The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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Mr. Joshua M. Yohe, Counsel
Criminal Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635

Re: Comments on the Criminal Procedural Rules Committee's Notice of Proposed Rulemaking

Dear Mr. Yohe,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Commission"), we are writing today to provide comments in response to the Notice of Proposed Rulemaking from the Supreme Court Criminal Procedural Rules Committee. We wish to thank the Committee for this opportunity to comment on the proposed rules, which evidence careful thought and a commitment to ensuring justice and equity in our Commonwealth's criminal legal system.

As you may know, the Commission was established by the three branches of Pennsylvania government to implement recommendations from the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, published in 2003. Since its inception, the Commission has dedicated its focus to eradicating the disparities faced by racial and ethnic minorities and indigent individuals in our Commonwealth's legal systems. It is in furtherance of that mission that we offer comment today.

- Proposed Pa.R.Crim.P. 122: Appointment of Counsel

The Commission supports the Committee's proposed language in Pa.R.Crim.P. 122, while suggesting an amendment. Although we endorse the rule's language setting forth the procedures that must occur when counsel is appointed for a defendant, we believe that section (A) should be broadened to guarantee the appointment of counsel for qualified defendants prior to their preliminary *arraignment,* rather than their preliminary hearing. As numerous studies have shown, 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. Having an attorney present for a defendant's first court appearance following custodial arrest signals to magistrates the necessary formality and gravity of the preliminary

arraignment, which otherwise might be overlooked as a routine and inconsequential component of the criminal justice system. A public defender or private defense attorney is also more familiar with and better able to advocate for a defendant's positive attributes and mitigating characteristics, which the defendant might be unequipped or hesitant to raise, especially if they are unacquainted with the often-intimidating nature of a court proceeding.

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 for all individuals arraigned during normal business hours at Pittsburgh Municipal Court.[1] After one year of the pilot program, the results were encouraging: 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.[2] Equally as encouraging was the fact that the 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.[3] Finally, 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.[4]

In suggesting this amendment to proposed Rule 122, the Commission acknowledges that some districts' public defender offices are better equipped than others to take on the representation of indigent individuals at their preliminary arraignments. However, it is precisely *because* resources are limited that existing procedures should be updated to decrease the strain on public defender offices downstream. 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 justice system more likely.[5] In sum, the Commission's proposed amendment will serve to decrease the likelihood that defendants are incarcerated pretrial and accordingly, the probability that those defendants will recidivate.

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[1] 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.

[2] Id.

[3] Id.

[4] Id. at 7.

[5] 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/.

- Proposed Pa.R.Crim.P. 520.1: Purpose of Bail

The Commission is in agreement 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 . . . ." The Commission also supports the intended purpose of proposed Pa.R.Crim.P. 520.1. With that said, we believe that several of proposed rule 520.1's provisions directly undercut these laudable goals.

Specifically, we suggest that the Committee delete or significantly alter subsections (A)(3) and (4) of the rule. 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. As you are aware, the "fundamental purpose of bail is to secure the presence of the accused at trial."[6] 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.[7] 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.[8]

Crucially, *not* included in the stated purposes of bail is the notion that magistrates should be empowered to incarcerate individuals simply due to their mental or physical disabilities. By granting courts the ability to ostensibly protect an individual from the risk of self-harm, subsection (A)(3) needlessly invites a dangerous element of paternalism into our criminal justice system. In short, it empowers magistrates, who are unequipped with the requisite experience or education, to detain individuals suffering from crises or addictions that are best diagnosed and remedied by physicians and other healthcare professionals. While 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* receive involuntary treatment or commitment to a facility from a physician, if they deem it necessary.[9]

Along with running counter to existing law, subsection (A)(3) is also out-of-step with the needs of individuals facing mental health issues or substance use disorders. Put simply, these individuals require access to treatment in their communities; exposing them to the harmful consequences of incarceration will only worsen their condition. It is well-documented that county jails do not have the resources to provide adequate mental health treatment for individuals held in pretrial

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[6] Commonwealth v. Truesdale, 296 A.2d 829, 834 (Pa. 1972).

[7] Pa. Const. art. 1, § 14 (1998).

[8] Truesdale, 296 A.2d at 834.

[9] 50 P.S. § 7302 (2019).

detention.[10] 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 elevated risk of suicide while incarcerated.[11] These outcomes are inescapably at odds with the text of subsection (A)(3), which purports to "protect" individuals. Therefore, even though (A)(3) is well-intentioned, its tendency to create a broad license to detain individuals pre-trial will ultimately cause irreparable harm to defendants who require treatment, rather than incarceration for a trial and conviction yet to be – or that will never be - consummated.

Like (A)(3), subsection (A)(4) 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 runs the risk of writing magistrates a blank check 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. In sum, proposed Pa.R.Crim.P. 520.1(A)(4) creates an amorphous standard that invites overly broad judicial discretion, substituting the intended aim of incarcerating as few individuals pre-trial as possible for an arbitrariness that runs counter to a defendant's due process rights. For this reason, subsection (A)(4) should be excised from the proposed rule's language.

- Proposed Pa.R.Crim.P. 520.3: Bail Determination After Finding of Guilt

The Commission supports proposed Pa.R.Crim.P. 520.3, while suggesting a brief amendment to section (D). Section (D) provides that, pursuant to potential modification of a defendant's bail order after verdict or sentencing, "the decision whether to change the type of release on bail or what conditions of release to impose shall be based," among other things, on "whether the defendant is a danger to any other person . . . or to *himself or herself*" (emphasis added). For reasons consistent with the concerns shared above, we recommend that "or to himself or herself" be deleted from the proposed rule's language. As we stated, basing an individual's bail conditions on a conjectural analysis of their risk of self-harm exits the province of judicial expertise and further harms individuals who require the care of healthcare professionals and treatment options *outside of* the carceral or legal setting.

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[10] 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.

[11] 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).

- Proposed Pa.R.Crim.P. 520.5: Counsel

The Commission supports proposed Pa.R.Crim.P. 520.5, with the exception of section (A). Section (A) provides that, "A defendant *may* be represented by counsel at the initial bail determination" (emphasis added). For reasons consistent with our comments on proposed Pa.R.Crim.P. 122 above, we recommend that the Committee include language that *requires* the representation of a defendant at their initial bail hearing. Absent the presence of counsel at this crucial first step in the criminal process, a defendant's bail conditions are likely to be more onerous, if bail is granted at all, and those conditions only tend to be *more* cumbersome if the defendant is a person of color. For this reason, we strongly urge the Committee to replace the word "may" with "shall" in proposed Pa.R.Crim.P. 520.5(A).

- Proposed Pa.R.Crim.P. 520.6: Release Factors

The Commission supports the language contained in proposed Pa.R.Crim.P. 520.6, save for subsection (A)(2)(d). This particular provision states that, when determining whether a defendant is bailable and what, if any, conditions should be imposed on him, the bail authority must consider "the defendant's immediate risk of substantial physical self-harm." Although an individual's identifiable mental or physical health issues are relevant to the efficacy of certain bail conditions, they are relevant only to the extent that they militate towards pre-trial release of the defendant. As we stated above, it is difficult to conceive of an instance in which a defendant would be better off in a carceral setting known to further deteriorate one's mental state than in a community-based program tailored to his or her unique mental or physical needs. Accordingly, we recommend that proposed rule 520.6 be amended to include language which explains that an individual's risk of self-harm is to be considered *only* as a factor supportive of the defendant's pre-trial release.

In making this recommendation, we acknowledge that subsection (A)(2)(d) is only one consideration among several that the proposed rule lists for bail authorities considering bail conditions. We are also aware that the phrase "*immediate* risk of *substantial* physical self-harm" limits the factor's application (emphasis added). However, in its present form, subsection (A)(2)(d) unavoidably invites magisterial discretion in a manner likely to increase pre-trial incarceration and thus, the risk that vulnerable populations will be further subjected to conditions adverse to their health.

- Proposed Pa.R.Crim.P. 520.7: Least Restrictive Bail Determination

The Commission strongly supports proposed Pa.R.Crim.P. 520.7, which requires that the bail determination and conditions imposed must be "the least restrictive to satisfy the purpose of bail." We believe that this standard is an improvement on the current standard, which merely requires the bail authority to implement conditions of bail that are "reasonably necessary" to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail

bond.[12] It is clear to us that the "least restrictive" standard encompasses fewer permissible conditions of bail than those permitted by the "reasonably necessary" standard, both in terms of the quantity of the conditions imposed and the extent to which the conditions restrict a defendant's pre-trial liberties. To draw from a different area of law without imputing its framework into the procedural rules here, the distinction between "least restrictive" and "reasonably necessary" is somewhat analogous to the different standards contemplated by the strict scrutiny and rational basis tests used in different instances to determine a given law's constitutionality. The distinction, in other words, should be fairly clear, and the "least restrictive" standard should serve to benefit individuals who would otherwise be subjected to onerous conditions of bail, especially those who are indigent and charged with non-violent offenses

- Proposed Pa.R.Crim.P. 520.10: Determination: Release with Non-Monetary Special Conditions

The Commission suggests several amendments to proposed Pa.R.Crim.P. 520.10. As drafted, rule 520.10 states that when general conditions of bail 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, 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."

First, consistent with our reasoning above, we recommend that the phrases "substantial physical self-harm" and "the integrity of the judicial system risk" be excised from the proposed rule's language. As we set forth in our comments above, these two justifications for imposing conditions on a defendant are at odds with the constitutional basis of bail, as laid out in Article I, § 14 of the Pennsylvania Constitution and Commonwealth v. Truesdale. In addition, we acknowledge that the phrase "integrity of the judicial system" is intended to address likely instances of witness intimidation and the destruction of evidence, as the Committee stated in the Comment to proposed Pa.R.Crim.P. 520.1: Purpose of Bail. However, proposed rule 520.10's list of enumerated conditions explicitly addresses that concern, by providing in subsection (B)(11) that the bail authority may issue "a protective order . . . when a potential risk of witness or victim intimidation is present." Therefore, along with creating an amorphous standard at odds with the Pennsylvania Constitution's contemplation of the purpose of bail, the inclusion of the phrase "integrity of the judicial system" is also needlessly redundant.

The insertion of the phrase "substantial physical self-harm" creates the same issues as those raised above. We recognize that the use of the standard in this context is distinguishable from its use in the aforementioned rules, because the consideration of one's risk of self-harm here is pursuant not to the direct imposition of incarceration, but rather to a special (and potentially helpful) condition, such as receiving a medical assessment. With that said, the inclusion of this language in proposed rule 520.10 foreseeably leads to perverse consequences that directly harm a defendant's well-being

[12] Pa.R.Crim.P. 524(A) (2000).

or unique psychological needs. More directly, if accused individuals intentionally *or* unintentionally fail to satisfy their special conditions of release, the magistrate may revoke their bail and incarcerate them, thus subjecting them to the mentally and physically harmful consequences of a carceral setting that their release subject to special conditions was designed to avoid. For these reasons, the phrase "substantial physical self-harm" should be removed from the proposed rule's language.

Finally, we suggest that the proposed rule's language be amended to include an explanation of the phrase "proof is evident or presumption is great." On its own, the phrase is a term of art that is not fully understood by all lawyers or magisterial district judges, particularly those who have not obtained a law degree. Fortunately, the Supreme Court of Pennsylvania recently expounded on the meaning of "proof is evident or presumption great" in an opinion issued on December 22, 2021.[13] Based on language taken directly from the Court's holding in Commonwealth v. Talley, we recommend the insertion of the following clarifying language into proposed rule 520.10(A):

> In determining whether the proof is evident or the presumption is great such that the imposition of both general and special non-monetary conditions of bail is necessary to mitigate the defendant's risk of nonappearance and to ensure the safety of the community, the bail authority shall conduct "both a qualitative and quantitative assessment" of the evidence the Commonwealth presents at the bail hearing. Commonwealth v. Talley, 14 MAP 2021, 2021 WL 6062913 at *40 (Pa. Dec. 22, 2021). To successfully demonstrate the need for such conditions, the Commonwealth's burden is more stringent than probable cause but less demanding than proof beyond a reasonable doubt. Id. at 31. In short, "proof is evident or presumption great" calls for a "substantial quantity of legally competent evidence, meaning evidence that is admissible under either the evidentiary rules, or that is encompassed in the criminal rules addressing release criteria." Id. at 42.

- Proposed Pa.R.Crim.P. 520.11: Determination: Release with Monetary Conditions

The Commission recommends several changes to provisions contained in proposed Pa.R.Crim.P. 520.11, while also extending its support to others. First, we suggest that section (A) of the proposed rule be amended. In its present form, section (A) states that, "A bail authority may impose a monetary condition . . . 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." Although section (A) seems to impliedly state a presumption against the imposition of monetary conditions of bail, we recommend that the language be modified to include a more explicit statement of this presumption. Accordingly, section (A) could be amended to read:

> "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

[13] Commonwealth v. Talley, 14 MAP 2021, 2021 WL 6062913 at *40 (Pa. Dec. 22, 2021).

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."

In suggesting this amendment, we recognize that the difference between the two sets of proposed rules is relative minor. However, spelling out a presumption against the use of cash bail in a more overt fashion is important because magistrates are not required to have received a law degree and therefore stand to benefit from a more express statement of the law. In addition, consistent with the changes recommended for proposed Pa.R.Crim.P. 520.10 above, we suggest that language be added to section (A) that clarifies the meaning of "proof is evident and the presumption is great."

We also propose an amendment to section (D) of proposed Pa.R.Crim.P. 520.11, which states that, "The amount of security required for the monetary condition . . . shall be *reasonably attainable* by the defendant" (emphasis added). We advise that the language tying the amount of cash bail to the defendant's financial abilities be strengthened so that the proposed section reads: "The amount of security required for the monetary condition, whether the entire amount or a percentage, shall not exceed that which the defendant presently has the ability to pay." In our view, the phrase "reasonably attainable by the defendant" invites a substantial amount of magisterial discretion, and therefore allows magistrates to continue setting cash bail in an impermissibly high amount, rather than adhering closely to what a defendant *actually* and *presently* has the means to afford.

As you are likely aware, the procedures currently governing the imposition of cash bail frequently create a *de facto* pre-trial detention order for many poor, non-violent criminal defendants, who cannot afford to pay even a minimal amount of money required to secure their release. Monetary conditions of bail also disproportionately impact defendants of color, who are less likely to have the means to pay off the conditions imposed on them than their White counterparts.[14] Therefore, limiting the instances and amounts in which cash bail can be levied by tying the imposition of monetary conditions more directly to a defendant's actual and present financial assets is crucial to ensuring that our state rules carefully separate punishment from poverty.

Relatedly, in order to make a specific determination of a defendant's actual and current finances, magistrates must conduct a detailed financial evaluation of the defendant's situation. In its current state, however, proposed Pa.R.Crim.P. (D)(1) merely states, in relatively broad and generic terms, that "[a] verified financial disclosure form setting forth a defendant's income, expenses, assets, and debts shall be completed whenever the imposition of a monetary condition is deemed necessary." This language is troubling for several reasons. First, it suggests that the financial evaluation is a *post hoc* procedure, to be completed almost as an afterthought after the bail authority has *already* determined, without any kind of financial roadmap in front of him or her, that the imposition of cash bail is necessary. Completing and reviewing a financial disclosure form after the necessity of cash bail has been predetermined defeats the purpose of completing the form

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[14] Jessica Eaglin & Danyele Solomon, *Reducing Racial Disparities and Ethnic Disparities in Jails: Recommendations of Local Practice*, Brennan Center for Justice, 20 (2015), available at https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf.

entirely; accordingly, the proposed language should be amended to make clear that such a form must be completed and evaluated *prior to* the decision to impose cash bail.

The proposed language also requires amendment because in its current form, it fails to elucidate specific details that the financial disclosure form must contain in order to satisfactorily capture a snapshot of a defendant's current financial situation. As noted above, subsection (D)(1) merely requires that a financial disclosure form set forth "a defendant's income, expenses, assets, and debts[.]" This language is silent on: (1) whether the bail authority may consider *only* the resources of the defendant, as opposed to the resources of defendant *and* his or her spouse; (2) *where* the completed evaluation must be documented, such as on a standardized form and as part of the court's file; and (3) whether (and which) certain factors establish a presumption that a defendant is indigent and lacks the ability to pay any monetary condition, such as the defendant's receipt of income-based public assistance or their status as a juvenile. Each of these considerations is essential to creating a detailed accounting of a defendant's financial situation and, therefore, to avoid the imposition of onerous monetary conditions of bail that will inevitably subject the defendant to the harmful consequences of pre-trial incarceration. To assist the Committee in drafting proposed language that encompasses each of these considerations, we have attached as *Appendix A* a sample rule and financial evaluation form that our Commission has previously drafted.

We do support proposed section (I), which states that the bail authority must "indicate in writing the specific risk that the monetary bail condition is intended to mitigate." Documenting the instances in which cash bail is imposed – and the reasoning for that imposition – creates a paper trail that requires magistrates to 'show their work," so to speak, in a manner that solemnizes and hopefully reduces the monetary burdens placed on a given defendant. As a best practice, we also recommend to the Committee that the written explanation be memorialized on the docket by inputting it in either the Magisterial District Judge System ("MDJS") or the Common Pleas Case Management System ("CPCMS").

- Proposed Pa.R.Crim.P. 520.15: Condition Review and 520.16: Detention

The Commission supports 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, we also have several suggestions to strengthen them.

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, we suggest that the time within which either hearing must occur be reduced from the maximum 72 hours to 48 hours. In making this recommendation, we recognize that 72 hours represents the outer limits of when a preventive detention hearing must occur and that some hearings will occur within a shorter time frame. There is a difference, though, between *some* hearings occurring in an abbreviated period and characterizing a scenario in which a defendant must wait the full 72 hours as a significant outlier or the extraordinary case.

Furthermore, although 72 hours appears to be a relatively short amount of time at first blush, 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."[15] Unfortunately, the courts' prescience on this subject is well-documented. As one study found, "A person detained *for even a few days* may lose her job, her housing, or custody of her children."[16] 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."[17] Exposed to the consequences of pretrial detention, it is not difficult to understand why defendants risk recidivating: "if a detained defendant loses her job, acquisitive criminal activities such as larceny or robbery might become comparatively more attractive as a means of making up for lost income."[18] 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 exchange for their release from jail, even when they have not actually committed the crimes for which they are charged.[19]

In short, the consequences of even a brief period of pretrial detention can be severe. Accordingly, rather than undermining the very reasons for which condition review and detention hearings exist, the Commission suggests that the Committee reduce the time period within which a hearing must occur from 72 to 48 hours. The Commission concedes that a difference of 24 hours will not completely eradicate the consequences that pretrial detention engenders. We also recognize that shortening this period potentially places a slightly greater strain on judicial districts' resources. However, implementing a process whereby defendants can potentially avoid an extra day of incarceration better preserves their liberties and livelihoods while also reducing their chance of recidivism, which would otherwise create its own strain on court resources down the line.

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

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

[17] 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.

[18] Paul Heaton et al., *supra* note 3, at 760.

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

Lastly, consistent with the Commission's suggestions above, we recommend that proposed Pa.R.Crim.P. 520.16(A) be updated so that its inclusion of the phrase "when proof is evident and presumption is great" is accompanied by an explanation of the precise test that this otherwise nebulous standard entails.

- Proposed Pa.R.Crim.P. 520.19: Pretrial Risk Assessment Tool Parameters

The Commission supports 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 essential that any pre-trial RAT distinguish between new criminal activity and technical violations of pretrial release conditions. As our 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.[20] This is especially true because, due to the ballooning imposition of fines, restitution, and other court-related costs, probation and parole violations are often directly tied to an indigent offender's financial situation.[21] 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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[20] 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/.

[21] Id. at 4.

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 we stated in our testimony to PCS, the category of prior arrests is not necessarily representative of future violence or threats to public safety.[22] Moreover, having a prior arrest on one's record is a disproportionately more likely outcome for individuals of color and other marginalized groups.[23] 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."[24] 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.[25] 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.

- Proposed Pa.R.Crim.P. 708.1: Violation of Probation or Parole: Notice, Detainer, *Gagnon* I Hearing, Disposition, and Swift Sanction Program

The Commission supports proposed Pa.R.Crim.P. 708.1, while recommending a few amendments. First, we commend the Committee for advocating for reforms that would reduce the lodging of detainers and establish other crucial due process protections for individuals accused of violating conditions of supervision. We are pleased to support a rule that would limit the ability of probation and parole departments to presumptively and unnecessarily lodge detainers against individuals who do not present a public safety or flight risk and are accused of simple supervision violations that are often not serious in nature.

Although proposed rule 708.1 represents a positive step forward, we recommend that the Committee amend section (C), which, in its current form, permits the supervising authority to lodge a detainer when he or she believes that the alleged conduct resulting in the defendant's technical violation creates, among other things, "an ongoing risk . . . to the defendant's safety[.]" For reasons consistent with our suggestions above, we recommend that this language be excised from the proposed rule. Allowing a probation officer to consider "the defendant's safety" when making a detention decision could lead to the harmful incarceration of individuals who are affected by mental illnesses and accordingly, require treatment rather than commitment to the local jail.

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[22] Id.

[23] Id.

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

[25] Id. at 760.61.

In addition, for reasons consistent with our comments on proposed rules 520.15 and 520.16 above, we recommend the amendment of section (D) of this proposed rule, which would require that a preliminary, *Gagnon* I hearing be held within 14 days of the defendant's arrest. Although we support the Committee's endeavor to create a time limit within which this constitutionally required hearing must occur, we believe that 14 days represents too lengthy of a time frame. As we stated above, even brief stints of incarceration can irreparably harm an individual's health, family, employment status, residential stability, and case disposition. Accordingly, we recommend that the Committee amend section (D) to provide for a *Gagnon* I hearing within either 48 or 72 hours of the defendant's detention.

- Proposed Pa.R.Crim.P. 1003: Procedure in Non-Summary Municipal Court Cases

The Commission supports the implementation of proposed Pa.R.Crim.P. 1003 as it is drafted. The proposed changes to the rule would make Philadelphia's summons practices consistent with the common-sense practices utilized by the rest of the Commonwealth. Specifically, subsection (C)(1) of the proposed rule would direct law enforcement in Philadelphia to "issue a summons and not a warrant of arrest" for individuals charged with most misdemeanor offenses. This is an important improvement over current procedures, which enable law enforcement in Philadelphia to arrest and facilitate the incarceration of countless individuals charged with very low-level offenses. This incarceration is costly to the individuals upon whom the severe consequences of incarceration falls, as well as to taxpayers throughout Pennsylvania, who foot the expensive bill that this needless incarceration causes.

In closing, we would like to thank the Committee for the meaningful opportunity to provide comments on its proposed changes to the Pennsylvania Rules of Criminal Procedure. If you have any questions or concerns regarding our input, please do not hesitate to contact me by phone, at (412) 697-1311 or (412) 298-9148, or by email, at lisette.mccormick@pacourts.us. We look forward to continuing to work with you to draft and implement state rules that advance the equitable administration of justice in our Commonwealth.

Sincerely,

Lisette McCormick, Esq.
Executive Director

cc: Justices of the Supreme Court of Pennsylvania
Geoff Moulton, Pennsylvania State Court Administrator
Teresa Sachs, General Counsel to the Supreme Court of Pennsylvania
Criminal Justice Committee Members
Interbranch Commission Members