



TESTIMONY SUBMITTED BY  
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THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA  
TO THE  
HOUSE DEMOCRATIC POLICY COMMITTEE  
PUBLIC HEARING ON PROPOSALS TO ELIMINATE CASH BAIL

March 18, 2021

Good morning, representatives. My name is Jessica Li, and I am the criminal justice investigator at the ACLU of Pennsylvania. I would like to thank Representative Lee, Chairman Bizzarro, and the House Democratic Policy Committee for hosting this hearing and for inviting us to testify today. In my role as an investigator, my work has focused primarily on bail and other forms of pretrial detention, so I greatly appreciate the committee taking up this critical issue.

Bail reform has been a cornerstone of our multi-year [Campaign for Smart Justice](#), which aims to: 1) reduce the number of people incarcerated in our prisons and jails; and 2) challenge racial disparities in the criminal legal system. Bail reform contributes to both those outcomes. Some of our recent work includes: a 2019 [report on cash bail practices in Allegheny County](#); a [lawsuit](#) against the Philadelphia Arraignment Court Magistrates based on data we collected while observing over [2,000 bail hearings](#); and a [decision by the Supreme Court of Pennsylvania](#) to investigate Philadelphia's bail practices under its King's Bench authority.<sup>1</sup> Additionally, we will soon be releasing a statewide report on bail in Pennsylvania with an accompanying interactive website that includes granular data on cash bail practices of magisterial district judges (MDJs) throughout the commonwealth. All of our work is done in conversation and consultation with coalition partners and people directly impacted by Pennsylvania's bail practices.

On any given day, over 36,000 people sit in Pennsylvania's county jails, 62% of whom have not been convicted of a crime.<sup>2</sup> Too many people in our commonwealth are incarcerated not because they are guilty, but simply because they are too poor to purchase their freedom. In the face of mounting concern, policymakers are turning to the state legislature for remedy. But this prompts the question: What are the best legislative remedies to address bail practices in Pennsylvania?

The law governing bail is sound as written. Cash bail is rampant not because the law is deficient, but because magisterial district judges (MDJs) fail to follow it. As a result — and it is important to emphasize this — **we do not believe simply prohibiting or eliminating the use of cash bail through legislation is the right solution**. In fact, legislation that eliminates cash bail, may lead not only to greater pretrial detention but also to wider racial disparities. We do, however, believe there are legislative solutions that can remedy related drivers of unjust pretrial detention in Pennsylvania.

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<sup>1</sup> *N.B.*: The [order from the court](#) includes bail remedies the court may consider (pg. 4-6).

<sup>2</sup> Vera Institute of Justice, Pennsylvania Incarceration Trends Fact Sheet, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-pennsylvania.pdf>.

## Current Law

### The Pennsylvania Constitution and Rules of Criminal Procedure

**The Pennsylvania Constitution rigorously protects pretrial liberty and dictates that pretrial detention should be exceedingly rare.**

The Pennsylvania Constitution guarantees a broad right to pretrial liberty, which the government may not restrict except in exceedingly rare and limited circumstances. The right to pretrial liberty is crucial: all individuals are innocent until proven guilty. The Pennsylvania Constitution prohibits “excessive bail”<sup>3</sup> and only permits pretrial detention, or the denial of bail, if the defendant faces life imprisonment or in the rare instance where the defendant poses such a threat that “no condition or combination of conditions other than imprisonment” can guarantee public safety.<sup>4</sup>

And the Pennsylvania Rules of Criminal Procedure, which govern bail, were designed to safeguard pretrial liberty and enshrine the presumption of innocence.

**The Pennsylvania Rules of Criminal Procedure provide judges five options for pretrial release:**

1. Release on recognizance (ROR) (a written promise to show up for their court date);
2. Release on non-monetary conditions (such as reporting requirements, restrictions on travel, or any other appropriate condition to ensure the defendant’s appearance and compliance with bail);
3. Release on unsecured bail (release conditioned upon the promise to be liable for a fixed sum of money if the person fails to appear in the future);
4. Release on nominal bail (release upon a small amount of cash with the agreement that a designated person will ensure the person’s return to court);
5. Release on a monetary condition (cash bail).

All types of release require the defendant to appear at future court dates, obey all orders of the bail authority, notify the court of any address change, refrain from criminal activity and neither do, nor cause, nor permit, any witness or victim intimidation.<sup>5</sup> If the defendant violates any of these conditions, her bail may be modified or revoked.<sup>6</sup>

### Bail authorities: magisterial district judges (MDJs) and arraignment court magistrates (ACMs)

Within every county, except for Philadelphia,<sup>7</sup> residents elect magisterial district judges (MDJs).<sup>8</sup> MDJs serve six-year terms and are responsible for [bail hearings in addition to early proceedings in nearly all criminal cases, low-level civil cases, protection from abuse orders, and traffic citations](#). The law does not require MDJs to have a law degree; any registered voter over 21 living within the district can become an MDJ so long as they can successfully complete 40 hours of training and pass one examination.<sup>9</sup> Only [35% of Pennsylvania’s MDJs](#) have law degrees. Moreover, holding office as an MDJ does not preclude people from holding other jobs, such as [real estate agent, landscaper, or garden nursery owner](#).

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<sup>3</sup> [Pa. Const. Art. 1 § 13](#).

<sup>4</sup> [Pa. Const. Art. 1 § 14](#).

<sup>5</sup> [Pa. R. Crim. P. 526](#).

<sup>6</sup> *Id.* (comment).

<sup>7</sup> In Philadelphia, arraignment court magistrates (ACMs) assign bail. ACMs are not elected, but rather appointed by a panel of judges from the First Judicial District. Unfortunately, the problems in Philadelphia mirror the rest of the state.

<sup>8</sup> [Pa. Const. Art. 5 § 7](#); [42 Pa.C.S.A. § 1511](#).

<sup>9</sup> [42 Pa.C.S.A. § § 3112, 3113](#).

## Judges must consider the least restrictive form of bail first.

Bound by the constitutional presumption of innocence, the bail authority — either arraignment court magistrates (ACMs) in Philadelphia or magisterial district judges (MDJs) in the rest of the state — must begin every bail consideration by determining whether ROR, the least restrictive form of bail, will ensure a person’s appearance and compliance with pretrial conditions.<sup>10</sup> *The MDJ may consider other bail alternatives only if ROR is insufficient.*<sup>11</sup> Then, before deciding what, if any, conditions to place on an individual’s release, the MDJ must consider a variety of factors relevant to whether a person will return to court for future hearings, including an individual’s family relationships, community ties, and financial condition.<sup>12</sup>

## Money bail may not be a default.

When cash bail is set, a person must pay a sum of money in order to be released. As an incentive, the idea is simple: if a person does not return to court, they will lose that sum of money. If the MDJ determines that cash bail is necessary to ensure appearance, it may only be assigned in a reasonable amount after the MDJ conducts a rigorous investigation into the defendant’s financial ability to pay.<sup>13</sup>

## Money bail can never be used solely for the purpose of incarcerating someone until trial.

A court may only detain a defendant pretrial if the accused is charged with homicide or poses such a grave danger to public safety “that no condition or combination of conditions can reasonably assure the safety of any person and the community.”<sup>14</sup>

The law precludes MDJs from using cash bail as *de facto* detention orders— in other words, they cannot impose unaffordable bail in order to guarantee that individuals will be incarcerated pretrial. As the Supreme Court of Pennsylvania recently reaffirmed, “No condition of release, whether non-monetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.”<sup>15</sup> Despite these clear rules, MDJs routinely impose unaffordable cash bail that keeps people in jail.

Pennsylvania’s existing law delineates a thorough and rigorous procedure for setting bail: it strenuously protects the constitutional right to pretrial liberty; it de-emphasizes the use of cash bail; and it prohibits the use of cash bail to keep a person incarcerated until trial. The law, if faithfully followed, severely limits the use of cash bail. Moreover, in the rare instances when cash bail is set, it must be reasonable and tied directly to the person’s ability to pay. Pennsylvania’s current state of mass pretrial incarceration is antithetical to existing law and fundamental constitutional principles.

## The Practice is the Problem

**Pennsylvania’s current law related to bail is good — it protects pretrial liberty. However, the elected officials responsible for setting bail ignore the law, engaging in unconstitutional bail practices that result in mass pretrial incarceration.**

Although cash bail has existed since the colonial era, mass incarceration — and pretrial incarceration, specifically — is a modern phenomenon.<sup>16</sup> It is only in recent decades that judges began to use cash bail more frequently and in higher amounts that result in pretrial detention. Unlike in other jurisdictions, the problem in Pennsylvania is not with the law, but rather with its *practice*. MDJs, the judges who determine Pennsylvanians’ pretrial freedom, *simply do not follow the law*.

<sup>10</sup> [Pa. R. Crim. P. 524 \(comment\)](#).

<sup>11</sup> *Id.*

<sup>12</sup> [Pa. R. Crim. P. 523\(A\)](#).

<sup>13</sup> [Pa. R. Crim. P. 528](#).

<sup>14</sup> [Pa. Const. art. 1 § 14](#).

<sup>15</sup> [Philadelphia Community Bail Fund v. Arraignment Court Magistrates](#), 21 EM 2019 (Pa. 2020).

<sup>16</sup> See generally, Schnacke, T. R. (2018). [A Brief History of Bail](#). *The Judges’ Journal*, American Bar Association, 57(3), 4-7.

In cursory, slipshod hearings, often held behind closed doors, MDJs routinely set bail in violation of existing law. The ACLU of Pennsylvania spent months investigating bail practices across the commonwealth. Through extensive research, court-watching, and interviews with stakeholders and people incarcerated in county jails, we found that MDJs fail to conduct careful, individualized assessments; they regularly impose cash without consideration for the defendant's ability to pay; and they routinely impose money bail for the sole purpose of keeping someone incarcerated until their trial. In other words, they ignore the law.

***“The rise in pretrial incarceration is not so much the result of changes in positive law or policy as it is the result of changing judicial practices and attitudes.”<sup>17</sup>***

— Mitali Nagrecha, Sharon Brett, and Colin Doyle, Criminal Justice Policy Program at Harvard Law School

## Legislative Recommendations

Legislation, if not tailored and targeted appropriately, risks weakening bedrock constitutional protections and exacerbating the devastating problem with pretrial detention. We also caution the legislature against the use of risk assessment tools. Experts have warned that risk assessment tools are fundamentally flawed and may lead to racially biased results.<sup>18</sup> Along with a growing number of organizations, including the [Leadership Conference Education Fund](#), [Pretrial Justice Institute](#), [Algorithmic Justice League](#), and others, the ACLU of Pennsylvania rejects any use of risk assessment tools in its advocacy for pretrial justice.

If the Pennsylvania legislature seeks to propose reforms, a number of issues do merit legislative remedies. These can include, but are not limited to, the following:

- Increase oversight of local magisterial district court practices.
- Mandate data collection of bail-setting practices and local incarceration rates.
- Ensure bail hearings are transparent and publicly accessible.
- Implement more robust educational requirements and continuing education for magisterial district judges.
- Establish clear standards for determining ability to pay.<sup>19</sup>
- Fund public defense.
- Support alternatives to incarceration.<sup>20</sup>

### The ACLU of Pennsylvania will not support:

- Any legislation that introduces the use of risk assessment tools into pretrial decision-making.
- Any legislation that expands electronic monitoring or pretrial surveillance.
- Any legislation that expands the use of preventative or pretrial detention.

We welcome the opportunity to discuss any of these proposals in greater detail with legislators and staff.

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<sup>17</sup> Mitali Nagrecha, Sharon Brett, and Colin Doyle (2020), Court Culture and Criminal Law Reform, *Duke Law Journal Online*, 69, <https://dlj.law.duke.edu/2020/04/courtculture/>.

<sup>18</sup> See Partnership on AI, [Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System](#); New York Times, [The Problems with Risk Assessment Tools](#); and [Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns](#).

<sup>19</sup> When imposing fines, costs, or restitution, courts must determine whether a defendant is financially able to pay. However, there are no consistent or clear guidelines for how judges should make that determination. [HB 248](#) PN 216 (Miller) provides a recent example of a bill that includes clear ability to pay criteria; or see the [ACLU-PA Legal Guide to Determining Ability to Pay](#) and the ACLU's [A New Vision for Pretrial Justice in the United States](#) for additional recommendations for ability to pay standards and guidelines.

<sup>20</sup> See ACLU, *A New Vision for Pretrial Justice in the United States*, March 2019, [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_pretrial\\_reform\\_toplines\\_positions\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf).