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RE: Proposed Amendment of Pa.R.Crim.P. 122 and 1003; Rescission of Pa.R.Crim.P. 520-529 and Replacement with Pa.R.Crim.P. 520.1-.19; Adoption of Pa.R.Crim.P. 708.1, and Renumbering and Amendment of Pa.R.Crim.P. 708

Dear Counsel Yohe:

We write to offer comments on the above-referenced proposal. The American Civil Liberties Union of Pennsylvania is a non-profit, nonpartisan organization dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In particular, the ACLU of Pennsylvania has a strong interest in protecting the right to pretrial liberty enshrined in the Pennsylvania Constitution.

Over the past four decades, Pennsylvania's jail population has skyrocketed, increasing by over 400 percent, an exponential rise caused in large part by unaffordable monetary bail and supervision detainers. Vera Inst. of Just., *Incarceration Trends in Pennsylvania* (2019). We encourage the Criminal Procedural Rules Committee of the Supreme Court of Pennsylvania (the "Committee") to promulgate rules that would reduce the number of people held pretrial by rigorously protecting pretrial liberty and the presumption of innocence. We appreciate the Committee's efforts and hope that the implementation of these new rules of criminal procedure represents a positive step towards improved pretrial and probation practices.

We have several concerns regarding the proposed rules and respectfully ask that the Committee make the following changes. First, we oppose the proposed expansion of the purposes of bail. Including the risk of self-harm

and the threat to judicial integrity in Rule 520.1 contravenes the Pennsylvania Constitution, threatens the well-being of people with disabilities, and ignores the reality of jails and preliminary arraignments. Second, we ask that the Committee eliminate consideration of non-willful failures to appear from the rules. Third, we urge the Committee to curtail the imposition of numerous non-monetary supervisory conditions on presumptively innocent people pretrial. Fourth, we advocate for accountability measures to ensure that detention and condition review hearings happen in the necessary timeframe. Fifth, we caution against the embrace of risk assessment tools as a best practice and, if adopted, urge the Committee to include additional parameters for these tools. Finally, we suggest a shorter timeframe for detainer hearings and a clear standard for pre-revocation incarceration.

I. RULE 520.1 SHOULD NOT EXPAND THE PURPOSES OF BAIL BEYOND CONSTITUTIONAL PARAMETERS.

The ACLU of Pennsylvania opposes the proposed expansion of the purposes of bail. First, this expansion runs contrary to the explicit constitutional language and principles of bail that date back to the founding of our Commonwealth. Second, incarceration in county jails is *not* treatment, and this expansion threatens the health and well-being of people with mental and physical disabilities. Third, bail authorities lack the necessary information, ability, clinical training, or time to make appropriate and clinical determinations at preliminary arraignment.

A. Expanding the purposes of bail to include risk of self-harm and judicial integrity contravenes explicit constitutional language and the right to pretrial release.

The expansion contemplated by Rule 520.1 contravenes an express provision of the Pennsylvania Constitution. "The fundamental purpose of bail is to secure the presence of the accused at trial," *Commonwealth v. Truesdale,* 296 A.2d 829, 834 (Pa. 1972), and "assure the safety of any person and the community," Pa. Const. art. 1, § 14. Pennsylvania's Constitution enshrines the right to bail, a "right that has existed in Pennsylvania law since the Commonwealth's founding by William Penn in 1682." *Commonwealth v. Talley*, 265 A.3d 485, 499 (Pa. 2021); *see* Pa Const. art. 1, § 14. This fundamental right protects the presumption of innocence, reflects our founders' abhorrence of the imposition of sanctions prior to trial,[1] and gives the accused person the "maximum opportunity to prepare his defense." *Talley*, 265 A.3d at 499 (quoting *Truesdale*, 296 A.2d at 834-

[1] Article 1, Section 9 of the Pennsylvania Constitution also prohibits pretrial punishment. This section, "Rights of accused in criminal prosecutions," protects the right to a "speedy public trial" and ensures that the government may not deprive a person "of his life, liberty or property, unless by the judgment of his peers or the law of the land." *Id.* Our federal constitution similarly forbids punishment before trial. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.")

35). In *Talley,* the Supreme Court of Pennsylvania reaffirmed the importance of this right and the rare circumstances under which a court may deny bail:

> [W]e hold that when the Commonwealth seeks to deny bail due to the alleged safety risk the accused poses to "any person and the community," those qualitative standards demand that the Commonwealth demonstrates that it is substantially more likely than not that (1) the accused will harm someone if he is released and that (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm.

Talley, 265 A.3d at 525 (emphasis removed).

Nowhere in Article 1, Section 14 of the Pennsylvania Constitution nor in the 1998 ballot question submitted to Pennsylvanians that amended this constitutional provision does "judicial integrity," the threat of "self-harm," or "danger to themselves" appear. *See* Statement of the Attorney General Regarding Joint Resolution 1998-1, 28 Pa. Bull. 3925 (Aug. 15, 1998). The Committee, while acknowledging that this proposed expansion of the purpose of bail is "arguably a substantive matter," notes that as the "defendant remains part of the community, so enumeration of the defendant's risk of self-harm was believed to be a reasonable interpretation of 'any person and the community.'" Supreme Ct. of Pa. Crim. Procedural Rules Committee, *Notice of Proposed Rulemaking* 59 (2022) ("Committee Report"). Reading the Pennsylvania Constitution in such a way requires an imaginative and inferential leap. The Pennsylvania Supreme Court expressly cautioned against interpreting constitutional provisions in such an expansive and unrealistic way. "The touchstone of interpretation of a constitutional provision is the **actual language of the Constitution itself** . . . [R]eading the provisions of the Constitution in any 'strained or technical manner' is to be avoided." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (emphasis added) (citations omitted).

The Committee noted that the intention behind the expansion for judicial integrity was "preventing both witness intimidation and the destruction of evidence." But the broad language of the proposed rule covers far more than those narrowly limited circumstances and invites standardless application and consequent unnecessary detention. If the bail authority believes that no condition or combination of conditions can ensure a witness or victim's safety, the court already has the power to detain that person under the public safety prong of the Pennsylvania Constitution discussed above.

Neither judicial integrity nor risk of self-harm correspond to the constitutional protections enshrined in our Pennsylvania Constitution. This vague notion of imperiled judicial integrity threatens a defendant's liberty, as a bail authority could interpret this language to mean almost anything. Amending the rules to permit a judge to deny a person their pretrial liberty when they

threaten only themselves or a vague notion of judicial integrity falls far short of the clarity and evidentiary burden our Constitution requires.

B. Incarceration in county jails is not treatment; jails threaten the health and well-being of all incarcerated people, particularly those with disabilities.

Jails are deadly places, particularly for people with disabilities. Copious research confirms that county jails do not provide treatment or protect people from self-harm. If a defendant faces a real risk of self-harm, they need hospitalization or treatment, not incarceration.

Suicide is the leading cause of death for people in jails. *See* Leah Wang, *Rise in jail deaths is especially troubling as jail populations become more rural and more female*, Prison Pol'y Initiative, Jun. 23, 2021. 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. E. Ann Carson, Bureau of Just. Stat., Off. of Just. Programs, U.S. Dep't of Just., *Mortality in Local Jails, 2000-2018 – Statistical Tables* 9 tbl.5 (2021). The vast majority of jail suicides occur among people in "unconvicted" status. *Id.*; *see also* Meghan Novisky & Daniel Semenza, *Jails and Health*, in *Handbook on Pretrial Justice* 39 (Christine Scott-Hayward et al., eds., 2021) (finding that "a large proportion of suicides are likely carried out by pretrial detainees"); Rachel Jenkins et al., *Psychiatric and social aspects of suicidal behavior in prisons*, Psychological Med., Feb. 2005, at 257 (estimating that the suicide rate among people awaiting trial in jail is seven and a half times higher than the general population).

Over the past two years, the pandemic has exacerbated county jails' death rates. The COVID-19 infection rate for incarcerated people is more than five times higher than the national infection rate. The COVID-19 death rate for incarcerated people is three times higher than the national death rate. Brendan Saloner et al., *Covid-19 Cases and Deaths in Federal and State Prisons*, JAMA, Aug. 2020, at 602, 602-03. Deaths from suicide, murder, and other causes also exponentially increased in Pennsylvania's jails over the past two years. Eighteen people died inside Philadelphia's jails last year. Samantha Melamed, *4 Philly Prisoners Died in Two Weeks, Capping a Tumultuous and Deadly Year*, Phila. Inquirer, Dec. 27, 2021; *see also* Pls.-Pet'rs Reply Br. in Supp. of Mot. for T.R.O. and Prelim. Inj., *Remick v. City of Philadelphia,* No. 2:20-cv-01959 (E.D. Pa. May. 5, 2020) (describing horrific and ongoing conditions inside Philadelphia jails where jails routinely deny medical care and out-of-cell time). Five people have died in Dauphin County prison in the past ten months. Christine Vendel, *Man Dies in Dauphin County prison, Marking the 5th Death in 10 Months*, PennLive, Jan. 31, 2022. In September 2021 alone, three people died inside the Allegheny County jail. *See* Hallie Lauer, *'Such a mess': Officials worried by Allegheny County Jail deaths, lack of information*, Pitt. Post-Gazette, Oct. 21, 2021. The vast majority of Pennsylvanians who died in local custody were awaiting trial, held on unaffordable monetary bail or detainers.

The Committee erroneously assumes that jails "assist in offering critical services to people in need." Committee Report at 60. In fact, jails do not offer adequate mental health care or drug addiction treatment for detained persons. *See* Novisky & Semenza at 39; Elliot Oberholtzer, *Police, courts, jails, and prisons all fail disabled people*, Prison Pol'y Initiative, Aug. 23, 2017. And detaining a mentally ill person can exacerbate their mental illness and destabilize their lives. Similarly, incarceration causes a greater risk of death for people with opioid use disorder. Overdose is the leading cause of death among recently released people and the third leading cause of death for those in custody. *See* Andrew Taylor et al., Vera Inst. of Just., *Overdose Deaths and Jail Incarceration: National Trends and Racial Disparities* (2020).

Overwhelming research and evidence from the past two years make crystal clear that jails provide no protection for those at risk of self-harm—in fact, quite the contrary. Incarcerating people because they are at risk of self-harm will not protect the community.

C. Bail authorities do not have the necessary information, ability, training, or time to assess a defendant's risk of self-harm.

Allowing a Magisterial District Judge (MDJ) to incarcerate someone pretrial based upon the MDJ's belief in a person's risk of future self-harm contradicts the express provisions of Pennsylvania's Mental Health Procedures Act (MHPA). 50 P.S. § 7302. The MHPA permits involuntary treatment only if an examining physician finds such treatment necessary. *Id.* MDJs are not, typically, doctors, nurses, or licensed social workers—they do not have the necessary training to conduct a clinical assessment of self-harm required for involuntary treatment. If a magistrate believes a person to be at risk of self-harm, they may recommend initiating a § 302 commitment; jail should never be a substitute for involuntary treatment.

In addition to MDJs' lack of relevant medical training, preliminary arraignments are not the appropriate venue for such a complicated determination. Employees of the American Civil Liberties Union of Pennsylvania have observed dozens of preliminary arraignments and conducted hundreds of interviews with incarcerated people in county jails across the Commonwealth. *See, e.g.*, ACLU of Pa., *Broken Rules: How Pennsylvania Courts Use Cash Bail to Incarcerate People Before Trial* (2021). The overwhelming majority of people we spoke with found preliminary arraignments a cursory and confusing experience. The vast majority of preliminary arraignments last mere minutes. Typically conducted via video, the arrested person stands in the county jail or local police station surrounded by police or correctional officers and other accused people. The accused often have no legal representation. During our interviews, incarcerated people repeatedly described preliminary arraignments in the following ways:

- The whole thing lasted less than a minute.
- The judge just told me my charges and gave me bail.
- I didn't think I could say anything.

- When I tried to speak, I was told to remain quiet.
- I didn't understand what was going on.

Preliminary arraignments are particularly inappropriate venues for the complex assessment of an arrestee's risk of self-harm because probing into a defendant's personal experience to assess their risk of self-harm threatens to generate inculpatory statements, especially when such hearings happen outside the presence of defense counsel.

The idea that a bail authority can, should, or would even be able to conduct a clinical assessment of someone's risk of self-harm under these circumstances ignores the reality of the proceedings.

D. Proposed Revisions

For the reasons described above, we suggest the following changes:

- **Eliminate the following provisions from Rule 520.1 *Purpose of Bail***: "(A)(3) the protection of the defendant from immediate risk of substantial physical self-harm;" and "(A)(4) the integrity of the judicial system."
- **Eliminate the following provision from Rule 520.6 *Release Factors*:** "(A)(2)(d) the defendant's immediate risk of substantial physical self-harm."
- **Amend Rule 520.10 *Determination: Release with Non-Monetary Special Conditions* in the following way:** "(A) Necessity. When general conditions are insufficient, a defendant may be released subject to both general conditions and any non-monetary special conditions necessary to mitigate the defendant's risk of non-appearance~~,~~ *[insert]* **and** the safety of the community, ~~substantial physical self-harm, or the integrity of the judicial system risk,~~ when the proof is evident and the presumption is great."
- **Amend Rule 520.11 *Determination: Release with Monetary Conditions* in the following way**: "(A) A bail authority may impose a monetary condition on a defendant's release only when proof is evident and the presumption is great that no non-monetary ~~special conditions exist to satisfy the purpose of bail, as provided in rule 520.1.~~ *[insert]* **conditions or combination of conditions can ensure the defendant's future appearance for court or the safety of the community.**"

II. ENSURE THAT THE BAIL AUTHORITIES CONTEMPLATE ONLY *WILLFUL* NON-APPEARANCE.

A bail authority making a release determination should not consider a defendant's prior instances of **non-willful** failure to appear at court proceedings. Pa.R.Crim.P. 523(A)(7) requires that a bail authority consider "whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape." This current language correctly assesses the risk of flight. Someone's unintentional failure to appear, whether due to the Commonwealth's

failure to provide service, illness, incarceration in another venue, or even simple human error, is not probative of a person's future intentional flight. *See* Alissa Fishbane, Aurelie Ouss, and Anuj K. Shah, *Behavioral nudges reduce failure to appear for court*, Science, Oct. 2020, at 682 (finding that most defendants mistakenly and unintentionally miss court). Denying a person's pretrial release or imposing harsh pretrial conditions for a prior non-intentional failure is contrary to common sense and the presumption of innocence.

Proposed Revisions: We suggest that you strike "of appearances at court proceedings" from proposed Rule 520.6(A)(3)(d) and rewrite the rule in the following way: "record ~~of appearance at court proceedings or~~ of flight to avoid prosecution or willful failure to appear at court proceedings."

III. ELIMINATE INCREASED PRETRIAL SUPERVISION CONDITIONS.

Proposed Rule 520.10 increases the number and type of non-monetary special conditions a bail authority may impose. The adoption of this Rule would permit bail authorities to impose a host of restrictive conditions similar to correctional supervision conditions upon presumptively innocent persons.

As discussed above, MDJs have neither the training nor the time at preliminary arraignment to make appropriate clinical assessments about an accused person's life. The assumption that an MDJ could, in a cursory hearing, make an appropriate clinical judgment regarding a person's treatment or service plan is unrealistic. Permitting bail authorities to impose extensive supervision requirements upon presumptively innocent people is problematic and paternalistic.

As we have seen in Pennsylvania, mass supervision feeds mass incarceration. *See* Hum. Rts. Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (2020). Research demonstrates that programming intended to reduce recidivism, such as day reporting, electronic monitoring, or intensive supervision, can actually have the opposite effect. *See* Christopher Lowenkamp et al., *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs*, Crime and Delinq., Jan. 2006, at 77, 86 ("Programs of these types have, in the past, been shown to be associated with null or iatrogenic effects."). Thus, imposing additional and stringent supervision requirements on people pretrial in the hope that this will prevent pretrial crime will likely have the unfortunate consequence of sending vast numbers of people into our county jails for **pretrial** supervision violations of merely prophylactic rules.

Moreover, such supervision disproportionately affects Black and brown people and those with limited financial means. *See, e.g.*, Kevin F. Steinmetz & Howard Henderson, *Inequality on probation: An examination of differential probation outcomes*, J. of Ethnicity in Crim. Just., Jan. 2016, at 1 (findings suggest that Black people are more likely to receive adverse probation

outcomes and less likely to be released from probation early compared with white people); Jesse Jannetta et al., Urban Inst., *Examining Racial and Ethnic Disparities in Probation Revocation: Summary Findings and Implications from a Multisite Study* 1 (2014) ("Black probationers were revoked at higher rates than white and Hispanic probationers in all study sites."); Hum. Rts. Watch & ACLU at 38-39.

Pretrial supervision requirements can impose costly burdens on those who can least afford it. Applying these costs before conviction has even more troubling ramifications. Moreover, this type of intense pretrial programming could interfere with a person's work, medical treatment, or even their ability to care for their families. While allowing people to remain in their community is always preferable to pretrial incarceration, we urge the Committee to jettison these additional non-monetary conditions and suggest, instead, that the Committee allow the current language of Rule 527 *Nonmonetary Conditions of Release on Bail* to remain.

We recommend striking the following provisions from Rule 520.10 *Determination: Release with Non-Monetary Special Conditions*:

- "(2) maintaining employment, or, if unemployed, actively seeking employment;"
- "(3) maintaining or commencing an educational program;"
- "(8) refraining from the use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription;" Such a provision would effectively mandate routine urinalysis for people suspected of a crime.
- "(9) submission to a medical, psychological, psychiatric, or drug or alcohol dependency assessment;"[2]
- "(10) compliance with any existing treatment plan or service plan;" Such a provision is not appropriate in the pretrial context, where there has been no finding of guilt. The bail authority has no power to determine what the appropriate treatment plan is, whether it is working, and what constitutes compliance – it is better for the judge handling the matter to make that determination.

[2] We recognize that specialty courts (such as drug and mental health courts) routinely order medical, psychological, psychiatric, and drug and alcohol assessments. These assessments, however, occur *after* a person has already agreed to participate in the specialty court programming. Moreover, in such specialty courts, judges order these assessments *after* careful consultation with counsel for both parties. That is a very different scenario than the pre-trial assessments proposed here. We are also concerned that these assessments, like self-harm assessments, will generate uncounseled, pretrial, inculpatory statements.

IV. ENSURE TIMELY DETENTION AND CONDITION REVIEW HEARINGS.

Neither Rule 520.15 *Condition Review* nor Rule 520.16 *Detention* ensures that defendants will receive timely review hearings. While we recognize that in some instances, it may not be feasible to hold a hearing within the specified timeframe, given the devastating ramifications of pretrial incarceration, we urge the Committee to create some sort of accountability measure to ensure the equitable application of these rules.

We urge the Committee to insert an accountability mechanism that guarantees these necessary hearings occur. Otherwise, people will remain unjustly incarcerated without any opportunity for review. We encourage the Committee to consider requiring that the jail release the defendant if the bail authority fails to hold the required hearing in the necessary time frame. As the Pennsylvania Constitution protects pretrial liberty and the presumption of innocence, release, not detention, should be the default. Moreover, as noted in the Committee's notes to this rule, "defaulted release could be a strong incentive for timely bail hearings." Committee Report at 74. Without such an incentive, we fear that judges will feel little impetus to ensure the timely adjudication of these hearings.

We suggest the Committee strike the following language:

> **Strike comment to Rule 520.15: "**While time is of the essence, the failure to conduct a [condition] review within the time specified in paragraph (A) shall not operate to release the defendant."
>
> **Strike Rule 520.16(E):** "No Default. The failure to conduct a detention hearing in the time prescribed by this rule shall not result in the defendant's release."

V. DO NOT EMBRACE PRETRIAL RISK ASSESSMENT TOOLS AS BEST PRACTICE, AND IF ADOPTED, INCREASE PARAMETERS FOR THEIR USE.

A. Do not adopt risk assessment tools as the "best practice" for pretrial reform.

While we applaud the Committee for including restraints on the use of pretrial risk assessment tools (RATs), we fear these parameters do not go far enough and caution against the embrace of pretrial RATs as best practice. While risk assessment tools offer the potential for improved individual assessments and greater objectivity, few, if any, have delivered on that promise.

Instead, the research has found that racial biases are endemic to most tools and that these tools offer little, if any, improvement on individual judicial determinations.[3]

Most pretrial risk assessment tools depend on prior criminal history to determine a person's risk of committing a crime or failing to appear. Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they face stiffer sentences. For example, while Blacks and whites both use and sell drugs at the same rate, Blacks have much higher arrest rates for both offenses. *See* Hum. Rts. Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* VII (2000). A study of Pittsburgh's arrest practices revealed the same problem. *See* Ctr. on Race and Soc. Probs., *Pittsburgh's Racial Demographics 2015: Differences and Disparities* 6 (2015) (despite similar use and selling rates, police arrested Black adults at four times the rate of white adults for drug violations in the city of Pittsburgh, five times the rate in Allegheny County, and seven times in Pittsburgh MSA); Harold Jordan and Ghadah Makoshi, ACLU of Pa., *Student Arrests in Allegheny County Public Schools: The Need for Transparency and Accountability* 2-3 (2022) (finding that Black male students and students with disabilities were at greatest risk for arrest and referral to law enforcement). Racially biased policing and prosecution practices yield biases in arrest and criminal history data, thereby infecting any tool that relies upon this data to make predictions of future behavior. Thus, racial disparities are "baked into" past criminal justice data via policing and prosecution practices. *See* Sandra Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218, 2251-57 (2019). Criminal history in risk assessment tools effectively functions as a proxy for race and produces a feedback loop, or "ratchet effect" that "aggravate[s] our tragic legacy of racial discrimination." Bernard Harcourt, *Against Prediction: Punishing and Policing in an Actuarial Age* 4 (2006).

As a result of the growing awareness that these tools have racial disparities "baked into" them, a growing host of scholars, researchers, and stakeholders have turned away from these tools altogether. In an open letter to several jurisdictions, twenty-seven university scholars and researchers cautioned:

> Actuarial pretrial risk assessments suffer from serious technical flaws that undermine their accuracy, validity, and effectiveness. They do not accurately measure the risks that judges are required by law to consider. …To generate predictions, risk assessments rely on deeply flawed data, such as historical records of arrests, charges, convictions, and sentences. This data is neither a reliable nor

[3] An in-depth discussion of the problems and concerns raised by the use of pretrial RATs exceeds the scope of this letter. We would instead refer the committee to Melissa Hamilton, Nat'l Ass'n of Crim. Def. Laws., *Risk Assessment Tools in the Criminal Legal System – Theory and Practice: A Resource Guide* (2020). This treatise provides a comprehensive analysis of the problems these tools create and best practices for their use.

> a neutral measure of underlying criminal activity. Decades of research have shown that, for the same conduct, African-American and Latinx people are more likely to be arrested, prosecuted, convicted and sentenced to harsher punishments than their white counterparts. Risk assessments that incorporate this distorted data will produce distorted results. These problems cannot be resolved with technical fixes. We strongly recommend turning to other reforms.

Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns (July 17, 2019). Similarly, the Pretrial Justice Institute, a four-decades-old organization dedicated to pretrial reform, recently reversed their position on risk assessment tools. Pretrial Just. Inst., *The Case Against Pretrial Risk Assessment Instruments* (2020). Explaining their reversal, the Institute wrote:

> Underscoring this new position, though, was the understanding, based on research, that these tools are not able to do what they claim to do—accurately predict the behavior of people released pretrial and guide the setting of conditions to mitigate certain behaviors. RAIs simply add a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future, based on information gathered from within a structurally racist and unequal system of law, policy and practice.

Id. at 1. In addition, the American Civil Liberties Union and more than 100 civil rights organizations signed a statement of concerns related to the use of pretrial risk assessment instruments. *See* Leadership Conf. Educ. Fund, *The Use of Pretrial Risk Assessment Instruments: A Shared Statement of Civil Rights Concerns* (2019).

We echo the concerns raised by these scholars and researchers. The parameters proposed by Rule 520.19 will not alleviate the threat these tools pose. We, therefore, urge the Committee not to adopt risk assessment tools predicated upon historical criminal justice data.

B. If used, require additional parameters for the use of pretrial risk assessment tools.

We recognize that the Committee may not be willing to reject the use of these tools entirely and therefore pose additional suggestions should the Committee move forward and encourage the adoption of these tools. In such a situation, we urge the Committee to include the following additional parameters in Rule 520.19:

- **Prohibit the use of arrests, violations of supervision, summary offenses, and other minor offenses in any risk calculations.**
- **Jettison the "risk of flight" requirement, as RATs cannot reliably predict future flight.** *See* Pretrial Just. Inst. at 1.

- **Ensure that the tool chosen supports the constitutional presumption of innocence and favors pretrial release.**
- **Prohibit misleading terms such as "high, medium, and low risk" and ensure that any pretrial RAT adopted communicates the likelihood of future success in statistical terms**. The tools should produce a score that indicates the statistical likelihood of not reoffending upon release in clear, concrete statistical terms and avoid the use of misleading labels to indicate risk. *See* Hamilton at 48.[4]
- **Ensure the tool answers the stated goal.** In other words, can the tool adopted **actually** predict an individual's future flight risk? Can the tool accurately predict an individual's risk of committing a violent crime during the pretrial period? A tool that generally predicts a person's likelihood of future arrest answers neither of these questions.
- **Involve stakeholders in the tool's inception, creation, and validation.** When deciding whether or not to adopt a tool, when creating the tool, and when validating the tool, incorporate a wide range of stakeholder feedback—not just academic researchers, prosecutors, and judges. Public defenders, formerly incarcerated people, and other system-involved people should all be involved in the creation and implementation of these tools.

VI. DETAINER RULE

A. When lodging a detainer, supervising authorities should not consider the defendant's safety or risk of unintentional non-appearance.

A supervising authority should not consider a defendant's safety when deciding whether to incarcerate a person on a probation detainer. As discussed above, jails cause people grievous harm. If the supervisory authority believes a person is at risk of self-harm, the officer should seek to direct the person to treatment, not jail.

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[4] Pennsylvania courts recognize that the use of scientific terminology without sufficient evidentiary bases can "infuse[] speech with unwarranted weight, i.e., bias" and has no place in our criminal justice proceedings. *Commonwealth v. Williams,* 69 A.3d 735, 748 (Pa. Super. 2011). Because this type of terminology carries such weight and "incendiary" power, our appellate courts prohibit assistant district attorneys from using such language during trial and similarly criticize trial courts when they use baseless scientific language at sentencing. *Id.* Risk labels, such as "high, medium, and low," with their unwarranted imprimatur of science and low accuracy, may fall into this dangerous category of pseudo-scientific speech.

In addition, when lodging a detainer, the supervising authority should only consider the defendant's risk of **future, willful** non-appearance. Otherwise, the Rule will punish people for their non-willful, unintentional conduct.

Proposed Revisions: We suggest the Committee amend Rule 708.1(C) as follows: "Unless a defendant requests, a detainer shall not be lodged unless the supervising authority believes the alleged conduct resulting in the technical violation creates an ongoing risk to the public's safety, ~~to the defendant's safety,~~ or of *[insert]* **willful** non-appearance at the revocation hearing. In all other cases, the supervising authority shall serve written notice for a hearing pursuant to paragraph (A)(1)."

B. Shorten the time for the detention hearing and create a clear evidentiary standard that must be met for detention.

Rule 708.1(D) proposes that upon incarceration on a probation detainer, the defendant "shall be brought before the sentencing judge or other designated judge or authority no later than 14 days after detention for a hearing… ." Two weeks of incarceration is a long time and can cause a person much harm; they can lose their job, spend two weeks apart from their children, and lose access to their medication and mental health or addiction treatment. We urge the Committee to shorten this time to 72 hours, in line with Pa.R.Crim.P 150.[5]

The Committee states that they considered a 72-hour requirement but "rejected because it might conflict with the operation of specialty courts where judges have dedicated oversight of a defendant. Bringing a judge before another judge who may not be familiar with the defendant or the program seemed antithetical to the concept of specialized courts." Committee Report at 79.

Rule 150 provides a good framework for accommodating specialty courts within a shorter timeframe. While Rule 150 provides a strict 72-hour timeframe within which a judge must conduct a bench warrant hearing, it also recognizes that when a special "supervising judge of a 'multi-county' investigating grand jury" issues a bench warrant that lodges a person in jail, that "individual **shall only be detained until the supervising judge is able to conduct the bench warrant hearing."** 150(5)(a). In all other cases, the bench warrants automatically expire after 72 hours. We urge the Committee to adopt a similar framework for Rule 708.1. In other words, make

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[5] New York recently passed the Less is More Act, 2021 N.Y. Sess. Laws 427 (McKinney), which revamps parole practices within that state, and requires that recognizance hearings (or detention assessments) occur within "twenty-four hours" of the execution of that warrant. If, after a detention assessment, the person remains incarcerated, the *Gagnon* I hearing must occur within five days.

an exception for specialty courts but mandate a much shorter time for most people held on detainers.

We also suggest Rule 708.1 create a presumption of release. New York's recently passed Less is More Act provides a good framework for these hearings:

> (vi) At the conclusion of the recognizance hearing, the court may order that the releasee be detained pending a preliminary or final revocation hearing **only upon a finding that the releasee currently presents a substantial risk of willfully failing to appear at the preliminary or final revocation hearings and that no non-monetary condition or combination of conditions in the community will reasonably assure the releasee's appearance at the preliminary or final revocation hearing**. Otherwise, the court shall release the releasee on the least restrictive non-monetary conditions that will reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings, with a presumption of release on recognizance.

2021 N.Y. Sess. Laws 427 (McKinney)

We would urge the Committee to amend Rule 708.1 in the following way:

> (D) **Gagnon I Hearing**. Unless a defendant has requested a detainer pursuant to paragraph (B)(2)(i), a defendant subject to a detainer for a technical violation pursuant to paragraph (A)(3) or (B)(2) shall be brought before the sentencing judge or other designated judge or authority ~~no later than~~ ~~14 days~~ after detention for a hearing to determine whether probable cause exists to believe that a violation has been committed and if the defendant can be released on any available condition. *[insert]* **A defendant may only be held pending final revocation upon a finding that the defendant presents a grave risk to the safety of another person or a substantial risk of willfully failing to appear at the final revocation proceeding.**
>
> **(a) If the defendant is enrolled in a specialty court, such as drug treatment court, the individual shall only be detained until the supervising judge or other judge of that court is able to conduct the Gagnon I hearing. An individual enrolled in a specialty court shall not be detained longer than 14 days.**
>
> **(b) In all other cases, this hearing must be held within 72 hours. The individual shall not be detained longer than 72 hours, or the close of the next business day if the 72 hours expires on a non-business day.**

In conclusion, we thank the Committee for their diligent and extensive efforts in developing these proposed changes. We thank the Committee for taking the time to read and consider our suggestions and all other submitted comments. We hope that the Committee ultimately passes new rules and brings much-needed change to Pennsylvania.

Sincerely,

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