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**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**

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**PETITIONERS' RESPONSE TO**  
**THE REPORT OF THE SPECIAL MASTER**

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## STATEMENT OF JURISDICTION

On July 8, 2019, this Court issued an order “invok[ing] its King’s Bench jurisdiction in this matter to conduct an inquiry,” into “the operation of the cash-bail system in the First Judicial District.”

Article V, Section 2 of the Pennsylvania Constitution provides that this Court “shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth.” Pa. Const. art. V, § 2(c). Consistent with this broad grant of jurisdiction, 42 Pa. Cons. Stat. § 502 provides:

The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.

“King’s Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.”

*Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

This litigation meets the standard for invoking King’s Bench authority. The functioning of the bail system in Philadelphia is of enormous public importance and interest. As Petitioners alleged, Respondent’s systemic violation of constitutional and rule based mandates impacts tens of thousands arrestees each

year, including Individual Petitioners who all were deprived of their pretrial liberty as result of indigency. (Amended Petition for Extraordinary Relief under the Court's King's Bench Jurisdiction ¶¶ 1-9) (hereinafter Amended Petition).

Petitioners alleged that the deleterious effects of delaying review of Respondents' systemic violations of defendants' rights under the constitution and rules are profound. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The issues raised by Petitioners also call into question the dignity and integrity of the criminal justice system in Philadelphia and plainly fall within the Court's King's Bench authority. Thus, this matter is properly before this Court pursuant to its King's Bench jurisdiction.

**ORDER OR OTHER DETERMINATION IN QUESTION**

On July 8, 2019, this Honorable Court issued an Order that provided, in pertinent part:

[T]his Court invokes its King’s Bench jurisdiction in this matter to conduct an inquiry, more fully described below, relative to the operation of the cash-bail system in the First Judicial District.

...

That inquiry shall be conducted by a special master. The inquiry shall be limited to Petitioners’ allegations regarding systemic failures of 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 those alleged systemic failures. Any attempt to advocate for the abolition of cash bail will not be entertained.

The Honorable John M. Cleland, Senior Judge of the Court of Common Pleas of McKean County, is appointed to preside as special master over the inquiry.

...

With respect to the proceedings before the special master, all necessary additional filings shall be presented and any hearings shall be concluded within 90 days of this order. Within 60 days thereafter, the special master is to submit to this Court a report and recommendation, detailing any indicated proposed findings of fact, conclusions of law, and recommendations for further action by this Court.

The Report of the Special Master dated December 16, 2019 and filed on December 17, 2019 (hereinafter Report) is presently before the Court for review.

## **STATEMENT OF THE QUESTIONS INVOLVED**

1. Whether this Honorable Court should adopt and implement the eight agreements, reached by the parties, to improve the bail procedures currently in use in the Philadelphia Arraignment Court and Municipal Court?

Answered by the Special Master in the Affirmative; Petitioners concur.

2. Whether this Honorable Court should resolve the disagreements among the parties and participants regarding the legal standards to be applied in bail proceedings in the Philadelphia Arraignment Court and Municipal Court so that the revised bail proceedings will comply with the law?

Answered by the Special Master in the Affirmative; Petitioners concur.

3. Whether this Honorable Court should recognize the President Judge of the Philadelphia Municipal Court as the unitary authority over bail proceedings in the Philadelphia Arraignment Court and Municipal Court and require that person to develop and implement methods to evaluate the job performance of the Philadelphia Arraignment Court Magistrates and to assess the implementation of changes ordered by this Honorable Court?

Answered by the Special Master in the Affirmative; Petitioners concur.

## STATEMENT OF THE CASE

On March 12, 2019, ten individuals held on monetary bail they could not afford, the Philadelphia Community Bail Fund, and the Youth Art & Self-Empowerment Project initiated this action by filing an Application for Leave to File Original Process, along with a Class Action Complaint and Petition for a Writ of Mandamus (hereinafter Complaint). The relief Petitioners sought was an order compelling the Arraignment Court Magistrates of the First Judicial District (“Respondents” or “ACMs”) to conduct preliminary arraignments in conformance with the Pennsylvania Rules of Criminal Procedure and the Pennsylvania Constitution.

The Complaint, based on the experiences of the Individual Petitioners and documentation of over 2,000 preliminary arraignments, alleged that the preliminary arraignments conducted by Respondents did not comply with the Pennsylvania Constitution and the Pennsylvania Rules of Criminal Procedure. It further alleged that those proceedings routinely resulted in the imposition of monetary conditions of release that indigent defendants, including the Individual Petitioners, could not hope to meet.

Petitioners alleged that Respondents: (1) did not meaningfully consider defendants’ ability to pay, or whether available alternative conditions of release would serve the primary purpose of bail; (2) imposed high monetary conditions for

the purpose of ensuring that certain defendants remain incarcerated pending trial; and (3) conducted preliminary arraignments in a cursory fashion and without any of the hallmarks of due process.

Petitioners further alleged that the failure to comply with the Pennsylvania Constitution and the Rules resulted in thousands of people who are entitled to release being assigned monetary bail that they cannot afford and unjustly deprived of their pretrial liberty. For years, community advocates such as the Philadelphia Community Bail Fund and the Youth Art & Self-Empowerment Project, along with academics, reform advocates, and government officials have called attention to the substantial harms caused by the imposition of unaffordable monetary bail in Philadelphia. Petitioners filed this action to bring bail setting practices in Philadelphia into compliance with the Rules and Constitution.

On March 26, 2019, Respondents filed a response to the complaint and petition. Petitioners thereafter filed an application on behalf of the Individual Petitioners for leave to proceed anonymously (April 8, 2019); a motion for leave to file an Amended Petition to add six additional Individual Petitioners and to reflect the change in custody status for several original Individual Petitioners (April 12, 2019); and a motion seeking class certification (April 30, 2019).

On July 8, 2019, this Court denied the application for leave to proceed anonymously, granted the application to file an amended complaint and petition,

denied the motion for class certification, and denied the request for mandamus relief. In that same Order, this Court invoked its King’s Bench jurisdiction to conduct an “inquiry relative to the operation of the cash-bail system in the First Judicial District . . . limited to Petitioners’ allegations regarding systemic failures of 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 those alleged systemic failures.” This Court appointed the Honorable John M. Cleland as a special master to oversee the inquiry, and invited the participation of the Philadelphia District Attorney’s Office, the Defender Association of Philadelphia, and the President Judges of the First Judicial District and of the Philadelphia Municipal Court. The Court set deadlines for the completion of the inquiry, the submission of a report from the Special Master, and responses, directed that any Individual Petitioner wishing to proceed with the action be identified by their full name, and ordered the names of the individual ACMs struck from the caption.

On July 18, 2019, Petitioners submitted an amended caption in conformity with the July 8, 2019 Order.<sup>1</sup>

On July 18, 2019, at a meeting convened by the Special Master,

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<sup>1</sup> On September 13, 2019, Petitioners sought leave to file an amended petition to further conform to the Supreme Court’s Order and to update the allegations regarding the Individual Petitioners. On September 30, 2019, the Court granted Petitioner’s application, and the amended petition was docketed the same day.

[I]t was agreed that the case would proceed in the nature of a mediation with the goal of reaching agreement among the participants [including Petitioners, Respondents, the District Attorney's Office and the Defender Association] rather than in the form of contested litigation involving discovery, witness testimony, briefing and argument.

The agreed-on goal reached at that meeting was to develop a set of joint recommendations for improvement of the Philadelphia bail system.

...

Thereafter, there followed a series of meetings in Harrisburg and Philadelphia. Some were held by conference call and some were face-to-face. [The Special Master] participated in some meetings and others involved only counsel without [the Special Master].

(Report 2.)

On October 7, 2019, the Court, upon the request of the Special Master, extended the applicable deadlines and ordered that proceedings before the Special Master conclude within thirty days.

After multiple rounds of negotiations, the District Attorney's Office, the Defender Association, Petitioners, the President Judge of the Municipal Court, and Respondents reached an agreement on eight recommendations for ensuring that the bail system in Philadelphia adheres to the Rules and the Constitution. However, the parties could not reach agreement on several of the relevant legal standards. On November 7, 2019, the parties submitted a document to the Special Master

outlining the agreements and outstanding issues. (Exhibit A, “Submission to the Special Master Proposed Interim Pretrial Reform”) (hereinafter Submission).

The Special Master reviewed the Submission and issued his Report on December 16, 2019. Therein, the Special Master recommended that this Court adopt the eight agreements and offered a number of additional suggestions for improving the bail system.

## SUMMARY OF THE ARGUMENT

This Court crafted the Rules of Criminal Procedure governing bail to discourage pretrial detention and secure the right to pretrial release set forth in Article I, Section 14 of the Constitution. Those Rules “reaffirm that the purpose of bail is to ensure the defendant’s appearance and that Pennsylvania law favors the release, rather than detention of an individual pending a determination of guilt or innocence.” 25 Pa.B. 4100, 4116 (Sept. 30, 1995).

Despite this, every day hundreds of people in Philadelphia await their trials behind bars, solely because they cannot afford to pay monetary bail. It is no wonder that they cannot afford their bail: despite Philadelphia’s extremely high poverty rates, the bails set in the Philadelphia Arraignment Court routinely exceed \$10,000, and even \$100,000. These bails do not reflect the required consideration of the defendant’s financial resources. These monetary bails set without consideration of the defendant’s resources are, in effect, detention decisions, made without meeting the constitutional standard that “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community.” Pa. Const. art I, § 14. In these cases, monetary bail becomes a de facto order of pretrial detention, rather than a condition of release.

Following this Court’s exercise of its King’s Bench jurisdiction, the parties – along with the Special Master, the District Attorney’s Office, the Defender

Association, and the President Judge of the Philadelphia Municipal Court – worked together to develop concrete proposed changes intended to align bail proceedings in Philadelphia Arraignment Court and Municipal Court with the Constitution and the Rules governing bail.

Petitioners wish to express their deep appreciation for the Special Master’s oversight of this process. The Special Master’s careful and thoughtful approach, as well as his patience with the complications of a four-way negotiation, made it possible for the parties to achieve far more through this process than would have been possible without the assistance of the Special Master.

As outlined in the Special Master’s Report, the parties reached the following eight substantive agreements to improve Philadelphia’s bail system:

**AGREEMENT 1:** Defendants shall be represented at preliminary arraignments, and shall be afforded an opportunity to communicate confidentially with counsel or counsel’s representative prior to and during the preliminary arraignment.

**AGREEMENT 2:** All conditions of bail imposed by the Arraignment Court Magistrates (“ACMs”) must be free from ambiguity, clearly explained to the defendant, documented, accessible to all parties and to law enforcement, and enforceable.

**AGREEMENT 3:** Pursuant to the law set forth in Article I, Section 14 of the Pennsylvania Constitution, all defendants shall be presumed releasable.

**AGREEMENT 4:** All parties agree that ACMs may, pursuant to their own determination or in response to a motion by the DAO, make the necessary findings and order a defendant held without bail at the time

of preliminary arraignment pursuant to Article I, Section 14 of the Pennsylvania Constitution and Rule of Criminal Procedure 520.

**AGREEMENT 5:** A decision to impose monetary conditions must consider a defendant's ability to pay along with the release criteria set forth in Rule of Criminal Procedure 523 and any decision to impose monetary or non-monetary conditions of bail must be guided by the Rules of Criminal Procedure.

**AGREEMENT 6:** If a defendant is held without bail at the preliminary arraignment, the defendant shall be entitled to a Release Determination Hearing in the Municipal Court within three business days, where practicable.

**AGREEMENT 7:** Any defendant who remains in custody due to the imposition of a monetary or non-monetary condition (e.g. house arrest), shall be entitled to a Bail Review Hearing within three business days.

**AGREEMENT 8:** Any defendant who remains in custody should be afforded an expedited preliminary hearing.

(Report 12-13).

The Special Master recommended, "all eight of the Agreements . . . be adopted and implemented." (Report 11). Petitioners concur in that request; as described below, these joint agreements are rooted in the law. However, these proposals will become reality only if this Court orders the parties to implement them.

The parties also articulated the following major points of disagreement regarding interpretation of the Constitution and Rules:

**DISAGREEMENT 1:** Petitioners and the Defender [Association] assert that, before a bail authority may order pretrial detention, the

Commonwealth must prove by clear and convincing evidence that the defendant presents a substantial threat to an individual and the community and that no conditions of release can reasonably assure their safety. [Respondents do not agree.]<sup>2</sup>

**DISAGREEMENT 2:** [Petitioners, the District Attorney’s Office and the Defender Association] agree that the ACMs should apply the least restrictive condition necessary to ensure a defendant’s appearance, the safety of all persons and the community, or compliance with the bail bond. [Respondents do not agree.]

**DISAGREEMENT 3:** [Petitioners, the District Attorney’s Office, and the Defender Association] agree that when assigning a condition of bail, other than ROR, the ACM must either state, in writing on the release paperwork or orally on the record, the specific reasons why the condition or combination of conditions is the least restrictive and reasonably necessary to ensure appearance, the safety of all persons and the community, and compliance with conditions. [Respondents do not agree.]

**DISAGREEMENT 4:** [Petitioners, the District Attorney’s Office, and the Defender Association agree] Prior to imposing monetary conditions of bail, the ACMs should conduct a robust ability-to-pay hearing carefully considering a defendant’s entire financial picture, including income and expenses as well as life circumstances. [Respondents do not agree.]

**DISAGREEMENT 5:** [Petitioners, the District Attorney’s Office, and the Defender Association agree] The First Judicial District should create a process to expedite release procedures for defendants charged with low-level misdemeanors. [Respondents do not agree.]

(Report 13-14). These outstanding disagreements largely pertain to the interpretation of the Rules and the development of standards to guide bail setting

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<sup>2</sup> The District Attorney’s Office took “no position on the standard of proof required before a bail authority may order pretrial detention.” (Submission 9, Disagreement 1).

practices. Petitioners ask this Court to resolve these disagreements.

In Section I, Petitioners set forth the history of Pennsylvania’s constitutional bail provisions to provide context and a framework to support the Court’s adoption of the joint agreement that all defendants be “presumed releasable.”

In Section II, Petitioners explain how the Rules of Criminal Procedure effectuate the constitutional right to pretrial release, require the procedural changes agreed to by the parties, and support Petitioners’ view of the applicable legal standards where those are in dispute. Petitioners assert that resolution of these substantive disagreements is necessary to give full meaning and effect to the current Rules.

In Section III, Petitioners discuss the procedural safeguards necessary for pretrial detention decisions, why the Court should hold that “clear and convincing evidence” is the appropriate evidentiary standard for pretrial detention, the prohibition against imposing conditions of release to ensure a defendant remains detained pretrial, and why detention review hearings are a necessary interim measure.

In Section IV, Petitioners address several suggestions offered by the Special Master to improve the operation and accountability of Philadelphia’s bail system.

Finally, in Section V, Petitioners urge this Court to provide for clear authority over bail proceedings and order the development of a plan to implement,

evaluate, and report on the progress and results of the changes contemplated by the parties' agreements and the Court's order.

The eight joint agreements, if implemented consistently and monitored for compliance, would help bring the Philadelphia bail system into compliance with the principles animating the Rules and the broad right to pretrial release enshrined in Article I, Section 14 of the Pennsylvania Constitution.

Equally important, however, is this Court's resolution of the parties' disagreements over the legal standards to be applied in the revised proceedings. Leaving the disagreements about these standards unresolved will undermine the goals of the agreed upon reforms, fail to remedy the behavior that forms the basis of Petitioners' Amended Complaint, and result in the continued pretrial detention of people, like the Individual Petitioners, who lack the ability to purchase their freedom. Therefore, Petitioners ask this Court to order implementation of the joint agreements and resolve the disagreements.

## ARGUMENT

### **I. THE PARTIES AGREE THAT THE PENNSYLVANIA CONSTITUTION CONFERS A RIGHT TO RELEASE FOR ALL BAILABLE DEFENDANTS AND PROHIBITS UNWARRANTED PRETRIAL DETENTION.**

Petitioners, Respondents, the Defender Association, and the District Attorney's Office agree that every defendant appearing before an ACM must be presumed releasable pursuant to Article I, Section 14 of the Pennsylvania Constitution. (Submission 3, Agreement 3). This agreement reflects the broad right to pretrial liberty guaranteed under the Pennsylvania Constitution. Petitioners provide a brief history of this constitutional provision, which forms the legal foundation for the parties' agreement.

Article I, Section 14 mandates that:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great. . . .

Pa. Const. art. I, § 14.<sup>3</sup>

Article I, Section 14 means precisely what it says: "the Constitution of the Commonwealth mandates all persons have a right to be released on bail prior to

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<sup>3</sup> Article I, Section 13 of the Pennsylvania Constitution further provides, in relevant part, that "[e]xcessive bail shall not be required."

trial in all cases except those” few who are not bailable under the Constitution. *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). This constitutional provision reflects “(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense.” *Id.* at 834-35.

#### **A. The Origins of Article I, Section 14 of the Pennsylvania Constitution.**

William Penn, Pennsylvania’s founder, originally drafted the language “all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great,” for the Commonwealth’s first governing document, the 1682 Frame of Government of Pennsylvania.<sup>4</sup> The 1682 Frame gave this provision teeth, affording defendants who should have been bailable but were instead detained the extraordinary power to sue for “double damages against the informer, or prosecutor.”<sup>5</sup> With this 1682 Frame, Penn created the most liberal pretrial release law in the colonies.<sup>6</sup>

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<sup>4</sup> See Pa. Frame of Government of 1682, Laws Agreed Upon in England, art. xi (1682).

<sup>5</sup> *Id.* at art. xii.

<sup>6</sup> Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, 28, National Institute of Corrections (2014).

The historical events and personal experiences that motivated William Penn to draft the 1682 Frame provide context for understanding Pennsylvania's broad constitutional bail provision. In seventeenth century England, the king could order people detained for long periods without a trial. Many incarcerated people bought their way out of oppressive and dangerous jails by paying bribes and fines.<sup>7</sup> Penn himself was incarcerated three times in England and once in Ireland, for writing, speaking, and acting as a Quaker.<sup>8</sup> While imprisoned in the Tower of London, Penn was likely denied bail.<sup>9</sup> On another occasion, a judge incarcerated Penn while his father lay dying, and Penn's father paid for his son's release so that they could be together before the elder Penn's death.<sup>10</sup>

In addition to his personal experience, Penn witnessed his Quaker brethren similarly persecuted and imprisoned.<sup>11</sup> These ordeals profoundly influenced Penn. In response, he sought to create in this new land, a "whole society in which

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<sup>7</sup> Neil Howard Cogan, *The Pennsylvania Bail Provisions: The Legality of Preventative Detention*, 44 Temp. L. Q. 51, 52 (1971).

<sup>8</sup> William Penn Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 Temp. L. Q. 475, 477 (1977); *The Papers of William Penn, Volume One, 1644-1679*, 171-75 (Mary Maples Dunn & Richard S. Dunn eds., Univ. of Penn. Press 1982) (discussing the arrest and trial of William Penn and his fellow Quaker William Mead in August 1670).

<sup>9</sup> Lermack, *supra* note 8, at 477.

<sup>10</sup> *The Papers of William Penn, Volume One*, *supra* note 8, at 171-72.

<sup>11</sup> *The Papers of William Penn, Volume Two 1680-1684* (Mary Maples Dunn & Richard S. Dunn eds., Univ. of Penn. Press 1982) (Letter from William Penn to English Parliament, Nov. 1680).

freedom should be mandatory.”<sup>12</sup> With the 1682 bail provisions, Penn took extraordinary steps to prevent unnecessary pretrial incarceration.

In 1776, the drafters of Pennsylvania’s first constitution incorporated Penn’s requirement that “all prisoners beailable,” along with a prohibition on excessive bail.<sup>13</sup> Pennsylvania’s bail provision became the model for almost every state constitution adopted after 1776.<sup>14</sup>

Throughout history, bail meant release.<sup>15</sup> A 1783 English treatise defined bail as a “means of giving liberty to a prisoner and at the same time securing” a defendant’s appearance, and directed that “justices must take care that, under pretence [sic] of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of bail; for this is looked upon as a great grievance.”<sup>16</sup>

Historically, sureties did not make an upfront monetary payment to secure an accused’s release. Rather, a surety was a *person* who guaranteed the accused’s

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<sup>12</sup> Paul A. Wallace, *Pennsylvania: Seed Of A Nation* 38 (1962).

<sup>13</sup> Pa. Const. Chapter II § 28-29 (1776). The framers did not incorporate the right to sue prosecutors for double damages into the constitution.

<sup>14</sup> Schnacke, *supra* note 6 at 28.

<sup>15</sup> Timothy Schnacke, *A Brief History of Bail*, 57 *Judges J.* 4, 6 (2018).

<sup>16</sup> Anthony A. Highmore, *Digest of the Doctrine of Bail; In Civil and Criminal Cases* vi, 193, 196 (1783).

presence at court.<sup>17</sup> Sureties were unpaid, unreimbursed, nonprofessionals, often friends and family, who promised to guarantee the accused's future attendance and who sometimes agreed to provide payment upon default. Even when a court required "security in advance," this meant only finding people who agreed to pay some amount of money upon the defendant's failure to appear, it did not mean payment in advance of release.<sup>18</sup> This system resembles what is now called "unsecured bonds."<sup>19</sup>

In fact, making an upfront monetary payment to secure an accused's release was not officially accepted in Pennsylvania until 1919. In a 1918 opinion, one court rejected a request from a defendant's brother that the clerk return to him cash he paid to obtain his brother's pretrial release.<sup>20</sup> The court noted, "[W]e have no statute in Pennsylvania that permits cash bail," therefore, the court concluded, the monetary bail transaction had been an "illegal proceeding" and the brother had no right to recover the money.<sup>21</sup>

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<sup>17</sup> Lermack, *supra* note 8, at 486. For example, during the same period in England, one charged with a felony could not be bailed without two sureties, and treason required four. Highmore, *supra* note 16, at 195-96.

<sup>18</sup> Lermack, *supra* note 8, at 488.

<sup>19</sup> Schnacke, *supra* note 15, at 6.

<sup>20</sup> *Commonwealth v. Atriano*, 16 Northampton Cnty. Rep. 149 (1918).

<sup>21</sup> *Id.*

Despite a recognition that upfront monetary payments were illegal transactions, the practice of “cash bail” began in the late 1800s.<sup>22</sup> Cash bail arose as “America began running out of those people who were willing to take responsibility for no money” and professional bail bondsmen, sensing an opportunity for profit, stepped in to fill this gap.<sup>23</sup>

In 1919, the Pennsylvania General Assembly, likely in response to the nascent practice of counties permitting monetary payments to secure pretrial release, passed an act, declaring cash bail “lawful” and repealing inconsistent laws.<sup>24</sup>

**B. Pennsylvania Courts Have Long Recognized that Bailable Defendants Have a Right to Pretrial Release under Article I, Section 14.**

For nearly 200 years, our courts have recognized that the Pennsylvania Constitution creates a broad right to pretrial release for those defendants who are “bailable.”

*Commonwealth v. Keeper of the Prison*, a Philadelphia Court of Common Pleas case from 1838, is one of the earliest cases to examine our constitutional language. 2 Ashm. 227, 232 (Phila. C.P. 1838). Two men held without bail,

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<sup>22</sup> In *Atriano*, the court recognized that Northampton County had been accepting cash bail as a practice for some time despite the lack of statutory authorization. *Id.* at 150.

<sup>23</sup> Schnacke, *supra* note 15, 6.

<sup>24</sup> 919 Pa. Laws 102, § 2 (1919).

William Nixon, the employer of an unmarried pregnant woman who encouraged the woman to have an abortion, and Henry Chauncey, the physician who administered the illegal abortion that resulted in the woman's death, filed a writ of habeas corpus seeking their release. In finding both men bailable, the court wrote,

If any faith is to be placed on human language, in expressing the intentions of a lawgiver, nothing can be clearer than that these provisions . . . of the constitutions of 1776 and 1790, intended to guaranty [sic] the right to the citizens of the state, that for all offences [sic] charged, bail by sufficient sureties should be received, except for capital offenses. . . . The language is peremptory: "all persons shall be bailable." In the class of cases not within the exception, *nothing is left to judicial discretion, except of course the ascertainment of the "sufficiency of the sureties" . . .*

*Id.* at 232 (emphasis added).

The court found Nixon bailable because the Commonwealth had charged him with accessory after the fact, a non-capital offense, and found Chauncey bailable because the Commonwealth failed to present the "proof evident, or the presumption great" that he had the necessary intent to kill. Thus "according to the constitution and laws of the state, we [the court] are bound to admit the defendants to bail; having by them no discretion vested in us to refuse them the benefit of this great chartered right." *Id.* at 236.

This Court echoed that interpretation over a hundred years later in *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1972). Reaffirming that "the fundamental purpose of bail is to secure the presence of the accused at trial," this

Court stated that “[i]n the absence of evidence the accused will flee, certain basic principles of our criminal law indicate bail should be granted.” *Id.* at 834. This Court explained the importance of vindicating the right to pretrial release: “unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Id.* at 835 n.13 (quoting *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951)).

In 1987, the Superior Court reaffirmed the principle that all defendants determined to be bailable are entitled to pretrial release:

Prior to conviction, in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial. Pa. Const., Art. 1, sec. 14. Absent evidence that the accused will flee, the importance of the presumption of innocence, the principle that punishment should not be imposed prior to conviction, and the need to provide an accused an unhampered opportunity to prepare a defense, dictate that bail should be granted prior to trial.

*Commonwealth v. Bonaparte*, 530 A.2d 1351, 1353 (Pa. Super. Ct. 1987); *see also* Ken Gormley, *The Pennsylvania Constitution: A Treatise on Rights and Liberties*, 533-34 (2004) (“The guarantee of bail has been considered so fundamental because it promotes the presumption of innocence, prevents the imposition of sanctions prior to trial and conviction and provides the accused the maximum opportunity to prepare his defense.”).

**C. The 1998 Constitutional Amendment Altered the Categories of Non-Bailable Defendants But Not the Right to Pretrial Release Afforded to All Other Defendants.**

Prior to 1998, this Court reasoned that the framers provided a limited exception to the rule of pretrial release for capital offenses because the risk of flight was so significant given the seriousness of a capital charge. *See Commonwealth v. Martorano*, 634 A.2d 1063, 1066 (Pa. 1993) (“The framers of our constitution recognized the virtual certainty of flight in the face of a possible death penalty.”)<sup>25</sup>

In 1998, Article I, Section 14 was amended to introduce two additional limited exceptions to the bailability mandate for those charged with non-capital offenses. The amendment allowed for detention of defendants facing life imprisonment and for those rare defendants who pose such a threat to an individual or a community that no condition or combination of release conditions could adequately ameliorate that threat.

The amendment required the same exacting standard of proof as the original constitutional language. As the Attorney General of Pennsylvania at the time explained, the amendment:

would extend to these two new categories of cases in which bail must

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<sup>25</sup> In 1972, this Court noted that the framers “did not feel the urge to flee was as great where the maximum penalty was life imprisonment, as indicated by the failure to draft the Constitution to read, bail may be denied in cases of ‘capital offenses or life imprisonment.’” *Truesdale*, 296 A.2d at 835.

be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.

Statement of the Attorney General Regarding Joint Resolution 1998-1, 28 Pa.B. 3925, 3926 (Aug. 14, 1998).

This Court, analyzing the 1998 constitutional amendment, held that the substantive constitutional rights undergirding the right to bail, the presumption of innocence, the right to defend oneself, and the right to be free from excessive bail all remained inviolate. *Commonwealth v. Grimaud*, 865 A.2d 835, 842-43 (Pa. 2005).

By requiring ACMs to presume all defendants releasable and only allowing the presumption to be rebutted when the “proof is evident or presumption great” that a defendant falls within one of the three narrow categories of non-bailable defendants, the parties’ agreements reflect the constitutional mandate enshrined in Article 1, Section 14. (Submission 3, Agreement 3). This agreement is consistent with the enduring interpretation of Article I, Section 14 laid out above and should be adopted by this Court.

**II. THE RULES OF CRIMINAL PROCEDURE REFLECT THE BROAD CONSTITUTIONAL RIGHT TO PRETRIAL RELEASE AFFORDED TO ALL BAILABLE DEFENDANTS, SET FORTH THE PROCEDURE THAT MUST BE FOLLOWED WHEN ASSIGNING CONDITIONS OF BAIL, AND DEEMPHASIZE THE USE OF MONETARY CONDITIONS.**

All parties agree the ACMs must follow the Rules of Criminal Procedure when making release determinations and assigning conditions of bail. (Submission 5, Agreement 5). This section contextualizes the Rules, demonstrates that the parties' agreements are consistent with the Rules, and provides this Court with a basis for resolving the areas of dispute related to interpretation of the Rules.

This Court promulgated the current iteration of the Rules of Criminal Procedure in 1995 to promote the constitutional presumption of release and protect defendants' pretrial liberty. The Explanatory Report states that the Rules were designed to "reaffirm that the purpose of bail is to ensure the defendant's appearance and that Pennsylvania law favors the release, rather than detention of an individual pending a determination of guilt or innocence." 25 Pa.B. 4100, 4116 (Sept. 30, 1995).

Petitioners do not seek changes to the Rules, an amendment to the Constitution, or the elimination of cash bail. To the contrary, Petitioners' requested relief is "actually quite modest." (Report 3, n.2). Petitioners believe that if ACMs follow the Rules, as they currently stand, their conformity with the law would

protect defendants' constitutional rights and ensure pretrial liberty for the vast majority of defendants.

However, substantive disagreements remain regarding interpretation of the Rules that govern the assignment of bail. Petitioners, the Defender Association, and the District Attorney's Office agree: ACMs must assign the "least restrictive conditions of bail necessary to ensure a defendant's appearance, the safety of all persons and the community or compliance with the bail bond." (Submission 10, Disagreement 2). Respondents do not agree. Likewise, Petitioners, the Defender Association, and the District Attorney's Office agree: "prior to imposing monetary conditions of bail, the ACMs should conduct a robust ability to pay hearing carefully considering the defendant's entire financial picture, including income and expenses as well as life circumstances." (Submission 10-11, Disagreement 4). Respondents do not agree. The Court's resolution of these two disagreements is fundamental to ensuring compliance with the Rules and the Constitution.

**A. Rule 520 Reflects the Constitutional Guarantee of Pretrial Release for Allailable Defendants.**

The parties agree that, pursuant to the Pennsylvania Constitution and Rule 520, ACMs may make the necessary findings and order a defendant held without bail pursuant to their own determination or in response to a motion by the Commonwealth. (Submission 3-4, Agreement 4). However, absent substantial proof that a defendant falls within one of the narrow non-bailability categories, the

Pennsylvania Constitution guarantees pretrial release to all defendants. Consistent with the Pennsylvania Constitution, the Rules reflect the historical understanding that bail means pretrial release as well as the fundamental constitutional distinction between those who are determined bailable—i.e. those who are entitled to release—and those who are not.

Rule 520 provides, “Bail before verdict *shall* be set in all cases as permitted by law” and whenever bail is refused, “the bail authority shall state in writing or on the record the reasons for that determination.” Pa.R.Crim.P. 520 (emphasis added). The comment to Rule 520 references Article I, Section 14, presumably as establishing the limited categories of circumstances in which a bail authority may refuse bail.

Buttressing this understanding, the Rules further define bail as, “the security or other guarantee required and given for release of a person, conditioned upon a written undertaking, in the form of a bail bond, that the person will appear when required and comply with all the conditions set forth in the bail bond.” Pa.R.Crim.P. 103. In other words, “bail” means any condition of release, monetary or otherwise. This understanding of bail is consistent with the historical understanding of what is now Article I, Section 14. *See supra* section I.

Consistent with the Pennsylvania Constitution and the meaning of Rule 520, the parties agreed that an ACM may deny pretrial release *only* if they find the

evidence sufficient to demonstrate that the defendant falls into one of the narrow categories of non-bailable defendants. (Submission 3-5, Agreement 4). *See infra* section III.A (discussing the evidentiary quantum of proof required).

**B. The Parties Agree that the Rules Presume that Bailable Defendants Will Be Released on Recognizance.**

The parties agree that the Rules presume ACMs will release bailable defendants on recognizance unless the ACM determines that an additional condition or combination of conditions is reasonably necessary to ensure appearance and compliance with the bail bond. (Submission 6, Agreement 5.3). As explained below, this agreement follows Article I, Section 14 and Rules 520, 524, and 526.

If the bail authority determines that the defendant is bailable under Rule 520 and Article I, Section 14, then the bail authority must decide which type of release is appropriate. Rule 524(C) sets forth the five types of release on bail: release on recognizance (“ROR”), release on a nonmonetary condition, release on unsecured bail bond, release on nominal bail, and release on a monetary condition.<sup>26</sup> Both the Constitution and Rules require that, if the defendant is bailable, the bail authority must release the defendant on one of these types of bail.

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<sup>26</sup> “Bail” is often understood as only referring to monetary conditions – i.e. “cash bail.” However, the Rules identify all five types of release as “bail,” whether or not they contain a monetary component. The conceptualization of bail as broadly meaning pretrial release is derived from the historical development of what is now Article I, Section 14 as well as the Rules. *See supra* section I.

When considering which type of release to assign a bailable defendant, Rule 524 requires the bail authority to start from a presumption of ROR, the least restrictive type of release. “[T]he bail authority must *initially* determine whether the defendant is likely to appear at subsequent proceedings and comply with the conditions of the bail bond set forth in Rule 526(A) if released on ROR.” Pa.R.Crim.P. 524 (comment) (emphasis added). Only if the “bail authority determines that ROR will not reasonably ensure the defendant’s appearance and compliance with the conditions of the bail bond” should the bail authority even consider other conditions. *Id.*

Thus, a presumption of ROR is the starting point for all bailable defendants and this Court should adopt the parties’ agreement to implement this presumption of ROR.

**C. The Court Should Resolve the Parties’ Dispute and Hold that Any Condition of Release Imposed Must Be the Least Restrictive Necessary to Ensure Appearance and Compliance with the Bail Bond.**

The parties agree, pursuant to the Rules, ACMs must release defendants on ROR unless the ACM determines an additional condition or conditions is necessary. (Submission 6, Agreement 5.3). To rebut the presumption of ROR and assign any condition—whether monetary or nonmonetary—beyond the generally applicable conditions contained in Rule 526, the bail authority must demonstrate that the additional condition of release is “reasonably necessary” to “ensure

appearance” and compliance with the bail bond. Pa.R.Crim.P. 524(A). The parties’ agreement that Rule 524 permits the imposition of conditions only when “reasonably necessary” is uncontroversial and this Court should order its implementation.

The parties were unable to reach agreement on the meaning of “reasonably necessary” and how ACMs should make this determination. (Submission 10, Disagreement 2). All parties, except for Respondents, understand Rule 524 to require assignment of the *least restrictive* condition necessary to ensure a defendant’s appearance, the safety of all persons and the community or compliance with the bail bond.

The Special Master, while not committing himself to the language Petitioners endorse, takes essentially the same position:

The issue is whether the appropriate standard is the “least restrictive” condition necessary to ensure the defendant’s appearance or whether some other construction of the standard is preferable. It appears this is more of a semantical than substantive disagreement. The Constitution and Rules of Criminal Procedure require cash bail or bail conditions only as necessary to ensure the defendant’s subsequent presence when required or to protect the public safety. Imposing bail requirements or conditions that exceed what is necessary to satisfy those requirements would presumably be improper regardless of how the standard is characterized.

(Report 25).

Petitioners respectfully assert that clarity regarding this standard is a matter of substance not mere semantics. Without clear guidance on the meaning of Rule

524(A), ACMs will make erroneously restrictive release decisions and the goals of the other joint agreements will be thwarted. As such, resolving this disagreement is essential. As detailed below, the Rules suggest that bail authorities should employ a “least restrictive” approach when imposing additional conditions of release.

Rule 526 lays out the conditions applicable to all types of bail, including ROR. Those universally applicable conditions require that the defendant appear at all times required, obey all orders of the bail authority, give notice of any address change, not intimidate or retaliate against witnesses, and refrain from criminal activity. Pa.R.Crim.P. 526(A). Should evidence demonstrate that the defendant would not appear for court, or would otherwise not comply with the Rule 526 conditions, *only then*, may the bail authority consider additional conditions of release.

Rule 523 sets forth nine criteria a bail authority must assess when deciding whether to impose conditions of release other than those contained in Rule 526. These factors relate to future appearance and compliance with the bail bond. The bail authority may also consider “any other factors relevant to whether the defendant will appear as requested and comply with the conditions of the bail bond.” Pa.R.Crim.P. 523(A)(10). When deciding what conditions of release to impose, the bail authority “must consider *all* the criteria provided in this rule, rather than considering, for example, only the designation of the offense or the fact

that the defendant is a nonresident.” Pa.R.Crim.P. 523 (comment) (emphasis added).

In requiring that the bail authority consider all information relevant to a defendant’s appearance and compliance with the bail bond, the Rules contemplate a thorough and careful inquiry. Such a searching inquiry precludes the arbitrary assignment of unnecessarily restrictive conditions. As such, any conditions imposed must be justified by a careful inquiry that demonstrates that the particular condition is the least restrictive capable of ensuring the goals of bail are met.

Given the presumption of innocence, the importance of pretrial liberty, and the explicit directives that bail authorities begin with ROR (the least restrictive condition) and only assign conditions of bail after carefully reviewing all the relevant criteria, Petitioners, the Defender Association, and the District Attorney’s Office all agree that any additional condition imposed requires a determination that it is the least restrictive condition necessary to ensure compliance with the bail bond and future appearance. Moreover, requiring ACMs to assign only the least restrictive conditions of bail will further compliance with constitutional mandates and the parties’ joint agreements. For all these reasons, Petitioners ask this Court to resolve the disagreement about the meaning of Rule 524(A) and hold that

“reasonably necessary” requires that bail authorities employ a least restrictive approach to imposing conditions of release.<sup>27</sup>

**D. The Parties Agree that the Rules Impose Additional Restrictions on the Use of Monetary Conditions of Release**

Consistent with Pennsylvania history and the broad right to pretrial release for bailable defendants enshrined in Article I, Section 14, the Rules impose additional restrictions on the use of monetary conditions. The Rules in their current iteration “encourage the use of conditions of release on bail other than those requiring a deposit of money, thereby deemphasizing the concept of financial loss as the primary means of ensuring a defendant’s appearance and compliance with the conditions of the bail bond.” 25 Pa.B. 4100, 4116 (Sept. 30, 1995). As such, when a bail authority contemplates assigning a monetary condition of release, the Rules require additional procedural safeguards. Reflecting the Rules, the parties agreed to the following:

If the ACM determines that it is necessary to impose a monetary condition of bail prior to setting any condition, the ACM shall determine the defendant’s ability to pay and review all the factors set forth in Rule 523. In making that determination, the ACM shall collect and consider the defendant’s relevant financial information. The ACM shall only assign reasonable amounts of monetary bail.

(Submission 6, Agreement 5.4). As detailed below, this agreement

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<sup>27</sup> As discussed more fully below, compliance with this standard can only be monitored if ACMs are required to state their reasons for bail determination. *See supra* section IV.E.

implements the additional restrictions imposed on a bail authority's ability to impose monetary conditions.

A bail authority may only impose a monetary condition of release if "necessary." Pa.R.Crim.P. 528(A). A monetary condition is only necessary if other less restrictive conditions of release are inadequate to ensure the defendant's future appearance or compliance with the bail bond. Rule 528(A) reiterates the "necessary" requirement contained in Rule 524(A) and emphasizes the importance of this inquiry in the context of monetary conditions. Under the Rules, monetary bail may not be the first step or the default in the bail authority's inquiry.

If the bail authority concludes that a monetary condition is in fact necessary, Rule 528 mandates that the court "shall consider" both "(1) the release criteria set forth in Rule 523; and (2) the financial ability of the defendant" when determining the amount of the monetary condition. Pa.R.Crim.P. 528(A). The amount set, therefore, may not be arbitrary or predicated solely on the nature of the offense charged. Rather, Rule 528 requires that the amount imposed be guided by an individualized assessment of the defendant's financial ability as well as consideration of all the Rule 523 factors.

Rule 528(B) further restricts monetary conditions by mandating that the amount "shall be reasonable." Pa.R.Crim.P. 528(B). Similarly, Rule 524(C)(5) provides that the amount "shall not be greater than is necessary to reasonably

ensure the defendant's appearance and compliance with conditions of the bail bond." Pa.R.Crim.P. 524(C)(5). The comment to Rule 524 further instructs, "No condition of release, whether monetary or non-monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial." Pa.R.Crim.P. 524 (comment).

The word "reasonable," as used by Rules 528 and 524, refers to the primary purpose of bail – ensuring appearance at future court dates. Therefore, any amount of monetary bail in excess of the amount necessary to ensure appearance is unreasonable and violates the Rules as well as the Constitution. *See supra* section III (discussing the constitutional limitations on de facto detention orders). Moreover, a monetary condition of bail imposed solely to incarcerate is patently unreasonable under the rules. Pa.R.Crim.P. 524 (comment). As such, the bail authority must make an explicit determination as to why a specific amount is necessary to ensure a defendant's future appearance and must refrain from imposing anything in excess of that amount.

The repeated reasonableness and necessity mandates in the Rules reflect the broad right to pretrial release in Article I, Section 14 as well as the prohibition against excessive bail contained in Article I, Section 13 of the Pennsylvania Constitution. Section 13 provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13.

Although there is a dearth of relevant case law, this Court has explained, “[S]ection 13 of article I, requires that bail be reasonable by prohibiting ‘excessive bail.’”

*Commonwealth v. Dixon*, 311 A.2d 613, 614 (Pa. 1973).

In reflection of the foregoing requirements, the parties agreed that (1) monetary conditions may only be imposed if necessary, (2) ACMs may only assign reasonable amounts of bail, and (3) when making these determinations, ACMs must consider a defendant’s financial ability to pay. (Submission 6, Agreement 5.4). Petitioners ask that this Court order implementation of the parties’ agreement to ensure all monetary conditions of bail meet the requirements set forth in the Rules.

**E. The Court Should Resolve the Parties’ Dispute and Hold that Consideration of a Defendant’s Financial Ability to Pay is Controlled by the Same Standards that Govern Other Financial Determinations in the Criminal Courts, and that the Information Currently Provided to the ACMs is Insufficient for this Inquiry.**

The parties disagree on what is required in practice by Rule 528’s mandate that the ACMs consider a defendant’s “financial ability to pay” and assign a “reasonable” monetary condition. (Submission 10-11, Disagreement 4).

Respondents contend that review of the limited financial information contained in the Pretrial Services Investigation Reports satisfies the ACM’s obligation to consider a defendant’s financial ability to pay. Petitioners strenuously disagree with this assertion, (*see* Amended Petition ¶¶ 69-70), as the financial information

contained in the Pretrial Services Investigation Reports is limited to employment status, income, and child support. The Special Master cautioned,

The ACM must make a reasoned evaluation of the defendant's ability to post cash bail and such an evaluation must be based on credible information that accurately reflects the totality of the defendant's financial situation.

(Report 26). Petitioners agree and assert that the Rules, the Constitution, and precedent require a more robust analysis of a defendant's complete financial circumstances before an ACM may assign a monetary condition.

Petitioners could find no authority explicitly interpreting Rule 528's requirements. Pennsylvania appellate courts have written in detail, however, about how courts should evaluate a litigant's "financial ability" in a variety of other contexts.<sup>28</sup> These cases all recognize what appears common sense: "financial ability to pay" means more than one's employment status and weekly income. The key principle from these decisions is that a court cannot look solely to a litigant's wages, but must also consider expenses, liabilities, and life circumstances. In keeping with this principle, this Court criticized a trial court's reliance on income alone to determine indigence for the purpose of appointing the public defender, because "[a]mong other factors that may be relevant to a defendant's financial

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<sup>28</sup> Petitioners, the Defender Association, and the District Attorney's Office all agree that incorporating these standards from other analogous contexts would ensure a constitutionally adequate determination of ability to pay.

ability to hire private counsel are the probable cost of representation for the crime charged and the defendant's liabilities." *Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1149 n.4 (Pa. 2004); *see also Amrhein v. Amrhein*, 903 A.2d 17, 22-23 (Pa. Super. Ct. 2006) (a "focus on only gross income ignores the unassailable expenses of life").

This Court uses the same approach when evaluating a petition to proceed *in forma pauperis*, recognizing that whether a person is too poor to pay court costs is "not . . . a mere mathematical exercise" of income versus expenses but instead an analysis of "all the facts and circumstances of the situation, both financial and personal, [which] must be taken into the account." *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). Similarly, the Superior Court has cautioned that a petition to proceed *in forma pauperis* must be "read not with an accountant's but with a housewife's eye," as poverty is not a question of net worth but instead "whether he is able to obtain the necessities of life." *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (*en banc*).

Pennsylvania courts routinely look to these precedents to determine the appropriate method for analyzing a defendant's ability to pay in criminal cases. *See Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011) (applying *in forma pauperis* standards to waive appeal costs); *Commonwealth v. Cannon*, 954 A.2d 1222, 1226-27 (Pa. Super. Ct. 2008) (relying on *in forma pauperis* case law

when determining indigence for the purpose of appointing an expert); *Commonwealth v. Mead*, 446 A.2d 971, 974 (Pa. Super. Ct. 1982) (reviewing *in forma pauperis* application and petition for appointment of counsel to help determine financial status when setting a fine).

Adopting these principles in the context of Rule 528 would require ACMs to look at a defendant's *entire* financial picture and "life circumstances." The paucity of financial information contained within the current Pretrial Services Investigation Reports does not suffice. To determine a defendant's financial ability, it is not enough to know that the defendant is employed or earns a certain amount of money a week. Before assigning a monetary condition of release, the court should look at all of the defendant's present income and expenses. For example, those expenses may include dependent care, rent, utilities, the costs of health insurance and other expenses and debts owed. *See Amrhein*, 903 A.2d at 22-23; *see also Crosby Square Apartments v. Henson*, 666 A.2d 737, 739 (Pa. Super. Ct. 1995) (food, clothing, transportation, and taxes).

Petitioners urge this Court to define "financial ability" to pay bail in accordance with common sense and the courts' long-standing jurisprudence in other contexts. The Special Master states that the bail authority must consider, the "totality of a defendant's financial situation," (Report 26), including income, liabilities, expenses, and life circumstances before assigning a monetary condition

of bail. Without guidance from the Court to ensure that bail authorities truly consider defendants' "financial ability," the monetary conditions assigned will not be "reasonable" and Petitioners believe the problematic bail practices described in the Amended Petition will persist.

**F. More Information Must Be Gathered to Ensure a Sufficient Inquiry into Defendants' Ability to Pay**

To conduct the ability to pay inquiry contemplated by the Rules, ACMs need more information than what is included in the Pretrial Services Investigation Report. In light of the limited nature of these reports, the Special Master recommended that Pretrial Services collect and provide more information to the ACMs. (Report 16, Suggestion 2) (remarking that the current reports do not include "financial obligations such as rent, utilities, or loan payments that might effect a defendant's ability to meet a bail obligation.")

Petitioners agree that ACMs need more information about ability to pay than is currently contained in the Pretrial Services Investigation Reports. In fact, doing so is necessary to bring bail setting into compliance with Rule 523 and 528.

Petitioners would note, however, a more robust Pretrial Services interview is not the only way that this information could be collected. Other jurisdictions use financial affidavits completed by the defendant to ensure that accurate information

is collected.<sup>29</sup> Petitioners suggest that a financial affidavit that captures a defendant's income, expenses, and life circumstances, prepared by the defendant in collaboration with their attorney (or attorney's representative) would more accurately capture the necessary financial information than a Pretrial Services interview.

In addition, the introduction of "bail advocates," a pilot program initiated by the Defender Association shows great promise. These bail advocates meet with a defendant shortly after arrest, gather information about the defendant's financial ability to pay and convey this information to the public defender handling the preliminary arraignment. A study by the Quattrone Center for the Fair Administration of Justice demonstrated the effectiveness of these bail advocates. *See* Amicus Curiae Brief of the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Carey Law School.

However, the absence of a more detailed Pretrial Services Investigation Report, financial affidavit, or bail advocate, does not absolve the ACMs of their responsibility to gather the information required by the Rules. During the hearing,

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<sup>29</sup> *See, e.g., Mock v. Glynn County*, Affidavit of Financial Hardship for Bail Determination in Misdemeanor Arrest Cases, [https://www.aclu.org/sites/default/files/field\\_document/financial\\_status\\_affidavit\\_bond\\_determination\\_order.pdf](https://www.aclu.org/sites/default/files/field_document/financial_status_affidavit_bond_determination_order.pdf).

the ACMs could ask the defendant questions, through his attorney, to collect the necessary information. Rules 523 and 528 contemplate precisely such a hearing.

**III. THE COURT SHOULD ORDER THAT DUE PROCESS PROTECTIONS ATTEND ANY DETENTION DECISION, RESOLVE THE DISPUTE REGARDING THE EVIDENTIARY STANDARD REQUIRED FOR SUCH DECISIONS, AND ADOPT THE PARTIES' AGREEMENTS TO PROVIDE REVIEW HEARINGS TO DEFENDANTS WHO ARE DETAINED PRETRIAL.**

As a matter of United States and Pennsylvania constitutional law, pretrial detention should be exceedingly rare and procedural safeguards must attend any decision to detain. To this end, Petitioners ask this Court to order implementation of the procedural safeguards the parties agreed should attend any detention decision. Petitioners also urge this Court to resolve the outstanding dispute as to the applicable evidentiary standard because clarity on the standard is essential to ensure that defendants are not erroneously detained. Petitioners also seek implementation of the agreement that any pretrial detention should be accomplished by an explicit detention order rather than imposition of unaffordable monetary conditions. Lastly, the parties agreed that all defendants detained pretrial – either by an explicit order or by an unattainable condition of release – should be afforded a prompt review hearing. This Court should adopt these review hearings as they are a necessary interim check as the bail system begins to comply with the

substantive and procedural requirements for constitutionally ordering pretrial detention.

**A. The Parties Agree that Robust Procedural Safeguards Must Attend Any Decision to Deny a Defendant Pretrial Release.**

The parties agreed that the Pennsylvania and United States Constitutions require that robust procedural protections attend any decision to refuse a defendant bail. These protections include, among other things: (1) defendants must be represented by counsel and afforded an opportunity to communicate confidentially with counsel prior to and during preliminary arraignment, (Submission 3, Agreement 1); (2) the Commonwealth may make a written or oral motion alleging specific facts that (a) the defendant committed a capital offense, (b) the defendant committed an offense punishable by life without parole, (c) the defendant presents such a threat to an individual and the community that no condition or combination of conditions can reasonably assure their safety, or (d) the defendant presents such a flight risk that no condition or combination of conditions will ensure appearance; and (3) the ACMs must state reasons for refusing bail in writing. (Submission 4-6, Agreement 4.3-5). The Court should order the implementation of these agreements because the enumerated protections will help ensure that pretrial detention decisions in Philadelphia comply with the due process requirements discussed below.

The United States Supreme Court has held that the right to pretrial liberty is “fundamental.” *United States v. Salerno*, 481 U.S. 739, 750 (1987). Because the right to pretrial liberty is fundamental, the substantive component of due process requires that deprivation of that liberty be narrowly tailored to serve a compelling state interest. *See, e.g., Foucha*, 504 U.S. at 81; *Nixon v. Dep’t Public Welfare*, 839 A.2d 277, 287 (Pa. 2003) (where laws infringe upon certain fundamental rights, courts apply strict scrutiny). A defendant may only be deprived of his or her pretrial liberty if an impartial decision maker finds that no less restrictive alternative would be sufficient to advance the state’s interests. *Salerno*, 481 U.S. at 742; *In re Humphrey*, 19 Cal. App. 5th 1006, 1026 (2018).

In addition to the narrow tailoring requirement, procedural protections “must attend” a denial of pretrial release. *See Salerno*, 481 U.S. at 750-53. Specifically, before the state may deprive a defendant of his or her liberty, the state must provide an individualized hearing at which counsel is provided and the defendant has a meaningful opportunity to be heard. *See, e.g., Commonwealth v. Diaz*, 191 A.3d 850, 862 (Pa. Super. Ct. 2018) (“upon the trial court’s determination at the civil contempt hearing that there is a likelihood of imprisonment for contempt and that the defendant is indigent, the court must appoint counsel and permit counsel to confer with and advocate on behalf of the defendant at a subsequent hearing.”); *Commonwealth v. Mauk*, 185 A.3d 406, 412 (Pa. Super. Ct. 2018) (“In addition, if

imprisonment is a possibility, each defendant must have a *timely* opportunity to consult with counsel, *i.e.*, before he appears before the judge.”) (emphasis in original); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (“the right to counsel at a bail hearing to determine pretrial detention is also required by due process”); *Booth v. Galveston County*, 352 F. Supp. 3d 718, 739 (S.D. Tex. 2018) (concluding that the Sixth Amendment requires representation by counsel at a pretrial detention hearing).<sup>30</sup>

The parties’ agreement regarding the process to be afforded defendants detained pretrial is consistent with constitutional standards and should be implemented.

**B. Denials of Pretrial Release Must Be Justified by Clear and Convincing Evidence.**

Petitioners assert that before a bail authority may order pretrial detention, the Commonwealth must prove the facts supporting detention by clear and convincing evidence. (Submission 9, Disagreement 1). Respondents “do not agree that the clear and convincing evidence standard is established law in this Commonwealth”

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<sup>30</sup> In light of the robust pretrial liberty interest created by Article I, Section 14 and the fact that “[r]elease on any form of bail necessarily restricts one’s liberty,” *Commonwealth v. Chiappini*, 782 A.2d 490, 531 (Pa. 2001) (Castille, J. concurring and dissenting), Petitioners contend all defendants are entitled to counsel at preliminary arraignment under the Pennsylvania Constitution. However, Petitioners will not address this issue as all parties have agreed that defendants shall be represented at all preliminary arraignments. (Submission 3, Agreement 1).

(*Id.*) The Special Master concluded that guidance on the applicable legal standard would be useful. (Report 23).

Petitioners urge this Court to resolve this fundamental question and rule that the substantial proof required under the Constitution, proof that is “evident or the presumption great,” equates to a clear and convincing standard of proof. In addition to being in line with the majority of jurisdictions who have interpreted similar constitutional provisions, such a ruling is compelled by Pennsylvania’s constitutional history, the importance of pretrial liberty, and concepts of due process.

In Pennsylvania, a defendant may not be denied pretrial release unless the “proof is evident or presumption great” for “capital offenses or for offenses for which the maximum sentence is life imprisonment” or “no other condition or combination of conditions can reasonably assure safety of any person and the community.” Pa. Const. art. I, § 14. As the Attorney General explained, the Constitution “require[s] the proof be evident or the presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.” 28 Pa.B. at 3926.

Because constitutional protections preclude pretrial punishment, and safeguard pretrial liberty and the presumption of innocence, the proof required to detain a defendant pretrial is substantial. *See, e.g., Salerno*, 481 U.S. at 755 (“In our society

liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

There is, however, limited Pennsylvania case law addressing the proper burden of proof. In *Commonwealth ex rel. Alberti v. Boyle*, 195 A.2d 97 (Pa. 1963), this Court addressed the narrow question of whether the record from a coroner’s inquest – i.e. the functional equivalent of a preliminary hearing – was sufficient basis in and of itself to deny a defendant bail. This Court answered the question in the negative and held that:

[T]he practice followed in the present case and in a number of lower Court cases of deciding this very important question [whether to denial bail] on the basis of the testimony presented at a coroner’s inquest is condemned and is no longer to be followed. In application for bail in a homicide case, a decision should be made on the basis of the *testimony which is presented* by the Commonwealth at that hearing . . .

*Id.* at 98 (emphasis added).

In rejecting the challenged practice, the Court clearly distinguished the Commonwealth’s burden of proof at preliminary arraignment from the burden for justifying pretrial detention. However, after so holding, this Court nonetheless stated if “the Commonwealth’s evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused.” *Id.* This statement has been subject to divergent interpretations as the “test of a *prima facie* case, and the

test of sufficiency of the evidence to sustain a jury's verdict are currently identical." *Commonwealth v. Hamborsky*, 75 Pa. D. & C.4th 505, 515 (Fayette Comm. Pls. Ct. 2005).

Eight years later, this Court, without citation to *Alberti* or discussion, affirmed the denial of bail for a juvenile charged with first degree murder on the basis that the "evidence offered at the preliminary hearing in the Family Court Division established a prima facie case of murder in the first degree."

*Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971).

The Superior Court subsequently stated that the Commonwealth can "satisfy its burden to prove that a defendant is not entitled to bail by establishing a prima facie case of murder in the first degree." *Commonwealth v. Heiser*, 478 A.2d 1355, 1356 (Pa. Super. Ct. 1984). Without explanation or analysis, the Superior Court cited *Alberti* and *Farris* for this proposition.

However, several lower courts have persuasively argued that *Alberti* does not establish that the proof is evident or the presumption great equates to a *prima facie* case. *Hamborsky*, 75 Pa. D. & C.4th at 515-16 n.1 (concluding that the statement in *Heiser* is "not an accurate or controlling statement of law in determining whether an offense is bailable."); *Commonwealth v. O'Shea-Woomer*, 8 Pa. D. & C.5th 178, 221 (Lancaster Comm. Pls. Ct. 2009) ("the *prima facie* standard identified in *Farris* and *Heiser* is lower than the one announced by

the Supreme Court in *Alberti*”); *but see Commonwealth v. Pal*, 34 Pa. D. & C.5th 524, 552 (Lackawanna Comm. Pls. Ct. 2013) (finding the analysis in *O’Shea* and *Hamborsky* “thoughtful” but ultimately applying a prima facie standard in light of the language in *Alberti* as a matter of stare decisis).

In a thorough and well-researched opinion, Judge David Ashworth of the Court of Common Pleas, Lancaster County, found, “the plain language of the evident proof standard in Article 1 § 14 suggests a ‘clear and convincing standard.’” *O’Shea-Woomer*, 8 Pa. D. & C.5th at 223.<sup>31</sup> Explaining his rationale, Judge Ashworth notes,

I must agree with the reasoning found in ... a myriad of other court decisions from around the country that the language “proof is evident or the presumption great” means something more than *prima facie* evidence, for to read it in this manner would do nothing to advance the constitutional rights of the accused, since a suspect may not be held without a showing of *prima facia* [sic] evidence in any case.

*Id.* at 222.

Petitioners agree that interpreting “proof is evident or the presumption great” as a lower standard such as prima facie or probable cause would render the relevant constitutional language meaningless. Reading *Alberti* as establishing a prima face or probable cause standard for pretrial detention would mean that,

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<sup>31</sup> The court held that the Commonwealth bears this heavy burden. *O’Shea-Woomer*, 8 Pa. D. & C.5th. at 216-217 (citing *Truesdale*, 296 A.2d at 836); *Heiser*, 478 A.2d at 1356 (“At a bail hearing, the Commonwealth bears the burden of proof”).

[T]he Common Pleas Court would have no decision at all to make on bail. If a defendant was charged with first or second-degree murder, and the district justice found sufficient evidence to bind the case for trial, bail would automatically be prohibited. Such an interpretation makes much of Article I, Section 14 mere surplusage.

*Hamborsky*, 75 Pa. D. & C.4th at 515-16.

As such, if a showing of probable cause to support a homicide charge was sufficient to justify pretrial detention, Article I, Section 14 would read “All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment” and not include the additional requirement that the proof be evident or presumption great. *O’Shea-Woomer*, 8 Pa. D. & C.5th at 222-23; *Fry v. State*, 990 N.E.2d 429, 445 (Ind. 2013) (“Probable cause is the minimum standard by which an arrest of an individual may be made . . . . If this were to be the same standard by which a person arrested for murder is denied the right of bail, Article 1, § 17, would simply say ‘murder or treason are not bailable.’ For this same reason, the State may not simply rest upon the indictment by a grand jury, or a prosecutor’s charging information. There must be something more.”); *Fountaine v. Mullen*, 366 A.2d 1138, 1141 (R.I. 1976) (“First we think it clear from the language itself that ‘proof is evident or the presumption great’ means something more than probable cause for if it were to be read in such a manner, the guarantee would add nothing to the accused’s rights,

since a suspect may not be held without a showing of probable cause in any instance.””).

Consistent with this rejection of a prima facie standard, the vast majority of jurisdictions with constitutional provisions similar to Article I, Section 14 have held that the “proof is evident or the presumption great” language requires clear and convincing evidence or its functional equivalent. *See, e.g., Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Crim. App. 1998) (“The burden of proof as to the provisions of Article 2, Section 8, is that of clear and convincing evidence. As to paragraph 1, capital offenses, the court must determine by clear and convincing evidence if ‘the proof of guilt is evident, or the presumption thereof is great.’”); *In re Haynes*, 619 P.2d 632, 636 (Or. 1980) (“While for this purpose guilt need not be shown ‘beyond a reasonable doubt,’ as it must for conviction, the evidence should at least be clear and convincing.”); *Nguyen v. State*, 982 S.W.2d 945, 947 (Tex. App. 1998) (“The term ‘proof is evident’ means clear and strong evidence”); *Browne v. People of Virgin Islands*, 50 V.I. 241, 260-263 (2008) (cataloguing states with similar constitutional language that employ a clear and convincing standard).<sup>32</sup>

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<sup>32</sup> A small handful of courts have held that proof evident or presumption great represents its own standard that cannot be shoehorned into the modern proof scheme. However, these courts generally apply something greater than prima facie and akin to clear and convincing evidence.

The overwhelming majority practice of requiring proof by clear and convincing evidence is also mandated by due process protections. When the individual interest at stake is of particular importance and “more substantial than the mere loss of money,” due process requires the application of a clear and convincing standard. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). The interest in physical liberty is fundamental and of the utmost importance. *See Addington v. Texas*, 441 U.S. 418, 427 (1979) (“the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence”).

As a result, many courts have held that due process requires that deprivations of pretrial liberty be justified by clear and convincing evidence. *See, e.g., Caliste*, 329 F. Supp. 3d at 313 (facts supporting pretrial detention must be demonstrated by clear and convincing evidence because of the “vital importance of the individual’s interest in pretrial liberty recognized by the Supreme Court”); *In re: Humphrey*, 19 Cal. App. 5th at 1035 (“We believe the clear and convincing standard of proof is the appropriate standard because an arrestee’s pretrial liberty

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*See, e.g., Simpson v. Owens*, 85 P.3d 478, 487–88 (Ariz. Ct. App. 2004) (“The history of the phrase alone suggests that it is unique and that it establishes its own standard since there is no comparison for recourse. To state otherwise would be to put a 21st century gloss on or give a modern substitute definition to an historic legal phrase.”).

interest, protected under the due process clause, is ‘a fundamental interest second only to life itself in terms of constitutional importance.’”)

In conformity with these principles, in the federal system, the government is required by statute to prove by clear and convincing evidence that “no conditions of release can reasonably assure the safety of the community or any person” before pretrial detention may be ordered. *Salerno*, 481 U.S. at 742 (citing 18 U.S.C.S. § 3142(f)(2)). Similarly, several states have mandated a clear and convincing standard by constitutional amendment.<sup>33</sup>

Finally, in reflection of best practices, the ABA Standard for pretrial detention likewise mandates that the government prove by “clear and convincing evidence that no condition or combination of conditions of release will reasonably

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<sup>33</sup> *E.g.*, Utah Const. art. I, § 8 (persons charged with an offense designated by statute as one for which bail may be denied are not bailable “if there is substantial evidence to support the charge and the court finds by *clear and convincing* evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.”) (emphasis added); La. Const. art. I, §18 (persons charged with certain specified offenses “shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by *clear and convincing* evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community.”) (emphasis added); Vt. Const. ch. 2, § 40 (A person charged with certain felonies, may only be held without bail if the “evidence of guilt is great and the court finds, based upon *clear and convincing* evidence, that the person’s release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.”) (emphasis added); Wash. Const. art. 1, § 20 (“Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by *clear and convincing* evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.”) (emphasis added).

ensure the defendant's appearance in court or protect the safety of the community or any person." ABA Standard 10-5.8.

Given the lack of agreement amongst the parties and the lack of agreement amongst lower courts, Petitioners urge this Court to clarify the applicable standard. As explained above, the overwhelming majority of courts apply a clear and convincing evidence standard and doing so is consistent with the Pennsylvania Constitution and due process requirements. If this issue remains unresolved or a lesser standard is applied by the ACMs, the presumption of innocence will be rendered meaningless and defendants will continue to be erroneously deprived of their fundamental right to pretrial liberty.

**C. The Parties Agreed that a Bail Authority is Prohibited from Imposing a Condition of Release to Ensure a Defendant Remains Detained Pretrial.**

As discussed above, only after affording robust due process and determining that the defendant is not bailable, may the bail authority deny bail by stating the reasons for the denial on the record and explicitly ordering the defendant detained. Pa.R.Crim.P. 520; *see also supra* section II.A. What a bail authority may *not* do is assign a bailable defendant unattainable conditions of release, whether it be unaffordable monetary conditions or unattainable nonmonetary conditions, that effectively incarcerate a defendant pretrial. As such, the parties agreed to

implement the prohibition against misusing conditions of release as de facto detention orders. (Submission 5, Agreement 5.2).

This prohibition is derived, in part, from the comment to Rule 524, which makes explicit:

No condition of release, whether nonmonetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial. *See* Standard 10-5.3, ABA Standards for Criminal Justice, Chapter 10, Pretrial Release.

Pa.R.Crim.P. 524 (comment).

The ABA Standard cited in the comment to Rule 524 provides that “(f)inancial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.” ABA Standard 10-5.3(b). “This Standard, like the federal and District of Columbia statutes, prohibits judicial officers from requiring a monetary bond in an amount beyond the reach of a defendant as a means of assuring the defendant’s detention.” ABA Standard 10-5.3(a) (comment). The ABA further explains:

The prohibition is based on a fundamental principle of these Standards: concerns about risks of pretrial crime should be addressed explicitly through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing—not covertly through the setting of bail so high that defendants cannot pay it.

ABA Standard 10-5.3(b) (comment).

The parties’ agreement to implement Rule 524’s prohibition on unattainable condition of release also ensures compliance with due process and equal protection

principles. Imposing an unaffordable monetary condition of release on a defendant operates as a de facto detention order effectively detaining the defendant because of indigence. *Hamborsky*, 75 Pa. D. & C.4th at 521 (holding a Commonwealth request to set bond at \$200,000 was the “equivalent to denying bail altogether” and “a charade that would only thinly disguise the denial of the defendant’s constitutional right to reasonable bail. . .”). The same conclusion has been reached in recent bail litigation from other jurisdictions. *See, e.g., ODonnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018) (“[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.”); *Weatherspoon v. Oldham*, No. 17-cv-2535-SHM-cgc, 2018 U.S. Dist. LEXIS 30386, at \*15-16 (W. Tenn. Feb. 26, 2018) (“requiring money bail as a condition of release at an amount impossible for the defendant to pay is equivalent to a detention order.”); *In re Humphrey*, 19 Cal. App. 5th at 1034 (“setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order”).

The United States Supreme Court has repeatedly held that, under a convergence of equal protection and due process principles, individuals may not be “subjected to imprisonment solely because of [their] indigency.” *Tate v. Short*, 401 U.S. 395, 398 (1971); *accord Williams v. Illinois*, 399 U.S. 235, 240-241 (1970); *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). These cases apply in the pretrial

detention context and make clear that pretrial detention “solely because of indigent status is invidious discrimination and not constitutionally permissible.” *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

These cases recognize that incarcerating a person because of an inability to pay a particular amount of money, when a similarly situated individual with money would go free, amounts to “little more than punishing a person for his poverty.” *Bearden*, 461 U.S. at 671. Such a practice violates both equal protection and due process unless the government establishes that the incarceration is necessary to further an important government interest. *Id.* at 665-66. These principles apply with “with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent.” *Buffin v. City & Cnty. of San Francisco*, Civil No. 15-4959, 2018 WL 424362, at \*9, 2018 U.S. Dist. LEXIS 6853, at \*24-25 (N.D. Cal. Jan. 16, 2018); accord *Pugh*, 572 F.2d at 1056-57.

Pennsylvania provides additional protections beyond the federal floor set by *Bearden* and its progeny. See Pa. Const. art. I, § 16 (“The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison...); Pa.R.Crim.P. 706; *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973) (noting it is “plain that a defendant may not be incarcerated merely because he cannot make full payment of a fine.”); *Commonwealth v. Eggers*, 742 A.2d 174,

176 (Pa. Super. Ct. 1999) (“[I]n Pennsylvania, we do not imprison the poor solely for their inability to pay fines.”).

To satisfy the Fourteenth Amendment to the United States Constitution and the Pennsylvania Constitution, a court must first consider a defendant’s ability to pay and may not condition an individual’s liberty on a payment the defendant cannot afford unless no alternative measure can adequately further the state’s interest. *Bearden*, 461 U.S. at 672-73.<sup>34</sup> In the context of bail, the state’s claimed interest is ensuring appearance at future court dates and public safety. *Stack*, 342 U.S. at 5; *Truesdale*, 296 A.2d at 834; Pa. Const. art. I, § 14.

As such, a defendant may not be detained on unaffordable monetary bail, unless the bail authority first considers ability to pay and also finds that no less restrictive alternative condition of release would meet the state’s interests in future appearance and public safety. *See ODonnell*, 892 F.3d at 161; *Pugh*, 572 F.2d at 1057-58 (“[I]n the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.”). The Court should order the ACMs to comply with this standard.

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<sup>34</sup> The *Bearden* and *Salerno* limitations on the state’s ability to deprive defendants of their pretrial liberty overlap. Both require that the court make a finding of necessity before a person may be detained on unaffordable bail. The *Salerno* due process limitations additionally require that robust procedural protections accompany any detention determination.

**D. The Agreed upon Detention Review Hearings are a Necessary Interim Measure until the System Fully Complies with the Foregoing Limitations on Pretrial Detention.**

The parties agreed that anyone incarcerated pretrial by an ACM will receive a full hearing within three business days of preliminary arraignment. (Submission 7-9, Agreements 6 and 7).<sup>35</sup> Petitioners ask that this Court order implementation of this review process as the hearings will provide due process protections and remedy errors made at preliminary arraignment. Petitioners acknowledge that this is an interim step and hope that as these improvements take effect, ACMs will conform their behavior to the Constitution and the Rules such that, going forward, fewer people will be erroneously incarcerated pretrial at arraignment and eventually these hearings will become infrequent occurrences.

**IV. THE PARTIES' AGREEMENTS AND SEVERAL OF THE SPECIAL MASTER'S SUGGESTIONS WOULD IMPROVE THE OPERATION AND ACCOUNTABILITY OF PHILADELPHIA'S BAIL SYSTEM AND PROMOTE DUE PROCESS PROTECTIONS**

All of the parties, as well as the Special Master, indicated a desire to improve the functioning of the bail system in Philadelphia. To that end, the parties reached several agreements that would improve logistics and protect defendants' right to be heard and meaningfully participate during preliminary arraignment. In

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<sup>35</sup> Petitioners ask that this Court order that review hearings be provided to any defendant already in pretrial detention at the time of implementation.

addition to the issues addressed by the parties, the Special Master provided several of his own suggestions to improve the system's functioning.<sup>36</sup> While the parties agreed on several ways to improve the bail system, the parties disagreed about developing a process to expedite low-level cases and whether the ACMs should be required to provide reasoning for their bail determinations.

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<sup>36</sup> The Special Master's report contains two suggestions that fall outside the scope of this litigation: that the First Judicial District develop a process to expedite review of probation detainees, (Report 19, Suggestion 5), as well as a pretrial risk assessment tool. (Report 17-18, Suggestion 3). The parties did not discuss, let alone attempt to formulate an agreement regarding, probation detainees or risk assessment tools during mediation. Therefore, Petitioners urge this Court to decline to weigh in on these issues.

Probation detainees are responsible for a significant portion of pretrial detention in Philadelphia and current practices raise substantial constitutional concerns. *See Commonwealth v. Davis*, 68 EM 2019 (Petition for Writ of Habeas Corpus challenging the constitutionality of probation detainee practices in Philadelphia and highlighting the extensive harm caused by these practices). The harm detainees cause is indeed extensive and grievous. However, this issue falls outside the scope of this litigation. None of the pleadings, briefing, mediation process or negotiations addressed the issuance or review of detainees. Thus, while Petitioners hope that the Court will take up this important matter in the future, Petitioners believe this case is not the appropriate vehicle for doing so.

Pretrial risk assessment tools are likewise beyond the scope of this litigation. None of the practical agreements to improve the bail system reached by the parties contemplated the implementation of such a tool. In fact, during the negotiations to reach this agreement, none of the parties indicated that such a tool was desirable let alone necessary to implement the much-needed reforms.

In addition, Petitioners have deep and substantive concerns regarding the efficacy, racial bias, and problematic nature of such tools. For these reasons, Petitioners strenuously disagree with the Special Master's assertion that a risk assessment tool would improve the bail system and urge this Court not to adopt the suggestion that the First Judicial District create a pretrial risk assessment tool.

**A. The Parties Agreed that All Defendants Shall Be Represented By Counsel and Afforded an Opportunity to Confidentially Communicate With Counsel Before and During Preliminary Arraignment.**

The parties agreed defendants shall be represented by counsel at preliminary arraignments and shall be afforded an opportunity to communicate confidentially with counsel or counsel's representative prior to and during the preliminary arraignment. (Submission 3, Agreement 1). This agreement reflects Pa.R.Crim.P. 540(A), which mandates "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." As described in the Amended Petition, the cursory bail hearings that presently occur in Philadelphia last on average less than three minutes and do not allow for defendants' meaningful participation. (Amended Petition ¶¶ 61-63). This Court should mandate that all defendants have the ability to speak confidentially with counsel in order to protect defendants' right to participate in this process.

**B. Bail Conditions Should be Clearly Explained and Accessible.**

All parties agreed that conditions of bail that are imposed by ACMs must be free of ambiguity, clearly explained to the defendant, and documented to ensure that they are accessible to all parties and enforceable. (Submission 3, Agreement 2). The Special Master suggested that the Court adopt "plain-language" standards and simplify terminology for all forms and communications used during

preliminary arraignment. (Report 20-21, Suggestion 8). The Special Master also suggested that law enforcement have access to information regarding bail conditions. (Report 18-19, Suggestion 4). Petitioners urge this Court to order implementation of these agreements and suggestions, as they would enhance accessibility, understanding, and transparency for those in contact with the bail system in Philadelphia.

**C. The Special Master’s Suggestion that Audiovisual Equipment be Improved is Necessary to Ensure that Defendants have a Meaningful Opportunity to be Heard.**

Improvement of the audiovisual equipment for preliminary arraignments is necessary because defendants were often unable to hear or understand the proceedings. (Complaint ¶¶ 51-53). Along with ensuring counsel and clear notice of bail conditions, improving the audiovisual system would allow defendants to participate meaningfully in their bail hearing. Petitioners urge the Court to order this improvement.

**D. The Parties’ Agreement to Provide Expedited Preliminary Hearings to Defendants in Custody is Necessary to Protect the Presumption of Innocence.**

The First Judicial District currently has a system to expedite preliminary hearings for those held in custody. All parties agreed this process should continue and all those held in custody pretrial should receive expedited preliminary

hearings. (Submission 9, Agreement 8). Our law dictates that even those charged with the most heinous crimes be considered innocent.

The preliminary hearing is the first judicial review of the sufficiency of the government's case and is the point at which charges are most likely to be withdrawn. No matter how serious the charges against them, incarcerated defendants should not be made to spend weeks in jail waiting for that opportunity.<sup>37</sup>

Petitioners believe there should be an expedited preliminary hearing process for those detained pretrial. The First Judicial District currently processes cases for those in custody differently and more expeditiously than those who are not incarcerated. All parties agree that this is necessary, and Petitioners ask the Court direct that this expeditious scheduling process be continued.

#### **E. Arraignment Court Magistrates Should Explain the Reasons for Their Bail Determinations.**

All parties, except for the Respondents, agreed that when assigning a condition of bail other than ROR, the ACM must state, either orally or in writing, the specific reasons why the condition or combination of conditions is the least restrictive and necessary. (Submission 10, Disagreement 3). Due process generally

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<sup>37</sup> For example, Petitioner Kimberly Blackwell, a twenty-seven year-old mother of two, spent sixty-nine days in pretrial incarceration before the Commonwealth withdrew all the charges against her at a preliminary hearing. (Amended Petition ¶ 31).

requires the decision maker to “state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.” *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (citations omitted). As the Special Master recognized,

[A]s a matter of good practice the ACM should explain the basis for any ruling or decision affecting a defendant’s liberty since demonstrating that a decision is the product of a reasoned and principled analysis of relevant factors is essential to maintaining public confidence and is a fundamental principle of the rule of law.

(Report 24). Any bail decision beyond the least restrictive imposition of ROR, restricts a defendant’s pretrial liberty. To ensure that the ACMs’ decisions comport with due process and as a “matter of good practice,” Petitioners urge this Court to order that the ACMs explain the reasons behind their determinations.<sup>38</sup>

**F. An Expedited Process for Defendants Charged with Low-Level Misdemeanors Would Bring Much Needed Relief to an Overburdened Preliminary Arraignment System.**

Petitioners, the District Attorney’s Office, and the Defender Association all agree that the First Judicial District should develop, in collaboration with other stakeholders, a process to expedite release procedures for defendants charged with low-level misdemeanors. (Submission 11, Disagreement 5). Such a process would

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<sup>38</sup> Petitioners believe that this requirement could be implemented within existing structures. Petitioners have reviewed a number of Pretrial Services Investigative Reports that were generated from the court’s electronic records. Those reports include a field in which the ACMs provide an explanation each time they assign a bail different from that suggested by the First Judicial District Bail Guidelines. It would require no new form or procedure for the ACMs to explain in this same field why they believed the conditions imposed were necessary.

allow those defendants facing minor charges to spend less time in custody and would leave ACMs more time to deal with the remaining cases.

In light of the recommendations provided to the Special Master during negotiations, Petitioners propose that the relevant stakeholders could create an expedited process to allow those charged with minor offenses to receive summons and waive preliminary arraignment. This would bring Philadelphia in line with the sixty-six other counties across the state and ensure that those charged with minor misdemeanors do not suffer unnecessary incarceration or delay.<sup>39</sup>

Over 30,000 defendants appear in Philadelphia's Arraignment Court every year.<sup>40</sup> A substantial percentage of cases involve low level charges and place a significant and unnecessary burden on Arraignment Court. Petitioners believe that if the stakeholders do not reduce the volume of cases that go through Arraignment Court, it will be extremely difficult to achieve the robust bail hearings mandated by the Rules and Constitution.

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<sup>39</sup> To the extent that such a process may require a change to Rule 1003 to allow for waiver of preliminary arraignment, Petitioners agree with and defer to the analysis set forth in the Response submitted by Defender Association.

<sup>40</sup> The First Judicial District, *The First Judicial District 2017 Annual Report* 150 (2018), <https://www.courts.phila.gov/pdf/report/2018-First-Judicial-District-Annual-Report.pdf>.

**V. THE COURT SHOULD PROVIDE FOR CLEAR AUTHORITY OVER BAIL PROCEEDINGS IN PHILADELPHIA'S ARRAIGNMENT AND MUNICIPAL COURTS AND ORDER THE DEVELOPMENT OF A PLAN TO IMPLEMENT, EVALUATE, AND REPORT ON THE PROGRESS AND RESULTS OF THE CHANGES CONTEMPLATED BY THE PARTIES' AGREEMENTS AND THE COURT'S ORDER.**

Petitioners, Respondents, the District Attorney's Office, and the Defender Association – as well as the Special Master – have made significant commitments of time and effort to reach the agreements discussed above. This Court can give life to that work by ordering that the parties implement the agreements and many of the suggestions made by the Special Master. But the Court cannot order the success of the planned improvements. That, as the Special Master made clear, can only happen through sustained commitment, proper implementation, and sound structures to ensure accountability.

The Special Master notes the high percentage of bail decisions that are modified by Municipal Court judges after the preliminary arraignment – generally, days or weeks after the preliminary arraignment, after the defendant has already suffered the consequences of pretrial detention.<sup>41</sup> Petitioners respectfully suggest that a properly functioning bail system should not rely upon subsequent review or legal advocacy to ensure its compliance with due process and the Rules. A

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<sup>41</sup> Pretrial detention even for short periods has devastating and often irreparable consequences. (See Amended Petition ¶¶ 94-105).

properly functioning bail system should incorporate evaluation and quality control systems of its own.

The Special Master recommends “align[ing] responsibility, authority, and accountability in one person” – the President Judge of the Philadelphia Municipal Court. Petitioners agree with this recommendation. (Report 15). The disparate chains of command for the various aspects of the preliminary arraignment process should be consolidated so that the President Judge has the clear authority and responsibility to make necessary changes and monitor the success of the project. Petitioners believe, however, that they, as well as the District Attorney’s Office and the Defender Association, should have an ongoing role in the implementation and evaluation of the expected changes. As the Special Master has noted, the arraignment “process must be both fair and perceived to be fair.” (Report 14). The involvement of the Petitioners will ensure transparency and accountability to the public.

The Special Master also underscored the advisability of enhanced training and education for the ACMs under the auspices of the Administrative Office of the Pennsylvania Courts. Petitioners concur with the Special Master’s suggestion that continuing education for ACMs be enhanced and restructured. (Report 19-20, Suggestion 6). It is of the utmost importance that this education be faithful to the

Rules and Constitution and conducted by persons without a financial interest in the bail bonds industry.

Finally, the Special Master emphasized the need for accountability, oversight, and monitoring to ensure that the parties implement the agreed upon reforms and that Philadelphia's "bail system operates in conformity with the law and maintains the public's confidence." (Report 21). As the Special Master noted, it will be "essential" for the President Judge of the Municipal Court to "[d]evelop[] and implement[] a method to evaluate the job performance of each ACM and to assess the impact of implementing the Agreements and Suggestions adopted by the Court." (Report 21). As the Special Master also noted, these evaluations must occur at both the micro (ACM) level and the macro (system) level.

The evaluation of the ACMs should be based on: (1) whether they conduct bail proceedings that conform to the Rules, (2) the quality of the reasoning they supply for their bail decisions, and (3) how often their decisions are modified by supervisory judges. As the Special Master suggested, the first and second criteria can be assessed through a random audit of each ACM's proceedings. The President Judge recently instituted an internal recording mechanism for supervision purposes. The President Judge, or a designee, can listen to several bail sessions per month for each of the ACMs to check, among other things:

- Whether the proceedings are audible to all participants and the public

- Whether the ACM allows appropriate participation by the defendant
- Whether the ACM inquires into the defendant's financial ability to pay before assigning monetary bail
- Whether the proceedings are conducted with respect and consideration for all participants

In addition, the President Judge or a designee should audit the reasons given by the ACMs for the conditions of release they impose. On a monthly or quarterly basis, a representative sample of each ACM's reasons and decisions should be collected and analyzed to ensure that they reflect the Rules' preference for release on recognizance and nonmonetary conditions of release, as well as an evaluation of the defendant's ability to pay any monetary bail imposed.

Because the quality of the ACM's decision making will depend in large part on the quality of the information they are provided, Petitioners agree with the Special Master that "a mechanism should also be developed to assess the quality of the performance of whatever unit is eventually charged with the responsibility of preparing reports for the ACMs." (Report 22).

The final criteria for evaluation of individual ACM performance – how often the ACM's decisions are modified by supervisory judges – should be informed by data that is readily available through the court's electronic record system.

As the Special Master made clear, the President Judge should also develop and implement a system for evaluating the performance of the bail system overall.

Petitioners agree with the Special Master that for this endeavor,

It would be advisable to engage an expert in evaluating bail systems to devise an appropriate evaluation tool. Particular attention should be given to encouraging attorneys, defendants, reform groups, or members of the public to offer opinions about the performance of the bail system in specific cases through a convenient and confidential reporting system. Further, the President Judge of the Municipal Court should engage trained observers to report periodically to the President Judge their observations about the operation of the bail system.

...

Metrics helpful in assessing the performance of the bail system might include time in detention before a bail hearing, percentage of each type of bail set, percentage of each type of bail condition, number and percentage of bail modifications and whether the modification is the result of a contested hearing or an agreement, and the number of bail violations reported, as well as any subsequent hearings and revocations. Each metric should measure some agreed-on feature of a system designed and operated in compliance with the law and applicable rules. While some of this data is currently collected, a method to analyze trends and identify areas for further inquiry is important to maintaining a culture of evaluation, adaptation, and improvement.

(Report 22-23).

Petitioners agree with the Special Master that overall evaluation of the bail system must be based upon robust and thorough data collection regarding the operation of all aspects of the contemplated reforms, as well as performance metrics set after soliciting the input of “attorneys, defendants, reform groups, [and] members of the public” as to what those metrics should measure. (Report 22).

Petitioners believe that this evaluation should include review of the performance of

each of the critical actors in the system, as well. For instance, the District Attorney's Office should be required to track the bail requests made by its representatives, how those requests compare to the conditions actually imposed by the ACMs, and how those requests compare with any later modification to the initial conditions of release. As noted by the Special Master, the quality of Pretrial Services Investigative Reports should be tracked and evaluated according to metrics informed by those who rely on the reports: the advocates and the ACMs.

System metrics may include the time from arrest to preliminary arraignment, from preliminary arraignment to posting of bail or a review hearing, and (for incarcerated defendants) from arrest to preliminary hearing; the mean amount of bail imposed overall, and for specific charges; the types of release conditions employed by the ACMs overall, and the incidence of violations of those conditions. Petitioners will not endeavor to propose a complete list of these data and performance metrics at this point, but believe, like the Special Master, that the data to be collected and the metrics to be used should be determined by an expert, and in consultation with all stakeholders.

Petitioners do make one additional request, which is that all of the data used to evaluate the bail system be made available to the public in aggregate and anonymized formats. The campaign to improve the Philadelphia bail system did not begin with this lawsuit: it has been the focus of the public, the press, and

advocates for people caught up in the criminal justice system for many years. Those groups are stakeholders in this system, as well, and deserve transparency and public accountability. To quote the Special Master one more time, “The decisional process must be both fair and perceived to be fair.” (Report 14). Nothing less than full public accountability will achieve that.

### CONCLUSION

The laws and rules as written are sound and Petitioners seek neither a change in the Rules of Criminal Procedure nor an amendment to the Constitution. As the Special Master noted, the relief requested is indeed “quite modest.” (Report 3 n.2). Petitioners seek compliance with the mandates of the Rules of Criminal Procedure and the Constitution. Consistent and system wide compliance with these mandates would mean that indigent defendants, like the Individual Petitioners, would no longer be subject to the grievous harms of pretrial detention solely because they are too poor to purchase their freedom.

As outlined above, the parties’ agreements will help bring bail setting practices in the First Judicial District into compliance with the Constitution and the Rules. However, these proposals and their promise have yet to be realized. Petitioners join with the Defender Association, the District Attorney’s Office, and Respondents to ask that this Court order the implementation of the agreed upon reforms and robust monitoring thereof.

Despite a lengthy and thoughtful mediation process, the parties were unable to obtain the Respondents' agreement concerning the legal standards that they must follow when deciding what conditions of release to impose on bailable defendants, and the standard for denying bail. If not resolved, these disagreements will frustrate the implementation of the parties' agreements and generate uncertainty. Petitioners, therefore, also ask this Court to resolve these legal questions so that preliminary arraignments in the First Judicial District can conform to both the law and best practices. Implementation of the agreements, resolution of the disputed legal standards, and consistent monitoring of compliance with any Order issued by this Court are imperative.

Date: January 30, 2020

Respectfully submitted,



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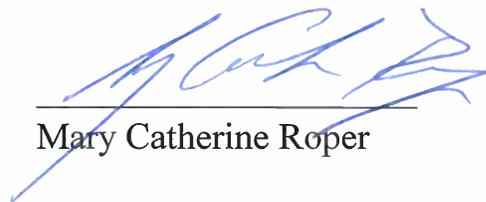
## **CERTIFICATE OF WORD ACCOUNT**

I hereby certify, pursuant to Pa.R.A.P. 2135, that this brief, excluding supplementary matters, is 17,018 words. This certificate is based on the word count of the word processing system used to prepare the brief. An application for leave to exceed the word limit established in Pa.R.A.P. 2135(a)(1) is being filed contemporaneously with this brief.

## **CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127**

I hereby certify, pursuant to Pa.R.A.P. 127, 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.

Dated: January 30, 2020



Mary Catherine Roper

# **EXHIBIT A**

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

THE PHILADELPHIA  
COMMUNITY BAIL FUND, *et. al.*,

*Petitioners,*

v.

No. 21 EM 2019

ARRAIGNMENT COURT  
MAGISTRATES of the FIRST  
JUDICIAL DISTRICT of the  
COMMONWEALTH OF  
PENNSYLVANIA,

*Respondents.*

**SUBMISSION TO THE SPECIAL MASTER**  
**PROPOSED INTERIM PRETRIAL REFORM**

November 7, 2019

## 1. INTRODUCTION

On July 8, 2019, the Pennsylvania Supreme Court invoked its King's Bench jurisdiction over *The Philadelphia Community Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial District* and appointed a Special Master, Judge John M. Cleland, to conduct an inquiry "limited to Petitioners' allegations regarding systemic failures of 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 those alleged systemic failures."

On July 18, 2019, Judge Cleland requested that the Philadelphia District Attorney's Office ("DAO") and the Defender Association of Philadelphia ("Defender") 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.

On, August 16, 2019, the Defender and DAO submitted such a plan (hereinafter "Joint Submission") which set forth a comprehensive set of proposals for reform, the policy and legal justification for the proposed reforms; a plan for implementation, including the expected costs and required personnel; the intended effect; and any areas of disagreement between the Defender and the DAO with respect to particular issues within the proposal.

Thereafter, Petitioners and Respondents each submitted responses identifying their respective areas of agreement and disagreement with the Joint Submission.

On October 3, 2019, Judge Cleland met with all parties, and suggested the parties consider an agreement that outlined shared goals for improvement. Judge Cleland suggested this agreement would not include a detailed plan for implementation or evaluation. Subsequently, counsel for the Defender, the DAO, Petitioners, and Respondents (hereinafter "all parties") met several times to attempt to reach further agreement on the proposals contained in the Joint Submission. While the parties reached substantive agreement on several large goals, disagreements remained. We set forth the results of these negotiations below.

## 2. REFORM PROPOSALS

**AGREEMENT 1: Defendants shall be represented at preliminary arraignments, and shall be afforded an opportunity to communicate confidentially with counsel or counsel’s representative prior to and during the preliminary arraignment.**

All parties agree that defendants must be able to communicate fully and confidentially with counsel or counsel’s representative before and during preliminary arraignments.

**AGREEMENT 2: All conditions of bail, imposed by the Arraignment Court Magistrates (“ACMs”) must be free from ambiguity, clearly explained to the defendant, documented, accessible to all parties and to law enforcement, and enforceable.**

All parties agree conditions of bail must be made part of the record, either orally or in writing, so such conditions may be enforceable.

**AGREEMENT 3: Pursuant to the law set forth in Pa. Const. art. I, § 14 all defendants shall be presumed releasable.**

Consistent with current law, the presumption of pretrial release may be rebutted when “the proof is evident or presumption great”<sup>1</sup> that the defendant: (1) has committed a capital offense, or an offense for which the maximum sentence is life imprisonment; (2) the defendant poses a serious risk of flight or grave threat such that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community or the defendant’s appearance.<sup>2</sup>

**AGREEMENT 4: All parties agree that ACMs may, pursuant to their own**

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<sup>1</sup> Article I, § 14 states that “All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great...” However, the standard of proof at these proceedings is an open question. *See, infra*, Areas of Disagreement, #1, p. 9-10. The parties, except for Respondents, ask the Court to clarify what the standard should be.

<sup>2</sup> The DAO takes the position that specific factual representations alone may be sufficient to meet the Commonwealth’s burden to rebut the presumption of pretrial release and that and hearsay is admissible in the relevant proceedings. The other parties jointly agreed, for the purpose of this interim reform proposal, to take no position on the application of the rules of evidence at the preliminary arraignment, release determination hearings, or bail review hearings.

**determination or in response to a motion by the DAO, make the necessary findings and order a defendant held without bail at the time of preliminary arraignment pursuant to Pa. Const. art. I, § 14 and Pa. R. Crim. P. 520.**

The parties agree that the principles set forth below must govern the process by which an initial determination to hold without bail must be made.

1. Pursuant to Pa. Const. art. I, § 14, all defendants are presumed releasable. This presumption of release may be rebutted if Commonwealth presents proof that is “evident or presumption great” of the following: (a) the defendant committed a capital offense; (b) the defendant committed an offense punishable by life without parole; (c) the defendant presents such a threat to an individual and the community that no condition or combination of conditions other than imprisonment can reasonably assure their safety; or (d) the defendant presents such a flight risk that no condition or combination of conditions other than imprisonment will ensure appearance.
2. 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 Joint Submission, the DAO and Defender proposed alternate variations of detention eligibility nets, limitations on the Commonwealth’s ability to file such motions. Respondents suggest such eligibility nets are a matter of internal DAO policy, and as such, they have no comment on these nets. Petitioners, the Defender, the DAO, and the Respondents intend to engage in further conversation about how to ensure that eligibility nets are constructed and implemented in a manner consistent with the Pennsylvania Constitution and the Rules.

3. The motion to hold without bail shall state, orally or in writing, 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.
4. When a motion to hold without bail is made, the ACM shall permit the

representative of the DAO and the defendant's counsel to be heard on the motion prior to rendering a decision.<sup>3</sup>

5. Upon consideration of the factors specified in Rule 523 and any other information presented, if the ACM finds sufficient evidence<sup>4</sup> that the defendant presents such a flight risk, or such a danger to the safety of any specific person and the community, that no condition or combination of conditions other than imprisonment will reasonably ensure appearance or the safety of any person or the community, bail may be refused. If bail is refused, the ACM 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.

**AGREEMENT 5: A decision to impose monetary conditions must consider a defendant's ability to pay along with the release criteria set forth in Rule 523 and any decision to impose monetary or non-monetary conditions of bail must be guided by the Rules of Criminal Procedure.**

All parties agree that the Rules of Criminal Procedure govern release determinations by ACMs. All parties agree that the ACMs must consider Rule 523 and engage in the analysis set forth therein.

Additionally, the parties agree that the principles set forth below provide the guidance necessary to ensure compliance with the Rules and Constitution going forward.

1. Pursuant to Pa. Const. art. I, § 14, all defendants are presumed releasable.
2. No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial. Pa. R. Crim. P. 524 (comment).<sup>5</sup>

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<sup>3</sup> The DAO takes the position that hearsay evidence is admissible at preliminary arraignment, the other parties agreed to take no position for the purpose of this submission. *See supra* note 2.

<sup>4</sup> The evidentiary standard necessary for pretrial detention remains a substantive point of disagreement between the Respondents and the other parties. *See infra*, Disagreement 1, 9-10.

<sup>5</sup> Respondents acknowledge that the comment to Rule 524 states that "no condition of release . . . should ever by

3. ACMs shall release defendants on recognizance pursuant to Rule 526, unless the ACM determines that an additional condition or combination of conditions is necessary<sup>6</sup> to ensure the defendant's appearance or compliance with the conditions specified in Rule 526, or where the defendant is otherwise held without bail.
4. If the ACM determines that it is necessary to impose a monetary condition of bail, prior to setting any condition, the ACM shall determine the defendant's ability to pay and review all the factors set forth in Rule 523. In making that ability to pay determination, the ACM shall collect and consider the defendant's relevant financial information.<sup>7</sup> The ACMs shall only assign reasonable amounts of monetary bail.
5. When a condition or combination of conditions beyond the standard release conditions is imposed, whether non-monetary or monetary, the ACM 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").
  - b. 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.
  - c. Explain orally to the defendant the conditions of release.<sup>8</sup>
6. When a defendant is released from preliminary arraignment, the release paperwork shall be given to the defendant, specifying the information required by Rule 525, including the specific conditions of release, and shall include the date and time of the next court date. The paperwork shall be

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imposed for the sole purpose of ensuring a defendant remains incarcerated until trial.”

<sup>6</sup> The standard for applying conditions of release remains a point of substantive disagreement between the parties. *See infra*, Disagreement 2, 10.

<sup>7</sup> What constitutes “relevant financial information” is another point of substantive disagreement. *See infra*, Disagreement 4, 10-11.

<sup>8</sup> All parties, except for Respondents, further agree that whenever an ACM imposes a condition of bail, the ACM should state the rationale for such condition, either in writing or orally on a record. Respondents note that no such requirement is necessary under the Rules, except Rule 520, which requires a bail authority to provide reasons on the record only if bail is refused.

signed by the defendant to assure proper notice.

**Respondents' position is that the ACMs – like all judicial officers – use the Rules of Criminal Procedure in making bail determinations. Respondents do not believe that it is appropriate for them to administratively agree to an interpretation of the Rules, nor do they believe it appropriate to insert standards that are neither in the Rules nor case law given the limited scope of the Supreme Court's Order. Further, either the suggested standards are not correct, or there are varying interpretations in case law.**

**AGREEMENT 6: If a defendant is held without bail at the preliminary arraignment, the defendant shall be entitled to a Release Determination Hearing in the Municipal Court within three business days, where practicable.**<sup>9</sup>

All parties agree that, if an ACM refused a defendant bail at the preliminary arraignment, the defendant shall be entitled to Release Determination Hearing in the Municipal Court within three business days, where practicable. All parties agree that, except for the applicable evidentiary standard, the due process protections that accompany preliminary hearings shall accompany Release Determination Hearings.

To accomplish these goals, the Defender, the DAO, and Petitioners agree to the procedures enumerated below.

1. If a defendant is refused bail, a hearing shall be held within three business days of when the Magistrate's order refusing bail is made. The First Judicial District shall evaluate this process and, within six to twelve months of the effective date this provision, shall hold such hearings within two business days, if possible.<sup>10</sup>
2. The hearing shall be conducted on the record in open court.
3. An attorney for the Commonwealth shall appear and may present evidence in the form of witnesses, documents, representations of specific facts or

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<sup>9</sup> The DAO does not believe that a Release Determination Hearing should be provided where the defendant is charged with a crime for which the maximum penalty is life imprisonment.

<sup>10</sup> Respondents' intention is to shorten the amount of time for a hearing after evaluating the three business day process for feasibility.

otherwise;<sup>11</sup>

4. The defendant shall appear,<sup>12</sup> shall be represented by counsel, and shall be permitted to
  - a. cross-examine witnesses and inspect physical evidence presented during the hearing by the Commonwealth;
  - b. call witnesses on the defendant's own behalf;
  - c. offer evidence on the defendant's own behalf; and
  - d. testify.
5. The Judge of the Municipal Court shall determine whether there is sufficient evidence to prove that the safety of any person and the community or the person's appearance cannot be ensured by any less restrictive available means other than imprisonment.<sup>13</sup> Whenever bail is refused, the Judge of the Municipal Court shall state in writing or on the record the specific reasons for the determination.
6. 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.<sup>14</sup>
7. 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 Rules.

**AGREEMENT 7: Any defendant who remains in custody due to the imposition of a monetary or non-monetary condition (e.g. house arrest), shall**

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<sup>11</sup> The DAO takes the position that hearsay evidence is permitted at Release Determination Hearings, all other parties take no position. *See supra* note 2.

<sup>12</sup> All parties except for Respondents agree that the defendant should be present in person during these hearings. Respondents do not object to having a defendant physically present, but note that this is an implementation issue involving other entities, including the Sheriff's Office.

<sup>13</sup> As noted above, the parties do not agree on the evidentiary standard necessary for pretrial detention.

<sup>14</sup> Respondents do not object to continuances for the defendant or Commonwealth, but leave that decision to a judge's judicial discretion. To the extent this proposal seeks to place limitations on a judge's discretion to grant the Commonwealth continuances beyond the 48 hours set forth in this proposal, Respondents' position is that it is a judge's discretion based on the particular facts.

**be entitled to a Bail Review Hearing within three business days.**

All parties agree that individuals who are ordered bailable at the preliminary arraignment upon satisfaction of specific conditions (e.g., house arrest, monetary bail, etc.), but have not been released within three business days, 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. These bail review hearings will be procedurally similar to the Release Determination Hearings except that they would incorporate the decision framework for imposing non-monetary or monetary conditions.

**AGREEMENT 8: Any defendant who remains in custody should be afforded an expedited preliminary hearing.**

All parties agree that defendants in custody should receive expedited preliminary hearing dates. All parties agree that the First Judicial District's current scheduling system sufficiently prioritizes defendants in custody, defendants in custody are generally given an initial preliminary hearing date within 14 days of preliminary arraignment, and that it is not necessary to change the existing scheduling procedure at this time.

### **AREAS OF DISAGREEMENT**

**DISAGREEMENT 1: Petitioners and the Defender assert that before a bail authority may order pretrial detention, the Commonwealth must prove by clear and convincing evidence that the defendant presents a substantial threat to an individual and the community and that no conditions of release can reasonably assure their safety.**

Petitioners and the Defender agree that because constitutional protections preclude pretrial punishment, the substantial proof required under the constitution, proof that is "evident or the presumption great," equates to a clear and convincing standard of evidence. Respondents do not agree that the clear and convincing evidence standard is established law in this Commonwealth, and from an administrative perspective, do not believe they have the authority to agree to this standard absent precedent or Rule change to the contrary. The DAO takes no position on the standard of proof required before a bail authority may order pretrial preventative detention. Petitioners will petition the Pennsylvania Supreme Court for clarity on this matter. Respondents will not join in this request.

**DISAGREEMENT 2:** All parties, except for Respondents, agree that the ACMs should apply the *least restrictive* condition necessary to ensure a defendant’s appearance, the safety of all persons and the community or compliance with the bail bond.

Respondents object to the proposition that the Rules direct ACMs to use the “least restrictive” condition when imposing bail conditions.

**DISAGREEMENT 3:** All parties, except for Respondents, agree that when assigning a condition of bail, other than ROR, the ACM must either state, in writing on the release paperwork or orally on the record, the specific reasons why the condition or combination of conditions is the least restrictive and reasonably necessary to ensure appearance, the safety of all persons and the community and compliance with conditions.

As noted above, Respondents object to both the requirement that the language “least restrictive condition be applied” and to any requirement that the ACMs record their reasoning. Respondents object to requiring ACMs to state, orally or in writing, their reasons for imposing conditions of release because Rule 520 only requires ACMs to state their reasons for refusing bail.

The Defender, the DAO, and Petitioners all agree that preliminary arraignments should be electronically recorded and capable of transcription. Respondents object to recording preliminary arraignments on the grounds that doing so would require additional resources and is not currently required by the Rules.

Petitioners and the Defender also agree that, if recording is not feasible, whenever ACMs impose a condition other than ROR, ACMs should provide written documentation of the reason why such condition is necessary.

**DISAGREEMENT 4:** Prior to imposing monetary conditions of bail, the ACMs should conduct a robust ability to pay hearing carefully considering a defendant’s entire financial picture, including income and expenses as well as life circumstances.

All parties, except for Respondents, agree that before setting monetary bail, ACMs must conduct a robust ability to pay determination, and if the ACM determines monetary conditions are necessary, the ACM must discern how much a defendant can afford. The information currently provided to the ACMs via the Pretrial

Services Investigation Report, consists of only employment, salary, and child support obligations. All parties, except for Respondents, believe this information is insufficient for a substantive ability to pay determination. The parties, except for Respondents, agree that incorporating the *in forma pauperis* criteria would ensure a constitutionally sufficient determination of ability to pay. *See* Pa. R. C. P. 240.<sup>15</sup>

Respondents agree that the ACMs should be provided with as much information about a defendant's financial situation as possible in order to make an informed determination. However, Respondents object to applying the *in forma pauperis* standard without further guidance in the Rules or from the Supreme Court. Respondents contend that the information collected by Pretrial Services satisfies the duty to consider the financial ability to pay under Rule 528, and that the ACMs may make further inquiry with the defendant if necessary. Respondents are not opposed to proposals to increase the amount of financial information available to ACMs.

**DISAGREEMENT 5: The First Judicial District should create a process to expedite release procedures for defendants charged with low-level misdemeanors.**

The parties, except for Respondents, 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 the serious cases.

Respondents believe such an expedited process is not possible under the current rules: the Rules require every defendant arrested to have a preliminary arraignment, and it is not clear that the Rules allow a defendant to waive appearing before an ACM for arraignment. What is more, the Joint Submission's logistics do not appear to decrease the defendant's time in custody given that the Joint Submission provides that they still must be interviewed by Pretrial Services, the ACM may appoint counsel, the defendant must have an opportunity to speak to counsel, and the District Attorney must be given the chance to review the case prior to release. This issue also raises logistical, implementation issues involving other entities, including the Police Department.

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<sup>15</sup> The DAO adds that it does not bear a burden of production to provide the ACMs with information regarding the defendant's ability to pay monetary bail. The DAO states that the Court should inquire and the defense may produce information relating to a defendant's financial situation, as they see fit.