SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

Proposed Amendment of Pa.R.Crim.P. 122 and 1003; Rescission of Pa.R.Crim.P. 520-529 and Replacement with Pa.R.Crim.P. 520.1-.19; Adoption of Pa.R.Crim.P. 708.1, and Renumbering and Amendment of Pa.R.Crim.P. 708.

COMMENTS OF PHILADELPHIA BAIL FUND

Submitted to:

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Date: Mar. 8, 2022

INTERESTS OF THE COMMENTER

The Philadelphia Bail Fund has a strong interest in offerings its comments on the Court's Criminal Procedural Rules Committee's proposed changes to state rules regarding bail and pretrial detention. The Philadelphia Bail Fund works to end money bail in the City of Philadelphia. Until the legal system abolishes money bail, the Bail Fund pays bail for people who are indigent—now more than 800 people to date. It makes these payments as early as possible, typically within 72 hours of arrest, because of the enormous negative consequences imposed on people by even short periods of pretrial detention.

In addition to paying bail for people who are indigent, the Bail Fund also engages in research, advocacy, and organizing on bail, pretrial criminal procedure, and pretrial detention. Since 2018, the Bail Fund has run Bail Watch, a program that monitors preliminary arraignments at which magistrates assign bail. Through the Bail Watch program, the Bail Fund and its volunteers have observed more than 4,000 hearings. The Bail Fund has analyzed trends and patterns from those hearings and described many of them in three different public reports on bail practices in Philadelphia.

The Bail Fund also works with community partners both in Philadelphia and across the Commonwealth.

INTRODUCTION

As the Criminal Procedural Rules Committee considers the proposed changes to rules governing pretrial detention, the Philadelphia Bail Fund offers two categories of observations. First, it explains its qualified support for certain aspects of those changes, including the eliminating of bail schedules and the requirement that judges make an individualized assessment of a person's ability to pay before imposing cash bail, as well as condition review hearings and the Philadelphia summons rule. Second, however, it shares substantial concerns with other aspects of the proposed changes. Some of those concerns include proposed reforms that do not go far enough in important ways. Others include proposed reforms that create entirely new problems. Regarding proposed reforms that do not go far enough, the Bail Fund specifically draws attention to things like the lack of definition of terms like "unattainable bail," a practice already disallowed by the Constitution but something that happens regularly. Regarding proposed reforms that risk making things worse, the Bail Fund specifically worries that the changes will increase the likelihood that people with mental health and/or drug and addiction issues will face pretrial detention, even though those people need community support rather than detention.

The opportunity for reform matters tremendously to real people in Philadelphia and across the Commonwealth. Real people suffer real harms when they are locked up pretrial solely because they cannot afford bail. The Committee should not let this opportunity pass by without considering how best to implement these reforms.

I. Certain aspects of the proposed rules deserve support.

The Bail Fund supports certain aspects of the new proposed rules, although notes that the efficacy of these provisions depends on manner of implementation, *see also* Section II, *infra*. First, the Bail Fund supports the bar on assigning money bail only if other non-monetary conditions would adequately serve the Commonwealth's interests. Second, the Bail Fund believes that even if the requirement for financial disclosure and specific risk-finding does not go far enough, it has real value in building a record for appellate review. Third, the Bail Fund believes condition review hearings could provide a meaningful check on people being held pretrial for long periods, based upon faulty or mistaken determinations made at rushed preliminary arraignments. Fourth, the Bail Fund hopes that the Philadelphia summons rule would meaningfully improve people's lives by drastically reducing the number of people who go through Philadelphia's bail system at all.

II. Some proposed reforms do not go far enough in important ways.

The Bail Fund also observes that the proposed reforms do not address many key problems in the present bail system. This particular failure matters all the more because of the infrequency with which these rules come up for revision, the absence of any apparent momentum for legislative reforms, and the reliance on broad discretion of magistrates and judges. We must not let the opportunity for meaningful reform pass with half-measures, especially after a pandemic has underscored the tremendous danger of pretrial detention for so many people. And at the moment, the proposed rules risk not achieving their objectives. Some of the proposed reforms include language that will ultimately depend very much upon implementation,

without providing adequate guidance to ensure that implementation will work well. Some of the reforms codify principles that the Constitution already requires, but that, in the Bail Fund's experience, magistrates routinely fail to apply at lighting fast preliminary arraignments. In fact, to the extent that the proposed reforms do not purport to change the nature of the preliminary arraignments at all, the Bail Fund has serious doubts that some of the reforms will work.

At present, bail hearings have several key problems. First, they are conducted extremely quickly. Entire hearings happen in a minute or two. *See Philadelphia Community Bail Fund et al. v. Arraignment Court Magistrates of the First Judicial District*, 21 EM 2019, Doc. 1 (complaint) (Mar. 12, 2019) (describing 27% of preliminary arraignments happening in less than one minute and an average time of 2.9 minutes). Second, they are conducted impersonally. People shuttle briefly via closed circuit television in front of a magistrate, who takes little interest in the individual's circumstances and makes a decision largely driven by the charge in question. Third, they happen without adequate access to counsel. That is, although on occasion a defense attorney may be there to represent them, even then people have no meaningful opportunity to consult with that attorney prior to or during the hearing, and no real way to share their life or financial circumstances to support an argument against bail. Fourth, the bail magistrates making these decisions need not be lawyers at all, and often lack legal training that would help them safeguard individual constitutional rights at these hearings.

The Bail Fund's own data about the bails that it has posted, and its observation of more than 4,000 hearings, underscores the need for reforms that fundamentally

change the nature of the hearings. In 2020 and 2021, the Bail Fund posted 603 bails. Some of those posted bails are extremely low; in 2020, the smallest bail posted by the Bail Fund was $30 (for a total bail amount of $300), and in 2021 the smallest was $10 (for a total bail amount of $100). Very obviously, a person who is indigent and who cannot post a $10 or $30 bail cannot post *any* bail. And in the Bail Fund's experience, bail magistrates who assign even these low bails to deeply impoverished people have not made a meaningful determination of their ability to pay, or considered the likelihood that they will remain detained pretrial solely because they cannot pay. At one such hearing—typical of the Bail Fund's observations—the magistrate assigned a $10,000 bail to someone with no income, and who used Prevention Point, a shelter, as a mailing address. *See* Ex. A (hearing transcript). The magistrate did so even though the person in question had no prior record, and even after the public defender explained that she had no income or stable address, in a hearing that lasted two minutes. *Id*.

Clients of the Bail Fund regularly share their harmful experiences with Philadelphia's preliminary arraignment system. Their experiences reflect the fundamental injustice of that system in exactly the ways described here. One spoke to recurring issues with informed advocacy, explaining that the attorney representing her interests "didn't really speak much. It's hard for them to do you justice when they don't know or haven't spoken to you." Another spoke to the impersonal nature of the arraignments, sharing that "I was treated like I was guilty . . . treated horribly. The commissioner didn't care what I had to say. They were discussing my case and I couldn't say anything. I was being accused of things, but I felt like a fly on the wall."

Many have shared that magistrates assigned bail despite knowing they could not pay, with one saying that "I told her I was unemployed. They were negotiating my bail. The commissioner said, 'I'm going to make it $100,000. He's not working, so he can't pay it anyway.' That's word for word—I won't forget that." And another still spoke to the speed of the preliminary arraignments, calling them "Very short. They don't even have time to think about my case . . . They don't care, and the time it takes them to make a decision shows that." Philadelphia Bail Fund & Pennsylvanians for Modern Courts, *Philadelphia Bail Watch Report, Findings and Recommendations based on 611 Bail Hearings* (Oct. 15, 2018) (containing all of the foregoing quotes).[1]

Unaffordable cash bail matters because it undermines justice and fairness in the criminal system. The legal system has long recognized that pretrial detention puts a thumb on the scale in favor of prosecutors. *See Barker v. Wingo*, 407 U.S. 514, 533 (1972). It coerces guilty pleas, results in harsher penalties and longer sentences for the same offenses compared to people not detained pretrial, and increases the risk and number of wrongful convictions. *See Anderson v. Perez*, 677 F. App'x 49, 50n.1 (3d Cir. 2017) ("One who maintains his or her innocence may, as in *Curry*, take a plea deal rather than mount a meritorious defense, or may wait out prolonged imprisonment—as here, four months—until charges are dismissed."). One report that analyzed ten years' worth of criminal statistics found that conviction rates for those released pretrial were roughly 50%, while conviction rates for those detained

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[1] *Available at*: https://static1.squarespace.com/static/591a4fd51b10e32fb50fbc73/t/5bc60034a4222f8cd2231c54/1539702839376/Philly+Bail+Report_Finalv2.pdf.

pretrial—even accounting for numerous other factors that might explain the disparity—were roughly 92%. *See* Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 308 (2011).[2] The scholarship tracks with the Bail Fund's observations. As noted, the Bail Fund posted 603 bails in 2020 and 2021. Of the 271 of those for which proceedings have already resolved, just 18 (or 6%) of the total—resulted in people sentenced to jail or prison time. The vast majority—85%—had their charges withdrawn, dismissed, or nolle prossed, and roughly 4-5 cases resolve each week.

The Bail Fund's clients are not only the sort of people who would face enormous coercion to plead guilty by pretrial detention, but people for whom even brief pretrial detention disrupts their lives. "Even short periods of jail detention impose harms as grave as serious crimes." Megan Stevenson and Sandra Mayson, Pretrial Detention and the Value of Liberty, Virginia Public Law and Legal Theory Research Paper No. 2021-14, at 7 (Feb. 16, 2021). Even in the short term, people can miss work shifts, and suffer loss of income and employment. *See, e.g.*, *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016). Pretrial detention can cause missed payments that cause them to lose housing, missed parental obligations that cause them to lose child custody rights, and, generally, can cause issues that take far longer to disentangle than to create. These harms—which, again, are imposed by even brief periods of pretrial detention—are caused by the nature of preliminary arraignment hearings under the current

[2] The Bail Fund, and others, have previously urged the Supreme Court to account for these effects. *See* Brief of Philadelphia Bail Fund et al., *Commonwealth v. Talley*, 21 MAP 2021 (filed May 19, 2021).

system. This is why the Bail Fund works diligently to post bails at the earliest possible point in the process. It believes not only in helping people avoid justice harms like coerced guilty pleas, but in preventing the many weighty consequences in people's lives from even short-term pretrial detention.

Considering all of this, the Bail Fund fears that the proposed reforms do not offer enough specificity to change the problems with the hearings. That fear is not speculative; it also reflects the Bail Fund's knowledge of reforms in other jurisdictions that have not lived up to their promise because they lacked specificity. Massachusetts, after a 2017 ruling (*Brangan v. Commonwealth*), adopted very similar proposals to the ones being proposed by the Rules Committee—including requiring judges to consider the financial resources of the accused and to provide a written or orally recorded finding of fact and reasons cash bail was set. However, a report examining 300,000 cases over three years found that the number of people held on cash bail did not change significantly following the introduction of reforms. *See* Shira Schoenberg, *Massachusetts bail reform commission recommends keeping cash bail, despite systemic problems*, Mass Live (Jan. 2, 2020). And in fact, people predicted that very result. "While these new procedural due process requirements for bail decisions will give defendants evidence with which to challenge excessive monetary conditions, the requirements likely will not prevent liberty deprivations through bail detention because they do not necessitate a significant change in bail hearing structures. *See Brangan v. Commonwealth*, 131 HARV. L. REV. 1497 (Mar. 9, 2018). Massachusetts' failure to grapple with the fundamental structure of the bail hearings undermined reform in part because, as here, the legal standard was not the key

problem. Imposing unaffordable bails is already unconstitutional, yet in Pennsylvania, bail magistrates often assign it anyway as a matter of course.

To avoid this problem, the Bail Fund believes that the Committee must provide some guidelines about what "affordable" means in context and what is means to "consider" financial information. For many of the Bail Fund's indigent clients, *no* cash bail may be affordable. Personalized review is key, but the Committee should give some guidance about what sorts of information to elicit to ensure that such personalized review is meaningful. Preliminary arraignments, to elicit that information, must last far longer than one to three minutes. While bail magistrates seek that information, people must have the counsel of a defense attorney with whom they consulted in advance, who has some sense of how best to advocate for them besides merely knowing their charge and the information they can glean in a brief exchange. The Committee's proposal to create a financial disclosure is good, but will only work if counsel can have that disclosure in advance, the bail magistrates take their time at the arraignments to consider the information it contains, and receive clearly defined guidance about the weight and purpose of the financial disclosure. The current proposed rules offer no clear standards to guide judges' and magistrates' evaluation of a person's ability to pay. If a bail magistrate assigns bail despite knowing that someone lives in a shelter and has no job even absent a more robust disclosure form, *see* Ex. A, the disclosure itself will not help.

The Committee's proposal for conditional review hearings has similar potential shortcomings. Absent guidance about what those hearings are or how they work, the Bail Fund worries that they will not achieve the Committee's objectives. Such

hearings should incorporate a presumption of release, which the Commonwealth may only overcome by meeting a high burden to show that no other conditions exist that could assure that person's reappearance or the safety of particular individuals. Those findings should be documented, including specifically as to why less restrictive conditions would not serve the Commonwealth's interest—increasing the likelihood of thoughtful reasoning, preventing errors, and creating a record for review later. The hearings should occur at defined intervals for people initially detained, and if circumstances change, they should be released. And accused people should have counsel at each hearing, who has had a meaningful opportunity to consult with them in advance and advocate from an informed posture. Without such guidance, the proposal could simply replicate Early Bail Review hearings in Philadelphia, which take place five-to-seven days after the preliminary arraignment. These hearings have undoubtedly resulted in release for some. However, absent clear guidance or safeguards, these hearings do not fundamentally alter the Philadelphia cash bail system. In practice, in these hearings, the burden falls on defendants and their counsel—flying in the face of the Pennsylvania Constitution and sometimes resulting in initially assigned cash bail remaining unchanged or even *increasing*. The Committee should not countenance such an outcome here.

To the extent that one of the allowable bases for pretrial detention is ensuring a person's reappearance for future proceedings, the Bail Fund also urges the Committee to explicitly differentiate between willful flight and people who would appear with support. Pretrial detention coupled with cash bail does not help with people who intend to flee, because such people by definition have the resources to do

so and therefore also to pay their bail. On the flip side, people who comprise the largest category—those whose failures to appear could easily be prevented—need not be detained to assure their appearance. In the Bail Fund's experience, the vast majority of people do not intend to flee criminal process. More than 90% of the Bail Fund's clients reappear at future proceedings, which tracks with scholarship and research on the subject. *See* Lauryn P. Gouldin, Defining Flight Risk, 85 U. CHI. L. REV. 677 (2018). This may owe to the Bail Fund undertaking simple steps, like text-message reminders, to help people remember details about their hearings. The Committee should require bail magistrates to make specific findings that people intend willful flight, before assigning bail on the basis of obtaining reappearance. And if the Commonwealth does not carry its burden to prove a likelihood of willful flight, people should be released with low-impact (and inexpensive) interventions like text message reminders of court dates.

III. Some proposed reforms create new problems that did not exist before.

The Bail Fund wholeheartedly opposes other aspects of the proposed reforms because they not only do not improve things, but risk making the current system worse. In particular, some proposed changes increase the likelihood that some of the most vulnerable people will face pretrial detention. These changes impermissibly expand the bases for detention, and risk reintroducing unguided discretion that has historically resulted in pretextual decisions about individuals and drive disparities in the aggregate. Relatedly, some of the proposed changes offer people false choices—allowing magistrates to impose onerous conditions resembling probation and

disconnected from the purposes of bail on people pretrial. These changes set people up for failure and impermissibly violate the Pennsylvania Constitution's protections for liberty. Accordingly, the Bail Fund urges the Committee not to adopt any of these proposed changes.

First, the proposed changes increase the likelihood of holding people with mental health or drug addiction issues pretrial, even though those people need support and services instead of detention. The proposed Rule 520.1 adds, as a permissible basis for pretrial detention, "the protection of the defendant from immediate risk of substantial physical self-harm." This change does not define "substantial risk," and offers no basis for assessing that risk—which matters all the more because bail magistrates do not have mental health expertise or training. The rule could allow for pretextual detention of people on this basis. Worse, though: even for people who do have a real, immediate risk of self-harm, detaining them pretrial heightens that risk, rather than mitigating it. *See* Samantha Melamed, *Philly prison 'crisis' now includes a grand jury investigation and more court-ordered reforms*, Philadelphia Inquirer (Sept. 20, 2021) (describing how in the first eight months of 2021, "at least 14 people have died in city jails, the majority of them by homicide, suicide or drug overdose"). Those people need community support, not pretrial detention.

That change not only fails to serve those people, but may well violate other laws. The Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (ADAAA) "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. §

12101(b)(1), and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132. Committee reports on the ADA confirm Congress's intent to cover all police agency activities, including arrests and pretrial detention. *See* House Comm. Judiciary, H.R. Rep. No. 101 485, pt. 3, at 50 (1990), *reprinted* in 1990 U.S.C.C.A.N. 445, 473.[3] And "the majority of circuits to have addressed the question" agree that "Title II applies to arrests." *See, e.g.*, *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1233-33 (9th Cir. 2014). For people who have mental health issues that might give rise to a risk of self-harm, but who do not pose a risk to others and who would likely show up for future court appearances without detention, it may well violate the ADA to detain them pretrial as a matter of policy rather than making a reasonable accommodation for their condition.

Second, the proposed changes create a new basis for detention that offers magistrates unfettered discretion to engage in pretextual detention. Rule 520.1 also adds, as a permissible basis for pretrial detention, a purported need to protect "the integrity of the judicial system." While the comment to the rule suggests that this "includes protection against likely witness intimidation and destruction of evidence," accepted canons of construction in the law mean that such "includes" language will

[3] "[T]o comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training . . ."

not be construed as exclusive or limiting. *See Andrew v. Del. County*, 490 F.3d 337, 348 (3d Cir. 2007) ("Clearly this list of examples is not exclusive, hence the 'e.g.'"). "Integrity of the judicial system" has various meanings in different contexts, including in estoppel, *Motley v. New Jersey State Police*, 196 F.3d 160, 163 (3d Cir. 1999), privilege and discovery, *United States v. Nobles*, 422 U.S. 225, 231 (1975), judicial recusal, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), and vagueness in criminal proceedings, *Beckles v. United States*, 137 S.Ct. 886, 899 (2017), among others—using it here provides no obvious limits. And if anything, the comment offering "witness intimidation" as one of the two examples only illustrates how little this change is needed—if the Commonwealth has real basis to believe that a person poses a danger to a witness, existing authority already allows the Commonwealth to seek pretrial detention without bail.

To the contrary, the comment text illustrates how inappropriate this gaping exception would be, if adopted. The comment itself acknowledges that "this purpose of bail may not be traced to the language of Article I, § 14." (Comment to proposed Rule 520.1). This Court recently addressed that provision and the bail system, holding that the text "provides an exception" to the right to bail only "for three classes of defendants," specifically, those accused of committing a capital offense, those accused of committing an offense with a maximum sentence of life, and those who present a danger to another person or the community that cannot be abated by bail plus available conditions. *Commonwealth v. Talley*, 14 MAP 2021, (Pa. Dec. 22, 2021) (slip op. at 25). "The integrity of the judicial system" appears nowhere on that list,

and in allowing unfettered discretion for magistrates to hold people based upon their own definitions of it, likely runs afoul of the Pennsylvania Constitution.

Both of these additions to the permissible bases to hold people pretrial risk exacerbating historical disparities in pretrial detention that harm people of color. In a disparity that has persisted for decades, Black people are arrested at a higher rate than similarly situated White people for a large number of misdemeanor offenses.[4] Decades of research have shown that arrest data primarily document the behavior and decisions of police officers and prosecutors, not the individuals or groups that the data claim to objectively describe.[5] Beyond arrest rates,[6] defendants of different races

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[4] Megan Stevenson, Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769-770 (2018).

[5] Carl B. Klockars, *Some Really Cheap Ways of Measuring What Really Matters, in Measuring What Matters: Proceedings. from the Police Research Institute Meetings*, 201, U.S. Dept. of Justice, Office of Justice Programs (1999), *available at*: https://www.ncjrs.gov/pdffiles1/nij/170610.pdf ("It has been known for more than 30 years that, in general, police statistics are poor measures of true levels of crime. This is in part because citizens exercise an extraordinary degree of discretion in deciding what crimes to report to police, and police exercise an extraordinary degree of discretion in deciding what to report as crimes. ... In addition, both crime and crime clearance rates can be manipulated dramatically by any police agency with a will to do so. It is also absolutely axiomatic that for certain types of crime (drug offenses, prostitution, corruption, illegal gambling, receiving stolen property, driving under the influence, etc.), police statistics are in no way reflective of the level of that type of crime or of the rise and fall of it, but they are reflective of the level of police agency resources dedicated to its detection.").

[6] Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA Today (Nov. 18, 2014), *available at*: https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207 ("Blacks are more likely than others to be arrested in almost every city for almost every type of crime.").

experience different treatment from police officers,[7] during plea bargaining,[8] in their ability to prepare or wait for trial,[9] and at sentencing,[10] among other points. Pretrial detention amplifies all of those disparities, and by doing so disproportionately harms communities of color. Adding in new, vague bases that depend on the discretion of prosecutors and bail magistrates risks exacerbating those historical trends and continuing discrimination.

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[7] *See, e.g.,* Rob Vogt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 Proceedings of the Nat'l Acad. Sci. 6521, 6521 (2017) ("We find that officers speak with consistently less respect toward black versus white community members, even after controlling for the race of the officer, the severity of the infraction, the location of the stop, and the outcome of the stop.").

[8] *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187 (2018) (finding in Wisconsin state courts that "[w]hite defendants are twenty-five percent more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime," making whites who face felony charges less likely to be convicted of felonies, and that "white defendants initially charged with misdemeanors are more likely than black defendants either to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.").

[9] Kristian Lum & Mike Baiocchi, *The Causal Impact of Bail on Case Outcomes for Indigent Defendants,* Proceedings of 4th Workshop on Fairness, Accountability & Transparency in Machine Learning 1, 4, Aug. 2017, *available at*: https://arxiv.org/pdf/1707.04666.pdf ("We find a strong causal relationship between setting bail and the outcome of a case. . . . [F]or cases for which different judges could come to different decisions regarding whether bail should be set, setting bail results in a 34 percent increase in the chances that they will be found guilty.").

[10] *See* U.S. Sentencing Comm'n, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, 2 (Nov. 2017) (finding that from 2012 to 2016, "Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders"); *see also* Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 Justice Quarterly 1 (2010) ("We find that Hispanics and blacks, males, and younger defendants receive harsher sentences than whites, females, and older defendants after controlling for important legal and contextual factors.").

Third, exchanging pretrial detention for more substantial pretrial supervision risks setting up people for violations and increasing detention without increasing safety or serving the interests of the Commonwealth. Proposed Rule 520.10 allows bail magistrates to assign conditions of release that look like the conditions people must meet while on probation. And Pennsylvania already incarcerates an enormous number of people for violations of probation when they fail to comply with conditions that ultimately do not serve the Commonwealth. *See* Samantha Melamed, Dylan Purcell, and Chris A. Williams, *'Everyone is Detained,' How probation detainers can keep people locked up indefinitely—even when they haven't committed a crime*, Philadelphia Inquirer (Dec. 27, 2019) (describing Pennsylvania's "overall rate of correctional control" as "the second-highest in the nation" based upon probation conditions).[11] Some of the proposed conditions—like engaging in particular programming, maintaining employment, complying with certain types of treatment plans—often set people up for failure, and do so without even offering meaningful protection for the Commonwealth's interests. And in offering so much discretion to magistrates or judges, the proposed rule risks putting people in impossible positions with their liberty at risk. *See id.* (quoting a judge warning someone on probation, "If you are having any type of conflict with your husband or anyone else, remember: You're the one on probation."). In practice, judges often use their discretion in ways that ultimately reflect their own policy preferences rather than permissible bases for

[11] *Available at*: https://www.inquirer.com/news/inq/probation-parole-pennsylvania-philadelphia-detainer-criminal-justice-system-20191227.html.

detention of the Commonwealth. *See* Eli Hager, *People on Probation and Parole Are Being Denied Perfectly Legal Medical Weed*, The Marshall Project (Jan. 17, 2020) (describing a Pennsylvania probation officer stopping a woman from using legal medical marijuana, followed immediately by her suffering 20 seizures in two weeks).[12]

Finally, the proposed rules also risk introducing or exacerbating racial disparities by allowing for jurisdictions to implement pretrial risk assessment algorithms without providing for racial equity. Such risk assessments learn from, forecast, and reinforce long-standing racial disparities.[13] Because algorithms are trained on historical data that reflects years of race discrimination in the criminal legal system,[14] they incorporate that discrimination into future projections and likely will

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[12] *Available at*: https://www.themarshallproject.org/2020/01/17/people-on-probation-and-parole-are-being-denied-perfectly-legal-medical-weed.

[13] Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook, Julie Ciccolini, *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, 46 Crim. Just. & Behavior 6, Feb. 2019 ("It is mathematically impossible to develop a model that will be fair in the sense of having equal predictive value across groups, and fair in the sense of treating members of groups similarly in retrospect.").

[14] Carl B. Klockars, *Some Really Cheap Ways of Measuring What Really Matters, in Measuring What Matters: Proceedings. from the Police Research Institute Meetings*, 201, U.S. Dept. of Justice, Office of Justice Programs, 1999, *available at*: https://www.ncjrs.gov/pdffiles1/nij/170610.pdf ("It has been known for more than 30 years that, in general, police statistics are poor measures of true levels of crime. This is in part because citizens exercise an extraordinary degree of discretion in deciding what crimes to report to police, and police exercise an extraordinary degree of discretion in deciding what to report as crimes. ... In addition, both crime and crime clearance rates can be manipulated dramatically by any police agency with a will to do so. It is also absolutely axiomatic that for certain types of crime (drug offenses, prostitution, corruption, illegal gambling, receiving stolen property, driving under the influence, etc.), police statistics are in no way reflective of the level of that type of

only exacerbate racial inequity. *See* Sandra Mayson, Bias In, Bias Out, 128 YALE L. J. 2218, 2234 (2019). The Bail Fund urges the Committee not to allow or encourage jurisdictions to use them.

IV. This opportunity matters.

For many of the Bail Fund's clients and partners, these proposed reforms could not come with higher stakes. Dante Jones became a Bail Fund client and partner in 2017, when he ended up living in a tent after he lost his job and his home, and faced pretextual drug charges and a $10,000 bail. Dante Jones, Without a home and arrested: What I learned about police while homeliness, WHYY (Dec. 29, 2020). For Mr. Jones at that moment, he had as little chance to pay the $1,000 he needed as if he'd needed to pay $10 million. *Id*. He only stayed out of pretrial detention because the Bail Fund posted the $1,000 for him, which helped him avoid taking a plea deal coerced by pretrial detention, and gave him the foundation to get back on his feet—finding an apartment, getting a job, and putting his considerable interpersonal skills to work serving his community instead of languishing in jail or prison. *Id*.

The Bail Fund cannot afford to bail out everyone who cannot afford to pay bail. And in a truly just system, our organization would not need to exist at all. The Bail Fund urges the Committee to take this opportunity to put meaningful protections into the preliminary arraignment process, and ensure that the many people who have the skills and potential to be like Mr. Jones have the same opportunity that he did—not because the Bail Fund happened to find him at the right moment, but because all

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crime or of the rise and fall of it, but they are reflective of the level of police agency resources dedicated to its detection.").

Pennsylvanians deserve it. The Bail Fund also remains willing to share its observations, experiences, and expertise in these matters with anyone interested in further discussion and would be happy to answer any questions raised by the comments above.

Respectfully submitted,

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Ex. A

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH :CASE NO: MC-51-CR-0004688-2021

VS. :

[redacted] :

COURTROOM B08

JUNIATA KIDD STOUT CENTER FOR CRIMINAL JUSTICE

PHILADELPHIA, PENNSYLVANIA

WEDNESDAY, MARCH 10, 2021

B E F O R E: COMMISSIONER PATRICK STACK

ARRAIGNMENT

PRESENT:

[redacted]

Defendant

APPEARANCES:

ASSISTANT DISTRICT ATTORNEY (UNIDENTIFIED)

PUBLIC DEFENDER (UNIDENTIFIED)

- - -

PROCEEDINGS

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(The matter began at 8:31 a.m.)

THE COURT: What's your name?

MS. [redacted].

THE COURT: This is your arraignment. It's where you're read the charges. You've got a felony charge of possession with intent to deliver, as well as possession of a narcotic. The allegation comes from the 2000 block of Birch, alleging unlawfully possessed crack cocaine and heroin with intent to deliver.

Now you've got a court date: The 26th of March at 9 a.m. in Courtroom 806, and that's in the Criminal Justice Center. You will get a copy of that information.

Let's say -- it looks like still a status only date. That means your attorney appears for you on that day. You're going to be notified by mail. I've got you cited as a homeless resident. Do you have a valid address?

MS. [redacted]: (Inaudible).

THE COURT: Where do you get your mail?

MS. [redacted]: Prevention Point.

THE COURT: Okay.

MS. [redacted]: 29--

THE COURT: Prevention Point.

PUBLIC DEFENDER: Prevention Point.

THE COURT: Are you looking for anything here?

THE COMMONWEALTH: Yeah, we are requesting $999,999, due to the amount. This does appear to be a first arrest, however, there was a significant amount of heroin recovered.

THE COURT: Okay.

PUBLIC DEFENDER: Requesting high sign-on bond or within the guidelines, which are $3700 to $12,000. Ms. [redacted] is 46 years old and, as stated, she has no prior record, no prior PWID charges or convictions.

She's completed some college. She has one child, and no income. And, as she stated, her mailing address is Prevention Point.

THE COURT: Yeah, I'm not going to give you a million-dollar bail. I've got a guideline. I'm going to keep it in the guidelines: $10,000 bail, 10 percent. The public defender is going to represent you.

Do not get arrested again. Do you

understand? All right, listen to the public defender.

PUBLIC DEFENDER: Good morning, Ms. [redacted]. I'm from the Defender Association. My office will be representing you in this case. If you are unable to post that $1000 bail, an attorney from my office will contact you shortly to discuss the --

MS. [redacted]: (Inaudible).

PUBLIC DEFENDER: -- facts of this case, as well as the possibility of getting your bill lowered. In the meantime, do not discuss the facts of the case with anyone except an attorney from my office, and know that the jail phones are recorded.

Last thing, Ms. [redacted]: do you have a good -- a cell phone number for a family or friend?

MS. [redacted]: Uh, yes.

PUBLIC DEFENDER: Go ahead.

MS. [redacted]: [redacted].

PUBLIC DEFENDER: 7309. And whose number is that?

MS. [redacted]: That's my number. I have a cell phone.

PUBLIC DEFENDER: Okay, great. Thank you,

Ms. [redacted].

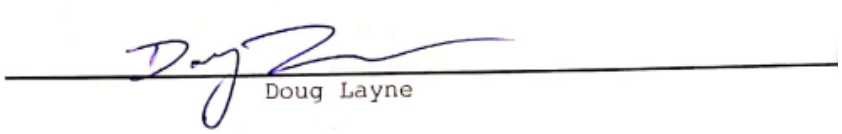
MS. [redacted]: (Unintelligible).

THE COURT: Thanks, PDU.

(The hearing was concluded at 8:33 a.m.)

CERTIFICATION

I, Doug Layne, the assigned transcriber, do hereby certify that the foregoing ER transcript of proceedings before the Court of Common Pleas, First Judicial District of Pennsylvania, March 10, 2021, is prepared to the best of my ability, in full compliance with the current transcript format for the judicial proceedings and is a true and accurate transcription of the proceedings as recorded.



Doug Layne

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