

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

21 EM 2019

**THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*,
*Petitioners,***

v.

**ARRAIGNMENT COURT MAGISTRATES OF THE FIRST
JUDICIAL DISTRICT OF THE COMMONWEALTH
OF PENNSYLVANIA,
*Respondents.***

**AMICUS CURIAE BRIEF OF THE
MONTGOMERY COUNTY OFFICE OF THE PUBLIC DEFENDER
IN SUPPORT OF PETITIONERS**

**On Petition for Extraordinary Relief
Under the Court's King's Bench Jurisdiction**

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February 3, 2020

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Montgomery County Office of the Public Defender represents indigent individuals facing criminal charges at all stages of their proceedings. Our office has a substantial interest in this matter.

The law governing bail practices directly affects our clients, their families, and the communities we serve. We are a community-oriented defender organization that recognizes the inherent link between access to justice and access to healthcare, housing, education, and employment—all of which are hindered when cash bail is improperly and excessively imposed on clients. We witness first-hand the multitude of individual and community harms caused by dysfunctional bail practices that result in unnecessary and prolonged pretrial detention. In addition to the human cost of unnecessary and disproportionate over-incarceration, such practices create obstacles to the preparation of the defense, negatively affect case outcomes, and cost our office and the county taxpayer money. We thus have a direct interest in the petition for judicial intervention that seeks to curb improper and excessive bail

determinations, increase accountability, promote uniform practices amongst the counties, and fortify Pennsylvania's existing law.

INTRODUCTION

While specific approaches to cash bail practices may differ between counties, the systemic failures found in Philadelphia's current cash bail practices are ubiquitous throughout the state. Montgomery County is one of many in which the judicial decision-makers of minor courts frequently fail to consider alternatives to cash bail, do not take into account the accused's ability to pay, and impose excessive bail for the purpose of ensuring pretrial incarceration.

Exemplifying the need for counseled, evidentiary- and rule-based bail determinations that provide for swift reviewability is the case of a teenaged nursing mother who was incarcerated in Montgomery County for over a month due to her indigency.¹ Bail for the teen mother was set at \$50,000. It was her first time entering the criminal justice system—she had no prior arrest records. Before the county incarcerated her she breastfed her baby, lived with family, attended high school, and kept a

¹ The anecdote herein is provided with permission from the client but the name of the juvenile mother and related docket number is withheld to preserve her confidentiality.

low-wage job. She had no history of violence other than the incident for which she was arrested, which did involve a violent altercation with another girl. The facts surrounding the altercation were disputed and unproven. She had strong family supports who attended courtroom proceedings with her. She was an indigent minor who qualified for the legal services of the Office of the Public Defender.

The county incarcerated the new teen mother at an adult facility. The monetary conditional bail of \$50,000 was an amount that was set as “cash” or “good” bail, meaning she would not be returned to community unless she paid the full amount. The adult jail in which she was housed provided her with no accommodation for nursing, breast milk preservation, or automatic pumping machine to utilize for expressing milk so that her body would continue to produce enough to feed her baby in the future if she were released.²

² Nursing mothers also need to express milk to prevent and relieves engorgement, a painful condition that can occur when breastfeeding schedules are interrupted. When unaddressed, engorgement can lead to the common infection that is known as mastitis. For more information regarding the relevant terminology and the topic of breastfeeding while incarcerated in general see Malcolm Burnley, *Staying Connected: Moms Who Pump in Prison*, NEXT MEN (Feb. 4, 2019), <https://nextcity.org/features/view/staying-connected-moms-who-pump-in-prison> (“The medical consensus is that babies who consume breast milk are at lower risk of asthma, diabetes, and sudden infant death syndrome, while mothers are less likely to develop breast and ovarian cancers. But the practice also promotes more stable

Counsel was not present at the initial bail determination. Upon learning of the teen mother's case, the assigned Assistant Public Defender filed an emergency petition seeking a bail reduction to \$50,000 unsecured bail. By then the teen had already been incarcerated for over two weeks. At the hearing on the motion, the girl's public counsel argued to a Court of Common Pleas judge that her young client posed no flight risk and would reside with a local family member while awaiting trial. In the alternative, counsel requested that the mother be permitted to be home on house arrest.

The prosecution argued that the mother should remain on \$50,000 cash bail because of the nature of the alleged crime. Prosecution also raised a common assertion that house arrest was not an option for pretrial detention in Montgomery County. The judge denied the request for less restrictive conditions, informing defense counsel that the mother would just have to express her milk by hand (ostensibly to be discarded, as no means of preserving the milk and transferring it to the baby were available). The judge also denied defense counsel's request for a reduction in bail to \$10,000.

family units, strengthening an emotional bond between child and caretaker. That bond can be strengthened even when mom is behind bars.”).

The Office of the Public Defender immediately began to prepare a petition for review to the Superior Court. The timeline for such a petition, however, did not meet the urgent needs of the mother and her baby. The young mother was eventually released, but not because of any ruling of the court. After the Court of Common Pleas denied the request for modification her family secured Philadelphia-based counsel who approached the National Community Bail Fund- Black Mama's Bail Out on her behalf. That national organization posted the excessive bail—assistance that is rarely seen in Montgomery County and is unlikely to be available to the vast majority of individuals who are incarcerated pending trial. After more than thirty-eight days of pre-trial incarceration in an adult prison, the teenage mother reunited with her infant. Supported by her family, she continues to reside in her community and is actively pursuing her GED. Unfortunately, her journey through local bail practices was not an outlier.

ARGUMENT

A. THE PROBLEMS IDENTIFIED BY THE PARTIES AND THE SPECIAL MASTER ARE NOT ISOLATED TO PHILADELPHIA

In Montgomery County, defendants' bail determinations are before Magisterial District Judges ("MDJs") in courtrooms located throughout the county.³ Similar to the problematic Philadelphia County practices raised in this case, Montgomery County bail determinations rarely consist of informed, evidence-based analyses of individualized circumstances in accordance with the mandates of the Pennsylvania Constitution and the rules of criminal procedure.

Similar to Philadelphia, Montgomery County's MDJs routinely impose cash bail on indigent defendants without any inquiry into their ability to pay. *But c.f.* Pa.R.Crim.P. Rule 528 (stating the bail authority shall consider, inter alia, the "financial ability of the defendant" and requiring the amount to be reasonable). Similar to Philadelphia, Montgomery County's MDJs regularly impose excessive bail amounts

³ Consistent with the description set forth by Amicus PACDL in their brief, Montgomery County's thirty MDJs are elected officials who are not required to have formal legal training or licensure. *See*, Unified Judicial System of Pennsylvania, Magisterial District Judges of Montgomery County, available at <http://www.pacourts.us/courts/minor-courts/magisterial-district-judges/Default.aspx>.

for the sole purpose of ensuring pretrial incarceration, as opposed to providing assurance of future court appearances upon release. *But c.f.* Pa.R.Crim.P. Rule 524(C)(5) (“The amount of monetary condition shall not be greater than is necessary to reasonably ensure the defendant’s appearance and compliance with the conditions of the bail bond.”). Bail amounts are typically set as “cash amounts,” which means the accused is required to pay the full 100% of the bond amount prior to release from jail, as opposed to the 10% nonrefundable surety option preferred in many jurisdictions. Similar to Philadelphia, bail determinations are regularly made in cursory hearings that are not recorded, do not follow any normative evidentiary standards, and do not consider alternative conditions, such as home arrest, that could reasonably assure community safety.⁴

Unlike Philadelphia, however, representatives from the Montgomery County public defender’s office are rarely present during bail determinations. *But c.f.* Report of the Special Master, at 7, 8

⁴ Indeed, Montgomery County probation representatives have historically argued that they do not provide pretrial electronic monitoring services. *See, e.g., Commonwealth v. Fountain*, CP-46-CR-0003966-2019, Order of Nov. 1, 2019 (mandating that county probation place the accused on electronic monitoring after a hearing on the issue when county probation asserted that they could not impose pretrial electronic monitoring).

(describing presence and appointment of PD representatives at ACM hearing). Juxtaposed against defense counsel’s lack of participation is the common practice of local police to present bail recommendations to Magisterial District Judges along with the criminal complaint submitted to the District Judge. Copies of police department bail recommendations are not provided to public defense counsel. *But c.f.* Report of the Special Master at 8 (“Before the hearing...defense counsel [is] electronically provided with the Pretrial Service Division Investigation Report .”).

Unlike Philadelphia, there are no local procedures in Montgomery County offering on-call judges to rapidly consider oral bail modification requests. Nor are there any automatically scheduled bail modification hearings. *C.f.* Report of the Special Master at 9 (describing on-call judges and Early Bail Review hearings). Instead, unrepresented detainees typically stay in jail until their cases are scheduled for preliminary hearings.

Preliminary hearings in Montgomery County rarely occur within a week of the bail determination. It is common practice for Montgomery County MDJs to initially schedule preliminary hearings within the

fourteen-day window required by Pa.R.Crim.P. Rule 540, but then continue the hearings in a manner that may, or may not, be in compliance with the procedures set forth in Rule 542(G). It is thus not uncommon for Montgomery County detainees to sit for a month or more before getting the opportunity to request bail modification with the assistance of counsel at a preliminary hearing. By then, the well-documented negative consequences of any period of extended incarceration are in full force and effect.

Given the lengthy wait for preliminary hearings, detained individuals often agree to waive those hearings to expedite their case and, in many instances, gain release. When detained individuals agree to waive their preliminary hearings, many MDJs will swiftly execute orders permitting release and setting a date for future appearances, in spite of having previously set unreasonable monetary bail in the earlier instance.

B. DE-FACTO INCARCERATION IS *DE RIQUEUR*

“No condition of release, whether monetary or non-monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial.”

- Pa.R.Crim.P. 524 (comment).

In spite of the plain language of Rule 524, it is common practice for the minor courts of Montgomery County to impose monetary conditions of bail for the purpose of ensuring that a defendant remains incarcerated until trial. Even when authorities do not intend for monetary bail to result in prolonged pre-trial incarceration, its imposition has that result. The Pennsylvania Justice Reinvestment Working Group reported that “more than half of the people who are required to pay monetary bail are unable to do so—a total of almost 43,000 people.” *Reinvestment in Pennsylvania: Policy Framework, Key Findings*, at 4, CSG Justice Center (June 2017).⁵

Sadly, individual, evidence-based assessments of accused persons’ ability to pay are not routine. The regular assignment in Montgomery County of a \$5,000 flat bail amount for retail theft charges reveals such

⁵ Available at <https://csgjusticecenter.org/jr/pennsylvania/publications/justice-reinvestment-in-pennsylvania-policy-framework>. The Pennsylvania Justice Reinvestment working group was established specifically for the purpose of developing policies that increase the state’s return on correction investments and reduce prison populations while improving public safety.

absence of individualized determinations, as does the routine imposition of bail amounts exceeding one thousand dollars on public defender clients who qualify for indigent legal services.

There is no shortage of anecdotal evidence of routine pre-trial incarceration that results from bail determinations that fail to take into account the finances of the accused. An indigent minor with significant mental health needs remained incarcerated after participating in a fight in his residential youth placement because he could not pay \$50,000 cash bail. Another indigent client recently spent 64 days in jail awaiting trial on a minor charge of marijuana possession because cash bail was set at \$5,000. An impoverished elderly woman was held on \$5,000 bail after being accused of taking a bottle of wine without paying. And an indigent man with documented mental illness remained incarcerated on \$250 bail after being charged with shoplifting Oil of Olay products that he could not afford. For those with sufficient disposable income to take a vacation, purchase non-essential luxury goods, or donate to charity, a cash bail amount that is set at \$250 may seem reasonable. For the impoverished defendant who cannot afford to

buy lotion, however, that amount is an insurmountable barrier to freedom.

Minor courts need more than a reminder that the law requires them to consider a defendant's financial ability when setting monetary bail. To ensure that individuals are not incarcerated for indigency, bail-setting authorities need to be able to identify predictable and uniform factors to inform their ability-to-pay determinations. Fortunately, as argued by Petitioners, such factors are already present in other contexts of existing Pennsylvania law.

C. THERE IS INSUFFICIENT ACCOUNTABILITY

Rule 523 requires MDJs to consider “all available information ... relevant to the defendant's appearance or nonappearance at subsequent proceedings” including:

- The nature of the offense and “any mitigating or aggravating” factors;
- The accused's employment status, history, and financial condition;
- Family relationships;
- Connection to community (length of residence, past residences);
- Age, character, reputation, mental condition, addiction;
- Prior compliance or non-compliance with bail bond and conditions;
- Record of flight or attempted escape;
- Prior criminal record;

- Use of false identification;
- And “any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.”

Pa.R.Crim.P. Rule 523(A). Because bail proceedings are not recorded or even observed by most defense counsel, however, there is no record of which of these factors bail-setting authorities rely upon when making their determinations or whether those determinations are sufficiently supported by evidence.

The absence of any statewide, fixed timeline to ensure timely review of bail decisions that result in detention is also problematic. In Montgomery County, the burden of requesting such reviews for indigent clients falls on strained public defender resources.

In order to identify individuals who are incarcerated as a result of excessive monetary bail conditions or bail denials, staff from the Office of the Public Defender search through county databases to monitor for newly incarcerated persons. After interview with intake staff, those individuals are assigned to an Assistant Public Defender who must review their file in order to determine whether to file an emergency petition for bail modification, file a standard petition for bail modification that may take weeks to get scheduled, or request

modification at the preliminary hearing. Such requests for modification are frequently denied in any instance, and subsequent appellate review is not predictably entertained by the Superior Court and is time consuming. The result is a system that lacks uniformity and accountability and, unfortunately, one that lacks reliable levels of compliance with the United States and Pennsylvania Constitutions as well as the Rules of Criminal Procedure.

D. THE HARMS ARE REAL

Even short periods in jail have long-term detrimental effect. Accused persons who are detained pending their opportunity to prove their innocence in court are more likely to be convicted and to receive lengthier sentences. *See* Christopher T. Lowenkamp, Marie VanNostrant, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation, (Nov. 2013);⁶ *see also* Mary T. Phillips, *A Decade of Bail Research in New York City*, at 127, New York City Criminal Justice Agency, Inc. (2012). These effects cut disproportionately along race lines. *See*, Pennsylvania Justice Reinvestment Working Group, *Justice*

⁶ Available at https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf

Reinvestment in Pennsylvania: Policy Framework, Key Findings at 4.

“Across all offense types, black defendants are far more likely than white defendants to receive a monetary bail decision, especially when charged with a felony involving a weapon.”).

Those awaiting trial on criminal accusations include single parents with young dependents; adult caregivers of the ailing, elderly and disabled; disabled persons in need of continuity of care; primary earners; rent-payers; pet owners; bill payers; college students with exams; employees; bosses; husbands, wives, and significant others. Removed from community, detained individuals are hindered and often altogether precluded from meeting familial and communal responsibilities. As a result, all of those who depend on them suffer.

In many cases, the resulting damage is irreversible. Sometimes the damage is permanent but hard to quantify, such as the young Montgomery County student who missed their high school graduation awaiting a hearing on a small amount of marijuana possession because they could not pay \$1,000 in bail. Another example is the indigent person with a documented seizure disorder and mental health needs who was incarcerated on \$250,000 bail on charges relating to a fight

that defense maintains was initiated by others. All of that person's medical and mental health benefits were cut off as a result of the pretrial detention. Incarcerated persons miss holidays, funerals, opportunities to be present with dying loved ones, and other major life milestones. Even short periods of incarceration can trigger a downward spiral into deep poverty or cause other life-changing events such as the loss of custody over beloved children. *See generally*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford L. Rev.* 711, 720 (July 2017).

Losses are not limited to circumstances beyond prison walls. Incarceration is a traumatic event. *See* Mika'll Deveaux, *The Trauma of the Incarceration Experience*, *Harvard Civil Rights – Civil Liberties Law Review* (Dec. 2013); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, (Dec. 2001).⁷ Montgomery County saw 4 in-custody suicide deaths in 2019. *See* Montgomery County 2019 Coroner's Office Annual Report. The actual death count does not include the multiple suicide attempts that occur throughout the year. The harms of flawed bail determinations are real.

⁷ Available at <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment>

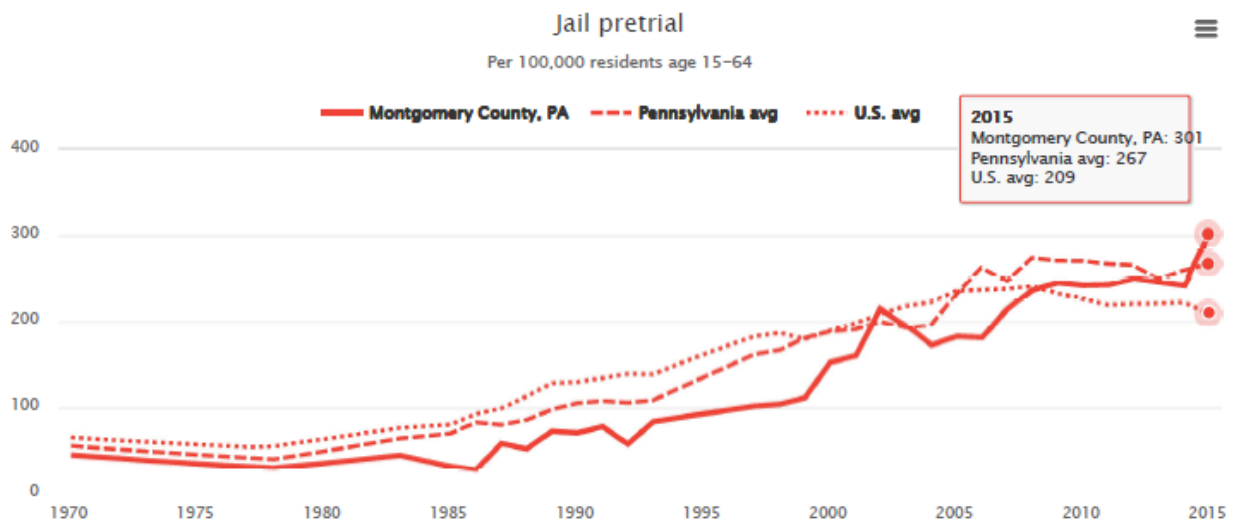
E. PRE-TRIAL INCARCERATION UNDENIABLY IMPLICATES LIBERTY INTERESTS THAT TRIGGER STRINGENT DUE PROCESS PROTECTIONS

“In cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’”

Addington v. Texas, 441 U.S. 418, at 425 (1979) (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir.1971)).

The sheer number of individuals who are incarcerated on unproven charges for substantial periods of time renders the relationship between liberty interests and bail determinations undeniable. Based on data collected by the Vera Institute of Justice,⁸ Montgomery County followed general statewide trends of increased pretrial incarceration from 1985 through 2015. Montgomery County surpassed statewide averages for pretrial detention in 2015 and significantly bucked national trends of declining rates of pretrial detention between 2010 and 2015:

⁸ The Institute compiled data from the U.S. Department of Justice Bureau of Justice Statistics as well as state and local corrections data, up to year 2015.



Vera Institute of Justice, *Incarceration Trends by County*, available at <http://trends.vera.org/rates/montgomery-county-pa>. This Court should disavow minor courts of any notion that such incarceration is permissible absent clear and convincing evidence that incarceration is the only option that can reasonably ensure the safety of persons or community. *See*, Pa. Const. art. I § 14.

Apparent from the Report of the Special Master and the briefing of Petitioners and *amici*, minor courts often fail to follow the plain meaning of the applicable Rules of Civil Procedure when determining bail eligibility and setting conditions of release. It is thus unlikely that they will unilaterally and uniformly apply a meaningful evidentiary standard to bail determinations absent guidance from this Court.

Both the plain language of the Pennsylvania Constitution and the liberty interests in stake call for the application of stringent evidentiary standards for bail determinations. The Pennsylvania Constitution calls for “proof” to be “evident.” Pa. Const. art. I, § 14. Even if that were not the case, the clear and convincing evidentiary standard is appropriate where the determination at stake involves a “significant deprivation of liberty,” “adverse social consequences ... [that have] a very significant impact on the individual,” and “the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.” *Addington v. Texas*, 441 U.S. 418, 425-427 (1979). All of those factors are present during bail determinations.

The harms of incarceration attach to all of those on whom it is imposed, whether or not their term of incarceration is before or after trial. “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

CONCLUSION

The call for clear judicial directives and uniform practices for bail determinations throughout Pennsylvania cannot be understated. The

bi-partisan Pennsylvania Justice Reinvestment Working Group expressly recommended that this Court review rules related to bail decisions, observing that, currently, “[t]here are 67 different approaches to pretrial practices in Pennsylvania’s 67 counties” *Policy Framework*, at 11. This case offers an immediate opportunity for this Court to fortify the existing rules and address the legal gaps identified by the parties and the Special Master. Meaningful implementation of the parties’ agreements, ensured through consistent monitoring, will provide a much-needed model for the rest of the state. Further clarification of the applicable rules and standards can provide accused persons throughout the state with the basic protections that they are due while they await their opportunity for a full and fair trial to address the unproven accusations lodged against them.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.Ps. 531 and 2135 that this brief does not exceed 7,000 words. Specifically, relying on a computer-generated word count that includes all captions, tables, certifications, and signature blocks, the total word count is 4042 words.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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