IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 21 EM 2019

PHILADELPHIA COMMUNITY BAIL FUND, et al.,

Petitioners,

v.

MAGISTERIAL COURT DISTRICT JUDGES, et al.,

Respondents.

On Petition for Extraordinary Relief Under King's Bench Jurisdiction

BRIEF OF AMICUS CURIAE INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION IN RESPONSE TO SPECIAL MASTER'S REPORT

NICOLAS Y. RILEY
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, DC 20001
202-662-4048
nr537@georgetown.edu

JON CIOSCHI (Bar No. 318793)
WISEMAN & SCHWARTZ, P.C.
718 Arch Street, Suite 702N
Philadelphia, PA 19106
267-758-2326
cioschi@wisemanschwartz.com

Counsel for Amicus Curiae

January 30, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION & INTEREST OF AMICUS CURIAE

The mission of the Institute for Constitutional Advocacy and Protection is to use the power of the courts to defend American constitutional rights and values. Among its litigation work, the Institute regularly represents journalists and community organizations in cases aimed at promoting public accountability and ensuring democratic self-governance. Much of this work focuses on the constitutional implications of government-imposed restrictions on people's ability to document and observe court proceedings. The Institute therefore has a strong interest in ensuring that the First Judicial District's policies and practices do not impede the public's ability to document and observe how prosecutors and arraignment court magistrates are conducting themselves during preliminary arraignments.[1]

This brief addresses two issues raised in the Special Master's Report, both of which bear on the transparency of the preliminary arraignment process:

(1) Whether arraignment court magistrates should publicly state their reasons for every bail decision on the record; and

(2) Whether preliminary arraignments should be recorded in a format that allows the parties and the public to obtain a verbatim record of the proceedings.

---

[1] Pursuant to Rule of Appellate Procedure 531(b)(2), counsel for *amicus curiae* certifies that (1) this brief was authored entirely by counsel for *amicus curiae* and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than *amicus curiae* contributed money to the preparation or submission of this brief.

As explained below, the answers to both of these questions are yes. Ensuring that the public can discern the reasons underlying every bail decision and access a full record of every hearing would not only increase public confidence in the bail system but also promote democratic accountability. As explained below, the arraignment court magistrates' stated objections to these reforms are unfounded. This Court should therefore direct the magistrates to state their reasons for every bail decision on the record and to preserve a verbatim account of every preliminary arraignment.

ARGUMENT

I. This Court should direct arraignment court magistrates to state their reasons for every bail decision on the record.

A. Requiring magistrates to state their reasoning on the record would increase public confidence and accountability within the bail system.

"A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987). Among other virtues, requiring judges to explain their thinking on the record (whether orally or in writing) helps to ensure that their decisions rest on consistent logical and legal principles. That consistency, in turn, promotes confidence in the judiciary by reassuring litigants and the public that courts are not deciding matters in an arbitrary or discriminatory fashion. *See generally*

Hon. J. Harvie Wilkinson, III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 794 (1989) ("[A] judiciary accountable to reason cannot resort to arbitrary acts.").

Requiring judges to state the reasons for their decisions on the record also promotes democratic accountability. After all, the public cannot assess the validity of any judicial decision without some basic understanding of the rationale underlying that decision. *See generally* Hon. Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 915 (1996) ("Candor is a necessary means of judicial accountability (particularly if the normal modes of governmental accountability, such as periodic elections or term appointments, are absent)."). The fact that ethical rules often bar judges (unlike legislators and most other public officials) from commenting publicly on matters pending before them only increases the public's need for on-the-record explanations for their decisions. *See* Pa. Code of Judicial Conduct Rule 2.10(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.").

The importance of on-the-record explanations is especially weighty in the bail context, given the high stakes of bail decisions. An arraignment court magistrate's bail decision determines whether an arrestee will spend the ensuing days, weeks, or months awaiting trial at home with family or alone in a jail cell. That decision often has profound consequences for the arrestee: for many, it dictates whether they will be

able to keep their jobs, support their families, avoid eviction, or obtain favorable resolutions to their cases. Moreover, several studies—including some focused specifically on Philadelphia's bail system—have shown that people detained before trial consistently experience worse outcomes in their cases, even when controlling for other possible causes.[2] In light of those potential consequences, it is critical that litigants and the public have access to some record of the reasons underlying the magistrate's bail decision. Indeed, in the analogous context of sentencing, this Court has long required trial judges to disclose their reasoning precisely because it fosters principled decision-making. *See Commonwealth v. Devers*, 519 Pa. 88, 90–91 (1988) (explaining that "our common law on the subject of sentencing implied the need for some degree of recorded explanation" and noting that the "principle of having a record" has been "reaffirmed" repeatedly over the years).

Given the significance of bail decisions, it is unsurprising that Philadelphia's bail process has become a focal point in public debates about the City's criminal justice system. Over the past several years, local officials, private citizens, and community leaders have been engaged in an ongoing civic discourse about the

---

[2] *See, e.g.*, Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 511 (2018), *available at* https://academic.oup.com/jleo/article/34/4/511/5100740 (finding that pretrial detention in Philadelphia leads to increased sentence lengths and an increased likelihood of pleading guilty); Arpit Gupta, Christopher Hansman, and Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* (Aug. 18, 2016), *available at* https://perma.cc/S9QS-7Y7Q (examining the use of cash bail in Philadelphia and Pittsburgh).

fairness of the City's bail system and, in particular, its impact on indigent communities. That discourse only further highlights why it is so important to preserve a record of the magistrates' reasoning. By shielding their reasoning from public view, the arraignment court magistrates deprive people of the ability not only to discern the reasons for their bail decisions, but also to discuss and debate the validity of those reasons.

B. Requiring the magistrates to state their reasons on the record would not conflict with Rule 520 or impose unreasonable burdens on them.

The Special Master's report states that the magistrates object to any requirement that they state their reasons for imposing bail "because Rule [of Criminal Procedure] 520 only requires [them] to state their reasons for *refusing* bail." Special Master's Report 37 (emphasis added). Nothing in Rule 520, however, precludes the magistrates from disclosing the reasons underlying their bail decisions. Indeed, the absence of an explicit *mandate* to provide such reasons is not the same thing as an explicit *prohibition* on doing so. After all, there is no provision in Pennsylvania law that requires appellate judges to provide their rationale for every ruling and, yet, appellate courts—like this Court—routinely issue written opinions explicating their reasons.

Nor would a requirement to provide reasons unduly burden the magistrates. Rule 523 sets forth the specific criteria that magistrates must consider in deciding whether and how to set bail in each case. If the magistrates are properly applying those criteria—as the rule requires—then it would hardly prove onerous for them to

briefly explain how they did so. These explanations need not be protracted or overlong. *Cf. Devers*, 519 Pa. at 101 (holding that judges should state their reasons for imposing sentences but need not provide "separate, written opinions embodying exegetical thought"). In fact, if the hearings were held on the record, *see infra* Part II, the magistrate could simply state his or her reasoning out loud to ensure that it was preserved. To the extent that such an effort would require any additional work on the part of the magistrates, it would be minimal and would pale in comparison to the immense value that the added transparency would provide to litigants and the public.

II. This Court should require that preliminary arraignments be recorded in a manner that preserves a verbatim record of the proceedings.

A. Creating a public record of the proceedings would elevate public discourse and increase accountability.

All preliminary arraignments in the First Judicial District occur entirely off the record. No court reporter is present during the hearings, and no transcripts or recordings are ever made available to the public. What's more, observers are prohibited from making any "stenographic, mechanical, [or] electronic recording[s]" of the hearings on their own. Pa. R. Crim. P. 112(C). As a result, the public is left with an incomplete picture of how Philadelphia's bail hearings—and the officials who participate in them—actually work.

This dearth of documentation has a concrete impact on public discourse. Most people cannot attend bail hearings in person and have no other way of learning what arguments the prosecutors raise, what questions the magistrates ask, or how arrestees

react to the magistrates' bail decisions. Moreover, members of the public who want to learn how changes in prosecutorial policy are being implemented on the ground have no way of doing so. For example, the District Attorney of Philadelphia announced in 2018 that his office will no longer be requesting cash bail for people charged with certain offenses. But the absence of any verbatim record of bail hearings makes it nearly impossible for most members of the public to determine whether line-level prosecutors are complying with the new policy—and, if so, whether the new policy has had an impact on the magistrates' bail decisions. *See, e.g.*, Bryce Covert, *Progressive Philly D.A. Larry Krasner's Bail Reform Plans Seem Stalled, Advocates Say*, THE APPEAL (June 25, 2019), *available at* https://perma.cc/D2FC-8G3K (discussing local groups' claims that some prosecutors were flouting the District Attorney's new bail policy).

The lack of a verbatim record also has an impact on the few members of the public who are actually able to attend the proceedings in person. Transcribing an entire bail hearing is extremely difficult, even for skilled note-takers, because the hearings typically involve rapid exchanges of large volumes of jargon-laden information, often in a very condensed period of time. The hearings are extremely brief—typically under four minutes in length—and occur in quick succession, one after another. Moreover, no information about the arrestees or their cases is ever disclosed in advance of each hearing. Faced with these constraints, most people would struggle to compile even a basic record of what happens during the hearings

(including, for instance, the arrestee's name and charges, the prosecutor's bail recommendation, defense counsel's response to that recommendation, the magistrate's questions for the parties, and the court's final bail decision). The obvious difficulty of accurately transcribing this information—all by hand and in real time—only underscores the value that a verbatim record would provide to the public.

Finally, the lack of any verbatim record raises serious fairness concerns for the arrestees themselves. Any arrestee who seeks to challenge a magistrate's initial bail decision would likely struggle to do so in the absence of a verbatim account of what transpired during the preliminary arraignment. For instance, if a magistrate sets bail without considering an arrestee's ability to pay, that oversight might provide the arrestee with a strong basis for an appeal. *See* Pa. R. Crim. P. 528(a)(2) (requiring any magistrate who "determines that it is necessary to impose a monetary condition of bail" to consider "the financial ability of the defendant"). But, without a record, the arrestee might not be able to show that the magistrate failed to consider a mandatory factor.

The fact that the magistrate's bail decision is reviewed *de novo* does not eliminate the broader fairness concern: after all, the bail appeal *also* takes place off the record and is typically conducted through counsel, entirely outside of the presence of the arrestee. Arrestees may therefore have difficulty learning exactly what was said during the bail appeal and ensuring that their arguments and relevant biographical information were accurately conveyed. And if the arrestee's initial bail appeal is

unsuccessful, he or she must then wait (in jail) for an opportunity to seek further review—again, without the benefit of any verbatim record of the initial bail proceedings. The absence of any such record—at both the preliminary arraignment and the initial bail appeal—thus deprives arrestees of the information they need to understand how bail was initially set in their cases and to obtain meaningful review of those initial bail decisions.[3]

B. The magistrates' stated concerns about the costs of preserving a public record of the proceedings are overstated.

The magistrates have indicated that they "object to recording preliminary arraignments on the grounds that doing so would require additional resources." Special Master's Report 37. But that argument ignores the fact that the Municipal Court is *already* audio-recording preliminary arraignments. As the magistrates recently stated in a filing in federal court, the Municipal Court began "mak[ing] audio recordings of preliminary arraignments" in April 2019 for its own internal purposes. *See Philadelphia Bail Fund v. Bernard*, No. 19-cv-3110 (E.D. Pa.), Supplemental Stipulation of Facts, ECF No. 42, at 1 (attached as Exhibit A). Although the Municipal Court does not make these recordings available to the public, it uses them

[3] Although Rule of Criminal Procedure 112(D) permits the parties to any criminal proceeding to make their own electronic recordings of the proceeding, that option is not realistically available to arrestees or their counsel during preliminary arraignments. As the Special Master's Report notes, arrestees must participate in their preliminary arraignments remotely (via video conference) and do not have access to recording devices while in custody. *See* Special Master's Report 7.

"to address technical issues, such as the quality of the microphones" in the courtroom and "for general performance monitoring of the Arraignment Court Magistrates by the President Judge." *Id.* at 1-2.

In other words, recording the preliminary arraignments would not impose any *additional* costs on the court system. And any costs that the court might incur from making copies of the recordings would be minimal and could easily be passed on to members of the public who seek to purchase those copies (as happens in many other courts). Thus, the magistrates' purported concern about the costs of creating verbatim records of preliminary arraignments—which is the only apparent basis for their objection—should not stop this Court from directing the magistrates to create such records. The public can request a verbatim record of virtually every other type of pretrial proceeding in the First Judicial District, including many where bail issues are discussed. And the fact that the Municipal Court is already creating its own recordings of the proceedings only reaffirms that such recordings play a valuable role in overseeing the magistrates' performance of their duties.

CONCLUSION

For the foregoing reasons, this Court should require that (1) arraignment court magistrates state their reasons for every bail decision on the record; and (2) all

preliminary arraignments be recorded in a manner that enables the parties and the public to obtain an audio or written transcript of any preliminary arraignment.

Respectfully submitted,

Jon Cioschi

NICOLAS Y. RILEY (DC Bar 1617861)
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, DC 20001
202-662-4048
nr537@georgetown.edu

JON CIOSCHI (PA Bar 318793)
WISEMAN & SCHWARTZ, P.C.
718 Arch Street, Suite 702N
Philadelphia, PA 19106
267-758-2326
cioschi@wisemanschwartz.com

January 30, 2020

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font, spacing, and type-size requirements of Rule of Appellate Procedure 531(b)(3). I further certify that this brief contains 2,590 words, excluding the portions of the brief excluded from the word count by Rule 2135(b).

Jon Cioschi

JON CIOSCHI
Counsel for Amicus Curiae

Exhibit A

Supplemental Stipulation of Facts from

Philadelphia Bail Fund v. Bernard, No. 19-cv-3110 (E.D. Pa.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MERRY REED; PHILADELPHIA BAIL FUND,

Plaintiffs,

v. Civil Action No. 2:19-3110

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, JANE RICE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF JEWELL WILLIAMS, in his official capacity,

Defendants.

Supplemental Stipulation of Facts

The parties stipulate, for the purposes of their cross-motions for summary judgment, that the following facts are undisputed:

1. The Municipal Court makes audio recordings of preliminary arraignments held in the Stout Criminal Justice Center. The Municipal Court began making these recordings in April 2019.

2. The Municipal Court states these recordings are used to address technical issues, such as the quality of the microphones used during preliminary arraignments.

3. The Municipal Court states these recordings also allow for general performance monitoring of the Arraignment Court Magistrates by the President Judge.

4. The recordings are not used for any judicial purpose related to a particular arraignment or case: they are neither filed of record nor used in making a judicial determination or decision related to a particular case.

5. The presiding magistrate controls the recording software from the bench.

6. These recordings are not done under the purview of the First Judicial District's Digital Recording Program, which is used to create official court transcripts of other proceedings. The Court does not employ Digital Recording Technicians to monitor these internal recordings, as it does for those proceedings administered by the Digital Recording Program.

7. The recordings are for internal use only.

8. The recordings are not available to the parties or the public, and they may not be used by either party for purposes of an appeal or any subsequent hearings.

Respectfully submitted,

/s/ *MICHAEL DALEY*
MICHAEL DALEY, ESQUIRE
MEGAN L. DAVIS, ESQUIRE
Administrative Office of PA Courts
1515 Market Street, Suite 1414

/s/ NICHOLAS Y. RILEY
NICOLAS Y. RILEY*
ROBERT D. FRIEDMAN*
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION

Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6300, Fax: (215) 560-5486

Counsel for Judicial Defendants

/s/ SEAN J. MCRATH
SEAN J. McGRATH
AMY KIRBY
Assistant City Solicitor Pa.
City of Philadelphia Law Department
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5444 (phone)
sean.mcgrath@phila.gov

Counsel for Sheriff Defendant

Dated: JANUARY 6, 2020

GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, DC 20001
Tel.: 202-662-4048
Fax: 202-662-9248
nr537@georgetown.edu
rdf34@georgetown.edu
* *Admitted pro hac vice.*

MICHAEL BERRY
PAUL J. SAFIER
SHAWN F. SUMMERS
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Tel.: 215-665-8500
Fax: 215-864-8999
berrym@ballardspahr.com
safierp@ballardspahr.com
summerss@ballardspahr.com

Counsel for Plaintiff

Dated: JANUARY 6, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MERRY REED; PHILADELPHIA BAIL FUND,

Plaintiffs,

v. Civil Action No. 2:19-3110

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, JANE RICE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF JEWELL WILLIAMS, in his official capacity,

Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies that on *January 6, 2020*, he caused the foregoing *Supplemental Stipulation of Facts* to be served via CM/ECF on all counsel of record.

/s/ Michael Daley
MICHAEL DALEY, ESQUIRE
Attorney I.D. No. PA 77212
Supreme Court of Pennsylvania
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6300, Fax: (215) 560-5486
Counsel for Defendants Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin,

James O'Brien, Jane Rice, and Robert Stack, in their official capacities; President Judge Patrick Dugan, in his official capacity.