

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

**21 EM 2019**

**THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*,**

**Petitioners**

**v.**

**ARRAIGNMENT COURT MAGISTRATE FRANCIS BERNARD, *et al.*,**

**Respondents**

**RESPONSE OF ARRAIGNMENT MAGISTRATES BERNARD, RICE,  
BEDFORD, DEVLIN, O'BRIEN, AND STACK TO PETITIONERS'  
"CLASS ACTION COMPLAINT AND PETITION FOR WRIT OF  
MANDAMUS"**

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## **I. INTRODUCTION**

Petitioners bring an action in mandamus seeking to compel Respondent Philadelphia Arraignment Court Magistrates (“Magistrates”) to “conduct preliminary arraignments in accordance with the mandatory requirements of the Pennsylvania Rules of Criminal Procedure and the local Arraignment Court Magistrate Rules.” (Petition, Prayer for Relief, § c, p. 54.)

Mandamus cannot be granted in this case for three principal reasons:

- Petitioners improperly seek mandamus to require the Magistrates to exercise their discretion, in future cases, in a particular manner designed to achieve Petitioners’ stated goal of ending cash bail. Petitioners’ admitted agenda to eliminate cash bail can be pursued only through comprehensive bail reform in the nature of statewide legislative or regulatory action that is not within Respondents’ purview; it cannot be achieved through the extraordinary issuance of a writ of mandamus.
- Petitioners lack standing to mandamus future judicial acts.

- In asking this Court to mandamus the Magistrates to follow Court Rules, Petitioners would have this Court commandeer, and thus improperly interfere with, the independent decision-making responsibility of Pennsylvania judicial officers.<sup>1</sup>

## **II. OVERVIEW OF ARRAIGNMENT PRACTICES**

The First Judicial District (FJD) has instituted significant justice reform efforts aimed at reducing the jail population, resulting in fewer people being detained on cash bail. The FJD's immediate emergency bail appeals, early bail hearings and expanded diversion programs have been accomplished without jeopardizing the safety of the community. The FJD and its Municipal Court continue to engage in a collegial manner with groups interested in effectuating criminal justice reforms.

However, the FJD disagrees with the position of Petitioners. In the present case, the Magistrates' practices as described in the Petition (*see* Petition, ¶ 8) are not "illegal." To the contrary, in making their judicial decisions regarding bail, the Magistrates undertake their duties cognizant of the Rules of Criminal Procedure, the Local Rules of the Philadelphia Municipal Court's Criminal Division, and the Philadelphia Municipal Court Arraignment Court Magistrate Rules. These

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<sup>1</sup>Arraignment Court Magistrates are appointed by the Philadelphia Municipal Court to conduct judicial functions such as arraignments, among other functions. *See* 42 Pa.C.S. § 1123(a)(5).

independent, discretionary judicial decisions are undertaken with information from the Preliminary Arraignment Reporting System (PARS), a computer arrest-tracking database that includes detailed Pretrial Service Division Investigation Reports. The Magistrates also consider information submitted by the Commonwealth (*i.e.*, the District Attorney) and defense counsel, *e.g.*, as is the case of the named individual Petitioners, a representative of the Philadelphia Defender Association of Philadelphia (“Defender”).<sup>2</sup>

Using the information available, the Magistrates follow the Rules of Criminal Procedure in making their judicial decisions. Legal arguments made *infra*, and the protection of the deliberative process of judicial officers, mitigate against a point-by-point response to the factual allegations of the Petition.

However, in contrast to the characterizations contained in the Petition,

Respondents respectfully submit the following for consideration:

**A. Immediate emergency appeal is available.**

Appeals from a bail decision of an Arraignment Court Magistrate can be heard within hours by the Emergency Municipal Court Bail Appeal Judge, who is specifically assigned by the President Judge of the Municipal Court. The appeal can be brought by either the defense counsel or the prosecutor, and the hours for

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<sup>2</sup> As explained below, prior to arraignment, the Magistrates receive a detailed Pretrial Services report, which covers the factors set forth in Pa.R.Crim.P. 523(A). Pretrial Services is a “bail agency” as set forth in Pa.R.Crim.P. 530.

such appeals are not restricted; the emergency bail appeal is available 24 hours per day, seven days a week, as provided by Municipal Court Rule 21's "Emergency Judge Procedures," *to wit*:

The President Judge of the Municipal Court shall designate an Emergency Judge who shall be available for all criminal and civil emergency matters, including appeals from bail set by a[n] Arraignment Court Magistrate. The name and phone numbers of the Emergency Judge shall be listed in the weekly court schedule and available through the City Hall switchboard (215-686-1776).

In addition, Phila. Crim R. 520(A) provides, in relevant part, as follows:

**Rule 520. Regulations Pertaining to Bail, Court of Common Pleas and Municipal Court**

(A) *Initial Determination of Bail.* Upon defendant's arrest, the initial determination of bail, where bail is applicable, to insure his appearance at proceedings concerning the charges for which he was arrested shall be made at Preliminary Arraignment by the Arraignment Court Magistrate regularly assigned. Appeals from the Arraignment Court Magistrate's decision shall be heard only by the Emergency Municipal Court Bail Appeal Judge specifically assigned by the Municipal Court President Judge. No other Municipal Court Judge may make such initial determination of bail, except upon prior written order of the President Judge of the Municipal Court, or, in the case of a Judge of the Court of Common Pleas, both the President Judge of the Municipal Court and the President Judge of the Court of Common Pleas.

The emergency appeal as provided in the Rules was available to the named Petitioners. Thus, the assertion that a bail appeal takes days (*see* Petition, ¶ 78) is simply incorrect.

**B. Early Bail Review is available.**

The Early Bail Review Program provides a mechanism for judicial modification, and, as important, facilitates negotiated agreement of bail conditions between the District Attorney's Office and the Defender. Petitioners recognize this procedure, but they claim that of those who receive Early Bail Review, 87% are released (Petition, ¶ 6); such release most often results through negotiated agreement of bail conditions between the District Attorney's Office and the Defender, which may be approved by the Municipal Court Judge, in the Judge's discretion. However, as indicated above, a defendant need not wait to take advantage of the Early Bail Review Program if the defendant files an immediate emergency appeal under the cited Rules. Bail review is also available through Phila. Crim. R. 520(B), which provides for modification of bail through application, by motion to the Common Pleas Court.

**C. Pretrial Services collects information as required by Rule 523(A) and generates an Investigative Report provided to the Magistrates prior to the arraignment.**

Petitioners wrongly allege that the Magistrates do not consider the factors in Rule 523(A). To the contrary, the factors are understood and considered by the Magistrates.

Prior to beginning an arraignment shift, the Magistrates receive and review PARS Reports, including the Pretrial Service Division Investigation Reports;

Pretrial Services is the “bail agency” under Rule 530(A) that investigates and provides the information required under Rule 523(A). Pretrial Services Reports are permissible under the Rules, and the Magistrate has the necessary, pertinent information available before and at the arraignment to make an independent judicial decision as required by the Rules.

**D. A Defendant’s financial information is investigated and provided to the Magistrate in advance.**

The Pretrial Service Division Investigation Reports, which are included in PARS, contain the defendant’s financial information reflecting the defendant’s ability to pay. A Magistrate takes this information into consideration in the judicial decision that is made in each individual case.

**E. The Bail Guidelines do not fetter a Magistrate’s discretion.**

The Bail Guidelines are established by Phila. M.C.R.Crim.P.A.C., § 8.01. Those guidelines allow the Magistrate, in an exercise of discretion, to “fix bail in an amount higher or lower” than the range indicated in the guidelines. The Magistrate has discretion to deviate from the guidelines, provided that “in such case the reason(s) shall be indicated in writing by the Magistrates.”

A review of the post-arraignment PARS reports of the individual Petitioners now before the Court shows that those reports in fact contain the reasons for guidelines deviation; most often, the written reasons given for such departure are “seriousness of open cases,” “prior history,” and “prior related offenses.” In

making these discretionary judgments, the Magistrates are setting bail in accordance with the cited Rule.

**F. A defendant is permitted to speak during arraignment if the defendant is permitted to do so by the defendant's representative.**

Petitioner's allegation of comments of the magistrates during bail proceedings cited in the Petition are taken out of context and ascribe incorrect motives to Respondents. The defendant being arraigned is advised not to speak about the charges or the case, in order to protect the right of the defendant to be free from self-incrimination, and to ensure that no rights are inadvertently waived by speaking without advice of counsel. When a defendant begins to speak at the bail hearing, the representative of the public defender may also attempt to intervene. However, if defense counsel or the public defender representative permits or requests the defendant to speak, Respondents will hear the defendant.

**G. Time is given to cases as necessary.**

The average time presented in the Petition is misleading. (*See* Petition, ¶ 54). For example, if no cash bail is imposed – as in a large number of cases – an arraignment is swift. If a case involves differing arguments from representatives of the District Attorney and the defense counsel or public defender, the arraignment will naturally take longer.

Lumping every case together without recognizing the distinctions between cases is neither helpful nor accurate. When the Magistrates require time to hear arguments or relevant information (in addition to what has already been collected by Pretrial Services), they take the time to make an informed decision.

**H. The prosecutor's reasons for seeking cash bail and the defense arguments are considered.**

Although Petitioners seek to end cash bail (*see* Petition, ¶ 16), the District Attorney's Office, which has an advocacy interest in this proceeding, continues to request cash bail for reasons stated in individual arraignment proceedings. Each Magistrate, after hearing from the defense attorney or public defender representative, weighs the information from both sides, along with the information required under Rule 523(A) as provided in the Pretrial Services Report. The Magistrate then proceeds, in the Magistrate's discretion, to render a bail decision that he or she believes is appropriate under the Rules.

**I. Video arraignments are workable and advantageous to defendants and improvements to the system are being made.**

Audio-visual arraignment is specifically allowed by the Rules of Criminal Procedure, *see* Pa.R.Crim.P. 540(A). Respondents make every effort to insure that the equipment is functioning by first asking the defendant to confirm his or her name to insure that the defendant can be heard at the beginning of the arraignment.

The Municipal Court is in the process of upgrading the audio system currently installed in the arraignment room and is committed to upgrade any technology that will facilitate communication between the defendant, counsel and the Magistrate, as well as provide better clarity to spectators in the arraignment room. An example of that commitment includes recording software already ordered which will allow monitoring of sound quality.

Video arraignments work to the advantage of the defendant in that the Municipal Court has reduced the time between arrest and arraignment from an average of 48 hours before use of video arraignments to a current average of 15 hours. Using videoconferencing technology substantially shortens the amount of time defendants are in custody prior to pre-trial release.

**J. Continuing education is required and completed by the Magistrates.**

Because the bail issue had been raised by the ACLU to the President Judge of the Municipal Court prior to the filing of the Petition, the Magistrates have been reminded again of the applicable procedural rules by the President Judge of Municipal Court.

Moreover, in addition to passing the certification requirements mandated in Pa.R.J.A. No. Rule 601, the Magistrates are required to attend yearly training by

the Minor Judiciary Education Board on issues within their jurisdiction, including the Rules of Criminal Procedure. Magistrates are instructed in those sessions to pay strict attention, in exercising their judicial discretion, to the requirements of said Rules.

### **III. ARGUMENT**

#### **A. Mandamus will not lie to compel a judicial officer to perform discretionary duties in accordance with certain rules or laws.**

Petitioners' mandamus request fails for a basic reason: mandamus cannot be used to compel a general course of official conduct or a long series of continuous acts to be performed under varying conditions. Moreover, mandamus cannot be used to compel the outcome of a discretionary act, and other remedies exist to appeal quickly from an initial bail decision.

Arraignment Court Magistrates are judicial officers created under § 1123(a)(5) of the Judicial Code, which provides, in relevant part, as follows:

[T]he Philadelphia Municipal Court, through the president judge and a majority of the judges of the court, shall have the power to appoint for four-year terms six arraignment court magistrates, to administer oaths and affirmations, preside at preliminary arraignments, assign counsel in certain cases, issue criminal complaints, fix bail and issue arrest warrants and search and seizure warrants. The arraignment court magistrates shall be employees of the Commonwealth and they shall receive an annual salary equal to the salary of an associate judge of the Traffic Court of Philadelphia. The method of selection and appointment and removal of arraignment court magistrates and establishing standards of conduct and the rights, responsibilities and authority of the arraignment court magistrates and the procedures for

appealing from the decisions of the arraignment court magistrates shall be provided by local rules adopted by the municipal court.

42 Pa.C.S. § 1123(a)(5).

Moreover, the Rule governing Preliminary Arraignment encompasses the Respondents as judicial officers:

**Sec. 8.00. Arraignment Court Magistrates to Fix Bail. Appeals.**

(a) Arraignment Court Magistrate shall have the same authority to fix bail at Preliminary Arraignments as Judges of the Philadelphia Municipal Court.

*See also* Pa.R.Crim.P. 1003, Comment, relating to procedure in non-summary Municipal Court cases (“As used in this rule, ‘Municipal Court judge’ includes a bail commissioner acting within the scope of the bail commissioner’s authority under 42 Pa.C.S. § 1123(A)(5).”).

Because each arraignment and bail adjudication is presided over by a duly authorized judicial officer acting pursuant to the cited valid authority, Petitioners are seeking to mandamus judicial officers acting in a judicial capacity in the performance of their duties. However, long-established case law holds that mandamus is not an appropriate remedy for compelling a general course of official conduct or a long series of continuous acts to be performed under varying conditions, as is requested here.

Mandamus actions compelling a judicial officer to perform a specific duty in a particular manner are extremely rare; moreover, such actions are suitable only to compel a judicial officer to perform a singular act in a particular case. *See United States v. Choi*, 420 U.S. 103 (1975) (court issued writ of mandamus preventing magistrate judge from considering certain factors as defenses to the merits of the government's case against criminal defendant); *Walters v. State*, 905 So. 2d 974 (Fla. 1<sup>st</sup> DCA 2005) (petitioner was entitled to mandamus relief directing the trial court to accept his waiver of appearance at a pretrial conference, consistent with the Florida Rules of Criminal Procedure).

This Honorable Supreme Court has stated, “[t]he ordinary office of the writ of mandamus is to coerce the performance of single acts of specific and imperative duty; and ordinarily, it is not an appropriate remedy to compel a general course of official conduct or a long series of continuing acts, to be performed under varying conditions.” *Dorris v. Lloyd*, 100 A.2d 924 (Pa. 1953) (dismissing complaint in mandamus filed by political party chairman in which he averred that the commissioners, acting as the registration committee and board of elections of the county, “neglected and willfully refused to perform the duties imposed upon them by law”), *cert. denied*, 347 U.S. 936 (1954). In denying mandamus relief, the Court in *Dorris* explained:

It is plain that where the court is asked to require the defendant to adopt a course of official action, although it is a course required by

statute and imposed upon the official by law, it would be necessary for the court to supervise, generally, his official conduct, and to determine in numerous instances whether he has, to the extent of his power, carried out the mandate of the court. It would in effect render the case open for an indefinite time to superintend the continuous performance of the duties by the respondent. Accordingly, the writ will not issue to compel the performance of a series of acts by a judicial officer...nor to compel performance of other acts of a continuous nature.

*Id.* (quoting 34 Am Jur. 864, § 74).

Based on this line of reasoning, Pennsylvania courts have repeatedly held that mandamus relief is inappropriate to compel the performance of future acts, which is what Petitioners seek. *See Russell v. Osser*, 437 Pa. 45, 261 A.2d 307 (1970) (modifying portions of an order that sought to regulate future conduct, and holding that the writ of mandamus will not issue to compel the performance of a series of acts by a judicial officer nor to compel performance of other acts of a continuous nature); *see also Spadaccino v. Middletown Township Supervisors*, 1965 Pa. Dist. & Cnty. Dec. LEXIS 282 (1965) (sustaining POs to petition for writ of mandamus seeking to compel police to follow certain provisions of the Vehicle Code).

In sum, it is “not the proper function of a mandamus” to order an official to “behave themselves in the future[.]” *Dorris*, 375 Pa. at 479.

Further, Petitioners wrongly seek to mandamus the future discretionary acts of the Magistrates in adjudicating cases where the Magistrates are authorized to

exercise judicial discretion to weigh the factors articulated in the applicable rules and render an independent judicial decision. It is axiomatic that where some form of action is mandatory under law, and the only discretion is the method of performance, a defendant may be compelled to exercise that discretion, but he may not be compelled in the manner of such exercise. *Id.* (citing *Edelman v. Boardman*, 2 A.2d 393 (Pa. 1938); *Rothey Bros., Inc. v. Elizabeth Twp.*, 112 A.2d 87 (Pa. 1955)).

Here, Petitioners seek to compel the Magistrates to perform their discretionary duties in future arraignment hearings in accordance with the Rules of Criminal Procedure. While mandamus may be appropriate to compel the Magistrates to exercise their discretion at future hearings, mandamus cannot be used to direct the manner in which the Magistrates exercise that discretion. That is, mandamus cannot be used to require a particular outcome.<sup>3</sup>

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<sup>3</sup> Nor does styling the Complaint as class action save Petitioners' mandamus action. "[T]he class action is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims; class status or the lack of it is irrelevant to the question whether an action is to be heard." *Lilian v. Commonwealth*, 467 Pa. 15 (1976); *Johnson v. GM Corp.*, 349 Pa. Super. 147 (1986). *See also Tesauro v. Quigley Corp.*, 2002 Phila. Ct. Com. Pl. LEXIS 37 (C.C.P. 2002) ("A motion for class certification addresses not the substance of the plaintiff's claims but rather the procedure by which those claims should be addressed. Pa. R.C.P. 1707, Explanatory Note, 1977 noting that the hearing for certification is not concerned with the merits of the controversy.")

Finally, mandamus is not available where, as here, other remedies are available. Because immediate bail review by a Municipal Court Judge is available through the emergency bail appeal process explained above, Petitioners have and had other remedies available to them. Mandamus is an extraordinary writ that will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy.” *Kuren v. Luzerne Cty.*, 637 Pa. 33, 92-93, 146 A.3d 715, 750-51 (2016) (citing *Jackson v. Vaughn*, 565 Pa. 601, 777 A.2d 436, 438 (2001)).

Mandamus is, therefore, not appropriate in this instance.

**B. The policy of ending cash bail is an initiative beyond the authority of Respondents or their Court.**

Petitioner Philadelphia Community Bail Fund seeks “to end cash bail and pretrial detention in Philadelphia” (Petition, ¶ 16); a fair reading of the Petition indicates that this purpose underlies the allegations of the Petition. However, the advantages and disadvantages of ending cash bail are policy matters for the Pennsylvania Legislature to debate and legislate.

Other states have enacted comprehensive bail reform policies through legislation, rather than through the judicial branch. For example, California passed a law in 2018 eliminating cash bail, and Washington, D.C., and New Jersey have

enacted laws that virtually eliminate cash bail in most circumstances.<sup>4</sup> In New Jersey, the legislature enacted the change by successfully proposing an amendment to the State Constitution to strengthen a citizen's right to pretrial release. *See Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018).

Likewise, in Pennsylvania, the right to bail is contained in the Constitution.

Pa. Const. Art. I, § 14, sets forth the right to pretrial release, stating:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion of the public safety may require it.

Pa. Const. Art. I, § 14.

This constitutional provision was most recently amended in 1998, when the General Assembly approved an amendment adding the language excepting individuals from bail where they pose a danger to the safety of any person and the community at large, and the questions were subsequently presented to and approved by the electorate. The procedure utilized for proposing amendments to the Constitution is at the discretion of the legislature. *Grimaud v. Commonwealth*,

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<sup>4</sup> California's law – SB-10 Pretrial release or detention: pretrial services – is located at [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201720180SB10](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB10) (retrieved March 25, 2019). The bill was passed and signed into law, but is subject to a voter referendum in November 2020.

581 Pa. 398, 865 A.2d 835 (2005). It does not appear that there have been any further efforts to amend this constitutional provision to limit the use of cash bail, as the New Jersey legislature did.

Statutory provisions regarding the use of cash bail in Pennsylvania appear to be similarly limited. Section 5702 of the Judicial Code is the main statutory authority for setting cash bail, and simply reads that “all matters relating to the fixing, posting, forfeiting, exoneration, and distribution of bail and recognizances shall be governed by general rules.” 42 Pa.C.S. § 5702. Therefore, the predominant authority for how and when to set monetary bail is the Rules of Criminal Procedure at issue in this case.

The Rules at present allow for cash bail, based on a discretionary weighing of the factors in Rule 523. Thus, Petitioners’ efforts at bail reform are more properly directed at the legislature (and, concomitantly, changing the Rules through the Criminal Rules Committee of the Supreme Court). Any effort to force comprehensive bail reform through this action against the Magistrates who make judicial determinations based on existing law and Rules should be denied. The Magistrates cannot themselves end cash bail, and the Magistrates would not be performing their mandated duty – making a judicial determination on the factors set forth in Rule 523 – if they were to decide never to impose cash bail. Moreover,

even if the Magistrates possessed such power, that would differ for the remainder of the Commonwealth.<sup>5</sup>

#### **IV. CONCLUSION**

For the foregoing reasons, Respondent Bail Arraignment Magistrates respectfully request this Honorable Supreme Court to deny the Petition for Mandamus.

Respectfully submitted,

*s/A. Taylor Williams*  
**A. Taylor Williams, Esquire**

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<sup>5</sup> At the local level, there has been some movement towards eliminating cash bail. Recently, the Philadelphia City Council passed a resolution which states:

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That it hereby encourages and supports the Philadelphia District Attorney's Office and the First Judicial District of Pennsylvania in instituting internal policies that reduce reliance on cash bail; and further calling on the Pennsylvania State Legislature and the Pennsylvania Supreme Court to revise state laws and procedure codes governing bail to allow for the elimination of cash bail statewide, or to provide for an exemption in the law for cities of the first class.

Philadelphia City Council Resolution No. 180032. However, this resolution does not have the force of law, and the General Assembly has not yet taken action to eliminate cash bail on a statewide basis.

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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on *March 26, 2019*, she personally caused to be served upon the following a true and correct copy of the foregoing Answer by filing via PACFile to all counsel of record.

**s/A. Taylor Williams  
A. TAYLOR WILLIAMS, ESQUIRE**