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HRW.org

Dear Members of the Criminal Procedural Rules Committee:

Human Rights Watch (“HRW”) is a nonprofit international human rights organization that investigates and advocates to end human rights abuses, including in the United States criminal legal system. In 2017, HRW published *“Not in it for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, a comprehensive report on the impact of pre-trial detention with a focus on California.¹ In 2020, Human Rights Watch and the American Civil Liberties Union published *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, a report documenting probation and parole (“supervision”) practices with a focus on three states including Pennsylvania.²

HRW applauds the Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee (“the Committee”) for proposing rules that would make vital changes to Pennsylvania’s pre-trial and probation violation systems. If adopted and implemented, the rules would substantially limit the number of people jailed while awaiting trial or probation violation proceedings and provide critical due process protections.

HRW is concerned, however, that some proposed rules would cause harm, and others do not go far enough to protect due process rights. HRW urges the Committee to consider the following

¹ Human Rights Watch, *“Not in it for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, 2017, <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.

² Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, 2020, <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>.

recommendations, detailed further below, that would limit incarceration and help people access needed resources in their communities:

1. **Rule 520.1:** Do not expand the purposes of detention to include risk of “self-harm” or “the integrity of the judicial system,” which would dramatically expand the use of incarceration, particularly for people with disabilities. Additionally, given many people do not appear for court due to transportation or childcare challenges, only permit detention to protect against *willful* non-appearance.
2. **Rule 520.10:** Wherever possible, provide voluntary, community-based supports and resources rather than imposing onerous release conditions. Where courts impose liberty-restricting conditions, require “clear and convincing evidence” that detention is necessary and proportionate to prevent the individual from physically harming another person or willfully fleeing from the legal proceedings.
3. **Rules 520.18-520.19:** Eliminate the use of algorithmic Risk Assessment Tools, which are inaccurate and replicate racial biases.
4. **Rule 708.1(c):** Do not permit probation detainers based on risk “to the defendant’s safety” or of non-willful flight.
5. **Rule 708.1(d):** Require *Gagnon I* hearings—or at least detention hearings—within 48 hours of arrest on a probation detainer, and heighten the standard to jail people pending *Gagnon II* hearings, to limit unnecessary and harmful incarceration.

Rule 520.1: Do Not Expand the Purposes of Detention to Include Risk of “Self-Harm” or “The Integrity of the Judicial System.” Require Evidence of *Willful Non-Appearance*.

Proposed Rule 520.1 would dramatically expand pre-trial incarceration in Pennsylvania. The proposed Rule subverts the primary purposes of bail according to Pennsylvania law—to ensure the appearance of those accused of crimes at legal proceedings and ensure the safety of any person and the community.³ It also

³ *Com. v. Truesdale*, 296 A.2d 829, 835 (Pa. 1972) (Under the Pennsylvania Constitution, the “fundamental purpose of bail is to secure the presence of the accused at trial.”); Pa. Const. Art. 1 § 14.

subverts the Committee’s express goal of “detaining the least number of people . . . as is necessary to reasonably ensure” these goals.”⁴

Permitting incarceration to protect “the integrity of the judicial system” is unduly vague and could be interpreted to allow authorities to jail people for *any* reason—including arbitrary or discriminatory factors, and reasons unrelated to community safety or risk of flight. The comment section of this proposed rule states that “reasonably assuring the integrity of the judicial system includes protection against likely witness intimidation and destruction of evidence.” In certain circumstances, after a thorough evidentiary hearing, these may be legitimate reasons to permit incarceration⁵ but even assuming these comments are binding, they do not narrow this definition sufficiently to cure its vagueness. The Committee should eliminate this basis for detention.

Additionally, detaining people based on the likelihood they will harm themselves puts people with disabilities at a substantial risk of incarceration.⁶ Nationwide, high numbers of people accused of crimes and serving terms of probation and parole have disabilities.⁷ In Pennsylvania as of 2017, 29 percent of incarcerated people had a mental health condition.⁸ Seventy percent of people admitted to Pennsylvania state prisons have substance-use disorders.⁹ Given its likely disparate impact on people with disabilities, this provision risks failing to provide people with disabilities an equal opportunity to complete probation, parole, or pre-trial release, potentially in violation of the Americans with Disabilities Act (“ADA”)¹⁰ and is inconsistent with

⁴ Supreme Court of Pennsylvania Criminal Procedural Rules Committee, Publication Report at 56 (2021), <https://www.pacourts.us/Storage/media/pdfs/20211228/150910-publicationreportrebail.pdf>.

⁵ “*Not in it for Justice*,” p. 67, n. 218.

⁶ See Comment to Proposed Rule 520.1 (explaining that “[a]n immediate risk of physical self-harm may include crisis induced by alcohol, drug, or mental health issues requiring emergent intervention”); Human Rights Watch & ACLU, *Revoked*, at 174 (Philadelphia judge stated “I would rather people go through withdrawal in prison than die on the street”).

⁷ See Human Rights Watch & ACLU, *Revoked*, at 162-63 (discussing high rates of mental health conditions among people in jail and prison and serving terms of probation and parole); 170 (discussing high rates of substance use disorder among incarcerated and supervision populations).

⁸ Samantha Melamed, *Can Pennsylvania find a way out for thousands of mentally ill inmates languishing in county jails?*, The Philadelphia Inquirer (Apr. 4, 2017), <https://www.inquirer.com/philly/news/politics/Can-PA-find-a-way-out-for-thousands-of-mentally-ill-inmates-languishing-in-county-jails.html>.

⁹ Samantha Melamed & Dylan Purcell, *Punishing Addiction*, The Philadelphia Inquirer (Oct. 24, 2019), <https://www.inquirer.com/news/inq/probation-parole-pennsylvania-philadelphia-addiction-criminal-justice-system-20191024.html>.

¹⁰ Americans with Disabilities Act, 42 U.S.C. § 12132 (prohibiting disability discrimination by public entities); 25 C.F.R. § 35.130 (b) (articulating forms of disability discrimination); see United States Department of Justice Civil Rights Division, “Ensuring Equality in the Criminal Justice System for People with Disabilities,” <https://www.ada.gov/criminaljustice/>.

international human rights standards prohibiting discrimination—including policies that have discriminatory effect, regardless of intent—on the basis of disability.¹¹

Further, incarcerating people does not stop them from harming themselves and could in fact induce self-harm. Many people do not receive needed mental health services or substance use disorder treatment in jail.¹² Moreover, jail itself is traumatizing and can further destabilize peoples’ mental health, as well as make people struggling with substance use disorder more likely to use drugs and to overdose due to reduced tolerance upon release.¹³ Incarcerated people also face higher risks of suicide than the general population: in 2020, suicides in Pennsylvania jails and prisons reached an all-time high, and occurred at a rate double the national average.¹⁴ Instead of permitting detention based on perceived risk of self-harm, the Commonwealth should connect people with voluntary, community-based, mental health and substance use disorder services.¹⁵

Finally, the Committee should clarify the purpose of bail – to reasonably assure that the defendant does not willfully fail to appear for legal proceedings. Many accused individuals do not appear for court due to factors beyond their control, such as lack

¹¹ International Covenant on Civil and Political Rights, art. 2(1) (prohibiting discrimination “of any kind”) adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States June 8, 1992, art. 9(1) The UN Human Rights Committee, the authoritative body charged with interpreting the ICCPR, has made clear that discrimination occurs not only where there is discriminatory intent, but also where there is a discriminatory effect. UN Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994), p. 26, para. 10 (stating that “discrimination” means “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”) (emphasis added). The United States has signed but not ratified the Convention on the Rights of Persons with Disabilities, which also specifically prohibits discrimination against persons with disabilities. See Convention on the Rights of Persons with Disabilities (CRPD), G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No.49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 5; See also “United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court,” United Nations General Assembly, May 4, 2015, paras. 56 and 122. <https://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/March2015/WGAD.CRP.1.2015.pdf>

¹² See Human Rights Watch & ACLU, *Revoked*, at 168-69 (discussing inadequate mental health services in jails and prisons), 174-79 (same for substance use disorder treatment).

¹³ *Id.*

¹⁴ Samantha Melamed, *Pennsylvania prison suicides are at an all-time high. Families blame ‘reprehensible’ mental-health care*, The Philadelphia Inquirer, Feb. 20, 2020, <https://www.inquirer.com/news/graterford-prison-suicide-pennsylvania-lawsuits-correct-care-solutions-mhm-20200220.html>.

¹⁵ See Human Rights Watch & ACLU, *Revoked*, at 204-208 (discussing proposed reforms).

of transportation or childcare, or because they simply forgot their court date.¹⁶ The Commonwealth should provide support—including court-appearance reminders as required by proposed Rule 520.18(c)—to help people appear for their court dates, not create rules that undermine this purpose.

Rule 520.10: Provide Supports, Rather Than Onerous Conditions, and Require “Clear and Convincing Evidence” to Impose Liberty-Restricting Conditions of Release.

Proposed Rule 520.10 permits magistrates to impose a host of probation-like conditions, including maintaining or seeking employment, complying with a curfew, regular reporting, and electronic monitoring. Many of these conditions are not necessary or proportionate to ensuring appearance in court and can infringe on rights.¹⁷ Further, these rules are difficult to navigate without adequate resources such as stable housing, a steady job, and reliable transportation, and thus regularly lead to technical violations, especially for Black and brown people.¹⁸ In 2017, a quarter of all Pennsylvania prison admissions stemmed from technical parole violations alone.¹⁹

Rather than requiring compliance with conditions, wherever possible the Commonwealth should connect people with voluntary, community-based services and supports, including assistance securing housing, employment, and mental health, or evidence-based substance use disorder treatment.²⁰ Additionally, the Commonwealth should offer supports including court date reminders²¹—as required

¹⁶ See Bail Project, *After Cash Bail: A Framework for Reimagining Pretrial Justice* at 20 (2020), <https://bailproject.org/after-cash-bail/#easy-footnote-bottom-4-39386>; Human Rights Watch & ACLU, *Revoked*, at 75-78.

¹⁷ See *United States v. Salerno*, 481 U.S. 739, 754 (1987) (“conditions of release or detention [cannot] be ‘excessive’ in light of the perceived evil” of protecting public safety and preventing flight); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”); See Bail Project, *After Cash Bail* at 14; See George Washington University Law School, “*Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System*,” 2021, <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3>

¹⁸ See generally Human Rights Watch & ACLU, *Revoked*.

¹⁹ Council of State Governments Justice Center, *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets*, 2019, <https://csgjusticecenter.org/publications/confined-costly/?usState=PA#primary>.

This figure does not even include probation violations, for which data was unavailable. *Id.*

²⁰ See The Bail Project, *After Cash Bail* at 21-22; Human Rights Watch, “*Not in it for Justice*” at 114-19 (proposing detailed recommendations to reform pre-trial detention); Human Rights Watch & ACLU, *Revoked*, at 202-223 (discussing alternatives to supervision and providing detailed recommendations to reduce supervision systems, including in Pennsylvania).

²¹ See Ross Hatton, “Research on the Effectiveness of Pretrial Court Date Reminder Systems,” UNC School of Government Criminal Justice Innovation Lab (Mar. 2020), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/03/Court-Date-Notifications-Briefing-Paper.pdf> (providing an analysis of available data on pretrial court date reminder systems finding that most state’s programs resulted in statistically significant improvements for failure to appear rates).

by proposed Rule 520.18—and court transportation services,²² which are less costly and rights restricting than incarceration or supervision and demonstrably curb failure to appear rates.²³

Where the Commonwealth imposes non-monetary conditions of release that restrict peoples’ liberty, it should demonstrate, by “clear and convincing evidence,” that the conditions are necessary to prevent willful flight or physical harm to another person.²⁴ Additionally, the Commonwealth should not require people to pay for conditions of their release, such as electronic monitoring or treatment programs.

Rules 520.18-520.19: Eliminate the use of Risk Assessment Tools.

The Committee should eliminate the use of algorithmic Risk Assessment Tools (“RATs”). RATs rely on data, such as criminal history, residential stability, and employment history, that contain race and class biases. They also make judgments based on statistical estimates of what people might do, that come from surveys of what others have done in the past, and their scoring systems are arbitrary and adjustable, thus easily manipulated to meet authorities’ perceived detention needs rather than what would be necessary on an individualized basis.²⁵ The results replicate and reinforce these biases, and therefore lead to poor people and Black and brown people being disproportionately labeled as “high risk”—making it more likely that they will be detained.²⁶

²² See Brice Cook et al., “Using Behavioral Science to Improve Criminal Justice Outcomes,” UChicago Urban Labs: Crime Lab (Jan. 2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> (explaining that supportive interventions including transportation assistance were effective compared to punitive and surveillance tools); Mukhtar M. Ibrahim, “Minneapolis will Offer Free Rides to Court for those Charged with Low-level Offenses,” Star Tribune (Jan. 16, 2019), <https://www.startribune.com/minneapolis-will-offer-free-rides-to-court-for-those-charged-with-low-level-offenses/504458952/>.

²³ See Lisa Pilnik et. al, “A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency,” National Institute of Corrections, 47 (Feb. 2017) <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf> (providing people with notification of upcoming court appearances was highly effective at reducing peoples’ risk of failure to appear); The Bail Project, *After Cash Bail*: at 21 (Bail Project clients who are functionally released on recognizance with court reminders consistently return for their court dates, appearing for over 90% of their criminal legal proceedings).

²⁴ For the reasons discussed above, the Committee should not add “substantial physical self-harm” or “the integrity of the judicial system risk” as bases for detention or imposition of monetary or non-monetary conditions of release.

²⁵ See Human Rights Watch, “Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions,” June 1, 2018, <https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions>.

²⁶ See Human Rights Watch, “Not in it for Justice” at 87-107; “Statement to the California Judicial Council Pretrial Reform and Operations Workgroup,” Human Rights Watch statement, February 11, 2020, <https://www.hrw.org/news/2020/02/11/human-rights-watch-statement-california-judicial-council-pretrial-reform-and#>; Chelsea Barbaras, et al., “The Problems with Risk Assessment Tools,” *N.Y. Times*, July 17, 2019, <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html>;

Instead of relying on algorithms, courts should honor people’s due process rights by conducting thorough, individualized hearings.²⁷

Rule 708.1(c): Do Not Permit Probation Detainers Based on Risk “to the Defendant’s safety” or of Non-Willful Flight.

Proposed Rule 708.1(c) provides critical limits on incarceration while people await probation violation proceedings. Today, probation authorities across Pennsylvania regularly jail people absent any evidence that they pose a flight or safety risk, including for technical violations and for new offense violations when they would otherwise be released pending trial.²⁸

The proposed Rule’s prohibition on lodging detainers for alleged new offense violations, and for alleged technical violations absent an ongoing public safety or flight risk, are vital. However, for the reasons discussed with respect to proposed Rule 520.1 and in light of the disproportionate impact including language on “self-harm” would have on people with disabilities without justification, the Committee should not permit detention based on risk “to the defendant’s safety.” Further, where flight is at issue, the Committee should only permit detention based on risk of the defendant’s *willful*/non-appearance.

Rule 708.1(d): Require *Gagnon I* Hearings—or Separate Detention Assessments—within 48 Hours, and Heighten the Standard for Detention.

Proposed Rule 708.1(d) offers crucial due process protections for Pennsylvanians incarcerated on detainers. Currently, there are no statewide regulations regarding when courts must hold *Gagnon I* hearings²⁹—meaning in parts of Pennsylvania, people are incarcerated for months before any hearing.³⁰

Massachusetts Institute of Technology, letter, “Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns,” July 16, 2019, https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf; Matt Henry, “Risk Assessment: Explained,” *The Appeal*, March 25, 2019, <https://theappeal.org/risk-assessment-explained/>; Julia Angwin, et al., “Machine Bias,” *ProPublica*, May 23, 2016, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

²⁷ See Human Rights Watch, “*Not in it for Justice*,” at 114-119 (providing recommendations to reform pre-trial detention).

²⁸ See Human Rights Watch & ACLU, *Revoked*, at 90-93 (describing widespread use of detainers, including in Pennsylvania).

²⁹ See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (people facing probation and parole revocation are “entitled to two hearings”—a preliminary hearing, commonly referred to as a “*Gagnon I*” hearing, and a final revocation hearing, called a “*Gagnon II*” hearing).

³⁰ See Human Rights Watch & ACLU, *Revoked*, at 94-102 (describing prolonged incarceration pending revocation proceedings, including in Pennsylvania); *El v. 38th Judicial District*, No. 376-MD-2021 (Pa. Cmwlth. Ct.) aclupa.org/montco (class-action lawsuit challenging automatic and prolonged incarceration pending revocation proceedings in Montgomery County, Pennsylvania).

The proposed rule requiring a *Gagnon I* hearing within 14 days of detention is a significant step forward. Yet 14 days is far too long to incarcerate a person absent any assessment of the strength of the allegations against them, their willful flight, or public safety risk. Even a few days in jail can cause devastating harm, disrupting access to jobs, housing, health care, and family, while exposing people to violence, abuse, and illness behind bars.³¹ Under international human rights law, anyone detained or arrested on a criminal charge, in all cases without exception, is entitled to a prompt hearing, generally within 48 hours of their detention.³²

Where individuals are detained, the Committee should require the court to hold *Gagnon I* hearings within 48 hours of detention. If it is not feasible to hold a *Gagnon I* hearing within that time period, the court should at a minimum hold a detention hearing within 48 hours.³³

Additionally, the court should specify the standard for incarcerating an individual pending their *Gagnon II* hearing—namely, a court should be permitted to order detention only upon a finding that detention is necessary and proportionate to prevent the accused from physically harming another person or willfully failing to appear for proceedings, and that no non-monetary condition or combination of conditions could ameliorate these risks. In this case, the court should be required to impose the least restrictive non-monetary conditions necessary to reasonably prevent physical harm to another person or willful flight, with a presumption of release without conditions.³⁴

The proposed Rules would significantly limit incarceration for people accused of crimes and probation violations in Pennsylvania, and provide critical due process protections. However, some Rules would subvert that goal by expanding the bases for detention. HRW urges the Committee to adopt these recommendations to prevent unnecessary detention and help people get the services they need in their communities.

³¹ See Human Rights Watch & ACLU, *Revoked*, at 103-08 (describing harms of incarceration pending revocation proceedings, including in Pennsylvania).

³² UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, December 16, 2014, paras. 32 and 33; See also Human Rights Watch & ACLU *Revoked*, at 196.

³³ Other jurisdictions impose similar requirements. See, e.g., 2021 NY S.B. 1144 § 4 (iv) (“Less is More Act”) (requiring recognizance hearing within 24 hours of arrest on parole detainer); Miss. Code Ann. § 47-7-37(3) (requiring preliminary revocation hearing within 72 hours of arrest for alleged supervision violation); *Gawron v. Roberts*, 113 Idaho 330, 336-37 (Idaho Ct. App. 1987) (requiring preliminary supervision revocation hearing within two days of arrest).

³⁴ See 2021 NY S.B. 1144 § 4 (iv)–(vii).

We would be happy to provide further information upon request.

Sincerely,

A handwritten signature in black ink that reads "Laura Pitter". The signature is written in a cursive style with a large initial "L".

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