IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Burroughs' Due Process and Equal Protection claims flow from a large body of research and empirical evidence that challenges the *status quo* belief about money bail's ability to incentivize compliance. This evidence has prompted numerous jurisdictions around the country to reconsider the constitutionality of their own unaffordable bail practices. Opening Brief ("Op. Br.") n.8. Despite its significant implications, the State has made no serious attempt and dealing with this evidence. Below, the State could not identify an expert, or even a single source, which challenges the reliability of this evidence or its applicability to the specific arguments made by Burroughs. And now, the State's Answer ("Answer") effectively asks this Court to reject that evidence without a single citation to Prof. Copp's testimony, her two reports, or the studies upon which she relied and testified.

The Answer is not just divorced from the evidence; it is barely responsive to the arguments. Although it speaks generally to the constitutional rights at issue, the Answer repeatedly ignores Burroughs' specific arguments and does not even attempt to address much of the underlying case law. Arguments which have not been addressed are identified below and should be deemed waived or conceded.[1]

[1] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

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

The State agrees the Judge's Order purports to employ strict scrutiny to Burroughs' Substantive Due Process claim. Answer 9—10. It does not dispute, and thus concedes, that this standard was required. It recognizes strict scrutiny required the State to prove by clear and convincing evidence that the imposed bail was the least restrictive means to address its safety concerns. Answer at 10. And finally, the Answer does not challenge the premise of Burroughs' argument: since non-financial terms are less restrictive than unaffordable money bail, the latter is only constitutional if *necessary* (*i.e.* if non-financial conditions would be unable to address safety concerns as effectively as financial conditions).[2]

With the above framework in mind, the Answer – and the Judge's Order – are clearly inadequate as neither identifies record evidence that even suggests the

[2] The State initially argued Burroughs misconstrued the issue because unaffordable bail does not rely on financial incentives; it forces pretrial compliance *via* incarceration. A251—252, 312. This position prompted Burroughs' Delaware Constitutional claim because unaffordable bail cannot, consistent with the Sufficient Sureties Clause, be justified by its function as a pretrial detention order. A289—96. The State abandoned that argument in the Answer, and seems to recognize, unaffordable bail can only be justified, consistent with the Sufficient Sureties Clause, by the theoretical inventive it would provide if the defendant posted.

financial incentive provided by money bail can more effectively address pretrial safety risks than can available non-financial conditions. Instead of identifying evidence that indicates money bail is necessary and the least restrictive means, the Answer reviews bail rules and statutes (which are not evidence) (Answer at 8—9), attempts to critique of Prof. Copp's opinion (which, even if accepted, only impeaches Burroughs' arguments, but cannot constitute affirmative evidence to support the State's burden) (Answer at 11—12), and describes the circumstances of Burroughs' arrest (which speak to the safety risk, not the least restrictive way to address it) (Answer at 13—15). The Answer does not dispute Burroughs' position that the lower court did not consider pretrial monitoring. Op. Br. at 17; A333.

a. ***The Answer fails to address pertinent statutory law.***

The Opening Brief argued that, regardless of money-bail's theoretical effects, it cannot incentivize public safety in Delaware because our courts are statutorily prohibited from forfeiting bail for any reason other than a missed court date.[3] Op. Br. at 18—19. Burroughs' Motion to Review made this same argument, and it was not addressed in the Judge's Order. A355. The Answer ignores this argument.

[3] 11 *Del. C.* §2113.

b. ***The Answer does not identify any evidence to suggest money bail addresses risks to community safety more effectively than non-financial conditions.***

The Answer's hyper-focus on "Burroughs' [apparent] . . . risk to the safety of the community" is a distraction from the bigger issue.[4] Answer at 13—15. Evidence of a safety risk is necessary, but insufficient to satisfy the strict scrutiny analysis which also requires proof that money bail would be more effective than "less restrictive" non-financial conditions. Ex. B. at 8, 17. Financial incentivization cannot be "necessary" if equal or better results can be expected from non-financial conditions. In other words, even assuming Burroughs were as dangerous as suggested, the State's argument still fails for failure to prove that money bail is "necessary" to address that risk.[5] This failure is dispositive.

From the outset of this litigation, Burroughs has emphasized the State's inability to identify clear and convincing evidence that money-bail is more effective than non-financial conditions. A299-300. The State initially planned on hiring an expert, who it presumably believed would provide the requisite evidence, but it ultimately failed to do so. A228—30. Next, the State indicated a "committee . . . assisting in responding to" Prof. Copp would identify "very specific Delaware cases"

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[4] As to his alleged dangerousness, Burroughs relies on his previously made arguments which the Answer does not address. Op. Br. at 13—15.

[5] The Opening Brief highlighted the State's failure to identify evidence about the efficacy of money bail. Op. Br. at 8, 13, 16—18. By leaving this argument completely unaddressed, the Answer recognizes no such evidence exists here.

through which it would satisfy its burden. A238. But the State was unable to this as well. As the Reviewing Judge's February 14, 2022 Letter recognized, the State has studiously avoided identifying evidence on this issue. A1081.

The only suggestion of evidence indicating non-financial terms might not be as effective comes from a clearly erroneous statement in the Commissioner's Order, which was **not** adopted in the Judge's Order, but nonetheless repeated in the Answer:

> *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.* Answer at 11 (citing Ex. A at 33—35, internal quotations omitted).

The Reviewing Judge did not credit this finding, and neither should this Court. The Commissioner's Order erroneously cites "the Phillips [S]tudy" and Prof. Copp's description of that study to support this finding. Ex. A n.94; A347—49. The Answer does not acknowledge Burroughs' argument about the misuse of these materials, and lacks even a single reference the Phillips Study, Prof. Copp's testimony, or any evidence which might support the Commissioner's finding.

Prof. Copp did not "admit;" she described the general state of the literature and noted that a single study, the Philips Study, produced an anomalous result which at first blush might suggest "monetary bail is more effective at assuring court appearances for high risk defendants." Left out of the Commissioner's Order is that both Prof. Copp (A211, 348, 435—436; 456—57), and Phillips herself (A1009;

A1016) cautioned against using the results in the exact way they are used in the Commissioner's finding, and the Answer. The Phillips Study used arrest, appearance rate, and bail data from New York City ("NYC"). The NYC system, uniquely, does not impose non-financial conditions of release, and therefore, findings based on NYC data are not generalizable to jurisdictions, like Delaware, which employ numerous non-financial bail conditions. Philips compared monetary bail to no conditions all. But even if the Phillips Study could be extended to Delaware generally, the specific findings relied on by the Commissioner only apply to money-bail's ability to address flight risks, not the public safety concerns at issue. A254. And even if this finding could be extended to public safety concerns, it only applies to defendants which fit Phillips' high-risk criteria, and Burroughs, objectively, does not.[6] Applying Phillips as the State suggests has no record support.

[6] Prof. Copp did not "unilaterally categorizes Burroughs as low [or moderate] risk." Phillips' findings are based on the CJA, NYC's data-driven assessment of flight risk. A1131—1132. Burroughs has never suggested that a judge's subjective assessment of risk has no role, but it is irrelevant to the objective criteria Phillips refers to as "high-risk." Secondly, unlike DELPAT, Delaware's risk assessment tool which captures risk to public safety and of missed court dates, the CJA only captures risk of missed court dates. A1131. Burroughs has *never* missed one. A362—63.

c. This Court should adopt Prof. Copp's opinions because they have extensive and unrebutted supported in the record. But even if this Court does not do so, it should still find that the State has not satisfied its burden, and reverse.

After conceding that the Judge's Order "did not address Burroughs' expert at length," the State proceeds to review portions of the Commissioner's Order describing purported "gaps" in Prof. Copp's testimony. Answer at 11. The Answer focuses on the Commissioner's discretion to make such factual findings (at 12) but fails to appreciate the flip side of the coin: despite that wide discretion and a highly deferential standard of review, [7] the Judge still did not adopt the Commissioner's critiques, as requested by the State. A543—44.

Burroughs argued – and seems to have persuaded the Reviewing Judge – that the Commissioner's critiques of Prof. Copp. were an abuse of discretion.[8] A336—49. The Reviewing Judge found Prof. Copp's conclusions "suggest Delaware may need to reevaluate provisions in its bail statute," which shows the Reviewing Judge viewed them as compelling and applicable Delaware. Ex. A 20—21. The State's suggestion that these "gaps" are reliable critiques based on the "expert's testimony, report, and conclusions" falls flat because the Answer makes no attempt whatsoever to tie those findings to any of those materials. Answer at 12. Just as the State could

[7] Super. Ct. Crim. R. 62 (4)(iv).

[8] Although the Judge's Order affirms the Commissioner's holding, it unquestionably reconsidered the Order, which according to Super. Ct. Crim. R. 62 (4)(iv), required the Judge to find the Commissioner's Order was based upon "findings of fact that are clearly erroneous, or is contrary to law, or an abuse of discretion."

not muster a meaningful response to Burroughs' argument in the Superior Court (A543—44), its Answer in this Court does not even acknowledge Burroughs' rebuttal of these purported "gaps."

Because Prof. Copp's conclusions are "supported by the record and are the product of a logical and orderly reasoning process,"[9] and the Answer fails to identify any record evidence to the contrary, this Court should adopt the expert's conclusions. Op. Br. at 10—12, 17—18. But even if it does not, this Court should reverse because it is the State's burden to prove money bail is the least restrictive means, not Burroughs' burden to disprove that claim.

[9] *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 528 (Del. 2009).

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

In addressing Burroughs' procedural due process claim, the Answer does not identify any alternative to the clear and convincing evidence standard advocated for by Burroughs. Op. Br. at 21—22. It also concedes the Commissioner's Order did not apply any standard at all. Answer at 19. The best the State can do is argue harmless error, but in doing so, it forgets the procedural context of this appeal. Answer at 19. Harmless error analysis is inapposite when addressing a moot issue.[10] This Court applies mootness exceptions to prevent harm in subsequent cases or to address issues of public importance – whether the error was harmless as to Burroughs is immaterial to each of these mootness exceptions.

Because the State has not acknowledged that the clear and convincing evidence standard is constitutionally required, and the Judge's Order did not correct the Commissioner's error on this point,[11] this Court should do so. Without

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[10] *See In re O.P.*, 143 Cal. Rptr. 3d 869, 872 (Ct. App. 2012) ("We decline to determine whether the trial court's error was harmless, because the order of commitment is moot. We have chosen to address the issues . . . because they involve matters of public interest that are likely to reoccur yet normally evade review . . . there would be little value in a harmless error analysis").

[11] The Judge's Order purports to employ a clear and convincing standard but is ambiguous as to whether that standard is required. As noted in the Opening Brief (at

authoritative guidance from this Court, it is all but certain that presumptively innocent Delawareans will continue to be detained based on "findings" that do not even purport to employ an evidentiary standard.

20—21), and once again, not addressed in the Answer, the actual procedural due process analysis in the Judge's Order affirms the Commissioner's decision that there is no burden. Ex. B 18—19.

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

Burroughs argued that his Equal Protection claim is controlled by the United States Supreme Court's decision in *Bearden v. Georgia,* which held "only if alternate measures are not adequate to meet the State's interests . . . may the court imprison" someone for inability to pay.[12] Op. Br. 24—26. Burroughs argued that, unlike equal protection claims based on "wealth discrimination alone," which are subject to rational basis review, his claim, and that in *Bearden*, stem from "an absolute deprivation" of a fundamental right based on access to money, which the United States Supreme Court, in *San Antonio Independent School District v. Rodriguez*, recognized warrants heightened scrutiny.[13] Op Br. at 24. The Answer does not dispute Burroughs' characterization of *Rodriguez* or his claim that he suffered an absolute deprivation of a fundamental right. The Answer's responses generally fall into three categories: (1) misguided arguments suggesting *Bearden* does not apply to Burroughs' claim, (2) suggested alternative equal protection frameworks which

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[12] *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

[13] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 20—22 (1973) (addressing equality in education). The Answer cites to *Rodriguez* as supporting its rational basis argument but does not address the portion of *Rodriguez* which was cited by Burroughs and supports heightened scrutiny. Answer nn.53, 64.

rely on misunderstandings of pertinent precedent, and (3) irrelevant arguments about how to label the *Bearden* test and the group of people to which it applies.

a. *The State's arguments as to why Bearden's rule would not apply to unaffordable money bail are unpersuasive.*

i. The *Bearden* rule applies pretrial.

The Answer suggests *Bearden* does not apply pretrial, (Answer at 27) but makes no attempt at addressing Burroughs' arguments on this exact point. Op. Br. at 25. The State's position is rendered even less convincing by the fact that *Vasquez*, the only case it relies on which even addresses *Bearden*, makes no such distinction.

ii. Most, if not all courts to have ruled on the issue have applied the *Bearden* rule to these same circumstances.

The Answer asserts that Burroughs has "no direct support," for the proposition that "heightened scrutiny applies to an absolute deprivation of liberty based on access to money." Answer at 20. This is a curious misrepresentation of Burroughs' argument given that the Opening Brief does include "direct support." Op. Br. nn.38—39. It just seems that instead of attempting to distinguish these cases, the State has chosen to pretend they do not exist. The State's claim that Burroughs' *Bearden* "argument fails because the great weight of case law applies rational basis review to wealth-based discrimination in the bail context" can be dispensed with similarly. Answer at 24. This Court is not required to side with "the great weight of

case law," but if it chooses to: the State has identified one case at most,[14] significantly fewer than the four highlighted by Burroughs.[15] Op. Br. nn.38—39.

iii. The Answer misunderstands the role of indigency in *Bearden* and has no support for its dubious claim that indigency has no relation to unaffordable bail in Delaware.

The Answer suggests that *Bearden* does not apply here because, apparently, "[Delaware law] ensures even application of pretrial detention across both indigent and the affluent . . . [such that] indigency [] has no bearing on pretrial incarceration." Answer at 23. This disparate impact argument is a straw man premised on a misunderstanding of the role of indigency in *Bearden*. This argument was addressed below (A168—69), and again in Burroughs' Opening Brief (at 25—26) yet ignored in the Answer. The *Bearden* test does not ask if the challenged practice disproportionately impacts the poor. *Bearden* is concerned with indigency as a "relative" concept: one is indigent as to a particular fine if that (rich or poor)

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[14] The only possible case is *Vasquez.* But, as described *infra* pp. 16—17, *Vasquez* involves bail but is a better understood as a sentencing case.

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

individual cannot afford the amount. Burroughs is "indigent" under any definition, and certainly as the term is applied in *Bearden*. Even if the State "ensure[d] even application of pretrial detention across both indigent and the affluent," that fact would not distinguish this case from *Bearden*.

In addition to misunderstanding *Bearden*, the State's factual claim that "indigency [] has no bearing on pretrial incarceration" is close to unbelievable. According to the State, income-based inequality in pretrial incarceration has been completely eradicated in Delaware because courts "decide whether financial conditions are appropriate *before* conducting an ability to pay analysis." Answer at 22. When the State made this astounding claim the first time, Burroughs' challenged the State to provide evidentiary support. A168 n.16. Unsurprisingly, the State has failed to provide any pertinent data, all of which it possesses. This claim also misunderstands Delaware law: Rule 5.2's requirement to "consider the defendant's wealth" does not require courts to ensure "indigency [] has no bearing on pretrial incarceration." Exhibit A to Answer at 25.

b. ***The Equal Protection frameworks suggested by the State are inapplicable.***

The Answer identifies two equal protection frameworks which it argues are better fits for Burroughs' claim than is *Bearden*. Answer at 23—26. As described below, the State misunderstands these precedents which if anything, support Burroughs' position.

i. The Abortion Framework

The Answer suggests this Court should analogize money based pretrial incarceration to the United States Supreme Court's invalidated abortion jurisprudence. Answer at 25. Firstly, post-*Dobbs*,[16] the precedential value of *Harris v. McRae* and *Maher v. Roe*, the abortion precedents identified in the Answer, is questionable. Second, the State misconstrues the rulings themselves. The State sees *McRae* and *Maher* as supporting its position on unaffordable bail because each case upholds a challenged budgetary/funding law, even though the results would be that wealthy woman could obtain abortions where indigent women could not. According to the State, this suggests that money-based incarceration should also be upheld, even though wealthy individuals will be able to obtain freedom where the indigent will not.

This analogy might seem persuasive as presented in the Answer, but an actual review of *McRae* and *Maher* shows they support Burroughs' position. Both cases are *explicitly* decided based on the distinction between practices through which the government places an obstacle in the way of a right, and those in which the

[16] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

government declines to affirmatively fund that right. *Maher*[17] and *McRae*,[18] on their own terms, only apply to the latter. According to the *McRae* Court "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[19] Burroughs has not asked the State to pay his bail. He has asked that it not impose an insurmountable obstacle, unaffordable bail, in the way of his pretrial liberty. The practice Burroughs challenges is analogues to the exact type of abortion restriction – something like a government imposed unaffordable cost on abortion – *Maher* and *McRae* indicate would be invalidated.

ii. The Credit Time at Sentencing Framework

The second equal protection framework suggested by the State is that addressing good time credit at sentencing found in *McGinnis v. Royster*.[20] *McGinnis* is distinguishable on procedural grounds because the parties agreed that rational-

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[17] *Maher v. Roe*, 432 U.S. 464, 474 (1977) ("The Connecticut regulation before us is different in kind from the laws invalidated . . . [it] places no obstacles absolute or otherwise in the pregnant woman's path to an abortion . . . The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.").
[18] *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization. . . encourages alternative activity.").
[19] *Id.*
[20] *McGinnis v. Royster*, 410 U.S. 263 (1973).

basis review applied, and thus the *McGinnis* Court did not, and had no occasion to decide the proper level of scrutiny.[21]

McGinnis is also distinguishable on the merits. *McGinnis* involved a claim of entitlement to earn "good time" credits during pretrial incarceration in "jail" before entry into New York's "prison" system. The *McGinnis* Court held that it did not offend the equal protection clause to deny "good time" credits for such pre-trial custody while affording credits to persons convicted but released on bail prior to sentencing.[22] While the *McGinnis* plaintiffs, like Burroughs, alleged that those who did not obtain release on bail were harmed, their claims do not implicate the absolute deprivation of a fundamental right,[23] which has been front and center to Burroughs' claim throughout this litigation. Op. Br. at 23—25; A169—75; A324; A356—58. *McGinnis* is entirely consistent with Burroughs' argument because its petitioners sought credit time – for which they had no right (let alone a fundamental right). Just like the abortion decisions misunderstood by the State, *McGinnis* deals with a request for a benefit (good time credit, or funding for an abortion), not a government imposed financial obstacle to a fundamental right.

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[21] *Id.* at 270 ("Appellees themselves recognize this to be the appropriate standard").
[22] *Id.* at 268.
[23] *Id.* at 266 ("appellees did receive jail-time credit for the period of their presentence incarceration in county jail").

Vasquez v. Cooper, the second sentencing case relied on by the State, is distinguishable for reasons Burroughs' argued below, and are unaddressed by the State. A167—68. The challenge in *Vasquez*, unlike that presented by Burroughs and the cases he relies on, was not a direct challenge to money bail. Rather, as the State recognizes:

> *Vasquez challenged the denial of credit time for time spent incarcerated pre-sentence. 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*. Answer at 23.

But the State's description conspicuously leaves out a critical point which distinguishes the *Vasquez* Court's analysis from Burroughs' claim. After noting that to "prevail on an equal protection theory, [Vasquez] must show that he is a member of a class that was *denied a benefit*,"[24] the *Vasquez* Court found that he was not denied a benefit because "consideration was given for the time the defendant was incarcerated pending sentencing,"[25] and by doing so, "the judge effectively put Vasquez in the same position as those who were released on bail."[26] Thus, the *Vasquez* Court's decision turns on the finding that Vasquez was effectively given the benefit he complains was denied. Burroughs' claim is distinguishable because he is squarely focused on an undisputed denial of pretrial liberty.

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[24] *Vasquez v. Cooper*, 862 F.2d 250, 252 (10th Cir. 1988) (emphasis added).
[25] *Id.* at 251.
[26] *Id.* at 253.

c. *Bearden prohibits money-based incarceration unless alternate measures are inadequate to address the State's interests. The label on the test and the name given to the group of impacted people are irrelevant.*

According to the State, "*Bearden* itself expressly rejected the Strict Scrutiny and Rational Basis dichotomy." Answer at 28. This is a misreading of *Bearden*, which rejected the due process/equal protection dichotomy,[27] not the distinction between levels of scrutiny. In any case, while it is true that the *Bearden* Court did not label the level of scrutiny it utilized, the test it employed – by which money-based incarceration was permitted "[o]nly if alternate measures are not adequate to meet the State's interests"[28] – was clearly heightened scrutiny.[29] A170—71.

For reasons which are unstated, it is important to the State that the class be called "persons who were subject to pretrial confinement because they could not post bail." Answer 24. The State's argument about the class label has legs: *Bearden* itself recognizes that "indigency in this context is a relative term rather than a classification."[30] However, like its quibble about the name of the level of scrutiny,

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[27] *Id.* at 666—67. Burroughs has *always* recognized that this claim is not strictly equal protection based, but also depends on the "absolute deprivation of a fundamental liberty," pretrial freedom specifically. A74—75, A169.
[28] *Id.* at 672.
[29] Because *Bearden* does not label its level of scrutiny, Burroughs has referred to its test as "heightened scrutiny," a term this Court uses to refer to scrutiny above rational basis, but not specifically strict scrutiny. *See Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 666 (Del. 2014) (describing both "intermediate" and "strict scrutiny" as "heightened scrutiny.").
[30] *Bearden*, 461 U.S. at 667.

this nit-picked distinction is pure semantics and has no bearing on the analysis because Burroughs' meets the indigency criteria no matter how it is defined.

d. ***The State's failure to address the harms of pretrial incarceration, or their legal significance, should be treated as a waiver.***

Burroughs argued that, even if this Court found the Judge's Order was correct to apply rational basis review, it should still reverse because United States Supreme Court precedent requires consideration of the undisputed harms caused by pretrial incarceration, and Burroughs' unaffordable bail cannot be justified considering those harms. Op. Br. at 27—28, and n.43. Burroughs' argument was made below (A87—89, 303—05), unaddressed by the Reviewing Judge, repeated in the Opening Brief (at 27—28), and unaddressed in the Answer.

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

The State does not hesitate to claim Burroughs "misrepresents the State's position," in claiming his bail's unaffordability was deliberate, but then dances around the issue by reviewing court rules and statutes instead of identifying what the proper interpretation of the record might be. Answer at 31. Similarly, the Answer claims Burroughs' position is "without . . . support in the record," (Answer at 34) but makes no attempt at addressing the record support cited by Burroughs. Op. Br. at 34—35 (citing A58; A272—78; and Ex. A at 42).

a. *If the Court accepts the State's position regarding Burroughs' Sufficient Sureties claim, then it must grant Burroughs' Due Process claims.*

The State's responses to Burroughs' Sufficient Sureties and Due Process claims reveal the internal inconsistency of a "heads I win, tails you lose" styled argument. A318-319. There are two theoretical means by which money bail might promote safety: (1) incentivizing safety, and (2) forcing safety through unaffordability. The State does not dispute Burroughs' position that unaffordable money-bail cannot, consistent with the Sufficient Sureties' Clause, be justified by its ability to function as a pretrial detention order. Instead, the State argues the facts,

and claims Burroughs' bail was not justified by incarceration. But, if Burroughs' bail was imposed to incentivize pretrial success (the remaining option), then the State has failed to satisfy its burden in Burroughs' due process claim because it has not provided clear and convincing evidence that money bail incentivization is more effective than non-financial conditions.

b. ***The record supports Burroughs' position that his bail was intended to be unaffordable.***

Firstly, this Court should note that the position taken here by the State is not that taken in the Judge's Order which denied Burroughs' *Sufficient Sureties* claim based on its determination that Burroughs' bail was issued in accordance with Delaware statute. Op. Br. at 31 (citing Exhibit B at 19). Burroughs' argued that the Reviewing Judge's rational was inadequate because statutory compliance does not prove compliance with Delaware's constitution. Op. Br. at 31—32. The State's complete failure to address this argument is a concession that the Order's rational was flawed.

The argument the Answer does make – Burroughs' bail was not intended to incarcerate him – is contradicted by the record evidence cited in the Opening Brief and unaddressed in the Answer. Op. Br. at 13, 16, 30, 34—35. The self-serving position taken by the State in its Answer is directly inconsistent with the position it took when Burroughs' bail was being addressed. A251—52; A272—278. It was only after Burroughs pointed out that this position violated Delaware's Sufficient

Sureties Clause (A289—96) that the State incredulously argued to the Commissioner (A309) and Reviewing Judge (A545) that Burroughs' bail was not intended to incarcerate him. The Answer, characteristically, asserts Burroughs' claim was made "without . . . support in the record," when in reality, the support is clear and entirely unaddressed in the Answer: neither the Reviewing Judge, nor the Commissioner found support for the position that Burroughs' bail was not intended to incarcerate; the Commissioner's Order is explicitly premised on the view that "[affordable] monetary bail is virtually meaningless" (Exhibit A at 43); the J.P. Magistrate did not impose pretrial monitoring (A25, 28); and the Court of Common Pleas increased Burroughs' already unaffordable $34,000 bail to $110,501. A58—59.

CONCLUSION

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

Respectfully submitted,

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