

## IN THE SUPREME COURT OF PENNSYLVANIA

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**No. 21 EM 2019**

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The Philadelphia Community Bail Fund, *by and through its Trustees*, Candace McKinley and Lauren Taylor, The Youth Art & Self-Empowerment Project, *by and through its Trustees*, Sarah Morris and Joshua Glenn, Gerald Thomas, *an individual held on bail he could not afford*, Stephon Thomas, *an individual held on bail he cannot afford*, Damier Moragne, *an individual held on bail he cannot afford*, Kimberly Blackwell, *an individual held on bail she could not afford*, Jeremy Harris, *an individual held on bail he could not afford*, Hasheen Jacobs, *an individual held on bail he cannot afford*, Z.L., *a minor held on bail he could not afford*, *by and through his mother* Alycia Brown, Nasir White, *an individual held on bail he could not afford*, Evan Slater, *an individual held on bail he could not afford*,

*Petitioners,*

v.

ARRAIGNMENT COURT MAGISTRATES OF THE FIRST JUDICIAL  
DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,

*Respondents.*

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### **BRIEF OF THE QUATTRONE CENTER AS *AMICUS CURIAE* IN RESPONSE TO THE SPECIAL MASTER'S REPORT**

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On Petition for Extraordinary Relief Under King's Bench Jurisdiction

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## **STATEMENT OF INTEREST OF AMICUS<sup>1</sup>**

*Amicus curiae*, the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Carey Law School (“Quattrone Center”), is a nonpartisan national research and policy hub that produces data-driven research to promote a fair criminal justice system. Its research and programs are independent and unbiased, engaging all entities required to effect substantial change to prevent errors in the criminal justice system including academia, the judiciary, law enforcement, defense and prosecution, legislators, forensic and social scientists, victims’ rights advocates, the media, and others.

The Quattrone Center has extensive working relationships with criminal justice stakeholders in the Philadelphia criminal justice system. In addition to individual research partnerships with both the Office of the District Attorney and the Defender Association, the Quattrone Center facilitates an ongoing research collaborative with all the stakeholders through a working group, the Philadelphia Event Review Team (“PERT”). PERT is a first-of-its-kind collaborative comprised of representatives from the First Judicial District of Philadelphia, the Office of the District Attorney, the Philadelphia Police Department, the Defender Association, the

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<sup>1</sup> No person or entity other than the *amicus curiae* or its counsel paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this *amicus curiae* brief.

Administrative Office of Pennsylvania Courts, and various academics and subject matter experts. The group evaluates Philadelphia criminal cases where an “error” occurred, identifies the factors that contributed to the error, and develops policy solutions and best practices that will prevent future errors.

Given the Quattrone Center’s extensive work with Philadelphia stakeholders on criminal justice matters, the main objective of this *amicus* brief is to provide the Court with an empirically grounded understanding of the impact of unaffordable bail on individuals in Philadelphia, rather than to take a particular side in the litigation. The Quattrone Center is uniquely positioned to provide insight into this issue because it has produced original empirical research that addresses the impact of cash bail and pretrial detention on case outcomes and on the integrity of the criminal justice system in the United States, including in Philadelphia itself. The Quattrone Center’s research has been peer-reviewed, published in major journals, awarded prizes, and cited by federal courts and the media.<sup>2</sup> In addition, the Quattrone

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<sup>2</sup> See, e.g., George Mason Univ., *News: Professor Megan Stevenson Awarded 2019 Oliver E. Williamson Prize*, <https://bit.ly/2RVDCbX> (last visited Jan. 27, 2020) (announcing that Stevenson’s article, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” was selected as the best article published in the *Journal of Law, Economics, and Organization* in 2019); *ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018) (citing the Quattrone Center’s article, “The Downstream Consequences of Misdemeanor Pretrial Detention,” for the proposition that pretrial detention might increase incidences of unlawful behavior); Editorial Bd., *Opinion: A Sad Last Gasp Against Criminal Justice Reform*, N.Y. Times (Nov. 17, 2019), <https://nyti.ms/2RzxaJ0> (citing a working paper by the Quattrone Center

Center’s research has been used by State Supreme Courts, legislatures, and executive branch agencies to improve pretrial detention policies.<sup>3</sup>

### **SUMMARY OF ARGUMENT**

At any given time, hundreds of thousands of people in the United States are being detained prior to trial. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 & n.1 (2017)<sup>4</sup> (“*Downstream Consequences*”) (citing Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Jail Inmates at Midyear 2014*, at 3 tbl.2 (2015)<sup>5</sup>). The majority of those detained are likely incarcerated because they cannot afford to pay their bail. *Id.* at 713 n.3. Thus, over the course of a year, millions of individuals are subjected to pretrial detention because of their inability to pay

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for the proposition that eliminating cash bail for a variety of offenses in Philadelphia did not increase defendants’ failure to appear in court).

<sup>3</sup> See, e.g., Delaware Courts, *Access to Justice Commission*, <https://bit.ly/3aPNxbF> (last visited Jan. 27, 2020) (stating that, in part due to recommendations from criminal justice experts at the Quattrone Center, “the Delaware Access to Justice Commission’s Committee on Fairness in the Criminal Justice System . . . released an independent study that looks into the issue of racial disparities in the Delaware criminal justice system”); Conn. Sentencing Comm’n, *Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut* 51 (2017), <https://bit.ly/38O5Hsv> (citing multiple articles by the Quattrone Center to explain that pretrial detention leads to an increase in guilty pleas, convictions, and longer sentences).

<sup>4</sup> See <https://stanford.io/2u0UwOD>.

<sup>5</sup> See <https://bit.ly/3aQpkSy>.

relatively modest sums. *Id.* (citing N.Y.C. Criminal Justice Agency, *Annual Report 2013* (2014)<sup>6</sup>).

In Philadelphia, approximately 5,000 people are being held in jail on any given day. Safety & Justice Challenge, *Philadelphia 2018 Fact Sheet 1* (2018)<sup>7</sup> (“*Safety and Justice Challenge Fact Sheet*”). As recently as the first four months of 2019, 25% of all criminal defendants in Philadelphia were detained pretrial. (Researchers’ calculations based on data from the Administrative Office of Pennsylvania Courts, January 2020.) As the Special Master notes, bail is denied in only a tiny fraction of cases, indicating that the majority of those detained in Philadelphia are there because they cannot afford bail. Report of the Special Master at 10 (Dec. 16, 2019). “[M]ore than half of pretrial detainees [in Philadelphia] would be able to secure their release by paying a deposit of \$1000 or less.” Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 4, 511, 512 (2018)<sup>8</sup> (“*Distortion of Justice*”). In addition, Philadelphia’s criminal justice system continues to be marked by significant racial disparities. “People of color account for 89% of the jail population, but only 55% of the city’s population.” *Safety and Justice Challenge Fact Sheet* at

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<sup>6</sup> See <https://bit.ly/37LpxVa>.

<sup>7</sup> See <https://bit.ly/37sWhCF>.

<sup>8</sup> See <https://bit.ly/310U3YY>.

1. Over the first four months of 2019, Black defendants were detained pretrial at a rate that was 40% higher than that of non-Black defendants. (Researchers' calculations based on data from the Administrative Office of Pennsylvania Courts, January 2020.)

Recent high-quality studies conducted both in Philadelphia and in other cities across the country demonstrate that pretrial detention causes adverse outcomes to detained individuals and their communities. *Distortion of Justice* at 512. Although bail decisions may be influenced by a variety of factors, these studies are specifically designed to measure the causal effect of bail—*i.e.*, the difference in outcomes that would be observed for the same defendant when released versus detained—rather than simply capture the correlation between bail and outcomes.<sup>9</sup>

The results of these studies show that pretrial detention due to inability to

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<sup>9</sup> To establish the causal relationship between unaffordable bail, pretrial detention, and negative consequences, the empirical studies utilized large administrative data sets in conjunction with “natural experiments.” Paul Heaton, *The Expansive Reach of Pretrial Detention*, 99 N.C.L. REV. (forthcoming 2020), <https://bit.ly/2TYL3C2>. A natural experiment takes advantage of random variation in factors such as the timing of a bail hearing or the relative leniency of the assigned judge in order to compare outcomes between groups of defendants who should be otherwise statistically similar. Because the only initial difference between the groups stems from this random external factor, this factor will necessarily be the cause of any differences in subsequent outcomes between these groups. Natural experiments are a particularly useful methodology because they allow researchers to differentiate between correlation and causation, and therefore to undertake studies that are able to measure the causal effects of pretrial detention.

afford bail causes increased conviction rates, the enhanced likelihood of a sentence resulting in incarceration, and imposition of longer sentences. *Downstream Consequences* at 715, 721 n.41. What is more, unaffordable bail disproportionately and negatively impacts low-income people and people of color. *See, e.g.,* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* at 24 (Univ. of Pa. Law School, working paper, 2016)<sup>10</sup> (“*Distortion of Justice 2016*”). Pretrial detention is particularly problematic when imposed for misdemeanors because defendants have perverse incentives to plead guilty to a crime in order to secure release from jail, regardless of innocence. *Downstream Consequences* at 715. Furthermore, pretrial detention can contribute to increased rates of recidivism, indicating that unaffordable cash bail may actually have a negative impact on public safety, particularly in low-level cases. *Id.* at 718.

Given the documented adverse consequences, the high rates of pretrial detention in Philadelphia based on one’s inability to pay should be a serious source of concern. Despite the value our system places on physical liberty, the presumption of innocence, and a fair adjudication of one’s guilt, defendants in Philadelphia—particularly low-income residents and people of color—are held in jail pretrial because they cannot afford bail. The Quattrone Center’s findings show

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<sup>10</sup> *See* <https://bit.ly/312g2yy>.

that pretrial detention based on an inability to pay bail corrupts the integrity of the criminal justice system itself. Confronting this pressing issue is critical both for individual defendants and their families, and to ensure the integrity and fairness of the criminal justice system in Philadelphia.

Reform efforts should pay particular attention to addressing pretrial detention in misdemeanor offenses, because perverse incentives to plead guilty are exacerbated in these cases and detention may in fact harm public safety. Furthermore, given that pretrial detention causally impacts the determination of guilt or innocence and the ultimate sentence including its length and harshness, the pretrial process would benefit from the robust procedural protections that are afforded to defendants in other areas of the criminal adjudication process. As an illustration, the Special Master has endorsed more robust information collection during the pretrial phase, Report of the Special Master at 15, and provision of “bail advocates” who gather individualized information and convey it to counsel prior to bail hearings has been found to lower incidences of bail violations, decrease pretrial and future crime, lessen punishment, and reduce racial disparities in Philadelphia. Paul Heaton, *Improving Pretrial Outcomes Without Actuarial Risk Assessment* (Dec. 2019) (“*Improving Pretrial Outcomes*”).<sup>11</sup>

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<sup>11</sup> See <https://bit.ly/38LnTmS> (additional results).

## ARGUMENT

- A. Under Philadelphia’s current system, the use of cash bail remains commonplace, and large numbers of criminal defendants are detained because they are unable to post bail.**

In Philadelphia’s current system, initial bail decisions are made very quickly with limited information about any given defendant’s circumstances. Indigent defendants are unlikely to have interacted with a public defender prior to their bail hearing and most hearings last only a few minutes. *Id.* at 8. As a result, system actors generally lack individualized information about a defendant’s financial circumstances and ability to pay, as well as about community ties that would ease potential concerns about the failure to appear.

As a result, pretrial detention remains commonplace in Philadelphia, and many people are detained who would be released if they were able to produce relatively small amounts of money for bond. Low-income people and people of color are disproportionately impacted by a system that fails to adequately address the ability to pay and are thus more likely to be detained pretrial than defendants who present the same level of risk but simply have access to more money. As of early 2019, 25% of all criminal defendants in Philadelphia were being detained pretrial, with Black defendants 40% more likely to be detained compared to non-Black defendants. More than 50% of those detained pretrial in Philadelphia could secure their release with less than \$1,000. *Distortion of Justice* at 512.

**B. Pretrial detention itself causes increased conviction rates, longer sentences, and reduced future economic productivity for defendants.**

Pretrial detention results in higher conviction rates, longer and harsher sentences, substantial and long-term collateral consequences, and in some jurisdictions, increased recidivism. Paul Heaton, *The Expansive Reach of Pretrial Detention* at 2, 99 N.C.L. REV. (forthcoming 2020), <https://bit.ly/2TYL3C2>.

1. *Pretrial detention increases conviction rates, unrelated to the culpability of defendants.*

According to the Quattrone Center's research, pretrial detention in Philadelphia leads to increased conviction rates that are unrelated to differences in defendants' culpability. In a study that analyzed data from 331,971 criminal cases (both misdemeanor and felony cases) arising in Philadelphia between September 2006 and February 2013, the Quattrone Center studied the impact of pretrial detention by using a natural experiment. The study took advantage of the fact that criminal defendants in Philadelphia are randomly assigned to one of six bail magistrates who "vary widely in their propensity to set bail at affordable levels." *Distortion of Justice* at 512. Because defendants are assigned randomly, "[t]hose who receive a strict magistrate are statistically identical to those who receive a more lenient magistrate except in their likelihood of being detained pretrial," and thus any differences in outcome between these two groups can be explained by the differences in pretrial detention. *Id.* Comparing these otherwise similar groups, the Quattrone

Center found that “pretrial detention leads to a 13% increase in the likelihood of being convicted on at least one charge.” *Id.*

This outcome is consistent with other research. The Quattrone Center also conducted a study of 380,689 misdemeanor cases that arose in Harris County, Texas, between 2008 and 2013, using a natural experiment design that relied on “random variation in the access defendants have to bail money based on the timing of the arrest.” *Downstream Consequences* at 717.<sup>12</sup> This study by Paul Heaton, Sandra Mayson, and Megan Stevenson found that misdemeanor defendants subjected to pretrial detention were 25% more likely to be convicted than otherwise similar defendants who had been released pretrial. *Id.* at 717, 734.

Other researchers have also found that those subjected to pretrial detention are more likely to be convicted of the initial offense than are non-detained defendants

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<sup>12</sup> This study analyzed the timing of arrest and corresponding bail hearings because 77% of those who eventually make bail do so within the first 48 hours following a bail hearing. *Downstream Consequences* at 753. The analysis compared those who had bail hearings during the beginning of the week and the end of the week on the theory that those with bail set later in the week would be more likely to make bail since friends and family receive pay-checks toward the end of the week. *Id.* Specifically, the natural experiment compared the average characteristics of defendants with bail hearings held on Tuesday, Wednesday, and Thursday, to focus on fairly uniform crimes and crime patterns and avoid comparisons between crimes that occurred on the weekends because these tend to involve different actors and activities than crimes that take place on the weekdays. *Id.* at 752, 755-56. Since there should be no systematic difference in culpability between those arrested early in the week and those arrested later in the week, the study could attribute any difference in outcome to pretrial detention itself. *Id.* at 755.

who are otherwise similarly situated. Will Dobbie, Jacob Goldin, and Crystal Yang, for example, studied the impact of pretrial detention in Philadelphia and Miami-Dade Counties. Like Stevenson, they exploited the “quasi-random assignment of cases to bail judges who vary in the leniency of their bail decisions.” Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018)<sup>13</sup> (“*Effects of Pretrial Detention*”). The probability of being found guilty was elevated by 14 percentage points when defendants were detained rather than released pretrial. *Id.* In a New York study that also took advantage of randomized assignment to judges, Emily Leslie and Nolan Pope found that “pretrial detention increases the probability that a felony defendant will be convicted by at least 13 percentage points.” Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530 (2017)<sup>14</sup> (“*Unintended Impact of Pretrial Detention*”).

Existing empirical evidence suggests that the difference in conviction rates for those subjected to pretrial detention is largely explained by the difference in plea

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<sup>13</sup> See <https://bit.ly/2O5hDOH>. The Dobbie study has some overlap with Stevenson’s study. The differences in the results stem from the inclusion of Miami in the Dobbie study, the different time periods studied, and their different specifications. *Distortion of Justice* at 513.

<sup>14</sup> See <https://bit.ly/3aMHEMD>.

rates among those detained pretrial. In Leslie and Pope’s study, for example, the thirteen-percentage point increase in convictions was largely explained by a ten-percentage point increase in guilty pleas. *Id.* at 543. In the Quattrone Center’s Harris County study, misdemeanor defendants subjected to pretrial detention pleaded guilty at a 25% higher rate than similarly situated defendants who were not detained. *Downstream Consequences* at 747. In the Dobbie study, 47% of initially detained defendants pleaded guilty compared to just 20.7% of initially released defendants. *Effects of Pretrial Detention* at 213-14. Finally, Stevenson explains in her study of misdemeanor and felony cases in Philadelphia that “[t]he effect on conviction is largely explained by an increase in the likelihood of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped.” *Distortion of Justice* at 512-13.

This finding demonstrates a system error: despite the value the system places on a presumption of innocence and a fair adjudication of one’s guilt, the difference in plea rates and convictions cannot be attributed to differences in defendants’ culpability. Instead, it is caused by pretrial detention itself. In low-level and misdemeanor cases, individual defendants who are already deprived of their liberty are given the perverse incentive to plead guilty regardless of whether or not they committed the crimes, since pleading guilty in those cases may allow for immediate release from jail. *Expansive Reach of Pretrial Detention* at 4. Differential

conviction rates have a high human cost, since even misdemeanor convictions “can result in jail time, heavy fines, invasive probation requirements, and collateral consequences that include deportation, loss of child custody, ineligibility for public services, and barriers to finding employment and housing.” *Downstream Consequences* at 715. The impact of misdemeanor convictions specifically will be discussed further below.

2. *Pretrial detention increases sentences, unrelated to the culpability of defendants.*

Defendants subjected to pretrial detention are not only more likely to be convicted, but they also are more likely to receive a sentence of incarceration rather than probation, compared to otherwise similar defendants who are initially released. In addition, defendants subjected to pretrial detention receive longer sentences than similar defendants who are released.

Studies across different cities each demonstrate a significant and marked increase in the length of incarceration for defendants detained pretrial when compared to non-detained defendants but otherwise similarly situated defendants, although the magnitude of that effect varies depending on the city and the nature of the charges. In the Quattrone Center’s Harris County study, for example, misdemeanor defendants subjected to pretrial detention were 43% more likely to receive a prison sentence instead of probation, compared to their otherwise similar but non-detained peers. *Id.* at 747. In addition, pretrial misdemeanor detainees had

sentences that were more than double those of similar releasees. *Id.* According to the Quattrone Center’s Philadelphia study, which was not limited to misdemeanors but instead analyzed both misdemeanor and felony cases, “[p]retrial detention leads to an expected increase of 124 days in the maximum days of the incarceration sentence” and “leads to a 136 day increase in the minimum number of days before being eligible for parole.” *Distortion of Justice* at 534-35. The impact on sentence length was only “partially explained by release on time-served,” suggesting that “the impacts of pretrial detention extend beyond the classic example of defendants pleading guilty in order to get out of jail.” *Id.* at 513.

The Quattrone Center’s research again aligns with other recent empirical findings. The Dobbie study found that “[i]nitially detained defendants are also 15.5 percentage points more likely to be incarcerated compared to initially released defendants” who are otherwise similar. *Effects of Pretrial Detention on Conviction*, at 214. Leslie and Pope found that “being detained pretrial increases the minimum sentence length for felony defendants by over 150 days.” *Unintended Impact of Pretrial Detention* at 546. These studies make clear that defendants receive different sentences for reasons that have nothing to do with the traditional factors that should go into sentencing, including a person’s culpability, the charge, or a prior history of criminal convictions. Instead, the pretrial detention system is operating such that people will get different sentences simply because one person has money and thus

can afford to pay bail and the other person does not.

These adverse case outcomes, including the higher conviction rates discussed earlier, may be explained by a variety of mechanisms. Besides being incentivized to plead guilty regardless of guilt, detained individuals may also have fewer resources for their defense and be “hindered in [the] ability to gather evidence, contact witnesses, or otherwise prepare [their] defense” while incarcerated. *Barker v. Wingo*, 407 U.S. 514, 533 (1972). In addition, individuals subjected to pretrial detention lack the opportunity to demonstrate positive behavior. *Downstream Consequences* at 722. For example, an individual who is detained is prevented from “paying restitution, seeking drug or mental health treatment, and demonstrating commitment to educational or professional advancement.” *Id.*

3. *Pretrial detention reduces future economic productivity for defendants and their families.*

At any given time, a large number of Philadelphians sit in jail because they cannot afford to pay bail and struggle to become economically stable or self-sufficient after getting out. As the Dobbie study notes, pretrial detention can lead to job loss, which makes it difficult for individuals who have been detained to find new employment, especially given the stigma of a criminal conviction. *Effects of Pretrial Detention on Conviction* at 205; see also *Curry v. Yachera*, 835 F.3d 373, 375 (3d Cir. 2016) (“Unable to afford bail, [the defendant] was jailed. . . . During his imprisonment, [the defendant] missed the birth of his child and lost his job” and

“feared losing his home and motor vehicle.”). Notably, many of those detained pretrial because they are too poor to afford bail are the same individuals who are saddled with debt, “owing hundreds or thousands of dollars to the courts through fees and fines.” *Distortion of Justice* at 512.

Those initially released, on the other hand, display more positive economic outcomes. In the two years after an initial bail hearing, individuals in Philadelphia who were initially released instead of detained were more likely to receive income, be employed, and earn substantially more money than those initially detained. *Effects of Pretrial Detention on Conviction* at 214.<sup>15</sup> The Dobbie study found that almost 38% of initially detained defendants were employed compared to almost 51% of those initially released. *Id.* In addition, initially detained defendants made \$5,224 in reported annual earnings compared to \$7,911 for initially released defendants for the first two years post-hearing, and income differentials persisted for years. *Id.* “By three to four years after a bail hearing, initially released defendants are 9.4 percentage points more likely to be employed in the formal labor sector.” *Id.* at 227. These outcomes have implications not only for individual defendants and their

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<sup>15</sup> This study included Internal Revenue Service controls for the year prior to bail including “tax filing status, the amount of reported W-2 earnings, household income, UI, and EITC, as well as indicators for any W-2 earnings, household income, UI, and EITC, and indicators for missing IRS data.” *Effects of Pretrial Detention on Conviction* at 219.

families, but for society at large.

4. *Pretrial detention may contribute to recidivism.*

Relatedly, unaffordable bail imposes a high cost on individual defendants as well as generating costs to public safety in the long term. While detention decreases the number of crimes that defendants are charged with on a short-term basis as a result of incapacitation, pretrial detention may cause longer-term increases in recidivism. The Quattrone Center's Harris County study, for example, found that "by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges." *Downstream Consequences* at 718. In terms of absolute numbers, the estimates from the study suggest that "a representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate 2800 new misdemeanor charges and roughly 1300 new felony charges in Harris County in the eighteen months after their release." *Id.* at 768. "If this same group were instead detained," however, "they would accumulate 3400 new misdemeanors and 1700 felonies over the same time period," which is "an increase of 600 misdemeanors and 400 felonies." *Id.*

This finding is in line with other recent research. The Dobbie study also found that pretrial detention contributes to the likelihood of future criminal behavior. *Effects of Pretrial Detention on Conviction* at 227. Two years after arrest, 46.2% of defendants detained for three days or more were rearrested, compared to 39.8% of

defendants released within three days. *Id.* at 214. Leslie and Pope found that the initial decrease in rearrests due to incapacitation of felony defendants is almost entirely offset by the increases in rearrests of defendants within two years of disposition, and that the initial decrease in rearrests due to incapacitation of misdemeanor defendants is entirely offset within two years. *Unintended Impact of Pretrial Detention* at 550. These findings raise doubts that pretrial detention contributes to long-term public safety.

**C. Unaffordable bail has a disproportionately negative impact on low-income people and people of color.**

Low-income people are less likely to be able to afford bail and are more likely to be detained in jails than their wealthy counterparts. Stevenson's Philadelphia study found that while those from low-income neighborhoods have their bail set at the same amount as those from wealthier neighborhoods with the same charge and criminal history, those from low-income neighborhoods are 7% more likely to be detained. *Distortion of Justice 2016*, at 4. These findings represent the fact that where poor people and wealthier people pose the same level of risk, poor people are incarcerated because they cannot afford bail whereas wealthier people remain free.

The Quattrone Center's Harris County study reveals a similar pattern: only about 30% of defendants coming from the wealthiest zip codes were detained pretrial, versus 60-70% in the poorest zip codes, indicating that low-income people are significantly more likely to be detained pretrial. *Downstream Consequences* at

737. These disparities cannot be explained by asserting that low-income people commit more crimes or more serious crimes than wealthier people as the study's researchers found no relationship between wealth and the seriousness of an offense. Controlling for the initial amount of bail set allowed the researchers to compare defendants who were presumably viewed by the court as presenting the same level of risk, but who ultimately differed as to whether or not they were detained. *Id.* at 717. In addition, "the strongly negative wealth/detention relationship persists when focusing on the pool of defendants with no prior charges in Harris County," indicating that poor people are more likely to be detained regardless of prior criminal history. *Id.* In other words, even when low-income people are not determined to be higher risk than other defendants, they still face a substantial likelihood of being held in pretrial detention while wealthier defendants face a higher likelihood of being released.

Beyond disproportionately impacting low-income people, pretrial detention disproportionately impacts racial minorities. Heaton found that in Philadelphia, while 59% of criminal defendants are Black, 66% of defendants who are detained pretrial are Black. *Improving Pretrial Outcomes* at 22. Stevenson's Philadelphia study found that bail amounts are only slightly higher for Blacks than for non-Black defendants facing the same charge and with the same criminal history, but Blacks are 10% more likely to be detained. *Distortion of Justice 2016*, at 4. This may be

explained in part by the fact that the median household income for Blacks is less than two-thirds of that of White households in Philadelphia, and thus Blacks have less income with which to pay the bail amounts. *Id.* (citing Duane C. Ingram et al., Urban League of Phila., *The State of Black Philadelphia* (2007)).<sup>16</sup>

Leslie and Pope’s study on New York City arraignments provides similar findings: while being detained pretrial “does not affect blacks or Hispanics differently than whites . . . minority defendants fail to make bail at higher rates than their white counterparts and are consequently detained more often.” *Unintended Impact of Pretrial Detention* at 531, 550-51. That study found that Black felony defendants are 14 percentage points more likely to be detained than White defendants, and Hispanic felony defendants are 9 percentage points more likely to be detained than White defendants, which is an important factor in explaining why minorities are at least 25% more likely to be sent to prison, conditional on being charged with a crime. *Id.* The Quattrone Center’s Harris County study further corroborates the disproportionate impact on racial minorities: in that study, 38.9% of the sample were Black, but 45.6% of those detained were Black, and only 31.3% of those released were Black. *Downstream Consequences* at 736. A subgroup analysis shows that 48.1% of White defendants were detained, compared to 60.3%

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<sup>16</sup> See <https://bit.ly/36zsS8C>.

of non-White defendants. *Id.* at 751.

Poor people and people of color are disproportionately detained pretrial, which means they are more likely to suffer the downstream consequences of pretrial detention in the form of higher conviction rates, longer and harsher sentences, and a higher chance of recidivism. As reasoned in *O'Donnell v. Harris County*:

[T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

892 F.3d 147, 163 (5th Cir. 2018).

The outcomes warned of in *O'Donnell* are evident in the results from Stevenson's Philadelphia study: conditional on receiving an incarceration sentence to begin with, individuals from low-income zip codes receive sentences that are 36 days longer and Blacks receive sentences that are 60 days longer. *Distortion of Justice 2016*, at 24. Controlling for pretrial detention reduces these differentials “to 16 days for those from low income zip codes and 8.5 days for African Americans,” which is equivalent to a 16% decrease in sentence differentials, and a 40% decrease in sentence differential across race. *Id.* As Stevenson explains, the reduction of

these differentials after accounting for pretrial detention indicates that money bail, combined with an unequal distribution of wealth, explains a considerable amount of the race gap in sentence length. *Id.*

**D. The Court should endorse reforms to the bail system that mitigate the adverse effects of pretrial detention and reduce racial disparities.**

As highlighted above, two defendants with identical case characteristics who are assigned the same bail face different probabilistic outcomes if only one of them can post bond. The research cited throughout this brief shows that defendants who do not post bond, often as a result of their inability to pay, are more likely to be convicted of a crime, less likely to receive probation, more likely to receive a sentence of incarceration and a harsher and longer sentence, and are more likely to struggle economically when compared with otherwise similar defendants who post bond. And it is low-income people and people of color who disproportionately face these negative outcomes. In light of these realities, the Court should seek a resolution of the case that addresses the harms arising from uneven or unwarranted imposition of detention.

Given that pretrial detention implicates the determination of guilt or innocence and the ultimate sentence, the pretrial process merits the robust procedural protections that exist in other parts of the criminal adjudication process. Indeed, procedural safeguards are necessary to protect individuals' due process rights and

ensure that the law is applied evenly and fairly for all criminal defendants, even at the stage of setting bail.

As an illustration, the Special Master has endorsed expansion of access to counsel during the pretrial phase. Report of the Special Master at 15. Relatedly, the Quattrone Center’s research suggests that providing Philadelphia defendants with “bail advocates” may be one useful tool within the broader project of reforming the bail system. *See generally Improving Pretrial Outcomes*. In a pilot program conducted by the Defender Association, bail advocates met defendants shortly after arrest, gathered information about the individual defendant’s financial circumstances and community ties, and then conveyed this information to public defenders for use at bail hearings. *Id.* at 7, 9.<sup>17</sup> A Quattrone Center study of this pilot demonstrated that access to bail advocates “substantially reduce[d] clients’ incidence of bail violation (-64%) and both pretrial (-41%) and overall future crime (-26%).” *Id.* at 3. In addition, provision of bail advocates reduced conviction rates

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<sup>17</sup> To measure the effects of this pilot project, which began in April 2017, Paul Heaton utilized a quasi-experimental design in order to draw conclusions about the causal impacts of having a bail advocate on criminal justice outcomes. *Improving Pretrial Outcomes* at 3. At researchers’ request, the Defender Association shuffled the days of the week that bail advocates would be available to interview defendants, creating two statistically similar groups of defendants: those who received a bail advocate, and those who did not. *Id.* In conjunction with this design, Heaton used “administrative data covering nearly 100,000 criminal cases” to “measure the causal impacts” of the advocates on pretrial release, failure to appear, case outcomes, and future crime. *Id.*

as well as “the likelihood . . . that [defendants] receive[d] probation terms extending beyond when the case [wa]s adjudicated.” *Id.* Furthermore, the Quattrone Center’s research indicates that bail advocates reduced racial disparities. *Id.* at 22.

Among potential reforms to the bail system, the Quattrone Center urges particular consideration of the issue of pretrial detention in misdemeanor offenses, because perverse incentives to plead guilty are exacerbated in cases where pretrial detention may serve as the harshest punishment associated with the charge and detention may in fact harm public safety. *Downstream Consequences* at 715. In exchange for pleading guilty to a misdemeanor, defendants are often offered probation or “time-served,” which means that a guilty plea results in release from incarceration, rather than serving as a starting point for harsher punishment. *Id.*; *Expansive Reach of Pretrial Detention* at 4 (“[P]retrial detention can cause [misdemeanor] defendants to essentially accrue their entire expected sentence while awaiting trial, a situation which creates perverse incentives for innocent defendants to plead guilty to crimes that they did not commit in order to shorten their jail stay.”). A person already detained may therefore plead guilty in order to return to their home, job, and family. *Downstream Consequences* at 714-16 & n.16 (citing Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1343-47 (2012)<sup>18</sup>).

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<sup>18</sup> See <https://bit.ly/2GrA2RP>.

This dynamic was borne out in the Quattrone Center’s Harris County study, which found that misdemeanor defendants subjected to pretrial detention were 25% more likely to be convicted than those who had been released pretrial. *Id.* at 717. In addition, the impact on conviction rates was disproportionately strong for first-time offenders. *Id.* at 749. As a result, pretrial detention causes first-time alleged misdemeanants to be “convicted and sentenced to jail time, rather than receiving intermediate sanctions or avoiding a criminal conviction altogether.” *Id.* Misdemeanor defendants—regardless of their innocence, guilt, or possible defenses—are pleading guilty to secure their freedom, even though this results in substantial future negative consequences for these individuals and their families.

Although misdemeanor charges may be viewed as comparably minor, misdemeanor convictions may still have drastic consequences for defendants. For example, misdemeanor convictions can limit access to educational, social, and employment opportunities and can limit eligibility for necessary resources such as public housing and food stamps. Natapoff, 85 S. CAL. L. REV. at 1316-17. In addition, a misdemeanor conviction “heightens the chances of subsequent arrest” and can contribute to a longer felony sentence in the future. *Downstream Consequences* at 715 n.12. Misdemeanor convictions can even result in deportation. *Id.* As a result, reform efforts should pay special attention to misdemeanor cases.

## CONCLUSION

The robust empirical studies described here raise grave concerns about the current operation of the bail process in Philadelphia’s criminal justice system. As Paul Heaton wrote, the “takeaway from this new generation of studies is that pretrial detention has substantial downstream effects on both the operation of the criminal justice system and on defendants themselves, causally increasing the likelihood of conviction, the severity of the sentence, and, in some jurisdictions, defendants’ likelihood of future contact with the criminal justice system.” *Expansive Reach of Pretrial Detention* at 1-2. And these substantial downstream effects are disproportionately felt by low-income defendants and people of color, who face different case outcomes based on an inability to afford bail. This Court has an important opportunity to implement reform efforts with particular attention to addressing pretrial detention in misdemeanor offenses and enhancing procedural protections for defendants. These reform efforts are necessary to promote fair and just outcomes for all defendants, regardless of their race and income.

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**CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 531 AND 2135**

I hereby certify that this brief complies with the word count limits of Pa.R.A.P. 531 and Pa.R.A.P. 2135. Specifically, this brief includes 6,192 words based on the word-counting feature of the word-processing system used to prepare this brief, excluding the supplementary matter as specified in Pa.R.A.P. 2135(b).

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**CERTIFICATE OF PUBLIC ACCESS COMPLIANCE**  
**PURSUANT TO Pa.R.A.P. 127**

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.

*/s/ Ilana H. Eisenstein*

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## CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, pursuant to Pa. R. App. P. 2185 and 2187, I filed the foregoing brief with the Prothonotary for the Pennsylvania Supreme Court by the Court's PACFile system, and served two copies by first-class mail on the following counsel of record:

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