

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

**THE PHILADELPHIA COMMUNITY**

**No. 21 EM 2019**

**BAIL FUND, *et. al.*,**

*Petitioners*

v.

**ARRAIGNMENT COURT**

**MAGISTRATES of the FIRST**

**JUDICIAL DISTRICT of the**

**COMMONWEALTH OF PENNSYLVANIA,**

*Respondents*

**REPORT OF THE SPECIAL MASTER**

Dated: December 16, 2019  
John M. Cleland, Senior Judge  
Special Master

**Background and Process**

By Order of the Supreme Court dated July 8, 2019, I was appointed as Special Master and directed to conduct an inquiry regarding Petitioners' allegations of systemic failures of the First Judicial District to properly conduct cash-bail matters and to make suggestions for action by the Court in response to those allegations. The Court specifically stated that no recommendation for the elimination of cash bail would be entertained.

It is my conclusion that the preliminary arraignment bail system as currently designed in Philadelphia is fundamentally sound. Accordingly, I have described my assignment as one to suggest bail system “improvements,” rather than to suggest bail system “reforms.”

As described in more detail in this report, the President Judge of the First Judicial District, the President Judge of the Municipal Court, the Philadelphia District Attorney (“DAO”), and the Defender Association of Philadelphia (“PD”) were, pursuant to the Court’s July 8, 2019 Order (“Order”), invited to participate in the proceedings.

On July 18, 2019, I met with counsel for the American Civil Liberties Union (“ACLU”), who represent Petitioners, and counsel for the Administrative Office of Pennsylvania Courts (“AOPC”), who represent Respondents. Counsel for the DAO and PD also attended the meeting. Because the Order did not specify what the nature of my “inquiry” should be or how it should be conducted, it was agreed that the case would proceed in the nature of a mediation with the goal of reaching agreement among the participants rather than in the form of contested litigation involving discovery, witness testimony, briefing and argument.

The agreed-on goal reached at that meeting was to develop a set of joint recommendations for improvement of the Philadelphia bail system. It was also agreed that as Special Master I would be authorized to speak *ex parte* to any of the attorneys for the litigants or to any of the invited participants as might be helpful to facilitate agreement.

Thereafter, there followed a series of meetings in Harrisburg and Philadelphia. Some were held by conference call and some were face-to-face. I participated in some meetings and others involved only counsel without my presence.

Throughout this process, I have been impressed by the good faith evidenced by all counsel involved for the litigants and the invited participants, by the expertise and diligence they have demonstrated in addressing the issues presented by this litigation, and by their commitment to the process of negotiation, implementation, and evaluation. Likewise, President Judge Idee C. Fox of the First Judicial District and President Judge Patrick F. Dugan of the Philadelphia Municipal Court have been directly engaged in addressing the legal and administrative concerns relative to defining and implementing the improvement recommendations. They have demonstrated their genuine commitment to this process.

The negotiations resulted in a set of eight Agreements, supplemented with five points of Disagreements. Those Agreements and Disagreements are set forth in full in the "Submission to the Special Master," which is attached as Exhibit A.<sup>1</sup>

Additionally, as the process developed, it was agreed that, once the negotiators had produced a set of Agreements, I would then develop a protocol. That protocol proposes implementation of the Agreements, as well as advances my additional Suggestions. Moreover, the protocol suggests a process for evaluating any changes made through implementation of the Agreements or my additional Suggestions.

In my view, the bail system as conceived is essentially sound<sup>2</sup> and any attempt to conduct a wholesale overhaul would be politically, organizationally and fiscally

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<sup>1</sup> As submitted, the Agreement contains several apparent formatting issues. See, e.g., Report of the Special Master at 33-34 (in which, *inter alia*, the text for footnote 16 is split between the footnote itself and the body of the Agreement; footnote 6 follows footnote 16; the text for footnotes 6-8 appear in superscript in the body of the Agreement). Presumably these will be addressed in subsequent filings by the parties with the Court.

<sup>2</sup> Petitioners' requested relief is actually quite modest. The Prayer for Relief in their Complaint asks the Court to require that in conducting preliminary arraignments, the Arraignment Court Magistrates simply comply with the Pennsylvania Rules of Criminal Procedure. "Specifically...(1) consider all information relevant to the release decision, including the factors enumerated in Rule 523(A); (2) abide by Rule 524's prohibition against imposing any condition of release for the purpose of ensuring that an (sic) defendant remains incarcerated pending trial; (3) conduct Rule 528(A)'s mandatory assessment of an (sic) defendant's financial ability to pay prior to imposing cash

unrealistic. Accordingly, my goal has been to develop proposals, by agreement if possible, that are practical, discrete, and incremental steps to improve that system.

Some practical considerations, however, must necessarily be recognized and taken into account:

1. An apparent overlap of authority between the Court of Common Pleas and the Municipal Court regarding oversight of the bail system. The Supreme Court's Order of January 27, 2016, entered at No. 460 Judicial Administration Docket, provides that the Administrative Governing Board of the First Judicial District "shall have authority over the operations of all courts and departments of the First Judicial District, including the monitoring of overall performance...." The Judicial Code, however, confers on the Municipal Court "through the President Judge and a majority of the judges of the court" the power to appoint and remove six arraignment court magistrates and adopt rules to establish standards of conduct and their "rights, responsibilities, and authority." 42 Pa.C.S. §1123(a)(5). Arraignment court magistrates are employees of the Commonwealth. See *id.*
2. The logistics of negotiating an increased appropriation from the City of Philadelphia for additional personnel would necessarily delay the process of implementing immediate improvements.

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bail; (4) carry out their duty under Rule 528(B) to only impose cash bail in reasonable amounts; (5) afford defendants a full opportunity to be heard." *Philadelphia Cmty. Bail Fund v. Arraignment Court Magistrates*, 21 EM 2019, Amended Class Action Complaint and Petition for Writ of Mandamus at 62.

3. The importance that all participants in this process nurture an atmosphere of mutual trust, goodwill, and reciprocal confidence that the development of an efficient and legally proper bail system serves the ends of justice.
4. While the Agreements and Suggestions are directed largely to the court system, if they are to be effectively implemented it will require a demonstrable commitment by the DAO and PD to fulfill the underlying budgetary and staffing obligations.
5. The involvement of the MacArthur Foundation and its Safety and Justice Challenge grant (“MacArthur Grant”) to the City of Philadelphia and the effect, or effectiveness, of that process in modifying the criminal justice processes and any possible effect on the existing bail system has not been taken into account.

### **Operation of the Bail System**

This year, some 30,000 people will be arrested in Philadelphia and scheduled for preliminary arraignment at which their bail will be set by one of six Arraignment Court Magistrates (“ACM”) who collectively staff the arraignment court 24/7/365.

ACMs are appointed by vote of the judges of the Municipal Court as detailed in the Rules of the Philadelphia Municipal Court. See Phila.M.C.R.Crim.P., A.C.M., Sec. 1.00. Eligible applicants must be residents of Philadelphia and either have been an attorney in good standing for four years or have completed a course of training and instruction and passed an examination.<sup>3</sup> No current ACMs are lawyers except for one recent appointment.

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<sup>3</sup> “The Minor Judiciary Education Board (the Board) shall prescribe and approve the subject matter and the examination for the course of training herein required.” *Id.* at Sec. 10.

In addition to conducting preliminary arraignments, ACMs are empowered to issue criminal complaints, schedule municipal court trials and preliminary hearings, and issue arrest and search warrants. See 42 Pa.C.S. §1123(5). The Municipal Court Rules further provide that “[t]he President Judge of the Philadelphia Municipal Court or his designee shall exercise general supervision and administrative control over all Arraignment Court Magistrates.” Phila.M.C.R.Crim.P., A.C.M., Sec. 6.00. The duty to supervise includes the power “for good cause [to] take disciplinary action” for instances including “inefficiency, inadequacy or misconduct.” *Id.* at Sec. 11. ACMs are specifically directed to conduct themselves at all times “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *Id.* at Sec. 7.00.<sup>4</sup>

An arrest institutes a complex processing procedure that, as currently operated, results in a preliminary arraignment and bail decision approximately seventeen hours later.

After arrest, a defendant is transported by the police department to one of seven detective divisions distributed throughout the city where the case processing begins. There an initial physical and mental screening is performed. Then an assigned police investigator generates an arrest report with identifying information about the defendant and enters it into the computerized Preliminary Arraignment Reporting System (“PARS”). What follows is a complex coordination of information among the police department mainframe, Image Capture System (photograph), Live Scan (fingerprinting), and a criminal history database. The PARS system has been developed and refined over a period of years. It has the effect of reducing the cost of prisoner transportation

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<sup>4</sup> The Arraignment Court Magistrate Rules also direct that ACMs “shall at all times comply with the Code of Professional Responsibility, adopted by the Supreme Court of Pennsylvania.” *Id.* at Sec. 6.06(c). This reference is evidently to the Rules of Professional Conduct which govern the conduct of attorneys not judges.

and resulting safety concerns, speeding up the process by the electronic transfer of information, and reducing the risk of lost or misplaced paperwork.

When the data set is complete, it is electronically transmitted to the District Attorney Charging Unit and to the Pretrial Service Division of the Court of Common Pleas (“PTS”). Once the District Attorney Charging Unit has either approved or disapproved the charges or added additional charges, notice is sent to the assigned police investigator at the processing location. Meanwhile, PTS staff interviews the defendant, either in person or by way of an audio-visual link, and enters additional information into the PARS system.

Using the information generated through the various steps in the process, PTS staff then completes a Pretrial Service Division Investigation Report. This report contains information about the defendant, including personal identifying information, arrest date, charges, address, with whom the defendant lives, primary language, length of residence in Philadelphia, marital status, number of children and child support obligation, military history, employment status, community ties, and the bail matrix guideline category. The degree of verifiable information may vary depending on the circumstances when the PTS interview is conducted. PTS staff then apply the bail guideline matrix and calculate a bail recommendation for the ACM.

Each of the seven processing locations is connected by a two-way audio-visual hookup with the ACM’s hearing room located in the Stout Criminal Justice Center. The hearing room is presided over by the ACM, with court clerical staff in attendance. Also present are representatives of the DAO and PD, who may be, but are not always, members of the Bar. The ACM hearings are open to the public and seating is provided

on benches located behind glass at the back of the hearing room where visitors can both see and hear the proceedings.

Before the hearing, the ACM, the DAO, and defense counsel are electronically provided with the Pretrial Service Division Investigation Report.

As designed, the hearings are to commence with the ACM first determining whether he/she can see and hear the defendant and that the defendant can see and hear the ACM over the audio-visual connection.<sup>5</sup> The PD is then appointed to represent any unrepresented defendant for purposes of the bail hearing.<sup>6</sup> The ACM then explains the process, the charges, and advises the defendant of the applicable legal rights. The ACM may ask questions to clarify or amplify the information contained on the PTS Investigation Report, as might the DAO and PD representatives. The defendant is given an opportunity to speak. Either on the ACM's own initiative or on the motion of the DAO or PD, the ACM then determines the bail as well as adding any additional bail conditions.<sup>7</sup> In setting bail, the ACM is required to consider the Bail Guidelines, but "may depart" and fix either a higher or lower amount provided the reason for doing so is "indicated in writing." Phila.M.C.R.Crim.P., A.C.M., Sec. 8.01.

If the defendant is released ROR or he/she has satisfied cash bail within four hours, he/she is processed at the holding site and released after receiving paper copies

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<sup>5</sup> This section of the Report details how the Philadelphia bail system is designed to operate. Petitioners have alleged that there have been instances when proceedings have failed to comply with certain aspects of this paradigm. See, e.g., *Philadelphia Cmty. Bail Fund v. Arraignment Court Magistrates*, 21 EM 2019, Amended Class Action Complaint and Petition for Writ of Mandamus at 31-33 (alleging that defendants were ignored or not allowed to speak at preliminary arraignments).

<sup>6</sup> Appointment of the PD at this stage occurs regardless of the defendant's economic circumstances and assures all defendants are represented by counsel.

<sup>7</sup> The options available to the ACM pursuant to local rules and Rule of Criminal Procedure 524 include refusing bail because of the crime charged, ROR (release on own recognizance), release on nonmonetary conditions, release on unsecured bail, release on nominal bail, or release on monetary condition. A commonly used additional bail condition is a "stay away order" directing the defendant to have no contact with a specific person(s). Philadelphia has other types of release that include various levels of reporting requirements

of documents associated with the case. If monetary bail is set but not satisfied after four hours, the defendant is transported to the county prison.

The ACM's bail decision is subject to review by a Municipal Court judge in a number of ways.

An immediate "Bail Appeal" may be requested by either the DAO or the PD. A Municipal Court judge is on-call and available within two hours to consider an oral bail modification request from either the DAO or PD. The Bail Appeal is conducted using a telephone connection from the ACM hearing room.

In addition, when cash bail has been set and a defendant is still incarcerated after two days, and the defendant is otherwise eligible under certain criteria, a review hearing is automatically scheduled for the defendant and held before a judge of the Municipal Court within five business days of the preliminary arraignment. These are referred to as Early Bail Review hearings ("EBR"). EBRs are categorized as EBR I and EBR II depending on various criteria employed involving the seriousness of the charges and other factors weighing on the bail decision. EBR Tier I hearings were instituted in July 2016 as part of the MacArthur Grant. The program was expanded to add EBR Tier II hearings in February 2019.

Of course, the DAO or defense counsel may file a motion at any time requesting a bail modification hearing before a judge of either the Municipal Court or the Court of Common Pleas.

Based on data supplied by the Municipal Court and trends to date, it is estimated that there will be 30,000 arrests in Philadelphia for the full year 2019. Of those arrests, it may be projected that:

- Cash bail will be set in 45%, or in 13,500, of the arrests.

- ROR (release on own recognizance) will be used in 38%, or 11,400, of the arrests.
- Non-cash bail with conditions will be used in 16%, or 4800, of the arrests.
- Bail will be denied in less than 1%, or less than 300, of the arrests.
- In approximately 7%, or 1,967, of the arrests, the ACM's bail decision will be reviewed either in a Bail Appeal, EBR Tier I or EBR Tier II.
- 330 cases will proceed in a Bail Appeal; 847 will proceed as an EBR Tier I; and 790 will proceed as an EBR Tier II.
- After Bail Appeals, the ACM's decision will be modified in 58% of the cases.
- After EBR Tier I review, bail set by the ACM will be modified and the defendant released in 86.9% of the cases.
- After EBR Tier II review, bail set by the ACM will be modified and the defendant released with some condition or after posting reduced bail in 52.7% of the cases; the bail set by the ACM will not be modified in 35.7% of the cases; and bail set by the ACM will be increased in 1.9% of the cases.
- The appearance rate at the next scheduled court date after a defendant has been released on bail by the ACM or after EBR Tier I or II – regardless of whether release is non-cash, conditioned, or some combination of cash and conditions – is in the range of 90%.

It is noteworthy that, while only a small fraction of bail matters proceed through Bail Appeals, EBR Tier I, or EBR Tier II, those review processes result in bail modifications in more than half of all matters that are considered.

Although there is no specific data, it is reported that a very significant number of the modifications are the result of agreements between the DAO and defense counsel and submitted to the Municipal Court judge for approval. In addition, some release conditions are available to the Municipal Court judge that are not available to the ACM. These include electronic monitoring which may take several days to arrange and cannot be immediately employed by the ACM at the preliminary arraignment.

There are four likely explanations for the significant number of modifications to the ACMs' bail decisions: (1) the ACM may not have been provided the complete information that subsequently becomes available to counsel and the Municipal Court Judge conducting the review; (2) a misapplication or misunderstanding of the applicable law or rules of criminal procedure by the ACM; (3) inadequate advocacy by the DAO and PD at the ACM hearing, or their failure to promptly enter into negotiations to reach agreement on bail modifications; (4) the availability of release conditions not available to the ACM.

### **Agreements of the Parties and Invited Participants**

It is my suggestion that all eight of the Agreements reached by counsel for the litigants and for the DAO and PD who participated as invited participants should be adopted and implemented. A summary of each of the Agreements follows. The summaries, however, do not fully capture the nuances of each Agreement. The full terms of each Agreement and the specific qualifications of some parties to some aspects of particular Agreements are set forth, in the language employed by the parties, in the Submission to the Special Master. See Exhibit A.

**AGREEMENT 1:** Defendants shall be represented at preliminary arraignments, and shall be afforded an opportunity to communicate confidentially with counsel or counsel's representative prior to and during the preliminary arraignment.

**AGREEMENT 2:** All conditions of bail imposed by the Arraignment Court Magistrates ("ACMs") must be free from ambiguity, clearly explained to the defendant, documented, accessible to all parties and to law enforcement, and enforceable.

**AGREEMENT 3:** Pursuant to the law set forth in Article I, Section 14 of the Pennsylvania Constitution, all defendants shall be presumed releasable.

**AGREEMENT 4:** All parties agree that ACMs may, pursuant to their own determination or in response to a motion by the DAO, make the necessary findings and order a defendant held without bail at the time of preliminary arraignment pursuant to Article I, Section 14 of the Pennsylvania Constitution and Rule of Criminal Procedure 520.

**AGREEMENT 5:** A decision to impose monetary conditions must consider a defendant's ability to pay along with the release criteria set forth in Rule of Criminal Procedure 523 and any decision to impose monetary or non-monetary conditions of bail must be guided by the Rules of Criminal Procedure.

**AGREEMENT 6:** If a defendant is held without bail at the preliminary arraignment, the defendant shall be entitled to a Release Determination Hearing in the Municipal Court within three business days, where practicable.

**AGREEMENT 7:** Any defendant who remains in custody due to the imposition of a monetary or non-monetary condition (e.g. house arrest), shall be entitled to a Bail Review Hearing within three business days.

**AGREEMENT 8:** Any defendant who remains in custody should be afforded an expedited preliminary hearing.

### **Disagreements of the Parties and Invited Participants**

While the parties and participants were able to arrive at a significant number of Agreements through their collegial efforts, there were some points where their approaches diverged. A summary of each of those Disagreements follows. As with the summary of the Agreements, the nuances of each Disagreement are not captured in this summary. A full development of each Disagreement may be found in the Submission to the Special Master. See Exhibit A.

**DISAGREEMENT 1:** Petitioners and the Defender assert that, before a bail authority may order pretrial detention, the Commonwealth must prove by clear and convincing evidence that the defendant presents a substantial threat to an individual and the community and that no conditions of release can reasonably assure their safety.

**DISAGREEMENT 2:** All parties, except for Respondents, agree that the ACMs should apply the least restrictive condition necessary to ensure a defendant's appearance, the safety of all persons and the community, or compliance with the bail bond.

**DISAGREEMENT 3:** All parties, except for Respondents, agree that when assigning a condition of bail, other than ROR, the ACM must either state, in writing on the release paperwork or orally on the record, the specific reasons why the condition or combination of conditions is the least restrictive and reasonably necessary to ensure

appearance, the safety of all persons and the community, and compliance with conditions.

**DISAGREEMENT 4:** Prior to imposing monetary conditions of bail, the ACMs should conduct a robust ability-to-pay hearing carefully considering a defendant's entire financial picture, including income and expenses as well as life circumstances.

**DISAGREEMENT 5:** The First Judicial District should create a process to expedite release procedures for defendants charged with low-level misdemeanors.

### **Additional Suggestions and Comments of the Special Master**

In evaluating the operation of the Philadelphia bail system, it is helpful to focus attention on what those involved in the system actually do, and what would be helpful to them to do their work more efficiently and consistent with the applicable law. There are many moving parts to this complex system, but there are three critical components:

- Accurate and complete information about a defendant must be quickly obtained and promptly shared by PTS among the ACM, DAO and PD.
- The environment in the ACM hearing room and at the police district stations must be safe, clean, and allow all participants to be seen and heard in public and to confer in private.
- The decisional process must be both fair and perceived to be fair.

Therefore, the practices of the ACMs in holding hearings must comply with procedures as detailed in the applicable rules and statutes; and all of an ACM's decisions regarding bail and bail conditions should be supported by clear statements of reasons and proper application of the relevant statute or rule of procedure.

In addition to recommending the adoption of the eight Agreements reached by counsel, my additional suggestions are as follows:

**SUGGESTION 1:** Establish a clear line of responsibility, authority, and accountability to administer the bail system.

The key to effecting organizational adjustments is to align responsibility, authority, and accountability in one person. This involves assigning the responsibility to complete a defined task, granting the authority required for successful implementation, and establishing a mechanism to create accountability through appropriate evaluation. Responsibility, authority, and accountability should not be diffused among a group, task force, or committee, although the assistance of such groups can be helpful.

Therefore, I suggest that the Supreme Court appoint the President Judge of the Municipal Court to oversee the implementation and evaluation of the Agreements and my Suggestions as may be adopted by the Court. I propose that the President Judge submit a plan of implementation to the Court Administrator of Pennsylvania within 60 days, to be followed by quarterly progress reports thereafter.

**SUGGESTION 2:** Provide the ACMs a more robust set of information about defendants through an enhanced interviewing and information-collection process.

When thinking about the management of the bail system, the number of people arrested is so large that the temptation to think of people in categories, classifications, and profiles, or as a dots on a matrix or grid is understandable. But individual attention required by the law requires accurate information about the person, the individual, who has been arrested. In a given case, a defendant charged with a serious crime might not present either a risk of flight or a danger to community safety while a person charged

with a less serious crime might present the risk of both. Therefore, it is important to collect complete and accurate information about a defendant as soon as possible.

As noted, a significant percentage of bail decisions made by an ACM are modified upon subsequent review by a Municipal Court judge. One important distinction between the preliminary arraignment and various bail review hearings is the additional information available to the judge and counsel that was not available to the ACM.

It is hardly debatable that better and more accurate bail decisions will be made by the ACMs if better and more accurate information is available to them. Assuming the ACMs correctly apply the law and applicable rules, their decisions, as enhanced by additional information, would reduce the number of bail review hearings, speed up bail negotiations between the DAO and counsel, and reduce both the number of days defendants spend in jail awaiting a bail review and the resulting cost of their incarceration.

The information collected in the PTS interview, for instance, does not include financial obligations such as rent, utilities service, or loan payments that might affect a defendant's ability to meet a bail obligation. Similarly, an amplification of information about family relationships, community ties, character and reputation, and other factors included in Rule of Criminal Procedure 523 would also be relevant in more accurately assessing the risk that the defendant may flee, not appear at subsequent court dates, or present a danger to public safety. Certainly not everyone arrested comes prepared to submit financial data or personal references, but some effort to collect such information and confirm it, if possible, would assuredly be helpful to the ACM's decision making.

The supervision of the PTS falls within the administrative authority of the Administrative Judge of the Trial Division of the Court of Common Pleas. While such an

allocation of authority may make sense in administering other aspects of the criminal justice system, insofar as collecting information for bail hearings is concerned, it would seem that oversight responsibility should fall within the purview of the President Judge of the Municipal Court, as do other aspects of the bail system. Either creating a Bail Information Unit from scratch, or reassigning personnel of the PTS to a new unit, would delineate the clear line of authority necessary to assure a specialized function is efficiently performed. Of course, any information collected before an ACM hearing would become part of the defendant's file and passed along in due course to the PTS.

One caution, however, is that providing more detailed information to the ACM may increase the length of time a defendant is held before the ACM hearing. In designing and implementing any new information collection process, the advantages of providing enhanced information must be weighed against the possible disadvantages of delaying that hearing.

**SUGGESTION 3:** Develop a risk-assessment tool to be used by ACMs.

It is fundamental that equal application of the law requires individualized consideration. A justice system that trumpets a uniform application of the law, but does not account for individual differences, is merely a system that masquerades as one doing justice. The court, police, prosecutors, and defenders have become trapped in a system with an expectation they will address social problems – poverty, mental illness, drug addiction – as though they were criminal justice problems. And they attempt to do so with limited resources, too few specialized staff, and poor or nonexistent facilities. Therefore, it is critical that, where possible, the criminal justice system should be able to differentiate those who may be ill from those who may be criminal; those who are

unfortunate from those who are predatory. Of course, lines can blur; but there is no reason to conclude the system cannot more often make such distinctions.

Development of a risk-assessment tool can be helpful to the ACM in that effort. Judicial decisions cannot, and should not, be reduced to the application of an algorithm. But to deny the utility of social science is foolhardy. A risk assessment is not determinative; it is only a tool to be used by an ACM in evaluating the factors which the law requires must be considered. What risks are counted and how those risks are assessed makes the difference between a tool that is generally useful in applying the law and one that distorts the application of the law. To be useful, a risk-assessment tool must be properly developed, account for bias that may creep into the underlying data, accurately assess whether the defendant presents an community danger, and be routinely tested and calibrated.

While efforts to date to develop a risk-assessment tool for use by ACMs have been rejected by the PD and the DAO, I am informed that this is not a rejection of the development of a tool *per se*, only that the tool that had been developed as part of the MacArthur Grant was not satisfactory to them.

**SUGGESTION 4:** Assure that law enforcement has access to information regarding any conditions that have been imposed on a defendant as a condition of release ROR or on bail, and that police have clear guidance regarding enforcement of bail conditions.

ACMs issue in excess of 10,000 “stay away” orders per year. But there is no mechanism by which police officers can access information regarding such orders, or any other bail conditions, which have been set by the ACM. This situation is not unique to Philadelphia.

Pennsylvania law, of course, requires that safety of the community be taken into account in making bail decisions. It is ironic that once bail conditions intended to protect public safety are imposed by an ACM, the police are not aware of what those specific conditions are. Further, if the police know that a defendant has violated a bail condition, it is unclear whether that presents probable cause for arrest or whether the officer must, instead, report the violation to a judicial authority. If consideration of community safety is a release factor, then the police should know what the conditions are and the procedure to enforce them.

**SUGGESTION 5:** Develop a process for an expedited determination about the continuing necessity to enforce a detainer.

A defendant who would be otherwise released ROR or upon satisfying the cash bail requirement will still be held by the ACM if there is an outstanding detainer. An expedited process available 24/7/365 should be created to determine whether the detainer is current, active, or continues to be necessary in the view of the authority who issued it. To the extent these policies could implicate detainers issued by jurisdictions other than the First Judicial District or the Board of Probation and Parole, those issues should be considered by the appropriate rules committees.

**SUGGESTION 6:** Enhance and restructure continuing education for ACMs.

Certainly, when decisions involving a person's liberty are at stake, the additional expertise that can result from providing continuing education to ACMs is always important.<sup>8</sup>

Each ACM must complete twenty hours per year of continuing education. See Phila.M.C.R.Crim.P., A.C.M., Sec. 10.01. To enhance the implementation of system

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<sup>8</sup> The same can also be said about ADAs and APDs.

improvements, each ACM should receive additional hours of continuing education each year specific to best practices in connection with the process and procedures used in Philadelphia. The curriculum should be created by the Supreme Court's Office of Judicial Education and approved by the Continuing Judicial Education Board of Judges.

**SUGGESTION 7:** Improvements to the audio-visual system.

While the audio-visual system connecting the ACM hearing room with the seven processing centers is generally satisfactory, some improvements should be considered.

Care should be taken that the location of the equipment in the processing centers is in an area free from extraneous background noise or echoes that impair the ability of both the defendant and the ACM to see and hear one another clearly.

In addition, locations for equipment should take into account the fact that some defendants may be mentally disturbed, under the influence of drugs or alcohol, or generally agitated. This presents safety risks for both police and a defendant as a defendant is moved within the processing unit. Therefore, consideration should be given to locating the audio-visual equipment in the most suitable site within the processing unit.

A space for access to the audio-visual system for private attorney-client communication should be provided adjacent to the ACM hearing room at the Stout Criminal Justice Center. If a PD representative is present at the processing center, a similar space for private attorney-client communication should be provided, if it is not already.

**SUGGESTION 8:** Adopt "plain-language" standards for all forms and use simplified terminology.

Upon release, a defendant is given a set of release paperwork that includes the conditions of the bail and a date for his/her next required appearance either in court or with the PTS.

The wording and design of these forms should be reviewed to assure they are in plain language, understandable, and simplified to assure defendants accurately comprehend their obligations. The Court Access division of the Administrative Office of Pennsylvania Courts may be of use to the First Judicial District in crafting this language.

**SUGGESTION 9:** Develop a process to evaluate the performance of each ACM and of the system as a whole.

Developing and implementing a method to evaluate the job performance of each ACM and to assess the impact of implementing the Agreements and Suggestions adopted by the Court is essential to assuring that the bail system operates in conformity with the law and maintains the public's confidence.<sup>9</sup>

Such an evaluation must collect information on both a micro and macro level. Data and statistical trends provide one window into a system's performance, but a method to assess the legality and appropriateness of the outcome in a representative sample of cases decided by each ACM must also be included in the evaluation.

While I do not suggest that ACM hearings be converted to courts of record, it does appear that President Judge Dugan now has in place a practice of taping some hearings for the sole purpose of job performance evaluations. This is certainly to be commended and should be continued. In addition, the computerized filing systems

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<sup>9</sup> I appreciate that evaluating the "performance" of judicial officers can be a sensitive and controversial proposition. Nevertheless, standards based on objective criteria could be helpful in identifying possible problematic practices that require remedial attention.

should be, if they are not already, programmed to pull cases by ACM to conveniently access information helpful in the job performance evaluation.

It would be advisable to engage an expert in evaluating bail systems to devise an appropriate evaluation tool. Particular attention should be given to encouraging attorneys, defendants, reform groups, or members of the public to offer opinions about the performance of the bail system in specific cases through a convenient and confidential reporting system. Further, the President Judge of the Municipal Court should engage trained observers to report periodically to the President Judge their observations about the operation of the bail system.

Because the timely collection and dissemination of comprehensive and accurate information is critical to the effective operation of the bail system, a mechanism should also be developed to assess the quality of the performance of whatever unit is eventually charged with the responsibility of preparing reports for the ACMs.

Of significant concern is whether implementing the Agreements and Suggestions would delay the process and result in defendants being held longer than they are now without any material effect on the eventual bail decision or the protection of public safety. If the Agreements and Suggestions are adopted and implemented, standards should be developed regarding how long a person should be detained before an ACM hearing is held and then data kept to determine whether the standard has been met.

Metrics helpful in assessing the performance of the bail system might include time in detention before a bail hearing, percentage of each type of bail set, percentage of each type of bail condition, number and percentage of bail modifications and whether the modification is the result of a contested hearing or an agreement, and the number of bail violations reported, as well as any subsequent hearings and revocations. Each

metric should measure some agreed-on feature of a system designed and operated in compliance with the law and applicable rules. While some of this data is currently collected, a method to analyze trends and identify areas for further inquiry is important to maintaining a culture of evaluation, adaptation, and improvement.

### **Comments of the Special Master**

Finally, I offer these comments regarding certain of the Agreements and Disagreements as negotiated by counsel for the parties, DAO and PD:

Footnotes in several Agreements reflect there is no consensus over the applicable standard of proof in ACM and various types of bail review hearings, and whether the Rules of Evidence apply in those hearings. The law is not clear whether the constitutional standard that “proof is evident and presumption great”<sup>10</sup> equates to a clear and convincing evidence standard. It is also unclear whether or not hearsay evidence is permitted in the various bail review hearings. I agree that guidance from the Supreme Court in some manner on those issues would be useful.

Agreement 5 addresses the conduct of preliminary arraignments. One of the principles provides that the ACM should explain to the defendant the conditions of release either in writing or orally on the record. In footnote 8, however, Respondents take the position the ACM is not required under Rule of Criminal Procedure 520 to state a reason for a decision unless bail is refused and, apparently, do not believe they are empowered to agree to a process not specifically authorized by the rule. While that may

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<sup>10</sup> “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, the public safety may require it.” PA.CONST. art. I, §14.

be a technically correct reading of the rule, it is my suggestion that as a matter of good practice the ACM should explain the basis for any ruling or decision affecting a defendant's liberty since demonstrating that a decision is the product of a reasoned and principled analysis of relevant factors is essential to maintaining public confidence and is a fundamental principle of the rule of law.

Agreement 6 proposes the creation of a Release Determination Hearing proceeding. Such a hearing would be held within three days for those defendants who were held without bail at the preliminary hearing. Footnote 22 indicates that the Respondents do not agree the defendant must be physically present at a Release Determination Hearing, but do not object to the defendant's presence if appropriate logistical arrangements can be put implemented. While the physical presence of the defendant is always preferable when liberty is at stake, the practical considerations of implementing such a policy are beyond the scope of my assignment as Special Master.

Additionally, in Footnote 19, the DAO indicates it does not believe such a hearing is required when the defendant is charged with a crime for which the maximum penalty is life imprisonment. The DAO's position might have some merit.<sup>11</sup> That said, the issue should be addressed as part of an ongoing assessment of the overall effectiveness of the new process of creating the Release Determination Hearing.

Similarly, the adoption and implementation of specific procedures and due process protections associated with hearings under EBR Tier I and II, Release Determination, and Bail Review are beyond the scope of my assignment. Presumably

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<sup>11</sup> See PA.CONST. art. I, §14 (providing that "[a]ll prisoners shall be bailable . . . unless for capital offenses or for offenses for which the maximum sentence is life imprisonment").

they will be established pursuant to subsequent action by the Supreme Court, local rule of court, or guidance from a procedural rules committee.

Disagreement 2 involves the phrasing of the standard the ACM should apply in determining the level of conditions necessary to assure a defendant's subsequent appearance. The issue is whether the appropriate standard is the "least restrictive" condition necessary to ensure the defendant's appearance or whether some other construction of the standard is preferable. It appears this is more of a semantical than substantive disagreement. The Constitution and Rules of Criminal Procedure require cash bail or bail conditions only as necessary to ensure the defendant's subsequent presence when required or to protect the public safety. Imposing bail requirements or conditions that exceed what is necessary to satisfy those requirements would presumably be improper regardless of how the standard is characterized.

Disagreement 3 addresses whether or not the ACM must state the specific reasons for his/her decision either in writing or orally on the record. I have previously noted my suggestion that it is best practice that all decisions made by an ACM should be supported by an explanation of reasons. That statement need not be complex. But if a statement of reasons is absent, confusion and misunderstanding are sure to follow.

This disagreement also implicated the issue of whether ACM hearings should be recorded in a form capable of transcription. That is a policy matter for others to consider, but since any review from the ACM decision is *de novo*, an assessment of costs versus benefits in installing a recording system and providing transcripts would be appropriate.

Disagreement 4 addresses the scope of the ability-to-pay hearing. I have previously suggested that the cash-bail system would be improved by a more robust

pre-hearing investigation by a to-be-formed Bail Information Unit. The ACM must make a reasoned evaluation of the defendant's ability to post cash bail and such an evaluation must be based on credible information that accurately reflects the totality of the defendant's financial situation. Whether supplying that information is best done in the form of *in forma pauperis* criteria or in some other manner seems to me to be simply a decision about how relevant information should be most efficiently collected and provided to the ACM.

Disagreement 5 addresses whether or not the First Judicial District should create a process for expedited release of defendants charged with low-level crimes. I take no position on this disagreement since it involves matters more properly considered by others together with an evaluation of the logistical considerations that may affect its implementation and effectiveness.

### **Conclusion**

One can never foresee all the consequences and complications that accompany change in a complex system – especially one as complex as the Philadelphia criminal court system with its interactions of prosecutors, defense attorneys, defendants, administrative staff, victims and concerned citizens. Nevertheless, the process of effectuating change in the pursuit of justice is a worthy effort, even after accounting for the risks of unintended consequences. The ongoing effort of the judges and administrators of the First Judicial District to modernize processes and adjust and adapt to the demands of an increasingly diverse society is commendable. Also commendable are the efforts of the ACLU, the District Attorney, and the Defender Association who, while on occasion differ over philosophy and strategy, are united in their desire to protect the rule of law in the service of protecting our democracy.

I am most appreciative of the cooperation of the judges, administrators, and counsel who have engaged in the process envisioned by the Supreme Court in appointing a special master, and I trust our efforts together will result in improvements that will demonstrate the process has been worthwhile.

RESPECTFULLY SUBMITTED



John M. Cleland, Senior Judge  
Special Master

## **EXHIBIT A**

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

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

*Petitioners,*

**v. No. 21 EM 2019  
ARRAIGNMENT COURT  
MAGISTRATES of the FIRST  
JUDICIAL DISTRICT of the  
COMMONWEALTH OF  
PENNSYLVANIA,**

*Respondents.*

**SUBMISSION TO THE SPECIAL MASTER  
PROPOSED INTERIM PRETRIAL REFORM**

**November 7, 2019**

**1. INTRODUCTION**

On July 8, 2019, the Pennsylvania Supreme Court invoked its King’s Bench jurisdiction over *The Philadelphia Community Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial District* and appointed a Special Master, Judge John M. Cleland, to conduct an inquiry “limited to Petitioners’ allegations regarding systemic failures of the First Judicial District to properly conduct cashbail matters pursuant to current law, as well as any suggestions for action by this Court in response to those alleged systemic failures.”

On July 18, 2019, Judge Cleland requested that the Philadelphia District Attorney’s Office (“DAO”) and the Defender Association of Philadelphia (“Defender”) submit joint “recommendations for improving the bail system on both an immediate and longer-term basis,” and include practical staffing, budgetary, and administrative implications as well as any areas of disagreement.

On, August 16, 2019, the Defender and DAO submitted such a plan (hereinafter “Joint Submission”) which set forth a comprehensive set of proposals for reform, the policy and legal justification for the proposed reforms; a plan for implementation, including the expected costs and required personnel; the intended effect; and any areas of disagreement between the Defender and the DAO with respect to particular issues within the proposal.

Thereafter, Petitioners and Respondents each submitted responses identifying their respective areas of agreement and disagreement with the Joint Submission.

On October 3, 2019, Judge Cleland met with all parties, and suggested the parties consider an agreement that outlined shared goals for improvement. Judge Cleland suggested this agreement would not include a detailed plan for implementation or evaluation. Subsequently, counsel for the Defender, the DAO, Petitioners, and Respondents (hereinafter “all parties”) met several times to attempt to reach further agreement on the proposals contained in the Joint Submission. While the parties reached substantive agreement on several large goals, disagreements remained. We set forth the results of these negotiations below.

## **2. REFORM PROPOSALS**

**AGREEMENT 1: Defendants shall be represented at preliminary arraignments, and shall be afforded an opportunity to communicate confidentially with counsel or counsel’s representative prior to and during the preliminary arraignment.**

All parties agree that defendants must be able to communicate fully and confidentially with counsel or counsel’s representative before and during preliminary arraignments.

**AGREEMENT 2: All conditions of bail, imposed by the Arraignment Court Magistrates (“ACMs”) must be free from ambiguity, clearly explained to the defendant, documented, accessible to all parties and to law enforcement, and enforceable.**

All parties agree conditions of bail must be made part of the record, either orally or in writing, so such conditions may be enforceable.

**AGREEMENT 3: Pursuant to the law set forth in Pa. Const. art. I, § 14 all defendants shall be presumed releasable.**

Consistent with current law, the presumption of pretrial release may be rebutted when “the proof is evident or presumption great”<sup>12</sup> that the defendant: (1) has committed a capital

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<sup>12</sup> Article I, § 14 states that “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

offense, or an offense for which the maximum sentence is life imprisonment; (2) the defendant poses a serious risk of flight or grave threat such that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community or the defendant's appearance.<sup>13</sup>

**AGREEMENT 4: All parties agree that ACMs may, pursuant to their own determination or in response to a motion by the DAO, make the necessary findings and order a defendant held without bail at the time of preliminary arraignment pursuant to Pa. Const. art. I, § 14 and Pa. R. Crim. P. 520.**

The parties agree that the principles set forth below must govern the process by which an initial determination to hold without bail must be made.

1. Pursuant to Pa. Const. art. I, § 14, all defendants are presumed releasable. This presumption of release may be rebutted if Commonwealth presents proof that is "evident or presumption great" of the following: (a) the defendant committed a capital offense; (b) the defendant committed an offense punishable by life without parole; (c) the defendant presents such a threat to an individual and the community that no condition or combination of conditions other than imprisonment can reasonably assure their safety; or  
(d) the defendant presents such a flight risk that no condition or combination of conditions other than imprisonment will ensure appearance.
2. At the time of the preliminary arraignment, an attorney for the Commonwealth may move, either orally or in writing that bail be denied pending a release determination hearing.

In the Joint Submission, the DAO and Defender proposed alternate variations of detention eligibility nets, limitations on the Commonwealth's ability to file such motions. Respondents suggest such eligibility nets are a matter of internal DAO policy, and as such, they have no comment on these nets. Petitioners, the Defender, the DAO, and the Respondents intend to engage in further conversation about how to ensure that eligibility nets are constructed and implemented in a manner consistent with the Pennsylvania Constitution and the Rules.

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other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great..." However, the standard of proof at these proceedings is an open question. *See, infra*, Areas of Disagreement, #1, p. 9-10. The parties, except for Respondents, ask the Court to clarify what the standard should be.

<sup>13</sup> The DAO takes the position that specific factual representations alone may be sufficient to meet the Commonwealth's burden to rebut the presumption of pretrial release and that hearsay is admissible in the relevant proceedings. The other parties jointly agreed, for the purpose of this interim reform proposal, to take no position on the application of the rules of evidence at the preliminary arraignment, release determination hearings, or bail review hearings.

3. The motion to hold without bail shall state, orally or in writing, specific and articulable facts alleging that: (1) the defendant is a risk of flight and no condition or combination of conditions other than imprisonment will reasonably assure appearance; or (2) the defendant presents a serious danger to the safety of any person and the community and no condition or combination of conditions other than imprisonment will reasonably mitigate that danger.
4. When a motion to hold without bail is made, the ACM shall permit the representative of the DAO and the defendant's counsel to be heard on the motion prior to rendering a decision.<sup>14</sup>
5. Upon consideration of the factors specified in Rule 523 and any other information presented, if the ACM finds sufficient evidence<sup>15</sup> that the defendant presents such a flight risk, or such a danger to the safety of any specific person and the community, that no condition or combination of conditions other than imprisonment will reasonably ensure appearance or the safety of any person or the community, bail may be refused. If bail is refused, the ACM shall:
  - a. state its reasons for the refusal in writing or on the record,
  - b. schedule a release determination hearing before a Judge of the Municipal Court within three business days; and
  - c. inform the defendant of the determination and date of the hearing.

**AGREEMENT 5: A decision to impose monetary conditions must consider a defendant's ability to pay along with the release criteria set forth in Rule 523 and any decision to impose monetary or non-monetary conditions of bail must be guided by the Rules of Criminal Procedure.**

All parties agree that the Rules of Criminal Procedure govern release determinations by ACMs. All parties agree that the ACMs must consider Rule 523 and engage in the analysis set forth therein.

Additionally, the parties agree that the principles set forth below provide the guidance necessary to ensure compliance with the Rules and Constitution going forward.

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<sup>14</sup> The DAO takes the position that hearsay evidence is admissible at preliminary arraignment, the other parties agreed to take no position for the purpose of this submission. *See supra* note 2.

<sup>15</sup> The evidentiary standard necessary for pretrial detention remains a substantive point of disagreement between the Respondents and the other parties. *See infra*, Disagreement 1, 9-10.

1. Pursuant to Pa. Const. art. I, § 14, all defendants are presumed releasable.
2. No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial. Pa. R. Crim. P. 524 (comment).<sup>16</sup>
3. ACMs shall release defendants on recognizance pursuant to Rule 526, unless the ACM determines that an additional condition or combination of conditions is necessary<sup>6</sup> to ensure the defendant’s appearance or compliance with the conditions specified in Rule 526, or where the defendant is otherwise held without bail.
4. If the ACM determines that it is necessary to impose a monetary condition of bail, prior to setting any condition, the ACM shall determine the defendant’s ability to pay and review all the factors set forth in Rule 523. In making that ability to pay determination, the ACM shall collect and consider the defendant’s relevant financial information.<sup>7</sup> The ACMs shall only assign reasonable amounts of monetary bail.
5. When a condition or combination of conditions beyond the standard release conditions is imposed, whether non-monetary or monetary, the ACM shall:
  - a. State and record the specific condition or combination of conditions on the paperwork the defendant receives at the time of release (hereinafter “release paperwork”).
  - b. Where the ACM finds that a stay away condition is necessary, in addition to the condition appearing on the bail bond, a separate order shall be issued indicating the specific terms and duration of the condition, and the possible consequences if the condition is violated.
  - c. Explain orally to the defendant the conditions of release.<sup>8</sup>
6. When a defendant is released from preliminary arraignment, the release paperwork shall be given to the defendant, specifying the information required by Rule 525, including the specific conditions of release, and shall include the date and time of the next court date. The paperwork shall be

imposed for the sole purpose of ensuring a defendant remains incarcerated until trial.”

<sup>6</sup> The standard for applying conditions of release remains a point of substantive disagreement between the parties. *See infra*, Disagreement 2, 10.

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<sup>16</sup> Respondents acknowledge that the comment to Rule 524 states that “no condition of release . . . should ever by

7 What constitutes “relevant financial information” is another point of substantive disagreement. *See infra*, Disagreement 4, 10-11.

8 All parties, except for Respondents, further agree that whenever an ACM imposes a condition of bail, the ACM should state the rationale for such condition, either in writing or orally on a record. Respondents note that no such requirement is necessary under the Rules, except Rule 520, which requires a bail authority to provide reasons on the record only if bail is refused.

signed by the defendant to assure proper notice.

**Respondents’ position is that the ACMs – like all judicial officers – use the Rules of Criminal Procedure in making bail determinations. Respondents do not believe that it is appropriate for them to administratively agree to an interpretation of the Rules, nor do they believe it appropriate to insert standards that are neither in the Rules nor case law given the limited scope of the Supreme Court’s Order. Further, either the suggested standards are not correct, or there are varying interpretations in case law.**

**AGREEMENT 6: If a defendant is held without bail at the preliminary arraignment, the defendant shall be entitled to a Release Determination Hearing in the Municipal Court within three business days, where practicable.<sup>17</sup>**

All parties agree that, if an ACM refused a defendant bail at the preliminary arraignment, the defendant shall be entitled to Release Determination Hearing in the Municipal Court within three business days, where practicable. All parties agree that, except for the applicable evidentiary standard, the due process protections that accompany preliminary hearings shall accompany Release Determination Hearings.

To accomplish these goals, the Defender, the DAO, and Petitioners agree to the procedures enumerated below.

1. If a defendant is refused bail, a hearing shall be held within three business days of when the Magistrate’s order refusing bail is made. The First Judicial District shall evaluate this process and, within six to twelve months of the effective date this provision, shall hold such hearings within two business days, if possible.<sup>18</sup>
2. The hearing shall be conducted on the record in open court.

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<sup>17</sup> The DAO does not believe that a Release Determination Hearing should be provided where the defendant is charged with a crime for which the maximum penalty is life imprisonment.

<sup>18</sup> Respondents’ intention is to shorten the amount of time for a hearing after evaluating the three business day process for feasibility.

3. An attorney for the Commonwealth shall appear and may present evidence in the form of witnesses, documents, representations of specific facts or otherwise;<sup>19</sup>
4. The defendant shall appear,<sup>20</sup> shall be represented by counsel, and shall be permitted to
  - a. cross-examine witnesses and inspect physical evidence presented during the hearing by the Commonwealth;
  - b. call witnesses on the defendant's own behalf;
  - c. offer evidence on the defendant's own behalf; and
  - d. testify.
5. The Judge of the Municipal Court shall determine whether there is sufficient evidence to prove that the safety of any person and the community or the person's appearance cannot be ensured by any less restrictive available means other than imprisonment.<sup>21</sup> Whenever bail is refused, the Judge of the Municipal Court shall state in writing or on the record the specific reasons for the determination.
6. Upon motion of the defendant, the court may grant a continuance. Upon motion of the Commonwealth, the court may grant a single continuance for no more than 48 hours if it finds that the Commonwealth has made a showing of good cause.<sup>14</sup>
7. Nothing shall preclude the defendant or the Commonwealth from otherwise filing a motion to modify the bail determination pursuant to the Rules of Criminal Procedure or Local Rules.

**AGREEMENT 7: Any defendant who remains in custody due to the imposition of a monetary or non-monetary condition (e.g. house arrest), shall be entitled to a Bail Review Hearing within three business days.**

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<sup>19</sup> The DAO takes the position that hearsay evidence is permitted at Release Determination Hearings, all other parties take no position. *See supra* note 2.

<sup>20</sup> All parties except for Respondents agree that the defendant should be present in person during these hearings. Respondents do not object to having a defendant physically present, but note that this is an implementation issue involving other entities, including the Sheriff's Office.

<sup>21</sup> As noted above, the parties do not agree on the evidentiary standard necessary for pretrial detention. <sup>14</sup> Respondents do not object to continuances for the defendant or Commonwealth, but leave that decision to a judge's judicial discretion. To the extent this proposal seeks to place limitations on a judge's discretion to grant the Commonwealth continuances beyond the 48 hours set forth in this proposal, Respondents' position is that it is a judge's discretion based on the particular facts.

All parties agree that individuals who are ordered bailable at the preliminary arraignment upon satisfaction of specific conditions (e.g., house arrest, monetary bail, etc.), but have not been released within three business days, should be afforded a hearing to assess whether the conditions are necessary, or whether other less restrictive conditions may be imposed consistent with constitutional standards.

These bail review hearings will be procedurally similar to the Release Determination Hearings except that they would incorporate the decision framework for imposing non-monetary or monetary conditions.

**AGREEMENT 8: Any defendant who remains in custody should be afforded an expedited preliminary hearing.**

All parties agree that defendants in custody should receive expedited preliminary hearing dates. All parties agree that the First Judicial District's current scheduling system sufficiently prioritizes defendants in custody, defendants in custody are generally given an initial preliminary hearing date within 14 days of preliminary arraignment, and that it is not necessary to change the existing scheduling procedure at this time.

### **AREAS OF DISAGREEMENT**

**DISAGREEMENT 1: Petitioners and the Defender assert that before a bail authority may order pretrial detention, the Commonwealth must prove by clear and convincing evidence that the defendant presents a substantial threat to an individual and the community and that no conditions of release can reasonably assure their safety.**

Petitioners and the Defender agree that because constitutional protections preclude pretrial punishment, the substantial proof required under the constitution, proof that is "evident or the presumption great," equates to a clear and convincing standard of evidence. Respondents do not agree that the clear and convincing evidence standard is established law in this Commonwealth, and from an administrative perspective, do not believe they have the authority to agree to this standard absent precedent or Rule change to the contrary. The DAO takes no position on the standard of proof required before a bail authority may order pretrial preventative detention. Petitioners will petition the Pennsylvania Supreme Court for clarity on this matter. Respondents will not join in this request.

**DISAGREEMENT 2: All parties, except for Respondents, agree that the ACMs should apply the *least restrictive* condition necessary to ensure a defendant's appearance, the safety of all persons and the community or compliance with the bail bond.**

Respondents object to the proposition that the Rules direct ACMs to use the "least restrictive" condition when imposing bail conditions.

**DISAGREEMENT 3: All parties, except for Respondents, agree that when assigning a condition of bail, other than ROR, the ACM must either state, in writing on the release**

**paperwork or orally on the record, the specific reasons why the condition or combination of conditions is the least restrictive and reasonably necessary to ensure appearance, the safety of all persons and the community and compliance with conditions.**

As noted above, Respondents object to both the requirement that the language “least restrictive condition be applied” and to any requirement that the ACMs record their reasoning. Respondents object to requiring ACMs to state, orally or in writing, their reasons for imposing conditions of release because Rule 520 only requires ACMs to state their reasons for refusing bail.

The Defender, the DAO, and Petitioners all agree that preliminary arraignments should be electronically recorded and capable of transcription. Respondents object to recording preliminary arraignments on the grounds that doing so would require additional resources and is not currently required by the Rules.

Petitioners and the Defender also agree that, if recording is not feasible, whenever ACMs impose a condition other than ROR, ACMs should provide written documentation of the reason why such condition is necessary.

**DISAGREEMENT 4: Prior to imposing monetary conditions of bail, the ACMs should conduct a robust ability to pay hearing carefully considering a defendant’s entire financial picture, including income and expenses as well as life circumstances.**

All parties, except for Respondents, agree that before setting monetary bail, ACMs must conduct a robust ability to pay determination, and if the ACM determines monetary conditions are necessary, the ACM must discern how much a defendant can afford. The information currently provided to the ACMs via the Pretrial Services Investigation Report, consists of only employment, salary, and child support obligations. All parties, except for Respondents, believe this information is insufficient for a substantive ability to pay determination. The parties, except for Respondents, agree that incorporating the *in forma pauperis* criteria would ensure a constitutionally sufficient determination of ability to pay. *See* Pa. R. C. P. 240.<sup>22</sup>

Respondents agree that the ACMs should be provided with as much information about a defendant's financial situation as possible in order to make an informed determination. However, Respondents object to applying the *in forma pauperis* standard without further guidance in the Rules or from the Supreme Court. Respondents contend that the information collected by Pretrial Services satisfies the duty to consider the financial ability to pay under Rule 528, and that the ACMs may make further inquiry with the defendant if necessary.

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<sup>22</sup> The DAO adds that it does not bear a burden of production to provide the ACMs with information regarding the defendant’s ability to pay monetary bail. The DAO states that the Court should inquire and the defense may produce information relating to a defendant’s financial situation, as they see fit.

Respondents are not opposed to proposals to increase the amount of financial information available to  
ACMs.

**DISAGREEMENT 5: The First Judicial District should create a process to expedite release procedures for defendants charged with low-level misdemeanors.**

The parties, except for Respondents, agree that Philadelphia’s system should process certain alleged low-level offenders through the system without a preliminary arraignment, thereby allowing these defendants to spend less time in custody and leaving ACMs more time to deal with the serious cases.

Respondents believe such an expedited process is not possible under the current rules: the Rules require every defendant arrested to have a preliminary arraignment, and it is not clear that the Rules allow a defendant to waive appearing before an ACM for arraignment. What is more, the Joint Submission’s logistics do not appear to decrease the defendant's time in custody given that the Joint Submission provides that they still must be interviewed by Pretrial Services, the ACM may appoint counsel, the defendant must have an opportunity to speak to counsel, and the District Attorney must be given the chance to review the case prior to release. This issue also raises logistical, implementation issues involving other entities, including the Police Department.