September 11, 2018

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Re: Request for Meeting to Discuss Reform of First Judicial District Bail Practices

Dear President Judge Woods-Skipper and President Judge Neifield:

We write to ask Your Honors for a meeting to discuss the First Judicial District's bail practices. Since March of 2018, the ACLU of Pennsylvania has observed approximately 650 FJD Arraignment Court proceedings. We also have begun to analyze court dockets for all of Philadelphia's 2018 Municipal Court cases. Our work builds on, and confirms, the concerns that we have heard from community activists, including organizations such as the Philadelphia Community Bail Fund and the NO215Coalition. These groups, and other stakeholders, have both illuminated the substantial harms caused by Philadelphia's overuse of cash bail and led a chorus of voices calling for reform.[1]

As a result of our court observations and initial docket analysis, we have concluded that certain practices of the bail commissioners employed by the FJD systematically violate the Rules of

[1] *See, e.g.,* Hayden Mitman, *Philadelphia is Looking to Skip Bail*, Philly Voice (Aug. 12, 2016), https://www.phillyvoice.com/could-philadelphia-prisons-do-away-bail/; Kyrie Greenberg, *Civic Leaders Host Forum to End Cash Bail in Philadelphia,* WHYY (Apr. 7, 2017), https://whyy.org/articles/civic-leaders-host-forum-to-end-cash-bail-in-philadelphia/; Victoria Law, *Taking on the Criminal Justice System After Spending 18 Months in Jail for a Crime He Didn't Commit*, Everyday Democracy (Sept. 6, 2017), https://www.everyday-democracy.org/news/taking-criminal-justice-system-after-spending-18-months-jail-crime-he-didnt-commit; Samaria Bailey, *Mama's Day Bailout Reunites Families for Mother's Day,* The Philadelphia Tribune (May 12, 2018), http://www.phillytrib.com/metros/mama-s-day-bailout-reunites-families-for-mother-s-day/article_d1bff99d-90ca-527a-96b7-9c5ba120b1b0.html.

Criminal Procedure and, more fundamentally, the federal and state constitutional rights of defendants.

In this letter, we set forth the results of our investigation and explain why we believe the FJD's bail practices are unconstitutional. We then suggest strategies to remedy the current defects in the FJD's preliminary arraignment procedures. We would welcome the opportunity to meet in person with Judge Neifield and other stakeholders to discuss our concerns and our proposed reform strategies. The practices at issue are causing many indigent defendants irreparable harm, and thus the situation warrants immediate attention. We would appreciate a response by September 21 and, until then, will not share our findings with the public. We hope to work collaboratively with the FJD to remedy these problems, and that litigation to ensure necessary reforms will not be needed.

I. THE IMPACT OF PHILADELPHIA'S OVERUSE OF CASH BAIL

Research confirms the concerns raised by activists and community members—pretrial detention swells jail populations, devastates individuals, destroys families, and profoundly harms many communities.[2] Cash bail creates *de facto* detention orders for poor Philadelphians and disproportionately impacts communities of color.[3] Numerous empirical studies demonstrate that pretrial detention increases the likelihood of conviction and sentence length.[4]

Potential bail reduction later in the process, such as at Early Bail Review or a preliminary hearing, does not erase the harm caused by the initial detention. People detained for just a few days may lose employment, housing, and even their children.[5] Those struggling with chronic illness or mental health problems lose access to medications, and health care providers. Nationwide, three-quarters of jail deaths occur among people in pretrial detention, and more than one-third of deaths occur within seven days of incarceration.[6]

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[2] Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention,* 69 Stan. L. Rev. 711, 713-715 (2016); Erika Kates, *Moving Beyond Incarceration for Women in Massachusetts: The Necessity of Bail/Pretrial Reform*, Wellesley Centers for Women, 2, 4-5 (2015), https://www.wcwonline.org/images/PolicyBrief3.15.Bail.Pretrial_Reform.pdf; Colorado Criminal Defense Institute, *The Reality of Pre-Trial Detention: Colorado Jail Stories*, 6-7 (2015), https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8bc816ea-9264-caa3-7e49-acfaed7d0789.

[3] *See, e.g.,* Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations For Local Practice*, Brennan Center For Justice, 19-20 (2015), https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf; Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Just. Q. 170, 181-83 (2005).

[4] Megan Stevenson & Sandra Mayson, *Pretrial Detention & Bail, in Reforming Criminal Justice: Pretrial and Trial Processes* 21-22 (Erik Luna ed., 2017).

[5] ABA Crim. Just. Section, *State Policy Implementation Project, Pretrial Release Reform*, 2 (2011), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf; Kates, *supra* note 2, at 4 (a survey of women in pretrial detention demonstrated that almost half were at risk of losing their home); Robynn Cox & Sally Wallace, *The Impact of Incarceration on Food Insecurity Among Households with Children,* Andrew Young School of Policy Studies Research Paper Series No. 13-05, Feb. 1, 2013, at 26; Col. Crim. Defense Inst., *supra* note 2, at 6-7.

[6] Margaret E. Noonan & Harley Rohloff, U.S. Dep't of Justice, Bureau of Justice Statistics, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables* 10 (2015).

Moreover, studies demonstrate that monetary conditions of bail do not promote public safety; to the contrary, the imposition of cash bail actually increases the likelihood that someone will engage in future crime. A large 2016 study of cash bail in Philadelphia and Pittsburgh found that assigning a monetary condition of bail to a defendant *causes* a 6-to-9 percent rise in recidivism.[7] The authors posited that one reason for this increase was that cash bail increased the likelihood of pretrial detention.

This ever-expanding body of evidence demonstrating the profound personal and societal costs of cash bail has caused many jurisdictions to eschew cash bail and to embrace more effective alternatives.

II. THE LEGAL FRAMEWORK

Advocates around the country are increasingly resorting to federal court litigation to address unconstitutional bail practices. Therefore, a growing body of law defines the applicable Due Process and Equal Protection law under the U.S. constitutions and approves court interventions to address systemic shortcomings in local procedures.

A. Bail Under the Fourteenth Amendment's Due Process Clause

Pretrial detention is a deprivation of liberty. In Pennsylvania, the right to pretrial release is defined and framed by the Constitution, which mandates that all prisoners "shall be bailable by sufficient sureties."[8] Pa. Const. Art. 1 § 14.

To determine whether Arraignment Court procedures adequately protect this right to pre-trial release, courts will follow a three-part balancing test that looks to "the private interest . . . affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest, including the function involved and the fiscal and administrative burdens" of alternate procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For instance, in *O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), the United States Court of Appeals for the Fifth Circuit applied *Mathews* to assess a Texas county court's procedures against a similar right to release under the Texas Constitution. Although the applicable rules of criminal procedure required detailed individual hearings, the county court's "hearings often last[ed] seconds," "[a]rrestees [were] instructed not to speak, and [were] not offered any opportunity to submit evidence of relative ability to post bond." 892 F.3d at 153-54. The Fifth Circuit held that these

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[7] Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 473 (2016). The authors posit that the money bail directly influences increased recidivism through the harms of pretrial incarceration imposed upon those unable to make bail, increased incarceration following conviction or the stigma of conviction. *Id.* at 473-75. Their findings follow a long line of research showing the criminogenic impact of even short periods of incarceration. *See, e.g.*, Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data: 1974-2002,* 6 Criminology & Pub. Pol'y 589, 591-93 (2007); National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 150-51 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

[8] Interpreting the "bailable by sufficient sureties" language found in New Jersey's Constitution, the Third Circuit, after conducting a rigorous historical analysis concluded that bail must be defined as "the right to release before trial." *Holland v. Rosen*, 895 F.3d 272, 290 (3rd Cir. 2018).

procedures provided insufficient Due Process to protect the arrestee's right to pretrial release. *Id.* at 160-61.

When the government seeks to deny pretrial release entirely, Due Process requires a full adversarial hearing, where the accused has meaningful representation by counsel, the opportunity to testify, present witnesses, and cross examine the witnesses against him, as well as other protections. *See United States v. Salerno*, 481 U.S. 739, 742 (1987).

B. Bail Under the Fourteenth Amendment's Equal Protection Clause

The Equal Protection Clause dictates that when similarly situated people are treated differently, the government must justify that different treatment. The burden on the government varies with the basis for the differential treatment. Courts apply heightened scrutiny when criminal procedures detain poor defendants *because of* their indigence. *See, e.g., Tate v. Short*, 401 U.S. 395, 397-99 (1971) (invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the Equal Protection rights of indigents). This occurs when (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973). *See also O'Donnell*, 892 F.3d at 161-62 (holding that *Rodriguez* applies in the bail context when "poor arrestees [ ] are incarcerated [and] similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond").

C. The United States Court of Appeals for the Third Circuit on Cash Bail

The Third Circuit has also addressed state bail procedures. Most directly, in *Holland v. Rosen*, the Third Circuit defined the "right to bail" as the "right to release before trial." 895 F.3d 272, 290 (3rd Cir. 2018) (holding that New Jersey's constitutional language requiring bail by "sufficient sureties" did not require the use of money bail). The court noted, "[m]onetary bail often deprived presumptively innocent defendants of their pretrial liberty, a result that surely cannot be fundamental to preserving ordered liberty." *Id.* at 296.

The Third Circuit has also expressed concern over bail practices in Pennsylvania that result in pretrial detention for poor defendants without any public safety justification. In *Curry v. Yachera,* the Third Circuit dismissed a malicious prosecution claim with "some reluctance." 835 F.3d 373, 375 (3d Cir. 2016). Mr. Curry's experience mirrors that of poor defendants in Philadelphia:

> Consider plaintiff-appellant Joseph Curry's alleged circumstances. The underlying Criminal Complaint charges that Curry collected items worth a total of $130.27 at a Wal-Mart and used a receipt found in the parking lot to return the items for cash. The maximum sentence he faced for each of the two misdemeanor charges against him was two years. His bail was set at $20,000. Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle. Ultimately, he pled nolo contendere in order to return home.

Id. at 376-77. The court wrote that "the circumstances of this case appear to exemplify what can be described as a flaw in our system of justice — in particular, the inequity bail can create in criminal proceedings." *Id.* at 375. The court went on to describe Pennsylvania's bail system as a "threat to equal justice under the law." *Id.* at 376. The court referred to calls for reform of cash bail – including in Philadelphia – and stated, "We hope those efforts will ensure equal justice under the law, regardless of an individual's ability to pay." *Id.* at 377, 377 n.9.

D. Bail Under the Pennsylvania Constitution

In addition to providing the predicate for a federal constitutional Due Process claim, the Pennsylvania Constitution's right to pretrial freedom affords even greater protection in its own right. The right to pretrial liberty is "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." Ken Gormley, *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 533-34 (Jeffrey Bauman et al. eds., 2004). If the government seeks pretrial detention, the "proof [must be] evident and the presumption great." Pa. Const. Art. 1 § 14. Only when the Commonwealth can prove that an individual either faces a capital offense or life imprisonment or "no other condition or conditions can reasonably assure safety of any person and the community," may the court permit pretrial detention for the accused. Pa. Const. Art. 1 § 14.

III. OUR OBSERVATIONS

As a result of our court observations and analysis, we have identified several practices of Philadelphia bail commissioners that present serious concern.[9] In summary, FJD bail commissioners conduct cursory, extremely brief bail hearings that fail to provide procedural Due Process and result in the incarceration of Philadelphians who do not have the financial means to post bail. When imposing monetary bail, FJD bail commissioners make no inquiry into defendants' financial ability to pay and usually fail to investigate whether alternatives to monetary bail would serve the same purpose. In addition, FJD bail commissioners routinely impose extremely high bail in serious felony cases as *de facto* detention orders that are intended to incarcerate defendants until their trial. Finally, defendants have no meaningful opportunity to be heard during these hearings and no meaningful access to counsel.

A. FJD Bail Commissioners Routinely Assign Cash Bail to Defendants They have Found to be Indigent

Both our direct observations and docket data reveal that FJD bail commissioners routinely impose bails that defendants have no ability to post. Time and again, we observed bail commissioners appoint the public defender in one breath and impose cash bail in the next, a practice that our preliminary docket analysis confirms is widespread. In the first eight months of 2018, 20,125 people were arraigned in Philadelphia and at least 8,557 of those defendants received cash

[9] We tracked all of our court observations by using the defendant's name and case number, however, in this letter we note our observations according to the date and time of observation to avoid using identifying information. Should you have any questions regarding the observations referenced, we can provide the corresponding docket number.

bail at arraignment, approximately 42.5 percent of the total.[10] Of those assigned monetary conditions of bail at arraignment, 6,301 were appointed counsel in the same proceeding. *In other words, 73.6 percent of defendants who were assigned cash bail had already been found to be indigent.*[11] Even the 10 percent down payment required by the FJD is out of reach for most indigent defendants – in fact, it can be difficult for the average family to come up with just $500 to pay for an emergency.[12]

B. FJD Bail Commissioners Seldom Investigate Either Defendants' Financial Resources or Nonmonetary Alternatives Before Assigning Cash Bail

In the hearings we observed, bail commissioners failed to inquire whether defendants could afford to pay bail and failed to investigate any nonmonetary conditions of release that could secure future appearance. We observed 286 cases in which the bail commissioners assigned cash bail; in 285 of those, the bail commissioner asked no questions about the defendants' ability to post the bail and ignored defendants' objections to the amount assigned.[13] (Again, in 207 of those cases, the bail commissioner also appointed counsel.) The Pretrial Services Reports that bail commissioners receive contain very limited information about a defendant's finances, usually weekly wages and whether the defendant pays child support. The reports do not reveal whether the defendant has savings or significant liquid assets that could be used to pay bail. Without further inquiry, therefore, the bail commissioner has no idea whether the defendant has the present ability to post bail.

Some defendants attempted on their own to argue that they could not meet the bail set. Apart from Commissioner Sheila Bedford who inquired in a few instances into defendants' ability to pay, the other bail commissioners did not engage in a dialog when a defendant said he had no money to pay. For example, after discussion regarding a defendant's receipt of public assistance,[14] Commissioner Kevin Devlin assigned $3,700 cash bail. Commissioner Devlin made no inquiry into whether the defendant could afford this bail, and after the defendant heard the amount, he asked the Commissioner, "How do I come up with bail? Do I come up with that?" Commissioner Devlin made no reply or modification. In another instance, an indigent defendant[15] who was assigned

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[10] It appears that in total, 9,609 defendants had monetary conditions of bail assigned at some point during the duration of their case. This would account for 47 percent of the total. However, for 1,052 defendants out of that 9,609 the type of bail was changed during the case. Because we cannot, at this point, determine the *initial* type of bail assigned for the 1,052, we use only the 8,557 defendants for whom monetary bail was the *only* type of bail assigned. For a significant number of these defendants, the lead charge was a misdemeanor.

[11] We did not include in this number the defendants who qualified for the public defender or court appointed counsel at some point during the case, but also had private representation, because we could not tell from the data whether they were found indigent at their preliminary arraignment.

[12] Maggie McGrath, *63% of Americans Don't Have Enough Savings to Cover a $500 Emergency,* Forbes (Jan. 6 2016), https://www.forbes.com/sites/maggiemcgrath/2016/01/06/63-of-americans-dont-have-enough-savings-to-cover-a-500-emergency/#54cc26d14e0d.

[13] In one case, the public defender argued that an $8000 bail was too high for an indigent client. The commissioner reduced the bail to $5000, but still took no evidence as to whether the defendant could post that. In 16 cases, the commissioner did ask questions about the defendants' finances, but it appeared to our observers that the questions were directed at whether or not to assign counsel, not whether the monetary bail amount was affordable.

[14] Observation from May 4, 2018 at 9:21 a.m.

[15] Observation from May 7, 2018 at 4:07 p.m.

$5,000 cash bail told Commissioner Patrick Stack, "What, I have no money?" Commissioner Stack made no reply or modification.

Nor did most of the bail commissioners we observed address the possibility of imposing nonmonetary conditions of release in lieu of bail. Apart from Commissioner Bedford, we never saw a commissioner refer a defendant to Pretrial Services for supervision in lieu of assigning bail. We never saw a commissioner ask a defendant whether he or she had a family member, friend, or employer who could help ensure the defendant appeared for future court dates. We never saw a commissioner ask a defendant if he or she had a reason for a past failure to appear.

FJD bail commissioners have several options to avoid money bail: they can Release on Special Conditions (ROSC), release on unsecured bond, release on recognizance, and assign nominal bail.[16] Philadelphia has a robust and successful Pretrial Services program under the supervision of Director Michael Bouchard. Mr. Bouchard's staff uses phone calls, text messages and other notifications to remind defendants of their court dates and the program has achieved a 95% appearance rate for those under its supervision.

Despite this robust Pretrial Services program, our docket data reveals that bail commissioners rarely used any options beyond monetary bail or ROR in the first eight months of 2018. Of the six bail commissioners, only Sheila Bedford and James O'Brien utilized four types of bail. Commissioner Patrick Stack used only monetary conditions and release on recognizance. Commissioners Devlin, Rice, and Stack, did not use ROSC.

C. FJD Bail Commissioners Use High Bail to Detain Defendants with Serious Charges

Bail commissioners routinely assign extremely high bail to certain defendants (those with more serious charges). Our preliminary docket analysis indicates that 26 percent of monetary bail orders in 2018 were $50,000 or higher. Our observations confirmed the regularity of this practice. For example, Commissioner Jane Rice assigned an indigent defendant charged with robbery a $450,000 monetary bond, knowing that the defendant was unemployed.[17] After determining indigence and appointing the public defender, Commissioner Patrick Stack assigned $250,000 to a defendant charged with possessing a gun.[18] We observed similar examples of this practice and in each case the bail commissioner failed to provide any reason for the high bail.

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[16] The Pretrial Services Reports provided to bail commissioners include recommendations regarding nonmonetary conditions of release. In June, we requested the Pretrial Services Reports from the First Judicial District for the arraignments we observed. The FJD initially gave us nine reports, and then refused to allow us access to additional reports. Since we do not have access to these reports, we cannot at this time analyze the extent to which the Pretrial Release Guidelines and resulting recommendations influenced the arraignments we observed. We would welcome information on that point from the FJD, and will perform our own analysis once we obtain the reports. We have, separately, filed a motion with the Court seeking review of the Office of Court Records' denial of our request for the Pretrial Service Reports. That motion remains outstanding as of the writing of this letter. If the motion is not granted we will bring litigation to compel the disclosure of the reports.

[17] Observed on August 15, 2018.

[18] Observed on June 15, 2018 at 12:12 pm.

Bail is properly used to assure appearance at trial. This purpose is frustrated if the defendant cannot obtain release. Bail cannot be used as a means of preventive detention, in lieu of full Due Process and a judicial determination that public safety requires such detention. The FJD's Arraignment Court does not come close to providing the Due Process required before denying pretrial release. *See Salerno*, 481 U.S. at 742.

D. Arraignment Court Hearings Do Not Provide Due Process

Preliminary arraignments in the FJD do not address all of the factors required by Rule of Criminal Procedure 523, and do not contain any of the hallmarks of proper Due Process. Compliance with either the Rule or Due Process is not possible in hearings that last less than two minutes, in which the defendant has no opportunity for meaningful participation. In almost all of the 655 arraignment hearings, we observed bail commissioners inform the defendant of the charges, provide a brief summary of the facts, assign bail, warn the defendant of the consequences should he or she fail to appear, announce the next court date, appoint the public defender, all without any direct input from the defendant.

The average length for the arraignments we observed was 2.3 minutes. A substantial number (38 percent) lasted one minute or less. The hearings in which bail commissioners imposed monetary conditions of bail were not meaningfully longer or more substantive. We have precise times for 196 of the 207 cases we observed in which the bail commissioner both appointed counsel and assigned cash bail: the average time per hearing was 3.24 minutes, the median length per hearing was 2 minutes (meaning that half of them lasted less than 2 minutes), and 36 (or 18.4 percent) lasted one minute or less.

Defendants do not have a meaningful opportunity to be heard, present evidence, or consult with counsel during these hearings. Defendants are not physically present during their arraignments; they participate in the process through a video link at the police station. The bail commissioners and representatives from the Defender Association and District Attorney's Office are in courtroom B08 of the Criminal Justice Center. Anything the bail commissioner, the public defender representative, or district attorney representative say must be spoken directly into the microphone to be audible to the defendant.[19] The public defender representative has no opportunity to consult privately with defendants before or during these the hearings as communication can only occur via the public microphone over the video link. In our observations, defendants rarely spoke and when a defendant attempted to present evidence, the bail commissioner routinely instructed him or her to remain silent. For example, in one of the cases we observed, Commissioner O'Brien instructed a Vietnamese interpreter that he should "not interpret anything the defendant says because he [the defendant] should not be speaking."[20]

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[19] We would note that our observers sat behind a pane of glass, and like the defendants, could only hear what was spoken into the microphones. For a concerning number of these hearings, neither representatives' comments were audible to our observers.

[20] Observed on July 2, 2018, at 1:01 pm.

IV. THE FJD'S BAIL PRACTICES VIOLATE THE RULES OF CRIMINAL PROCEDURE AND THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS

All of the problems that we document here have been the subject of extensive public discussion. The effect that the FJD's bail procedures have on pretrial detention has been discussed in the media and in numerous MacArthur meetings and has been the subject of academic study.[21] After extensive public hearings earlier this year, the Philadelphia City Council unanimously passed a resolution that calls on the "First Judicial District of Pennsylvania to institute internal policies that reduce reliance on cash bail."[22] And, several of these issues were detailed in an April 11, 2018 letter to the Court from the Philadelphia Bail Fund.

The FJD has been on notice of these unconstitutional bail practices for some time. While we recognize that some steps have been taken to address these issues, including early bail reviews, systemic problems remain. The practices that we seek to remedy are so widespread as to establish an unwritten "policy" of the FJD for purposes of a claim under 42 U.S.C. § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 n.10 (1986) ("A § 1983 plaintiff . . . may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state 'custom or usage.'").

A. The FJD's Bail Commissioners Have a Practice and Custom of Imposing *De Facto* Detention Orders on Defendants

Imposing cash bail without consideration of a defendant's ability to pay the bail creates a *de facto* detention order. *See, e.g., O'Donnell*, 892 F.3d at 158 ("[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 1006, 1014 (2018) ("setting bail in an amount it was impossible for petitioner to pay, effectively constituted a sub rosa detention order lacking the Due Process protections constitutionally required to attend such an order."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (describing setting unattainable bail as a "less honest method of unlawfully denying bail altogether").

The practice in the FJD is to assign cash bail without consideration of the defendant's ability to pay it and without regard to whether alternative conditions of release would ensure appearance at trial. The FJD is well aware that this practice results in *de facto* detention, has ready and effective alternatives to ensure appearance in its Pretrial Services Program, and yet continues to use cash bail routinely. This practice constitutes deliberate indifference to the rights of indigent defendants.

In addition, it appears that for defendants charged with gun offenses or violent crimes, FJD bail commissioners deliberately misuse cash bail as preventive detention. Cash bail cannot serve as a substitute for the process required to deny release pretrial. We observed over fifty hearings where

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[21] *E.g.,* Heaton, Mayson, & Stevenson, *supra* note 2; Gupta, Hansman & Frenchman, *supra* note 8.

[22] City of Philadelphia, Resolution 180032 (Feb. 1, 2018).

bail commissioners assigned monetary bail of $100,000 or more without explanation of the need for such high bail or consideration of alternatives. This practice violates Due Process. *See Salerno*, 481 U.S. at 742.

B. The FJD's Bail Commissioners Fail to Provide the Protections Required by Federal and State Law

Federal courts across the country have recognized that assigning defendants unaffordable cash bail without consideration of nonmonetary alternatives violates Due Process and Equal Protection principles. As discussed above, the Fifth Circuit found similar proceedings wholly inadequate to protect defendants' rights:

> [I]n practice, County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies, did not achieve any individualized assessment in setting bail, and was incompetent to do so.... The hearings often last seconds, and rarely more than a few minutes. Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount.

O'Donnell, 892 F.3d at 153-154. The court determined that in Harris County secured bail targeted poor individuals and "function[ed] as a pretrial detention order against the indigent misdemeanor arrestees," in violation of the Due Process Clause *Id.* at 154.

The court also found that Harris County's bail practices violated the Equal Protection Clause:

> [T]wo misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the Equal Protection clause, and we agree.

Id. at 163. The Fifth Circuit found the district court's injunction overbroad, but affirmed the district court's judgment that the plaintiff "established a likelihood of success on the merits of its claims that the County's policies violate procedural Due Process and Equal Protection," and remanded the action for a revised injunction. *Id.* at 152.

Other federal courts also have ruled that systems that indiscriminately assign unaffordable cash bail to defendants, like the FJD's system, violate constitutional Due Process and Equal Protection rights. *See, e.g., Walker v. City of Calhoun,* No. 17-13139, 2018 U.S. App. LEXIS 23570, at *38-40 (11th Cir. Aug. 22, 2018) (authorizing injunction to halt detentions without Due Process); *Weatherspoon,* 2018 U.S. Dist. LEXIS 30386, at *17-19 (finding a magistrate's decision

to assign $200,000 bail to an indigent defendant facing attempted murder charges unconstitutional because the magistrate failed to investigate the defendant's financial ability to pay or whether other conditions could provide an alternative to monetary bail); *Rodriguez-Ziese v. Hennessy,* No. 17-cv-06473-BLF, 2017 U.S. Dist. LEXIS 201147, at *7 (N.D. Cal. Dec. 6, 2017) (finding the assignment of $200,000 bail to a defendant charged with carjacking unconstitutional because the bail authority failed to consider the defendant's indigence and nonmonetary alternatives); *Cooper v. City of Dothan,* No. 1:15-CV-425-WKW, 2015 U.S. Dist. LEXIS 78813, at *3-5 (M.D. Ala. June 18, 2015) (ordering the release of a defendant held on monetary bond because "long standing case law… establishes the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined for periods of time solely due to their inability to tender monetary amounts"); *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at *9 (M.D. Ala. Sept. 14, 2015) (holding that the assignment of monetary bail without consideration of a person's indigence or alternatives violates Due Process and noting, "Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all.").

The comment to Rule 524 of the Pennsylvania Rules of Criminal Procedure states "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." Yet FJD bail commissioners routinely set $50,000, $100,000 and even $250,000 cash bail for indigent defendants charged with gun possession. The only reasonable inference is that the bail commissioners intend for these defendants to remain detained until trial.

The Pennsylvania Supreme Court promulgated the relevant Rules of Criminal Procedure to "reaffirm that the purpose of bail is to ensure the defendant's appearance and that the Pennsylvania law favors the release, rather than detention of an individual pending a determination of guilt or innocence." 25 Pa. Bull. 4100, 4116 (Sept. 30, 1995) (explaining the Pennsylvania Supreme Court's adoption of new bail rules). These "rules also encourage the use of conditions of release on bail other than those requiring a deposit of money, thereby deemphasizing the concept of finance loss as the primary means of ensuring a defendant's appearance and compliance with the conditions of bail bond." *Id.* Further, before determining the appropriate type of bail, the bail commissioner must consider all ten factors articulated in Rule 523. Pa. R. Crim. P. 523. Consideration of one or two factors is insufficient, 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." *Id.* (comment) (emphasis added). Preliminary arraignments in the FJD manifestly fail to meet this standard.

Pennsylvania Rule of Criminal Procedure 528 also requires that before a bail authority assigns a monetary condition of bail, the "bail authority **shall** consider both "1) the release criteria set forth in Rule 523; **and** financial ability of the defendant." Pa. R. Crim. P. 528 (emphasis added). The Rule also mandates that "the amount of the monetary condition **shall** be reasonable." Pa. R. Crim. P. 528(B) (emphasis added). When setting monetary bail, the bail commissioners we observed failed to conduct any investigation of defendants' financial ability to pay and failed to consider whether the monetary bail amounts they assigned were affordable.

The bail practices we observed in the First Judicial District's Arraignment Court violate Pennsylvania's Constitution and the Pennsylvania Rules of Criminal Procedure.

V. CONCLUSIONS AND RECOMMENDATIONS

We believe the FJD needs to take immediate steps to ensure that bail proceedings adhere to constitutional and procedural requirements. Specifically, the practice of assigning cash bail without regard to ability to pay or consideration of alternative conditions to ensure appearance and the use of high bails as a means of preventive detention are impermissible. The Court must conduct full Due Process hearings for those defendants whom the Commonwealth wishes to detain until trial. Such hearings must comply with the Rules and with *United States v. Salerno*, 481 U.S. 739 (1987).

We understand that the current volume of cases [23] poses a hurdle, but it cannot justify hearings that take less than two minutes. We believe there are several steps that the FJD and other stakeholders can take to bring Arraignment Court into compliance with legal standards.

A first step is that bail commissioners must acknowledge that when assigning the public defender or court appointed counsel, they have made a finding of indigence, which means that any amount of cash bail will act as a detention order. Therefore, for all defendants represented by the public defender, the bail commissioners should employ a presumption against the use of cash bail and explore alternative conditions of release. In cases where the bail commissioner does not appoint counsel, the bail commissioner must, before assigning cash bail, engage in a full review of all of the factors contained with Rule 523 and, most particularly, conduct a meaningful investigation into the defendant's financial ability to post bail. Pa. R. Crim. P. 528.[24]

In addition, bail commissioners should make greater use of nonmonetary conditions of release to ensure court appearance. Monetary conditions of bail may not actually be that effective at getting people to come to court, the main purpose for their existence. One study that examined bail and court appearance rates in Pittsburgh and Philadelphia found no evidence that money bail increased the probability of appearance.[25] Another study demonstrated that release on unsecured bonds was slightly more effective in getting people to appear in court than assigning money bail.[26]

Additional research has shown that other methods may be more effective than cash bail at getting people to come to court. Phone call reminders increase appearance rates by 42% and mail

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[23] According to our docket analysis, approximately 37,000, cases passed through arraignment court last year, an average of 101 cases per day.

[24] As with any ingrained practice, we expect that it will take some time for bail commissioners to change their routines to comply with the law. We, along with community partners, will continue to monitor bail proceedings. But we believe the FJD has an obligation to ensure that its bail commissioners follow the law. While direct observation of bail proceedings by judges or other staff is impractical in a court as busy as the FJD, it would be relatively easy to record all bail proceedings. The court could identify appropriate people to review periodically – more frequently in the beginning – a representative number of bail proceedings. Recording and auditing proceedings is likely also to have the salutary benefit of discouraging bail commissioners from taking legal shortcuts in the first instance.

[25] Gupta, Hansman, & Frenchman, *supra* note 8, at 475.

[26] Michael Jones, *Unsecured Bonds, the As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute, 11 (2013), https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf.

reminders may increase appearance rates by as much as 33%.[27] Text messages that notify defendants of pending court dates and allow them to communicate with their lawyers have dramatically reduced failure to appear rates. Uptrust, a relatively new not-for-profit tech company provides a messaging app for public defenders that allows defenders to notify their clients via text message of their pending court dates. Uptrust has achieved a 95% court appearance rate for those who receive this service.[28]

We would suggest an expansion of the current Pretrial Services notification program, which uses phone calls, text messages and clear notifications to remind defendants of their court date. These simple, cost-effective steps have done far more to reduce failure to appear rates than monetary bails. While we do not support an expansion of electronic monitoring in lieu of bail, we would encourage the FJD to expand the Pretrial Services Program's notification program.

Another strategy would be for the FJD to collaborate with the District Attorney's Office and the Philadelphia Police Department to institute a program to divert offenders charged with low level offenses out of Arraignment Court through complaint and summons. Currently the vast majority of low level offenses coming through Arraignment Court result from police observing illegal behavior and making an on-sight arrest. This does not have to be the case. Instead of arresting defendants, filing misdemeanor charges and holding everyone until Arraignment Court, defendants could be arrested, fingerprinted at the police station, given a copy of their criminal complaint and a summons for their next court date either in a diversionary program or for room 404. Then these defendants would be sent on their way with strict instructions that failure to appear would result in a warrant for their arrest. The Rules of Criminal Procedure permit such a program. *See* Pa. R. Crim. P. 502, 509, 1003. This would divert the vast majority of low level misdemeanor defendants out of Arraignment Court and greatly reduce the current volume of defendants who require hearings.[29]

Finally, we have also heard considerable community concern about the administrative fee retained by the FJD when a defendant is entitled to the return of posted bail. The Clerk of Courts returns 70 percent of the cash posted, retaining the remaining 30 percent as an administrative fee regardless of the case outcome. While we understand that the Rules of Criminal Procedure allow Philadelphia to keep a fee for "reasonable costs related to the administration of the cash bail program" we note that these costs must be connected to the county's actual cost of administering bail. Pa. R. Crim. P. 535(d). From the information we have been able to obtain,[30] we believe that

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[27] Tim R. Schnacke, Michael R. Jones, & Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 Court Review 86, 89 (2012) (telephone live-caller experiment); Alan J. Tomkins, Brian Bornstein, Mitchel N. Herian, David I. Rosenbaum & Elizabeth M. Neeley, *Reducing Courts' Failure to Appear Rate By Written Reminders*, 19 Psychol. Pub. Pol'y & L. 70, 71-72 (2013).

[28] Uptrust Home Page, http://www.uptrust.co/ (last visited Sept. 11, 2018).

[29] In a recent national poll, voters expressed broad support for this process. Seventy-three percent of voters favor reducing arrests for low-level nonviolent offenses and 76 percent support citations in lieu of arrest for low-level, nonviolent offenses. Pretrial Justice Institute, *Support Grows for Pretrial Justice Reform: National Poll Shows Voters Want Safety, Limited Use of Detention, and Assistance to Ensure Court Appearance* (July 12, 2018), https://university.pretrial.org/viewdocument/support-grows-for-pretrial-justice.

[30] In late 2017, the FJD denied a Right to Know Law request from the ACLU for financial information related to the collection and use of bail fees, asserting that those were not public records as defined by Pennsylvania Rule of

these fees are instead used for other purposes, thus creating a conflict of interest for the FJD. *See, Caliste*, 2018 U.S. Dist. LEXIS 131271, at *44-45. We urge the FJD to reduce the amount that it retains from cash bail deposits.

We write this letter to start a discussion of the best paths for reform of the bail system. Kindly let us know by September 21 whether the FJD is interested in this process. We look forward to speaking with you.

Respectfully,

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Judicial Administration 509, and that the Right to Know Law is unconstitutional to the extent it imposes any greater obligation on the courts than Rule 509. The question whether the FJD is governed by the Right to Know Law's definition of "financial records" is currently on appeal to the Commonwealth Court in a separate case.