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

RESPONSE BRIEF OF PARTICIPANT DEFENDER ASSOCIATION OF PHILADELPHIA

Response To Report Of The Special Master Issued December 17, 2019 Under The Court's King's Bench Jurisdiction Invoked By Order July 8, 2019.

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I. INTEREST OF THE PARTICIPANT, DEFENDER ASSOCIATION OF PHILADELPHIA

The Defender Association of Philadelphia (hereinafter "the Defender") not only formally represents a large majority of the tens of thousands of people charged with criminal offenses in Philadelphia each year, it *de facto* represents every person, with very limited exceptions, at a preliminary arraignment in Philadelphia under Pa.R.Crim.P. 1003.

On December 17, 2019, the Special Master appointed by this Court issued a Report recommending improvements to Philadelphia's pre-trial bail and arraignment system as a result of mediation between the American Civil Liberties Union (hereinafter "ACLU") and the Arraignment Court Magistrates (hereinafter "ACM"). *See* Report of the Special Master (hereinafter "the Report"). The Defender is uniquely positioned to provide a detailed response as it has nearly a century of institutional experience with respect to Philadelphia's pre-trial system, and will be one of the three main actors, along with the District Attorney's Office (hereinafter "DAO") and the First Judicial District (hereinafter "FJD"), responsible for implementing and carrying out any improvements adopted by this Court. Because of the Defender's unique perspective and the necessity of its involvement in carrying out any of this Court's orders, it offers this Court its commentary on and additional recommendations to the Report.

II. BACKGROUND & RESPONSE SUMMARY

A. Background

In early 2019, the Defender approached the FJD and the DAO with a bail improvement proposal because consistent with changes being made by other states and municipalities, it saw major inadequacies relating to Philadelphia's current bail process. Presented in a rule based format, its amendments centered around three main concerns: (1) that Defense Counsel was not provided a meaningful opportunity to connect with and collect necessary information from persons slated for preliminary arraignments and subject to detention on monetary bail; (2) that the ACMs were not following the law or Rules of Criminal Procedure when imposing monetary conditions of bail; and (3) that there was an inadequate opportunity to re-address serious cases in which defendants were made bailable, but who could not afford the monetary condition.

On March 12, 2019, the ACLU filed the instant action in this Court. Shortly thereafter, on March 27, 2019, the Defender presented its proposal to the FJD executive committee and the DAO recommending significant changes to Local Rule of Criminal Procedure 520 and proposing an amendment to Rule of Criminal Procedure 1003 which could be jointly referred to Criminal Procedural Rules Committee. *See* Defender Proposed Amendments to Local Rule 520 and Pa.R.Crim.P. 1003, attached collectively at Exhibit B. The DAO expressed general

support for many of the suggestions in the proposal. The FJD, however, took no position, nor did it follow up with a response.

On July 8, 2019 this Court granted the ACLU's Petition for Kings Bench review and appointed a Special Master. It invited the participation of the Defender and the DAO. On July 18, 2019, the Special Master requested that Defender and the DAO submit joint "'recommendations for improving the bail system on both an immediate and longer-term basis,' and include practical staffing, budgetary, and administrative implications." Joint Submission to Special Master, August 16, 2019, at 2, attached at Exhibit A (Hereinafter "Defender/DAO Submission"). On August 16, 2019, the Defender and DAO complied and submitted a lengthy and detailed improvement proposal. *See* Defender/DAO Submission.

On November 7, 2019, after much debate, the parties and participants submitted a unified Submission to the Special Master. *See* Submission to the Special Master, Proposed Interim Pretrial Reform, Nov. 7, 2019 (hereinafter "Unified Submission") (appended to the Report of the Special Master). Although the Unified Submission is largely based on the Defender/DAO Submission, it omits important substantive and procedural protections that the Defender and DAO believe will be necessary to ensure constitutional compliance and effective implementation.

B. Summary of Response to the Report of the Special Master

The Report's recommendations are divided between discussing eight agreements recommended by consensus of the parties and the participants, Report at 11-13; the notation of five disagreements, Report at 13-14; nine "suggestions," Report at 14-23, and several "additional comments," Report 23-26. The Defender agrees with the Special Master's conclusion that "all eight of the Agreements reached by counsel for the litigants and the DAO and the [Defender] who participated as invited participants should be adopted and implemented." Report at 11. In some instances, these agreements sufficiently represent the Defender's position. Recommended Agreements 1, 5, 6, and 7, however, lack necessary additional substantive and procedural protections necessary to ensure compliance with state and federal law and the long-term success of any improvements.

Section III.A., *infra,* outlines the Defender's concerns in these specific areas and makes recommendations regarding how these agreements can be strengthened. In some instances, issues raised in the "disagreements" and "suggestions" outlined in the Report overlap with the Defender's responses to an agreement. Where appropriate, the Defender's response to the suggestion or disagreement is discussed within the context of the broader response to a particular agreement.

Section III.B., *infra,* responds to the disagreements identified in the report if not previously discussed. These disagreements are not tangential to

implementation. In some cases they are fundamental to a proposal's failure or success. The Defender anticipates that the ACLU will adequately address disagreements 1 (respecting the application of a clear and convincing evidence standard to the denial of bail) and 2 (respecting the application of a "least restrictive" standard to the imposition of bail conditions beyond those required by Pa.R.Crim.P. 526). *See* Report at 13. The Defender supports the ACLU's position on these issues. The Defender addresses only disagreements 3 through 5, and recommends that this Court include the following in any order adopting the agreements: (1) if an ACM or Court imposes bail conditions beyond those required by Rule of Criminal Procedure 526, it must state its reasons for doing so in writing or on the record; (2) that ACMs must conduct a robust ability to pay hearing before imposing monetary conditions, and require specific guidance as to what financial information to consider; and (3) that this Court should ask the Criminal Procedural Rules Committee to consider amending Rule 1003 to permit Philadelphia to design a process consistent with the rest of the state, whether by summons or otherwise, that allows defendants who would otherwise be released on their own recognizance to expedited release without a preliminary arraignment.

Lastly, Section III.C. addresses the Defender's concerns regarding several of the Report's "suggestions" that seem independent of the agreements. While the defender generally opposes the need to adopt a risk assessment instrument, it

comments specifically on Suggestion 2 (relating to the collection of information) and Suggestion 4 (relating to the enforcement of bail conditions). It believes the ACLU, the DAO or amicus will likely sufficiently address any remaining concerns the Defender has with respect to the other suggestions and therefore, they will not be repeated here.

III. RESPONSE TO REPORT OF THE SPECIAL MASTER

A. This Court Should Require the FJD to Adopt All Eight Recommended Agreements Along With the Additional Due Process Protections and Implementation Protocols Consistent with the Defender/DAO Submission.

Each one of the eight agreements recommended for adoption by the Special Master are important, necessary, and would significantly improve the practice of setting bail in Philadelphia. Implementing these agreements would result in fewer people being unnecessarily incarcerated before trial without increasing crime. Indeed, preliminary reports suggest that greater individualized attention, the elimination of unaffordable monetary bails, and greater transparency will result in better court attendance, fewer rearrests, more equitable trial outcomes, and a reduction in racially discriminatory effects.[1] We stress, however, that the

[1] *See, e.g.*, Paul Heaton, *Improving Pretrial Outcomes Without Actuarial Risk Assessment*, Quattrone Center, Working Draft on File with Author (2020) (evaluating the effect of Defender Association of Philadelphia Bail Advocates an concluding that pre-arraignment interviews substantially reduce clients' likelihood of bail violation, future arrest and reduce racial disparities in pretrial detention); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON.& ORG. 511, 538 (2016) (discussing negative impacts of unnecessary pre-trial detention in philadelphia); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, ARNOLD FOUND. 4

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agreements should not be adopted piecemeal. Nor should they be adopted without consideration of what additional safeguards are required to ensure proper implementation and long-term stability. Each agreement is part of a larger picture, each building on the back of the others.

1. Response to Agreement 1

The Defender cannot emphasize enough the importance of ensuring representation at preliminary arraignments. Indeed, the Defender and DAO jointly declared:

> Bail decisions are improved where the ACM has more information about a defendant's individual background, risks and needs, financial circumstances, community connections, and plan if and when released to the community (where the defendant will go, who they might be with, and why it is likely that they will appear). While Pretrial Services obtains some of this information, it is minimal, sometimes inaccurate, and defendants are more likely to reveal important personal information to their counsel than to a court agency.

Defender/DAO Submission, at 3.

While this Court's current Rules require notice of the right to appointed counsel at the preliminary arraignment, *see* Pa.R.Crim.P. 1003(D)(3)(d)(i), and the appointment of counsel to indigent defendants prior to a preliminary hearing, *see* Pa.R.Crim.P. 122, they do not require the appointment of counsel prior to or during

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[1]...continue
(Nov. 2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf (discussing how pre-trial incarceration significantly increases the chance of conviction and ultimate sentence for otherwise similarly situated defendants).

the preliminary arraignment. At least in Philadelphia, where the Defender is already present and acts as *de facto* counsel in nearly every preliminary arraignment, its ability to gather useful bail related information is stymied because it is not actually appointed for the purposes of the preliminary arraignment prior to commencing the hearing. Appointing the Defender during the hearing, where it has no information other than what is presented in the arrest paperwork, renders the value of any assistance marginal at best. Moreover, Rule 1002(D)(2)'s mandate "that the defendant must be permitted to communicate fully and confidentially with defense counsel immediately **prior to and during** the preliminary arraignment" goes unfulfilled. Pa.R.Crim.P. 1002(D)(2) (emphasis added).

To remedy this problem, Rule 1003(D)(2) should be given full force. If this Court adopts agreement 1, it should further direct that ACMs enter a standing order at the beginning of each arraignment shift appointing the Defender for the purposes of the preliminary arraignment. This will help to ensure that the counsel is given the meaningful pre-arraignment opportunity to converse with the defendant and that any conversations had prior to the arraignment are given the solemnity and confidentiality they deserve.[2]

The University of Pennsylvania's Quattrone Center has studied and documented how access to counsel prior to the initial appearance benefits

[2] The Defender/DAO Submission fully explains how the participants intend to fulfil this mandate if approved by this Court. Defender/DAO Submission at 3-5. Since filing the Defender/DAO Submission, the Defender has pursued a possible funding strategy.

defendants both in the short and long term. It reviewed the Defender's bail advocate pilot program, where the Defender assigned individuals to quickly interview select defendants prior to the preliminary arraignment in order to explain the process and collect information. The program had a dramatic effect on improving compliance with bail when released, reducing racial disparities in pre-trial detention, and if the defendant was ultimately convicted, reducing recidivism.[3]

The Quattrone Center's findings are consistent with other studies that have measured the impact of representation during the defendant's initial appearance. Over 50 years ago the Vera Institute's Manhattan Bail Project published studies showing persons who are released following arrest have better legal and personal outcomes then those who stay in jail pending the resolution of their cases.[4] Additional research shows having counsel at the initial appearance before a magistrate not only increases the defendant's chances for release but also their sense of fairness about the process. One study, for example, found that a defendant with a lawyer at initial appearance is: two-and-a-half times more likely to be released on recognizance; four-and-a-half times more likely to have their bail significantly reduced; likely to serve less time in jail; and more likely to feel fairly

[3] Paul Heaton, *Improving Pretrial Outcomes Without Actuarial Risk Assessment*, Quattrone Center, Working Draft on File with Author (2020).
[4] Daniel J. Freed & Patricia M. Wald, Bail in the United States: A Report to the National Conference on Bail and Criminal Justice, 9-21 (1964).

treated by the system.[5] Another recent study has also demonstrated how decisions made by a magistrate at the initial appearance impacts case outcomes, finding that detained defendants are 25% more likely than similarly situated defendants who have been released to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.[6]

Moreover, scholars uniformly recommend and best practices require appointing counsel prior to the initial bail hearings.[7] The American Bar Association[8] and the National Legal Aid and Defender Association also recommend that defense counsel be appointed prior to the initial bail hearing.[9] More importantly, it is required by due process,[10] and other state courts have

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[5] Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

[6] Paul Heaton, Sandra Mayson, Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

[7] *See* Colin Doyle et al., *Bail Reform: A Guide for State and Local Policymakers*, Criminal Justice Policy Program, Harvard Law School, 2, 20-12 (Feb. 2019) (hereinafter "*Policymaker's Guide*"), available at http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf (advocating "defense counsel should be appointed as early as possible to ensure that judges make informed release decisions"); Alena Yarmosky, *The Impact of Early Representation, An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit*, California Policy Lab (June 2018) (finding that individuals given counsel prior to a bail hearing were twice as likely to be released as those who were not given counsel, demonstrating that the information counsel learned and provided affected the imposition of bail and ultimate detention), available at https://www.capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf.

[8] Criminal Justice Standards for the Defense Function, Standard 4-3.6 (American Bar Association 2015).

[9] National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation, Guidelines 2.1 and 2.3 (2006).

[10] *See Rothgery v. Gillespie Co.*, 554 U.S. 191, 213 (2008) ("a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."); *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (finding

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concluded that an initial appearance where pretrial liberty is at issue is a critical stage of the proceedings which requires not merely the appointment, but the presence of counsel.[11] The literature demonstrates that counsel's role serves two functions. Counsel assists in gathering the defendant's relevant release and financial information for later presentation to the ACM at the bail hearing. And, counsel plays a key role in advising the defendant about the process, i.e., what is or is not likely to occur, and what decisions the defendant will have to make at each of the next stages of the case. This latter point is critical. The immediate aftermath of the arrest is often the most disorienting moment of the criminal justice process. Counsel can help defendants weather the storm, guide them through the process, and explain each of the next steps. This creates transparency, which engenders

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[10]...continue
that a preliminary bail hearing is a "critical stage ... at which the accused is ... entitled to [counsel]"); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019) ("the Court finds that the right to counsel at a bail hearing to determine pretrial detention is also required by due process.").

[11] *See Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010) ("As is here relevant, arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the "critical stage" label, it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents.") (citations omitted); *see also DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013) (holding that the right to counsel attaches in any proceeding that my result in the defendant's incarceration); *Tucker v. State*, 394 P.3d 54 (Idaho 2017) (holding that the initial appearance when bail was set in any amount which the defendant could not post was a critical stage of the proceeding that requires the presence of counsel).

greater trust in the system. When defendants trust the process, they are more likely to return to court.

2. Response to Agreement 5

Agreement 5 facially requires the ACMs to follow the current law and Rules of Criminal Procedure, which mandate that no bail conditions should be imposed for the purposes of detention, that only "necessary" conditions beyond those required by Rule 526 be imposed, and that the defendant's ability to pay be considered in setting monetary bail. Report, Unified Submission at 32-24. Although the Unified Submission's guidance provisions are valuable, it omits three essential features that appear in the Defender/DAO Submission's "Proposal 5": (1) that the term "necessary" be construed to require a "least restrictive" determination; (2) that the "relevant financial information" be defined expansively; and (3) that the ACM be required to explain on the record or in writing the specific reasons why the condition or combination of conditions is the least restrictive condition necessary. *See* Defender/DAO Submission at 11-13. These additional procedures are consistent with best practices,[12] required under the law,[13] and are

[12] *See, e.g., Policymaker's Guide*, at, 31 (the order imposing conditions of release should "include written findings of fact and a written statement of the reasons for the conditions imposed, including the reason no less restrictive conditions would reasonably assure the defendant's appearance in court or the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process . . . ."); at 55 (citing Illinois' Bail Reform Act of 2017, Pub. Act 100-0001 (Sen. Bill 2034), (2017)).

[13] The Defender anticipates the ACLU will address why the law requires that ACMs may only impose the least restrictive condition necessary to ensure compliance, as it did so before in its legal Brief to the Special Master.

necessary to ensure that each defendant is afforded a fair and individualized assessment despite the volume and repetitiveness of Philadelphia's preliminary arraignment court. This Court should adopt each one.

Part of the problem that led to this litigation is that ACMs do not provide reasons for imposing a particular type or amount of release condition. Instead, decisions appear dependent on the charge alone. For example, defendants charged with violent, sexual, and firearms offenses are given monetary bails in the tens or hundreds of thousands despite receiving public assistance. Requiring the ACMs to state their reasons for imposing these conditions, while a good start, will not resolve the problem if they are not given guidance how to determine when a condition is or is not necessary, or how to decide if a defendant does or does not have the ability to pay.

Accordingly, not only does the law require that only the "least restrictive" condition be imposed, that rubric is directly related to requiring ACMs to put their reasons for imposing additional monetary or non-monetary conditions in writing. Without directing ACMs to explain why the imposed condition is the least restrictive, any explanation will likely result in an ACM stating something to the effect of the following: "the violent nature of the offense sufficiently demonstrates that the restrictive condition imposed is necessary to ensure safety of the community." It would be hard, upon review, to claim that such a conclusion is

inappropriate where there is no clear mandate that the ACM consider and reject other less restrictive options. This likelihood is compounded here because direct appellate oversight will be minimal at best.[14] The Defender believes the effect will be that ACMs err on the side of imposing and readily justifying as "necessary" overly restrictive conditions. This is especially true in low information, high volume settings like the preliminary arraignments.[15]

Requiring the ACM to state **why** it rejected less restrictive options in favor of the condition imposed will guarantee an express consideration of those other options. Regardless of whether this statement is in writing or orally on a record, it will protect against the imposition of reflexive unnecessary restrictions that ACMs may otherwise impose out of habit. It will also create a record that can be used to evaluate the success of the proposed improvements and facilitate the collection of data. The goal of this litigation is to create lasting improvements and protect against reversion to the mean. In his classic study *Court Reform on Trial: Why Simple Solutions Fail*, Malcom Feeley argued that "[i]t is rare to find an innovation that is carefully initiated and ever rarer to see one successfully implemented. But it

[14] Most subsequent bail modification motions are reviewed *de novo*, so there is little chance of any detailed scrutiny of the ACM decision.

[15] Research about discretion suggests that despite a desire to reform, too much discretion may result in a reversion to the mean or overly erring on the side of detention. Research into discretion afforded to judges in Kentucky with respect to how to use a risk assessment tool suggested judges often ignored the assessments for a variety of reasons, and erred on over, not under incarcerating. *See, e.g.,* Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018).

is rarer still to find a workable new idea well institutionalized."[16] The Center for Court Innovation recommends that when implementing new programs,[17] it is essential to formalize an operational model and collect data in order to measure performance.[18] Adopting the Defender/DAO position on this issue will create transparent reviewable orders, guarantee that all release options are considered, and ensure long-term consistency and accountability in decision making.

Second, the Defender urges this Court to adopt the Defender/DAO Submission Proposal 5.4, which requires a robust ability to pay hearing and requires consideration of broadly defined relevant financial information, specifically, the information identified in Pa.R.Civ.P. 240(h) (relating to *In Forma Pauperis* determinations). Defender/DAO Submission, at 12. The Special Master is correct that defendants will not always be prepared to provide a full accounting of their financial data at the time of their preliminary arraignments, *see* Report at 16, but the ACMs should be told that relevant financial data includes those items specified in the *in forma pauperis* Rule.

There is no policy disagreement on this question, but the ACMs have objected to a mandate that they inquire into the defendant's entire financial picture. *See* Report, at 14, 37 (Disagreement 4). The ACMs have repeatedly asserted that

[16] Malcolm M. Feeley, Court Reform on Trial: Why Simple Solutions Fail, 126 (2013)
[17] *See* Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521 (2017).
[18] Amanda B. Cissner et al., Avoiding Failure of Implementation: Lessons from Process Evaluations, Center for Court Evaluation (2009).

the information they currently receive satisfies the duty under Rule of Criminal Procedure 528 to consider a defendant's "financial ability." Report, at 37. The Defender wonders how accurate bail can be set if all that is known is the defendant's profession and weekly income. Adopting the Defender/DAO's submission will ensure that ACMs are attentive to not only the financial information it is able to collect, but the information it lacks. Defense counsel plays an essential role in this process through the collection of relevant financial information from the defendant and advocating for conditions of release that take into account the defendant's ability to pay.[19] Moreover, the ACM must inquire into and consider general estimates of a defendant's debts, rents, loans, child care, spousal income, etc., even if these numbers are not provided with precision.[20]

This issue, of course, dovetails with the Report's "SUGGESTION 2." Report, at 15-17. There, the Special Master advocates for Pre-Trial Services

[19] ABA Criminal Standards for the Defense Function, Standard 4-3.2: Seeking a Detained Client's Release from Custody or Reduction in Custodial Conditions (2017).

[20] The Fifth Circuit has ruled that Due Process requires a court to collect and consider the information recommended by the Defender/DAO Submission. *O'Donnell v. Harris County*, 892 F.3d 147, 165-66 (5th Cir. 2018). It declared that the court must attempt to collect the following information:

> 1) arrestee and spouse's income from employment, real property, interest and dividends, gifts, alimony, child support, retirement, disability, unemployment payments, public-assistance, and other sources; 2) arrestee and spouse's employment history for the prior two years and gross monthly pay; 3) arrestee and spouse's present cash available and any financial institutions where cash is held; 4) assets owned, e.g., real estate and motor vehicles; 5) money owed to arrestee and spouse; 6) dependents of arrestee and spouse, and their ages; 7) estimation of itemized monthly expenses; 8) taxes and legal costs; 9) expected major changes in income or expenses; 10) additional information the arrestee wishes to provide to help explain the inability to pay.

O'Donnell, 892 F.3d at 165-66.

(hereinafter "PTS") to play an increased role in collecting the relevant information. Report, at 16-17. The Defender has significant concerns with designating PTS as the entity responsible for gathering this information for four reasons: (1) unnecessary added costs, (2) added delay; (3) the reliability of the information; and (4) Fifth Amendment and Article 1, Section 9 compelled incrimination concerns.

While better training for current PTS collection is desirable, the entity best able to quickly collect financial information is counsel for the defendant.[21] Expanding PTS to conduct a more thorough examination will unnecessarily expand costs associated with PTS as additional employees will be needed. It is unnecessary because expanding counsel's role at the preliminary arraignment is precisely designed to accomplish this end. Further, delaying the hearing for PTS to conduct a more sweeping interview, and only then to duplicate it by counsel is not a reasonable solution.

Nor would the information collected by PTS be reliable. The Defender avers that its decades of experience has proven information collected by PTS is historically insufficient and unreliable for a variety of reasons—including defendants' inherent distrust of court personnel, fears relating to who will receive the information, concerns about disclosing incriminating information, and often, a desire to have other more pressing questions about their situation answered first,

[21] ABA Criminal Standards for the Defense Function, Standard 4-3.2: Seeking a Detained Client's Release from Custody or Reduction in Custodial Conditions (2017).

which PTS staff is ill equipped to do. Counsel on the other hand, will be able to quickly resolve these concerns. Moreover, counsel is more likely to get positive responses from a defendant's family members or friends if calls are placed to double check the defendant's assertions.

Counsel would not replace PTS. That system needs improvement, and additional training or the addition of several specific questions is desirable. However, ACMs should rely on bail advocates and counsel to relay the majority of the needed financial information to the court when available. This process has already been shown to work in early bail review hearings, where counsel collects the necessary information and presents it to the DAO and the court. In the overwhelming majority of cases, monetary conditions are reduced resulting in immediate release.[22] Moving this process up to the preliminary arraignment is the best course of action.

3. Response to Agreements 6 and 7

The Defender strongly agrees that Agreements 6 and 7 should be adopted. However, it also believes that this Court must not accept "three business days" as the appropriate time frame in which to mandate a hearing. The preliminary arraignment, even with the adoption of the Defender's recommended additional safeguards, is not intended to be a full hearing, equipped with complete due

[22] *See* Report, at 10. Early Bail Review results in decrease modification in almost 90% of lower level felony cases and more than half of more serious felony cases.

process rights. It is inevitable that detentions will be improperly ordered, and release conditions, including monetary bail, will sometimes still be imposed that a defendant will not be able to meet despite being found releasable. Where liberty is at stake, however, due process requires swift and accurate adjudications of whether detention is proper.

In setting monetary bail at the preliminary arraignment, the ACM should not be asking what amount of money the defendant could ever possibly pay, but "what amount the arrestee could reasonably pay **within 24 hours of his or her arrest,** from any source, including the contributions of family and friends." *O'Donnell*, 892 F.3d at 166 (emphasis added). After the defendant is determined bailable and bail is set at the preliminary arraignment, if the defendant does not pay the bond within 24 hours, the presumption is that the ACM has overestimated the amount of bail the defendant is able to pay. To delay a more robust hearing to expedite release is to tolerate wrongful pre-trial incarceration based solely on the defendant's inability to meet a financial condition of release which is explicitly prohibited.[23]

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[23] The United States Supreme Court has consistently held that incarcerating individuals solely because of their inability to pay a fine or fee, without regard for indigence and a meaningful consideration of alternative methods of achieving the government's interests, effectively denies equal protection to one class of people within the criminal justice system while also offending principles of due process. *See Williams v. Illinois*, 399 U.S. 235 (1970) (finding that the practice of incarcerating an indigent individual beyond the statutory maximum because they could not pay the fine and court cost to which they had been sentenced to be unconstitutional); *Tate v. Short*, 401 U.S. 395 (1971) (finding that incarcerating an indigent individual convicted of a fine only offense in order to satisfy the fine imposed constituted unconstitutional discrimination because it subject the individual to imprisonment solely because of indigency); *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that the Fourteenth Amendment prohibits a State from

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Delaying a review hearing for three business days could mean that for some people, they could spend almost a week in custody before a hearing. Those arrested on a Friday afternoon before a weekend, for example, could be unreasonably detained for five days. On holiday weekends, this could be extended to a week. We recognize that requiring these hearing to take place within 48 hours of the initial appearance may create budgetary and staffing challenges for all the parties involved, but it is worth noting that it is the Defender who will undoubtedly bear the brunt of these challenges; nevertheless, we feel these are critical reforms that should be implemented regardless of the costs imposed on the parties.

This Court should mandate that those remaining in custody after the initial preliminary arraignment are afforded a right to a full hearing with sufficient due process protections within 48 hours.[24] However, the Defender agreed to accept a short delay in implementation of this time frame as stated in Proposal 6 and 7 of the Defender/DAO Submission. Defender/DAO Submission, at 13-18.

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[23]...continue
revoking an indigent defendant's probation for failure to pay a fine and restitution without determining that the defendant had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist).

[24] Federal Courts have consistently ruled that within 48 hours of arrest if an individual is still detained, a judicial officer must make an individual consideration of a defendant's ability to pay. *See O'Donnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2019); *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018).

B. This Court Should Require the FJD to Adopt the Petitioner's, Defender's, and DAO's Positions with respect to Disagreements 1-5.

The Defender encourages this Court to resolve the five disagreements in the manner advocated by the Petitioners and in the Defender/DAO Submission. The Defender believes the ACLU and Amicus will sufficiently address the law with respect to Disagreements 1 and 2. Moreover, we have already discussed Disagreements 3 (state the reasons for conditions orally or in writing) and 4 (ACMs must conduct a full ability to pay hearing) in the previous sections as they relate to the proper functioning of specific improvement proposals outlined in the Report. Therefore this section addresses only the final disagreement.

Disagreement 5 relates to the Defender/DAO Submission's "Long Term Reforms" proposal 1 which encourages the creation of a process to expedite the release of defendants charged with certain low level crimes without sitting through a formal preliminary arraignment. Defender/DAO Submission, at 16.[25] The Special Master takes no position on this issue. Report, at 26. This Court should not do the same. It should expressly adopt the following:

> Adopted: The FJD develop a process that permits defendants to be released in lieu of a formal preliminary arraignment, or recommend a joint proposal to Amend Rule 1003 of the Rules of Criminal Procedure to permit such a process.

[25] Long Term Proposal 1 is entitled "The ACM shall issue a summons for defendants charged with low level misdemeanors after the filing of a complaint and the defendant shall not be subject to a preliminary arraignment."

One of the reasons that inadequate attention is paid to setting bail conditions at the preliminary arraignment is the sheer volume of cases proceeding through arraignment court each day. Release on own recognizance (ROR) bail will be used in almost 40% of the cases. Report, at 10. Both the Defender and DAO can usually quickly identify which defendants will be given ROR. However, current Rule 1003(D) requires that all defendants arrested in Philadelphia "shall be afforded" a preliminary arraignment. Pa.R.Crim.P. 1003(D)(1). Every jurisdiction in Pennsylvania, other than Philadelphia however, allows the police to release defendants post arrest who are charged with low-level misdemeanors from custody without a preliminary arraignment. Pa.R.Crim.P. 519(B).

While the DAO does not consent to a process that precludes its ability to review the complaint and that would not ensure that the defendant receives notice of their court date prior to release, the Defender and DAO are in agreement that the current preliminary arraignment process is not sufficiently useful to the almost 40% of defendants that would otherwise get ROR bail. "[T]he Participants agree that Philadelphia's system should process certain alleged low-level offenders through the system without a preliminary arraignment, thereby allowing these defendants to spend less time in custody and leaving ACMs more time to deal with more serious cases." Defender/DAO Submission at 17.

This system decreases delay and allows counsel to spend more time with clients who might be detained or receive more restrictive conditions. It may also have a profound effect on ACM decision making. In high volume low information settings, the contrast between cases can have an effect on how each case is viewed. This "contrast effect is the tendency to base judgments on comparisons with similar examples even though the judgments were intended to be independent." Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 725 (2015). Research, although limited in this area, has demonstrated that both lay people and judges make contrasting judgments about sentencing. *See, e.g.,* Jeffrey J. Rachlinski & Forest Jourden, *The Cognitive Components of Punishment*, 88 CORNELL L. REV. 457, 477 (2003); Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013).

These possible effects cannot be ignored. For example, under the current system, an ACM might be presented with four minor cases in a row, all receiving ROR. These cases are then immediately followed by a felony. Even though in comparison to other felony cases, this defendant's case independently would not necessarily justify detention or restrictive conditions, it may be perceived as more serious than it objectively is because of its greater severity than the cases just

preceding it. The result may be that the ACM assigns more conditions or detains the individual based on implicit and unintentional comparisons, not because of true objective need. Taking out the thousands of minor cases a year from the process will lessen the degree of contrast between cases being evaluated by the ACM, meaning any skew based on the effect will be reduced.

Addressing this problem may be resolved via practical solutions agreed upon by the participants and the FJD in line with a formal directive from this Court, consistent with the plan provided in the Defender/DAO Submission. As stated there:

> The idea would be that in low level cases, the Commonwealth can file the complaint, and the ACM can conduct an expedited review to generate a docket number and a first court date, which will then be provided to the defendant by the police department upon release, absent a hearing. Participants agree that this process must allow for the following: 1) pretrial services to interview the defendant; 2) an opportunity for the Defender to confidentially communicate with the defendant; 3) the ACM to appoint counsel; and 4) the DAO to review the case prior to release.

Defender/DAO Submission, at 17.

There is no need to have a formal oral reading of the required rights under Rule 1003(D) as opposed to written notice, unless requested by the Assistant District Attorney or counsel for the defendant in cases where the defendant has literacy issues or developmental disabilities. Largely, this will require a

readjustment of which cases get addressed first, but it will not necessarily require a massive overhaul of the system.

Upon examination, if the participants and the FJD do not believe a process can function without Amending Rule 1003(D), the solution is simple. The participants and FJD can recommend a unified Rule Change to the Rules Committee. Because Rule 1003 applies only to Philadelphia, a unified proposal will likely be adopted. Accordingly, the Defender recommends that an order to engage in this process be included in any final directives.

C. This Court should Adopt Suggestions 1, 6, 7, 8, and 9; Adopt in Part Suggestions 2 and 4; Reject Suggestions 3; and Defer Addressing Suggestion 5.

The Defender greatly appreciates the thoughtful work of the Special Master in suggesting additional improvements that he believes would facilitate fair and constitutional pre-trial bail determinations. Many are reasonable, but some are either unnecessary, or involve many additional complications that cannot be easily resolved in this process. They are briefly addressed in turn.

1. Adopt Suggestions 1, 6, 7, 8 and 9.

The Defender agrees with Suggestion 1 that there needs to be a clear delineation of who is responsible for addressing concerns with respect to Philadelphia's bail process. The Defender also agrees that the FJD should have to submit a plan in accordance with this Court's order. However, any requirement

that the FJD submit an implementation plan within 60 days with progress reports fails to set any firm deadlines actually righting any constitutional wrongs. Rather, this Court should be more specific. It should require that the FJD submit an implementation plan within 60 days, that all improvements unless otherwise provided be implemented within 6 months of submission of the plan, to be followed by quarterly progress reports. Where any portions of the plan are likely to take more than 6 months, a specific deadline should be stated.

With respect to Suggestion 8, respecting the development of improved forms "Proposal 3" in the Defender/DAO Submission addresses some of these concerns. There, the Defender and DAO stated:

> The Participants agree that all release conditions beyond those required under Rule 526 be entered into the docket by a clerk in B-08 at the time of preliminary arraignment and that proper written notice be provided to the defendant of all such conditions on the bail bond. Additionally, "stay away orders" with respect to specific victims or witnesses, or when imposed pursuant to 18 Pa.C.S. § 2711, shall be written on a separate document and provided to the defendant. A copy may also be provided by the DAO to the complainant. The bail bond and any additional conditions will clearly state the consequences of any violation. In some cases, the issuance of protective orders under 18 Pa.C.S. § 4954 may be appropriate. These additional conditions must also be clearly explained orally to the defendant.
>
> Implementing these changes effectively will require the involvement of the FJD, the Philadelphia Police Department[26] and Pretrial Services. The Participants propose that if approved by this Court, the Participants will work with these entities to 1) identify any duplication or inadequacies on the current pre-trial documents and

[26] The Participants are unsure whether the Police Department would need to update the process by which it provides defendants with documents, and files those documents in the record.

> template bail bond, 2) develop new release paperwork as necessary; 3) develop a supplemental "stay away order" document that can be easily completed for any given case, 4) ensure that the additional conditions are specified in the docket [. . . .]

Defender/DAO Submission at 6-7. This Court should consider these more specific parameters in adopting a directive along these lines.

The Defender has little to add regarding Suggestions 6, 7, and 9, which it believes are reasonable.

2. Adopt in Part Suggestions 2 and 4.

The Defender has already addressed portions of Suggestion 2, which relates to the information collection process prior to the preliminary arraignment. *See* Section III.A., *supra.* While the Defender agrees that more information must be obtained, that role should fall more on counsel's shoulders than on an expanded PTS department. However, the Defender does believe PTS could be expanded. The Defender and DOA, however, recommended that investment in expansion come in the form of increasing the number and forms of available pre-trial supervision. *See* Defender/DAO Submission, Long Term Proposal 2, at 17.

In the Defender/DAO Submission, the participants stated:

> At the moment, ACMs have very few pretrial supervision options to assign defendants: the only types of non-monetary conditions available at preliminary arraignment are ROSC [release on special conditions] I and II, which involve an intake, and then periodic phone calls with a pretrial officer. Additional options are available at Early Bail Review when some defendants appear before a judge, 5 to 7 days after arrest. These include house arrest and direct supervision. The

> Participants believe that if additional methods of supervision were available to ACMs, a greater number of defendants could be safely released.

Defender/DAO Submission, at 17.

The Defender supports increasing options available to the ACMs that neither involve detention nor monetary conditions, but instead rely on community based support or supervision. In some instances, a defendant who has a history of missing court, but has succeeded on probationary supervision could be assigned a pre-trial supervision officer in lieu of detention. Other pre-trial supervision options can be explored as well. This Court should be concerned about the imposition of unnecessarily restrictive conditions if PTS were expanded, but giving ACMs more tools to employ in lieu of the relative extremes of release or detention is valuable. The overuse of these conditions should also be reduced if this Court were to require ACMs to employ the "least restrictive" condition rubric recommended by the Defender, DAO and by the Respondents.

Suggestion 4 relates to ensuring that bail conditions or other pre-trial orders are enforceable. The Defender agrees that this has to occur. The Special Master expressed doubt as to the remedies available to law enforcement and the judiciary when a condition of release is violated but Rule 536 provides clarification as to how such violations should be addressed.

That Rule allows the bail authority to issue a bench warrant, and then a subsequent hearing will determine if bail should be revoked. It does not permit police to arrest for a violation of a condition. Pa.R.Crim.P. 536(A)(1). Nor should police be designated warrant officers. While they should be able to access information relating to conditions, and therefore, be capable of informing the bail authority of any possible violations that are not otherwise criminal, arrest is not the proper procedure. Just as police do not make arrests for technical probation violations, they should not be in the business of making arrests for bail condition violations.[27]

Clarity and transparency need to be strengthened and enforcement of conditions is required. That role, however, in part could be done by expanding the purview of PTS, effectively the bail agency in Philadelphia, not by empowering police to become bail agents. *See* Pa.R.Crim.P. 530 (the powers and duties of the bail agency is "supervising defendants when so designated by the bail authority").

3. Reject Suggestion 3; and Defer Addressing Suggestion 5

The Defender does not believe a risk assessment tool, as indicated in Suggestion 3, is necessary and its position will likely be addressed by the ACLU and Amicus partners. Specifically, it has been encouraged by the Quattrone Center's analysis that an individualized, information-centered model with

[27] Protective orders, separate from stay away conditions, when properly issued under 18 Pa.C.S. § 4954, do authorize police to make arrests for violations. 18 Pa.C.S. § 4955.

sufficient checks and protections will be just as effective, if not more so and prevent acquiescence to easy, but often incomplete, answers.

With respect to Suggestion 5, the Defender fully agrees that expediting a detainer removal process is desirable. However, that process is complicated and should be considered as part of a much longer term solution. If this Court does address the issue in any order, the Defender suggests that any implementation plan required by this Court not necessarily include the process for improvement of detainer practice in the first submission. The Defender strongly desires remedies, and believes fundamentally, that the process of issuing detainers is flawed, *see Commonwealth v. Davis*, 68 EM 2019 (referring a King's Bench application to address detainer practices to the Criminal Procedural Rules Committee), but addressing that may require broader discussion. The Defender also does not want to see improvements in many of the areas already discussed be delayed because of concerns arising in separate, although related areas.

IV. **CONCLUSION**

WHEREFORE, this Court is respectfully requested to issue an order consistent with the Report and the recommendations outlined above and by the Defender/DAO Submission.

Respectfully Submitted,

/S/

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January 30, 2020

CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

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.

/S/

AARON MARCUS, Assistant Defender
Attorney Registration No. 93929

EXHIBIT "A"

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*, *Petitioners*, v. **ARRAIGNMENT COURT MAGISTRATES** of the FIRST JUDICIAL DISTRICT of the COMMONWEALTH OF PENNSYLVANIA, *Respondents*.	**No. 21 EM 2019**

JOINT SUBMISSION TO SPECIAL MASTER

Pre-Trial Reform Proposal of The Defender Association of Philadelphia & The Philadelphia District Attorney's Office

August 16, 2019

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I. INTRODUCTION

On July 8, 2019, the Pennsylvania Supreme Court granted King's Bench review of *Philadelphia Community Bail Fund, et al. v. Philadelphia Arraignment Court Magistrates* and appointed a Special Master to address allegations of "systemic failure to the First Judicial District to properly conduct cash bail matters pursuant to current law, as well as any suggestions for action by this Court in response to alleged systemic failures." On July 18, 2019, the Special Master requested that the Philadelphia District Attorney's Office ("DAO") and the Defender Association of Philadelphia ("Defender") (collectively "Participants") submit joint "recommendations for improving the bail system on both an immediate and longer-term basis," and include practical staffing, budgetary, and administrative implications as well as any areas of disagreement.

The following document includes only those proposals on which both sides can agree. Any disagreements are identified and the area of disagreement is briefly explained. The proposals are laid out in two parts: (1) proposals for immediate implementation; and (2) proposals for longer term implementation which may require state rule changes, or significant structural reforms.

Each part will be subdivided into specific independent proposals. Discussion of the proposal will identify the proposed reform; the policy and legal justification for the proposed reform; and a plan for implementation, including the expected costs and required personnel; the intended effect; and if the Participants disagree with respect to any particular issues within the proposal.

II. THE PROPOSALS

PART A: IMMEDIATE REFORM PROPOSALS

PROPOSAL 1: Defendants shall be represented at preliminary arraignments, and shall be afforded an opportunity to communicate confidentially with counsel prior to and during the preliminary arraignment.

Overview: The Participants agree that bail decisions are improved by increasing information the parties have about the defendant's individual circumstances. Rule 1003(D)(2) reflects this idea by granting defendants the right to "communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment." Under the current structure, despite the Defender's

advocacy on behalf of nearly all defendants during the arraignment, and its appointment to represent most defendants at trial, the Defender is not given the opportunity to speak to defendants. The Participants agree this must change. There are also no notable disagreements regarding this proposal.

The proposal has three major components: 1) ACMs shall appoint the Defender to all defendants at the beginning of each arraignment shift for the purposes of the preliminary arraignment only, except when counsel appears on behalf of the defendant or the defendant otherwise seeks to waive his right to counsel; 2) The Defender will staff preliminary arraignment court 24/7 with a "pretrial advocate" and an attorney; and 3) the FJD and Philadelphia Police will provide the pretrial advocate a meaningful opportunity to speak confidentially with each defendant prior to arraignment through a two-way simultaneous audio-visual communication system, and then ensure that the pretrial advocate can timely communicate that information to the attorney prior to commencing a preliminary arraignment. In no case shall a defendant be arraigned who has not been given a meaningful opportunity to speak with counsel.

Justification: Bail decisions are improved where the ACM has more information about a defendant's individual background, risks and needs, financial circumstances, community connections, and plan if and when released to the community (where the defendant will go, who they might be with, and why it is likely that they will appear). While Pretrial Services obtains some of this information, it is minimal, sometimes inaccurate, and defendants are more likely to reveal important personal information to their counsel than to a court agency. Moreover, currently the Defender is not appointed until the conclusion of the arraignment, even though it acts as a representative on nearly every case prior to and during the arraignment process. This situation is untenable. It places the Defender in the role of advocate for every case, but does not create an official attorney/client relationship. This should be remedied. Finally, preliminary reports from a Quattrone Center study of the Defender's bail advocate program demonstrate that providing counsel prior to arraignment will reduce racially disparate detention rates, improves court appearance rates, and reduces the rate of pre- and post-trial rearrest rates.[1]

Implementation: The Participants do not believe any statewide or local rule changes are necessary to effectuate these reforms in Philadelphia. The reforms may be addressed logistically under the following parameters.

[1] The study is not yet published, but the Participants have been briefed on the preliminary findings. The Participants will provide a supplemental filing attaching the study upon publication.

First, Rule of Criminal Procedure 122 authorizes ACM's to appoint counsel to all people who are indigent or otherwise "unable to employ" counsel when "there is a likelihood of imprisonment" or where the "interest of justice require it." At the commencement of each arraignment list, the ACM shall enter a standing order appointing the Defender for the purposes of the preliminary arraignment in all "court cases" (non-summary matters). If the Defender is appointed as counsel, then Rule 1003(D)(2) applies, which mandates that the defendant "must be permitted to communicate fully and confidentially with defense counsel prior to and during the preliminary arraignment." At the conclusion of each preliminary arraignment hearing, the appointment practice shall remain as currently operative under Rule 122.

Second, The Defender will assign a pretrial advocate and an attorney to preliminary arraignment at all times. Pretrial advocates will interview defendants during the arraignment shift in tandem with hearings. Once interviewed, that information would be given to the defense attorney and the attorney may discuss the case with the Assistant District Attorney prior to the next hearing or set of hearings. Both counsel would then suggest a bail disposition. The cases would continue like this throughout the shift.

Third, the FJD and the Police Department will have to provide the space and equipment to ensure that these interviews could occur. There is currently space in the basement of the Criminal Justice Center (CJC) that would suffice for the Defender's purposes. However, logistics with the Police Department will need to be considered. These participants will need to be brought to the table.

Costs: The Defender will need to hire seven new pretrial advocates and will need to reassign current attorneys. The Defender currently employs four pretrial advocates, but three of those are funded by the MacArthur grant, which expires in 2020. Thus, to employ seven additional pre-trial advocates, the cost will be roughly 420,000 (40k base salary and 20k benefits) per year, without including any costs associated with office supplies, which will be absorbed.

The DAO will need to staff arraignment court with an attorney 24/7. This will require four additional full-time attorneys. We estimate that salary and benefits for each attorney will be approximately $70,000 a year and so the approximate total cost to the DAO will be $280,000 per year.

The FJD will need to provide physical space, in the basement of the CJC, to facilitate easy communication between the defense attorney and the bail advocate. Participants believe space is currently available with minimal reorganization. The plan will also require additional two-way simultaneous communication equipment. In addition to installation in the basement of the CJC, each police district will have to provide a location to install the equipment and facilitate its use. The ACMs will

have to agree with this proposal and implement the change. The Philadelphia Police Department will need to be trained on the process.

Disagreements: There are no disagreements with respect to this proposal.

PROPOSAL 2: The preliminary arraignment shall be recorded.

Overview: The Participants agree that the preliminary arraignment must be electronically recorded and capable of transcription. As a matter of principle, the Participant's agree that a record should be created of any proceeding in which defendants may be deprived of their liberty.

Justification: The Participants believe that proceedings in which the rights of defendants are affected should be recorded. Although Participants acknowledge that transcriptions of the proceedings may rarely be necessary at future hearings in individual cases,[2] a record capable of transcription serves several purposes: First, and most importantly, it creates transparency and accountability, the lack of which has resulted in the current law suit. Second, it will provide a record of the parties' averments and the findings of the ACM. Third, it may be useful in emergency appeals or later proceedings where disputes arise between counsel. Lastly, a record may be useful in indirect criminal contempt cases where a defendant is in alleged violation of a bail condition and the notice element is challenged.

Implementation: The proposal would require that a Digital Recording Technician (DRT), or some other approved mechanism for creating a record of the proceedings, be installed in B08 of the Criminal Justice Center.

Costs: The cost of a DRT and recording each preliminary arraignment shift is unclear. Specific costs will require consultation with the FJD. The FJD's Court Reporter Service last issued a public report in 2011, thus the most recent data on costs associated with transcription and storage is unavailable and the FJD will need to be consulted regarding these changes. Additionally, it is not clear how many requests for transcription will be submitted, although Participants believe that such requests will be uncommon.

[2] The Participants note that Pa.R.Crim.P. 112(D), 115 and 1012, do not require any record or transcription be made of proceedings during preliminary arraignment. However, these Rules do not prohibit recording or transcription or preliminary arraignments, as long as it is conducted by an official court stenographer. Pa.R.Crim.P. 112(C), *cf* Pa.R.Crim.P. 112(D) (prohibiting the use of recordings or transcriptions other than those made by an official court stenographer). The Participants also note that an amendment to Phila.Co.Crim.Div.R. 115(a) may be useful, but not necessary.

PROPOSAL 3: **A court clerk will be present at preliminary arraignment at all times, which will enable bail conditions to be docketed, and recorded in NCIC where appropriate, so that conditions are clear, certain, accessible, and enforceable.**

Overview: The parties agree that any condition on a bail bond imposed by the ACM must be free from ambiguity, clearly explained to the defendant, accessible to all parties and to law enforcement, and enforceable.

Justification: Philadelphia notifies defendants of the required conditions of bail under our statutes and rules. *See* Pa.R.Crim. 526, Pa.R.Crim.P. 1003,18 Pa.C.S. § 4956 (pretrial release). However, certain bail conditions, like "stay away orders" issued in B-08 can be difficult to enforce because the terms of the orders are often not specific or clearly announced to the defendants. They are also not clearly docketed, entered into the NCIC database[3], and are not otherwise accessible to law enforcement or the victims. Practically, this means that if a complainant calls the police because the defendant is having prohibited contact, the police have no way to verify that there is a "stay away" order in place, and have no way to notify the ACM or judge that the defendant may be in violation. Additionally, many conditions of bail or release, such as a stay away order, are currently unconstitutionally vague: bond documents given to a defendant will say nothing more than "stay away." Typically, the defendant is not told from whom they are to avoid contact, and what types of contact is prohibited.

While the rules of Criminal Procedure permit ACMs to impose and enforce bail conditions, *see, e.g.,* 18 Pa.C.S. § 2711(allowing specified restrictions on defendants arrested for certain misdemeanor domestic violence crimes); Pa.R.Crim.P. 526-28; and Pa.R.Crim.P. 536, Philadelphia does not currently employ any reliable mechanism to ensure adequate notice or compliance. Participants believe that having a Municipal Court Clerk in the room at all times will help to ensure that bail conditions will be clear, docketed, and enforceable, and, when appropriate, recorded in the NCIC database. These practices will result in fewer motions to detain and ultimate detentions.

Implementation: The Participants agree that all release conditions beyond those required under Rule 526 be entered into the docket by a clerk in B-08 at the time of preliminary arraignment and that proper written notice be provided to the defendant of all such conditions on the bail bond. Additionally, "stay away orders" with respect to specific victims or witnesses, or when imposed pursuant to 18

[3] NCIC is the "National Crime Information Center" database run by the FBI. Information entered into this database can be seen by Philadelphia Police Officers each time they run a record check on an individual.

Pa.C.S. § 2711, shall be written on a separate document and provided to the defendant. A copy may also be provided by the DAO to the complainant. The bail bond and any additional conditions will clearly state the consequences of any violation. In some cases, the issuance of protective orders under 18 Pa.C.S. § 4954 may be appropriate. These additional conditions must also be clearly explained orally to the defendant.

Implementing these changes effectively will require the involvement of the FJD, the Philadelphia Police Department[4] and Pretrial Services. The Participants propose that if approved by this Court, the Participants will work with these entities to 1) identify any duplication or inadequacies on the current pre-trial documents and template bail bond, 2) develop new release paperwork as necessary; 3) develop a supplemental "stay away order" document that can be easily completed for any given case, 4) ensure that the additional conditions are specified in the docket; 5) identify mechanisms to report identified violations to ACMs or a Judge, and 6) discuss mechanisms to enter information relating to stay away orders and protective orders into NCIC, when appropriate.

Costs: The participants do not know the cost of covering a clerk 24/7 (21 shifts) or the costs associated with amending current forms or creating new ones. Further discussion with the FJD will be necessary.

PROPOSAL 4: At the time of the preliminary arraignment, an attorney for the Commonwealth may make a motion requesting that bail be denied pending a release determination hearing.

Overview: The Participants agree that preliminary arraignment must be structured to align with Pennsylvania's Constitution that most defendants are presumed bailable, and that no monetary or non-monetary condition of bail should be used to detain a person. The proposal also incorporates an understandable constitutional standard for when a person may be held without bail while first requiring a court to consider and reject less restrictive conditions. The proposal also ensures that the Rules are followed that if "bail is refused, the bail authority shall state in writing or on the record the reasons for that determination." Pa.R.Crim.P. 520.

Justification: ACMs currently impose monetary bail conditions on defendants in order to detain a person before trial. Not only is this unconstitutional, it fails to take into account a defendant's ability to pay, which the Rules of Criminal Procedure

[4] The Participants are unsure whether the Police Department would need to update the process by which it provides defendants with documents, and files those documents in the record.

require. A motion to hold will require the Commonwealth to identify and clearly articulate its reasons why detention is appropriate, and will inform the ACM that where no motion is made, the defendant is releasable.

Implementation: The Participants recommend adopting the below procedure at the preliminary arraignment.

Note: Although the Participants are in near uniform agreement as to these procedures, they disagree on three issues relating to when the DAO can ask to hold a defendant: (1) whether the DAO can ask to hold defendants charged with violations of 18 Pa.C.S. §§ 6106 and 6108 (gun possession where the defendant is legally eligible to carry a gun, but does not have a license); (2) how to identify and define low level "crime spree" cases for inclusion; and (3) the language and scope of a catch-all inclusion to address exceptional cases. Each of these are bracketed and bolded, and presented in detail where needed.

Motion to Hold Without Bail.

1. At the time of the preliminary arraignment, an attorney for the Commonwealth may move, either orally or in writing, that bail be denied pending a release determination hearing in the following circumstances:

    a. The defendant is charged with any of the following:

        18 Pa.C.S. Ch. 25 (relating to criminal homicide).
        18 Pa.C.S. Ch. 27 (relating to assault) when graded as a felony or is against a family or household member as defined in 23 Pa.C.S. § 6102.
        18 Pa.C.S. Ch. 29 (relating to kidnapping).
        18 Pa.C.S. Ch. 31 (relating to sexual offenses).
        18 Pa.C.S. § 3301 (relating to arson and related offenses).
        18 Pa.C.S. § 3502 (relating to burglary) when graded as a Felony of the first degree.
        18 Pa.C.S. Ch. 37 (relating to robbery).
        18 Pa.C.S. § 4915.1 or § 4915.2 (relating to failure to comply with registration requirements).
        18 Pa.C.S. Ch. 49 Subch. B (relating to victim and witness intimidation).
        18 Pa.C.S. § 5921 (relating to escape).

18 Pa.C.S. § 6105 (relating to person not to possess or use firearms).
18 Pa. C.S. § 6106 and § 6108 (relating to possession of a firearm) *(DAO wants this included, Defender does not)
30 Pa.C.S. § 5502.1 (relating to homicide by watercraft while operating under influence).
75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) when graded as a felony.
75 Pa.C.S. § 3732 (relating to homicide by vehicle).
75 Pa.C.S. § 3735 (relating to homicide by vehicle while driving under influence).
75 Pa.C.S. § 3735.1 (relating to aggravated assault by vehicle while driving under the influence).
75 Pa.C.S. § 3742 (relating to accidents involving death or personal injury).

b. The offense charged is a felony or homicide and the defendant is awaiting trial or sentencing in an unrelated case that is not part of the same conduct, transaction, occurrence, or criminal episode in which the charged offense is a felony or homicide;

c. The offense charged is part of the same conduct, transaction, occurrence, or criminal episode in which the defendant is charged with an offense or offenses against **["four or more" or "multiple"]** separate individuals; (*Defender wants the text to read "four or more," DAO wants it to read "multiple")

d. The defendant is charged with a misdemeanor or felony and the defendant is also charged with violating a protection of abuse order in the same case.

e. Participants disagree on the language in subpart e, which is essentially a "catch all" for cases that do not fit into any above category, but where the DAO may want to hold a defendant at preliminary arraignment:

DAO version:
When the Commonwealth avers that there is a significant risk that the defendant (a) will pose a danger to another person or the community, (b) will obstruct justice or threaten, injure or intimidate witnesses or

jurors, (c) will flee the jurisdiction to avoid prosecution, or (d) the defendant is unlikely to appear in court.

Defender version:
In exceptional cases, when the Commonwealth avers that there is a significant risk that the defendant (a) will cause serious bodily injury or death to another person, (b) will obstruct justice or threaten, injure, or intimidate witnesses or jurors, or (c) will flee the jurisdiction in an effort to avoid prosecution.

2. The Motion to Hold Without Bail shall set forth specific and articulable facts alleging that: (1) the defendant is a risk of flight and no condition or combination of conditions other than imprisonment will reasonably assure appearance; or (2) the defendant presents a serious danger to the safety of any person and the community and no condition or combination of conditions other than imprisonment will reasonably mitigate that danger.

3. When a Motion to Hold Without Bail is made, the Arraignment Court Magistrate shall permit the representative of the District Attorney's Office and the defendant's counsel to present evidence or argument on the motion prior to rendering a decision.

4. Upon consideration of the factors specified in Pa.R.Crim.P. 523 and any other information presented, if the Arraignment Court Magistrate finds clear and convincing evidence that the defendant will fail to appear, or that the defendant presents a danger to the safety of any specific person or the community, and no condition or combination of conditions other than imprisonment will reasonably ensure appearance or the safety of any person and the community, bail may be refused. If bail is refused, the Arraignment Court Magistrate shall

    a. state its reasons for the refusal in writing or on the record,

    b. schedule a release determination hearing before a Judge of the Municipal Court within three business days; and

    c. inform the defendant of the determination and date of the hearing.

If the defendant is without the ability to afford counsel, the Arraignment Court Magistrate shall appoint counsel to appear at the release determination hearing.

Costs: A review of 2018 preliminary arraignments suggests that if a motion were made in every case enumerated above, the DAO would file a motion on between 18% and 25% of the cases, or roughly 450 to 650 individual cases per month. Assuming that a motion is filed on every eligible case, and that the ACM held every person for whom a motion is filed, this would result in between 23 and 32 cases listed for Release Determination Hearings every day.

Of course, this is a high estimate, as the Participants do not presume a motion to hold will be made in every eligible case, nor do they believe that a motion to hold will be granted in every case in which it is made. Early bail review hearings, which occur 5 days a week, currently handle approximately 10 to 12 cases per day. An entire list currently takes approximately 90 minutes to complete.[5]

PROPOSAL 5: **Where no motion to hold without bail is made, the decision to impose monetary conditions must consider a defendant's ability to pay, and the decision to impose any monetary or non-monetary conditions must be guided by a least restrictive alternative approach.**

Overview: The Participants agree that monetary bail setting practice must include a robust ability to pay determination, and that if monetary conditions are imposed, ACMs must be able to discern how much a defendant can afford. The Participants agree that incorporating the *in forma pauperis* criteria is relevant to make a constitutionally consistent determination of ability to pay. *See* Pa.R.C.P. 240. Additionally, the Participants agree that non-monetary conditions must be the least restrictive necessary to assure appearance and the protection of the community.

Justification: Under Pennsylvania's Constitution, pre-trial release is presumed after an arrest for nearly all defendants. However, current monetary bail practices operate as a proxy for detention orders without ensuring due process, and the imposition of additional conditions beyond those required by Rule 526 are not addressed by considering the least restrictive alternative. It also discriminates against indigent defendants, who cannot pay even small amounts of bail.

[5] Early Bail Review is a Safety and Justice Challenge Initiative, sponsored by the MacArthur Foundation which has been implemented in stages since 2016. Since February, 2019, defendants charged with crimes that do not involve sex, children or firearms, and whose bail is set at $100,000 or less receive a hearing within 5 to 7 days of preliminary arraignment. At that hearing, a Municipal Court Judge may choose to reduce bail, place a defendant on house arrest or direct supervision or (in some cases) may increase bail.

Implementation: The Participants agree that arraignment procedures should reflect the following changes:

1. In making the initial determination of bail, all defendants shall be presumed releasable, unless the offense is a punishable by life without parole or the Commonwealth has moved to hold without bail along with the necessary averments.

2. No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial, for example, imposing monetary conditions where the defendant qualifies for a public defender, or receives public benefits.

3. Defendants shall be released on recognizance pursuant to Pa.R.Crim.P. 526, unless the Arraignment Court Magistrate determines that any additional condition or combination of conditions is the least restrictive condition necessary to ensure the defendant's appearance, or where the defendant is otherwise held without bail.

4. If the Arraignment Court Magistrate determines that it is necessary to impose a monetary condition of bail, prior to setting any condition, the Arraignment Court Magistrate shall determine the defendant's ability to pay. In making that determination, the Arraignment Court Magistrate shall collect and consider the defendant's relevant financial information as specified Pa.R.C.P. 240(h) (relating to *In Forma Pauperis*) and any other relevant financial considerations.

5. When a condition or combination of conditions beyond the standard release conditions is imposed, whether non-monetary or monetary, the Arraignment Court Magistrate shall:

    a. State and record the specific condition or combination of conditions on the paperwork the defendant receives at the time of release (hereinafter "release paperwork").[6]

[6] Release paperwork will include any bail bond paperwork, as well as any stay-away orders imposed upon the defendant at the time of preliminary arraignment.

b. State in writing on the release paperwork or orally on the record, the specific reasons why the condition or combination of conditions imposed is the least restrictive reasonably necessary restriction to ensure appearance and compliance with the standard conditions.

c. Where the ACM finds that a stay away condition is necessary, in addition to the condition appearing on the bail bond, a separate order shall be issued indicating the specific terms and duration of the condition, and the possible consequences if the condition is violated.

d. Explain orally to the defendant the conditions of release.

6. When a defendant is released from preliminary arraignment, the release paperwork shall be given to the defendant, specifying the information required by Pa.R.Crim.P. 525, including the specific conditions of release, and shall include the date and time of the next court date. The paperwork shall be signed by the defendant to assure proper notice.

Costs: Transitional costs may require the adoption and printing of new paperwork. The ACMs currently possess few options beyond cash bail. Although Pretrial Services offers "release on special conditions I and II," (these require in person orientation and periodic phone call check-ins), they are rarely employed by the ACMs. Defendants may be placed on direct supervision or house arrest at Early Bail Review, which only certain defendants receive 5 to 7 days after preliminary arraignment. Implementation of expanding release and conditions will require cooperation and training between pre-trial services, the ACMs, and the Participants.

The Participants suggest that the FJD request that pre-trial services develop a specific proposal to expand the use of direct reporting and needs based supervision and referrals, accounting for mental illness, homelessness, and addiction-based needs. The costs associated with any improvements would be subject to the scope of the changes. However, this proposal is not dependent upon any immediate change or expansion of pre-trial services, and therefore this expansion is discussed at greater length in Part B, the "Longer Term Reform" section.

PROPOSAL 6: If the defendant is refused bail at the preliminary arraignment, within 3 business days the defendant shall be

entitled to Release Determination Hearing in the Municipal Court.[7]

Overview: A release determination hearing is a more formal adjudicatory hearing before a judge that will determine whether a defendant should be held or released on conditions when the defendant is held pending review after a preliminary arraignment.

Justification: The preliminary arraignment is not designed to and is not capable of addressing all of the concerns that may initially justify holding a defendant. However, many of these concerns can be addressed through adequate investigation and planning by the defendant's counsel and investigation by the DAO. Thus, to protect against unnecessary detention, a more formal hearing should be held as soon as is practicable to determine whether the defendant shall remain held or released on conditions. This practice is consistent with bail reform efforts around the country and with the best practices suggested by the empirical literature.

Implementation: The Participants agree that arraignment procedures should reflect the following changes:

1. If the Commonwealth files or makes a motion to hold without bail and the Magistrate refuses bail, a hearing shall be held within three business days of when the Magistrate's order refusing bail is made. Within 6 to 12 months of the effective date this provision, the hearing shall be held within 2 business days.

2. The hearing shall be conducted on the record in open court.

3. An attorney for the Commonwealth may appear and present evidence in the form of witnesses, documents, or otherwise;

4. The defendant shall appear in person, except as provided in these Rules and the Pennsylvania Rules of Criminal Procedure, and may be represented by counsel, and be permitted to

    a. cross-examine witnesses and inspect physical evidence presented against the defendant;

[7] Participants agree that hearings should occur as quickly as is practicable. After the program is up and running, Participants will likely seek to have hearings within two business days after a period of 6 to 12 months. However, the Participants are open to discussion about the timeline for accomplishing this transition.

b. call witnesses on the defendant's own behalf;
c. offer evidence on the defendant's own behalf, and testify;

5. The Rules of Evidence shall not apply.

6. The Judge of the Municipal Court shall determine whether there is clear and convincing evidence that the safety of any person and the community or the person's appearance cannot be ensured by less restrictive available means other than imprisonment. Whenever bail is refused, the Judge of the Municipal Court shall state in writing or on the record the specific reasons for the determination.

7. Continuances. Upon motion of the defendant, the court may grant a continuance. Upon motion of the Commonwealth, the court may grant a single continuance for no more than 48 hours if it finds that the Commonwealth has made a showing of good cause.

8. Nothing shall preclude the defendant or the Commonwealth from otherwise filing a motion to modify the bail determination pursuant to the Rules of Criminal Procedure or Local Rule.

Costs: The costs to implement procedural changes are unknown. It is true that similar types of hearings already occur for many defendants within 5 to 7 days of preliminary arraignment. Participants believe that the Early Bail review program can be expanded to absorb additional cases each day.

The Participants agree that best practices would require a Release Determination Hearing within 48 hours of an ACM's order to hold without bail. Due to implementation concerns, the Participants agree that the initial reform should require a hearing within three business days with a commitment from all parties to reduce this period to two business days as soon as is practicable.

PROPOSAL 7: Any person not otherwise held without bail, but who remains in custody on a condition of release after three business days shall be entitled to a Release Determination Hearing (similar to the current early bail review).

Overview: The Participants agree that if people held without bail are given a robust adversarial hearing to address whether detention is appropriate, individuals who are ordered releasable at the preliminary arraignment upon satisfaction of specific conditions (e.g., house arrest, monetary bail, etc.), but have not been

released within 72 hours, should be afforded a hearing to assess whether the conditions are necessary, or whether other less restrictive conditions may be imposed consistent with constitutional standards. The hearing shall be scheduled with the cases slated for a Release Determination Hearing and the standards and procedures associated with the hearing would be similar.

Justification: The Participants agree that people who are otherwise releasable should not be detained for more than three days if less restrictive conditions may be imposed.

Implementation: A list will be generated of all defendants without detainers who remain in custody after two business days. Those defendants will be placed on a court list the following business day. If the defendant is released between being placed on the list and the hearing, the listing will be marked "listed in error" and no hearing will be held.

These hearings will be procedurally similar to other Release Determination Hearings except that they would incorporate the decision framework for imposing non-monetary or monetary conditions.

Costs: The Participants do not believe substantial expense is associated with this reform. The FJD is currently able to identify eligible defendants who are not released within several days and create a list of those individuals for Early Bail Review Hearings.

PART B: LONGER TERM REFORMS

The Participants propose that the following reforms go into effect within a reasonable period after the first set of new rules are implemented.

LONG TERM PROPOSAL 1: The ACM shall issue a summons for defendants charged with low level misdemeanors after the filing of a complaint and the defendant shall not be subjected to a preliminary arraignment.

Overview: Every jurisdiction in Pennsylvania, other than Philadelphia, allows the police to release defendants charged with low-level misdemeanors from custody without a preliminary arraignment. These offenders are released with a "summons," a document that tells a defendant that they are likely to be charged

and that they will receive notice of a court date in the mail. However, Pennsylvania Rule of Criminal Procedure 1003 does not appear to allow for this process in Philadelphia.

The DAO does not consent to any process in which a defendant would be released from custody before the date of the first court listing has been set and given to all the parties: the DAO fears that such a process would lead to an increase in the number of defendants who fail to appear in court. However, the Participants agree that Philadelphia's system should process certain alleged low-level offenders through the system without a preliminary arraignment, thereby allowing these defendants to spend less time in custody and leaving ACMs more time to deal with more serious cases.

The idea would be that in low level cases, the Commonwealth can file the complaint, and the ACM can conduct an expedited review to generate a docket number and a first court date, which will then be provided to the defendant by the police department upon release, absent a hearing. Participants agree that this process must allow for the following: 1) pretrial services to interview the defendant; 2) an opportunity for the Defender to confidentially communicate with the defendant; 3) the ACM to appoint counsel; and 4) the DAO to review the case prior to release.

Costs: The Participants are not aware of significant costs to implementing this type of procedure. However, the proposal will require planning by both the Participants and the FJD to develop and implement the plan.

LONG TERM PROPOSAL 2: Expand pretrial supervision services.

Overview: At the moment, ACMs have very few pretrial supervision options to assign defendants: the only types of non-monetary conditions available at preliminary arraignment are ROSC I and II, which involve an intake, and then periodic phone calls with a pretrial officer. Additional options are available at Early Bail Review when some defendants appear before a judge, 5 to 7 days after arrest. These include house arrest and direct supervision. The Participants believe that if additional methods of supervision were available to ACMs, a greater number of defendants could be safely released.

Costs: The costs of expanding available pretrial services could be significant, but cannot be assessed without involving the FJD.

LONG TERM PROPOSAL 3: Ensure that data from the initial phase of the program is collected, evaluated, and reviewed

and mandate that a report evaluating the reforms be issued after 1 year of implementation.

Overview: The Participants believe that it is critical that an outside person or organization be assigned to evaluate the reforms and report back to the Court and the parties on the progress that has been made. The Participants suggest that all parties partner with some group of researchers and share all data regarding implementation with that group, and that an independent report be created, detailing the results of the process.

Costs: The costs of such a study are unknown, but grant funding may be available.

III. CONCLUSION

The Participants believe each of these proposals are essential to ensure: (a) public safety; (b) that Pennsylvania's Constitution and this Court's Rules are obeyed; (c) that detention and bail practices are fair and non-discriminatory; and (d) that all decisions consider the individualized circumstances of the person appearing before the court.

Respectfully Submitted,

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August 16, 2019.

EXHIBIT "B"

DEFENDER ASSOCIATION of PHILADELPHIA

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Local Court Rules--Eastern Region
Philadelphia County
Court of Common Pleas
Criminal Division Rules
Chapter 5. Pretrial Procedures in Court Cases
Part C. Bail

Phila. Co. Crim. Div. 520

Rule 520. Regulations Pertaining to Bail, Court of Common Pleas and Municipal Court

Currentness

(A) Initial Determination of Bail.

(1) Upon defendant's arrest, **when the defendant has not been released,** the initial determination of bail, where bail is applicable, to insure his appearance at proceedings concerning the charges for which he was arrested shall be made at Preliminary Arraignment by the ~~Municipal Court Bail Commissioner~~ **Arraignment Court Magistrate** regularly assigned.

(2) Prior to making an initial determination of bail, the Arraignment Court Magistrate shall provide the defendant with a meaningful opportunity to have a confidential communication with their attorney or their attorney's representative, and the Magistrate shall permit the attorney or the attorney's representative a meaningful opportunity to speak with the District Attorney or the District Attorney's representative.

(3) In making the initial determination of bail, all defendants shall be presumed releasable, unless the offense is a punishable by life without parole or the Commonwealth has filed a motion pursuant to section (B).

a. No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial, for example, imposing monetary conditions where the defendant is indigent, qualifies for a public defender, or receives public benefits.

b. In all cases, the bail authority shall use the least restrictive conditions of bail reasonably necessary under Pa. R. Crim. P. 524 to ensure the defendant's good behavior and appearance at trial.

c. Bail conditions in addition to the standard release conditions provided in Pennsylvania Rule of Criminal Procedure 526 shall not be imposed unless the Arraignment Court Magistrate determines that the specific additional restrictions are necessary to ensure the defendant's appearance and compliance with the standard conditions.

(4) When a condition or combination of conditions beyond the standard release conditions is imposed the Arraignment Court Magistrate shall:

a. State the specific condition or combination of conditions on the bail bond;

b. State in writing on the bail bond or otherwise, or orally on the record, the specific reasons why the condition or combination of conditions imposed is reasonably necessary to ensure appearance or compliance.

(5) Appeals from the ~~Bail Commissioner's~~ **Arraignment Court Magistrate's** decision shall be heard only by the Emergency Municipal Court Bail Appeal Judge specifically assigned by the Municipal Court President Judge. No other Municipal Court Judge may make such initial determination of bail, except upon prior written order of the President Judge of the Municipal Court, or, in the case of a Judge of the Court of Common Pleas, both the President Judge of the Municipal Court and the President Judge of the Court of Common Pleas.

(B) Motion to Hold Without Bail.

(1) At the time of the preliminary arraignment, an attorney for the Commonwealth may file, along with the criminal complaint, a written motion requesting that bail be denied pending a Release Determination Hearing in the following circumstances:

a. The defendant is charged with any of the following:
   - 18 Pa.C.S. Ch. 25 (relating to criminal homicide).
   - 18 Pa.C.S. Ch. 27 (relating to assault) when graded as a felony or is against a family or household member as defined in 23 Pa.C.S. § 6102.
   - 18 Pa.C.S. Ch. 29 (relating to kidnapping).
   - 18 Pa.C.S. Ch. 31 (relating to sexual offenses).
   - 18 Pa.C.S. § 3301 (relating to arson and related offenses).
   - 18 Pa.C.S. § 3502 (relating to burglary) when graded as a Felony of the first degree.
   - 18 Pa.C.S. Ch. 37 (relating to robbery).
   - 18 Pa.C.S. § 4915.1 or § 4915.2 (relating to failure to comply with registration requirements).
   - 18 Pa.C.S. Ch. 49 Subch. B (relating to victim and witness intimidation).
   - 18 Pa.C.S. § 5921 (relating to escape).
   - 18 Pa.C.S. § 6105 (relating to person not to possess or use firearms).
   - 30 Pa.C.S. § 5502.1 (relating to homicide by watercraft while operating under influence).
   - 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) when graded as a felony.
   - 75 Pa.C.S. § 3732 (relating to homicide by vehicle).
   - 75 Pa.C.S. § 3735 (relating to homicide by vehicle while driving under influence).
   - 75 Pa.C.S. § 3735.1 (relating to aggravated assault by vehicle while driving under the influence).
   - 75 Pa.C.S. § 3742 (relating to accidents involving death or personal injury).

b. The offense charged is a homicide or felony and the defendant is awaiting trial or sentencing in an unrelated case that is not part of the same conduct, transaction, occurrence, or criminal episode in which the charged offense is homicide or felony;

c. The offense charged is part of the same conduct, transaction, occurrence, or criminal episode in which an offense or offenses are charged against four or more separate individuals;

d. The defendant is charged with a misdemeanor or felony and the defendant is also charged with violating a protection of abuse order against the complainant; or

e. Upon leave of court by the Emergency Municipal Court Bail Appeal Judge when the Commonwealth avers to the Emergency Judge specific and articulable exceptional reasons why the defendant's immediate release will pose a clear and convincing imminent threat of serious bodily injury or death to a specific person or persons and why no condition or combination of conditions will adequately mitigate that threat.

(2) The Motion to Hold Without Bail shall

a. With clear and convincing evidence allege that the person is a serious risk of flight and no condition or combination of conditions other than imprisonment will reasonably ensure appearance or that the defendant presents a serious threat of violence to the safety of any specific person and the community; and

b. Set forth specific and articulable facts supporting the averment.

(3) When the Arraignment Court Magistrate has determined the Commonwealth's motion satisfies the requirements of subparagraph (B)(2), bail may be refused. If bail is refused, the Commissioner shall state its reasons for the denial in writing or on the record, and shall schedule a release determination hearing before a Judge of the Municipal Court within two business days and inform the defendant of the determination and date of the hearing.

(4) If the defendant is without the ability to afford counsel, the Arraignment Court Magistrate shall appoint counsel to appear at the release determination hearing.

(C) Release Determination Hearing.

(1) If the Commonwealth files a motion to hold without bail under paragraph (B), and the Magistrate refuses bail, a hearing shall be held within two business days.

(2) The hearing shall be conducted on the record in open court.

(3) An attorney for the Commonwealth may appear and present evidence in the form of witnesses or otherwise;

(4) The defendant shall appear in person, except as provided in these Rules and the Pennsylvania Rules of Criminal Procedure, and may be represented by counsel, and be permitted to

- **a. cross-examine witnesses and inspect physical evidence presented against the defendant;**
- **b. call witnesses on the defendant's own behalf;**
- **c. offer evidence on the defendant's own behalf, and testify;**

(5) The Rules of Evidence shall not apply.

(6) The Judge of the Municipal Court shall determine whether there is clear and convincing evidence that the safety of any person and the community or the person's appearance cannot be ensured by available means other than imprisonment. Whenever bail is refused, the Judge of the Municipal Court shall state in writing or on the record the specific reasons for the determination.

(7) Continuances. A single continuance to the following business day may be granted upon request by the defendant, or where counsel for the defendant is unavailable or is removed due to a conflict of interest.

(8) Nothing in this Subsection shall preclude the defendant or the Commonwealth from otherwise filing a motion to modify the bail determination pursuant to Subsection (D).

~~(B)~~(D) Modification of Bail.

(1) **Except as provided in Paragraph (C) (Release Determination Hearings),** Modifications as to the form and amount of bail made as part of the Preliminary Hearing or Municipal Court trial shall be made only by the Judge assigned to the Preliminary Hearing or Municipal Court trial.

(2) Any modification as to the form and amount of bail between Preliminary Arraignment and Common Pleas Court trial (except as part of the Preliminary Hearing or Municipal Court trial) shall be made only by the Judge regularly assigned to the Common Pleas Court Criminal Motion Court, or on weekends and Court holidays to the Judge assigned in advance for this purpose by the President Judge of the Common Pleas Court.

The assignment to the Common Pleas Court Criminal Motion Court shall be for a seven-day period, and the Judge so assigned, if not available in City Hall, will be available by telephone through the City Hall Message Center.

(3) An application for modification of bail shall be in writing and shall include the defendant's name, address, Municipal Court number, or, if the defendant has been indicted, the indictment number, the charges, the present bail, the date and name of the Judge or **Arraignment Court Magistrate** ~~Bail Commissioner~~ who presided at the Preliminary Arraignment or Municipal Court trial. During the normal hours of Court operation (9 a.m. to 5 p.m., Monday through Friday), the application shall be filed with the clerk of the Motion Court. The Clerk shall designate in writing the time and place of the hearing to be held in the Motion Court. The District Attorney shall be served with notice of the application by counsel for the applicant at least twenty-four (24) hours before the scheduled hearing unless waived by the Motion Court Judge or the District Attorney.

If the application for modification of bail is made during other than normal hours of Court operation, it shall be filed with the Judge assigned to the Common Pleas Court Criminal Motion Court, who shall indicate thereon the time, date, and place of the hearing. Notice of the application and the time, date and place of the hearing shall be communicated to the District Attorney at least twenty-four (24) hours prior to the hearing unless waived by the Judge assigned to the Motion Court or the District Attorney.

(4) No Judge shall rule upon such application without first providing the attorney for the defendant and the District Attorney opportunity to be heard and present evidence.

(5) The defendant need not be present. If defendant's counsel wishes to have the defendant present during the normal hours of Court operation, counsel must request the clerk to issue and deliver to the Sheriff an appropriate bring-down order.

(6) All evidence offered at hearings held in Motion Court shall be stenographically recorded. Evidence presented on weekends, or Court holidays need not be so recorded.

(7) At the conclusion of the hearing, whether stenographically recorded or not, the Judge shall issue a written order as to the amount and form of bail on a certificate provided by the clerk. Copies of the certificate which shall include the Municipal Court number or indictment number, shall be issued forthwith to the attorney for defendant and the District Attorney. Counsel for the defendant shall have the responsibility of delivering the original order to the clerk of the Motion Court. If the order is issued during other than the normal hours of Court operation, the attorney for the defendant shall file the original with the clerk of the Motion Court on the first regular Court day thereafter. The copy issued to defendant's counsel shall be surrendered by him at the time bail is entered.

(8) Only one such application for bail shall be made unless defendant can establish to the satisfaction of the Court that: 1) there has been a significant change in defendant's circumstances; 2) there has been a material change in applicable law; 3) defendant has newly discovered evidence; or 4) there has been an unreasonable delay on the part of the Commonwealth in bringing the defendant to trial. Any second or subsequent bail application under the provisions of this Rule must include in the written notice a statement of the earlier application or applications and reasons why further bail proceedings are warranted.

(C) Modification at Trial. Once indictments have been assigned to an individual Judge for trial, only that Judge may consider an application to modify the amount or form of bail. If the existing bail shall have been set by another

Judge of the Court of Common Pleas, the Trial Judge shall not modify such order, except upon proof to his satisfaction of the existence of one of the reasons stated in Subsection B(8) of these Rules.

(D) Habeas Corpus Bail. Bail-pending proceedings on a petition for writ of habeas Corpus shall be determined by the Judge regularly assigned to the Criminal Motion Court, or, on weekends and Court holidays, by the Judge assigned pursuant to Subsection B of this Rule to hear bail applications. No other Judge may make such initial determination of bail on the petition, except upon written order of the President Judge.

(1) The amount and form of bail pending the petition shall be determined according to the procedures required by Subsection B of this Rule.

(2) If bail on the charges has been previously set by another Judge of the Court of Common Pleas, the Judge receiving the petition shall set bail on the petition in like amount and form. Any bail bond or other form of security accepted by the Court for defendant's release on the charges shall likewise be accepted for release on the petition.

(3) If bail on the charges was set by a Municipal Court Judge or has not been set at all, the Judge receiving the petition shall set bail as provided in these Rules and such bail shall apply both to the petition and the charges and shall supersede any bail on the charges as may have been set.

(E) Scheduling Habeas Corpus Hearings. In addition to setting bail, the Judge receiving the petition shall set a return date, not sooner than five calendar days from presentation of the petition, for a hearing in the Criminal Motion Court, and a copy shall be served forthwith on the District Attorney. A hearing on the petition may not be held before any Judge other than the Judge regularly assigned to the Criminal Motion Court or earlier than five calendar days from presentation except upon written order of the President Judge.

(F) Invalid Orders. Any action by a Judge not authorized to hear an application for bail shall be invalid and the clerk shall not accept any bail entered pursuant thereto.

(G) District Attorney Warrants. Arrests made pursuant to District Attorney Warrants shall be scheduled for Preliminary Arraignment at the Police Administration Building.

(H) Appeal by Way of Re-Arrest. When a re-arrest is effected by the Commonwealth following dismissal of the earlier proceeding because of lack or want of prosecution, the Preliminary Arraignment shall be conducted by the designated Municipal Court Judge.

When a re-arrest is taken in the nature of an appeal by the Commonwealth from an earlier dismissal, the Judge assigned to the Common Pleas Court Motion Court shall hold the Preliminary Arraignment. The Preliminary Hearing shall likewise be scheduled in the Common Pleas Court Motion Court, within three to ten days after preliminary arraignment. Continuances may be granted in accordance with Local Court Rule 801, Continuances at Preliminary Hearings; no continuances shall be longer than two weeks, unless for cause shown or by agreement of both counsel.

Credits

[Adopted June 4, 2014, effective 30 days after the publication in the *Pennsylvania Bulletin*.]

<Headings in brackets [ ] have been supplied by the Publisher.>

Phila. Co. Criminal Division 520, PA R PHILADELPHIA CTY RCRP 520
Current with amendments received through December 1, 2018.

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 10. Rules of Criminal Procedure for the Philadelphia Municipal Court and the Philadelphia Municipal Court Traffic Division (Refs & Annos)
Part A. Philadelphia Municipal Court Procedures

Pa.R.Crim.P. Rule 1003

Rule 1003. Procedure in Non-Summary Municipal Court Cases

(A) Initiation of criminal proceedings

(1) Criminal proceedings in court cases shall be instituted by filing a written complaint, except that proceedings may be also instituted by:

(a) an arrest without a warrant when a felony or misdemeanor is committed in the presence of the police officer making the arrest; or

(b) an arrest without a warrant upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when the arrest without a warrant is specifically authorized by law; or

(c) an arrest without a warrant upon probable cause when the offense is a felony.

(2) *Private Complaints*

(a) When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.

(b) If the attorney for the Commonwealth:

(i) approves the complaint, the attorney shall indicate this decision on the complaint form and transmit it to the issuing authority;

(ii) disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the President Judge of Municipal Court, or the President Judge's designee, for review of the decision. Appeal of the decision of the Municipal Court shall be to the Court of Common Pleas.

(B) Release

(1) The arresting officer shall promptly release from custody a defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met:

(a) the attorney for the Commonwealth reviews and approves the charges submitted by police officers where the District Attorney for the County has elected to require approval under Rule 507;

(b) the most serious offense charged is a misdemeanor of the second degree, an ungraded misdemeanor punishable by a term of imprisonment of not more than 3 years, or a misdemeanor of the first degree in cases arising under 75 Pa.C.S. § 3802;

(c) the defendant is not charged with violating an order pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse); and

(d) the defendant does not pose a real and present threat of immediate physical harm to any other person or to himself or herself, or if the defendant does not possess an address at which a summons can be received.

(2) When a defendant is released pursuant to paragraph (B)(1), a complaint shall be filed against the defendant within 5 days of the defendant's release. Thereafter, the issuing authority shall issue a summons, not a warrant of arrest, and shall proceed as provided in Rule 510 and paragraph (F).

(B)**(C) Certification of complaint.** Before an issuing authority may issue process or order further proceedings in a Municipal Court case, the issuing authority shall ascertain and certify on the complaint that:

(1) the complaint has been properly completed and executed; and

(2) when prior submission to an attorney for the Commonwealth is required, an attorney has approved the complaint.

The issuing authority shall then accept the complaint for filing, and the case shall proceed as provided in these rules.

(C)(D) Summons and arrest warrant procedures. When an issuing authority finds grounds to issue process based on a complaint, the issuing authority shall:

(1) issue a summons and not a warrant of arrest when **the defendant has been arrested without a warrant and released pursuant to paragraph (B), or where** the offense charged is punishable by imprisonment for a term of not more than 1 year, except as set forth in paragraph (C)(2);

(2) issue a warrant of arrest when:

(a) the offense charged is punishable by imprisonment for a term of more than 5 years;

(b) the issuing authority has reasonable grounds for believing that the defendant will not obey a summons;

(c) the summons has been returned undelivered;

(d) a summons has been served and disobeyed by a defendant;

(e) the identity of the defendant is unknown;

(f) a defendant is charged with more than one offense, and one of the offenses is punishable by imprisonment for a term of more than 5 years; or

(3) when the offense charged does not fall within the categories specified in paragraph (C)(1) or (2), the issuing authority may, in his or her discretion, issue a summons or a warrant of arrest.

(D)(E) Preliminary arraignment

(1) When a defendant has been arrested within Philadelphia County in a Municipal Court case, with or without a warrant, the defendant shall be afforded a preliminary arraignment by an issuing authority without unnecessary delay. If the defendant was arrested without a warrant pursuant to paragraph (A)(1)(a) or (b), unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

(2) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

(3) At the preliminary arraignment, the issuing authority:

(a) shall not question the defendant about the offense(s) charged;

(b) shall give the defendant's attorney, or if unrepresented the defendant, a copy of the certified complaint;

(c) if the defendant was arrested with a warrant, the issuing authority shall provide the defendant's attorney, or if unrepresented the defendant, with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant's attorney, or if unrepresented the defendant, shall be given copies no later than the first business day after the preliminary arraignment; and

(d) also shall inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(ii) of the day, date, hour, and place for the trial, which shall not be less than 20 days after the preliminary arraignment, unless the issuing authority fixes an earlier date for the trial upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth, and that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued;

(iii) in a case charging a felony, unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2, of the date, time, and place of the preliminary hearing, which shall not be less than 14 nor more than 21 days after the preliminary arraignment unless extended for cause or the issuing authority fixes an earlier date upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and that failure to appear without cause for the preliminary hearing will be deemed a

waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and that the case shall proceed in the defendant's absence, and a warrant of arrest shall be issued;

(iv) if a case charging a felony is held for court at the time of the preliminary hearing, that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued; and

(v) of the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

(4) After the preliminary arraignment, if the defendant is detained, he or she shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail, as provided by law.

(E) (F) Preliminary Hearing in Cases Charging a Felony.

(1) Except as provided in paragraphs (E)(2) and (E)(3), in cases charging a felony, the preliminary hearing in Municipal Court shall be conducted as provided in Rule 542 (Preliminary Hearing; Continuances) and Rule 543 (Disposition of Case at Preliminary Hearing).

(2) At the preliminary hearing, the issuing authority shall determine whether there is a *prima facie* case that an offense has been committed and that the defendant has committed it.

(a) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.

(b) Hearsay evidence shall be sufficient to establish any element of an offense including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(3) If a *prima facie* case is not established on any felony charges, but is established on any misdemeanor or summary charges, the judge shall remand the case to Municipal Court for trial.

(F) (G) Acceptance of bail prior to trial. The Clerk of Courts shall accept bail at any time prior to the Municipal Court trial.

Comment: The 2004 amendments make it clear that Rule 1003 covers the preliminary procedures for all non-summary Municipal Court cases, see Rule 1001(A), and cases charging felonies, including the institution of proceedings, the preliminary arraignment, and the preliminary hearing.

See Chapter 5 (Procedure in Court Cases), Parts I (Instituting Proceedings), II (Complaint Procedures), III(A) (Summons Procedures), III(B) (Arrest Procedures in Court Cases), and IV (Proceedings in Court Cases Before Issuing Authorities) for the statewide rules governing the preliminary procedures in court cases, including non-summary Municipal Court cases, not otherwise covered by this rule.

The 2004 amendments to paragraph (A)(1) align the procedures for instituting cases in Municipal Court with the statewide procedures in Rule 502 (Means of Instituting Proceedings in Court Cases).

The 1996 amendments to paragraph (A)(2) align the procedures for private complaints in non-summary cases in Municipal Court with the statewide procedures for private complaints in Rule 506 (Approval of Private Complaints). In all cases in which the affiant is not a law enforcement officer, the complaint must be submitted to the attorney for the Commonwealth for approval or disapproval.

As used in this rule, "Municipal Court judge" includes a bail commissioner acting within the scope of the bail commissioner's authority under 42 Pa.C.S. § 1123(A)(5).

The procedure set forth in paragraph (C)(3) allows the issuing authority to exercise discretion in whether to issue a summons or an arrest warrant depending on the circumstances of the particular case. Appropriate factors for issuing a summons rather than an arrest warrant will, of course, vary. Among the factors that may be taken into consideration are the severity of the offense, the continued danger to the victim, the relationship between the defendant and the victim, the known prior criminal history of the defendant, *etc.*

If the attorney for the Commonwealth exercises the options provided by Rule 202, Rule 507, or both, the attorney must file the certifications required by paragraphs (B) of Rules 202 and 507 with the Court of Common Pleas of Philadelphia County and with the Philadelphia Municipal Court.

For the contents of the complaint, see Rule 504.

Under paragraphs (A) and (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before the defendant may be detained. *See Riverside v. McLaughlin*, 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Within the meaning of paragraph (D)(2), counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (D)(2), the issuing authority has discretion to order that a defendant appear in person for the preliminary arraignment.

Under paragraph (D)(2), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning *venue* when proceedings are conducted pursuant to this rule using advanced communication technology.

Paragraph (D)(3)(c) requires that the defendant's attorney, or if unrepresented the defendant, receive copies of the arrest warrant and the supporting affidavits at the preliminary arraignment. This amendment parallels Rule 540(C). *See also* Rules 208(A) and 513(A).

Paragraph (D)(3)(c) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (1987).

The 2012 amendment to paragraph (D)(3)(d)(iii) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Rule 556.2. *See* also Rule 556.11 for the procedures when a case will be presented to the indicting grand jury.

Paragraphs (D)(3)(d)(ii) and (D)(3)(d)(iv) require that, in all cases at the preliminary arraignment, the defendant be advised of the consequences of failing to appear for any court proceeding. *See* Rule 602 concerning a defendant's failure to appear for trial. *See also Commonwealth v. Bond*, 693 A.2d 220 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.' ")

Under paragraph (D)(4), after the preliminary arraignment, if the defendant is detained, the defendant must be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she must be committed to jail as provided by law.

Paragraphs (D)(3)(d)(iii) and (E) make it clear that, with some exceptions, the procedures in Municipal Court for both preliminary hearings and cases in which the defendant fails to appear for the preliminary hearing are the same as the procedures in the other judicial districts.

Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally,

but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare* Commonwealth ex rel. Buchanan v. Verbonitz, 525 Pa. 413, 581 A.2d 172 (1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case). *See also* Rule 542.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

Credits

Note: Original Rule 6003 adopted June 28, 1974, effective July 1, 1974; amended January 26, 1977, effective April 1, 1977; amended December 14, 1979, effective April 1, 1980; amended July 1, 1980, effective August 1, 1980; amended October 22, 1981, effective January 1, 1982; Comment revised December 11, 1981, effective July 1, 1982; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; rescinded August 9, 1994, effective January 1, 1995. New Rule 6003 adopted August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; amended March 22, 1996, effective July 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; amended August 28, 1998, effective immediately; renumbered Rule 1003 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended August 24, 2004, effective August 1, 2005; amended August 15, 2005, effective February 1, 2006; amended April 5, 2010, effective April 7, 2010; amended January 27, 2011, effective in 30 days; amended June 21, 2012, effective in 180 days [December 18, 2012]; *Comment* revised July 31, 2012, effective November 1, 2012; amended April 25, 2013, effective June 1, 2013; amended May 2, 2013, effective June 1, 2013.