The Pennsylvania Interbranch Commission
for Gender, Racial, and Ethnic Fairness

601 Commonwealth Ave, Suite 6200
P.O. Box 62545
Harrisburg, PA 17106-2545
717.231.3300, ext. 4138
pa-interbranchcommission.com

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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 Republished 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 in response to the request from the Supreme Court Criminal Procedural Rules Committee for stakeholder input on the republished rules governing bail proceedings, violations of probation and parole, and related issues. Thank you for this opportunity to comment on the proposed rules, which demonstrate both an attentiveness to the concerns raised during the first comment period and a commitment to detaining the least number of people possible during pretrial processes.

The Commission was established by the three branches of Pennsylvania government to implement the recommendations contained in 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 focused on 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.

In preparing these comments, the Commission decided not to re-address the rules in the Committee's proposal which we had already supported, and which have been preserved in the republished proposal. Instead, the comments we are submitting today are those offering substantive contributions to the proposed rules that were not amended between the first and second proposals or which were otherwise included for the first time in this version of the Committee's proposal.

- Proposal-Wide Revisions

The Commission supports the Committee's proposal-wide removal of any reference to either protecting the defendant from self-harm or assuring the integrity of the judicial system as justifiable purposes of bail. As the Committee notes in its Republication Report, these nebulous justifications neither comport with Article I, § 14 of the Pennsylvania Constitution nor with the Supreme Court of Pennsylvania's recent holding in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021). Rather, as we noted in our last round of comments, these provisions substantially expand the function of bail in a way that creates tension with its limited, fundamental purpose, which is "to secure the presence of the accused at trial."[1]

Removing reference to protecting the defendant from self-harm will limit the ability of magistrates to detain individuals due to their mental or physical disabilities. By extension, the Committee increases the instances in which individuals are released pre-trial, honoring 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.[2] The Committee also permits individuals suffering from crises or addictions the opportunity to seek diagnoses and treatment for same outside of jail, rather than subjecting them to harmful consequences of incarceration that could worsen their condition.[3]

An individual's due process rights similarly stand to benefit from the Committee's decision to excise any mention of reasonably assuring "the integrity of the judicial system" as a warranted purpose of bail. Like the self-harm provision discussed above, this language would give magistrates the ability to detain individuals pre-trial for any reason that does not fit neatly into the other, deliberately more specific reasons for which bail may be prescribed. By removing this standard, the Committee reduces the possibility of judicial activism, preserving the intended aim of incarcerating as few individuals pre-trial as possible.

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

The Commission endorses the rule's language setting forth the procedures that must occur when counsel is appointed for a defendant; however, consistent with our previous comments, we suggest that the Committee broaden section (A) to guarantee the appointment of counsel for qualified defendants prior to their preliminary *arraignment,* rather than their preliminary hearing. Ensuring the provision of counsel for indigent or otherwise qualified defendants at the preliminary arraignment stage is crucial to detaining the least number of individuals possible. This is the primary goal of the pretrial process as noted by the Committee' Republican Report. 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

[1] *Commonwealth v. Truesdale*, 296 A.2d 829, 834 (Pa. 1972).
[2] *Id.*
[3] 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.

routine and inconsequential component of the criminal justice system. A public defender or private criminal defense attorney is more familiar with and better able to advocate for a defendant's positive attributes and mitigating characteristics, which the layperson defendant might be unequipped or hesitant to raise.

Data collected in Allegheny County supports our position. 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.[4] 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.[5] 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.[6] 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.[7]

In offering this amendment a second time, the Commission acknowledges that the Committee may have elected to retain its initial proposed language in recognition of the fact 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.[8] In sum, the Commission's proposed amendment will serve to decrease the likelihood that defendants are incarcerated pretrial and the probability that those defendants will recidivate.

This consideration of downstream consequences is one to which the Committee appears privy, given its proposed language in the Comment to Pa.R.Crim.P. 122. In paragraph six of the proposed Comment, the Committee acknowledges that although some districts may have trouble with appointing counsel in time for a defendant's preliminary *hearing*, it is nevertheless "believed that this [difficulty] is . . . offset by the prevention of many post-conviction proceedings that would otherwise be brought based on the denial of the right to counsel." The same logic is applicable at one step prior

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[4] 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.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 7.
[8] 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/.

in the criminal legal system, the preliminary arraignment – and so too are the acknowledged benefits that the Committee documents in its proposed Comment.

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

We support 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 previous round of comments and with those provided directly above, we recommend that the Committee include language that *requires* a defendant to be represented by counsel at their initial bail hearing. Absent the presence of counsel at this crucial first step in the criminal legal 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 a few provisions, including subdivision (a)(3)(i). This provision would require the bail authority to consider "relevant criminal history" in determining whether a defendant is bailable and what, if any, conditions to impose upon that individual. "Relevant criminal history" improperly encompasses an individual's prior arrests, which, as the Committee notes in its Republication Report, often reflect disparities in how communities are policed rather than actual differences in criminal involvement.

As we stated in our last round of comments, prior arrests are not talismanic indicators of an individual's propensity for future violence and thus should not be reviewable by the bail authority in the analysis of whether a defendant is bailable.[9] Moreover, having a prior arrest on one's record is a disproportionately more likely outcome for individuals of color and other marginalized groups.[10] 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."[11] The arrest rate for black individuals has hovered around 1.7 times the arrest rate for white individuals 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.[12] 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. So long as the Committee and judicial districts across the Commonwealth seek to incentivize bail determinations that are racially and ethnically

[9] 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, 4 (2018), available at https://pa-interbranchcommission.com/testimony-before-the-pa-commission-on-sentencing-on-its-proposed-risk-assessment-instrument/.
[10] *Id.*
[11] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 731 (2018).
[12] *Id.* At 760-61.

equitable, any consideration of prior arrests as a legitimate factor for release should be excluded by the proposed Rule's language.

In suggesting this amendment, the Commission acknowledges that the inclusion of "relevant criminal history" permits, but does not *require*, bail authorities to consider prior arrests when deciding whether a defendant is bailable and which conditions of bail to impose. It may well be the case that bail authorities in some judicial districts neglect, intentionally or unintentionally, to review individuals' arrest history. However, such discretion avoidably invites arbitrary outcomes that render a defendant's ability to be deemed bailable susceptible to the individual preferences of the bail authority to which they have been assigned, rather than to the standardized, universally applicable release factors themselves. The arbitrariness created by this discretion would exacerbate, rather than remedy, the racial disparities outlined above.

We also suggest removing or otherwise amending the phrase "final civil protection orders against the defendant" in subdivision (a)(3)(i), which addresses a defendant's "prior *criminal* history" (emphasis added). The issuance of such protection orders is civil in nature and should not be deemed equivalent to a criminal proceeding or determination, given the different standards of proof that operate in each context. In making this recommendation, we acknowledge the Committee's reasoning contained in its Republication Report, which asserts that such orders could be relevant in domestic violence cases. However, consideration of a final protection order is arguably only relevant when the *same* parties implicated in that order are also involved in the criminal matter. For this reason, we suggest that this language be removed or, at minimum, amended to specify the limited instance described above in which consideration of a final civil protection order is relevant to a bail authority's determination of whether a defendant is bailable.

Next, the Commission recommends the amendment of subdivision (a)(3)(iv), which, as proposed, requires a bail authority to consider a defendant's "record of appearances at court proceedings or of flight to avoid prosecution or willful failure to appear at court proceedings." A defendant's absence at a previous court proceeding is not necessarily dispositive or even indicative of that individual's risk of flight. Defendants occasionally miss their scheduled proceedings for benign or unintentional reasons, including mere forgetfulness, a lack of access to transportation on which they can rely to ensure their attendance, or miscommunication with counsel.

Recognizing this, jurisdictions across the country have successfully reduced failures-to-appear by implementing court-date reminder systems that rely on reminders via live-caller, text message, and simple, readable postcards.[13] Absent the widespread institution of similar systems in our own Commonwealth, defendants should not be denied or assigned more restrictive conditions of bail based solely on the number of court proceedings for which they have been both willfully *and* unintentionally absent, since only the former may be predictive of a defendant's flight risk. We thus urge the Committee to strike from subdivision (a)(3)(iv) the phrase "of appearances at court proceedings or,"

[13] Schnacke, Jones, & Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders; Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, Court Review 48 (3) (2011).

so that it instead reads, "record of flight to avoid prosecution or willful failure to appear at court proceedings."

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

We support proposed Rule 520.7, which accessibly provides a detailed description of the bail determination process, save for one suggestion. As proposed, the Rule states that any bail conditions beyond release with general conditions may be imposed only upon a finding that they are "necessary" to satisfy the purpose of bail. We recommend that the Committee amend the Rule to state that such conditions may only attach upon a finding that they are "the least restrictive necessary and available conditions[.]" This language better matches the first sentence of the proposed Comment, which makes direct reference to "the least restrictive bail determination," as well as the language contained in "Part C: Bail Introduction," which requires the bail authority to "make a determination of the least restrictive necessary and available conditions to reasonably assure the purpose of bail, if any."

In addition to offering consistency with the text set forth in other proposed rules, our suggested amendment also comports with the language proposed by the Committee in its first Notice of Proposed Rulemaking. In our last round of comments, we applauded the Committee for requiring as part of then-proposed Rule 520.7 that the bail determination and conditions imposed be "the least restrictive to satisfy the purpose of bail." This requirement represented an improvement over 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.[14] 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. By re-incorporating this language into proposed Rule 520.7, the Committee offers both textual consistency within the Rules and assistance to individuals who would otherwise be subject 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

We endorse the inclusion in proposed Rule 520.10 of limiting language stating that any non-monetary special condition be "individualized to the defendant," which, as the proposed Comment makes clear, requires that such conditions be tailored to the specific risks posed by a defendant's release. This provision signifies to the bail authority that while general conditions may be insufficient on their own to fulfill the purpose of bail, the authority should avoid prescribing non-monetary special conditions beyond those that are specifically adapted to the defendant's unique set of circumstances.

[14] Pa.R.Crim.P. 524(a) (2000).

However, the purpose for which this qualifying language was ostensibly included is undercut by the expansive list of stringent conditions available to the bail authority in subdivision (b). The imposition of these restrictions, which approach *correctional* supervision conditions, are likely to prove too cumbersome for otherwise presumptively innocent individuals, particularly people of color and those of limited financial means. Subdivision (b)(5), for instance, would permit the bail authority to require that the defendant report on a regular basis to a law enforcement agency or pretrial services program. Although an individual who owns a vehicle or lives in a neighborhood with access to reliable public transportation may be able to satisfy this condition without issue, the same cannot be said for indigent individuals, who are disproportionately people of color. Because the inclusion of this and other provisions would predispose vulnerable individuals to violating the conditions to which they were assigned, we urge the Committee to more carefully consider the list of permissible restrictions it has included in subdivision (b).

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

Consistent with our previous comments, the Commission recommends several changes to provisions contained in proposed Pa.R.Crim.P. 520.11, while also extending our support to others. First, we suggest that subsection (a) be amended by inserting at the beginning of the subsection the following sentence: "There is a strong presumption against conditioning the defendant's release upon compliance with a monetary condition." Although subsection (a) seems to impliedly state such a presumption by permitting the attachment of monetary conditions only "when general . . . and non-monetary special conditions . . . are insufficient," we recommend that the language be modified to include a more explicit statement of this presumption. Although this distinction may seem insignificant, spelling out a presumption against the use of cash bail in a more overt fashion is important in that it provides magistrates, who are not required to have received a law degree, with a clearer articulation of the law.

We also propose an amendment to subsection (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. It allows magistrates to set cash bail at an impermissibly high amount, rather than adhering closely to what a defendant *actually* and *presently* has the means to afford.

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.[15] Therefore, limiting the instances and amounts in which cash bail can be levied by tying the imposition of monetary conditions to a defendant's actual and present financial assets is crucial to ensuring that our statewide rules carefully separate punishment from poverty.

Relatedly, 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. 520.11(d)(1) merely states, in relatively broad and generic terms, that "[a] financial disclosure form, verified by the defendant, setting forth a defendant's income, expenses, assets, and debts shall be completed whenever the imposition of a monetary condition is deemed necessary." As we stated during the prior comment period, 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 entirely; therefore, the proposed language should be amended to make clear that such a form must be completed and evaluated *before* the decision to impose cash bail.

The proposed language also requires amendment because in its current form, it fails to specify the information that the financial disclosure form must contain to satisfactorily capture a snapshot of a defendant's current financial situation. As noted above, subdivision (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 thus 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 create a detailed accounting of a defendant's financial situation and avoid the imposition of onerous monetary conditions of bail that will subject the defendant to the harmful consequences of pre-trial incarceration. To assist the Committee in crafting proposed language that encompasses each of these considerations, we have attached as *Appendix A* a sample financial evaluation form that our Commission has previously drafted.

We do support subsection (g), which prohibits reliance on the rigid strictures of a bail schedule to determine the amount of a monetary bail condition. Although we endorse this important provision, we recommend that the proposed language be slightly modified by inserting the word "present" immediately before "ability to pay," so that the second sentence reads: "The determination shall be based upon the defendant's present ability to pay." By including this amendment, the Committee ensures that if defendants are assigned monetary conditions, those conditions are limited to the

[15] Jessica Eaglin & Danyele Solomon, *Reducing Racial Disparities and Ethnic Disparities in Jails: Recommendations of Local Practice*, Brennan Center for Justice 1, 20 (2015), available at https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf.

amount defendants can *presently* pay – not the amount they used to be able to pay, or might be able to pay in the future, if their situation improves.

We also support subsections (h) and (i) as proposed. We concur with the Committee that omitting the word "sole" from subsection (h) clarifies that detention is not a proper justification, whether as the only purpose or as one among many, of assigning a defendant a secured monetary condition. We similarly approve of subsection (i), which states that the bail authority must "indicate in writing the specific risk that the monetary bail condition is intended to mitigate." As we noted in our last round of comments, 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. 520.12: Statement of Reasons

Consistent with our reasoning directly above, the Commission supports proposed Rule 520.12, which requires the provision of a recorded or written contemporaneous statement of reasons for any bail determination, excluding the two least restrictive forms of bail. Documenting one's reasoning encourages a more searching inquiry into why a particular form of bail has been assigned. Additionally, as the proposed Comment indicates, requiring such documentation assists in expediting review of and potential modifications to the bail determination, thus eliminating guesswork and reducing the expenditure of courts' valuable time and resources.

- 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. However, we also offer several suggestions to strengthen proposed Rule 520.15.

Pa.R.Crim.P. 520.15 provides 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 five days after the initial bail determination[.]" In effect, this means that the detained individual is entitled to a condition review hearing within five days – two days longer, potentially, than the period of 72 hours first proposed by the Committee in its Notice of Proposed Rulemaking in 2022.

Although such a hearing affords defendants crucial procedural protections and presents the accused with a second opportunity to be granted bail or less restrictive conditions of bail, we suggest that the time within which a condition review hearing must occur be reduced from the maximum of five days to 48 or, at most, 72 hours. In making this recommendation, we recognize that five days represents the outer limits of when a condition review 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 five days as a significant outlier or the extraordinary case.

Furthermore, although five days may appear to be a brief amount of time relative to the speed at which other criminal legal proceedings occur, 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."[16] As one study found, "[a] person detained *for even a few days* may lose her job, her housing, or custody of her children."[17] An even more recent report concurred: "even a small number of days in custody . . . [increases] the likelihood that people will be found guilty, [harms] their housing stability and employment status and, ultimately, [increases] the chances that they will be convicted on new charges in the future."[18] 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."[19] 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.[20]

Therefore, rather than undermining the very reasons for which condition review hearings exist, the Commission suggests that the Committee reduce the time within which a hearing must occur from five days to 48 or 72 hours. As the Committee itself acknowledges in the proposed Comment to Rule 520.15, "time is of the essence." And while a difference of a few days will not completely eradicate the consequences that pretrial detention engenders, it will better protect defendants' liberties and livelihoods while also reducing their chance of recidivism, thus preserving court resources down the line. Implementing this change would also sensibly align the provisions of Rule 520.15 with those contained in proposed Rule 520.16, which entitle an individual denied bail altogether to a detention hearing within either 48 or 72 hours.

- Proposed Pa.R.Crim.P. 520.19: Pretrial Risk Assessment Tool ("RAT") Parameters

The Commission generally supports proposed Pa.R.Crim.P. 520.19, save for a few suggestions. First, we recommend the inclusion of more specific language within the Rule that 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

[16] *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).
[17] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, Stan. L. Rev. 711, 713 (2017) [hereinafter Paul Heaton et al.] (emphasis added).
[18] 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.
[19] Paul Heaton et al., *supra* note 17, at 760.
[20] Digard & Swavola, *supra* note 18, at 5.

violations of probation or parole should be excluded as impermissible bases for which bail conditions may be made more onerous or denied altogether. This change can be made by inserting at the end of subdivision (b) the following language: "provided that neither prior arrests nor technical violations of probation or parole shall be included in the tool as permissible determinants of these risks."

As we stated in our previous comments, it is imperative that any pre-trial RAT distinguish between new criminal activity and technical violations of pretrial release conditions. 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.[21] 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.[22] 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 people of color) with posing a threat to public safety.

Similarly, for reasons consistent with our comments on proposed Pa.R.Crim.P. 520.6, *supra* pp. 4-5, 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. Along with failing to accurately predict a defendant's propensity for future violence or the threats they pose to public safety, the category of prior arrests disproportionately targets individuals of color and other marginalized groups. We strongly urge the Committee that any reliance on prior arrests as a RAT factor be specifically excluded by the Rule's language.

It is with these same concerns regarding equity in mind that we suggest the inclusion in the proposed Rule of language that requires not just the publication of validation reports evaluable by the public across racial and gender categories, but *also* a standalone provision requiring that, as part of its statistical validation, the tool be assessed and shown by judicial districts themselves to not exacerbate gender or racial disparities. In suggesting this amendment, we acknowledge that the Committee chose to remove from the Rule the previously proposed language requiring "racial and gender neutrality," given the mathematical impossibility of risk estimates being neutral across racial and gender lines if the base rates of the predicted outcome differ across those lines. However, rather than removing this requirement entirely, we urge the Committee to simply include language that more precisely captures the valid concerns at which the previously proposed language was directed. The potentially deleterious impact that RATs may have on equity in our criminal justice system requires not just the scrutiny of the public eye, but also the mandated review of the tool's outcomes by judicial districts, who have greater expertise and resources available to recognize and address such an impact.

Finally, we recommend a minor amendment to subdivision (h), which states that "a bail recommendation . . . shall not be the sole determinate [*sic*] for making a bail determination." We

[21] 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/.
[22] *Id.* at 4.

suggest that "determinate" be replaced by the word "determinant," as the latter is the noun form of what we believe the Committee intends to describe.

- 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 the Committee's decision to reduce the time frame within which a *Gagnon I* hearing must occur from 14 to five days. We recognize that there is an argument to be made for a time frame consistent with bail hearings (72 hours). The requirement to hold a *Gagnon* I hearing withing five days, coupled with proposed subdivision (d)'s requirement that a detainer automatically expire if such a hearing is not held within this reduced time period, balances the interests of honoring defendants' procedural rights without unduly burdening judicial districts' resources.

We do recommend the insertion of a clearer evidentiary standard into subdivision (d) to ensure that defendants are not needlessly detained pending their final revocation hearing. To that end, we encourage the Committee to insert immediately before the final sentence in subdivision (d) language mirroring the following: "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." The inclusion of this standard will underscore for the authority supervising the defendant that detaining him or her is not intended by the Rules to operate as the default outcome.

- Conclusion

Thank you for the meaningful opportunity to provide comments on the Committee's 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 (717) 998-1297, or by email, at maraleen.shields@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,

Maraleen Shields, Esq.
Executive Director

Brendan Bertig, Esq.
Staff Attorney

cc: Interbranch Commission Members
Interbranch Commission's Criminal Justice Committee Members

APPENDIX A

Ability-to-Pay Evaluation

Commonwealth of Pennsylvania
v.

Docket No.: _____

_____, Defendant

Section I: Identification and Employment

Name – Last, First, Middle	Date of Birth	Spouse Full Name (if married)	
Home Address	City	State	Zip
Telephone Number	Number of People in House/ Number Working		
Employer	Occupation / Date Hired	Supervisor Name and Telephone Number	
Employer Address	City	State	Zip

Section II: Monthly Income

Monthly Income (take-home income)	$
Dates of Last Employment if Unemployed	
Legal Spouse's Income	$
Interest/Dividends	$
Pension/Annuity	$
Social Security Benefits	$
Disability Benefits	$
Unemployment Compensation	$
Welfare/TANF/V.A. Benefits	$
Worker's Compensation	$
Other Retirement Income	$
Support from Other People (parents, children, etc.)	$
Other Income (e.g. trust fund, estate payments)	$
TOTAL MONTHLY INCOME	$

Section III: Monthly Expenses

Rent/Mortgage	$
Utilities (Gas, Electric, Water)	$
Television/Internet	$
Food (amount beyond what food stamps cover)	$
Clothing	$
Telephone	$
Healthcare	$
Other Loan Payments	$
Credit Card Payments	$
Education Tuition	$
Transportation Expenses (car payment, insurance, transit pass, etc.)	$
Payments to courts/probation/parole	$
Number of Dependents (e.g. children)	
Dependent Care (including child support)	$
Other Expenses (explain)	$
TOTAL MONTHLY EXPENSES	$

Section IV: Liquid Assets

Cash on Hand	$
Money in Bank Accounts (checking and savings)	$
Certificates of Deposit	$
Stocks, Bonds, and Mutual Funds	$

MONTHLY INCOME: $_____

MONTHLY EXPENSES: $_____

DISPOSABLE INCOME: $_____
(Income left over after expenses each month)

Signature: _____

Date: _____

125%[1] of the 2020 Federal Poverty Guidelines:
Individual: $15,950
Family of 2: $21,550
Family of 3: $27,150
Family of 4: $32,750
Family of 5: $38,350
Family of 6: $43,950
Family of 7: $49,550
Family of 8: $55,150
Family of 9: $60,750
Family of 10: $66,350

[1] Recommended by the National Task Force on Fines, Fees and Bail Practices, a joint task force of the Conference of Chief Justices and the Conference of State Court Administrators, coordinated by the National Center for State Courts. *See* National Task Force on Fines, Fees and Bail Practices, "Lawful Collection of Legal Financial Obligations: A Bench Card for Judges," http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.