The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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February 2, 2022

Honorable Mik Pappas
Magisterial District 05-2-31
5750 Baum Boulevard
Pittsburgh, PA 15206

Re: Comments on the Administration of Justice Sub-Committee's Proposed Local Rules of Bail

Dear Judge Pappas,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Interbranch Commission"), we are writing today in response to the request from the Allegheny County Bar Association's Administration of Justice Sub-Committee for stakeholder input on the second draft of the Sub-Committee's proposed Local Rules for Bail. We wish to thank you for this opportunity to comment on the proposed rules, which evidence careful thought and a commitment to ensure justice and equity more effectively in our county's criminal legal system.

As we stated in our comments previously submitted to the Sub-Committee on August 6, 2021, the Interbranch 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.

In preparing our comments, the Commission determined that we would not re-address the rules in the Sub-Committee's proposal which we had already drafted, supported, or previously suggested changes to in our first iteration of comments. Instead, the comments we are submitting today are those offering substantive contributions to the proposed rules which the Commission did not originally propose, or which were otherwise included for the first time in the Sub-Committee's second draft, as well as comments suggestive of clerical or grammatical changes.

- **Substantive Comments on Proposed Rules**

Proposed All.C.R.Crim.P. 524.1: Least Restrictive Types and Conditions of Release on Bail Available, Additional Grounds for a Preventive Detention Review Hearing

The Commission supports the Sub-Committee's proposed language in All.C.R.Crim.P. 524.1(A), which would require the bail authority to determine the condition or combination of conditions of release on bail "that are the least restrictive available." 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.[1] It is clear to us that the "least restrictive available" 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 liberty. 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 available" standard should serve to benefit individuals, especially those who are indigent and charged with non-violent offenses, who would otherwise be subjected to onerous conditions of bail.

Although the Commission supports section (A), we have a concern with the proposed language provided in Rule 524.1(B). Section (B) states that, "Any defendant who remains incarcerated after the imposition of any type . . . of conditions of release on bail, shall be provided with a preventive detention review hearing within 72 hours thereafter . . . ." While such a hearing affords defendants crucial procedural protections and presents them with a second opportunity to be granted bail, we suggest that the Sub-Committee recommend a shorter the period within which the hearing must occur, reducing it from 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."[2] Unfortunately, the courts' prescience on this subject is well-documented. As one study found, "A person detained *for even a*

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

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

few days may lose her job, her housing, or custody of her children."[3] 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."[4] 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."[5] 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 might not actually have committed the crimes for which they are charged.[6]

In short, the consequences of even a brief period of pretrial detention can be severe. Accordingly, rather than undermining the very reasons for which a preventive detention hearing exists, the Commission suggests that the Sub-Committee recommend a shorter the period within which a hearing must occur, reducing it from 72 hours 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 court 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.

Proposed All.C.R.Crim.P. 540.1: Right to Counsel at Preliminary Arraignment

The Commission supports proposed All.C.R.Crim.P. 540.1, which would guarantee defendants in Allegheny County the right to counsel at their preliminary arraignments. Having an attorney present for a defendant's first court appearance following custodial arrest is critical to ensuring the maximum preservation of the defendant's liberties. The presence of counsel signals to magisterial district judges ("MDJs") the necessary formality and gravity of the preliminary arraignment stage, which otherwise might be overlooked or underestimated 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 to raise or hesitant to bring up, especially if they are unacquainted with the often-intimidating nature of a court proceeding.

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

[4] 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.

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

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

Data from right here in Allegheny County supports these assertions. As you are likely aware, the Allegheny County Office of the Public Defender ("OPD") began a pilot project in April 2017 in which they utilized existing staff to provide legal representation for all individuals arraigned during normal business hours at Pittsburgh Municipal Court.[7] After one year of the pilot program, 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.[8] 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 were re-arrested during the pretrial stage or failed to appear.[9] 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.[10]

In sum, the Commission supports proposed rule 540.1, because it will decrease the likelihood that defendants are incarcerated pretrial and accordingly, the probability that those defendants will recidivate or suffer severe consequences to their livelihoods. The implementation of this rule is even more important because, per the Commission's understanding, the OPD is no longer staffing preliminary arraignments during its business hours.

Proposed All.C.R.Crim.P. 520.2: Denial of Bail Standards and Procedures

The Commission supports proposed All.C.R.Crim.P. 520.2, while suggesting a minor amendment. First, we agree with the Sub-Committee that the proposed Local Rule should refer to the specific standard of proof to be used when assessing whether an individual should be denied bail. The Sub-Committee's application of a "substantially more likely than not" test comports with both the Supreme Court case that it references[11] and our own analysis of the requirements outlined in 42 Pa.C.S. § 5701 and Article I, Section 14 of the Pennsylvania Constitution.

With that said, however, the Commission suggests that the Sub-Committee draft an official Comment to proposed All.C.R.Crim.P. 520.2(B)(3). Section (B)(3) provides that, "The bail authority may . . . deny bail when the Commonwealth establishes, with evidence . . . admissible under either the evidentiary rules, or that is encompassed in the criminal rules addressing release criteria, that it is substantially more likely than not that the accused . . . [p]resents a danger to any person or the community that cannot be abated by using any available bail conditions."

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[7] 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.

[8] Id.

[9] Id.

[10] Id. at 7.

[11] *See Commonwealth v. Tally*, 2021 WL 6062913 (Pa. 2021).

We believe that an inquiry into whether a defendant "presents a danger to any person or the community" requires the application of a fairly broad and nebulous standard, one that will foreseeably encourage MDJs or other bail authorities to improperly conflate the prior commission of an alleged, potentially violent crime by a defendant with the notion that he or she will inevitably commit such a crime again if not denied bail. This situation runs dangerously close to violating proposed rule 520.2's very first section, which prohibits the imposition of any type of bail "for the sole purpose of ensuring that the defendant remains incarcerated until trial."

Accordingly, we recommend the addition of an official Comment to section (B)(3) that clarifies its proposed standard for denying a defendant bail. We offer a sample Comment below, which is drawn directly from the *Talley* case from which the Sub-Committee borrowed its "substantially more likely than not" standard:

> In determining whether it is "substantially more likely than not" that a defendant "presents a danger to any person or the community that cannot be abated by using any available bail conditions," the bail authority shall conduct both a quantitative and qualitative assessment of the evidence adduced at the bail hearing. Commonwealth v. Talley, 14 MAP 2021, 2021 WL 6062913, at *20 (Pa. Dec. 22, 2021). For the bail authority to deny the accused bail pursuant to Section (B)(3), there must be 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 21. It is not enough to infer that the evidence supporting the underlying charge automatically demonstrates that the accused presents a risk of *future* dangerousness that no condition of bail can mitigate. Id. at 18. Rather, because the Commonwealth bears the burden of production and persuasion, it must articulate a specific, identifiable, and temporally proximate threat that the accused presents to another person or group of people. Id. at 16.

The Commission also supports section (D) of this proposed rule, which would afford defendants crucial procedural protections, including the rights to testify, be represented by counsel, and present and cross-examine witnesses, during their preventive detention review hearings. As the Sub-Committee states, the U.S. Supreme Court held in *U.S. v. Salerno* that the federal Bail Reform Act's procedural protections (on which this local rule's safeguards are based) satisfied the Due Process Clause of the Fifth Amendment.[12] Furthermore, as we noted above, the preventive detention review hearing represents a critical second chance for individuals to demonstrate that they should be eligible for some form or combination of bail conditions. Codifying procedures that give defendants a fair shot at securing bail and, thus, potentially avoiding the harmful consequences of pretrial detention is an important update to our local criminal rules.

[12] 481 U.S. 739, 755 (1987).

Proposed All.C.R.Crim.P. 528.2: Monetary Condition of Release on Bail

The Commission supports proposed All.C.R.Crim.P. 528.2, while suggesting a minor amendment. First, we applaud section (B), which implies a presumption against cash bail that can only be overcome by a bail authority finding that a monetary condition is "the least restrictive condition" available and that the defendant has the ability to pay that monetary condition. As you know, the use of cash bail often creates a *de facto* pre-trial detention order for many poor, non-violent criminal defendants, who cannot afford to pay even a small 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.[13] Limiting the instances in which cash bail can be levied, along with requiring the bail authority to evaluate a defendant's financial ability to pay, ensures that our local rules are carefully separating punishment from poverty.

The Commission also supports the proposed rule's requirement in section (E) that the bail authority explain their rationale for *any* monetary condition of bail that is imposed, in contrast with the present requirement that such reasoning be provided only if bail is *refused*.[14] Documenting all instances in which cash bail is imposed creates a paper trail that requires MDJs to "show their work," so to speak, in a way that solemnizes – and hopefully reduces – the monetary burdens placed on a given defendant.

With these supportive comments in mind, the Commission offers a small revision to proposed All.C.R.Crim.P. 528.2. Although section (B) of the rule impliedly states a presumption against the imposition of monetary conditions, we recommend that the language be modified to include a more explicit statement of this presumption. In the suggested rules that we drafted in collaboration with the ACLU-PA (and which the Sub-Committee references in its Comments), we used the following language: "There is a strong presumption against conditioning the defendant's release upon compliance with a monetary condition . . . ." Although the difference between the two sets of proposed rules is relatively minor, spelling out a presumption against cash bail in a more overt fashion is arguably important because MDJs are not required to have received a law degree and could therefore benefit from a more express statement of the law.

Proposed All.C.R.Crim.P. 536.1: Procedure for Requesting Issuance of a Bench Warrant for Violation of Conditions of Bail Bond

The Commission supports All.C.R.Crim.P. 536.1, which would clarify local procedures for requesting the issuance of a bench warrant when an individual has allegedly violated the conditions of their bail bond. This clarity is necessary because, as the Sub-Committee's comments state,

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

[14] Pa.R.Crim.P. 520(A) (2006).

existing rules only authorize the issuance of a bench warrant without setting forth *how* such a warrant can be issued. This lack of clarity frustrates the efficient administration of justice and also leaves domestic violence victims/survivors, who are unsure of how to report violations of "no contact" conditions of bail bond, without recourse. By elucidating clear procedures and providing a specific address to which requests for the issuance of a bench warrant may be submitted, proposed All.C.R.Crim.P. 536.1 remedies these existing problems.

- **Suggested Grammatical & Clerical Changes to Proposed Rules**

The following comments propose minor changes to ensure that the finalized version of the rules is grammatically and stylistically sound:

I. On page three of the Proposed Rules, **replace "their" with "its" in All.C.R.Crim.P. 523.2(A)(1)**, which states that the bail authority may designate a court approved Third-Party Surety Organization as a condition of bail, where "the bail authority, within **their** discretion, imposes percentage monetary bail . . ." (emphasis added).

II. On page 12 of the Proposed Rules, **delete "in" from the second paragraph of the Comments to All.C.R.Crim.P. 520.2** which states that, "Section A of this proposed Local Rule has been adopted **in by** Venango County, and it restates current Pennsylvania law" (emphasis added).

III. On page 14 of the Proposed Rules, All.R.Crim.P. 528.2(A)(2)(a) states that, "Notwithstanding the foregoing, if the bail authority determines that the defendant . . . does not have the ability to pay . . . the bail authority may impose a percentage cash bail amount that a Third Party Surety Organization agrees to pay on behalf of the defendant pursuant to **All.R.Crim.P. 532.2"** (emphasis added). However, because Rule 532.2 does not currently exist in the Allegheny County Rules of Criminal Procedure, and because the Sub-Committee's proposal would create a Rule 523.2 that addresses the designation of Third-Party Surety Organizations as a condition of bail, the Commission is assuming that Rule 528.2(A)(2)(a) intended to refer to Rule 523.2 and that, accordingly, "532.2" is a typo.

IV. On page 17 of the Proposed Rules, **add "of" before "a bench" to the Comment to All.C.R.Crim.P. 536.1** which states that, "the rules are silent or unclear regarding the procedure for requesting the issuance **a bench warrant"** (emphasis added).

V. On page nine of the Proposed Rules, **substitute "forth" for "for" in All.C.R.Crim.P. 524.1(B)** which states that, "Any defendant who remains incarcerated after the imposition of any . . . conditions of release on bail, shall be provided with a preventive detention review hearing within 72 hours thereafter, consistent with the standards set **for** in All.C.R.Crim.Pa. 520.2(C)" (emphasis added). In addition, we recommend that the Sub-Committee amend the language in proposed rule 524.1(B) to reference both All.C.R.Crim.P. 520.2(C) **and** (D), because while section (C) references a defendant's right to a preventive detention review hearing, it is section (D) that actually lays out the

standards and procedures for that hearing. Because proposed rule 524.1(B) purports to incorporate those standards, we suggest that section (D) be referenced in Rule 524.1(B).

VI. On page six of the Proposed Rules, All.C.R.Crim.P. 115.1 states that, "All preliminary arraignments and **bail hearings** shall proceed in open court and shall be transcribed verbatim, audio recorded, **or** both" (emphasis added). However, on page 15 of the Proposed Rules, All.C.R.Crim.P. 528.2(E)(1) states that, "If the bail authority imposes a monetary condition of release on bail," the bail authority must "explain in writing **and** on the audio record, the reasons for imposing the monetary condition . . . ." (emphasis added). Because proposed rule 528.2 contemplates bail hearings concerning the imposition of cash bail and is therefore within All.C.R.Crim.P. 115.1's sweep, we recommend that rule 528.2(E)(1) be brought into conformity with rule 115.1's proposed language. In other words, for the sake of consistency, All.C.R.Crim.P. 528.2(E)(1) should state that the bail authority must explain **"in writing, on the audio record, or both"** his or her rationale for imposing cash bail.

- **Conclusion**

In closing, we would like to thank the Sub-Committee for the meaningful opportunity to provide comments on its proposed local rules of bail. 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 and other stakeholders to draft and implement local rules that advance the equitable administration of justice in Allegheny County.

Sincerely,

Lisette McCormick

Lisette McCormick, Esq.
Executive Director

cc: Criminal Justice Committee Members
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