Docket No. 20-1632

==========

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

==========

PHILADELPHIA BAIL FUND,
Plaintiff-Appellee,

v.

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE, ROBERT STACK; and PRESIDENT JUDGE PATRICK DUGAN,
Defendant-Appellants,

SHERIFF ROCHELLE BILAL,
Defendant.

==========

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania (No. 19-cv-3110-HB)

==========

BRIEF ON BEHALF OF THE DEFENDER ASSOCIATION OF PHILADELPHIA AND PHILADELPHIA CHAPTER OF THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE FOR AFFIRMANCE

==========

AARON J. MARCUS
Assistant Defender,
Chief, Appeals Division
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 Sansom St.
Philadelphia, PA 19102
267-765-6760

Attorney for the *Amici Curiae*

June 5, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER AUTHORITIES

I. CORPORATE DISCLOSURE STATEMENT

Under Federal Rules of Appellate Procedure 26.1 & 29(a)(4)(A), *Amicus Curiae* Defender Association of Philadelphia is a not-for profit corporation and *Amicus Curiae* Philadelphia Chapter of the Pennsylvania Association of Criminal Defense Attorneys is a professional association. Neither organization has a parent corporation. There is no publicly held corporation that owns 10% or more of either of the *Amicus* entities.

II. INTEREST OF THE *AMICI CURIAE*

The Defender Association of Philadelphia ("Defender Association") and the Philadelphia Chapter of the Pennsylvania Association of Criminal Defense Lawyers ("PACDL") jointly submit the instant brief as *Amici Curiae*.

The Defender Association is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County, Pennsylvania at trial, at probation and parole revocation proceedings and on appeal. The Defender Association provides high quality client-centered legal representation, courtroom advocacy, and a connection to social services. Its practice strives to protect the state and federal Constitutions, ensure a fair and equitable justice system, and to improve the lives of vulnerable populations. The Defender Association represents almost every person arrested in Philadelphia at preliminary arraignments in the Philadelphia Municipal Court and staffs the proceedings twenty-four hours a day, seven days a week.

Amici have no stake or direct interest in the merits of the instant action with respect to the parties. *Amici* also have little interest in ensuring the right of the press or the public to access or record proceedings. Rather, *Amici*'s interest is protecting the rights of their current and future clients to fair and open proceedings before the Philadelphia Municipal Court and ensuring that Philadelphia Arraignment Court Magistrates follow the Pennsylvania Rules of Criminal Procedure and the

Pennsylvania and Federal Constitutions. In that light, *Amici* contend that ACMs regularly and consistently fail to follow Pennsylvania's Rules of Criminal Procedure and state and federal law. These failures flow directly from the lack of any oversight, clarity, or accountability for their decisions.

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. PACDL has a regional chapter located in the city of Philadelphia ("Chapter").

As *Amicus Curiae*, the Chapter presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants in the city of Philadelphia. Chapter membership currently includes Philadelphia private criminal defense practitioners and public defenders.

The Chapter has an interest in the fairness and workings of the criminal justice system in Philadelphia and has, through its members, previously participated in PACDL amicus briefs in other cases before state and federal courts. PACDL's mission is to ensure the fair administration of justice and to advocate for the rights

of persons charged with, and those convicted of and imprisoned for, crimes. The Chapter's members have a direct interest in the outcome of this appeal because of their concerns for ensuring that the rights of all defendants at each phase of the criminal proceedings in Philadelphia.

Amici have received the consent of both parties to this matter to file this instant brief as *Amicus Curiae*, relieving the requirement of seeking leave of court. F.R.A.P. 29(a)(2).

III. STATEMENT OF QUESTION PRESENTED

The question as abridged for clarity is:

Did the District Court err in concluding that Appellee the Philadelphia Bail Fund has a First Amendment right to make its own audio recordings of preliminary arraignments.

Suggested Answer: *No*.

IV. ARGUMENT

PRIVACY INTERESTS ARE NOT HARMED BY MAKING PRELIMINARY ARRAIGNMENTS OPEN TO RECORDING BY THE COURT OR THE PUBLIC.

Appellants remind us that courts have an "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity'" to protect a defendant rights and reputational interests. Brief for Appellant at 41 (quoting Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378 (1979)). This duty, however, should not be employed at the defendant's expense or in a categorical fashion, which is the precise effect created by the current unnecessary and sweeping opacity in Philadelphia's preliminary arraignment court. The First Judicial District's lack of a transcribable and publicly available record of preliminary arraignment proceedings, and the refusal to permit the public to record, does not protect a defendant's privacy interests, but rather serves to shield Arraignment Court Magistrates (ACMs) from accountability for illegal and unconstitutional actions that harm defendants' interests. Appellants' argument to the contrary does not survive scrutiny for two reasons: 1) any prejudicial disclosures are a result of the Appellants' own making as their failure to follow the Pennsylvania Rules of Criminal Procedure prevent the employment of more appropriate safeguards such as access to and confidential

communication with counsel; and (2) the public disclosure of information which occurs during a preliminary arraignment is no different than that which occurs at a preliminary hearing, which is recorded.

A. Preliminary Arraignments in Practice And The Lack Of Transparency.

It will be helpful to begin with a practical primer on Philadelphia arraignment court and the problems counsel and defendants experience. While the stipulations of the parties regarding arraignment procedure appear to depict a streamlined and well-functioning system, see Stipulation (12/11/2019), the reality is far from rosy.[1]

The Pennsylvania Supreme Court has promulgated detailed rules regarding bail practice and procedure. When employed fairly and correctly, the Rules promote a fairly efficient and constitutionally sound bail process. But the lack of transparency in B08, Philadelphia's preliminary arraignment courtroom, has often resulted in ACMs ignoring these Rules. They regularly impose unaffordable bails without regard to a defendant's poverty or ability to pay, and the effects disproportionately harm minority groups.[2] To understand how the system hit this current point, and how

[1] The problems were sufficient for the Pennsylvania Supreme Court to grant King's Bench authority over a lawsuit challenging the current practices by the American Civil Liberties Union. See Philadelphia Community Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial District, 21 EM 2019. The Defender Association is a participant in this lawsuit and the lawsuit remains pending.

[2] See Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 4, 511 (2018) ("*Distortion of Justice*") (illustrating that Black

counsel and defendants experience the process, requires understanding a few key additional facts about the process beyond those presented by the Parties.

First, even the oversight structure of arraignment court practice is flawed. ACMs operate largely in isolation, and have escaped direct accountability. This is in part a structural flaw. Currently, ACM oversight power is diffuse and unclear as a legal conflict exists between which judicial body is given supervisory authority; the Administrative Governing Board of the First Judicial District, 42 Pa.C.S. § 1123(a)(5), or the President Judge of the Municipal Court, Order, 460 JAD 2016, (Pa., Jan. 27, 2016).[3]

Second, there is a significant gap between what information Pre-Trial Service ("PTS") Reports are deigned to provide versus what information is acquired by PTS staff. After a person is arrested and fingerprinted, and charges are approved by the

Philadelphians are 40% more likely to be detained on unaffordable bails than non-Black defendants, and that many detainees held on a cash bail would be released if bail were lowered to an amount within their economic reach); Paul Heaton, *Improving Pretrial Outcomes Without Actuarial Risk Assessment, Quattrone Center*, Working Draft on File with Author (2020) ("Heaton, *Improving Pretrial Outcomes*") (summary available at https://bit.ly/38LnTmS) (demonstrating that although 58% of Philadelphia arrestees are Black 66% of the detainees are Black); see also, e.g., Philadelphia District Attorney's Office, *Public Data Dashboard: Bail Report (Firearms Offenses)*, https://data.philadao.com/Bail_Report.html (indicating that roughly 55% of people arrested for firearms offenses have bail set above $25,000 with the plurality, between 30% and 40% have bail set above $100,000 despite the overwhelming majority of defendants qualifying for public defender services).

[3] See Philadelphia Community Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial District, 21 EM 2019, Report of the Special Master at 3, (Pa. Dec. 16, 2019) available at http://www.pacourts.us/assets/files/setting-6834/file-8323.pdf?cb=d59ca2. ("Special Master's Report") (discussing the conflict).

District Attorney's Office, the defendant is interviewed by PTS staff. Stipulation, at ¶ 10. PTS staff, while having the ability to ask about and record a large amount of background information, "[t]he degree of verifiable information may vary depending on the circumstances when the PTS interview is conducted." Special Master's Report at 7. In fact, it varies greatly. Many defendants exhibit an initially strong distrust towards the police and court officials, including public defenders, as they assume each participant is part of the system that subjected them to their current incarceration.[4] Other defendants may be experiencing symptoms of a mental illness or withdrawal from a drug addiction, or simply have an inability to recall specific information. Regardless of the reasons, often PTS acquires little information which deprives ACMs of a complete picture of the person or their circumstances.

Additionally, "[t]he information collected in the PTS interview, for instance, does not include financial obligations such as rent, utilities service, or loan payments that might affect a defendant's ability to meet a bail obligation." Id. at 16. It also does not include questions regarding all the bail consideration criteria set forth in Pa.R.Crim.P. 523. Id. Nor are the Defender Association's representatives given

[4] See, e.g., Steven Zeidman, *Raising the Bar: Indigent Defense and the Right to A Partisan Lawyer*, 69 MERCER L. REV. 697, 713 (2018); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 74 (1986) ("[D]efendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees.") Although this distrust can be overcome, usually by counsel who spend enough time with the defendant to explain the process and demonstrate a commitment to the person's interests, PTS agents are not seen as allies. See Heaton, *Improving Pretrial Outcomes*, at 31) (discussing these concerns).

much if any opportunity to confidentially consult with the defendant before or during the hearing, despite the requirements of Pa.R.Crim.P 1003(D)(2) (giving defendants the right to consult with their attorney confidentially prior to and during the hearing). Rarely can counsel explain to a defendant what is about to happen at the arraignment, or collect additional bail related information that may be helpful in determining an appropriate bail. Importantly, counsel also lacks an opportunity to assuage any initial distrust that creates obstacles to the defendant's willingness to disclose bail related information.

Third, after the Defender Association and District Attorney's Representatives make argument on bail, the ACMs must first determine if a defendant is bailable. Pa.R.Crim.P. 520. If bail is refused, the ACMs must "state in writing or on the record the reasons for that determination." Pa.R.Crim.P. 520. It is extremely rare that bail is refused, so reasons for any decision are rarely recorded.

Instead, ACMs avoid this obligation by imposing cash bail amounts far out of the defendant's reach. Because bail is not meant to result in detention, when a bail condition (monetary or non-monetary) is set, ACMs are not required to announce their reasons in open court or record them in writing or on the docket. Setting unattainable bails therefore has the effect of refusing bail while relieving the ACM from stating reasons for the decision. This, of course, violates the Rules. See Pa.R.Crim.P. 524 comment ("No condition of release, whether monetary or non-

monetary should ever be imposed for the sole purpose of ensuring the defendant remains incarcerated until trial."). This practice is a significant barrier to transparency and accountability. The Special Master's Report declared as a matter of good policy the "ACM should explain the basis for any ruling or decision affecting a defendant's liberty since demonstrating that a decision is the product of a reasoned and principled analysis of relevant factors is essential to maintaining public confidence and is a fundamental principle of the rule of law." Special Master's Report at 24. This suggestion, at the moment, remains just that, and no changes have been made to arraignment practice. Further, as an appeal of any bail decision is conducted *de novo*, the ACMs are never put to task to demonstrate that they know of, understand, or follow the Rules.

Empirical data suggests that ACM decisions regarding what amount of cash bail to set is disconnected from the defendant's ability to afford it, but instead based mostly on the charge alone. For example, only 23% of people charged with violent offenses are given cash bails above $25,000, while 55% of people charged with possessory firearms offenses receive bail amounts above that threshold. See Philadelphia District Attorney's Office, *Public Data Dashboard*, https://data.philadao.com/Bail_Report.html. These high bails are imposed even though more than 80% of those arrested in Philadelphia qualify for the Defender Association or court appointed counsel. See https://phillydefenders.org/ (relaying

internal data indicating *Amicus* represents roughly 70% of those arrested in Philadelphia); Heaton*, Improving Pretrial Outcomes*, at 15 Table 3 (reviewing every case appointment over three months in 2017 and finding more than 80% of arrestees were deemed indigent).

While some categories of crimes are prevalent among certain economic classes, there is no reason to assume violent offenses versus firearms offenses are committed by different economic demographic populations—in Philadelphia, both are equally likely to be poor, yet people charged with the latter crimes are more than twice as likely to be given unattainable cash bail. Without a record of stated reasons, the data is suggestive, but not conclusive in any given case.

For a majority of cases in which defendants are detained on high bails, no reasonable remedy is available to gather information and present it to a bail authority in a timely manner. While for a select group of less serious cases, expedited review is available in what is called "Early Bail Review" or "EBR", the current rules exclude the precise types of cases that are most likely to result in categorical ill-informed high bails, like those involving firearms, sexual allegations, and defendants with probation detainers among others.[5]

[5] When the defendant is made bailable by the ACM and given a cash amount, and remains incarcerated after two days, "a review hearing is automatically scheduled for the defendant and held before a judge of the Municipal Court within five business days of the preliminary arraignment." Special Master Report at 9. "EBRs are categorized as EBR I and EBR II depending on various criteria employed involving the seriousness of the charges and other factors weighing

With respect to the minority of cases eligible for EBR, the poor quality of decision making in arraignment court can be understood by comparing the decisions made there versus the decisions made at the EBR hearing.

- After EBR Tier I review, bail set by the ACM will be modified and the defendant released in 86.9% of the cases.
- After EBR Tier II review, bail set by the ACM will be modified and the defendant released with some condition or after posting reduced bail in 52.7% of the cases; the bail set by the ACM will not be modified in 35.7% of the cases; and bail set by the ACM will be increased in 1.9% of the cases.

Special Master's Report, at 10. This stark discrepancy is disturbing. Importantly, only two key features other than the hearing results separate EBR and preliminary arraignment hearings: EBR hearings are public and stenographically recorded; and counsel is given more time to speak with their clients. Both are necessary but missing in B08. Despite judges overruling nearly 75% of ACM decisions, ACMs continue to err unabated. None have ever been held to account. Shedding light on this darkness is necessary to immediately remedy the problem.

B. **Any Prejudice to Defendants at Preliminary Arraignments is a Result of the ACMs' Own Making.**

Appellants assert that because bail hearings involve discussion about the defendant's "criminal history, the nature of the current charge, drug abuse issues,

---

on the bail decision" Id. Additionally, *Amici* knows of no specific prejudice occurring because of public dissemination of information disclosed at an EBR hearing.

mental condition, a history of flight" and often the defendant's own words, non-recording or public availability of the hearing should be the default. *Amici*, of course agree that in some cases, public disclosure of this information can potentially be damaging to a prospective defense and a fair trial, or more generally to a defendant's reputation. However, it is certainly not categorical, and much of the information discussed at preliminary arraignments is already available publically, like criminal record information, see Pennsylvania Unified Judicial Portal, https://ujsportal.pacourts.us/default.aspx (allowing easy public access to criminal records).

Under the current practice in B08, as discussed above, this information is sometimes presented in open court and broader disclosure could theoretically pose harm to *Amici*'s clients. However, public disclosure of sensitive information is not a necessary feature of preliminary arraignments, but a flaw in how the process currently operates—and one that exists because of the ACMs' failures to follow the Rules of Criminal Procedure.

As stated above, Rule 1003 governs preliminary arraignments in Philadelphia. Specifically, the Rule provides that "when counsel for the defendant is present, the defendant must be permitted to communicate **fully and confidentially prior to and during** the preliminary arraignment." Pa.R.Crim.P. 1003(D)(2). Despite the Defender Association being appointed to represent the overwhelming majority of

defendants on any given arraignment list, it is extremely rare for counsel and the defendant to be able to discuss the case or the process before the hearing.

If counsel were in fact permitted to communicate with a defendant prior to the hearing, most of the information which counsel believed might be particularly damaging would be filtered in a manner designed to protect the defendant's interests. Disclosure, if at all, would be based on more thoughtful consideration of whether privacy interests and possible prejudice outweighed the benefits accrued from disclosure to the Commonwealth and the public more broadly—the same decisions made by counsel at every public hearing throughout the criminal process.

Without a rule or statute prohibiting the use or derivative use of the defendant's statements at the arraignment hearing, there should never be a situation where the defendant is compelled to speak to secure their own release, especially when counsel is present in the room. In the few cases where concerning information arises and where it could affect the case or the defendant's standing in the community, the Court's obligation would be met by providing counsel with the opportunity to speak to the defendant beforehand. Counsel could then acquire the necessary information and relay it to the court in a responsible manner. The Rules provide for this allowance, but the practice does not occur. Instead, Appellants argue that to prevent untoward disclosures, the court should accept practices that insulate ACMs from detailed public accountability.

Further, there is nothing unusual about *Amici*'s suggestion that the ACMs follow the rules. Scholars uniformly recommend and best practices require appointing counsel prior to the initial bail hearings to do just what the Appellants claim their current actions are deigned to do.[6] The American Bar Association[7] and the National Legal Aid and Defender Association also recommend that defense counsel be appointed prior to the initial bail hearing.[8] More importantly, it is required by due process[9] and other state courts have concluded that an initial appearance where pretrial liberty is at issue is a critical stage of the proceedings which requires not merely the appointment, but the presence of counsel.[10]

---

[6] See Colin Doyle et al., *Bail Reform: A Guide for State and Local Policymakers*, Criminal Justice Policy Program, Harvard Law School, 2, 20-12 (Feb. 2019), available at http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf (advocating "defense counsel should be appointed as early as possible to ensure that judges make informed release decisions"); Alena Yarmosky, *The Impact of Early Representation, An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit*, California Policy Lab (June 2018) (finding that individuals given counsel prior to a bail hearing were twice as likely to be released as those who were not given counsel, demonstrating that the information counsel learned and provided affected the imposition of bail and ultimate detention), available at https://www.capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf

[7] Criminal Justice Standards for the Defense Function, Standard 4-3.6 (American Bar Association 2015).

[8] National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation, Guidelines 2.1 and 2.3 (2006).

[9] See Rothgery v. Gillespie Cty, Tex., 54 U.S. 191, 213 (2008) ("a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."); Coleman v. Alabama, 399 U.S. 1, 10 (1970) (finding that a preliminary bail hearing is a "critical stage ... at which the accused is . . . entitled to [counsel]"); Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019) ("the Court finds that the right to counsel at a bail hearing to determine pretrial detention is also required by due process.").

[10] See Rothgery, 554 U.S. at 194 ("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a

The literature demonstrates that counsel's role serves two functions. Counsel plays a key role in advising the defendant about the process, *i.e.* what is or is not likely to occur, and counsel assists in gathering the defendant's relevant release and financial information for later presentation to the ACM at the bail hearing in a manner that best serves the defendant's interests.

What *Amici* find remarkable, is that the ACMs agree that they should follow Rule 1003(D)(2). In the joint agreement submitted to the Pennsylvania Supreme Court's Special Master, the Appellants here joined a uniform agreement with the District Attorney's Office, the ACLU, and the Defender Association in stating "[a]ll parties agree that defendants must be able to communicate fully and confidentially with counsel or counsel's representative before and during preliminary arraignments." Special Master's Report, at Appendix A, 31. If Appellants in fact agree and work to grant the Defender Association or any other appointed counsel

---

defendant is told of the formal accusation against him and restrictions are imposed on his liberty."); Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010) ("As is here relevant, arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the "critical stage" label, it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents.") (citations omitted); see also DeWolfe v. Richmond, 76 A.3d 1019 (Md. 2013) (holding that the right to counsel attaches in any proceeding that my result in the defendant's incarceration); Tucker v. State, 394 P.3d 54 (Idaho 2017) (holding that the initial appearance when bail was set in any amount which the defendant could not post was a critical stage of the proceeding that requires the presence of counsel).

access to the defendant prior to the hearing, most of the privacy and prejudice concerns expounded on at length by Appellants simply vanish.

While we recognize the chicken or the egg problem if this Court were to affirm the District Court's order and make the record public before the ACMs live up to their agreement, some detriment to our client's privacy and possibly to their rights to a fair trial could theoretically occur. This concern, however, is not sufficient to justify *Amici* standing silent. *Amici* must protect against the greater harm—the continued illegal detention of our clients, lack of ACM accountability, and other improper practices in B08. It is also absurd to capitulate to a practice that appears to be in direct defiance of the Pennsylvania Supreme Court's clear Rules. Finally, as discussed in the next section, much of the current information disclosed that raises concerns is also disclosed, often **on the record**, at every other bail hearing which occurs in Municipal Court with little detriment to our client's constitutional rights. Because the disclosure of any private information lies at the fault of ACMs, not the nature of preliminary arraignments, this Court should affirm the District Court's order.

C. **Much of the Same Information Is Often Disclosed At Other On-The-Record Municipal Court Hearings Without Jeopardizing Defendant's Rights.**

The District Court was correct that Appellants' privacy justifications are overblown due to the reality that similar disclosures regularly occur elsewhere in the process. The information Appellants' claim needs categorical court protection is already disclosed routinely in Philadelphia Criminal Justice Center courtrooms. Under Rule of Criminal Procedure 529, bail may be modified at any time prior to the verdict.[11] Early bail review hearings and modification motions made at preliminary hearings all take place before a Judge of the Municipal Court. The Municipal Court is a court of record and a stenographer is present at each of these hearings. Pa.R.Crim.P. 1012(A); Pa.R.Crim.P. 115.

Amici litigate thousands of bail modification motions yearly in the Municipal Court, at EBR and preliminary hearings. In a single case, it's not unusual to argue for a bail reduction multiple times if the preliminary hearing is continued and the defendant remains in jail on a bail that he is unable to afford. For decades, *Amici* have juggled defendants' interests in their privacy and right to a fair trial with the need to effectively seek their release. Counsel rarely, if ever, complains that they declined to present an argument in favor a bail because it might be prejudicial to the defendant. Instead, in the rare cases where privacy is an issue, counsel filters the

[11] See Pa.R.Crim.P. 529; Pa.R.Crim.P. 1011(A) (Prior to verdict, an existing bail order may be modified by a Municipal Court judge in a Municipal Court case in the same manner as a judge of the Court of Common Pleas may modify a bail order pursuant to Rule 529(C), (D), and (E).”); Phil.R.Crim.P. 529 (providing details on modification allowances). Pa.R.Crim.P. 1011(A).

information in manner that relays the important points but protects their client's privacy, or in the exceptionally rare case, asks to submit a motion under seal. *Amici* have never, and do not now, believe it is necessary to stop recording bail hearings in the Municipal Court. In fact, the records are beneficial because all parties know that there is a transcript of each party's actions from which any decision can be tested, either on review, or in the court of public opinion.

The interest the ACMs allege should be balanced against the right of public disclosure simply holds no weight. Moreover, if the ACMs were actually concerned with defendants' privacy interests, they would allow counsel to speak with defendants confidentially, rather than directly ask them questions. ACMs instead ask defendants questions directly (rather than directing their questions toward counsel), which creates a risk of eliciting incriminating responses. At preliminary hearings, these problems rarely arise because counsel is present with the defendant.

Additionally, the privacy considerations regarding public disclosure of a defendant's statement pale in comparison to the prejudice created when the statement is overheard by the District Attorney. To the extent that any defendant's statements are prejudicial, it is rarely because of public disclosure. Rather, the damage is done when a defendant states something overheard by the District Attorney's Representative, and later used to conduct investigation or even as

evidence of an admission at trial. The existence of a record or lack thereof has no real effect on the bulk injury caused by defendant disclosures.

It is ultimately disingenuous to argue, as Appellants do, that privacy considerations are greater in B08 than at these later stages because "[t]hose later proceedings do not involve the release of a defendant's words spoken in their own voice." Brief for Appellants at 48. These concerns only exist because Appellants fail to follow the rules. They cannot light a fire and claim the savior when they put it out. This Court should affirm.

V. CONCLUSION

Amici request that this Court affirm the District Court's Order granting public access in the form of privately recording or requiring the First Judicial District to provide access to transcripts of the proceedings. Either solution sheds light on the current practices in B08 that deprive defendants of their rights and result in an untold number of excessive bails and unnecessary detentions. The greater good is served by this outcome.

Respectfully Submitted

/S/

Aaron Marcus, Assistant Defender
Chief, Appellate Division
Pa. ID. No. 93929
Defender Association of Philadelphia
1441 Sansom St.
Philadelphia, Pa. 19102
267-765-6760

June 5, 2020

REQUIRED CERTIFICATIONS

A. Bar Membership. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. Type-Volume. This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 29(a)(4)(G), I certify, based on the word-counting function of my word processing system (Microsoft Word), that this brief complies with the type-volume limitations of Rule 29(a)(5) in that the brief contains fewer than 6,500 words, that is, no more than 4788 words.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. Microsoft Security Essentials, with current updates, has been run against the electronic (PDF) version of this brief before filing, and no virus was detected.

/S/

Aaron Marcus, Assistant Defender
Chief, Appellate Division
Pa. ID. No. 93929
Defender Association of Philadelphia
1441 Sansom St.
Philadelphia, Pa. 19102
267-765-6760

CERTIFICATE OF SERVICE

On June 5, 2020, I served a copy of the foregoing brief via this Court's ECF system on all counsel for Appellant and Appellees.

/S/

Aaron Marcus, Assistant Defender
Chief, Appellate Division
Pa. ID. No. 93929
Defender Association of Philadelphia
1441 Sansom St.
Philadelphia, Pa. 19102
267-765-6760