

NO. 21 EM 2019

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IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

THE PHILADELPHIA COMMUNITY BAIL FUND, ET AL.,  
*Petitioners,*

V.

ARRAIGNMENT COURT MAGISTRATES OF THE FIRST JUDICIAL  
DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,  
*Respondents.*

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**COMMONWEALTH'S RESPONSE  
TO  
SPECIAL MASTER'S REPORT AND RECOMMENDATION**

**I. The District Attorney's Office ("DAO") Supports the Improvements Recommended by the Special Master**

The DAO supports the "Improvements" recommended in the Special Master's Report ("SMR"), and agreed upon by all of the participants.<sup>1</sup> We understand the potential complications and expense to our Office of instituting these reforms and are prepared and willing to make the changes this Court may require.

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<sup>1</sup> Whether the Court wishes to call these changes "Improvements" or "Reforms" is of no moment to this Office. Our position, as it has been throughout this process, is that significant changes must be made to the bail-setting process in Philadelphia to ensure that it is constitutional, equitable and provides the safeguards necessary to protect public safety.

The current system by which bail is set in Philadelphia can and should be reformed. It is unjust and unlawful that our residents have monetary bail set in their cases without having spoken to their counsel and with no real assessment of their ability to pay the amount set. The Improvements laid out by the Special Master are a strong first step toward a system that holds individuals in custody only when they pose a flight risk or a danger to the community, and not because they live in poverty.

We would ask the Court to refer to the Initial Proposal drafted and agreed to by the DAO and the Defender Association, attached as Exhibit A to this Response (“Joint Proposal”) for specifics regarding the logistics of how these proposals would work. The Joint Proposal, referred to throughout this submission, will give the Court a clearer understanding of the logistical challenges faced by the parties and the solutions that the DAO and the Defender Association believe will help us surmount those challenges. Although this Court may wish to abstain from overseeing logistics, the DAO respectfully requests that the Court: (a) give the Participants specific instructions as to the changes that must be made; (b) provide a timeline for the completion of certain tasks; and (c) maintain oversight over that timeline as well as the results that the Improvements produce. This last request would require the collection of data surrounding the Improvements and the

ongoing oversight of a third party, whether that be the Special Master, or another person or entity.

## **II. A System to Enforce “Stay-Away Orders” Is Critical to the Success of the Improvement Effort**

In Agreement 2 of the SMR, the Special Master recommends that “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.” SMR at 12. A crucial piece of this, explained in more detail in the Initial Proposal is that enforceable “stay-away” orders are critical to the success of these reforms. *See* Ex. A at 5-6. Under the current system, ACMs will sometimes instruct defendants to stay away from witnesses at their preliminary arraignment. When they do, the defendant’s paperwork is simply marked “stay away,” with no specifics. This information cannot be docketed in CPCMS, the database used by the Pennsylvania Courts, because there is no clerk in the room with access to the database. *Thus, there is currently no mechanism to record existence of the stay-away order in the police database, the National Crime Information Center (“NCIC”). If the stay-away order is not recorded in NCIC, the police cannot arrest a defendant who has improper contact with a witness or a complainant.* To further complicate matters, because there is no record at the preliminary arraignment, it is difficult to prove, at

a future hearing, that the defendant received notice to stay away from a specific individual. Consequently, there is no way to enforce these orders.<sup>2</sup>

As part of the Improvements, the DAO asks that the Court to give specific instructions to the parties to find a method by which to record “stay-away” information into CPCMS and NCIC, which would authorize the police to take a defendant into custody who makes unwanted contact with a victim or witness, regardless of whether the defendant has committed a new crime. This Improvement would allow the DAO to recommend that more defendants be released at preliminary arraignment, without fear that a defendant’s future contact with a complainant or a witness will go unchecked.

### **III. A Risk Assessment Tool Is Not Necessary for the Success of the Proposed Improvements**

In Suggestion 3 of the SMR, the Special Master recommends that the ACMs utilize a Risk Assessment Tool (“RAT”) when setting bail for defendants. SMR at 17-18. This recommendation is inappropriate as it has not been a part of the discussion or negotiations surrounding this litigation. Furthermore, the implications of a RAT could significantly impact or, at the very least delay, the

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<sup>2</sup> Some of these concerns would be ameliorated if preliminary arraignments were recorded, as the DAO and the Defender Association suggested in their Joint Proposal. *See*, Ex. A, at 5.

implementation of the other recommended Improvements. We respectfully ask the Court not to order the implementation or creation of such a tool.

Despite years of talk on the subject, the DAO, the Defender Association and the Municipal Court have not been able to agree on what type of RAT should be implemented in Philadelphia, or whether a RAT is necessary at all.<sup>3</sup> In light of these disagreements, in the last six months, the parties have agreed to participate in a Research Advisory Council (RAT RAC), along with experts in the field, to seek a common answer to these questions. It is the DAO's understanding that the RAT RAC will make a recommendation when it has completed its work and that the parties intend to abide by that recommendation. The DAO asks that the Court not disturb that process, but rather order the implementation of the Improvements as soon as is practicable, and allow the RAT RAC to do its work on its own timeline.

It is the DAO's position that the changes laid out by the Special Master and agreed to by the Participants can be accomplished without a RAT, and that Philadelphia should not wait to make these Improvements. We fear that a ruling that a RAT is necessary will delay the Improvements and mire the process in an unnecessary controversy.

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<sup>3</sup> The DAO does not necessarily object to a RAT that is both transparent and interpretable, so that all parties understand what factors are being considered and how they are being weighted. A similar tool is used in New Jersey, New York and San Francisco. When a tool is a "black box," such as the one that the Courts have repeatedly expressed support for, the reason that a defendant scores high is shrouded in mystery and cannot be scrutinized. A transparent and interpretable RAT allows all parties to understand how any one factor affects the final risk score so that attorneys can argue as to how the tool may not be the best way to judge his or her client.

#### **IV. For the New Process to Comply With Pennsylvania Law, Defendants Must Have the Opportunity to Consult with Counsel**

Defendants are entitled to communicate “fully and confidentially” with their counsel prior to and during preliminary arraignment. 234 Pa. CSA § 1003(D)(2). This is not the current practice. The Joint Proposal recommended that the Defender be given a room in the basement of the Juanita Kidd Stout Criminal Justice Center with a CCTV connection to all of the police districts so that a bail advocate working for the Defender Association could communicate with the defendant prior to hearing. *See Ex. A 2-3*. The information revealed during these interactions can be used to advocate on behalf of the client at the preliminary arraignment and can also greatly improve a defendant’s belief that the process was fair. It is our position that a separate room in the basement of the Criminal Justice Center where the Defender Association can speak to its clients by CCTV prior to their hearings is the most reasonable and low-cost solution to bringing the current system into compliance with the law.

#### **V. House Arrest Should Be Available to Defendants at Preliminary Arraignment**

At the present time, a defendant cannot be placed on house arrest at the preliminary arraignment. A house arrest order requires the signature of a judge, as well as a clerk to enter the information into CPCMS, neither of which is available at the preliminary arraignment in Philadelphia. However, should the Municipal

Court agree, ACMs could order house arrest for some defendants and then the orders generated could be transmitted to a Municipal Court Judge for review, signature and docketing.

This change might increase the use of house arrest in Philadelphia, which might require additional resources in that area, but it would likely save the city the cost of holding a defendant in custody. Furthermore, it would benefit those defendants who would otherwise be held in custody, by allowing them the ability to continue to work and remain connected to their families.

**VI. For the New Process to Comply with the Law, ACMs Must Make an Assessment of each Defendant's Ability to Pay Before Setting Bail**

Pennsylvania Rule of Criminal Procedure 528 mandates that a defendant's ability to pay must be considered when bail is set. At the present time, ACMs make no such determination prior to setting bail. In the Joint Proposal, the participants suggested that ACMs engage in a fact-finding exercise similar to the one used when the Court attempt to determine whether a litigant may proceed in *forma pauperis*. See Ex. A11. We respectfully request that the Court consider ordering this process or another specific process to determine a defendant's ability to pay prior to setting bail.

# Exhibit A

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

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

*Petitioners,*

v.

**ARRAIGNMENT COURT  
MAGISTRATES of the FIRST  
JUDICIAL DISTRICT of the  
COMMONWEALTH OF  
PENNSYLVANIA,**

*Respondents.*

**No. 21 EM 2019**

**JOINT SUBMISSION TO SPECIAL MASTER**

**Pre-Trial Reform Proposal of The Defender Association of Philadelphia &  
The Philadelphia District Attorney's Office**

**August 16, 2019**

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## **I. INTRODUCTION**

On July 8, 2019, the Pennsylvania Supreme Court granted King’s Bench review of *Philadelphia Community Bail Fund, et al. v. Philadelphia Arraignment Court Magistrates* and appointed a Special Master to address allegations of “systemic failure to the First Judicial District to properly conduct cash bail matters pursuant to current law, as well as any suggestions for action by this Court in response to alleged systemic failures.” On July 18, 2019, the Special Master requested that the Philadelphia District Attorney’s Office (“DAO”) and the Defender Association of Philadelphia (“Defender”) (collectively “Participants”) 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.

The following document includes only those proposals on which both sides can agree. Any disagreements are identified and the area of disagreement is briefly explained. The proposals are laid out in two parts: (1) proposals for immediate implementation; and (2) proposals for longer term implementation which may require state rule changes, or significant structural reforms.

Each part will be subdivided into specific independent proposals. Discussion of the proposal will identify the proposed reform; the policy and legal justification for the proposed reform; and a plan for implementation, including the expected costs and required personnel; the intended effect; and if the Participants disagree with respect to any particular issues within the proposal.

## **II. THE PROPOSALS**

### **PART A: IMMEDIATE REFORM PROPOSALS**

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

Overview: The Participants agree that bail decisions are improved by increasing information the parties have about the defendant’s individual circumstances. Rule 1003(D)(2) reflects this idea by granting defendants the right to “communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.” Under the current structure, despite the Defender’s

advocacy on behalf of nearly all defendants during the arraignment, and its appointment to represent most defendants at trial, the Defender is not given the opportunity to speak to defendants. The Participants agree this must change. There are also no notable disagreements regarding this proposal.

The proposal has three major components: 1) ACMs shall appoint the Defender to all defendants at the beginning of each arraignment shift for the purposes of the preliminary arraignment only, except when counsel appears on behalf of the defendant or the defendant otherwise seeks to waive his right to counsel; 2) The Defender will staff preliminary arraignment court 24/7 with a “pretrial advocate” and an attorney; and 3) the FJD and Philadelphia Police will provide the pretrial advocate a meaningful opportunity to speak confidentially with each defendant prior to arraignment through a two-way simultaneous audio-visual communication system, and then ensure that the pretrial advocate can timely communicate that information to the attorney prior to commencing a preliminary arraignment. In no case shall a defendant be arraigned who has not been given a meaningful opportunity to speak with counsel.

Justification: Bail decisions are improved where the ACM has more information about a defendant’s individual background, risks and needs, financial circumstances, community connections, and plan if and when released to the community (where the defendant will go, who they might be with, and why it is likely that they will appear). While Pretrial Services obtains some of this information, it is minimal, sometimes inaccurate, and defendants are more likely to reveal important personal information to their counsel than to a court agency. Moreover, currently the Defender is not appointed until the conclusion of the arraignment, even though it acts as a representative on nearly every case prior to and during the arraignment process. This situation is untenable. It places the Defender in the role of advocate for every case, but does not create an official attorney/client relationship. This should be remedied. Finally, preliminary reports from a Quattrone Center study of the Defender’s bail advocate program demonstrate that providing counsel prior to arraignment will reduce racially disparate detention rates, improves court appearance rates, and reduces the rate of pre- and post-trial rearrest rates.<sup>1</sup>

Implementation: The Participants do not believe any statewide or local rule changes are necessary to effectuate these reforms in Philadelphia. The reforms may be addressed logistically under the following parameters.

First, Rule of Criminal Procedure 122 authorizes ACM’s to appoint counsel to all people who are indigent or otherwise “unable to employ” counsel when “there

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<sup>1</sup> The study is not yet published, but the Participants have been briefed on the preliminary findings. The Participants will provide a supplemental filing attaching the study upon publication.

is a likelihood of imprisonment” or where the “interest of justice require it.” At the commencement of each arraignment list, the ACM shall enter a standing order appointing the Defender for the purposes of the preliminary arraignment in all “court cases” (non-summary matters). If the Defender is appointed as counsel, then Rule 1003(D)(2) applies, which mandates that the defendant “must be permitted to communicate fully and confidentially with defense counsel prior to and during the preliminary arraignment.” At the conclusion of each preliminary arraignment hearing, the appointment practice shall remain as currently operative under Rule 122.

Second, The Defender will assign a pretrial advocate and an attorney to preliminary arraignment at all times. Pretrial advocates will interview defendants during the arraignment shift in tandem with hearings. Once interviewed, that information would be given to the defense attorney and the attorney may discuss the case with the Assistant District Attorney prior to the next hearing or set of hearings. Both counsel would then suggest a bail disposition. The cases would continue like this throughout the shift.

Third, the FJD and the Police Department will have to provide the space and equipment to ensure that these interviews could occur. There is currently space in the basement of the Criminal Justice Center (CJC) that would suffice for the Defender’s purposes. However, logistics with the Police Department will need to be considered. These participants will need to be brought to the table.

Costs: The Defender will need to hire seven new pretrial advocates and will need to reassign current attorneys. The Defender currently employs four pretrial advocates, but three of those are funded by the MacArthur grant, which expires in 2020. Thus, to employ seven additional pre-trial advocates, the cost will be roughly 420,000 (40k base salary and 20k benefits) per year, without including any costs associated with office supplies, which will be absorbed.

The DAO will need to staff arraignment court with an attorney 24/7. This will require four additional full-time attorneys. We estimate that salary and benefits for each attorney will be approximately \$70,000 a year and so the approximate total cost to the DAO will be \$280,000 per year.

The FJD will need to provide physical space, in the basement of the CJC, to facilitate easy communication between the defense attorney and the bail advocate. Participants believe space is currently available with minimal reorganization. The plan will also require additional two-way simultaneous communication equipment. In addition to installation in the basement of the CJC, each police district will have to provide a location to install the equipment and facilitate its use. The ACMs will have to agree with this proposal and implement the change. The Philadelphia Police Department will need to be trained on the process.

Disagreements: There are no disagreements with respect to this proposal.

**PROPOSAL 2: The preliminary arraignment shall be recorded.**

Overview: The Participants agree that the preliminary arraignment must be electronically recorded and capable of transcription. As a matter of principle, the Participant's agree that a record should be created of any proceeding in which defendants may be deprived of their liberty.

Justification: The Participants believe that proceedings in which the rights of defendants are affected should be recorded. Although Participants acknowledge that transcriptions of the proceedings may rarely be necessary at future hearings in individual cases,<sup>2</sup> a record capable of transcription serves several purposes: First, and most importantly, it creates transparency and accountability, the lack of which has resulted in the current law suit. Second, it will provide a record of the parties' averments and the findings of the ACM. Third, it may be useful in emergency appeals or later proceedings where disputes arise between counsel. Lastly, a record may be useful in indirect criminal contempt cases where a defendant is in alleged violation of a bail condition and the notice element is challenged.

Implementation: The proposal would require that a Digital Recording Technician (DRT), or some other approved mechanism for creating a record of the proceedings, be installed in B08 of the Criminal Justice Center.

Costs: The cost of a DRT and recording each preliminary arraignment shift is unclear. Specific costs will require consultation with the FJD. The FJD's Court Reporter Service last issued a public report in 2011, thus the most recent data on costs associated with transcription and storage is unavailable and the FJD will need to be consulted regarding these changes. Additionally, it is not clear how many requests for transcription will be submitted, although Participants believe that such requests will be uncommon.

**PROPOSAL 3: A court clerk will be present at preliminary arraignment at all times, which will enable bail conditions to be docketed,**

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<sup>2</sup> The Participants note that Pa.R.Crim.P. 112(D), 115 and 1012, do not require any record or transcription be made of proceedings during preliminary arraignment. However, these Rules do not prohibit recording or transcription or preliminary arraignments, as long as it is conducted by an official court stenographer. Pa.R.Crim.P. 112(C), *cf* Pa.R.Crim.P. 112(D) (prohibiting the use of recordings or transcriptions other than those made by an official court stenographer). The Participants also note that an amendment to Phila.Co.Crim.Div.R. 115(a) may be useful, but not necessary.

**and recorded in NCIC where appropriate, so that conditions are clear, certain, accessible, and enforceable.**

Overview: The parties agree that any condition on a bail bond imposed by the ACM must be free from ambiguity, clearly explained to the defendant, accessible to all parties and to law enforcement, and enforceable.

Justification: Philadelphia notifies defendants of the required conditions of bail under our statutes and rules. *See* Pa.R.Crim. 526, Pa.R.Crim.P. 1003,18 Pa.C.S. § 4956 (pretrial release). However, certain bail conditions, like “stay away orders” issued in B-08 can be difficult to enforce because the terms of the orders are often not specific or clearly announced to the defendants. They are also not clearly docketed, entered into the NCIC database<sup>3</sup>, and are not otherwise accessible to law enforcement or the victims. Practically, this means that if a complainant calls the police because the defendant is having prohibited contact, the police have no way to verify that there is a “stay away” order in place, and have no way to notify the ACM or judge that the defendant may be in violation. Additionally, many conditions of bail or release, such as a stay away order, are currently unconstitutionally vague: bond documents given to a defendant will say nothing more than “stay away.” Typically, the defendant is not told from whom they are to avoid contact, and what types of contact is prohibited.

While the rules of Criminal Procedure permit ACMs to impose and enforce bail conditions, *see, e.g.*, 18 Pa.C.S. § 2711(allowing specified restrictions on defendants arrested for certain misdemeanor domestic violence crimes); Pa.R.Crim.P. 526-28; and Pa.R.Crim.P. 536, Philadelphia does not currently employ any reliable mechanism to ensure adequate notice or compliance. Participants believe that having a Municipal Court Clerk in the room at all times will help to ensure that bail conditions will be clear, docketed, and enforceable, and, when appropriate, recorded in the NCIC database. These practices will result in fewer motions to detain and ultimate detentions.

Implementation: The Participants agree that all release conditions beyond those required under Rule 526 be entered into the docket by a clerk in B-08 at the time of preliminary arraignment and that proper written notice be provided to the defendant of all such conditions on the bail bond. Additionally, “stay away orders” with respect to specific victims or witnesses, or when imposed pursuant to 18 Pa.C.S. § 2711, shall be written on a separate document and provided to the defendant. A copy may also be provided by the DAO to the complainant. The bail bond and any additional

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<sup>3</sup> NCIC is the “National Crime Information Center” database run by the FBI. Information entered into this database can be seen by Philadelphia Police Officers each time they run a record check on an individual.

conditions will clearly state the consequences of any violation. In some cases, the issuance of protective orders under 18 Pa.C.S. § 4954 may be appropriate. These additional conditions must also be clearly explained orally to the defendant.

Implementing these changes effectively will require the involvement of the FJD, the Philadelphia Police Department<sup>4</sup> and Pretrial Services. The Participants propose that if approved by this Court, the Participants will work with these entities to 1) identify any duplication or inadequacies on the current pre-trial documents and template bail bond, 2) develop new release paperwork as necessary; 3) develop a supplemental “stay away order” document that can be easily completed for any given case, 4) ensure that the additional conditions are specified in the docket; 5) identify mechanisms to report identified violations to ACMs or a Judge, and 6) discuss mechanisms to enter information relating to stay away orders and protective orders into NCIC, when appropriate.

Costs: The participants do not know the cost of covering a clerk 24/7 (21 shifts) or the costs associated with amending current forms or creating new ones. Further discussion with the FJD will be necessary.

**PROPOSAL 4: At the time of the preliminary arraignment, an attorney for the Commonwealth may make a motion requesting that bail be denied pending a release determination hearing.**

Overview: The Participants agree that preliminary arraignment must be structured to align with Pennsylvania’s Constitution that most defendants are presumed bailable, and that no monetary or non-monetary condition of bail should be used to detain a person. The proposal also incorporates an understandable constitutional standard for when a person may be held without bail while first requiring a court to consider and reject less restrictive conditions. The proposal also ensures that the Rules are followed that if “bail is refused, the bail authority shall state in writing or on the record the reasons for that determination.” Pa.R.Crim.P. 520.

Justification: ACMs currently impose monetary bail conditions on defendants in order to detain a person before trial. Not only is this unconstitutional, it fails to take into account a defendant’s ability to pay, which the Rules of Criminal Procedure require. A motion to hold will require the Commonwealth to identify and clearly articulate its reasons why detention is appropriate, and will inform the ACM that where no motion is made, the defendant is releasable.

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<sup>4</sup> The Participants are unsure whether the Police Department would need to update the process by which it provides defendants with documents, and files those documents in the record.

Implementation: The Participants recommend adopting the below procedure at the preliminary arraignment.

Note: Although the Participants are in near uniform agreement as to these procedures, they disagree on three issues relating to when the DAO can ask to hold a defendant: (1) whether the DAO can ask to hold defendants charged with violations of 18 Pa.C.S. §§ 6106 and 6108 (gun possession where the defendant is legally eligible to carry a gun, but does not have a license); (2) how to identify and define low level “crime spree” cases for inclusion; and (3) the language and scope of a catch-all inclusion to address exceptional cases. Each of these are bracketed and bolded, and presented in detail where needed.

### Motion to Hold Without Bail.

1. 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 following circumstances:

- a. The defendant is charged with any of the following:

18 Pa.C.S. Ch. 25 (relating to criminal homicide).

18 Pa.C.S. Ch. 27 (relating to assault) when graded as a felony or is against a family or household member as defined in 23 Pa.C.S. § 6102.

18 Pa.C.S. Ch. 29 (relating to kidnapping).

18 Pa.C.S. Ch. 31 (relating to sexual offenses).

18 Pa.C.S. § 3301 (relating to arson and related offenses).

18 Pa.C.S. § 3502 (relating to burglary) when graded as a Felony of the first degree.

18 Pa.C.S. Ch. 37 (relating to robbery).

18 Pa.C.S. § 4915.1 or § 4915.2 (relating to failure to comply with registration requirements).

18 Pa.C.S. Ch. 49 Subch. B (relating to victim and witness intimidation).

18 Pa.C.S. § 5921 (relating to escape).

18 Pa.C.S. § 6105 (relating to person not to possess or use firearms).

**18 Pa. C.S. § 6106 and § 6108 (relating to possession of a firearm)** \*(DAO wants this included, Defender does not)

30 Pa.C.S. § 5502.1 (relating to homicide by watercraft while operating under influence).

75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) when graded as a felony.

75 Pa.C.S. § 3732 (relating to homicide by vehicle).

75 Pa.C.S. § 3735 (relating to homicide by vehicle while driving under influence).

75 Pa.C.S. § 3735.1 (relating to aggravated assault by vehicle while driving under the influence).

75 Pa.C.S. § 3742 (relating to accidents involving death or personal injury).

- b. The offense charged is a felony or homicide and the defendant is awaiting trial or sentencing in an unrelated case that is not part of the same conduct, transaction, occurrence, or criminal episode in which the charged offense is a felony or homicide;
- c. The offense charged is part of the same conduct, transaction, occurrence, or criminal episode in which the defendant is charged with an offense or offenses against **["four or more" or "multiple"]** separate individuals; (\*Defender wants the text to read "four or more," DAO wants it to read "multiple"\*)
- d. The defendant is charged with a misdemeanor or felony and the defendant is also charged with violating a protection of abuse order in the same case.
- e. **Participants disagree on the language in subpart e, which is essentially a "catch all" for cases that do not fit into any above category, but where the DAO may want to hold a defendant at preliminary arraignment:**

**DAO version:**

When the Commonwealth avers that there is a significant risk that the defendant (a) will pose a danger to another person or the community, (b) will obstruct justice or threaten, injure or intimidate witnesses or jurors, (c) will flee the jurisdiction to avoid prosecution, or (d) the defendant is unlikely to appear in court.

**Defender version:**

In exceptional cases, when the Commonwealth avers that there is a significant risk that the defendant (a) will cause serious bodily injury or

death to another person, (b) will obstruct justice or threaten, injure, or intimidate witnesses or jurors, or (c) will flee the jurisdiction in an effort to avoid prosecution.

2. The Motion to Hold Without Bail shall set forth 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.
3. When a Motion to Hold Without Bail is made, the Arraignment Court Magistrate shall permit the representative of the District Attorney's Office and the defendant's counsel to present evidence or argument on the motion prior to rendering a decision.
4. Upon consideration of the factors specified in Pa.R.Crim.P. 523 and any other information presented, if the Arraignment Court Magistrate finds clear and convincing evidence that the defendant will fail to appear, or that the defendant presents a danger to the safety of any specific person or the community, and no condition or combination of conditions other than imprisonment will reasonably ensure appearance or the safety of any person and the community, bail may be refused. If bail is refused, the Arraignment Court Magistrate 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.

If the defendant is without the ability to afford counsel, the Arraignment Court Magistrate shall appoint counsel to appear at the release determination hearing.

Costs: A review of 2018 preliminary arraignments suggests that if a motion were made in every case enumerated above, the DAO would file a motion on between 18% and 25% of the cases, or roughly 450 to 650 individual cases per month.

Assuming that a motion is filed on every eligible case, and that the ACM held every person for whom a motion is filed, this would result in between 23 and 32 cases listed for Release Determination Hearings every day.

Of course, this is a high estimate, as the Participants do not presume a motion to hold will be made in every eligible case, nor do they believe that a motion to hold will be granted in every case in which it is made. Early bail review hearings, which occur 5 days a week, currently handle approximately 10 to 12 cases per day. An entire list currently takes approximately 90 minutes to complete.<sup>5</sup>

**PROPOSAL 5: Where no motion to hold without bail is made, the decision to impose monetary conditions must consider a defendant’s ability to pay, and the decision to impose any monetary or non-monetary conditions must be guided by a least restrictive alternative approach.**

Overview: The Participants agree that monetary bail setting practice must include a robust ability to pay determination, and that if monetary conditions are imposed, ACMs must be able to discern how much a defendant can afford. The Participants agree that incorporating the *in forma pauperis* criteria is relevant to make a constitutionally consistent determination of ability to pay. *See* Pa.R.C.P. 240. Additionally, the Participants agree that non-monetary conditions must be the least restrictive necessary to assure appearance and the protection of the community.

Justification: Under Pennsylvania’s Constitution, pre-trial release is presumed after an arrest for nearly all defendants. However, current monetary bail practices operate as a proxy for detention orders without ensuring due process, and the imposition of additional conditions beyond those required by Rule 526 are not addressed by considering the least restrictive alternative. It also discriminates against indigent defendants, who cannot pay even small amounts of bail.

Implementation: The Participants agree that arraignment procedures should reflect the following changes:

1. In making the initial determination of bail, all defendants shall be presumed releasable, unless the offense is a punishable by life without parole or the

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<sup>5</sup> Early Bail Review is a Safety and Justice Challenge Initiative, sponsored by the MacArthur Foundation which has been implemented in stages since 2016. Since February, 2019, defendants charged with crimes that do not involve sex, children or firearms, and whose bail is set at \$100,000 or less receive a hearing within 5 to 7 days of preliminary arraignment. At that hearing, a Municipal Court Judge may choose to reduce bail, place a defendant on house arrest or direct supervision or (in some cases) may increase bail.

Commonwealth has moved to hold without bail along with the necessary averments.

2. No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial, for example, imposing monetary conditions where the defendant qualifies for a public defender, or receives public benefits.
3. Defendants shall be released on recognizance pursuant to Pa.R.Crim.P. 526, unless the Arraignment Court Magistrate determines that any additional condition or combination of conditions is the least restrictive condition necessary to ensure the defendant's appearance, or where the defendant is otherwise held without bail.
4. If the Arraignment Court Magistrate determines that it is necessary to impose a monetary condition of bail, prior to setting any condition, the Arraignment Court Magistrate shall determine the defendant's ability to pay. In making that determination, the Arraignment Court Magistrate shall collect and consider the defendant's relevant financial information as specified Pa.R.C.P. 240(h) (relating to *In Forma Pauperis*) and any other relevant financial considerations.
5. When a condition or combination of conditions beyond the standard release conditions is imposed, whether non-monetary or monetary, the Arraignment Court Magistrate 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").<sup>6</sup>
  - b. State in writing on the release paperwork or orally on the record, the specific reasons why the condition or combination of conditions imposed is the least restrictive reasonably necessary restriction to ensure appearance and compliance with the standard conditions.
  - c. Where the ACM finds that a stay away condition is necessary, in addition to the condition appearing on the bail bond, a separate order

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<sup>6</sup> Release paperwork will include any bail bond paperwork, as well as any stay-away orders imposed upon the defendant at the time of preliminary arraignment.

shall be issued indicating the specific terms and duration of the condition, and the possible consequences if the condition is violated.

- d. Explain orally to the defendant the conditions of release.
6. When a defendant is released from preliminary arraignment, the release paperwork shall be given to the defendant, specifying the information required by Pa.R.Crim.P. 525, including the specific conditions of release, and shall include the date and time of the next court date. The paperwork shall be signed by the defendant to assure proper notice.

Costs: Transitional costs may require the adoption and printing of new paperwork. The ACMs currently possess few options beyond cash bail. Although Pretrial Services offers “release on special conditions I and II,” (these require in person orientation and periodic phone call check-ins), they are rarely employed by the ACMs. Defendants may be placed on direct supervision or house arrest at Early Bail Review, which only certain defendants receive 5 to 7 days after preliminary arraignment. Implementation of expanding release and conditions will require cooperation and training between pre-trial services, the ACMs, and the Participants.

The Participants suggest that the FJD request that pre-trial services develop a specific proposal to expand the use of direct reporting and needs based supervision and referrals, accounting for mental illness, homelessness, and addiction-based needs. The costs associated with any improvements would be subject to the scope of the changes. However, this proposal is not dependent upon any immediate change or expansion of pre-trial services, and therefore this expansion is discussed at greater length in Part B, the “Longer Term Reform” section.

**PROPOSAL 6: If the defendant is refused bail at the preliminary arraignment, within 3 business days the defendant shall be entitled to Release Determination Hearing in the Municipal Court.<sup>7</sup>**

Overview: A release determination hearing is a more formal adjudicatory hearing before a judge that will determine whether a defendant should be held or released on conditions when the defendant is held pending review after a preliminary arraignment.

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<sup>7</sup> Participants agree that hearings should occur as quickly as is practicable. After the program is up and running, Participants will likely seek to have hearings within two business days after a period of 6 to 12 months. However, the Participants are open to discussion about the timeline for accomplishing this transition.

Justification: The preliminary arraignment is not designed to and is not capable of addressing all of the concerns that may initially justify holding a defendant. However, many of these concerns can be addressed through adequate investigation and planning by the defendant's counsel and investigation by the DAO. Thus, to protect against unnecessary detention, a more formal hearing should be held as soon as is practicable to determine whether the defendant shall remain held or released on conditions. This practice is consistent with bail reform efforts around the country and with the best practices suggested by the empirical literature.

Implementation: The Participants agree that arraignment procedures should reflect the following changes:

1. If the Commonwealth files or makes a motion to hold without bail and the Magistrate refuses bail, a hearing shall be held within three business days of when the Magistrate's order refusing bail is made. Within 6 to 12 months of the effective date this provision, the hearing shall be held within 2 business days.
2. The hearing shall be conducted on the record in open court.
3. An attorney for the Commonwealth may appear and present evidence in the form of witnesses, documents, or otherwise;
4. The defendant shall appear in person, except as provided in these Rules and the Pennsylvania Rules of Criminal Procedure, and may be represented by counsel, and be permitted to
  - a. cross-examine witnesses and inspect physical evidence presented against the defendant;
  - b. call witnesses on the defendant's own behalf;
  - c. offer evidence on the defendant's own behalf, and testify;
5. The Rules of Evidence shall not apply.
6. The Judge of the Municipal Court shall determine whether there is clear and convincing evidence that the safety of any person and the community or the person's appearance cannot be ensured by less restrictive available means other than imprisonment. Whenever bail is refused, the Judge of the Municipal Court shall state in writing or on the record the specific reasons for the determination.

7. Continuances. 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.
8. 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 Rule.

Costs: The costs to implement procedural changes are unknown. It is true that similar types of hearings already occur for many defendants within 5 to 7 days of preliminary arraignment. Participants believe that the Early Bail review program can be expanded to absorb additional cases each day.

The Participants agree that best practices would require a Release Determination Hearing within 48 hours of an ACM's order to hold without bail. Due to implementation concerns, the Participants agree that the initial reform should require a hearing within three business days with a commitment from all parties to reduce this period to two business days as soon as is practicable.

**PROPOSAL 7: Any person not otherwise held without bail, but who remains in custody on a condition of release after three business days shall be entitled to a Release Determination Hearing (similar to the current early bail review).**

Overview: The Participants agree that if people held without bail are given a robust adversarial hearing to address whether detention is appropriate, individuals who are ordered releasable at the preliminary arraignment upon satisfaction of specific conditions (e.g., house arrest, monetary bail, etc.), but have not been released within 72 hours, 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. The hearing shall be scheduled with the cases slated for a Release Determination Hearing and the standards and procedures associated with the hearing would be similar.

Justification: The Participants agree that people who are otherwise releasable should not be detained for more than three days if less restrictive conditions may be imposed.

Implementation: A list will be generated of all defendants without detainers who remain in custody after two business days. Those defendants will be placed on a court list the following business day. If the defendant is released between being placed on the list and the hearing, the listing will be marked “listed in error” and no hearing will be held.

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

Costs: The Participants do not believe substantial expense is associated with this reform. The FJD is currently able to identify eligible defendants who are not released within several days and create a list of those individuals for Early Bail Review Hearings.

## **PART B: LONGER TERM REFORMS**

The Participants propose that the following reforms go into effect within a reasonable period after the first set of new rules are implemented.

**LONG TERM PROPOSAL 1: The ACM shall issue a summons for defendants charged with low level misdemeanors after the filing of a complaint and the defendant shall not be subjected to a preliminary arraignment.**

Overview: Every jurisdiction in Pennsylvania, other than Philadelphia, allows the police to release defendants charged with low-level misdemeanors from custody without a preliminary arraignment. These offenders are released with a “summons,” a document that tells a defendant that they are likely to be charged and that they will receive notice of a court date in the mail. However, Pennsylvania Rule of Criminal Procedure 1003 does not appear to allow for this process in Philadelphia.

The DAO does not consent to any process in which a defendant would be released from custody before the date of the first court listing has been set and given to all the parties: the DAO fears that such a process would lead to an increase in the number of defendants who fail to appear in court. However, the Participants 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 more serious cases.

The idea would be that in low level cases, the Commonwealth can file the complaint, and the ACM can conduct an expedited review to generate a docket number and a first court date, which will then be provided to the defendant by the police department upon release, absent a hearing. Participants agree that this process must allow for the following: 1) pretrial services to interview the defendant; 2) an opportunity for the Defender to confidentially communicate with the defendant; 3) the ACM to appoint counsel; and 4) the DAO to review the case prior to release.

Costs: The Participants are not aware of significant costs to implementing this type of procedure. However, the proposal will require planning by both the Participants and the FJD to develop and implement the plan.

### **LONG TERM PROPOSAL 2: Expand pretrial supervision services.**

Overview: At the moment, ACMs have very few pretrial supervision options to assign defendants: the only types of non-monetary conditions available at preliminary arraignment are ROSC I and II, which involve an intake, and then periodic phone calls with a pretrial officer. Additional options are available at Early Bail Review when some defendants appear before a judge, 5 to 7 days after arrest. These include house arrest and direct supervision. The Participants believe that if additional methods of supervision were available to ACMs, a greater number of defendants could be safely released.

Costs: The costs of expanding available pretrial services could be significant, but cannot be assessed without involving the FJD.

### **LONG TERM PROPOSAL 4: Ensure that data from the initial phase of the program is collected, evaluated, and reviewed and mandate that a report evaluating the reforms be issued after 1 year of implementation.**

Overview: The Participants believe that it is critical that an outside person or organization be assigned to evaluate the reforms and report back to the Court and the parties on the progress that has been made. The Participants suggest that all parties partner with some group of researchers and share all data regarding implementation with that group, and that an independent report be created, detailing the results of the process.

Costs: The costs of such a study are unknown, but grant funding may be available.

### III. CONCLUSION

The Participants believe each of these proposals are essential to ensure: (a) public safety; (b) that Pennsylvania's Constitution and this Court's Rules are obeyed; (c) that detention and bail practices are fair and non-discriminatory; and (d) that all decisions consider the individualized circumstances of the person appearing before the court.

Respectfully Submitted,

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