

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

21 EM 2019

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

v.

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

***AMICUS CURIAE* BRIEF OF MEMBERS OF THE CRIMINAL
DEFENSE BAR WHO PRACTICE IN MONTGOMERY COUNTY IN
SUPPORT OF PETITIONERS**

**On Petition for Extraordinary Relief
Under the Court's King's Bench Jurisdiction**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is submitted by private criminal defense counsel who are familiar with Montgomery County bail practices. *See* Appendix: List of *Amici Curiae*. It substantially incorporates and expounds upon arguments presented in a previous amicus curiae brief filed by the Montgomery County Public Defenders' Office on February 3, 2020, and withdrawn on February 11, 2020.¹

Counsel represent individuals in Montgomery County and the surrounding counties facing criminal charges at all stages of their proceedings. Some of the undersigned also serve as court-appointed counsel for indigent criminal defendants in Montgomery County. Combined, we have over 300 years of experience as public defenders, court-appointed counsel, and private attorneys.

The law governing bail practices directly affects all of our clients, their families, and the communities we serve. We recognize the inherent link between access to justice and access to healthcare,

¹ This brief contains the same anecdotes and factual representations as the now-withdrawn brief because they are consistent with the experiences of the attorneys submitting this *amicus* brief and the writers of the now-withdrawn brief have verified that they are true.

housing, education, and employment—all of which are hindered when cash bail is improperly and excessively imposed on our clients. We witness first-hand the multitude of individual and community harms caused by dysfunctional bail practices that result in unnecessary and prolonged pretrial detention.

In addition to the human cost of unnecessary and disproportionate pretrial incarceration, such practices create obstacles to the preparation of a defense, negatively affect case outcomes, and cost county taxpayer money. All of us represent criminal defendants in Montgomery County, and many of us are also residents of Montgomery County, Pennsylvania. We thus have a direct interest in the petition for judicial intervention that seeks to curb improper and excessive bail determinations, increase accountability, promote uniform practices amongst the counties, and fortify Pennsylvania's existing law.

INTRODUCTION

While specific bail practices may differ between counties, the systemic failures found in Philadelphia's current cash bail practices are ubiquitous throughout the state. Montgomery County has traditionally been one of many in which the judicial decision-makers of minor courts all too often fail to consider alternatives to cash bail or the accused's ability to pay, and they tend to acquiesce to law enforcement's *ex parte* requests for excessive bail for the purpose of promoting the Commonwealth's goal of ensuring pretrial incarceration.²

Very recently, Montgomery County has taken steps to make improvements to the county's bail system. While laudable, the proposed improvements are in very preliminary stages and have not yet been implemented. Accordingly, it is unknown what impact these changes will have on the problems identified herein. Moreover, given the long

² It was previously very common in Montgomery County for Montgomery County Detectives to have a "go-to" District Justice or Justices to request and obtain excessive bail for defendants they wanted to stay in pretrial custody. Fortunately, under the current District Attorney's administration, this practice has ended. Without adequate safeguards, however, it could easily recur under a different District Attorney.

history of the deficiencies in Montgomery County bail practices, our concerns persist despite the county's effort to make improvements.

Exemplifying the need for counseled, evidence- and rule-based bail determinations that provide for swift reviewability is the case of a teenaged nursing mother who was incarcerated in Montgomery County for over a month due to her indigency.³ Bail for the teen mother was set at \$50,000. It was her first time entering the criminal justice system—she had no prior arrests. Before the county incarcerated her, she breastfed her baby, lived with family, attended high school, and kept a low-wage job. She had no history of violence other than the incident for which she was arrested, which involved a violent altercation with another girl. The particular facts surrounding the altercation were disputed and unproven. She had strong family support, including family members who attended courtroom proceedings with her. She was an indigent minor who qualified for the legal services of the Office of the Public Defender.

³ The anecdote herein is provided with permission from the client, but the name of the juvenile mother and related docket number is withheld to preserve her confidentiality.

The county incarcerated the new teen mother at an adult facility. The monetary conditional bail of \$50,000 was an amount that was set as “cash” or “good” bail, meaning she would not be returned to community unless she paid the full amount.⁴ The adult jail in which she was housed provided her with no accommodation for nursing, breast milk preservation, or an automatic pumping machine to express milk so that her body would continue to produce enough to feed her baby once she was released.⁵

Counsel was not present at the initial bail determination, which is not uncommon in Montgomery County. In Montgomery County there have also been multiple instances of district judges not waiting for

⁴ Eligibility for ten-percent (10%) cash bail is relatively uncommon in Montgomery County.

⁵ Nursing mothers also need to express milk to prevent and relieves engorgement, a painful condition that can occur when breastfeeding schedules are interrupted. When unaddressed, engorgement can lead to the common infection that is known as mastitis. For more information regarding the relevant terminology and the topic of breastfeeding while incarcerated in general see Malcolm Burnley, *Staying Connected: Moms Who Pump in Prison*, NEXT MEN (Feb. 4, 2019), <https://nextcity.org/features/view/staying-connected-moms-who-pump-in-prison> (“The medical consensus is that babies who consume breast milk are at lower risk of asthma, diabetes, and sudden infant death syndrome, while mothers are less likely to develop breast and ovarian cancers. But the practice also promotes more stable family units, strengthening an emotional bond between child and caretaker. That bond can be strengthened even when mom is behind bars.”).

counsel to be present for the bail hearing, despite knowing counsel to be in transit to preliminary arraignment.

Upon learning of the teen mother's case, the assigned Assistant Public Defender filed an emergency petition seeking a bail reduction to \$50,000 unsecured bail. By then, the teen had already been incarcerated for over two weeks.⁶ At the hearing on the motion, the girl's public counsel argued to a Court of Common Pleas judge that her young client posed no flight risk and would reside with a local family member while awaiting trial. In the alternative, counsel requested that the mother be permitted to be home on house arrest.

The prosecution argued that the mother should remain on \$50,000 cash bail because of the nature of the alleged crime and asserted that pretrial house arrest was simply not an option—a common refrain in Montgomery County courts.⁷ The judge denied the request for less

⁶ For decades, bail reduction petitions filed in Montgomery County would not be scheduled for hearing by the court for four-to-six weeks after the filing of the petition. Recently, however, that delay has been significantly reduced to two-to-three weeks, but that is still an excessive delay.

⁷ The proffered reason for refusing pretrial house arrest was a familiar one in Montgomery County: the Montgomery County Office of Probation has advised the Court that there are not enough electronic monitors to facilitate pretrial house arrest because, according to the Probation Office, the Court denied its budgetary request for additional monitors. Seemingly unaware of this budgetary denial and

restrictive conditions, informing defense counsel that the mother would just have to express her milk by hand (ostensibly to be discarded, as no means of preserving and transferring the milk to the baby were available). The judge also denied defense counsel's request for a bail reduction to \$10,000.

The Office of the Public Defender immediately began to prepare a petition for review to the Superior Court. The timeline for such a petition, however, did not meet the urgent needs of the mother and her baby.

The young mother was eventually released, but not because of any ruling of the court. After the Court of Common Pleas denied the request for modification, her family secured Philadelphia-based counsel who approached the National Community Bail Fund- Black Mama's Bail Out on her behalf. That national organization posted the excessive bail—assistance that is rarely seen in Montgomery County and is unlikely to be available to the vast majority of individuals who are incarcerated pending trial. After more than thirty-eight days of pretrial

restriction, certain judges have ordered pretrial electronic monitoring in isolated occasions through 2019.

incarceration in an adult prison, the teenage mother was reunited with her infant.⁸

Supported by her family, she continues to reside in her community, has passed three sections towards earning her GED, and obtained new employment. Her case was resolved in juvenile court as a simple assault and possession of instruments of crime. Unfortunately, her journey through local bail practices was not an outlier.

⁸ There are more egregious instances of much lengthier terms of pretrial incarceration, especially when one considers detained probation violators. In Montgomery County, probation detainers constitute the overwhelming majority of inmates housed in the Montgomery County Correctional Facility. This situation could be substantially alleviated by the use of electronic monitoring while violators await *Gagnon* hearings, which often take months to be held.

ARGUMENT

A. THE PROBLEMS IDENTIFIED BY THE PARTIES AND THE SPECIAL MASTER ARE NOT ISOLATED TO PHILADELPHIA

In Montgomery County, defendants' bail determinations are before Magisterial District Judges (hereinafter "MDJs") in courtrooms located throughout the county.⁹ Similar to the problematic Philadelphia County practices raised in this case, all too often bail determinations in Montgomery County are not informed, evidence-based analyses of individualized circumstances in accordance with the mandates of the Pennsylvania Constitution and the rules of criminal procedure.

Similar to Philadelphia's bail commissioners, Montgomery County's MDJs frequently impose cash bail on indigent defendants without any meaningful inquiry into their ability to pay. *But see* Pa. R. Crim. P. 528 (stating that bail must be reasonable and that the bail

⁹ Consistent with the description set forth by Amicus PACDL in their brief, Montgomery County's thirty MDJs are elected officials who are not required to have formal legal training or licensure. *See* Unified Judicial System of Pennsylvania, Magisterial District Judges of Montgomery County, *available at* <http://www.pacourts.us/courts/minor-courts/magisterial-district-judges/Default.aspx>.

authority shall consider, inter alia, the “financial ability of the defendant”). Also similar to Philadelphia, Montgomery County’s MDJs often impose excessive bail where the only apparent basis for doing so is to ensure pretrial incarceration, as opposed to providing reasonable assurance of future court appearances upon release. *But see* Pa. R. Crim. P. 524(C)(5) (“The amount of monetary condition shall not be greater than is necessary to reasonably ensure the defendant’s appearance and compliance with the conditions of the bail bond.”).

Bail amounts are typically set as “cash amounts”, which means the accused is required to pay the full amount of the bond prior to release, as opposed to the 10% nonrefundable surety preferred by many jurisdictions. Similar to Philadelphia, bail determinations are regularly made in very quick, cursory hearings that are not recorded, do not follow any normative evidentiary standards, and do not involve an assessment of alternative conditions such as house arrest through electronic monitoring, which could reasonably assure community safety.¹⁰

¹⁰ Indeed, Montgomery County probation representatives have historically argued that they do not provide pretrial electronic monitoring services. *See, e.g., Commonwealth v. Fountain*, CP-46-CR-0003966-2019, Order of Nov. 1, 2019

Unlike Philadelphia, however, defense counsel are rarely present during bail determinations. *But cf.* Report of the Special Master at 7-8 (describing presence and appointment of public defender representatives at hearing). Further, it is not uncommon for law enforcement to present *ex parte* bail recommendations to MDJs at the time the criminal complaint is submitted. Police department bail recommendations are not made in writing and are not provided to the defense. *But cf.* Report of the Special Master at 8 (“Before the hearing . . . defense counsel [is] electronically provided with the Pretrial Service Division Investigation Report.”).

Unlike Philadelphia, there are no local procedures in Montgomery County providing for on-call judges to rapidly consider oral bail modification requests,¹¹ nor are there automatically scheduled bail modification hearings. *But cf.* Report of the Special Master at 9 (describing on-call judges and Early Bail Review hearings). Instead,

(mandating that county probation place the accused on electronic monitoring after a hearing on the issue when county probation asserted that they could not impose pretrial electronic monitoring).

¹¹ There are, of course, on-call MDJs to set bail at a preliminary arraignment when an arrest is made outside of normal business hours.

unrepresented detainees often stay in jail until their cases are scheduled for preliminary hearings.

Preliminary hearings in Montgomery County rarely occur within a week of the bail determination. It is common practice for Montgomery County MDJs to initially schedule preliminary hearings within the fourteen-day window required by Pa. R. Crim. P. 540(G)(1) but then, as a matter of course, continue the hearings outside of the fourteen-day window under Pa. R. Crim. P. 542(G). It is therefore all too common for Montgomery County detainees to be forced to wait a month or more before having an opportunity to request bail modification with the assistance of counsel at a preliminary hearing. By then, the well-documented negative consequences of any period of extended incarceration are in full force and effect.

Given the often-lengthy wait for preliminary hearings, detained individuals often agree to waive those hearings to expedite their case and, in many instances, in exchange for an agreement to unsecured bail. Despite setting excessive cash bail for the same individual on the same charges beforehand, MDJs routinely sign off on these agreements

for unsecured bail without hesitation, creating the appearance that bail is being set to incentivize defendants to waive their rights.

B. DE-FACTO INCARCERATION IS *DE RIQUEUR*

“No condition of release, whether monetary or non-monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial.”

Pa. R. Crim. P. 524 (comment).

In spite of the plain language of Rule 524, it is too often that the minor courts of Montgomery County impose monetary conditions of bail for the purpose or effect of ensuring that the defendant remains incarcerated until trial. Even when authorities do not intend for monetary bail to result in prolonged pretrial incarceration, its imposition has that result. The Pennsylvania Justice Reinvestment Working Group reported that “more than half of the people who are required to pay monetary bail are unable to do so—a total of almost 43,000 people.” Pennsylvania Justice Reinvestment Working Group,

Justice Reinvestment in Pennsylvania: Policy Framework, Key Findings at 4, CSG Justice Center (June 2017).¹²

Sadly, individualized evidence-based assessments of accused persons' ability to pay are not routine. The frequent assignment in Montgomery County of a \$5,000 flat bail amount for retail theft or other non-violent offenses reveals the absence of individualized determinations, as does the routine imposition of bail amounts exceeding \$1,000 on our clients who qualify for indigent legal services.

We have no shortage of anecdotes of routine pretrial incarceration resulting from bail determinations that fail to account for the finances of the accused. An indigent minor with significant mental health needs remained incarcerated after getting into a fight in his residential youth placement because he could not pay \$50,000 cash bail. Another indigent client recently spent 64 days in jail awaiting trial on a minor charge of marijuana possession because cash bail was set at \$5,000.¹³ An

¹² Available at <https://csgjusticecenter.org/jr/pennsylvania/publications/justice-reinvestment-in-pennsylvania-policy-framework>. The Pennsylvania Justice Reinvestment working group was established specifically for the purpose of developing policies that increase the state's return on correction investments and reduce prison populations while improving public safety.

¹³ The maximum sentence for this charge is 30 days. 35 P.S. § 780-113(g).

impoverished elderly woman was held on \$5,000 bail after being accused of taking a bottle of wine without paying. And an indigent man with documented mental illness remained incarcerated on \$250 bail after being charged with shoplifting Oil of Olay products that he could not afford.

For those with sufficient disposable income to take a vacation, purchase non-essential luxury goods, or donate to charity, cash bail of \$250 may seem reasonable. For an impoverished defendant who cannot even afford the bare necessities, that amount is an insurmountable barrier to freedom.

Minor courts need more than a reminder that the law requires them to meaningfully consider a defendant's financial ability when setting monetary bail. To ensure that individuals are not incarcerated merely for indigency, bail-setting authorities must carefully identify predictable and uniform factors to inform their ability-to-pay determinations. Fortunately, as argued by Petitioners, useful factors can already be found in other areas of existing Pennsylvania law.

C. THERE IS INSUFFICIENT ACCOUNTABILITY

Rule of Criminal Procedure 523 requires MDJs to consider “all available information . . . relevant to the defendant’s appearance or nonappearance at subsequent proceedings” including:

- The nature of the offense and “any mitigating or aggravating” factors;
- The accused’s employment status, history, and financial condition;
- Family relationships;
- Connection to community (length of residence, past residences);
- Age, character, reputation, mental condition, addiction;
- Prior compliance or non-compliance with bail bond and conditions;
- Record of flight or attempted escape;
- Prior criminal record;
- Use of false identification;
- And “any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.”

Pa. R. Crim. P. 523(A). Because bail proceedings are not recorded and are rarely even observed by defense counsel, however, there is no record of what factors bail-setting authorities are relying upon when setting bail or whether the authorities’ findings are sufficiently supported by evidence.

The absence of any state-wide, fixed, and reasonable timeline for review of bail decisions that result in detention is also problematic. In Montgomery County, the burden of requesting that kind of review for

indigent clients falls on strained public defender resources or court-appointed counsel who the county generally pays a flat fee of \$1,000 per case for non-trial dispositions, regardless of the number of hours the attorney worked on the case.

In order to identify individuals who are incarcerated as a result of excessive monetary bail conditions or unreasonable bail denials, staff from the Office of the Public Defender must search through county databases to monitor for newly incarcerated persons. After interviewing with intake staff, those individuals are assigned to an Assistant Public Defender who must review their file in order to determine whether to file an emergency petition for bail modification, file a standard petition for bail modification that may not be scheduled for weeks, or request modification at the preliminary hearing.

Such requests for modification are frequently denied in any instance. Subsequent appellate review is not predictably entertained by the Superior Court and is time consuming when it is. The result is a system that lacks uniformity and accountability. Unfortunately, and perhaps most importantly, the resulting system fails to reliably comply

with the United States and Pennsylvania Constitutions or the Pennsylvania Rules of Criminal Procedure.

D. THE HARMS ARE REAL

Even short periods in prison have long-term detrimental effects. Accused persons who are detained while awaiting their opportunity to prove their innocence in court are more likely to be convicted and to receive lengthier sentences. *See* Christopher T. Lowenkamp, Marie VanNostrant, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation (Nov. 2013); *see also* Mary T. Phillips, *A Decade of Bail Research in New York City*, New York City Criminal Justice Agency, Inc., at 127 (2012). These effects cut disproportionately along race lines. *See* Pennsylvania Justice Reinvestment Working Group, *Justice Reinvestment in Pennsylvania: Policy Framework, Key Findings* at 4 (“Across all offense types, black defendants are far more likely than

white defendants to receive a monetary bail decision, especially when charged with a felony involving a weapon.”).¹⁴

Those awaiting trial on criminal charges include single parents with young children; adult caregivers of the ailing, elderly, and disabled; disabled persons in need of continuity of care; households’ primary earners; rent payers; pet owners; bill payers; college students with exams; employees; bosses; husbands, wives, and significant others. Removed from their community, often losing their jobs or homes, detained individuals are hindered and often completely precluded from meeting familial and communal responsibilities. As a result, all of those who depend on them suffer.

In many cases, the resulting damage is irreversible. Sometimes the damage is permanent but hard to quantify, such as the young Montgomery County student who missed their high school graduation awaiting a hearing on a small amount of marijuana charge because they could not pay \$1,000 for bail. There is also the indigent person with a documented seizure disorder and mental health needs who was

¹⁴ Available at:
https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf

incarcerated on \$250,000 bail on charges arising from a fight that the defense maintains was started by others. That person's medical and mental health benefits were completely cut off as a result of pretrial detention.

Incarcerated persons miss holidays, funerals, opportunities to be present with dying loved ones, and other major life milestones. Even short periods of incarceration can trigger a downward spiral into deep poverty, exacerbate existing mental health issues, or cause other life-changing events such as the loss of custody over beloved children. *See generally* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford L. Rev.* 711, 720 (July 2017).

Moreover, incarceration is a traumatic event. *See* Mika'll Deveaux, *The Trauma of the Incarceration Experience*, *Harvard Civil Rights – Civil Liberties Law Review* (Dec. 2013); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, (Dec. 2001).¹⁵ Montgomery County saw four in-custody suicide deaths in

¹⁵ Available at <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment>

2019. See Montgomery County 2019 Coroner’s Office Annual Report.

This death count does not include the numerous suicide attempts that occur throughout the year. The harms of flawed bail determinations are real.

E. PRE-TRIAL INCARCERATION UNDENIABLY IMPLICATES LIBERTY INTERESTS THAT TRIGGER STRINGENT DUE PROCESS PROTECTIONS

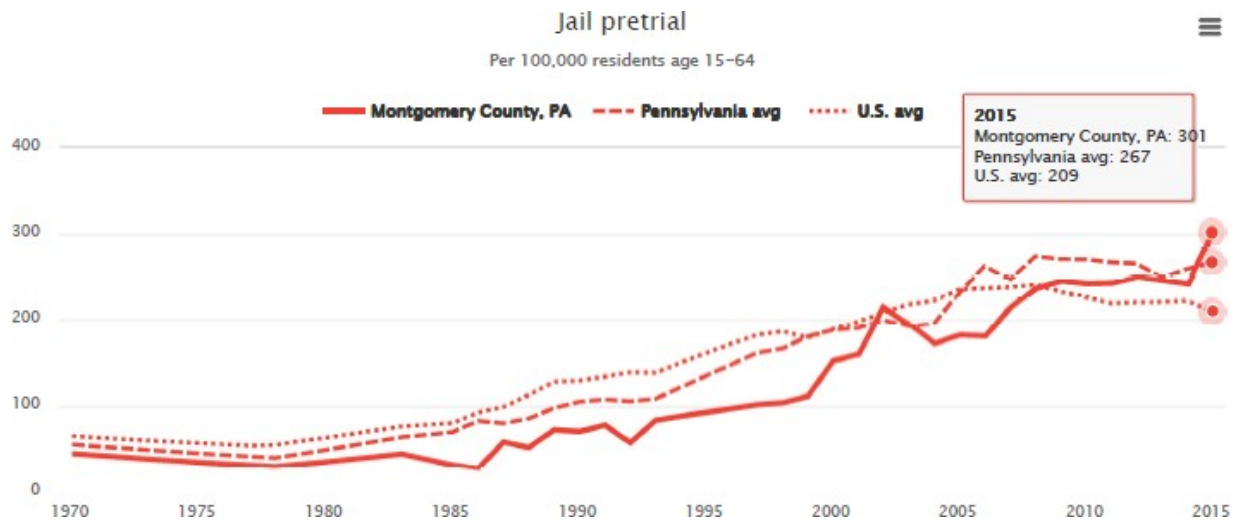
“In cases involving individual rights, whether criminal or civil, [t]he standard of proof [at a minimum] reflects the value society places on individual liberty.”

Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)).

The sheer number of individuals who are incarcerated on unproven charges for substantial periods of time renders the relationship between liberty interests and bail determinations undeniable. Based on data collected by the Vera Institute of Justice,¹⁶ Montgomery County followed general statewide trends of increased pretrial incarceration from 1985 through 2015. Montgomery County

¹⁶ The Institute compiled data from the U.S. Department of Justice Bureau of Justice Statistics as well as state and local corrections data, up to year 2015.

surpassed statewide averages for pretrial detention in 2015 and significantly bucked national trends of declining rates of pretrial detention between 2010 and 2015:



Vera Institute of Justice, *Incarceration Trends by County*, available at <http://trends.vera.org/rates/montgomery-county-pa>.

This Court should disabuse minor courts of any notion that such incarceration is permissible absent clear and convincing evidence that incarceration is the only option that can reasonably ensure the safety of persons or community. *See* Pa. Const. art. I § 14.

Apparent from the Report of the Special Master and the briefing by Petitioners and *amici*, minor courts often fail to follow the plain meaning of applicable court rules when determining bail eligibility and

setting conditions of release. It is thus unlikely that they will unilaterally and uniformly apply a meaningful evidentiary standard to bail determinations absent guidance from this Court.

Both the plain language of the Pennsylvania Constitution and the liberty interests at stake call for the application of stringent evidentiary standards for bail determinations. The Pennsylvania Constitution calls for “proof” to be “evident.” Pa. Const. art. I § 14. Even if that were not the case, the clear and convincing evidentiary standard is appropriate where the determination at stake involves a “significant deprivation of liberty”, “adverse social consequences . . . [that have] a very significant impact on the individual”, and “the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.” *Addington*, 441 U.S. at 425-27. Every factor is relevant to bail determinations.

The serious and irreparable harms of incarceration attach to all of those it is imposed upon, whether or not their term of incarceration is before or after trial. “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

CONCLUSION

The need for clear judicial directives and uniform practices for bail determinations throughout Pennsylvania cannot be understated. The bipartisan Pennsylvania Justice Reinvestment Working Group expressly recommended that this Court review rules related to bail decisions, observing that, currently, “[t]here are 67 different approaches to pretrial practices in Pennsylvania’s 67 counties” *Policy Framework* at 11.

This case offers an immediate and valuable opportunity for this Court to fortify the existing rules and address the legal gaps identified by the parties and the Special Master. Meaningful implementation of the parties’ agreements, ensured through consistent monitoring, will provide a much-needed model for the rest of the state. Further clarification of the applicable rules and standards can provide accused persons throughout the state with the basic protections that they are due while they await their opportunity for a full and fair trial to address the unproven accusations lodged against them.

Respectfully submitted,

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I certify pursuant to Pa. R.A.P. 531 and 2135 that this brief does not exceed 7,000 words, as measured by the word processor used to prepare it.

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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.

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