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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK EX. Rel. PHILIP DESGRANGES, ESQ. ON BEHALF OF CHRISTOPHER KUNKELI Petitioner, v. ADRIAN BUTCH ANDERSON, Dutchess County Sheriff, Respondent.	App. Div. Docket No. 2018-346

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

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Dated: January 9, 2018
New York, N.Y.

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PRELIMINARY STATEMENT

The constitutional command of "equal justice under law" applies with particular force to prohibit discrimination against indigent defendants in the administration of criminal justice. In *Bearden v Georgia* (461 US 660 [1983]), the Supreme Court held that an individual may not be imprisoned for failing to pay a fine where such failure rested on an inability to pay. *Bearden* recognized that freedom from incarceration should not turn on the ability of individuals to purchase their freedom. Accordingly, the *Bearden* Court insisted that alternatives to incarceration must be considered and rejected before incarceration could be imposed upon indigent persons. The principles articulated in *Bearden* have since been embraced and applied to bail decisions for pretrial defendants by several courts around the country.

Bearden's insistence upon the exploration of alternatives prior to incarceration have been reinforced by the New York Court of Appeals decision in *People ex. rel. Wayburn v Schuff* (39 NY2d 682 [1976]). There, the Court of Appeals reasoned that because "any pre-trial detention impinges on the right to liberty" detention may be imposed "only if no less restrictive means are available to satisfy [a] compelling state interest."

The substantive requirements set forth in *Bearden* are further supported by procedural due process principles identified by the Supreme Court in *Goldberg v*

Kelly (397 US 254 [1970]) and applied to a pretrial bail determination by the Supreme Judicial Court of Massachusetts in *Brangan v Commonwealth* (477 Mass. 691 [2017]). In *Brangan* the Court required "a statement of findings and reasons, either in writing or on the record" to prevent the routine incarceration of individuals simply because they could not afford bail.

Petitioner Christopher Kunkeli is an indigent pretrial defendant accused of a misdemeanor. Bail was set in his case at an amount that he could not afford. He was then sent to jail where he has remained for nearly three months. The mandate that he be incarcerated was imposed without any exploration of his ability to pay the amount of bail that was set or of any lesser amount that would have secured Mr. Kunkeli's appearance at subsequent proceedings without resulting in his pretrial incarceration. There was no exploration of any alternative requirements short of incarceration that could have secured Mr. Kunkeli's subsequent appearance. And there was no statement of findings and reasons, on the record, to ensure that these issues were explored. Petitioner seeks declaratory judgment and his release from detention to cure these constitutional violations. He requests that the Court declare that it is presumptively impermissible under equal protection and due process principles to incarcerate an indigent pretrial defendant solely because he is unable to pay bail; that incarceration is impermissible without a finding that

no less restrictive alternative will reasonably assure his return to court; and that such finding must be on the record.

STATEMENT OF FACTS

Petitioner Christopher Kunkeli is a 32-year-old mechanic from Dutchess County.[1] In October, he was arrested in the Town of Poughkeepsie for allegedly shoplifting a vacuum cleaner from Target. For nearly three months now, he has been confined in the Dutchess County jail solely because he is unable to pay bail. At his arraignment, Judge Paul Sullivan (hereinafter the "presiding judge") set $5,000 bail and $10,000 bond, without inquiring into whether Mr. Kunkeli could pay those amounts or whether financial or non-financial alternatives would reasonably assure Mr. Kunkeli's return to court. When Mr. Kunkeli could not pay the bail, the presiding judge ordered the county sheriff to confine Mr. Kunkeli in jail, where he remains today.

Mr. Kunkeli's facts are not unique. Pretrial detainees have consistently accounted for the vast majority of the Dutchess County jail population. Most recently, in 2016, they comprised 71% of the average daily population. Data obtained from the county jail spanning the eight-year period of 2010-2017 reveal that pretrial defendants are commonly committed to jail for long periods because

[1] A full account of the facts and procedural history in this case can be found in the Verified Petition, which the petitioner incorporates herein by reference. In addition, a full data analysis of the bail practices in Dutchess County can be found in the affidavit of Michelle Shames, which the petitioner also incorporates by reference.

of their inability to pay bail. Of those pre-trial detainees with a bail set who spent at least one night in jail, the average length of stay was 41 days.[2] Like the petitioner, the majority of these individuals were charged with low-level offenses.[3] Sixty percent had a misdemeanor as their most serious charge, while three percent had a violation as their most serious charge.[4] Moreover, data shows that indigent defendants were jailed because they cannot afford even the most modest amounts of bail. During the same eight-year time span, 684 pretrial detainees were jailed for one week or more for failing to satisfy a bail requirement of $500 or less, while 262 defendants were jailed for one month or more.[5]

The 257-bed county jail has been plagued with overcrowding for years, so much so that the county resorted to jailing individuals in large nearby trailers, referred to as "temporary pods."[6] Given the availability of effective pretrial release services in the county, the problem of an overcrowded jail filled with pretrial detainees could be alleviated, at least in part, by proper recourse to these services, instead of imposing bail that poor defendants cannot afford.[7] But the pretrial problems in Dutchess County are symptomatic of a larger problem throughout the

[2] Affidavit of Michelle Shames In Support of Petition for Writ of Habeas Corpus for Christopher Kunkeli ("Shames Aff."), at ¶ 12.
[3] Shames Aff. at ¶ 10.
[4] Shames Aff. at ¶¶ 10, 13, 15.
[5] Shames Aff. at ¶ 17.
[6] Patricia R. Doxey, *Dutchess County's New Jail Could Be too Small, Sheriff Warns*, Daily Freeman (Aug. 1, 2017) (exhibit 24 to petitioner's verified petition).
[7] Shames Aff. at ¶ 22.

State. Former Chief Judge Jonathan Lippman recently observed that "there is precious little evidence that either prosecutors or judges consider a person's ability to pay bail, even though New York's bail statue requires that the 'financial resources' of the defendant be taken into account."[8] In fact, because bail is often set without regard to the defendant's ability to pay, public defenders in Brooklyn have begun the process of systematically challenging bail determinations before this Court.[9]

New York's discriminatory and antiquated bail practices stand in stark contrast to the bail reform movement sweeping the country. New Jersey, Maryland, Kentucky, Colorado, New Mexico, New Orleans, and Chicago have all recently adopted legislative or regulatory reforms to prevent the jailing of individuals solely because of their inability to pay bail.

STATUTORY FRAMEWORK

Under New York's statute, judges must determine "the kind and degree of control or restriction that is necessary to secure [a defendant's] court attendance when required" (CPL § 510.30 [2] [a]). When deciding what restriction, if any, is appropriate, section 510.30 requires that judges consider several factors, including the defendant's character, ties to and length of residence in the community,

[8] *See* Jonathan Lippman, Independent Commission on Criminal Justice, *A More Just New York City* at 44 (April 2017) (excerpted) (exhibit 16 to petitioner's verified petition).
[9] Ian Macdougall, *The Failure of New York's Bail Law*, The Atlantic at 2, (Nov. 24, 2017) (exhibit 18 to petitioner's verified petition).

employment, and "financial resources." (*Id*.) Although the statute lists financial resources as a factor, it does not specifically require that judges determine whether defendants can afford to pay the bail amounts that are imposed.[10] (*See id.*)

The statute provides judges with the option of nine forms of bail, ranging from traditional, restrictive cash bail and insurance company bonds, to less restrictive unsecured bond and partially secured bonds.[11] (CPL § 520.10 [1]). An unsecured bond involves the defendant or his guarantor signing a contract promising to pay a sum of money if the defendant fails to appear in court.[12] A partially secured bond involves the defendant or his guarantor depositing a "fractional sum of money fixed by the court, not to exceed ten percent of the" bond amount.[13] These alternative forms of bail were included in the statute to provide additional opportunities for release and, therefore, to "reduce the unconvicted portion of our jail population."[14]

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[10] Indeed, the practice commentaries note, "in too many cases what would appear to be reasonable [bail] in the abstract simply results in detention for defendants with insufficient resources. In that sense, the lack of a nexus between the resources of a defendant and the use of financial bail reflects an absence of logic in the whole securing order system." Peter Preiser, Practice Commentaries, McKinney's Cons. Laws of New York, 2012, Electronic Update, CPL § 510.30.

[11] Courts cannot set only one form of bail. *People ex rel. McManus v Horn*, 18 NY3d 660, 666 (2012).

[12] Commission on Revision of the Penal Law and Criminal Code, Memorandum in Support of Explanation of Proposed Criminal Procedure Law, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561, 10 (March 1970) (exhibit 15 to petitioner's verified petition).

[13] *See id.*

[14] *Id.*

The pretrial statutory rights afforded to defendants differ depending on the classification of their charges. Defendants charged with violations and misdemeanors have a right to release on recognizance or release on the condition they pay bail. (CPL §§ 530.20 [1]; 530.40 [1].) On the other hand, judges may remand felony defendants (i.e., order their detention until the case is resolved) if incarceration is "necessary" to assure the defendant's court appearance. (CPL §§ 510.30 [2] [a]; 530.20 [2] [b]; 530.40 [4].) Finally, pretrial services are available options for judges in 55 of the 62 counties in New York.[15] Dutchess County is one of those counties. Although the bail statute does not explicitly reference pretrial supervision or similar pretrial services, "courts have the inherent power to place restrictive conditions upon the release of a defendant" to assure the defendant's return to court. (*People ex rel. Shaw v Lombard*, 95 Misc 2d 664, 667 [Monroe County Court 1978].)

As noted above, New York's bail statute does not require that judges determine whether a defendant can afford to pay the bail amounts set or whether there are less restrictive alternatives to unaffordable bail that will reasonably assure a defendant's return to court. As a result, unaffordable bail is imposed too frequently. But the petitioner does not challenge the constitutionality of New York's bail statute. Although the statute does not, on its face, require an on-the-

[15] *See* Data Clearinghouse, Pretrial Services Statewide Metrics, Vera Institute, *available at* https://www.vera.org/state-of-incarceration/data-clearinghouse

record inquiry into the defendant's ability to pay, it does not prohibit such an inquiry. The problem is that such inquiries are not conducted. This then is an "as applied" challenge in which petitioner seeks review of the unconstitutional application of the bail statute where, as here, there has been a failure to consider ability to pay and a failure to determine that no less restrictive alternatives short of detention would adequately assure petitioner's return to court.

STANDARD OF REVIEW

As discussed more fully below, the petitioner asserts that his pretrial detention violates the equal protection and due process clauses of the U.S. and New York Constitutions. The Court of Appeals has held that "habeas corpus is an appropriate proceeding to test a claim that the relator has been imprisoned after having been deprived of a fundamental constitutional [. . .] right." (*People ex rel. Keitt v McMann*, 18 NY2d 257, 262 [1966] [holding that habeas was proper where the relator claimed he was illegally detained because he was imprisoned after his due process rights and privilege against self-incrimination were violated at trial].)

Because the petitioner contends that his detention violates his constitutional rights, this Court must review the bail-setting court's actions *de novo* (*People ex rel. Klein v Krueger*, 25 NY2d 497, 503 [1969] [holding that, "for constitutional reasons at the very least," a habeas court has "plenary review" because "the constitutional mandates both as to habeas corpus and bail are paramount and

controlling over any statutory distribution of judicial power, appealability, and reviewability"]). Indeed, this Court has confirmed that *de novo* review is appropriate in habeas cases when the "impairment of [a] constitutional right is involved." (*People ex rel. Peters v Cyrta*, 36 AD2d 637, 637-38 [2d Dept 1971].)

ARGUMENT

I. TO PREVENT PRETRIAL DEFENDANTS FROM BEING INCARCERATED SOLELY BECAUSE THEY ARE INDIGENT, CONSTITUTIONAL PRINCIPLES RESPECTING EQUAL PROTECTION AND DUE PROCESS REQUIRE AN ON THE RECORD INQUIRY INTO WHETHER A PRETRIAL DEFENDANT CAN AFFORD BAIL AND, IF NOT, WHETHER THERE ARE LESS RESTRICTIVE ALTERNATIVES TO INCARCERATION THAT WILL ASSURE DEFENDANT'S APPEARANCES IN SUBSEQUENT PROCEEDINGS.

A. Constitutional Principles Emerging from the Supreme Court Decision in *Bearden v Georgia* Require a Bail-Setting Court to Inquire, On the Record, Whether an Indigent Pretrial Defendant can Afford Bail and, if not, Whether there are Alternatives Short of Incarceration.

The Supreme Court has, in a variety of circumstances, prohibited states from discriminating against indigent defendants solely because of their indigence.[16] In *Griffin v Illinois* (351 US 12 [1956]) the Court reviewed the constitutionality of a

[16] As the U.S. Supreme Court has explained, "indigency in this context is a relative term." *Bearden v Georgia*, 461 US 660, 667 n 8 (1983). The Court in *Bearden* used "indigent" interchangeably with "someone who through no fault of his own is unable to" pay. *Bearden*, 461 US at 670. The N.Y. Court of Appeals has done the same. *People v Amorosi*, 96 NY2d 180, 184 (2001) (citing *Bearden* and stating that "when a probationer cannot pay restitution—despite sufficient good faith efforts to acquire the resources to do so—then a court must consider measures of punishment other than imprisonment. Indeed, depriving probationers of conditional freedom based simply on their indigence would be an invidious denial to one class of defendants of a substantial benefit available to another.")

state rule that denied indigent defendants an adequate appellate review because the State would not provide defendants with trial transcripts if they were unable to pay the transcription costs. In doing so, the *Griffin* Court offered a foundational concept: "equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court" (*Id.*at 17 [internal quotation and citation omitted]). Applying this concept the Court held that due process and equal protection principles prohibit discrimination against indigent defendants "at all stages" of criminal proceedings. (*Id. at* 18–20).

In keeping with *Griffin*, the Supreme Court has prohibited such discrimination at several other stages of the criminal process. (*See, e.g., Williams v Illinois*, 399 US 235, 236 [1970] [indigent defendant may not be imprisoned beyond statutory limit because he is unable to pay a fine]; *Tate v Short* , 401 US 395, 396 [1971] [indigent defendant sentenced to a fine may not be exposed to having the fine converted "into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."]; *Douglas v California*, 372 US 353 [1963] [indigent defendant entitled to counsel on first direct appeal]; *Roberts v LaVallee*, 389 US 40 [1967] [indigent entitled to free transcript of preliminary hearing for use at trial]; *Mayer v Chicago*, 404 US 189 [1971] [indigent defendant cannot be denied an adequate record upon which to appeal a conviction].)

In *Bearden v. Georgia* (461 US 660 [1983]) the Court expanded upon these holdings. In that case, the trial court had sentenced Bearden to three years of probation on the condition that he pay a fine and restitution costs. (461 US 660, 662 [1983].) When Bearden later lost his job and could not pay the balance of the fine and restitution, the State filed a petition to revoke his probation. (*Id.* at 663.) The trial court then held an evidentiary hearing, revoked Bearden's probation because of his failure to pay, and sentenced him to serve the remainder of his probationary period in prison. (*Id.*)

The Supreme Court reversed the trial court decision. In doing so, the Court observed that due process and equal protection principles converge in its analysis of cases involving the disparate treatment of indigent defendants in the criminal justice system. (*Id.* at 665.) The Court explained that it typically analyzes "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause" and it typically analyzes "the fairness of relations between the criminal defendant and the State under the Due Process Clause." (*Id.* at 665.) These constitutional principles drove the *Bearden* Court to conclude that the trial court had impermissibly detained the defendant "*solely* because he lack[ed] the funds to pay the fine." (*Id.* at 674 [emphasis added].)

Although Bearden had received some process in the form of a probation revocation hearing, the Supreme Court found the process inadequate to protect his liberty interest. (*Id.* at 672-74.) According to the Court, principles of fundamental fairness prohibited Bearden's incarceration because the trial court "made no finding" that Bearden had failed to engage in bona fide efforts to pay; or that Bearden had failed to pay for any reason other than his indigence; or that alternatives to imprisonment were inadequate to satisfy the State's interest. (*Id.* at 673-74.) By depriving Bearden "of his conditional freedom simply because, through no fault of his own, he [could not] pay the fine" the trial court was found to have violated the defendant's constitutional rights. (*Id.* at 672-73.)

The Supreme Court further held that, going forward, trial courts "must inquire into the reasons for the failure to pay" before revoking an individual's probation and, if he lacks the funds, they "must consider alternate measures of punishment other than imprisonment." (*Id.*) The Court further held that "*[o]nly if* alternate measures are not adequate to meet the State's interests [. . .] may the court imprison a probationer who" cannot afford to pay. (*Id.* at 672 [emphasis added].) As discussed below, *Bearden*'s reasoning applies equally in the pretrial context.

Because due process and equal protection principles protect indigent defendants at all criminal proceedings, the Court's reasoning in *Bearden* cannot be limited to probationers. (*See Griffin*, 351 US at 18-20 [holding that equal

protection and due process prohibit discrimination against the indigent "at all stages" of criminal proceedings].) Indeed, compared to the probationer in *Bearden*, the petitioner in this case has an even stronger "interest in liberty" because he has not been convicted and is presumed innocent before trial. (*United States v Salerno*, 481 US 739, 755 [1987].) The Supreme Court has held that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Salerno*, 481 US at 755.) Without the right to freedom before trial, the presumption of innocence is diminished because a detained defendant finds it far more difficult to aid in preparing a defense than one who is not detained. (*Stack v Boyle*, 342 US 1, 4 [1951]; *see also People v Johnson*, 27 NY3d 199, 208 [2016] ["Pretrial detention hampers a defendant's preparation of his defense by limiting his 'ability to gather evidence (and) contact witnesses' during the most critical period of the proceedings"] [Pigott, J., concurring].)

The purpose of bail is to encourage the pretrial release of a defendant while, at the same time, securing his or her appearance at trial. (*Stack*, 342 US at 4-5 [stating that freedom before trial is "*conditioned* upon the (defendant) giving adequate assurance that he will stand trial and submit to sentence if found guilty"] [emphasis added].) Like the defendant in *Bearden*, the petitioner here was granted freedom on the condition that he pay a sum of money and, when he could not pay,

the presiding judge summarily ordered pretrial detention. Thus, the central facts in *Bearden* mirror the petitioner's case and that of other pretrial defendants.

Recognizing the import of *Bearden*, courts around the country have relied on its reasoning and rejected local bail practices that result in the incarceration of pretrial indigent defendants solely because of their inability to pay bail. In *Odonnell v Harris County*, for example, plaintiffs brought a class-action suit challenging a Texas county's practice of detaining indigent defendants solely because of their indigence. (251 F Supp 3d 1052, 1058-59 [SD Tex 2017], pending appeal 227 F Supp 3d 706.) Relying on *Bearden*, the district court held that pretrial detention of indigent defendants on unaffordable bail "is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest." (*Id.* at 1140.) In a similar case in Alabama, the plaintiff challenged her pretrial detention on unaffordable bail because she could not pay the money required by the city's bail schedule. (*Jones on behalf of Varden v City of Clanton*, 2015 WL 5387219, *2 (MD Ala Sept. 14, 2015].) Relying on *Bearden*, the district court held that "the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or

alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment." (*Id.*)

Last year, the Ninth Circuit applied the reasoning of *Bearden* in a case challenging the bond-setting practices of immigration judges. (*Hernandez v Sessions*, 872 F3d 976, 981-93 [9th Cir 2017].) Bond in the immigration context serves the same purpose as bail in the criminal context: "the government's purpose in conditioning release on the posting of a bond in a certain amount is to 'provide enough incentive' for released detainees to appear in the future." (*Id.* at 991.) The Ninth Circuit relied on *Bearden* for the general proposition that "no person may be imprisoned *merely* on account of his poverty." (*Id.* at 981 [emphasis added].) Based on that proposition, the Circuit held that the government's policies failed to provide "adequate procedural protections" for non-citizens because imposing a "bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings." (*Id.* at 991.) Going forward, immigration judges who set bond in the Central District of California "should explain why, whether orally or in writing, the bond amount is appropriate" given the non-citizen's financial circumstances and why alternative conditions of supervision were not ordered. (*See* Instructions and Guidelines to

Immigrations Judges, *Hernandez v Sessions*, No. 5:16-cv-00620-JGB-KK, ECF. No. 126-1, p. 6, ¶ 9.)

Even prior to *Bearden*, two courts had addressed bail practices and concluded that jailing indigent defendants solely because of their inability to pay bail is unconstitutional. In *Pugh v Rainwater*, the Fifth Circuit panel struck down Florida's new bail rule because it "retains the discriminatory vice of the former system: When a judge decides to set money bail, the indigent will be forced to remain in jail." (557 F2d 1189, 1201 [5th Cir 1977], *opinion vacated on reh en banc*, 572 F2d 1053 [5th Cir 1978].) The en banc court took up the case and agreed that "imprisonment *solely* because of indigent status is invidious discrimination and not constitutionally permissible."[17] (*Pugh*, 572 F2d 1053, 1056 [emphasis added].) The en banc court explained that if Florida's new rule required pretrial confinement for inability to post bail even when alternative forms of release could reasonably assure an indigent defendant's return to court, that "would constitute imposition of an excessive restraint." (*Id.* at 1058.) But because the en

[17] In *Odonnell* and a similar case *Walker v City of Calhoun, Georgia*, 2017 WL 2794064 (ND Ga June 16, 2017), currently pending before the Fifth and Eleventh Circuits respectively, dozens of current and former law enforcement officials have submitted amicus briefs in support of the plaintiffs, urging both Circuits to adhere to the principle espoused in the en banc decision in *Pugh*, "that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." Brief for Amici Curiae Supporting Plaintiffs-Appellees, *Odonnell* at 2, ECF. No. 00514107922, filed on August 8, 2017; Brief for Amici Curiae Supporting Plaintiffs-Appellees, *Walker* at 3, filed on November 20, 2017.

banc court did not "read the new rule to require such a result," it vacated the panel's decision.[18] (*Id.* at 1058-59.)

In *Lee v Lawson*, a habeas petitioner challenged the Mississippi bail statutes as unconstitutional because they resulted in her pretrial detention solely because of her indigence. (375 So 2d 1019, 1021 [Miss 1979].) After considering the equal protection and due process rights of the petitioner, the Mississippi Supreme Court said it was led "to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional." (*Id.* at 1023.) The Mississippi bail statutes, however, afforded options for releasing defendants on alternatives to bail, thus the court did not find them unconstitutional. (*Id.*) But because the record in the petitioner's case was "devoid of any consideration [. . .] of alternative forms of release," the court remanded the case to the lower court with instructions "to consider whether a form of pretrial release other than money bail would adequately assure the defendant's presence at trial." (*Id.* at 1024.)

B. The Constitutional Principles Emerging From the *Bearden* Decision Are Further Supported by the New York Court of Appeals Decision in *People ex rel. Wayburn v Schupf*.

The New York Court of Appeals has provided further support for the *Bearden* principles by observing that, under the federal and State Constitutions, pretrial detention must be examined under the requirements of strict judicial

[18] Though the Second Circuit has not yet decided a case similar to Pugh, it has held that "a man should not be imprisoned solely because of his lack of wealth." *Gaines v United States*, 449 F2d 143, 144 (2d Cir 1971).

scrutiny. (*See People ex rel. Wayburn v Schupf*, 39 NY2d 682, 686-87 [1976].) In *Wayburn*, the Court of Appeals addressed whether a provision of the Family Court Act authorizing the pretrial detention of high-risk juvenile delinquents violated due process and equal protection.[19] (*Id.* at 685 [stating later that "(t)o a very large extent the considerations of equal protection and due process are the same" regarding the pretrial detention provision].) The Court found that "*any* pretrial detention impinges on the right to liberty, a fundamental right that is recognized in the constitutional sense as carrying a preferred status and so is entitled to special protection." (*Id.* at 686-87 [emphasis added].) It explained that, under strict scrutiny, the difference in the treatment of juveniles compared to adults who could not be similarly detained "may be justified only by the existence of a compelling State interest to be served by the differentiation, and even then only if no less restrictive means are available to satisfy that compelling State interest."[20] (*Id.* at 687.)

[19] The Court of Appeals has not addressed an as-applied challenge of New York's bail statute, like this one, but it has addressed facial challenges to the statute. *See People ex rel. Gonzalez v Warden, Brooklyn House of Det.*, 21 NY2d 18, 22 (1967) (rejecting petitioner's "request that this court adopt a nonfinancially oriented system of bail" because "the adoption of such a system is more properly within the province of the Legislature."); *Bellamy v Judges & Justices Authorized to Sit in New York City Criminal Court*, 41 AD2d 196, 197 (1st Dept 1973), *aff'd* 32 NY2d 886 (1973) (granting summary affirmance of the Appellate Division's decision that New York's bail statute is constitutional on its face.)

[20] Ultimately, the Court of Appeals found that preventive detention for juveniles survived strict scrutiny and did not violate due process and equal protection because the state had a compelling interest to protect "the juvenile from his own folly" and detention was the least burdensome means to achieve that objective. *Wayburn*, at 689.

Relying on *Wayburn*, this Court has also recognized that discrimination resulting in a young adult's detention "must be strictly scrutinized" (*Balmer v New York State Bd. of Parole*, 54 AD2d 979, 979 [2d Dept 1976], *aff'd*, 42 NY2d 939 [1977]).

C. The Requirements of *Bearden* and *Wayburn* Are Further Reinforced by the Requirement of Reasoned Decision-making Imposed by Federal and State Due Process Principles.

Finally, this past year, the Massachusetts Supreme Judicial Court addressed the imposition of bail under circumstances where an indigent defendant could not afford bail and was, therefore, subjected to pretrial detention (*Brangan v Commonwealth*, 477 Mass 691 [2017]). The *Brangan* Court observed: "Where [. . .] the defendant is unable to give the necessary security for his appearance at trial because of his indigence, the purpose of bail is frustrated. The cost to the defendant is the loss of liberty and all the benefits that ordinarily would accrue to one awaiting a trial to determine guilt or innocence." (*Id.* at 954.)

Recognizing that the loss of liberty deeply implicates federal and state due process concerns, the *Brangan* Court concluded that "a statement of findings and reasons, either in writing or orally on the record, is a minimum requirement where a defendant faces a loss of liberty." (*Id*. at 708.) Expanding on the requirement for such on the record statements, the Massachusetts Court held that "where [. . .] it appears that the defendant lacks the financial resources to post the amount of bail

set by the judge, such that it will likely result in defendant's long-term pretrial detention,[21] the judge must [. . .] confirm the [. . .] consideration of the defendant's financial resources, explain how the bail amount was calculated, and state why . . . the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings." (*Id*. at 707.)

The decision in *Brangan* was drawn from and consistent with basic due process principles. In *Goldberg v Kelly* (297 US 254, 271 [1970]), the Supreme Court recognized the requirement of "reasoned decision-making" as a fundamental element of due process. Pursuant to the requirement of "reasoned decisionmaking," the Supreme Court has further insisted that courts or fact-finders explain their findings in a variety of contexts. In *Turner v Rogers*, for example, the Supreme Court held that the following procedural safeguards must be in place when an indigent parent faces incarceration for failure to pay child support: notice to the parent that their ability to pay is a critical issue at the contempt proceeding, a fair opportunity to be heard, and "an express finding by the court" that the parent can pay. (564 US 431, 447-449 [2011].)

In *Morrissey v Brewer*, the Supreme Court addressed the requirements of due process in connection with parole revocations. (408 US 471, 480–81 [1972].)

[21] The *Brangan* court defined "long-term pretrial detention" as the "period of time longer than the defendant might need to collect cash or collateral to post bail." *Id.* at 694 n. 4.

Despite the restricted liberty interests of parolees, the Court found that due process required both an informal preliminary hearing to determine whether there is probable cause that the parolee violated the conditions of his parole and a formal parole revocation hearing to evaluate contested facts and determine whether revocation is warranted. (*Id.* at 485-88.) In the preliminary hearing, the hearing officer must state the reasons for his decision and the evidence he relied on. (*Id.* at 487.) And at the revocation hearing, the hearing officer must provide a "written statement" of the evidence relied on and the reasons for revoking parole. (*Id.* at 489; *see also Gagnon v Scarpelli,* 411 US 778, 782 [1973] [requiring the same process for revocation of probation].)

Later in *Wolf v McDonnell*, the Supreme Court held that two procedures extended to parolees in revocation proceedings must also be extended to prisoners facing facility discipline: (1) written notice of the charges, and (2) a "written statement" from the fact-finders about "the evidence relied upon and the reasons for the disciplinary action taken." (418 US 539, 563 [1974].) In *Wolf*, the prisoner's liberty interest was restricted to a statutory right to good time credit (meaning early release through credited good behavior in prison), which he could lose if subjected to a disciplinary sanction. (*Id.* at 557-58.) The Court found that a written statement from prison administrators explaining the reasons for disciplinary

sanctions is necessary to both ensuring that administrators act fairly and that other bodies had a basis to review their actions. (*Id.* at 565.)

From *Goldberg* to *Wolf*, these Supreme Court cases require that courts or fact-finders state the reasons for their decisions, ensuring that the oral or written record consists of more than cursory decision-making. While these Supreme Court cases do not involve the rights of a pretrial defendant, they are nonetheless persuasive here because it is beyond dispute that a pretrial defendant has a greater liberty interest than a parolee, probationer, or prisoner and that criminal proceedings require greater safeguards than those involving civil contempt. (*Salerno*, 481 US at 755; *Allen v Illinois*, 478 US 364, 368 [1986] [stating that the privilege against self-incrimination applies in criminal proceedings, not civil contempt proceedings].) If fact-finders in those cases must provide oral or written findings, then bail-setting courts must also provide the necessary on-the-record findings.

In an analogous case in the pretrial context, the New York Court of Appeals addressed whether a defendant's due process rights were violated when the trial court handcuffed the defendant during a bench trial without specifying its reasons for doing so on the record. (*People v Best*, 19 NY3d 739, 742 [2012].) The *Best* Court concluded that under both federal and state constitutional law, a defendant has the right to be free of restraints "unless there has been a case-specific, on-the-

record finding of necessity." (*Id.* at 743 [internal quotations and citations omitted].) That right furthers the "fundamental legal principles" of "preserving the presumption of innocence" and ensuring that the defendant can meaningfully participate in their defense.[22] (*Id.* at 744.) Although no jury was present in this case, the Court of Appeals held that "routine and unexplained use of visible restraints does violence to each of these principles." (*Id.*) Because the trial court failed to explain its actions on the record, the Court of Appeals held that the defendant's due process rights were violated. (*Id.*)

At bottom, what emerges from these cases is a strong constitutional presumption against incarcerating pretrial defendants solely because they cannot afford bail. In its operation this constitutional presumption requires that less restrictive alternatives must be explored and rejected before incarceration can be imposed. These substantive standards are secured by procedural due process. Accordingly, where it appears that an indigent defendant lacks the financial resources to "make bail," the judge imposing bail must consider the defendant's financial resources; explain how bail was calculated; and find that no less costly or nonfinancial conditions will suffice to assure defendant's appearance in subsequent proceedings. These matters must be addressed, on the record, before an indigent defendant can be incarcerated for failing to pay bail.

[22] It is also furthers the fundamental principle of "maintaining the dignity of the judicial process." *Best*, 19 NY3d at 744.

II. WHEN MEASURED AGAINST THE REQUIREMENTS SET FORTH ABOVE, THE PRETRIAL INCARCERATION OF PETITIONER MUST BE FOUND IMPERMISSIBLE, AND PETITIONER IS ENTITLED TO RELEASE AND THE DECLARATORY JUDGMENT SET FORTH BELOW.

A. The Presiding Judge Failed to Inquire into the Petitioner's Ability to Pay; Failed to Explore Less Restrictive Alternatives; and Incarcerated Petitioner Solely Because of His Indigence.

The presiding judge failed to make the required on-the-record findings that petitioner's failure to pay was due to anything other than his indigence or that no less restrictive alternatives would satisfy the state's interest in assuring petitioner's appearance at subsequent proceedings. The transcript of the petitioner's arraignment reflects that no such inquiry was made. (*See* arraignment tr at 2-3, exhibit 30 to petitioner's verified petition.) Instead, the presiding judge ordered that the petitioner be confined to jail and renewed this order after each subsequent court appearance. (*See* securing orders, exhibit 1 to petitioner's verified petition.) The presiding judge applied the statute here in a discriminatory manner by creating different consequences for two categories of people: freedom for those with money, jail for those without. (*Id*.; *see also* tr at 2-3) This difference in treatment can only be justified by a compelling state interest and only if no less restrictive alternative would adequately satisfy that interest. (*Wayburn*, 39 NY2d at 687.)

States certainly have an interest in assuring that defendants return to court. In fact in New York, the *only* legitimate consideration for judges setting bail is "the

kind and degree of control or restriction that is necessary to secure [a defendant's] court attendance." (CPL § 510.30 [2] [a].) But the federal and state constitutions also impose an interest in avoiding unnecessary pretrial detention. (*See United States v Barber*, 140 US 164, 167 [1891].) Indeed, "in criminal cases, it is for the *interest of the public* as well as the accused that the latter should not be detained in custody prior to his trial." (*Id.* [emphasis added].) These competing interests explain why pretrial detention is not the norm but instead the "carefully limited exception." (*Salerno*, 481 US at 755.) This state's compelling interest is thus not to *guarantee* that every defendant return to court; instead, it is to "*reasonably assure"* that defendants return to court. (*Pugh*, 572 F2d at 1057 [emphasis added].)

Under *Bearden and Wayburn*, only if no less restrictive alternative to pretrial detention would satisfy the state's compelling interest may the state incarcerate a pretrial detainee on unaffordable bail. (*See Bearden*, 461 US at 672; *Wayburn*, 39 NY2d at 687.) The presiding judge made no finding that there were no adequate alternatives to the unaffordable bail that resulted in the petitioner's pretrial detention. (*See* tr at 2-3; *Bearden*, 461 US at 673-74 [requiring such a finding by trial courts].) Nor could it make this finding because several adequate alternatives were available.

The presiding judge had the option of imposing less restrictive, alternative forms of bail—like unsecured bond and partially secured bond—that would adequately assure the petitioner's return to court without depriving him of his liberty. Studies show that unsecured bonds and partial secured bonds are just as effective at assuring someone's return to court as secured bonds (i.e., cash bail and insurance company bond).[23] In one of the most comprehensive studies on unsecured bonds, the Pretrial Justice Institute collected data on 1,970 defendants booked into ten county jails over a ten-month period in Colorado and found that unsecured bond was just as, if not more, effective than secured bond across all risk levels.[24] Another study conducted by the Bureau of Justice Statistics found that federal defendants released from 2008-2010 on unsecured bond had a 2% overall failure to appear rate.[25] In a Vera Institute for Justice study involving the use of partially secured and unsecured bond in New York City,[26] the failure to appear

[23] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute at 2 (Oct. 2013) (exhibit 19 to petitioner's verified petition); Thomas H. Cohen, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal Courts, 2008-2010* at 5 (Nov. 2012), (exhibit 7 to petitioner's verified petition).

[24] *See* Jones at 6; *see also* Arpit Gupta et al., *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions*, Maryland Office of the Public Defender at 4, 14 (June 2016) (finding that Baltimore defendants' failure to appear rates were 6.3% on unsecured bond, compared to 6.5% on secured bond) (exhibit 20 to petitioner's verified petition.

[25] Cohen at 16.

[26] Eighty-six of the cases analyzed used partially secured bond; 13 used unsecured. Insha Rahman, Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* at 19, (Sept. 2017) (exhibit 21 to petitioner's verified petition).

rates were 12%[27] – much lower than the 14% City failure to appear rates for secured bond.[28]

In addition to these less restrictive forms of bail available under the statute, Dutchess County has a range of pretrial services for judges to choose from. These services range from check-in meetings with probation, to release under the supervision of probation, to electronic monitoring.[29] Data obtained from the Dutchess County Probation Office spanning eight years from 2010-2017 shows that defendants released on the county's pretrial services had a 4.8% failure to appear rate.[30] Such a low failure to appear rate is consistent with data collected by the state Division of Criminal Justice Services, which showed a 3.1% failure to appear rate among 44,098 defendants released on pretrial services in 40 New York counties.[31] These failure to appear rates for defendants on pretrial services are much less than the New York City failure to appear rates of 14% for secured bond.

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[27] *Id*.

[28] New York City Criminal Justice Agency ("CJA"), *Effects of Release Type on Failure to Appear* at 25, (2011) (excerpted) (exhibit 22 to petitioner's verified petition).

[29] *See* Pretrial Release Services of Dutchess County, Division of Criminal Justice Services, (exhibit 27); *see also* Alternatives to Incarceration, Support Services, & Bail Options Manual, 3rd Edition, Dutchess County Criminal Justice Council (March 17, 2016) (excerpted) (exhibit 28 to petitioner's verified petition).

[30] Shames Aff. at ¶ 22.

[31] New York State Division of Criminal Justice Services, *Pretrial Services Programs* (2010), available at http://www.criminaljustice.ny.gov/opca/pdfs/pretrialservices2010annualrpt.pdf (accessed Jan. 5, 2018) (data included forty counties, all outside of New York City). Pretrial services in New York City have achieved similarly low 4.2% FTA rate. *See* Freda F. Solomon & Russell F. Ferri, New York City Criminal Justice Agency, *Community Supervision as a Money Bail Alternative: The Impact of CJA's Manhattan Program on Legal Outcomes and Pretrial Misconduct* at 16 (Apr. 2016) (exhibit 29 to petitioner's verified petition).

As this data demonstrates, jailing any defendant without regard to whether alternative forms of bail or pretrial services are adequate alternatives to jail is not narrowly tailored to reasonably assure his return to court. There were alternatives available to the presiding judge that could have adequately satisfied the state's compelling interest without depriving the petitioner of his liberty. Indeed, this data demonstrates that setting unaffordable bail that results in pretrial detention is rarely necessary to reasonably assure a defendant's return to court given the effectiveness of less restrictive alternatives available in Dutchess County.

B. Administrative Convenience Cannot Justify the Petitioner's Pretrial Detention.

Requiring that bail-setting courts make an on-the-record finding of whether the defendant has the ability to pay the set bail and whether less restrictive alternatives would reasonably assure the defendant's return certainly represents a change in the status quo. But cases such as this "expose old infirmities which apathy or absence of challenge has permitted to stand." (*Williams v Illinois*, 399 US 235, 245 [1970].) While holding it unconstitutional to imprison indigent defendants beyond the statutory maximum penalty solely because they could not pay a fine, the Supreme Court recognized that its decision may burden the administration of criminal justice. (*Id.* at 243-45.) But it found that constitutional

imperatives "must have priority over the comfortable convenience of the status quo." (*Id.* at 244-45.) This Court must come to the same conclusion.

That said, any administrative inconvenience for the presiding judge is miniscule. Judges are *already* required by the bail statute to consider the defendant's "financial resources," and that consideration can expand to whether the defendant has the ability to pay bail. (*See* CPL § 510.30 [2] [a].) Judges are *already* required to consider "the kind and degree of control or restriction that is necessary" to assure the defendant's return to court. (*Id.*) That consideration can expand to whether less restrictive alternatives to unaffordable bail would adequately assure the defendant's return to court without depriving him of his freedom. And judges are *already* required to make on-the-record findings or statements of reasons in bail proceedings to demonstrate that their exercise of discretion was not arbitrary. (*See e.g. People ex rel. Shapiro v Keeper of City Prison*, 290 NY 393 [1943] ["Denial of bail is no light matter, and needs to be buttressed by a real showing of reasons"]; *People ex rel. Perez v Nevil*, 45 AD2d 445, 446 [3d Dept 1974], ["It is well established that without a record containing (. . .) findings by Special Term as to the amount of bail, the exercise of discretion (. . .) must be deemed arbitrary."], *lv. denied* 36 NY2d 645 [1974].) Requiring that judges provide on-the-record findings to comply with constitutional imperatives cannot then be deemed too burdensome. If courts in Massachusetts, Harris

County, and elsewhere can make these findings to comply with their constitutional obligations, then New York courts can too.

C. Petitioner Is Entitled to Release and the Declaratory Judgment Requested Below.

Petitioner seeks the following relief:

1. A declaratory judgment recognizing that it is presumptively impermissible under equal protection and due process to incarcerate an indigent pretrial defendant solely because he or she is unable to pay bail. Incarceration is impermissible unless the bail-setting court, on the record, (a) inquires into whether the defendant has the financial resources to pay and, if the defendant does not, (b) explains how bail was calculated and why that amount is necessary, (c) determines that, and explains why, no less restrictive form of financial bail and alternatives to bail would reasonably assure the defendant's return to court, and (d) explains why the risk of flight is so great that nothing short of pretrial detention will reasonably assure the defendant's return to court.
2. A further declaratory judgment that, because the presiding judge failed to adhere to the constitutional requirements set forth above, the petitioner's pretrial detention solely because is unable to pay bail violates equal protection and due process principles.

3. In the exercise of its habeas authority under CPLR 7010 [a], this Court should order the release of the petitioner forthwith on the basis of the presiding judge's failure to adhere to the constitutional requirements above. (*See People ex rel. Keitt v McMann*, 18 NY2d 257, 263 [1966].). In the alternative, this Court may return the matter to the presiding judge for disposition consistent with the above declaratory judgment pursuant to its declaratory judgement authority. CPLR §§ 3001; 3017 [a].[32]

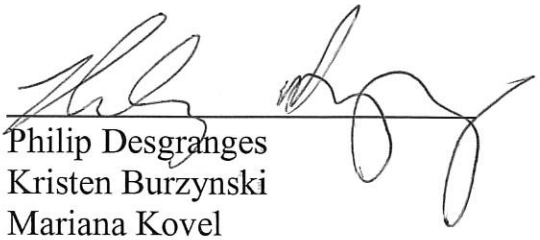
CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court order his immediate release and issue the declaratory judgment requested.

[32] If the petitioner's case becomes moot because he is released, this Court should find that the mootness exception applies and convert this proceeding to an Article 78 proceeding for declaratory judgment for three reasons. First, this case involves a "substantial" or "novel" question regarding whether New York's bail statute is being applied consistent with the Constitution. *Cf. Boggs v New York City Health & Hosps. Corp.*, 70 NY2d 972, 974 (1988) (stating that "the narrow jurisdictional context of this case presents no novel, *constitutional* or substantial legal question for this court's review") (emphasis added). Second, this issue will certainly occur again because judges will continue to apply the statute in an unconstitutional manner. *Hearst Corp. v Clyne*, 50 NY2d 707, 715 (1980) (stating that "a likelihood of repetition, either between the parties or among other members of the public" supports an exception to mootness); *see also* Shames Aff. ¶¶ 9-20 (analyzing eight years of data demonstrating widespread pretrial detention of indigent defendants being held on low levels of bail). Third, since most criminal cases are resolved with plea bargains, it is not surprising that pretrial defendants in Dutchess County who cannot pay bail are detained, on average for relatively short time periods – 32 days for misdemeanor defendants and 41 days for felony defendants – making this issue "a phenomenon typically evading review." *Hearst Corp.*, 50 NY2d at 715; *see also Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154 (1994) (finding that an issue typically evades review if it involves a "relatively short time frame").

Dated: January 9, 2018
New York, New York

Respectfully submitted,



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CERTIFICATION OF COMPLIANCE

Pursuant to Second Department Rule § 670.10.3(f), I certify that the memorandum of law in support of Christopher Kunkeli's verified petition for writ of habeas corpus was prepared on a computer, using Times New Roman (proportionally spaced) typeface, 14-point type, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The word count, as generated by Microsoft Word, is 8,034.

Dated: January 9, 2018
New York, NY

PHILIP DESGRANGES