PENNSYLVANIA BAR ASSOCIATION
CIVIL AND EQUAL RIGHTS COMMITTEE
RECOMMENDATION
Regarding Proposed Bail and Detention Rule Changes

The Civil and Equal Rights Committee (CERC) recommends that the Pennsylvania Bar Association provide the following comment in response to the Notice of Proposed Rulemaking from the Supreme Court Criminal Procedural Rules Committee ("Committee"). We commend the Committee on their efforts to reduce pretrial detention through the proposed changes. We recommend that the PBA support many of the proposed changes with some suggested modifications as this fulfills the mission of supporting and promoting the equal administration of justice for all and that no one on account of poverty be denied their legal rights. However, we recommend that the PBA strongly oppose the inclusion of any language expanding the purpose of bail.

REPORT

A. The PBA Should Oppose the Inclusion of Broad and Discriminatory Language That Will Harm Defendants With Disabilities

CERC agrees with the Committee's introductory comments on the subchapter governing bail determination procedures, which assert that, "The goal of the bail determination procedures is for the least number of people being detained . . . ." However, several of the provisions of proposed **Rules 520.1 and 520.10** directly undercut these important goals and open the doors to discrimination against people with disabilities.

Specifically, **we recommend that the PBA strongly oppose the Committee's inclusion of subsections (A)(3) and (4) of Rule 520.1 as well as the inclusion of these factors in Rule 520.10.**[1]

> Subsection (A)(3) provides that conditions of bail may be implemented to reasonably assure "the protection of the defendant from immediate risk of substantial physical self-harm[.]"

This provision substantially expands the purpose of bail in a way that creates tension between the rule's broad sweep and the more limited instances in which the Pennsylvania Constitution and well-established case law have set forth as the proper use of bail. The "fundamental purpose of

[1] The proposed changes to Pa.R.Crim.P. 520.3(D), 520.6 (A)(2)(d) and 708.1(C) also include similarly harmful language allowing magistrates to consider the risk of self- harm or danger to oneself. CERC recommends that the PBA oppose the inclusion of this language in each of these proposed rules to avoid the discriminatory effect and predictable harm discussed in this portion of the Report.

bail is to secure the presence of the accused at trial."[2] In other words, in the absence of evidence indicating that no condition or combination of conditions will prevent an individual from fleeing or posing a grave threat to another person, magistrates should release an individual pre-trial.[3] Maximizing the instances in which magistrates release individuals honors some of our criminal legal system's most important principles: safeguarding the presumption of innocence, avoiding the imposition of sanctions prior to trial and conviction, and providing individuals with the maximum opportunity to prepare their defense.[4]

Crucially, *not* included in the traditional purposes of bail is the notion that magistrates should be empowered to incarcerate individuals simply due to their mental or physical disabilities. Unfortunately, the proposed rule empowers magistrates to detain individuals suffering from crises or addictions that are best diagnosed and remedied by physicians and other healthcare professionals. While the impropriety of this is arguably apparent on its face, it is also supported by existing Pennsylvania law, which provides that a person with serious mental disabilities at risk of self-harm may *only* be subjected to involuntary treatment or commitment to a facility on the judgment of a physician, if they deem it necessary.[5]

Along with running counter to existing law, subsection (A)(3) endangers the health of individuals with psychiatric disabilities and/or substance use disorders. Jails and prisons are already at a crisis point, housing more people with serious mental health conditions than do psychiatric hospitals or facilities.[6] These systems are overburdened and under resourced, with an estimated 64% of people in jail having a mental health condition.[7] It is well-documented that county jails do not have the resources to provide adequate mental health treatment for individuals held in pretrial detention.[8] Lacking the infrastructure and training to address the unique needs of pre-trial detainees, county jails frequently exacerbate these individuals' mental illnesses and even put them at a significantly

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[2] *Commonwealth v. Truesdale*, 296 A.2d 829, 834 (Pa. 1972).
[3] Pa. Const. art. 1, § 14 (1998).
[4] *Truesdale*, 296 A.2d at 834.
[5] 50 P.S. § 7302 (2019).
[6] Torrey, EF, Kennard AD, Eslinger D et al., *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States* (Arlington, VA: Treatment Advocacy Center, 2010).
[7] Kim, Cohen & Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System: A Scan of Practice and Background Analysis* (Urban Institute, March 2015). *See also* Bronson, J, Berzofsky, M, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012* (Bureau of Justice Statistics, June 22, 2017, NCJ 250612) (finding that 44% of people in jail had been told by a mental health professional that they had a mental health disorder, and 26% "met the threshold for serious psychological distress," compared to 5% for the general population).
[8] Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jail in America*, Vera Institute of Justice 12 (2015), available at https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america.

elevated risk of suicide while incarcerated.[9] In 2019 alone, 355 people committed suicide while held in local jails.[10] These individuals require access to treatment in their communities. Rather than protecting them, incarcerating these individuals puts them at a substantially greater risk of serious injury, worsening mental health and death.

Likewise, incarcerating individuals with substance use disorders jeopardizes any efforts at ongoing recovery and endangers their lives. Few jails in Pennsylvania offer any access to Medication Assisted Treatment ("MAT")/Medication for Opiate Use Disorders ("MOUD").[11] Those that do fall far short of providing the comprehensive access to medications and therapy necessary for the treatment of Opiate Use Disorder ("OUD"). As a result, many people with OUD, including those in recovery, are forced to endure painful forced withdrawal upon incarceration. For those in recovery and prescribed MOUD prior to incarceration, this interferes with their treatment for this recognized medical condition and can eliminate the progress they have made. According to the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "patients who discontinue OUD medication generally return to illicit opioid use."[12] Moreover, forced withdrawal causes a heightened risk of fatal overdose upon re-exposure to even small amounts of opioids. Drug overdose is the leading cause of death upon release from incarceration. Within the first two weeks after release, the risk of death from overdose is 12.7 times higher than for the general population.[13]

These outcomes are inescapably at odds with the text of subsection (A)(3), which purports to "protect" individuals. Therefore, the tendency of (A)(3) to create a broad license to detain individuals pre-trial will ultimately cause irreparable harm to defendants who require treatment and community support.

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[9] Meghan Novisky & Daniel Semenza, *Handbook on Pretrial Justice* 39 (2021); Rachel Jenkins et al., *Psychiatric and social aspects of suicidal behaviour in prisons*, 35 PSYCHOLOGICAL MEDICINE 257 (2005).

[10] Carson, E. Ann, *Suicide in Local Jails and State and Federal Prisons, 2000-2019 Statistical Tables*, (Bureau of Justice Statistics, October 2021, NCJ 300731).

[11] *See* Shelly Weizman, Joanna Perez, Isaac Manoff, Melissa Baney, and Taleed El-Sabawi, *National Snapshot: Access To Medications For Opioid Use Disorder In U.S. Jails And Prisons*, (O'Neill Institute for National and Global Health Law at Georgetown Law Center, July 2021) (identifying only 12 of the 62 counties with jails in Pennsylvania as providing "some form of MOUD").

[12] SAMHSA, Treatment Improvement Protocol 63: Medications for Opioid Use Disorder at ES-3 (July 2021) *available at* https://store.samhsa.gov/product/TIP-63-Medications-for-Opioid-Use-Disorder-FullDocument/PEP21-02-01-002.

[13] Elizabeth Needham Waddell, et al, *Reducing overdose after release from incarceration*, Health & Justice (July 2020) *available at* https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-020-00113-7 (last accessed, February 15, 2022).

This expansion of the purpose of bail that provides magistrates with discretion to discriminate against individuals with disabilities is particularly troubling in light of recent Department of Justice ("DOJ") findings regarding the Unified Judicial System of Pennsylvania ("UJS").[14] In a February 2022 Findings Letter, the DOJ "determined that the UJS, through the actions of its component courts, violated Title II of the [Americans with Disabilities Act] by at times prohibiting and at other times limiting the use of disability-related medication to treat OUD by individuals under court supervision."[15] The DOJ not only found that two specific counties had discriminated against individuals, but that "the bans and limitations imposed on OUD medication by other county treatment courts strongly suggest that those UJS component courts have similarly discriminated and continue to discriminate against other individuals with OUD who were or currently are under court supervision."[16]

The DOJ recommended that in order to remedy this discrimination, "the UJS should promptly implement corrective measures…adopting or revising written policies to explicitly state that no court within the UJS may discriminate against, exclude from participation, or deny the benefits of their services, programs, or activities—including county court proceedings, probationary programs, and treatment courts—to qualified individuals with disabilities because they have OUD."[17] Implementation of Rule 520.1 as currently written would do the opposite. In a system that is already experiencing difficulties complying with federal laws against disability discrimination, a proposal that provides magistrates with additional discretion to make bail and detention decisions based on their evaluation of the defendant's risk to themselves is ill advised.

> Subsection (A)(4) states that another purpose of bail is to "reasonably assure . . . the integrity of the justice system."

This broad catch-all language also creates an expansive license to detain individuals pre-trial. By including "[assuring] the integrity of the justice system" as a purpose of bail, the Committee opens the door to magistrates to detain individuals for any reason that does not fit neatly into subsections (1) through (3). Indeed, the Comment to proposed Pa.R.Crim.P. 520.1 states that, "Reasonably assuring the integrity of the judicial system *includes* protection against likely witness intimidation and destruction of evidence" (emphasis added). Although this language was likely intended to exemplify instances in which the integrity of the judicial system would be impaired, use of the word "includes" signifies to magistrates that these examples are not exhaustive, empowering them to detain individuals for reasons not listed or contemplated by the Comment's drafters.

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[14] February 2, 2022 DOJ Findings Letter re The United States' Findings and Conclusions Based on Its Investigation of the Unified Judicial System of Pennsylvania under Title II of the Americans with Disabilities Act, DJ # 204-64-170 *available at* https://www.ada.gov/ujs_lof.pdf (last visited February 15, 2022).

[15] *Id.* at 1.

[16] *Id.* at 6.

[17] *Id.* at 7.

In sum, proposed Pa.R.Crim.P. 520.1(A)(3) and (4) create expansive amorphous standards that invite overly broad judicial discretion, as well as expansion of judicial expertise to the medical, mental and health fields, with corresponding harm to a defendant's due process rights. For this reason, these subsections should be excluded from the proposed rule's language.

B. The PBA Should Support Proposed Rules Providing Additional Protections to Defendants But Should Propose Modifications to Reduce the Time Before Necessary Proceedings

CERC recommends that the PBA support proposed **Rules 520.15 and 520.16**, as they provide defendants with the meaningful opportunity, with counsel present, to contest their bail conditions and/or incarceration, which may well lead to a reduction in the number of individuals held pre-trial. However, CERC supports the suggestions of the Interbranch Commission to strengthen these provisions.

> First, proposed Pa.R.Crim.P. 520.15 states that, "If a defendant remains detained after 48 hours following the initial bail determination because the defendant has not satisfied a bail condition, then a review of conditions shall be conducted no longer than 72 hours . . . after the initial bail determination[.]" In effect, this means that the detained individual is entitled to a condition review hearing within 72 hours. Similarly, proposed Pa.R.Crim.P. 520.16(B) and (C) provide that an individual denied bail altogether is entitled to a detention hearing within either 48 or 72 hours.

Although these hearings afford defendants crucial procedural protections and present the accused with a second opportunity to be granted bail or less restrictive conditions of bail, **CERC recommends that the PBA join the Interbranch Commission in suggesting that the time within which either hearing must occur be reduced from the maximum 72 hours to 48 hours.** Courts have long recognized that pretrial confinement in *any* capacity "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[18] As one study found, "A person detained *for even a few days* may lose her job, her housing, or custody of her children."[19] An even more recent report concurred: "even a small number of days in custody . . . can have many negative effects, increasing the likelihood that people will be found guilty, harming their housing stability and employment status and, ultimately, increasing the chances that they will be convicted on new charges in the future."[20] Facing the potential of losing their job, being evicted from their apartment, or losing custody of their children has also forced defendants to accept a guilty plea in

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[18] *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

[19] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, Stan. L. Rev. 711, 713 (2017) [hereinafter Paul Heaton et al.] (emphasis added).

[20] Léon Digard & Elizabeth Swavola, Vera Institute of Justice, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* 1, 4 (April 2019) [hereinafter Digard & Swavola], available at https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

exchange for their release from jail, even when they have not actually committed the crimes for which they are charged.[21]

For similar reasons, proposed **Pa.R.Crim. Rule 708.1(D),** which would require that a preliminary, *Gagnon* I hearing be held within 14 days of the defendant's arrest, should be modified to provide for a *Gagnon* I hearing within either 48 or 72 hours of the defendant's detention.

C. PBA Should Support the Use of Risk Assessment Tools Only With Careful Monitoring to Ensure Racial and Gender Neutrality

CERC recommends that the PBA support proposed **Pa.R.Crim.P. 520.19**, with a key qualification. First, we support section (C), which provides that if a president judge authorizes the adoption and use of a pretrial risk assessment tool ("RAT"), the RAT must be "statistically validated [in validation reports made public] prior to adoption and at an established interval thereafter to demonstrate racial and gender neutrality[.]" Although the adoption of pre-trial RATs is often well-intentioned, numerous studies have demonstrated that, absent the validation reports contemplated by proposed Rule 520.19, RATs are capable of deleteriously impacting racial and ethnic equity in our criminal justice system.

It is precisely *because* of the potential dangers that inhere in the use of pre-trial RATs, however, that we recommend the inclusion of more specific language within the rule that more clearly delineates which risk assessment factors may and may not be considered as relevant to determining the relative risk that the accused will re-offend and pose a threat to public safety. In pursuit of that specificity, we suggest that, where a risk assessment analyzes the likelihood that an individual will recidivate if released, prior arrests and recommitments to the PA Department of Corrections for technical violations of probation or parole should be excluded as impermissible bases for which bail conditions may be made more onerous or denied altogether.

It is also essential that any pre-trial RAT distinguish between new criminal activity and technical violations of pretrial release conditions. As the Interbranch Commission stated in its 2018 testimony before the Pennsylvania Commission on Sentencing ("PCS"), a technical violation of release conditions is not equivalent to the commission of a new crime, nor does it merit being treated as such, because it does not pose the same threat to public safety.[22] Overall, including technical violations of release conditions as a factor used pursuant to pre-trial risk assessments should be explicitly prohibited, because it dangerously conflates indigency (which is disproportionately experienced by communities of color) with posing a threat to public safety.

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[21] Digard & Swavola, *supra* note 4, at 5.

[22] Pa. Interbranch Comm'n for Gender, Racial and Ethnic Fairness, *Testimony Before the Pennsylvania Commission on Sentencing on its Proposed Sentence Risk Assessment Instrument* 1, 3 (2018), available at https://pa-interbranchcommission.com/testimony-before-the-pa-commission-on-sentencing-on-its-proposed-risk-assessment-instrument/.

Similarly, risk assessment instruments should not be permitted to use a defendant's prior arrests as a metric indicative of the likelihood that the individual will re-offend and pose a threat to public safety. As stated in the Interbranch Commission's testimony to PCS, the category of prior arrests is not necessarily representative of future violence or threats to public safety.[23] Moreover, having a prior arrest on one's record is a disproportionately more likely outcome for individuals of color and other marginalized groups.[24] Looking at misdemeanor arrest rates alone, a 2018 study found that "there is profound racial disparity in the misdemeanor arrest rate for almost all offense types."[25] Specifically, the Black arrest rate has hovered around 1.7 times the White arrest rate since 1980, and the Black-White arrest ratios for drug possession, vagrancy, disorderly conduct, drunkenness, DUI, simple assault, and other offenses have remained relatively stable, too.[26] As that study suggests, these findings indicate that our misdemeanor justice system – as a microcosm of our criminal justice system more generally – is plagued by structurally racist arrest patterns that have persisted for decades.

Accordingly, so long as the Committee and judicial districts across the Commonwealth seek to incentivize pre-trial RATs that demonstrate racial and gender neutrality, as section (C) of the proposed rule indicates, any reliance on prior arrests as a RAT factor should be specifically excluded by the rule's language.

D. Right To Counsel At the Earliest Possible Stage is Crucial

CERC recommends that the PBA support the Committee's proposed language in **Pa.R.Crim.P. 122**, which recognized the importance of appointment of counsel for all defendants without financial resources as well as those who are unable to employ counsel prior to the preliminary hearing. However, CERC recommends that the PBA join in the Interbranch Commission's suggestion to broaden the guarantee of appointment of counsel for qualified defendants prior to their preliminary *arraignment,* rather than their preliminary hearing. For similar reasons, CERC emphatically recommends that proposed **Pa.R.Crim.P. 520.5(A)** which provides "A defendant *may* be represented by counsel at the initial bail determination" (emphasis added) be modified to replace the word "may" with "shall."

Numerous studies have shown that ensuring the provision of counsel for indigent or otherwise qualified defendants at the preliminary arraignment stage is crucial to reducing pretrial incarceration and maximizing a defendant's procedural liberties. Data collected in Allegheny County supports these assertions. The Allegheny County Office of the Public Defender ("OPD") began a pilot project in 2017 in which they utilized existing staff to provide legal representation

[23] *Id.*
[24] *Id.*
[25] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 731 (2018).
[26] *Id.* at 760.61.

for all individuals arraigned during normal business hours at Pittsburgh Municipal Court.[27] After one year of the pilot program, individuals represented by a public defender at their preliminary arraignment were less likely to receive cash bail and less likely to be booked into the Allegheny County Jail, as compared to a matched sample of individuals who did not have such representation.[28] This reduction in the use of cash bail and the increase in the number of people released following their arraignment did not increase the rates at which individuals failed to appear or were re-arrested during the pretrial stage.[29] Importantly, staffing preliminary arraignments with defense counsel was found to reduce the racial disparities present in cash bail decisions and jail bookings between Black defendants and their White counterparts.[30]

It is an unfortunate truth that due to limited resources, some districts' public defender offices are better equipped than others to take on the representation of indigent individuals at their preliminary arraignments. One possible alternative could be that the judge can appoint a lawyer if the local public defender's office is unable to provide representation...[31] In sum, this proposed amendment will serve to decrease the likelihood that defendants are incarcerated pretrial and accordingly, the probability that those defendants will recidivate.

E. Release with Monetary Conditions

Rule 520.11 addresses a defendant's release upon compliance with monetary conditions stating that "A bail authority may impose a monetary condition . . .. only when proof is evident and the presumption is great . . . ." While this is commendable, as suggested by the Interbranch Commission, a more explicit emphasis of the presumption against the imposition of monetary conditions of bail should be stated by a simple amendment or rewording –

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[27] Kathryn Colins et al., Allegheny County Analytics, *Public Defense at Preliminary Arraignments Associated with Reduced Jail Bookings and Decreased Disparities* 1 (Oct. 2020), *available at* https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/10/20-ACDHS-06-Public-Defense-Brief_v5.pdf.

[28] *Id.*

[29] *Id*.

[30] *Id*. at 7.

[31]Numerous studies have demonstrated that "when defendants are incarcerated pretrial, they often lose their employment, housing, and access to community services, making their eventual re-entry into the community more difficult" and their re-exposure to the criminal legal system more likely. Pa. Interbranch Comm'n for Gender, Racial and Ethnic Fairness, *Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform* 1, 4 (July 2017), available at https://pa-interbranchcommission.com/ending-debtors-prisons-in-pennsylvania-current-issues-in-bail-and-legal-financial-obligations-a-practical-guide-for-reform/.

> "There is a strong presumption against conditioning the defendant's release upon compliance with a monetary condition. A bail authority may only impose a monetary condition on a defendant's release 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"

Additionally, with respect to the amount of security required for the monetary condition in **Rule 520.11, section (D)** included language which is not tied to a defendant's ability to pay. The language included in the rule is "reasonably attainable by the defendant." This permits a substantial amount of discretion, allowing bail to be set at higher amounts than what a defendant actually has the means to afford, or could possibly permit the court to set bail based on the family's resources which would exacerbate the harm on the family. The financial wherewithal of a defendant, or lack thereof, while set forth in Pa.R.Crim.P (D)(1) requires a detailed financial evaluation of a defendant's actual situation, it needs to be done before any bail authority determination is made.

CONCLUSION

The Supreme Court Criminal Rules Committee should be commended for focusing on the needed changes to the rules for bail. However, the changes should not alter the "fundamental purpose of bail" which is "to secure the presence of the accused at trial." Many of the proposed changes expand the purpose to include the risk of self-harm, which not only presents potential discrimination against people with mental health disabilities or substance abuse disorders, but also turns our courts in medical health professionals. The very harm which the court is concerned about, the risk of self-harm, is actually exacerbated by the detention of such individual in a jail without adequate resources.