D, and the Justice of the Peace Court, as set forth in Exhibit E, shall follow Interim Special Rule of Criminal Procedure for Pretrial Release. As the Interim Rule is applied and refined, these courts shall amend their rules as necessary.

3. The Clerk of the Court is directed to transmit forthwith a certified copy of this Order to the clerk of each trial court in each county.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'L. S. W.', written over a horizontal line.

Chief Justice

Exhibit A

Interim Special Rule of Criminal Procedure for Pretrial Release

Interim Rule 5.2. Pretrial Release.

(a) *Definitions.*

For the purposes of this rule the following definitions apply:

(1) “Bail Reform Act” or “Act” means House Bill No. 204 as Amended by House Amendment No. 1 in the 149th General Assembly, entitled an “Act to Amend Title 11 of the Delaware Code Relating to Release of Persons Accused of Crimes.”

11 *Del. C.* § 2101 et seq.

(2) “Conditions of release bond” means a commitment by the defendant promising appearance in court and compliance with all conditions ordered by the court and mandated by statute. A conditions of release bond may or may not have financial terms holding the defendant liable for the full amount of the bond if the defendant violates the conditions of release.

(A) “Fully secured conditions of release bond” means a conditions of release bond guaranteed by a pledge of cash or its equivalent (*i.e.*, a cashier’s check, a certified bank check, or a money order) in the full amount of the bond as security.

(B) “Secured conditions of release bond” means a conditions of release bond guaranteed by a surety or pledge of property, cash or its equivalent, or other assets, where the value of the assets pledged may be equal to or less than the amount of the bond (*i.e.*, fully secured or partially secured).

(C) “Unsecured conditions of release bond” means a conditions of release bond that is not guaranteed by any surety or specific pledge of cash or its equivalent.

(3) “Conditions of release” means the requirements that the court determines a defendant must satisfy to be eligible for release pending trial.

(4) “Covered factor” means any of the following factors, which have been incorporated in and given weight by the pretrial assessment or this rule:

(A) the nature and circumstances of the crime charged;

(B) whether a firearm was used or possessed:

(C) the possibility of statutory mandatory imprisonment;

(D) the defendant's record of convictions;

(E) the defendant's history of amenability to lesser sanctions;

(F) the defendant's history of breach of release; and

(G) the defendant's record of appearances at court proceedings or of flight to

avoid prosecution or failure to appear at court proceedings.

(4) "Domestic violence assessment" means the empirically developed lethality assessment instrument required by section 2104(e)(1) of the Bail Reform Act, known as the Domestic Violence Lethality Screen for First Responders, and which shall be used by the court, when available, to assess the likelihood or predicted severity of future violence against the alleged victim.

(5) “Excluded factor” means any of the following factors, which were excluded from the pretrial assessment because they were found to lack a sufficiently strong correlation with the defendant’s risk of pretrial failure:

(A) the defendant’s employment;

(B) the defendant’s custody status at the time of the offense; and

(C) the defendant’s length of residence in the community.

(6) “Factor-specific special findings” mean special findings:

(A) that, in a case where the court gives additional weight to a covered factor, there is a compelling reason indicating that the pretrial assessment, domestic violence assessment, and this rule do not adequately account for the factor;

(B) that the court is not giving weight to any excluded factor;

(C) that, in a case where the court gives weight to a suspect factor or any other factor not included in the pretrial assessment, the domestic violence assessment, or this rule, the court believes that consideration of the factor will improve the

decision's reliability without creating disparities based on defendants' race, gender, or wealth;

(D) that, in a case where the court gives weight to the defendant's mental condition, the defendant:

(i) has objectively documented mental health issues relevant to the defendant's risk to public safety; or

(ii) currently exhibits mental health or substance abuse issues relevant to the defendant's risk to public safety, provided that, in the case of a defendant who is unable to knowingly and intelligently participate in presentment proceedings because of incapacitation as a result of the consumption of alcohol or the use of drugs, the court shall follow the procedures and standards contained in 11 *Del. C.* § 1909; and

(E) that explain why, under the circumstances presented, it is necessary and appropriate to give weight to the factor even though the pretrial assessment score is

based on factors demonstrated to be correlated with pretrial failure based on empirical evidence.

(7) “Initial recommended response” means the recommended conditions of release indicated by:

(A) the defendant’s pretrial assessment score, as described in subsection (b)(1);

(B) the domestic violence assessment, as described in subsection (b)(2); or

(C) subsection (h)(2) of this rule.

(8) “Obstruct justice” means commit an offense under 11 *Del. C.* §§ 1261–1269 or otherwise interfere with the integrity of the judicial proceedings.

(9) “Pretrial assessment” means the empirically developed pretrial assessment instrument required by section 2104(e)(1) of the Bail Reform Act that shall be implemented by the Delaware Criminal Justice Information System in January 2019 as the Delaware Pretrial Assessment Tool (“DELPAT”), as amended

from time to time, and used by the court to assess the defendant's risk of failing to appear at court proceedings or incurring a new criminal arrest before trial.

(10) "Pretrial assessment score" means the score produced by the pretrial assessment.

(11) "Pretrial Services" means the Pretrial Services unit of the Bureau of Community Corrections of the Department of Correction.

(12) "Public safety" means the protection of the community, alleged victims, witnesses, or any other persons.

(13) "Referral protocol" means the initiation of the protocol, based on the alleged victim's answers to the domestic violence assessment, to inform the alleged victim of the high danger assessment and offer the alleged victim the opportunity to be screened by a hotline counselor for assistance.

(14) "SENTAC" means the Delaware Sentencing Accountability Commission.

(15) “Special findings” means specific findings of fact and conclusions of law made by the court that:

(A) state that the court is making these findings in response to a special showing by the State that explicitly requests more intensive conditions of release than the initial recommended response, and is not making the findings *sua sponte*;

(B) explain why the more intensive conditions of release requested by the State are the least restrictive conditions of release necessary to address the specific risk of pretrial failure at issue;

(C) reference the affidavit filed by the State documenting the factual basis for the State’s request for more intensive conditions of release; and

(D) satisfy any subject-specific requirements of this rule.

(16) “Special showing” means a submission to the court by the State that:

(A) explicitly requests more intensive conditions of release than the initial recommended response;

(B) explains why the more intensive conditions of release requested by the State are the least restrictive conditions of release necessary to address the specific risk of pretrial failure at issue;

(C) includes an affidavit documenting the factual basis for the State's request for more intensive conditions of release; and

(D) satisfies any subject-specific requirements of this rule.

(17) "Standard conditions of release used by Pretrial Services" means:

(A) the mandatory conditions of release required by subsection (d) of this rule;

(B) a requirement that the defendant report to his or her supervising officer at such times and places as directed, and permit the officer to visit the defendant's home and place of employment;

(C) a requirement that the defendant report any new arrest, conviction, or police contact within 72 hours to his or her supervising officer;

(D) a requirement that the defendant report any change in residence or employment within 72 hours to his or her supervising officer; and

(E) a requirement that the defendant obtain authorization from his or her supervising officer to leave the State of Delaware or the defendant's approved state of residence.

(18) "State" means the Attorney General, the Attorney General's designee, or a peace officer under 11 *Del. C.* § 1901.

(19) "Suspect factor" means any of the following factors, which have been found to pose a risk of racial, gender, or wealth bias:

(A) the defendant's family ties;

(B) the defendant's financial resources; and

(C) the defendant's character and mental condition.

(b) *Initial recommend response indicated by pretrial assessment and domestic violence assessment.*

(1) *Pretrial assessment.* In setting the defendant's conditions of release, the court shall use the pretrial assessment. The initial recommended response indicated by the pretrial assessment is determined by the pretrial assessment matrix in Schedule 5.2A to this rule.

(A) If the color of the box in the pretrial assessment matrix is green, the initial recommended response is to release the defendant on his or her own recognizance, subject to a conditions of release bond consisting of only the two mandatory conditions of release set forth in subsection (d) and, if applicable, a requirement that the defendant make no contact with the alleged victim.

(B) If the color of the box in the pretrial assessment matrix is blue, the initial recommended response is to release the defendant subject to an unsecured conditions of release bond, the mandatory conditions set forth in subsection (d), and any other

conditions of release necessary to reasonably assure the defendant's appearance at court proceedings and public safety.

(C) If the color of the box in the pretrial assessment matrix is orange, the initial recommended response is to release the defendant subject to an unsecured conditions of release bond, the mandatory conditions set forth in subsection (d), any other conditions of release necessary to reasonably assure the defendant's appearance at court proceedings and public safety, and a requirement that the defendant report to and comply with the conditions of release determined appropriate by Pretrial Services.

(2) *Domestic violence.* If the domestic violence assessment is available to the court and the referral protocol is triggered, the initial recommended response is to release the defendant subject to a secured conditions of release bond, with a fully secured conditions of release bond being the preferred response, the mandatory

conditions set forth in subsection (d), and any other conditions of release necessary to reasonably assure public safety.

(c) *Right to pretrial release upon execution of conditions of release bond.*

Any defendant eligible for pretrial release under 11 *Del. C.* § 2103 shall be released pending trial upon execution of one of the following:

- (1) a conditions of release bond;
- (2) an unsecured conditions of release bond;
- (3) a secured conditions of release bond; or
- (4) a fully secured conditions of release bond.

(d) *Mandatory conditions of release.*

For every defendant whom the court grants pretrial release, the court's order setting the conditions of release shall:

- (1) require the defendant to return to the court at any time upon notice and submit to the orders and processes of the court;

(2) prohibit the defendant from committing any new criminal offense pending trial; and

(3) if the defendant is charged with any crime involving child sexual abuse or exploitation or a violation of 21 *Del. C.* § 4177 that is alleged to be punishable as a felony pursuant to that section, the conditions of release required by 11 *Del. C.* § 2108(b) or (c).

(e) Discretionary conditions of release.

Except as required by subsection (d), conditions of release are not mandatory and may be required only after an exercise of judicial discretion consistent with the Bail Reform Act and this rule.

(f) Presumption that the initial recommended response determines the discretionary conditions of release.

In setting any discretionary conditions of release, the court shall presumptively adhere to the initial recommended response generated by the pretrial

assessment, the domestic violence assessment, and subsection (h)(2) of this rule, and give substantial weight to that response.

(g) *Conditions of release for risk of failure to appear.*

(1) *In general.* In requiring any discretionary conditions of release based on the risk that the defendant will fail to appear at court proceedings, the court shall recognize that the risk that the defendant will not appear at trial is different from the threat that a defendant will commit harm if released pending trial. In particular, in addressing the risk of non-appearance, the court shall consider the more intensive notification measures now in use. Any doubt as to the need for discretionary conditions of release to address the risk of non-appearance shall be resolved against the imposition of a secured conditions of release bond.

(2) *Requirements for imposing more intensive conditions of release than initial recommended response.* The court shall not require more intensive conditions

of release than the initial recommended response based on the risk that the defendant will fail to appear at court proceedings unless:

(A) the State makes a special showing supporting its conclusion that the defendant poses a demonstrated and specific risk of flight in the current case; and

(B) the court makes special findings supporting its conclusion that the defendant poses a demonstrated and specific risk of flight in the current case, which shall include any applicable factor-specific special findings.

(h) *Conditions of release for risk to public safety.*

(1) *In general.* In requiring any discretionary conditions of release based on the defendant's risk to public safety, the court shall consider that the most serious threats to be addressed by conditions of release are when the defendant poses a risk of harm to the general public or a specific person.

(2) *Specific risks to public safety.*

(A) *Domestic violence.* In cases involving suspected domestic violence where the referral protocol is triggered, the domestic violence assessment provides for the initial recommended response to be a secured or fully secured conditions of release bond, as described in subsection (b)(2) of this rule.

(B) *Signal offenses.* If the defendant is charged with one of the signal offenses set forth in Schedule 5.2B, the initial recommended response shall be in the court's discretion, based on the entire record, including the defendant's pretrial assessment score and the results of the domestic violence assessment, if available. The court may require any type of conditions of release bond that is necessary to reasonably assure public safety, including a secured conditions of release bond. In determining the amount of any unsecured or secured conditions of release bond, the court shall, consistent with the current SENTAC bail guidelines, set an amount that is substantial enough to sufficiently: (i) deter the defendant from harming the public or a specific

person; or (ii) ensure that the surety will supervise the defendant intensely enough to reasonably assure public safety. The court may also require any other conditions of release necessary to reasonably assure public safety.

(C) *Risk to public safety from recidivist impaired drivers.* In cases where the defendant has been charged with violating 21 *Del. C.* § 4177(d)(3)–(7), the court shall consider the frequency and recency of past convictions for violating 21 *Del. C.* § 4177. Based upon these considerations, the initial recommended response shall be to release the defendant subject to either:

(i) an unsecured conditions of release bond and non-monetary conditions of release, for which the defendant or a surety on the defendant's behalf shall be financially responsible, that are sufficient to protect the public from the severe harm that could result if the defendant again violates 21 *Del. C.* § 4177 before trial, and taking into account the availability of the devices or measures, such as a requirement that the defendant:

(I) wear a monitor that records whether the defendant has consumed alcohol;

(II) install an ignition interlock system on his or her vehicle; or

(III) comply with any other conditions of release tailored to address the specific risk that the defendant will recidivate before trial; or

(ii) where the defendant is not willing to take financial responsibility for the cost of the conditions of release required by the court under clause (i), a secured conditions of release bond, under the standard set forth in subparagraph (B) of this paragraph.

(3) *Requirements for imposing more intensive conditions of release than initial recommended response.* The court shall not require more intensive conditions of release than the initial recommended response based on the defendant's risk to public safety unless:

(A) the State makes a special showing supporting its conclusion that releasing the defendant with less intensive conditions of release would pose a substantial danger to public safety; and

(B) the court makes special findings supporting its conclusion that releasing the defendant with less intensive conditions of release would pose a substantial danger to public safety, which shall include any applicable factor-specific special findings.

(i) Conditions of release for risk of obstruction of justice.

(1) *In general.* In requiring any discretionary conditions of release based on the risk that the defendant will obstruct justice, the court shall consider the possibility that the defendant will undermine the rule of law by intimidating witnesses or taking other steps that obstruct justice and the ability of the judicial system to hold a fair trial.

(2) *Requirements for imposing more intensive conditions of release than initial recommended response.* The court shall not require more intensive conditions of release than the initial recommended response based on the risk that the defendant will obstruct justice unless:

(A) the State makes a special showing supporting its conclusion that the defendant has in the current case threatened to, attempted to, or already obstructed justice; and

(B) the court makes special findings supporting its conclusion that the defendant has in the current case threatened to, attempted to, or already obstructed justice.

(3) *Recommended conditions of release.* If the court determines that more intensive conditions of release are necessary under paragraph (1), the court shall presumptively release the defendant subject to a secured conditions of release bond, with a fully secured conditions of release bond being the preferred response. In

determining the amount of the bond, the court shall, consistent with the current SENTAC bail guidelines, set an amount that is substantial enough to sufficiently: (i) deter the defendant from obstructing justice; or (ii) ensure that the surety will supervise the defendant intensely enough to reasonably assure that the defendant does not obstruct justice. The court may also require any other conditions of release necessary to reasonably assure that the defendant does not obstruct justice.

(j) Downward departures from the initial recommended response.

Notwithstanding the presumption set forth in subsection (f), the court may require less intensive conditions of release than the initial recommended response if the court finds that less intensive conditions would be adequate to reasonably assure the defendant's appearance at court proceedings, public safety, and that the defendant does not obstruct justice.

(k) *Limitations on release subject to supervision by Pretrial Services.*

(1) *In general.* Consistent with the risk that overuse of supervision by Pretrial Services may cause many of the same harms as the overuse of money bail, and consistent with the presumption of innocence guaranteed by the United States and Delaware Constitutions, the court shall not treat release to supervision by Pretrial Services in the same manner as a post-conviction sentence involving probation and parole, or the conditions required in connection with participation in a diversion program.

(2) *Use of standard conditions of release or consultation with Department of Correction required.* Notwithstanding any other provision in this rule, the court shall not require the defendant to report to Pretrial Services for supervision unless it (i) subjects the defendant to the standard conditions of release used by the Department of Correction; or (ii) if possible, first consults with the Department of Correction.

(3) *Limitations to scope of supervision; tailoring of supervision to address specific risk posed.* Consistent with the distinction between pretrial conditions of release and post-conviction sentences involving probation and parole, the court shall not require conditions of release that involve alcohol or drug testing, monitored curfews, or electronic monitoring (whether through Global Positioning System or home confinement), unless:

(A) the Department of Correction recommends those conditions of release; or

(B) the court finds, by clear and convincing evidence, that the conditions of release are necessary to reasonably assure public safety and are tailored to the specific risk posed by the defendant's release, and the court reports its findings under this subparagraph in accordance with subsection (m)(1).

(l) Consideration of the defendant's financial circumstances when requiring an unsecured, secured, or fully secured conditions of release bond.

If the court requires the defendant to execute an unsecured, secured, or fully secured conditions of release bond, the court shall, when setting the amount of the bond and provided that reliable evidence exists, consider the defendant's financial circumstances, including the defendant's ability to furnish the security or money necessary to guarantee the bond by a surety or pledge of property, cash or its equivalent, or other assets. To that end, the court shall give to the defendant a standard form to use to provide that information.

(m) Reporting requirements.

(1) Special findings required to be docketed as an order and sent to presiding judge and Chief Justice. Whenever required by this rule to make special findings, the court shall docket its decision in writing as an order of the court and send a copy of that order to the court's presiding judge. The presiding judge of each court shall,

on a monthly basis, compile the relevant court orders. Solely for purposes of economy and efficient data collection, the presiding judge shall send these orders to the Chief Justice with the court's 30, 60, or 90-day report, depending on the given court's approved practice, in accordance with the Policy on Judicial Reporting on Matters Under Advisement.

(2) *Statistical reporting requirements.* Upon setting the defendant's conditions of release under this rule, the court shall record its decision by selecting at least one judicial response code in the Delaware Criminal Justice Information System.

(n) *Special circumstances under which the court may require more intensive conditions of release on its own initiative.*

Notwithstanding any requirement in this rule that the State make a special showing, the court may require more intensive conditions of release than the initial

recommended response on its own initiative without a special showing by the State

if the court:

(1) makes special findings, including any applicable factor-specific special findings, in accordance with subsection (g)(2)(B), (h)(3)(B), or (i)(2)(B) of this rule;

(2) makes findings of fact on the record supporting its conclusion that requiring more intensive conditions of release without a special showing by the State is necessary to address the specific risk of pretrial failure at issue;

(3) reports its findings under paragraphs (1) and (2) in accordance with subsection (m)(1); and

(4) upon request by the defendant, holds a hearing in accordance with Rule 5.3 at which the defendant and the State can address the court's basis for requiring more intensive conditions of release and the court's use of any covered or suspect factor.

Schedule 5.2A. Pretrial assessment matrix.

DELPAT Scoring Response Matrix

Percentages = pretrial failure rates in each category (2015 data)		DELPAT NCA Score										
		0 10.7%	1 15.3%	2 17.9%	3 19.3%	4 25.5%	5 30.0%	6 33.7%	7 41.0%	8 43.2%	9 45.7%	
DELPAT FTA Score	0 13.1%											
	1 16.6%											
	2 21.4%	-										
	3 27.0%	-										
	4 33.9%	-										
	5 36.0%	-										
	6 39.7%	-	-	-								

Green = release without conditions (standard conditions apply - no criminal activity and return for all court dates)

Blue = release on self-monitored conditions

Orange = release to supervision of Pretrial Services

Schedule 5.2B. Signal Offenses.

A signal offense shall include any of the following offenses:

(1) Any Title 11 Class A felony.

(2) One of the following Title 11 Class B felonies:

§ 606: Abuse of a Pregnant Female in the First Degree.

§ 613: Assault in the First Degree.

§ 632: Manslaughter.

§ 633: Murder of a Child by Abuse or Neglect in the Second Degree.

§ 771(a)(2): Rape in the Third Degree.

§ 772: Rape in the Second Degree.

§ 777A(e)(2) or (e)(4): Sex Offender Unlawful Sexual Conduct
Against a Child.

§ 778(2): Sexual Abuse of a Child by a Person in a Position of Trust,

Authority, or Supervision in the First Degree.

§ 783A: Kidnapping in the First Degree.

§ 787(b)(1): Trafficking an Individual (Victim is a Minor).

§ 787(b)(2): Forced Labor (Victim is a Minor).

§ 787(b)(3): Sexual Servitude (Victim is a Minor).

§ 826(a)(2): Burglary in the First Degree, provided that the victim who

suffers physical injury is 62 years of age or older.

§ 826A: Home Invasion.

§ 832: Robbery in the First Degree.

§ 836(a)(4) through (a)(6): Carjacking in the First Degree.

§ 1103B: Child Abuse in the First Degree.

§ 1108: Sexual Exploitation of a Child.

§ 1109: Unlawful Dealing in Child Pornography, provided that the defendant is eligible for sentencing under § 1110.

§ 1112A(h): Sexual Solicitation of a Child.

§ 1112B(g): Promoting Sexual Solicitation of a Child.

§ 1253: Escape After Conviction (Infliction of Injury Upon Another Person).

§ 1254(b): Assault in a Detention Facility (Causing Serious Injury).

§ 1304(b)(3): Hate Crimes, provided that the underlying offense alleges a Class C felony.

§ 1304(b)(4): Hate Crimes, provided that the underlying offense alleges a Class B felony under.

§ 1447: Possession of a Deadly Weapon During Commission of a Felony.

§ 1447A: Possession of a Firearm During Commission of a Felony.

§ 1503: Racketeering.

§ 3533: Aggravated Act of Intimidation.

(3) Possession of a Firearm by Persons Prohibited under the following circumstances:

11 *Del. C.* §1448(a)(1), where either the defendant has a prior conviction for a violent felony or the defendant has been previously convicted of causing serious bodily injury to another.

11 *Del. C.* §1448(a)(3): Prior Controlled Dangerous Substance possession, use, or distribution conviction.

11 *Del. C.* §1448(a)(4): Juvenile adjudication for felony.

11 *Del. C.* §1448(a)(6): Protection from abuse order pending.

11 *Del. C.* §1448(a)(7): Conviction for domestic violence misdemeanor.

(4) Any violent felony as defined by 11 *Del. C.* §4201(c) allegedly committed while defendant is pending adjudication on a previously charged violent felony.

(5) Any violent felony as defined by 11 *Del. C.* §4201(c) allegedly committed against the petitioner with an active Protection from Abuse order against the defendant.

(6) Any violent felony as defined by 11 *Del. C.* § 4201(c) allegedly committed while the defendant is pending adjudication on a previously charged offense of domestic violence as defined by 11 *Del. C.* §1448(a)(7) allegedly committed against the same victim.

(7) Any offense of domestic violence as defined by 11 *Del. C.* §1448(a)(7) allegedly committed while defendant is pending adjudication on a previously charged violent felony as defined by 11 *Del. C.* § 4201(c) allegedly committed against the same victim.

(8) 11 *Del. C.* § 612: Assault in the second degree, provided that the defendant allegedly caused serious physical injury to the victim or caused physical injury to a peace officer as defined by 11 *Del. C.* § 1901.

(9) 11 *Del. C.* § 607: Strangulation.

(10) Any offense that alleges possession of a Tier 4 or Tier 5 quantity of a Schedule I or Schedule II narcotic.

Commentary on Interim Rule 5.2

Purposes of the Bail Reform Act and This Rule

In 2018, the General Assembly enacted legislation to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”). Codified in Chapter 21, Title 11 of the Delaware Code, the Bail Reform Act encourages the use of non-monetary conditions of release when those conditions reasonably assure the defendant’s appearance at court proceedings, public safety, and the integrity of the judicial process. In particular, the Act was intended to prevent defendants from being subjected to excessive financial conditions of release, traditionally referred to as money bail. By this means, the Act sought to reduce the unnecessary pretrial incarceration of defendants who are not wealthy enough to pay money bail, as well as reduce the resulting loss in employment, the pressure to plead guilty, the economic toll on non-affluent defendants and their families, and other substantial harm that results from the excessive use of money bail.

To accomplish those goals, this rule requires courts to impose the least restrictive conditions necessary to reasonably assure the defendant’s appearance in court, public safety, and the integrity of the judicial process. The rule also recognizes that the risk that the defendant will fail to appear is different from the threat that a defendant will commit harm if released pending trial. Finally, the Act and this rule

reflect the overriding principle that, given the presumption of innocence underlying the American system of criminal justice, there is a crucial difference between pretrial conditions of release and post-conviction sentences, and thus the court shall not treat the former the same as the latter.

Overview of the Pretrial Assessment

Role of the pretrial assessment in accomplishing the purposes of the Act and this rule. The Bail Reform Act and this rule seek to increase the reliability and equity of decisions about conditions of pretrial release. To that end, the Act requires the use of an empirically developed pretrial assessment instrument. Consistent with that requirement, a diverse group of constituencies, with the aid of qualified academic and professional advisors, developed the “DELPAT.” The DELPAT takes into account factors relevant to whether defendants are, compared to other defendants, at greater risk of failing to appear at trial, endangering public safety, or obstructing justice, and is therefore designed to provide a reliable basis for setting conditions of release. The pretrial assessment was based on consideration of nationally available models and has been tested preliminarily for reliability and validity and to ensure that the assessment is not affected by bias based on race, gender, wealth, or other inappropriate grounds. It is designed to: (i) improve the reliability of pretrial decisions by ensuring that relevant factors are given consistent and measured weight, based on empirical testing and professional input; (ii) increase equity by ensuring

that relevant factors are given consistent weight in all like cases, so that defendants are subject to equal treatment; and (iii) reduce discrimination against poor defendants.

Pretrial assessment score. To aid in the reliable, equitable, and efficient determination of discretionary conditions of release, the pretrial assessment measures the defendant's risk of pretrial failure, which is defined as either (i) failing to appear after notice of a court proceeding or (ii) incurring a new criminal arrest while the current case is pending. The assessment has two scales that address these two distinct types of failure: a Failure to Appear ("FTA") scale and a New Criminal Arrest ("NCA") scale. The scores of these two scales are combined to produce the final pretrial assessment score.

Risk of failure to appear. The FTA scale assesses the risk that the defendant will fail to appear after notice of a court proceeding. The FTA scale employs four risk factors that were found to correlate with an increased risk of non-appearance:

- (i) at least one prior sentence that included probation supervision in the past 10 years;
- (ii) total number of prior FTA warrants in the past year;
- (iii) total number of prior FTA warrants in the past 10 years; and
- (iv) the current arrest includes at least one charge of Uniform Crime Reporting code "larceny" or "stolen vehicle."

Factors (i) and (iv) each receive one point, if applicable. Factors (ii) and (iii) each receive one point if one prior FTA warrant is present and two points if two or more prior FTA warrants are present. Thus, a person's FTA score will range from zero to six. There are three FTA scale risk levels: low (zero to one), moderate (two to three), and elevated (four to six).

Risk of new criminal arrest. The NCA scale assesses the risk that the defendant will be arrested for committing a new crime while the current case is pending. The NCA scale employs seven risk factors that were found to correlate with an increased risk of a new criminal arrest before trial:

- (i) another pending criminal case;
- (ii) prior convictions;
- (iii) at least one prior misdemeanor arrest in the past two years;
- (iv) at least one prior sentence that included probation supervision;
- (v) age at first arrest;
- (vi) at least one prior FTA warrant; and
- (vii) at least one prior violent conviction within the past five years.

Each risk factor that is present receives one point, except that factor (ii) receives two points in the case of multiple convictions and factor (iii) receives two points. Thus, a person's NCA score will range from zero to nine. There are four

NCA scale risk levels: very low (zero to one), low (two to four), moderate (five to six), and elevated (seven to nine).

Testing of the Statutory Factors and FTA and NCA Scales

An important proviso: defendants at an elevated risk in the large sample used to validate the pretrial assessment were still likely to appear in court and to not get arrested. The testing of the pretrial assessment demonstrated that during the period before trial, most defendants (i) appeared in court and (ii) did not get arrested. That is, even as to the category of defendants deemed to be at an elevated risk of non-appearance or incurring a new criminal arrest, most defendants appeared as required at court proceedings and were not arrested before trial. Thus, in none of the tiers does the defendant's pretrial assessment score indicate that the defendant is more likely than not to fail to appear or get arrested. Instead, the score indicates only that the defendant presents a greater risk of failing to appear or being arrested compared to individuals in lower tiers.

Testing and other consideration of statutory factors. Section 2105(b) of the Bail Reform Act requires the court to consider certain factors when determining the defendant's risk of pretrial failure. To implement that requirement, the professionals developing the pretrial assessment tested many of these factors as part of its development. Some of the statutory factors were not included in the pretrial assessment because statistical analysis determined that they were not good predictors

of the defendant's risk of failing to appear or getting arrested. Some of the other factors could not be tested because of a lack of reliable and consistent data. Because the Act and this rule were designed to improve the consistent, reliable, and equitable determination of conditions of release, the use of factors that are not subject to reliable and consistent data risks defeating this key purpose. Other factors have been considered, and the empirical literature suggests they are associated with bias on the basis of race, gender, or wealth, and therefore the use of them would be inconsistent with the purposes of the Act and this rule.

Statutory factors included in the FTA and NCA scales or elsewhere in this rule. Consistent with section 2105(b), the pretrial assessment, the domestic violence assessment, and this rule have fully or substantially taken into account many of these statutory factors and determined their appropriate weight, thereby obviating the need for courts to consider the factors on an inconsistent, ad hoc basis. For that reason, the court may not give additional weight to any factor fully or substantially included in the pretrial assessment, the domestic violence assessment, or this rule absent a special finding that there is a compelling reason indicating that the pretrial assessment, the domestic violence assessment, and this rule do not adequately account for the factor. Factors in this category needing a special finding include:

- (i) the nature and circumstances of the crime charged;
- (ii) whether a firearm was used or possessed;

- (iii) the possibility of statutory mandatory imprisonment;
- (iv) the defendant's record of convictions;
- (v) the defendant's history of amenability to lesser sanctions;
- (vi) the defendant's history of breach of release; and
- (vii) the defendant's record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;

Statutory factors tested and excluded for not being good predictors of the defendant's risk of pretrial failure. Several of the section 2105(b) factors were tested and found to lack a sufficiently strong correlation with the defendant's risk of pretrial failure. The rule therefore prohibits the court from giving weight to these factors.

Factors in this category include:

- (i) the defendant's employment;
- (ii) the defendant's custody status at the time of the offense; and
- (iii) the defendant's length of residence in the community.

Suspect statutory factors not tested but presenting a risk of racial, gender, or wealth bias. Several of the section 2105(b) factors were not tested due to the lack of reliable and consistent data or preexisting evidence of racial, gender, or wealth bias in the academic literature. The rule prohibits giving weight to these suspect factors except by making special findings that considering the factor does not create disparities based on race, gender, or wealth. Factors in this category include:

- (i) the defendant's family ties;
- (ii) the defendant's financial resources; and
- (iii) the defendant's character and mental condition.

Special note on the defendant's character and mental condition. The Bail Reform Act refers to the defendant's "character and mental condition." These terms refer to separate concepts. The term "character" is subjective, has no reliable benchmark, and overlaps with many factors already taken into account by a defendant's criminal record, which is a major input into the pretrial assessment. For that reason, any consideration of that factor is suspect. The term "mental condition" is vague and may also lead to biased decisionmaking, such as where a court uses the term to refer to the defendant's perceived intelligence. That said, there may be circumstances that call for consideration of the defendant's mental condition, in the more discrete sense of a case where the defendant is suffering from a mental illness or condition that indicates that the defendant poses a substantial risk to public safety, or where the defendant is currently under the influence of alcohol or drugs. Given the potential for bias, however, the rule instructs the court not to consider the defendant's mental condition unless the defendant has objectively documented mental health issues relevant to the defendant's risk to public safety or currently exhibits mental health or substance abuse issues relevant to the defendant's risk to public safety. In the case of a defendant who is unable to knowingly and intelligently

participate in presentment proceedings because of incapacitation as a result of the consumption of alcohol or the use of drugs, the court shall follow the separate statutory procedures and standards contained in 11 *Del. C.* § 1909.

Domestic Violence

Domestic violence assessment. In cases where the State contends that the defendant has committed domestic or intimate partner violence, the domestic violence assessment, when available, helps to measure the risk that the defendant may seriously injure or kill the alleged victim. This domestic violence assessment includes the following questions that a first responder is to ask the alleged victim at the time of the incident:

- (i) Has the defendant ever used a weapon against you or threatened you with a weapon?
- (ii) Has the defendant threatened to kill you or your children?
- (iii) Do you think the defendant might try to kill you?
- (iv) Does the defendant have a gun or can the defendant get one easily?
- (v) Has the defendant ever tried to choke you?
- (vi) Is the defendant violently or constantly jealous or does the defendant control most of your daily activities?
- (vii) Have you left the defendant or separated after living together or being married?

(viii) Is the defendant unemployed?

(ix) Has the defendant ever tried to commit suicide?

(x) Do you have a child that the defendant knows is not his or hers?

(xi) Does the defendant follow or spy on you or leave threatening messages?

(xii) Is there anything else that worries you about your safety? If so, what worries you?

Trigger of referral protocol. Questions in the domestic violence assessment are grouped into two sets, plus a general catch-all question that serves as an override, the answers to which may trigger a referral protocol that requires the first responder to inform the alleged victim of the high danger assessment and offer the alleged victim the opportunity to be screened by a hotline counselor for assistance. The first set consists of questions (i) through (iii), the second set contains questions (iv) through (xi), and question (xii) is the general catch-all question. The referral protocol is triggered by either (i) an affirmative response to any one of the first set of questions; (ii) an affirmative response to at least four of the second set of questions; or (iii) a discretionary decision by the first responder, based on the alleged victim's response to the catch-all question or any other reason, to trigger the referral protocol.

Conditions of Release for Failure to Appear

Although it is critical that there be incentives and consequences that address the possibility that a defendant will not appear for trial, the risk that the defendant will fail to appear at scheduled court proceedings is categorically different from the threat that a defendant will commit harm if released pending trial. For that reason, the rule discourages the use of monetary conditions where the only risk is that the defendant will fail to appear, and the court can require a secured bond only if the State makes a special showing and the court makes special findings that there is a demonstrated and specific flight risk in the current case. For example, if a defendant with a warrant for his or her arrest purchases a one-way ticket to a foreign country, those circumstances may justify the imposition of a secured bond to assure the defendant's appearance in court. In addition, the court has the authority to make special findings of this kind on its own motion. In most cases, however, the court should not require a secured bond at first appearance where the main risk is that the defendant will fail to appear. Instead, the rule encourages the use of notification measures and other non-monetary conditions of release to assure the defendant's appearance. If the defendant has already failed to appear in the current case, by contrast, the court may under Rule 5.4 impose more intensive conditions of release in its discretion without ordering a new pretrial assessment. When, despite being given a chance to have conditions of release not involving monetary terms, a

defendant fails to appear, the defendant's breach will subject him to the imposition of monetary conditions, in the discretion of the court, as is generally true when a defendant breaches conditions of release.

Conditions of Release for Risk to Public Safety

The most serious threat to be addressed by conditions of release is when the defendant poses a risk of harm to the general public or a specific person. Consistent with the seriousness of that threat, the pretrial assessment provides for a higher score based on the defendant's risk to public safety, and the domestic violence assessment provides for a secured conditions of release bond where there is a heightened risk that the defendant may harm the alleged victim. In addition, the rule identifies certain serious offenses that signal a heightened risk to public safety. These signal offenses involve very serious offenses, such as homicides, crimes of violence, sex crimes, gun crimes, and high level drug offenses. A number of these signal offenses specifically involve domestic violence and therefore supplement the protections of the domestic violence assessment in addressing this important area. As to these signal offenses, the court has discretion to impose more stringent conditions of release than suggested by the initial recommended response, including monetary conditions. The rule also addresses the risks posed by recidivist impaired drivers, by providing for conditions of release tailored to the unique threats posed by these defendants.

In addition, the rule allows for the court to require more intensive conditions of release where the State makes a special showing and the court makes special findings that releasing the defendant with less intensive conditions of release would pose a substantial danger to public safety. Likewise, the court has the authority to make special findings of this kind on its own motion. Given the breadth of the signal offenses, the rule contemplates that these “residual” departures will be relatively rare.

Conditions of Release for Obstruction of Justice

The Bail Reform Act recognizes that some defendants pose the danger of undermining the rule of law by intimidating witnesses or taking other steps that obstruct justice and the ability of the judicial system to hold a fair trial. These situations are case-specific, not susceptible to being addressed by a pretrial assessment instrument, and therefore this rule sets forth standards by which the State can make a special showing and the court can make special findings to address when a defendant has taken specific actions that show this threat to be substantial and justify more intensive conditions of release than the initial recommended response. As with non-appearance and public safety risks, the court also has the authority to make special findings of this kind on its own motion.

Downward Departures from the Initial Recommended Response

The rule provides for procedures where the court wishes to depart downward from the initial recommended response. The court may impose less intensive conditions of release than the initial recommended response without making “special findings” so long as the court finds that less intensive conditions will adequately assure the defendant’s appearance at court proceedings, public safety, and that the defendant does not obstruct justice. For statistical tracking purposes, the court still must record its decision by selecting at least one judicial response code in the Delaware Criminal Justice Information System.

Limitations on Release to Pretrial Services

Consistent with the risk that overuse of supervision by Pretrial Services may cause many of the same harms as the overuse of money bail, and consistent with the presumption of innocence guaranteed by the United States and Delaware Constitutions, the rule discourages the court from confusing release to Pretrial Services with either a post-conviction sentence involving probation and parole or participation in a diversion program. Specifically, if the court releases the defendant to Pretrial Services, it must either impose the standard conditions of release used by Pretrial Services or first consult with the Department of Correction. In addition, the rule discourages the use of types of conditions of release that are either suspect in

the context of pretrial release or resource intensive: alcohol or drug testing, curfews, and electronic monitoring.

Consideration of the Defendant's Financial Circumstances

Due to concerns about creating disparities based on race, gender, or wealth, the rule prohibits giving weight to the defendant's financial circumstances in setting the conditions of release except by making special findings. Put plainly, in initially determining whether to impose monetary conditions of release, a defendant's wealth should not bias that decision. But, when the court decides to impose monetary conditions of release, equity requires the court to consider the defendant's wealth and ability to satisfy those monetary conditions of release. The rule therefore directs the court to provide defendants with a form to provide financial information so that the conditions of release can fully take into account the defendant's means in setting appropriate monetary conditions of release.

Sua Sponte Departures from the Initial Recommended Response

As previously noted, the court may depart downward from the initial recommended response on its own initiative. And as noted, the rule also allows for the court to depart upward on its own initiative, provided that the court explains its reasons for doing so (and that the court makes the same special findings that it must make when the State requests more intensive conditions of release). But consistent

with the defendant's right to seek review of her conditions of release, the court must offer the defendant an opportunity to contest that upward departure.

Interim Rule 5.3. Modification of conditions of release.

(a) *Definitions.*

All terms shall have the meanings given them in Rule 5.2(a).

(b) *Obligation to review conditions of release if the defendant is detained for inability to meet required conditions of release.*

Unless reviewed earlier, if the defendant remains detained for more than 72 hours from the defendant's initial presentment as a result of the inability to meet the required conditions of release, the court with jurisdiction over the defendant shall, on its own initiative, review de novo the defendant's conditions of release to determine whether to modify those conditions. This review shall occur within 10 days from the date of detention.

(c) *Motions by parties for review of conditions.*

(1) *In general.* A defendant, regardless of custody status, or the Attorney General, the Attorney General's designee, a third party private or commercial surety,

the Department of Correction, or any person or nongovernmental organization to whom a defendant has been released for supervision may file a motion in the court with jurisdiction over the defendant to modify the defendant's conditions of release or make an oral application at any proceeding at which the parties are both present.

(2) *Hearing on motion.*

(A) *Expedited hearing required.* Upon a request for modification of conditions under this subsection, the court shall hold a hearing in an expedited manner, but in no event later than 10 days after the filing of the motion or oral application.

(B) *Defendant's right to counsel.* The defendant shall have the right to assistance of retained or appointed counsel at any hearing under this subsection.

Nothing in this subparagraph shall be construed to create or expand any substantive right to appointed counsel.

(d) Same standards apply to requests for modification of conditions.

In determining whether to modify the defendant's conditions of release under this rule, the court shall continue to adhere to Rule 5.2 in all respects.

(e) Court must state reasons for decision and issue implementing order.

Upon the disposition of any request to modify the defendant's conditions of release under subsection (c), the court shall set forth on the record the reasons for amendment or continuation of the conditions required and issue an implementing written order.

(f) Later motion for review; later review limited.

After an initial request for modification of the defendant's conditions of release under subsection (c), later motions for review of the order setting conditions of release may be filed only upon a material change in circumstance. The court may rule on later motions with or without a hearing.

Commentary to Interim Rule 5.3.

Rule 5.3 provides for two different mechanisms for judicial review of the defendant's conditions of release after the court's initial determination. First, the court with jurisdiction over the defendant shall review the defendant's conditions of release on its own initiative within 72 hours if the defendant remains detained because she cannot meet the conditions of release. Second, the rule provides the State, the defendant, and certain other interested parties with the opportunity to move for modification of the conditions of release. Upon a request for modification, the court shall hold a hearing and state its reasons on the record, and in making a determination under either mechanism, the court shall follow the same considerations as it would under Rule 5.2 in making an initial determination. After the first request for modification, however, the court need not hold a hearing.

Interim Rule 5.4. Hearings for violation of conditions of release.

(a) Definitions.

All terms shall have the meanings given them in Rule 5.2(a).

(b) Power of the court to issue summons or warrant.

The court, when notified by the State or the Department of Correction of a violation of the defendant's conditions of release, may issue a summons or a warrant for the arrest of a defendant for violating any condition of release.

(c) Power to arrest and authorize arrest without a warrant.

(1) *In general.* In addition to the State's authority to arrest a defendant without a warrant as otherwise provided by law, the Commissioner of the Department of Correction or any probation officer, acting in performance of his or her duties, under exigent circumstances may arrest a supervised defendant without a warrant when in the judgment of the Commissioner or probation officer the supervised defendant has

violated any material condition of release, as set forth in 11 *Del. C.* § 2114. The Commissioner or probation officer may deputize any other officer with power of arrest to do so by giving that officer a written statement setting forth in what manner the supervised defendant has in the judgment of the Commissioner or the probation officer violated a material condition of release. When an arrest is made by a probation officer or the Commissioner, the officer shall present to the detaining authority a written statement of the circumstances of violation.

(2) *Notice to court and detaining authority.* Upon arrest and detention under this subsection, the State, the Commissioner, or a probation officer shall immediately notify the court with jurisdiction over the defendant and shall submit to the court a written report showing in what manner the defendant has violated the conditions of release.

(d) *Pretrial violations hearing.*

If the State, the Commissioner, or a probation officer alleges noncompliance with material conditions of release, or if the defendant is arrested under the authority of a summons or warrant issued for violation of the conditions of release, a probation officer shall take the defendant directly before the court with jurisdiction over the defendant if that court is in session or take the defendant before a magistrate who may revoke or modify the bail, provided that a hearing before the court that has jurisdiction shall be held within 72 hours. The hearing may be summary in nature.

(e) *Entry of order.*

Upon the completion of a hearing under subsection (d), the court shall enter an order continuing the existing conditions of release, setting different conditions of release, or revoking the defendant's release. If the court finds that the defendant has breached the conditions of release, the court may require more intensive conditions

of release in its discretion and need not order a new pretrial assessment. The court shall revoke the defendant's release only when the State:

(1) shows that the defendant knowingly violated a condition of release; and

(2) proves, by clear and convincing evidence, that no other condition or combination of conditions of release can reasonably assure the defendant's appearance at court proceedings, public safety, and that the defendant does not obstruct justice.

(f) *Review.*

An order continuing or modifying the conditions of release under this rule is reviewable by the court only upon a material change in circumstance. The court may rule on subsequent motions with or without a hearing.

Commentary on Interim Rule 5.4.

The Bail Reform Act and these rules are designed to give defendants an opportunity to be released on the least restrictive conditions needed to reasonably assure the defendant's appearance, public safety, and the integrity of the judicial process. When a defendant receives that opportunity and then fails to comply with the conditions of release, however, the defendant is in a categorically different position.

For that reason, Rule 5.4 gives the court discretion to determine the appropriate consequences of a breach of the conditions of release, including the discretion to impose monetary conditions of release. Although the court may take into account the results of the pretrial assessment in determining those consequences, the court need not follow the results of any prior pretrial assessment, give it any particular weight, or order a new pretrial assessment. Instead, upon a breach of release, the court is entitled to use its discretion under this rule to modify the conditions of release as it deems appropriate to reasonably assure the defendant's appearance, public safety, and the integrity of the judicial process.

Exhibit B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
ORDER REGARDING INTERIM SPECIAL RULE OF CRIMINAL
PROCEDURE FOR PRETRIAL RELEASE

This 13th day of December 2018, it appears to the Court that:

WHEREAS, the General Assembly enacted legislation in 2018 to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”);

WHEREAS, the Bail Reform Act takes effect on January 1, 2019, requiring the Judiciary to put in place an implementing rule by January 1, 2019 for an important systemic reform;

WHEREAS, the Bail Reform Act directs that its implementation and the procedure for pretrial release shall be as provided by the Rules of the Superior Court, but the procedure for pretrial release must apply across multiple courts, specifically the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, the Supreme Court and the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court agree that the unique, cross-court nature of the procedure for pretrial release mean that Interim Special Rule of Criminal Procedure for Pretrial Release should be adopted by the Supreme Court to establish the procedure for pretrial release in the

Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, by order dated December 13, 2018, the Supreme Court, with the agreement of the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, adopted Interim Special Rule of Criminal Procedure for Pretrial Release;

WHEREAS, by order dated December 13, 2018, the Supreme Court, directed the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, to follow Interim Special Rule of Criminal Procedure for Pretrial Release beginning January 1, 2019 and, as the Interim Rule is applied and refined, to amend their rules as necessary;

NOW, THEREFORE, IT IS ORDERED that, beginning January 1, 2019, this Court shall follow Interim Special Rule of Criminal Procedure for Pretrial Release. As the Interim Rule is applied and refined, this Court shall amend its rules as necessary.

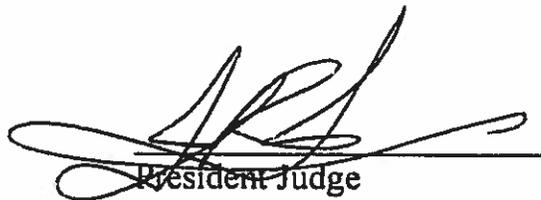

President Judge

Exhibit C

IN THE FAMILY COURT OF THE STATE OF DELAWARE
ORDER REGARDING INTERIM SPECIAL RULE OF CRIMINAL
PROCEDURE FOR PRETRIAL RELEASE

This 13th day of December 2018, it appears to the Court that:

WHEREAS, the General Assembly enacted legislation in 2018 to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”);

WHEREAS, the Bail Reform Act takes effect on January 1, 2019, requiring the Judiciary to put in place an implementing rule by January 1, 2019 for an important systemic reform;

WHEREAS, the Bail Reform Act directs that its implementation and the procedure for pretrial release shall be as provided by the Rules of the Superior Court, but the procedure for pretrial release must apply across multiple courts, specifically the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, the Supreme Court and the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court agree that the unique, cross-court nature of the procedure for pretrial release mean that Interim Special Rule of Criminal Procedure for Pretrial Release should be

adopted by the Supreme Court to establish the procedure for pretrial release in the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, by order dated December 13, 2018, the Supreme Court, with the agreement of the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, adopted Interim Special Rule of Criminal Procedure for Pretrial Release;

WHEREAS, by order dated December 13, 2018, the Supreme Court, directed the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, to follow Interim Special Rule of Criminal Procedure for Pretrial Release beginning January 1, 2019 and, as the Interim Rule is applied and refined, to amend their rules as necessary;

NOW, THEREFORE, IT IS ORDERED that, beginning January 1, 2019, this Court shall follow Interim Special Rule of Criminal Procedure for Pretrial Release. As the Interim Rule is applied and refined, this Court shall amend its rules as necessary.

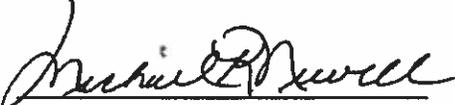

Chief Judge

Exhibit D

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
ORDER REGARDING INTERIM SPECIAL RULE OF CRIMINAL
PROCEDURE FOR PRETRIAL RELEASE

This 13th day of December 2018, it appears to the Court that:

WHEREAS, the General Assembly enacted legislation in 2018 to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”);

WHEREAS, the Bail Reform Act takes effect on January 1, 2019, requiring the Judiciary to put in place an implementing rule by January 1, 2019 for an important systemic reform;

WHEREAS, the Bail Reform Act directs that its implementation and the procedure for pretrial release shall be as provided by the Rules of the Superior Court, but the procedure for pretrial release must apply across multiple courts, specifically the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

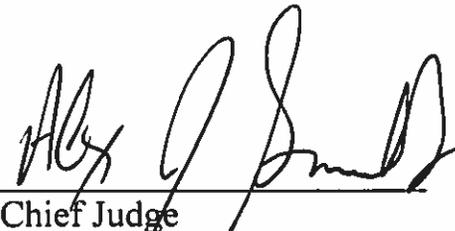
WHEREAS, the Supreme Court and the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court agree that the unique, cross-court nature of the procedure for pretrial release mean that Interim Special Rule of Criminal Procedure for Pretrial Release should be adopted by the Supreme Court to establish the procedure for pretrial release in the

Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, by order dated December 13, 2018, the Supreme Court, with the agreement of the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, adopted Interim Special Rule of Criminal Procedure for Pretrial Release;

WHEREAS, by order dated December 13, 2018, the Supreme Court, directed the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, to follow Interim Special Rule of Criminal Procedure for Pretrial Release beginning January 1, 2019 and, as the Interim Rule is applied and refined, to amend their rules as necessary;

NOW, THEREFORE, IT IS ORDERED that, beginning January 1, 2019, this Court shall follow Interim Special Rule of Criminal Procedure for Pretrial Release. As the Interim Rule is applied and refined, this Court shall amend its rules as necessary.



Chief Judge

Exhibit E

IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
ORDER REGARDING INTERIM SPECIAL RULE OF CRIMINAL
PROCEDURE FOR PRETRIAL RELEASE

This 13th day of December 2018, it appears to the Court that:

WHEREAS, the General Assembly enacted legislation in 2018 to reform the system under which courts subject defendants to pretrial conditions of release (the “Bail Reform Act” or “Act”);

WHEREAS, the Bail Reform Act takes effect on January 1, 2019, requiring the Judiciary to put in place an implementing rule by January 1, 2019 for an important systemic reform;

WHEREAS, the Bail Reform Act directs that its implementation and the procedure for pretrial release shall be as provided by the Rules of the Superior Court, but the procedure for pretrial release must apply across multiple courts, specifically the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, the Supreme Court and the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court agree that the unique, cross-court nature of the procedure for pretrial release mean that Interim Special Rule of Criminal Procedure for Pretrial Release should be adopted by the Supreme Court to establish the procedure for pretrial release in the

Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court;

WHEREAS, by order dated December 13, 2018, the Supreme Court, with the agreement of the presiding judges of the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, adopted Interim Special Rule of Criminal Procedure for Pretrial Release;

WHEREAS, by order dated December 13, 2018, the Supreme Court, directed the Superior Court, the Family Court, the Court of Common Pleas, and the Justice of the Peace Court, to follow Interim Special Rule of Criminal Procedure for Pretrial Release beginning January 1, 2019 and, as the Interim Rule is applied and refined, to amend their rules as necessary;

NOW, THEREFORE, IT IS ORDERED that, beginning January 1, 2019, this Court shall follow Interim Special Rule of Criminal Procedure for Pretrial Release. As the Interim Rule is applied and refined, this Court shall amend its rules as necessary.



Chief Magistrate