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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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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

BRIEF OF AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Petitioners' Petition for Extraordinary Relief Under the Court's King's Bench Jurisdiction invoked by the Supreme Court by Order dated July 8, 2019.

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE*…...……………………………1

I. ARGUMENT……………………………………………...……………………2

A. Introduction and Summary of the Argument……….……………………………2

B. It is critical that this Court be clear and explicit when discussing the legal standards that Magistrate Judges and Judges of the Court of Common Pleas must follow when setting bail conditions to prevent unfair and unconstitutional practices that currently occur across the Commonwealth on a regular basis……………..……………..……………5

1. The force of the Rules of Criminal procedure needs to be clarified to prevent the use of monetary conditions of bail being used as a *de facto* detention order without sufficient due process……………………………………………….………..7

2. Modest changes to or clarifications of the Rules of Criminal Procedure are necessary to ensure that the Rules of Criminal Procedure meet the constitutional requirement of due process prior to the deprivation of liberty…………………9

i. A robust ability to pay assessment, incorporating the *in forma pauperis* criteria, should be conducted in any case in which monetary conditions are imposed…………………………………………..….….…………9

ii. When assigning a condition of bail other than ROR, bail authorities should be required to state in writing or put on the record the specific reason why the conditions of release are the least restrictive and reasonably necessary to ensure appearance, the safety of the community and compliance with conditions……………………..……………..10

iii. A defendant that is held either without bail or who remains in custody due to the imposition of monetary or non-monetary conditions, should be entitled to a timely Bail Review Hearing in the Court of Common Pleas……………………………………..……………...…..11

iv. Bail authorities need guidance regarding factors to be considered when the prosecution asks for bail to be denied based on alleged dangerousness…...…………………………………………………13

v. Robust procedural safeguards should be established for hearings that relate to a denial of pretrial release, based either upon a denial of bail or a monetary condition that acts as a *de facto* detention order……………..….15

vi. Pretrial detention should be limited to serious charges, so that defendants are not held pretrial longer than they could be held if convicted of the underlying offense………………………………………………..16

C. Unwarranted pretrial detention not only destroys lives but increases the likelihood of conviction……………………..……………………………………………….…..17

II. CONCLUSION………………………………………………………….................21

TABLE OF AUTHORITIES

Page(s)

Cases

Commonwealth v. Scarborough,
421 A.2d 147 (Pa. 1980)....................................3
Commonwealth v. Truesdale,
296 A.2d 829 (Pa. 1972)....................................13
In re Haefner,
436 A.2d 665 (Pa.Super. 1981)....................................17
Salerno v. United States,
481 U.S. 739 (1987)....................................*passim*

Statutes

18 U.S.C. §3145(c)....................................12
42 Pa.C.S. § 1515(a)(4)....................................3
42 Pa.C.S. § 3152(a)(4)....................................3
Pa. Const. Art. I, §14....................................5, 13

Rules

Pa.R.C.P. 240....................................10
Pa.R.A.P. 531....................................1

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania who are actively engaged in providing criminal defense representation. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for defendants. PACDL includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

No entity other than *amicus* and its members authored or paid for this brief.

I. ARGUMENT

A. Introduction and Summary of the Argument

The United States Supreme Court affirmed over thirty years ago that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno v. United States*, 481 U.S. 739, 755 (1987). This litigation seeks to ensure that this statement is not an empty promise but a judicial reality.

The Amended Petition for Extraordinary Relief Under the Court's King's Bench Jurisdiction ("Amended Petition") ably explains the requirements for setting and denying bail, both under the Pennsylvania and United States Constitutions and our Criminal Rules of Procedure. Moreover, the Report of the Special Master comprehensively highlights the areas of improvement necessary to make Philadelphia's bail system meet constitutional muster and reflect notions of fundamental fairness.

This Court's ruling, however, will not solely affect Philadelphia. The mandates of the Pennsylvania and United States Constitutions apply to all citizens of Pennsylvania and any modifications or clarifications this Court may consider to the Rules of Criminal Procedure would, in most instances, also apply across the Commonwealth. Thus, this Court must consider how any proposed procedures would affect the rest of the state.

Outside of Philadelphia, initial bail determinations are handled by Magisterial District Judges ("MDJs"). 42 Pa.C.S. § 1515(a)(4). Like Arraignment Court Magistrates of the First Judicial District, Magisterial District Judges need not be attorneys. *See* 42 Pa.C.S. PA ST Pt. III, Ch. 31, Subch. B, *Qualifications of Certain Minor Judiciary*. In fact, most are not. Laura McCrystal, *Montco's First African American District Judge Ran Against the Odds*, The Philadelphia Inquirer (March 9, 2016)(explaining that in 2016 only 150 out of 517 district judges across the state were lawyers).[1] Magisterial District Judges are elected for six-year terms and sit in district courts that are not courts of record. 42 Pa.C.S. § 3152(a)(4). Thus, there is never a transcript of any bail hearing at a preliminary arraignment. *Commonwealth v. Scarborough*, 421 A.2d 147, 155 n.10 (Pa. 1980). Moreover, only very rarely is counsel present; there is certainly no guarantee of counsel, and public defender's offices almost never provide counsel at preliminary arraignments.

Once bail is set, a defendant can file a motion for modification of bail with the Court of Common Pleas. The Court of Common Pleas is a court of record, and these hearings are therefore recorded. The defendant's counsel generally files bail modification motions, and thus when there is a hearing

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[1] Article available at https://www.inquirer.com/philly/news/20160309_Montco_s_first_African_American_district_judge_ran_against_the_odds.html

on such a motion, counsel is nearly always present. There is currently no time limit, however, for when a hearing on a bail modification motion must be held. It is not uncommon for Courts of Common Pleas to schedule bail modification motions for a week to a month or more from the filing of the motion.

All of the improper bail practices highlighted in the Amended Petition that occur in Philadelphia regularly occur across the rest of the Commonwealth as well. Specifically, Magisterial District Judges regularly: (1) fail to consider the release criteria enumerated in Rule 523(A), (2) impose conditions of release with the specific intent of entering a *de facto* detention order, or at a minimum without any assessment of the defendant's ability to pay, and (3) give defendants no opportunity to be heard. Hearings in front of Common Pleas Judges are often not more robust than those in front of Magisterial District Judges, even hearings in which the Commonwealth asks that bail be revoked entirely.

Part of this is simply error on the part of Common Pleas Judges, but another part is that many of the standards to be employed in bail hearings are unclear. For instance, the standard of proof that the "proof be evident or presumption great" is not clearly understood by either the bench or bar. If

the standard were labeled "clear and convincing evidence," it would be much better comprehended.

Moreover, while Rule 523(A) lists release factors relevant to the likelihood of the defendant's appearance at further court proceedings, because Rule 523 was written prior to the Pennsylvania Constitutional Amendment which allows for bail denial based upon dangerousness, there are no specific release criteria for judges to consider when evaluating whether there is "no condition or combination of conditions other than imprisonment [that] will reasonably assure the safety of any person and the community." Pa. Const. Art. I, §14. Therefore, the same modest changes to the bail system proposed by Petitioners in the First Judicial District must be applied to the rest of the Commonwealth.

B. It is critical that this Court be clear and explicit when discussing the legal standards that Magistrate Judges and Judges of the Court of Common Pleas must follow when setting bail conditions to prevent unfair and unconstitutional practices that currently occur across the Commonwealth on a regular basis.

The Report of the Special Master concludes that "the preliminary bail system as currently designed in Philadelphia is fundamentally sound." (Report of the Special Master at 2). Moreover, Petitioners state that "[w]ith modest changes to the current preliminary arraignment system, Respondents could both protect defendants' right to pretrial release and accommodate the

high number of defendants who pass through Philadelphia's arraignment court." Amended Petition at 6, ¶ 9. Similarly, with limited exceptions, there is no fault with the structure or substance of the Rules of Criminal Procedure. The problem is that those rules are often misunderstood and rarely followed.

Most of the injustices in the system could be corrected by this Court clearly and explicitly communicating to bail authorities the force of the Rules and the procedures to be followed. It is critical that this Court be clear and explicit precisely because the officers charged with making initial bail decisions in the Commonwealth are primarily non-lawyers who are not extensively educated on the nuances of the constitutional concepts of procedural or substantive due process. Judicial officers of all stripes need explicit rules to follow that can be easily comprehended.

1. **The force of the Rules of Criminal procedure needs to be clarified to prevent the use of monetary conditions of bail being used as a *de facto* detention order without sufficient due process.**

The Rules of Criminal Procedure reflect the broad constitutional right to pretrial liberty afforded to all "bailable" defendants and deemphasize the use of monetary conditions. *See* Rules of Criminal Procedure Chapter 5, Part C, Rules 520 and 523-528. In fact, the Rules presume release on recognizance ("ROR") and provide bail authorities with limited discretion to

impose additional conditions of release, if appropriate. Pa.R.Crim.P. 524 (comment) (only if the "bail authority determines that ROR will not reasonably ensure the defendant's appearance and compliance with the conditions of the bail bond" should the bail authority even consider other conditions beyond ROR). Any monetary condition of bail must reflect the defendant's ability to pay, and Rule 528 prohibits using a monetary condition as a *de facto* detention order. *See* Pa.R.Crim.P. 528.

Notwithstanding the rules, there is a large percentage of Magisterial District Judges across the Commonwealth who never or rarely order ROR. Indeed, representatives for the Commonwealth are known to explicitly ask judicial authorities to set a high bail with the specific aim of keeping the defendant incarcerated. Bail is regularly set at a level that is a *de facto* denial of release without any showing that the defendant is a danger to anyone or that there is any reason to believe he will not appear for court.

Additionally, some bail authorities have a set amount of monetary bail that they order in every case of a certain type without regard to the defendant's ability to pay, such as $5,000 bond for any retail theft charge.[2] If the person is accused of shoplifting $10 worth of food, it is unlikely that he

[2] ABA Pretrial Release Standard 10-5.3 (e) rejects bail schedules: "[f]inancial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."

or she would be able to post even a percentage of $5,000. More importantly, the amount bears no relationship to the applicable Rules governing bail. The specifics of these "rules of thumb" are less significant than the fact that Magisterial District Judges do not sit in courts of record and are not required to justify in writing the monetary conditions they impose. Thus, it is impossible to comprehensively catalogue or sometimes even uncover such practices.

It is critical that this Court be clear that ROR is the default and that the appropriate standard for release is the "least restrictive" condition or conditions necessary to ensure the defendant's appearance and the safety of the community.

The Report of the Special Master notes that whether the appropriate standard should be described as a "least restrictive" standard is "more of a semantical than substantive disagreement" between Petitioners and Respondents. (Report of the Special Master at 25). This semantic difference is important, however, because a "least restrictive" standard has a common meaning easily comprehended by non-lawyer judicial officers. The standard proposed by Respondents is not clearly articulated and thus not a helpful guide to judicial officers.

To summarize, the current Rules provide a satisfactory framework for judicial officers to utilize when setting bail. With clarification of the standards to be followed, Pennsylvania's bail practices can be substantially improved.

2. Modest changes to or clarifications of the Rules of Criminal Procedure are necessary to ensure that the Rules of Criminal Procedure meet the constitutional requirement of due process prior to the deprivation of liberty.

While the Rules of Criminal Procedure are generally sound, there are procedural issues for which the Rules are silent. This Court should clarify practice in these critical areas to ensure that defendants receive sufficient due process prior to the deprivation of liberty. PACDL agrees with all the proposals advocated by Petitioners, but how certain reforms will impact practice throughout Pennsylvania will be highlighted.

i. A robust ability to pay assessment, incorporating the *in forma pauperis* criteria, should be conducted in any case in which monetary conditions are imposed.

All parties agree that when setting monetary bail, the Rules require consideration of the defendant's ability to pay. Petitioners propose, and all parties other than Respondents agree, that use of the *in forma pauperis* criteria would ensure a constitutionally sufficient determination of ability to pay. *See* Pa.R.C.P. 240. Respondents argue that "the information collected by Pretrial Services satisfies the duty to consider the financial ability to pay

under Rule 528, and that the ACMs [Arraignment Court Magistrates] may make further inquiry with the defendant if necessary." (Report of the Special Master at 37).

Respondents do not provide under what circumstances further inquiry would become legally necessary, so this proposed standard is nebulous at best. Moreover, outside of Philadelphia, there is nothing identical to the "Pretrial Services" department whose job it is to collect such financial information. Thus, this Court should be explicit as to what types of information should be considered by bail authorities and the standard to be applied when analyzing ability to pay monetary conditions of bail. Since there is already a body of law devoted to analyzing a defendant's ability to pay, using the established *in forma pauperis* criteria only makes sense. It is clear and it has been proven to be relatively easy to apply. Thus, this Court should direct bail authorities to utilize the *in forma pauperis* criteria when conducting a robust ability-to-pay assessment.

ii. **When assigning a condition of bail other than ROR, bail authorities should be required to state in writing or put on the record the specific reason why the conditions of release are the least restrictive and reasonably necessary to ensure appearance, the safety of the community and compliance with conditions.**

As explained above, Magisterial District Judges make the initial bail determination and do not sit in courts of record. Thus, it can be impossible to

ascertain the basis for their decisions. Even when Common Pleas judges review bail, the release criteria found in Rule 523 are unevenly applied. Thus, it is critical that when bail authorities assign any condition of release other than ROR they be required to state in writing or put on the record the specific reason why the conditions of release are the least restrictive and reasonably necessary to ensure appearance, the safety of the community and compliance with conditions.

Requiring a record would ensure that bail authorities are aware that ROR is the default, and that they considered whether the conditions of release imposed are necessary. Moreover, it would allow for effective review, especially since attorneys are almost never present at preliminary arraignments outside of Philadelphia. Given the opacity of the current process, there could not be a more critical reform.

iii. **A defendant that is held either without bail or who remains in custody due to the imposition of monetary or non-monetary conditions, should be entitled to a timely Bail Review Hearing in the Court of Common Pleas.**

One of the procedural safeguards present in the Federal Bail Reform Act that prompted the United States Supreme Court to uphold it as constitutionally protective of due process was that the bail determination was immediately appealable. *See United States v. Salerno*, 481 U.S. 739 (1987); 18 U.S.C. §3145(c).

Agreements 6 and 7 in the Report of the Special Master relate to the requirement that a defendant held without bail or who remains in custody due to the imposition of bail conditions, should be entitled to review in Municipal Court within three business days, where practicable. *See* Report of the Special Master at 34-36.

Outside of Philadelphia, there is no comparable body to Municipal Court. Magisterial District Judges both conduct preliminary arraignments as well as preliminary hearings and any review of their decision-making is done by the Court of Common Pleas. As explained above, the scheduling of bail motions in Common Pleas courts can take from over a week to months even after being filed by counsel. There are cases in which bail motions in the Common Pleas Court are not heard for over four months.[3]

The reason judges do not give immediate hearings to bail motions is because there is currently no time limit regarding the scheduling of those motions. While it may not be practicable to obtain a hearing in every case across the Commonwealth in three days, some explicit guidance should be articulated by this Court. Without a clear time limit, it is unlikely that scheduling practices would change, and a bail hearing held months in the future is equivalent to no process at all. As Martin Luther King, Jr. said in

[3] *See, e.g., Commonwealth v. Talley*, 2627 EDA 2018 (appeal pending).

his "Letter from Birmingham Jail": "Justice too long delayed is justice denied."

iv. **Bail authorities need guidance regarding factors to be considered when the prosecution asks for bail to be denied based on alleged dangerousness.**

The Pennsylvania Supreme Court promulgated revised rules regarding bail in 1995. 25 Pa.B. 4100, 4116 (Sept. 30, 1995). At that time, the central purpose of bail was to ensure the presence of the accused at court hearings. *See, e.g., Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1972).

In 1998 a constitutional amendment allowed for the first time for the detention of the rare defendant who posed such a threat to an individual or the community that no condition or combination of release conditions could ameliorate that threat. *See* Pa.Const. Art. I, §14. However, since this constitutional amendment was enacted, there has been no revision to the Rules of Criminal Procedure governing how a bail authority is to determine whether a defendant is so dangerous that he should be denied bail. Thus, there are currently no factors for judges to consider when making this decision.[4]

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[4] The Special Master recommends the use of a risk-assessment tool. *See* Report of the Special Master at 17. A discussion of the benefits and dangers associated with risk-assessment tools is beyond the scope of this amicus brief. Nevertheless, explicitly delineating factors for judges to consider regarding dangerousness does not require this Court to adopt the use of any risk-assessment tool.

One procedural safeguard present in the Federal Bail Reform Act that motivated the United States Supreme Court to uphold it as constitutionally protective of due process is that the bail authority "charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors…." *United States v. Salerno*, 481 U.S. 739, 751-52 (1987). Indeed, the American Bar Association has promulgated Pretrial Release Standards ("ABA Standards") largely modeled after the Federal Bail Reform Act. *ABA Standards for Criminal Justice, Third Edition, Pretrial Release* (2007). Standard 10-5.8 relates to "Grounds for pretrial detention." It lists a variety of factors that bail authorities should consider. Some of the factors are very similar to those found in Rule 523, but others specifically relate to a consideration of the defendant's dangerousness including, *inter alia*, "the nature and circumstances of the offense charged," "the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release," and "the weight of the evidence." *Id.* This last factor is critical because the proof cannot be evident or the presumption great that a defendant poses such a risk of danger that he should not be released if the evidence that he committed the underlying crime is very weak. Preliminary hearings do not ameliorate

this issue because the strength of the evidence is not tested at a preliminary hearing.

Even Common Pleas judges and seasoned attorneys are confused by the standard courts are to use when determining whether there are any conditions or combination of conditions that can reasonably assure the safety of the community. This Court needs to conclusively answer the question of what factors a bail authority should consider when deciding if a defendant is too much of a danger to be released, and to clearly articulate the burden of proof.

v. **Robust procedural safeguards should be established for hearings that relate to a denial of pretrial release, based either upon a denial of bail or a monetary condition that acts as a *de facto* detention order.**

Currently there are few procedural safeguards established for hearings in Pennsylvania relating to a denial of pretrial release, either based upon an outright denial of bail or when monetary conditions are used as a *de facto* detention order. Agreement 6 lists the procedural safeguards that all parties agree should be guaranteed. *See* Report of the Special Master at 35. A similar set of procedural safeguards, again modeled on the Federal Bail Reform Act, can be found in the ABA Standards, Standard 10-5.10. Such procedural safeguards are necessary to ensure that bail hearings provide

constitutionally mandated due process. *United States v. Salerno*, 481 U.S. 739 (1987).

The most important procedural safeguard that the United States Supreme Court repeatedly emphasizes in the Federal Bail Reform Act is that any detention order must be supported by clear and convincing evidence. *See Salerno,* 481 U.S. at 741, 742, 744, 750, 751, 752 and 763. Therefore, to meet constitutional scrutiny, this Court must hold that "the proof is evident or presumption great" is coterminous with a clear and convincing standard. An adequate burden of proof upon the prosecution seeking to detain an individual presumed innocent, combined with the procedural safeguards agreed upon by all parties, would better protect the right of all Pennsylvanians to be free from unjustified pretrial detention.

vi. **Pretrial detention should be limited to serious charges, so that defendants are not held pretrial longer than they could be held if convicted of the underlying offense.**

The Bail Reform Act "narrowly focuses on a particularly acute problem in which the Government's interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses." *Id.* at 750. "Because of this narrow tailoring of when bail may be denied, the Supreme Court held that the Bail Reform

Act was narrowly tailored to serve a compelling state interest and thus did not violate substantive due process. *Id.*

There is no such limitation in Pennsylvania law. In Pennsylvania, a bail authority can revoke or deny bail for a defendant charged with misdemeanors or when the potential sentence for the underlying crime is less than the typical pretrial period. Bail denials in non-serious cases regularly occur. Such results must be ameliorated as they do not meet constitutional scrutiny.

Pretrial detention must be limited to serious felonies. If the defendant is not charged with a serious crime or substantial violation, there cannot be clear and convincing evidence that there are *no* conditions of release which can reasonably assure the safety of the community.

C. Unwarranted pretrial detention not only destroys lives but increases the likelihood of conviction.

"One of the basic tenets of our system of criminal justice is that the accused is presumed innocent until proven guilty beyond a reasonable doubt." *In re Haefner*, 436 A.2d 665, 666 (Pa.Super. 1981). The guarantee of the presumption of innocence is meaningless if a defendant can be punished prior to the finding of guilt.

Bail denials have grave consequences for detainees. Detained individuals can lose their jobs, custody of their minor children, or their

homes. One can easily be overwhelmed by statistical figures, but every person who is wrongfully denied bail after insufficient due process is a living, breathing human being whose life is upended if not destroyed.

Moreover, being imprisoned without bail substantively affects the outcome of a defendant's case. In May of 2016, Megan Stevenson of the University of Pennsylvania Law School conducted an analysis of how bail denials affect case outcomes in Philadelphia. *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, Journal of Law, Economics & Organization, September 18, 2018.[5] Comparing similarly situated defendants, those detained pretrial are 8% more likely to be convicted than those released. *Id.* at 3.

And it is no surprise. Presented with the choice of pleading guilty for a crime that they did not commit for a time-served offer, or remaining in jail until trial many months in the future,[6] many people will take the offer. Not everyone will defend their innocence when their future or their children's futures are threatened by continued incarceration. The fact that our system is designed so that it can be *irrational* for innocent men to maintain their

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[5] Available at https://academic.oup.com/jleo/article/34/4/511/5100740.

[6] There are cases in which the Commonwealth offers time-served if a defendant pleads guilty, but otherwise argues he is too dangerous to be released pretrial. *See, e.g., Commonwealth v. Talley*, 2627 EDA 2018.

innocence because a not guilty plea can lead to longer incarceration than a guilty plea cannot be countenanced by this Court.

Prosecutors know that incarcerated individuals are more likely to plead guilty, and it is naive to believe that this does not affect their decision to request a defendant be detained. Such misplaced incentives require stringent procedural safeguards to protect not only the liberty of those still cloaked in the presumption of innocence, but also to ensure that pretrial detention is not used to coerce guilty pleas.

And worryingly, it is cases with weak evidence that are the most affected by pretrial incarceration. "Weak-evidence crimes," such as harassment, show an even greater effect of pretrial detention. *Id.* at 4. That is, the weaker the evidence against the accused, the more likely that pretrial detention will cause a guilty verdict. Additionally, "[f]or those with very limited experience in the criminal justice system, pretrial detention leads to a 17 percentage point increase in the likelihood of being convicted." *Id.* at 3-4.

In short, those with the lowest likelihood of being guilty are the ones who are most injured by pretrial detention.

Pretrial detention harms the defendant through several mechanisms. First, as described above, it can coerce a guilty plea. Beyond that, it impairs the ability to gather exculpatory evidence, makes confidential

communications more difficult and the shackles worn by the detainee create the superficial impression of criminality. *Id.* at 5. "Furthermore, if a defendant must await trial behind bars he may be reluctant to employ legal strategies that involve delay." *Id.* at 5. Every defense attorney has had a conversation with a detained client in which the attorney recommends a course of action such as consulting an expert, but the client is reluctant because he is in pretrial confinement and hopes to be released more quickly.

It is true that, in very limited circumstances, defendants may need to be detained prior to trial. However, those circumstances should be rare and detentions should occur only after sufficient due process to ensure the true necessity of removing that person's liberty.

II. CONCLUSION

For the foregoing reasons, *amicus curiae* PACDL submits this Honorable Court must clarify and enforce the current Rules of Criminal Procedure governing bail in the Commonwealth and consider additional Rules as suggested in this brief to guarantee the liberty rights provided in Article I, § 14 of the Pennsylvania Constitution and the due process rights under the 5th and 14th Amendments to the United States Constitution are provided to every Pennsylvania citizen.

Respectfully submitted,

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Dated: January 29, 2020

CERTIFICATE OF COMPLIANCE WITH RULE 531

I hereby certify that the foregoing Appellant's brief consists of 4,456 words, excluding the title page, table of contents, table of citations, signature blocks, and appendices, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 531 that an Amicus Curiae brief shall not exceed 7,000 words.

/s/ Katherine Ernst
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CERTIFICATE OF COMPLIANCE WITH RULE 127

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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