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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF TYRESE BURROUGHS FOR A WRIT OF PROHIBITION	)))	No. 130, 2022

PETITIONER'S SUPPLEMENTAL SUBMISSION REGARDING WHETHER PETITIONER'S GUILTY PLEA MOOTS THE PETITION FOR WRIT OF PROHIBITION.

Burroughs filed the instant petition on April 13, 2022. The State filed its answer and motion to dismiss on May 3, 2022. On June 23, 2022 this Court requested supplemental briefing on whether Burroughs' guilty plea moots the petition.

The underlying controversies – which stem from the legality of Burroughs' pretrial detention and the corresponding procedures – ceased on April 14, 2022 when Burroughs was convicted *via* guilty plea. Pursuant to the mootness doctrine, an action will generally be dismissed if the underlying controversy ceases;[1] however, Burroughs' claims should not be dismissed because each of "[t]wo recognized exceptions to the mootness doctrine" – (1) "situations that are capable of repetition but evade review," and (2) "matters of public importance" – separately apply.[2]

[1] *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 823 (Del. 1997).
[2] *Id.* at n. 5. The State's omission of mootness as an argument in support of its motion to dismiss, filed three weeks after Burroughs' plea, suggests it too recognizes that at least one of the exceptions apply. Further, the State's suggestion that this claim should be reviewed on direct appeal would chronologically necessitate an exception because a direct appeal, by definition, follows conviction.

I. UNCONSTITUTIONAL PRETRIAL INCARCERATION OF PRESUMPTIVELY INNOCENT DELAWAREANS WILL *REPEAT YET EVADE REVIEW* IF THIS COURT DOES NOT EXERCISE JURISDICTION.

The tendency of this type of challenge to avoid review in Delaware is evidenced by the dearth of opinions and guidance from this Court on the issues presented by Burroughs. If this Court does not step in, the unconstitutional use of money bail to incarcerate thousands of Delaware's indigent citizens every year will *Repeat Yet Evade Review* because a reasonable estimate of the timespan of the litigation exceeds that of typical pretrial detainment.

As the Supreme Court of the United States noted in applying this mootness exception in *Gerstein v. Pugh,* "[p]retrial detention is by nature temporary," and "it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted."[3] Bail challenges are especially unlikely to be addressed by this Court without employing a mootness exception because the timespan of the *litigation* in Delaware is uniquely prolonged by our superior court's insistence on conducting its own two stage review process (by a commissioner and then judge).[4] On the other hand, the timespan of the *controversy*

[3] 420 U.S. 103, 111 n.11 (1975) ("The claim . . . [is] capable of repetition, yet evading review.") (requiring judicial probable cause determination for extended restraint of liberty following arrest).

[4] D.I. #8, Court's January 11, 2021 Letter, *attached* as Ex. 1.

(pretrial detention) is not just short, it is unpredictable.[5] For these reasons, the high courts of numerous other states have applied the *Repeat Yet Evade Review* exception in identical circumstances to address lower courts' bail practices.[6] This Court should do the same.

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[5] *Gerstein*, 420 U.S. at 111 n.11 ("[t]he length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction.").

[6] *State v. Mercedes*, 183 A.3d 914, 924 (N.J. 2018) ("Because he was released . . . the arguments presented . . . are now moot. They are also 'capable of repetition' . . . yet may evade review if other defendants plead guilty before similar challenges can be resolved."); *Witt v. Moran*, 572 A.2d 261, 264 (R.I. 1990) (applying exception to challenge to bail practices); *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 460 P.3d 976, 982 (Nev. 2020) ("most bail orders are short in duration and the issues concerning bail and pretrial detention become moot once the case is resolved."); *In re Webb*, 7 Cal. 5th 270, 274 (2019) ("[q]uestions involving release on bail especially tend to evade review"); *State v. Ingram*, 447 P.3d 192, 197 (Wash. Ct. App. 2019) ("given the time constraints inherent in criminal cases, the [challenge to bail rules] might otherwise evade appellate review"); *Saunders v. Hornecker*, 344 P.3d 771, 774–75 (Wyo. 2015) ("whether cash-only bail is unconstitutional . . . falls under the exception for issues that are likely to evade review. Pretrial bail issues are generally short-lived"); *People ex rel. McManus v. Horn*, 967 N.E.2d 671, 672–73 (N.Y. 2012) ("the mootness exception applies . . . because the propriety of cash-only bail is an important issue that is likely to recur and which typically will evade our review"); *Com. v. Dixon*, 907 A.2d 468, 473 (PA. 2006) ("The 185 days between the ripening of the issue and the last day the case can go to trial, absent exceptions, are obviously insufficient to permit the Superior Court and this Court to review"); *State v. Briggs*, 666 N.W.2d 573, 576–77 (Iowa 2003) ("it is conceivable that [challenges to cash only bail] could reach us under circumstances that would not involve a moot controversy, [but] we believe this issue is highly likely to recur yet evade our review."); *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) ("cash only bail orders are capable of repetition, likely to evade judicial review . . . [as are m]ost pretrial bail issues"); *United States v. Edwards*, 430 A.2d 1321, 1324 n.2 (D.C. 1981) ("inherently limited time period for pretrial detention renders confinement under the statute . . . capable of repetition, yet evading review."); *Martin v. State*, 517 P.2d 1389, 1391 (Alaska 1974).

Any attempt to analogize this case to those in which the exception is not applied because of a party's failure to act expeditiously is meritless. For example, in *Radulski v. Delaware State Hosp* this Court declined to employ the exception because that appellant not only failed to request expedited treatment, but also sought "numerous time extensions."[7] The circumstances of *Radulski* are incompatible to those present in this case where the record makes clear that Burroughs did his part to expedite the process. On January 6, 2021, the outset of this litigation, Burroughs asked the superior court to address his claims on an expedited basis.[8] On May 5, 2021 he sent a second letter, renewing his request for expedited treatment.[9] Similarly, Burroughs complied with all scheduling orders without seeking "numerous time extensions."[10]

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[7] 541 A.2d 562, 566 (Del. 1988); *but see Martin v. State*, 517 P.2d 1389, 1391 (Alaska 1974) (applying exception to bail practices despite noting appellant used slower appellate process than available).

[8] D.I #5, Burroughs' January 6, 2021 Request to Expedite, *attached* as Ex. 2.

[9] D.I. #24, May 5, 2021 *Renewed* Request to Expedite, *attached* as Ex. 3.

[10] Burroughs sought a single, thirteen-day extension to expand the typical ten days allotted for a motion to review a commissioner's order. D.I. #58. This extension does not reflect a lack of expeditiousness, but instead was necessitated by the complexity and amount of material at issue in this atypically extensive commissioner's order. Similar extensions would be required in future litigation. Further, the mootness issue would undoubtedly have arisen without the thirteen additional days.

II. UNCONSTITUTIONAL PRETRIAL INCARCERATION OF PRESUMPTIVELY INNOCENT DELAWAREANS IS A *MATTER OF PUBLIC IMPORTANCE*.

Delaware courts apply the *Public Importance* exception to (1) questions of public importance, (2) whose impact on the law are real.[11] Both requirements are satisfied here.

The procedures and rules advanced by the commissioner's order, and approved by the superior court judge, allow for systematically incarcerating presumptively innocent Delawareans solely due to their indigence, without any showing that alternatives are inadequate. It should go without saying that the use of such unconstitutional procedures is an issue of public importance. This matter's public importance is evidenced by the attention bail policy receives in statewide and national media, and our State's significant efforts and resources spent on updating our bail practices. Employing the *Public Importance* exception would place our state in line with *every other state* to address the issue, all of which concluded that

[11] *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 218 (Del. 1990). Although "[t]he public-interest exception to the mootness doctrine is *usually applied* to issues which are 'capable of repetition, yet evading review,'" (*Radulski*, 541 A.2d at 566 (emphasis added)), this Court can, and does apply the former doctrine without consideration of the latter. *See e.g. Appeal of Infotechnology, Inc.*, 582 A.2d at 218; *State ex rel. Traub v. Brown*, 39 Del. 187, 197 (1938) (applying *Public Importance* exception, for the first time in Delaware, and doing so without consideration of *Repeat Yet Evade Review*). Afterall, if *Repeat Yet Evade Review* were a prerequisite to *Public Importance*, then the latter would be a useless redundancy.

constitutionally disputed pretrial detention is an issue of public importance.[12] Finally, the existence of numerous litigants who have made similar claims weighs in favor of applying this exception.[13]

Importantly, the public importance of reviewing this matter is not limited to pretrial detention policy. The challenged order creates dangerous precedent by purporting to employ strict scrutiny – a standard used to protect our most fundamental liberties, and marginalized peoples – yet in reality only paying lip service to this standard. To allow this *pseudo*-strict scrutiny to go uncorrected would

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[12] *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 460 P.3d 976, 983 (Nev. 2020) ("statewide" and "widespread" importance); *State v. Ingram*, 447 P.3d 192, 194 (Wash. Ct. App. 2019) ("though the bail issue is moot . . . it is a matter of public importance"); *State v. Mercedes*, 183 A.3d 914, 924 (N.J. 2018) ("considerable public importance"); *Saunders v. Hornecker*, 344 P.3d 771, 776 (Wyo. 2015) ("significant public importance"); *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) ("important public issue of statewide significance"); *Witt v. Moran*, 572 A.2d 261, 264 (R.I. 1990) ("extreme public importance"); *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971) ("pre-adjudication detention of children is a matter of public concern"); *Pauley v. Gross*, 574 P.2d 234, 236 (Kan. 1977); *In re Webb,* 440 P.3d 1129, 1132 (Cal. 2019); *People ex rel. McManus v. Horn*, 967 N.E.2d 671, 673 (N.Y. 2012); *L. O. W. v. Dist. Court In & For Arapahoe Cty*., 623 P.2d 1253, 1256 (Colo. 1981).

[13] *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 836 (Del. 2011) (applying *Public Importance* exception to mooted issue concerning disgorgement remedies for *Brophy* claims "because other litigants have raised the *Brophy* issue in actions now pending before the Court"). Between September 2019 and May 2020, there were at least seven defendants who made these arguments to the superior court. *State v. Lewis*, DUC 1909006789, Commissioner's Order, D.I. #62 (Del. Super. Ct. May 14, 2020) (noting additional attempts to address these issues).

pave the way for other unconstitutional treatment of fundamental liberties, and marginalized peoples.

The "impact on the law is real" because this Court's "resolution [on the merits] will have a continuing and significant impact on the development of the law."[14] This is unquestionably the case as Delaware courts routinely hold the indigent on unaffordable bail in reliance on the procedures challenged herein, and yet to be addressed by this Court.[15] Similarly, and as argued above, the Court's resolution on the merits will impact the manner in which lower courts conduct strict-scrutiny reviews in other contexts.

Respectfully submitted,

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[14] *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del. 2002).
[15] The other litigants noted previously speak to this as well. *See supra* note 13.