To Be Argued By:
Philip Desgranges
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK EX REL. PHILIP DESGRANGES, ESQ. ON BEHALF OF CHRISTOPHER KUNKELI,

Petitioner-Appellant,

-against-

ADRIAN BUTCH ANDERSON, Dutchess County Sheriff,

Respondent-Respondent.

Appellate Division Docket No. 2018-04903

BRIEF FOR PETITIONER-APPELLANT

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Supreme Court, Dutchess County Clerk's Index No. 90-2018

STATEMENT PURSUANT TO CPLR § 5531

1. The action is identified as Index Number 90-2018 in the Supreme Court, Dutchess County.

2. The name of the petitioner is Christopher Kunkeli and the name of the respondent is Adrian Butch Anderson. There have been no changes to the names of the parties.

3. The action was commenced in the Appellate Division, Second Department and referred to the Supreme Court, Dutchess County.

4. The action was commenced by the filing and service of an order to show cause, petition for a writ of habeas corpus, and supporting memorandum of law on January 9, 2018. The answer and supporting memorandum of law was served on January 19, 2018. The reply memorandum of law was served on January 26, 2018.

5. Petitioner Christopher Kunkeli commenced this action seeking declaratory judgment and his release from pretrial detention on the grounds that he was detained in violation of the New York State and U.S. Constitutions.

6. The appeal is from the decision, order, and judgment of Hon. Maria G. Rosa, dated January 31, 2018, and entered in the office of the Dutchess County Clerk on February 2, 2018.

7. The method of appeal is on a reproduced full record.

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QUESTIONS PRESENTED

1. Whether it is permissible under equal protection and due process principles for courts to incarcerate indigent pretrial defendants for their inability to pay bail without finding that no less restrictive alternative to incarceration would reasonably assure the defendant's return to court?

   The lower court properly declared that "the failure of a court imposing bail as a condition of pre-trial detention to consider an individual's ability to pay that bail, as occurred in this case, is a violation of the due process and equal protection clauses of the New York Constitution and the United States Constitution." The lower court further declared correctly that when imposing bail, a court must consider whether there is any less restrictive means [other than incarceration] to "'reasonably assure' the accused returns to court." But the lower court failed to declare that incarceration is impermissible unless a court finds that no less restrictive alternative would reasonably assure the defendant's return to court.

2. Whether due process requires that courts explain their bail decisions on the record to protect the liberty interests of indigent pretrial defendants and the constitutional promise of equal justice?

   The lower court failed to address this question.

PRELIMINARY STATEMENT

This case presents a common question confronting appellate courts across the country: What protections must a court afford pretrial defendants to ensure that they are not deprived of liberty solely because of their inability to afford bail? In *Bearden v Georgia* (461 US 660 [1983]), the U.S. Supreme Court recognized that freedom from incarceration should not turn on the ability of individuals to purchase their freedom. At issue in *Bearden* was the constitutionality of revoking the probation and incarcerating an individual for failure to pay a fine that the individual could not afford to pay. The Court held that equal protection and due process principles converge in requiring that courts consider a defendant's ability to pay and alternatives to incarceration, and that incarceration would only be permissible if courts find that no alternative would satisfy the State's interest. (*Id.* at 672-73.)

A similar convergence of equal protection and due process principles occurred in *People ex rel. Wayburn v Schupf* (39 NY2d 682 [1976]). In that case, the New York Court of Appeals reviewed the constitutionality of a statute that imposed standards for the pretrial detention of juveniles that were not applicable to adult defendants. Because the case implicated the "fundamental" right to liberty, the Court of Appeals found that the inequality in treatment of adults and juveniles should be subjected to "strict judicial scrutiny" and could be sustained "only if no less

restrictive means [other than incarceration were] available to satisfy [a] compelling State interest." (*Id.* at 687.)

Neither *Bearden* nor *Wayburn* involved the imposition of bail that a pretrial defendant could not afford. But the reasoning employed by the Supreme Court in *Bearden* and the legal standard articulated by the Court of Appeals in *Wayburn* apply, as well, to the imposition of bail upon indigent pretrial defendants. Indeed, in recent years, appellate courts have drawn upon the reasoning of *Bearden*, in particular, and have insisted that the imposition of bail upon an indigent pretrial defendant must comport with constitutional requirements that are both substantive and procedural in nature. (*See In re Humphrey*, 19 Cal.App.5th 1006 [Ct.App. 2018]; *ODonnell v Harris County*, 892 F3d 147 [5th Cir. 2018].) Another appellate court, relying solely on due process principles, has done the same. (*Brangan v Commonwealth*, 477 Mass 691 [2017].) This case presents similar equal protection and due process claims that were recognized in *Humphrey, ODonnell* and *Brangan* to make it impermissible to deprive an individual of liberty solely because that individual cannot afford bail.

Petitioner Christopher Kunkeli initiated this hybrid habeas corpus/declaratory judgment action in Dutchess County to challenge his pretrial detention on unaffordable bail without being afforded the protections provided by *Bearden* and *Wayburn*. The petitioner sought his release from jail and a declaration that bail-

setting courts must afford defendants these protections and explain their bail decisions on the record. In granting partial relief to the petitioner, the Dutchess County Supreme Court declared that "the failure of a court imposing bail as a condition of pre-trial detention to consider an individual's ability to pay that bail, as occurred in this case, is a violation of the due process and equal protection clauses of the New York State Constitution and the United States Constitution." The lower court further declared that "when imposing bail the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public and to 'reasonably assure' the accused returns to court."

But the lower court's declaration is deficient in two respects: (1) it failed to declare that it is impermissible under equal protection and due process principles for courts to incarcerate an indigent pretrial defendant on unaffordable bail unless they find that no less restrictive alternative would reasonably assure the defendant's return to court; and (2) it failed to declare that bail-setting courts must explain, on the record, their bail decisions.[1] The petitioner brings this appeal to obtain the complete declaratory relief to which he is entitled under equal protection and due process principles.

[1] In addition, as explained in footnote 52, the lower court erroneously described the scope of the State's interest in setting bail.

STATEMENT OF THE CASE

Petitioner's Circumstances

Petitioner Christopher Kunkeli has lived in Dutchess County his whole life.[2] Before his incarceration, he was steadily employed as a mechanic, earning a salary of about $1,000 per month.[3] In October 2017, he was arrested in the Town of Poughkeepsie for shoplifting a vacuum cleaner from Target.[4] 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.[5] When Mr. Kunkeli could not pay the bail, the presiding judge ordered the county sheriff to confine Mr. Kunkeli in jail and renewed this order after each subsequent court appearance.[6] After nearly three months of incarceration because of this unaffordable bail, Mr. Kunkeli initiated this action.[7] He was then offered a plea deal resulting in his eventual release from jail.[8]

[2] R. 27 at ¶ 33 (Verified Petition for Writ of Habeas Corpus "Verified Petition"). Citations to "R." are citations to the Record on Appeal.
[3] R. 27 at ¶ 33 (Verified Petition).
[4] R. 28 at ¶ 34 (Verified Petition).
[5] R. 28 at ¶ 35 (Verified Petition); R. 590 ¶¶ 3-4 (Affidavit of Christopher Kunkeli "Kunkeli Aff.").
[6] R. 29 at ¶ 37 (Verified Petition); R. 40-44 (Exhibit 1 to the Verified Petition).
[7] R. 29 at ¶ 37 (Verified Petition).
[8] R. 595 at ln. 9-10 (Corrected Transcript of Oral Argument on Jan. 19, 2018 ("Corrected Tr. of Oral Argument").

Bail Practices in Dutchess County

Mr. Kunkeli's experience is typical. In Dutchess County, judges routinely set unaffordable bail resulting in the pretrial incarceration of indigent defendants.[9] Both the county public defender and the conflict defender[10] explained that judges in the county routinely set bail in a defendant's case without regard to the defendant's ability to pay.[11] As a result, pretrial detainees have consistently accounted for the vast majority of the Dutchess County jail population.[12] In 2016, for example, they accounted for 71% of the average daily population.[13] Unsurprisingly, the 257-bed county jail has been plagued with overcrowding for years, so much so that the county recently resorted to jailing individuals in large trailers, referred to as "temporary pods."[14]

Data obtained from the county jail spanning the eight-year period of 2010-2017 reveal that judges commonly commit pretrial defendants to jail because these defendants cannot afford even the most modest amounts of bail.[15] During that eight-year time span, for example, 684 pretrial detainees were jailed for one week or more

[9] R. 588 at ¶ 3 (Affirmation of Mikael Cohn "Cohn Aff.").
[10] The conflict defender in Dutchess County provides legal representation to indigent defendants accused of crimes when the Dutchess County Public Defender cannot represent that defendant because of a conflict of interest. *See* R. 587 at ¶ 1 (Cohn Aff.).
[11] R. 586 at ¶ 2 (Affirmation of Thomas Angell "Angell Aff."); R. 588 at ¶ 2 (Cohn Aff.).
[12] R. 14 at ¶ 4 (Verified Petition); *see also* R. 304-05 (Exhibit 25 to the Verified Petition).
[13] R. 14 at ¶ 4 (Verified Petition).
[14] R. 301 (Exhibit 24 to the Petition).
[15] R. 24 at ¶ 28 (Verified Petition); *see also* R. 366 at ¶¶ 17-20 (Affidavit of Michelle Shames "Shames Aff.").

for failing to satisfy a bail requirement of $500 or less, while 262 detainees were jailed for one month or more, and 83 detainees for 90 days or more.[16] Of those pretrial detainees with a bail set who spent at least one night in jail during that eight-year timespan, the average length of stay was 41 days.[17] The majority of these individuals were charged with low-level offenses.[18] Sixty percent had a misdemeanor as their most serious charge, while three percent had a violation as their most serious charge.[19]

New York's Bail Statute and Alternatives to Traditional Bail

The pretrial problems in Dutchess County are symptomatic of a larger, statewide problem. As the Dutchess County Supreme Court noted, "[a]cross our State, between sixty percent on average, and in New York City as much as seventy five percent, of inmates have not been convicted of a crime but are awaiting arraignment or trial."[20] New York's bail statute does not, by its terms, 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

[16] R. 366 at ¶ 17 (Shames Aff.).
[17] R. 364 at ¶ 12 (Shames Aff.).
[18] R. 364 at ¶ 10 (Shames Aff.).
[19] R. 364-65 at ¶¶ 10, 13, 15 (Shames Aff.).
[20] R. 7 (Decision, Order, and Judgment).

assure a defendant's return to court. As a result, unaffordable bail is frequently imposed.[21]

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 "must [] consider and take into account" several factors, including the defendant's character, ties to and length of residence in the community, employment, and "financial resources." (*Id*.) Although the statute lists financial resources as a factor, as noted above, it does not specifically require that judges determine whether defendants can afford to pay the bail amounts that are imposed.[22] (*See id.*) A criminal-justice commission chaired by 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 statute requires that the 'financial resources' of the defendant be taken into account."[23]

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[21] R. 178-79 (Exhibit 17 to the Verified Petition); R. 163 (Exhibit 16 to the Verified Petition); R. 192-93 (Exhibit 18 to the Verified Petition).

[22] 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.)

[23] R. 166 (Exhibit 16 to the Verified Petition).

Under New York's statute, when judges determine that a "restriction [] is necessary to secure [a defendant's] court attendance," (CPL § 510.30 [2] [a]), they have the option of imposing nine forms of bail, ranging from traditional, restrictive cash bail and insurance company bonds, to less restrictive unsecured bond and partially secured bonds. (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.[24] A partially secured bond involves the defendant or his or her guarantor depositing a "fractional sum of money fixed by the court, not to exceed ten percent of the" bond amount.[25] 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."[26]

In 55 of the 62 counties in New York, judges have the added option of imposing pretrial services.[27] Dutchess County, for example, affords judges the option of ordering that a defendant: (1) be released on the condition that he or she

[24] R. 156 (Exhibit 15 to the Verified Petition). For felony defendants, judges also have the option of ordering remand (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].)

[25] R. 156 (Exhibit 15 to the Verified Petition).

[26] R. 156 (Exhibit 15 to the Verified Petition).

[27] R. 398 (Memorandum of Law In Support of Verified Petition [citing to Data Clearinghouse, Pretrial Services Statewide Metrics, Vera Institute, *available at* https://www.vera.org/state-of-incarceration/data-clearinghouse].) 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].)

report regularly to probation; (2) be released under the more restrictive supervision of probation; and (3) be released under electronic ankle monitoring.[28] And these pretrial services have been effective. During the eight-year period of 2010-2017, defendants released on the county's pretrial release services failed to appear in fewer than 5% of the cases.[29] Other counties have had similar success rates with pretrial services.[30] But despite the availability of such effective, less restrictive alternatives to traditional bail, judges throughout New York routinely jail pretrial defendants solely because of their inability to pay two of the most restrictive forms of bail: cash bail and insurance company bond.[31]

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.[32]

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[28] R. 321 (Exhibit 27 to the Verified Petition); R. 325-26 (Exhibit 28 to the Verified Petition).
[29] Pretrial defendants had a 4.8% failure to appear rate. R. 366-67 at ¶¶ 21-22 (Shames Aff.).
[30] Data collected by the state Division of Criminal Justice Services showed a 3.1% failure to appear rate among 44,098 defendants released on pretrial services in 40 New York counties. R. 27 at ¶ 32 (Verified Petition [citing to New York State Division of Criminal Justice Services, Pretrial Services Programs [2010], *available at* http://www.criminaljustice.ny.gov/opca/pdfs/pretrialservices2010annualrpt.pdf]).
[31] R. 166 (Exhibit 16 to the Verified Petition); R. 194 (Exhibit 18 to the Verified Petition).
[32] R. 18 at ¶¶ 15-18 (Verified Petition).

Procedural History

Under the circumstances discussed above, the petitioner initiated this action on January 9, 2018 directly with the Appellate Division, Second Department seeking declaratory judgment and his release from pretrial detention, and arguing that the presiding judge detained him in violation of the equal protection and due process clauses of the U.S. and New York Constitutions.[33] That same day, the Appellate Division referred the action to the Dutchess County Supreme Court.[34] Later in the afternoon of January 9, the petitioner accepted a plea deal resulting in his release from jail on January 19.[35] On January 19, Respondent served and filed answering papers, and the Dutchess County Supreme Court heard oral argument.[36] On January 26, the petitioner served and filed his reply.[37] On January 31, the Dutchess County Supreme Court issued its decision, order, and judgment.[38]

The Lower Court's Decision

The Dutchess County Supreme Court first decided that it was appropriate to consider this case as an action for declaratory judgment despite the respondent's claims that this action was moot because of Mr. Kunkeli's guilty plea.[39] In support

[33] R. 12-34 (Verified Petition); R. 7 (Decision, Order, and Judgment).
[34] R. 7 (Decision, Order, and Judgment).
[35] R. 437 at ¶ 22 (Verified Answer to Petition "Verified Answer"); R. 595 at ln. 9-10 (Corrected Tr. of Oral Argument).
[36] R. 594 ln.1-5 (Corrected Tr. of Oral Argument).
[37] R 565-84 (Reply Memorandum of Law).
[38] R. 6-10 (Decision, Order, and Judgment).
[39] R. 7 (Decision, Order, and Judgment).

of that decision, the lower court relied on the New York Court of Appeals standard for granting an exception to mootness where (1) the case raises a substantial or novel issue; (2) the issue has a "likelihood of repetition, either between the parties or among other members of the public"; and (3) because of the fleeting nature of the dispute, the issue will typically evade judicial review.[40] (*Hearst Corp. v Clyne*, 50 NY2d 707, 714-15 [1980].) The Court also relied on *People ex rel. McManus v Horn* (18 NY3d 660 [2012]), a case similar to this one involving a challenge to a defendant's pretrial incarceration where, after the defendant pleaded guilty and thus was no longer a pretrial detainee, the Court of Appeals found an exception to mootness and considered the case as an action for declaratory judgment.[41]

Addressing the merits, the Dutchess County Supreme Court granted partial declaratory relief. The petitioner had requested a declaration that (1) it is presumptively impermissible, under equal protection and due process principles, to incarcerate an indigent pretrial defendant solely because of an inability to pay bail; and (2) that such incarceration can only take place after exploring, on the record, the defendant's ability to pay and, if the defendant cannot pay, finding, on the record, that no less restrictive alternative will reasonably assure his return to court.[42] The lower court instead declared that "the failure of a court imposing bail as a condition

[40] R. 7 (Decision, Order, and Judgment).
[41] R. 7 (Decision, Order, and Judgment).
[42] R. 31-32 at ¶ 48 (Verified Petition).

of pre-trial detention to consider an individual's ability to pay that bail, as occurred in this case, is a violation of due process and equal protection clauses of the New York State Constitution and the United States Constitution."[43] In addition, the lower court declared that "when imposing bail the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public to 'reasonably assure' the accused returns to court."[44] The lower court failed to declare that, under equal protection and due process principles, it is impermissible for courts to incarcerate a defendant if less restrictive alternatives would reasonably assure his return to court. And the lower court failed to declare that courts must explain their bail decisions on the record.

STANDARD OF REVIEW

The questions presented by this appeal are questions of law, which this Court must review *de novo* without affording deference to the lower court's judgment. (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005] [stating that "the question of whether it

[43] R. 9 (Decision, Order, and Judgment).
[44] R. 10 (Decision, Order, and Judgment). The lower court's declaration that bail-setting courts may consider "the State's interest in protecting individuals and the public" is erroneous as further explained in footnote 52.

was a dismissal for neglect to prosecute is a question of law on which we need not defer to Supreme Court's judgment."].) When reviewing declaratory judgment actions, this Court may modify the order and judgment of the lower court to grant further declaratory relief and then affirm the modified order and judgment. (*Benson Realty Corp. v Beame*, 50 NY2d 994, 995-96 [1980] [modifying the declaratory judgment of the Second Department to declare that the New York City Rent Control Law is constitutional and then affirming the modified order and judgment]; *Parietti v Town of Ramapo*, 153 AD3d 1418, 1418-19 [2d Dep't 2017] [modifying the lower court's order and judgment in a hybrid Article 78 proceeding/action for declaratory judgment to declare the results of a special election valid and then affirming the modified order and judgment].) This Court should modify the lower court's order and judgment to grant the complete declaratory relief requested by the petitioner and then affirm this modified order and judgment.

The legal issues raised by this case rest upon the factual conclusion reached by the lower court that the bail-setting court failed to consider Mr. Kunkeli's ability to pay the bail that was imposed.[45] ([The lower court found that "the failure of a court imposing bail as a condition of pre-trial detention to consider an individual's ability to pay that bail, *as occurred in this case* . . . .] [emphasis added].) That factual finding is entitled to deference "unless it is clear that its conclusions could not have

[45] R. 9 (Decision, Order, and Judgment).

been reached under any fair interpretation of the evidence." (*Ardmar Realty Co. v Bldg. Inspector of Vill. of Tuckahoe*, 5 AD3d 517, 518 [2d Dep't 2004]; *see also Bragdon v Bragdon*, 23 AD3d 203, 204 [1st Dep't 2005] ["The factfinding of a trial court should not be disturbed unless its conclusions could not have been reached under any fair interpretation of the evidence"].)

ARGUMENT

I. EQUAL PROTECTION AND DUE PROCESS PRINCIPLES PREVENT PRETRIAL DEFENDANTS FROM BEING INCARCERATED SOLELY BECAUSE OF THEIR INDIGENCE AND REQUIRE THAT COURTS EXPLORE, ON THE RECORD, A DEFENDANT'S ABILITY TO PAY BAIL AND, IF THE DEFENDANT CANNOT PAY, FIND THAT NO LESS RESTRICTIVE ALTERNATIVE TO INCARCERATION WOULD REASONABLY ASSURE THE DEFENDANT'S RETURN TO COURT.

A. The Foundational Reasoning of the Supreme Court in *Bearden v Georgia* Supports the Conclusion That It Is Impermissible to Incarcerate Pretrial Defendants Solely Because They Cannot Afford Bail.

In *Bearden v Georgia* (461 US 660 [1983]), the Supreme Court identified a convergence of equal protection and due process principles where individuals are deprived of liberty solely because of their indigence. [46] In that case, the trial court

[46] 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

had sentenced Bearden to three years of probation on the condition that he pay a fine and restitution. (*Id*. at 662.) 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 discussed the inter-relationship between due process and equal protection principles in cases involving the treatment of indigent defendants in the criminal justice system. (*Id*. at 665.) The Court explained that, when applying the concept of "equal justice," it typically analyzes "whether the State has invidiously denied one class of [criminal] defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." (*Id.* at 664-65.) The Court further implicitly recognized that because the potential deprivation of liberty is a common feature of the criminal justice process, "the fairness of relations between the criminal defendant and the State [is typically analyzed] under the Due Process Clause." (*Id.* at 665.) Recognizing that Mr. Bearden had been incarcerated "*solely* because he lack[ed] the funds to pay the fine," (*id.* at 674 [emphasis added]), the Supreme Court invoked

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freedom based simply on their indigence would be an invidious denial to one class of defendants of a substantial benefit available to another"].)

both equal protection and due process principles in concluding that his incarceration was unconstitutional. (*Id.*)

In the lower court, Bearden had received some process in the form of a probation revocation hearing. But 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 or she lacks the funds, they "must consider alternate measures of punishment other than imprisonment." (*Id*.) And the Court concluded 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].)

The New York Court of Appeals has similarly recognized the convergence of equal protection and due process principles as applied to criminal justice

controversies. (*People ex rel. Wayburn v Schupf*, 39 NY2d 682, 686-87 [1976].) At issue in *Wayburn* was whether it was constitutionally permissible for the Family Court Act to authorize the pretrial detention of juveniles who posed a serious risk of future dangerousness while awaiting trial when, under New York law, pretrial detention cannot be imposed upon adults on the basis of future dangerousness. (*Id.* at 685-89.)

The disparity imposed by New York law raised equal protection concerns. (*Id.* at 686-87.) And to the degree that the Family Court Act authorized deprivations of liberty, the due process clause was also implicated. (*Id.*) In this regard, the Court of Appeals observed that "any pre-trial detention impinges on the right to liberty" which the Court regarded as a "fundamental right." (*Id.*)

Supreme Court precedent had previously incorporated the protection of "fundamental rights" into "equal protection" analysis and had held that inequalities that significantly burden fundamental rights would be regarded as presumptively unconstitutional and would be sustained only if they advance compelling state interests and do so in the least burdensome or restrictive manner. (*Dunn v Blumstein*, 405 US 330, 342-343 [1972]; *Shapiro v Thompson*, 394 US 618, 627-33 [1969].) Citing these cases, the Court of Appeals in *Wayburn* considered the fundamental right to liberty in addressing the equal protection claim raised in that case and concluded that "the legislative differentiation [created by the Family Court Act] in

treatment between youths and adults is to be examined under strict scrutiny and 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." (*Wayburn*, 39 NY2d at 687.) Applying "strict scrutiny" the Court of Appeals ultimately upheld the disparate treatment at issue in *Wayburn*. (*Id.* at 689-91.)

The "heightened scrutiny" standard identified by the Court in *Wayburn* has guided subsequent court decisions. (*See, e.g., Matter of Quinton A.*, 49 NY2d 328, 337 [1980] [citing *Wayburn* for the proposition that strict scrutiny is the appropriate test when a law's discriminatory treatment "impinges upon some fundamental constitutional right such as liberty"].) Indeed, this Court, in *Balmer v New York State Bd. of Parole*, 54 AD2d 979 [2d Dep't 1976], relied on *Wayburn* to apply strict scrutiny to the Board of Parole's decision to impose an additional one-year sentence on a young adult that would not have been imposed if the individual had been more than 21 years old. Applying such scrutiny, this Court invalidated such additional punishment for young adults because there was no "justification for the special sentences given to them." (*Id*. at 980.)

The legal standard articulated by the Court of Appeals in *Wayburn*, and applied by this Court in *Balmer*, is consistent with the reasoning employed by the Supreme Court in *Bearden*. And *Bearden's* reasoning fully applies to pretrial bail

decisions. This is so for two reasons. First and foremost, compared to the probationer in *Bearden*, a pretrial defendant such as the petitioner in this case has an even stronger "interest in liberty" because he was simply accused of a crime and must be presumed innocent prior to trial. (*United States v Salerno*, 481 US 739, 750 [1987].) The Supreme Court has observed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Id.* at 755.) Without this 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, 210 [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].)

Second, the *Bearden* decision rested on what the Supreme Court regarded as its long-standing "sensitiv[ity] to the treatment of indigents in our criminal justice system." (461 US at 664.) In this regard, the *Bearden* Court recognized that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Id.* [quoting *Griffin v Illinois*, 351 US 12, 19 [1956].) Prior to *Bearden* the Supreme Court had held that indigent defendants must be provided with a trial transcript at state expense, *Griffin*, *supra*; are entitled to counsel at first appeal,

Douglas v California, (372 US 353 [1963]); are entitled to a free transcript of a preliminary hearing for use at trial, *Roberts v LaVallee*, (389 US 40 [1967]); cannot be denied an adequate record upon which to appeal a conviction, *Mayer v Chicago*, (404 US 189 [1971]); cannot be imprisoned beyond the statutory limit because they are unable to pay a fine, *Williams v Illinois*, (399 US 235 [1970]); and cannot be sentenced to jail for a crime for which only a fine is prescribed where the defendant is too poor to pay the fine, *Tate v Short*, (401 US 395 [1971]). Each of these rulings is consistent with the directive offered by the plurality opinion in *Griffin* that "equal justice" must be afforded to indigent defendants "at all stages" of the criminal process. (*Griffin*, 351 US at 17-18.)

Based on these reasons, the imposition of bail upon a pretrial defendant must comport with constitutional requirements that are both substantive and procedural in nature. The concept of "equal justice" emerging from the Equal Protection and Due Process clauses holds that it is presumptively impermissible to deprive an individual of liberty simply because that person cannot afford bail. What follows is that before incarcerating such a person who cannot afford bail, the court must consider alternatives to incarceration; and that only if a court finds that alternative measures are inadequate can the court impose pretrial detention upon an accused who cannot afford bail. As discussed more fully below, these substantive requirements are further informed and protected by procedural due process principles holding that a

court imposing bail upon an indigent defendant must make findings on the record that reflect the substantive standards set forth above.

B. Applying These Equal Protection And Due Process Principles to Bail Determinations, Appellate Courts Have Rejected Discriminatory Bail Practices Under Heightened Scrutiny Standards.

Given the liberty interest of pretrial defendants and the Supreme Court's protection of indigent defendants at all stages of the criminal process, it is unsurprising that courts around the country are concluding that *Bearden*'s reasoning must be applied to pretrial bail determinations. Two appellate courts this year have relied on the reasoning of *Bearden* and rejected local bail practices that result in the incarceration of pretrial indigent defendants solely because of their inability to pay bail. [47]

First, in *In re Humphrey*, the petitioner initiated a habeas corpus proceeding challenging his pretrial detention on unaffordable bail and arguing that such detention is impermissible under equal protection and due process principles unless the court finds that no alternative condition or combination of conditions could

[47] The New York 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 Dep't 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).]

satisfy the purposes of bail.[48] (19 Cal.App.5th 1006, 1015 [Ct.App. 2018], *pending appeal*, 417 P.3d 769 [Cal. 2018].) The California appellate court agreed with the petitioner, finding that, under a heightened scrutiny standard, the liberty interests of a pretrial defendant could only be abridged "to the degree necessary to serve a compelling governmental interest." (*Id.* at 1028.) Relying on the principles of *Bearden*, the *Humphrey* court ordered the trial court to consider the petitioner's ability to pay bail and alternatives to bail. (*Id.* at 1026, 1048.) The *Humphrey* court further ordered that, if the petitioner is unable to afford the bail amount that the trial court determines is necessary to assure his return to court, "it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." (*Id*. at 1048.)

Second, in *ODonnell v Harris County*, plaintiffs brought a class-action suit on equal protection and due process grounds 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].) Relying on *Bearden*, the district court held that, under equal protection principles, the pretrial detention of indigent defendants on unaffordable bail "is permissible only if a court finds, based on evidence and in a

[48] 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].)

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 affirming "most[49] of the district court's rulings," the Fifth Circuit upheld the district's conclusions of law regarding the application of equal protection principles to the bail decision. (*ODonnell v Harris Cty.*, 892 F3d 147, 152, 161-63, 166 [5th Cir 2018].) In doing so, the Fifth Circuit agreed that Harris County's bail practices were subject to heightened scrutiny and that they were not narrowly tailored to meet the State's interest. (*Id.* at 162.)

[49] Although the Fifth Circuit disagreed with the district court in three respects, none of those respects are relevant to New York's bail practices. (*ODonnell v Harris Cty.*, 892 F3d 147, 152 [5th Cir 2018]). The Fifth Circuit modified the district court's decision for the following three reasons: (1) it disagreed with the district court that there was a Texas-law created liberty interest under due process to be released from custody before trial; the Fifth Circuit instead found that there was a narrower Texas-law created liberty interest to weigh the defendant's right to pretrial release with the State's right to secure the defendant's court attendance; (2) it disagreed with the breadth of the district court's injunction because it was not tailored to correspond with the Fifth Circuit's finding of a narrower Texas-law created liberty interest; and (3) it disagreed with the district court that the County Sheriff was a policymaker under § 1983. (*Id.* at 152, 157-61.) Each of these reasons is irrelevant here because the petitioner does not advance claims based on a Texas-law created liberty interest, and he does not claim that the Dutchess County Sheriff is a policy maker. In its decision, the Fifth Circuit instructed the district court that it could modify the injunction to require a hearing within 48 hours of arrest that afforded certain procedural protections in order to comply with the Fifth Circuit's finding of a narrower Texas-law created liberty interest. (*Id.* at 165–66). After the district court modified the injunction to afford additional protections that were not found in the Fifth Circuit's instruction, the Fifth Circuit stayed the injunction and concluded it was too broad and did not comport with the court's mandate because it still afforded defendants a right to mandatory release. (*ODonnell v Goodhart*, No. 18-20466, 2018 WL 3853454, at *2-7 [5th Cir. Aug. 14, 2018]; *see also Walker v City of Calhoun, GA*, No. 17-13139, 2018 WL 4000252, at *14 [11th Cir. Aug. 22, 2018] [disagreeing with plaintiffs' argument that pretrial defendants are entitled to an indigency hearing within 24 hours of their detention on unaffordable bail, and instead citing *ODonnell v Goodhart* to support its holding that the City of Calhoun's policy of detaining pretrial defendants for up to 48 hours on unaffordable bail before an indigency hearing could be held did not violate the Constitution].)

C. Applying Procedural Due Process Principles, Appellate Courts Have Required On-the-Record Reasoned Decisionmaking in Bail Determinations And in Analogous Contexts.

Last year, the Massachusetts Supreme Judicial Court addressed the imposition of unaffordable bail for an indigent defendant that resulted in his pretrial detention. (*Brangan v Commonwealth*, 477 Mass 691 [2017].) The Massachusetts high 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 692.) Recognizing that the loss of liberty deeply implicates federal and state due process concerns, the *Brangan* court explained that the government's use of pretrial detention must be "narrowly tailored to further a legitimate and compelling governmental interest." (*Id.* at 703 [internal quotation and citations omitted].) The *Brangan* court further explained that even when the government meets this requirement, due process requires that this deprivation of liberty be implemented in a fair manner. (*Id.*)

Applying the requirements of procedural due process to the defendant's case, the *Brangan* court held 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.) The *Brangan* court further 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, 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 decisions in *Humphrey* and *ODonnell* also invoked procedural due process considerations. The *Humphrey* court held that a bail-setting court's "findings and reasons must be stated on the record or otherwise preserved." (*In re Humphrey*, 19 Cal.App.5th at 1048). In imposing this obligation, the *Humphrey* court noted that "express findings and statements of decision [are] of particular importance" in bail proceedings to ensure that "orders for release on bail do not become de facto detention orders" (*Id.* at 1037-38). The Fifth Circuit, in *ODonnell*, similarly held that procedural due process principles require that Texas magistrates "specifically enunciate their individualized, case-specific reasons" for setting an unaffordable bail resulting in the defendant's pretrial detention.[50] (*ODonnell*, 892 F3d at 159-60.)

[50] Within the immigration bond context, it is also notable that immigration judges who set bond in the Central District of California are advised to "explain why, whether orally or in writing, the bond amount is appropriate" given the non-citizen's financial circumstances and why alternative

The decisions in *Brangan*, *Humphrey*, and *ODonnell* were drawn from and consistent with basic principles of procedural due process. In *Goldberg v Kelly* (397 US 254, 271 [1970]), the U.S. Supreme Court recognized the requirement of "reasoned decisionmaking" as a fundamental element of due process. In explaining this requirement, the Court suggested that reasoned decisionmaking assures the public and the parties to the controversy that the decision rests upon the proper legal standards and upon supporting evidence. (*Id*.) The Supreme Court has repeatedly recognized these interests in regard to deprivations of liberty. (*See Morrisey v Brewer*, 408 US 471, 480-489 [1972] [parole revocation hearings must involve reasoned decisionmaking in the form of a "written statement" of evidence relied upon and the reasons for revoking parole]; *Gagnon v Scarpelli*, 411 US 778, 782-86 [1973] [requiring a similar process for revocation of probation]; *Wolf v McDonnell*, 418 US 539, 563 [1974] [requiring a similar process in prison discipline proceedings]; *Turner v Rogers*, 564 US 431, 447-449 [2011] [requiring "an express

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conditions of supervision were not ordered. (*See* Instructions and Guidelines to Immigration Judges, *Hernandez v Sessions*, No. 5:16-cv-00620-JGB-KK, ECF No. 126-1, p. 6, ¶ 9.) These instructions were developed after the Ninth Circuit held that the government's bond-setting practices failed to provide "adequate procedural protections" for non-citizens. (*Hernandez v Sessions*, 872 F3d 976, 991 [9th Cir 2017].) In so holding, 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].)

And in *People v Best*, the Court of Appeals, invoked procedural due process principles to require a trial court that orders the handcuffing of a defendant in the courtroom to explain, on the record, the basis for its decision to do so. (19 NY3d 739, 743 [2012] [holding that, even when no jury is present, a defendant has the right to be free of restraints "unless there has been a case-specific, on-the-record finding of necessity." [internal quotations and citations omitted].)

finding by the court" when a parent faces incarceration for failure to pay child support].)

Former Chief Judge Jonathan Lippman observed that the practice of "[i]ncarcerating indigent defendants for no other reason than that they cannot meet even a minimum bail amount strips our justice system of its credibility and distorts its operation."[51] The procedural due process protections identified in *Brangan*, *Humphrey*, and *ODonnell* are necessary to cure that injustice and to ensure compliance with the substantive principles articulated in *Bearden*.

II. THE LOWER COURT ERRED BY FAILING TO DECLARE (1) THAT IT IS IMPERMISSIBLE TO INCARCERATE A PRETRIAL DEFENDANT FOR HIS OR HER INABILITY TO PAY BAIL UNLESS THE COURT FINDS THAT NO LESS RESTRICTIVE ALTERNATIVE WOULD REASONABLY ASSURE THEIR RETURN TO COURT; AND (2) THAT COURTS MUST EXPLAIN THEIR BAIL DECISIONS ON THE RECORD.

What emerges from these cases is a clear requirement that bail-setting courts must explore, on the record, the defendant's ability to pay bail and, if the defendant cannot pay, find, on the record, that no less restrictive alternative to incarceration would reasonably assure the defendant's return to court. While the lower court declared that courts must consider a pretrial defendant's ability to pay bail and less

[51] R. 187 (Exhibit 17 to the Verified Petition).

restrictive alternatives, this declaration fell short of the requirements of equal protection and due process for two reasons. [52]

First, the lower court failed to declare that pretrial incarceration on unaffordable bail cannot be imposed unless courts find no less restrictive alternative to incarceration would reasonably assure the defendant's return to court.[53] Together, *Bearden* and *Wayburn* limit pretrial incarceration to the circumstances when it is *necessary*, and this means that the state may incarcerate a pretrial defendant on unaffordable bail only if no less restrictive alternative to pretrial incarceration would satisfy the state's compelling interest. (*See Bearden*, 461 US at 672; *Wayburn*, 39 NY2d at 687.) But the lower court's declaration failed to fully articulate this requirement. Second, the lower court failed to declare that the determination

[52] The lower court erroneously described the scope of the State's interest here by declaring that bail-setting courts may consider "the State's interest in protecting individuals and the public." R. 10 (Decision, Order, and Judgment). In New York, under section 510.30 of the Criminal Procedure Law, the operative statute for bail decisions, 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].) The legislative history of section 510.30 demonstrates that a provision creating a procedure to consider public safety was deleted from the bail statute because the procedure "was admittedly inadequate because it failed to provide appropriate due process safeguards." R. 157 (Exhibit 15 to the Verified Petition). Thus, even if this Court does not adopt the modification sought in the Conclusion of this brief, this Court should use this occasion to correct the erroneous suggestion of the lower court that bail-setting courts may consider "the State's interest in protecting individuals and the public."

[53] The state's compelling interest is not to *guarantee* that every defendant return to court; instead, it is to "*reasonably assure*" that defendants return to court. (*Pugh v Rainwater*, 572 F2d 1053, 1056-57 [1978] [emphasis added] [stating, in a case involving a challenge to Florida's bail law, that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible"].); *see also United States v Barber*, 140 US 164, 167 [1891] [stating that "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."] [emphasis added].)

regarding the ability to afford bail and, where a defendant cannot afford bail, the determination that no less restrictive alternative to incarceration would suffice must be "on the record."

Modification of the lower court's declaratory judgment is important to fulfill the constitutional promise of equal justice offered by *Bearden*. Courts in Dutchess County have frequently ordered the incarceration of pretrial detainees on unaffordable bail, even though data demonstrates that such incarceration is rarely necessary. For example, studies show that unsecured bonds and partially secured bonds are just as effective at assuring a pretrial defendant's return to court as secured bonds (i.e., cash bail and insurance company bonds).[54] Data from Dutchess County and from New York State also shows a low failure-to-appear rate for defendants released on the Dutchess County's pretrial services (4.8%) and for defendants released on the pretrial services of 40 other counties (3.1%).[55]

[54] R. 22 at ¶ 25. 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. *See* R. 206, 211 (Exhibit 19 to the Verified Petition). In a Vera Institute for Justice study involving the use of partially secured and unsecured bond in New York City, the failure to appear rates were 12% –lower than the 14% City failure to appear rates for secured bond. *See* R. 263 (Exhibit 21 to the Verified Petition); R. 293 (Exhibit 22 to the Verified Petition).

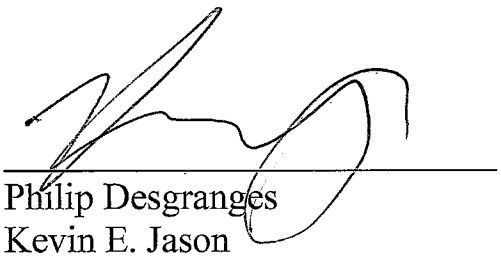
[55] R. 27 at ¶ 32 (Verified Petition); R. 366-67 at ¶¶ 21-22 (Shames Aff.). Pretrial services in New York City have achieved a similarly low 4.2% FTA rate. *See* R. 346 (Exhibit 29 to the Verified Petition).

Declaring that bail-setting courts must make on-the-record findings of whether defendants have the ability to afford the bail that has been set and whether less restrictive alternatives would reasonably assure their return to court certainly represents a change to 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].) In *Williams*, the U.S. Supreme Court held it unconstitutional to imprison indigent defendants beyond the statutory maximum penalty solely because they could not pay a fine. In doing so, the Court recognized that its decision might impose a modest burden upon 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.) In this case, the administrative burden of an "on the record" determination is, indeed, modest. And, if courts in Massachusetts, Harris County, Texas, and California can make these findings to comply with their constitutional obligations, then New York courts can too.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court modify the lower court's order and judgment by substituting, in its place, a declaration that it is presumptively impermissible under equal protection and due process principles to incarcerate an indigent pretrial defendant solely because he or she is unable to pay bail; that 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. This Court should then affirm the modified order and judgment.

Dated: August 30, 2018
New York, New York



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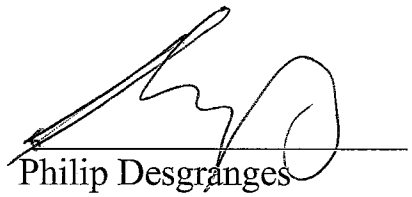
CERTIFICATE OF COMPLIANCE

Pursuant to the Second Department Rules of Procedure, Section 670.10.3(f), I certify that the foregoing brief was prepared on a computer, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations etc., is 8,429.

Dated: August 30, 2018
New York, New York



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