

20-1632

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Merry Reed and the Philadelphia Bail Fund

Appellees

v.

Francis Bernard, Arraignment Court Magistrate Judges, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, in their Official Capacities, and President Judge Patrick Dugan, in his Official Capacity, and the Sheriff of Philadelphia

Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, and President Judge Patrick Dugan

Appellants

**Appeal from the February 25, 2020, Order
of the United States District Court for the Eastern
District of Pennsylvania, in Civil Action No. 19-3110**

**Reply Brief of Appellants Arraignment Court Magistrate Judges
Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien,
Cateria McCabe, and Robert Stack, and Philadelphia Municipal
Court President Judge Patrick Dugan**

MICHAEL DALEY, ESQUIRE
Attorney I.D. PA 77212
MEGAN L. DAVIS, ESQUIRE
Attorney I.D. PA 321341
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
(215) 560-6326

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Summary of the Argument

The Bail Fund's reliance on *United States v. Martin* is misplaced.

That case involved the common law right of access to judicial records, did not base its holding on the First Amendment right of access to courts, and did not hold that a state court must create a transcript or otherwise allow court observers to make their own audio recordings.

Like *United States v. Antar*, which the Bail Fund also relies on, *Martin* concerns inapposite issues.

The policy arguments that the Bail Fund and its Amici make are better presented to the Supreme Court of Pennsylvania, and those issues are currently before that Court. Just because some states make different policy choices does not create a First Amendment right. As the United States Supreme Court holds in this area of law: "the states must be free to experiment."

A. The Bail Fund's reliance on cases involving the common law right of access to judicial records is misplaced.

The Bail Fund attempts to support its position by citing to *United States v. Martin*. The *Martin* court, however, addressed the common law right to access to judicial records, not the First Amendment. *United States v. Martin*, 746 F.2d 964, 967 n.3 (3d Cir. 1984)(noting that the Court's decision is based on non-constitutional grounds). Of course, that is not at issue in the case at bar: the question here is limited to the First Amendment right of access.

Moreover, the *Martin* court did not hold that a state court must create a transcript or otherwise allow court observers to make their own audio recordings. Instead, it held that the common law right of access covered transcripts that had *already been created* and given to the jury. *Id.* at 969. Thus, the transcripts were judicial records. As noted in Judicial Appellants' Principal Brief, the case at bar is not an access to judicial records case.

Finally, the tapes and transcripts at issue in *Martin* were of a preexisting conversation involving the defendants. *See id.* at 966. This is an important distinguishing factor, which this Court pointed out in

the case that *Martin* primarily relied upon. See *United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981)(noting that the apprehension concerning the effect that contemporaneous broadcasting a court proceeding might have on the proceeding's conduct is different from the broadcast of events that happened prior to court). Here, the Bail Fund desires to record court hearings, which this Court has recognized carries a potential prejudice, as highlighted in Judicial Appellants' Principal Brief.

Similarly, the Bail Fund's reliance on statements in *United States v. Antar* is of no moment: the issue there did not involve a right for court observers to make their own recordings of court proceedings or require a court to create a judicial record. 38 F.3d 1348 (3d Cir. 1994).

It is understandable that the Bail Fund would forage for dicta like those it cites from cases such as *Martin* and *Antar* that involve different issues: it does not have any case holding that the First Amendment requires a court to allow observers to make their own recordings (or requires a court to create a transcript).

B. The Bail Fund and its Amici make policy arguments better addressed to the Supreme Court of Pennsylvania, and those issues are currently before that court.

The Bail Fund and its amici make extensive policy arguments about why it should be allowed to record arraignments. Yet policy arguments do not make a constitutional right. Especially where the Supreme Court has already weighed in on this issue: “the states must be free to experiment” when it comes to the extent of electronic coverage of proceedings. *Chandler v. Florida*, 449 U.S. 560, 582 (1981). Simply because certain states have chosen a different policy – as allowed by the Supreme Court – does not create a First Amendment right. Moreover, adopting the Bail Fund’s position would run counter to the Supreme Court’s mandate that states be allowed to experiment.

What is more, the Amici briefs’ policy arguments highlight that the current right of access to preliminary arraignments, which comports with the First Amendment, does not meaningfully interfere with an individual or entity’s right to inform themselves about arraignments.¹

¹ Amici the Cato Institute, et al. and the Defender Association spend most of their respective briefs arguing about cash bail, whether the arraignment court magistrates follow the Pennsylvania Rules of Criminal Procedure, and other issues unrelated to the First

To the contrary, the briefs reveal that not only has the Bail Fund produced reports, but also so have amici the ACLU and Pennsylvanians for Modern Courts. The Defender Association Brief also cites to numerous sources of information and reports about bail and arraignments in Municipal Court.² Thus, as underscored by Amici, the Rules do not meaningfully interfere with the public and press's ability to inform themselves of the proceedings.

Finally, as Amici point out, last year the Pennsylvania Supreme Court appointed a special master to review allegations of systemic issues with how arraignments were conducted in Municipal Court.³ The special master conducted a comprehensive review and issued a report to

Amendment right of access question. Indeed, the Defender Association states that it has "little interest in ensuring the right of the press or the public to access or record proceedings." (Defender Association Amicus Brief at 2.)

² The Defender Association's Brief also recognizes the potential for prejudice caused by a defendant's own words regarding their criminal history, the nature of the current charge, a history of flight or escape, and so on. (Defender Association Amicus Brief at 13-14.)

³ The case is *Philadelphia Community Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial Dist. of Phila.*, No. 21 EM 2019.

the Supreme Court.⁴ Thus, the matter is now before the Supreme Court, which has the ultimate administrative authority over all of Pennsylvania's courts and is in the best position to make these policy decisions.

Indeed, the issue of making verbatim records of arraignments has been presented to the Supreme Court in that case: the Institute for Constitutional Advocacy, which represents the Bail Fund here, filed an amicus brief asking the Supreme Court to order that “all preliminary arraignments be recorded in a manner that enables the parties and the public to obtain an audio or written transcript of any preliminary arraignment.”⁵ Like the Bail Fund does here, it made numerous policy arguments as to why the Supreme Court should do so.

At bottom, the policy determination about how to balance the constitutionally protected right of access, a defendant’s right to a fair trial, and administration of the court system is a matter best left to the

⁴ The Report is available at <http://www.pacourts.us/assets/files/setting-6834/file-8323.pdf?cb=d59ca2> (retrieved on June 11, 2020).

⁵ See <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/01/PCBD-Amicus-Brief.pdf> (retrieved on June 11, 2020).

Pennsylvania courts. The Bail Fund has its First Amendment right to attend, observe, report, and compile documents and data. It and the public have what this Court holds is required: meaningful access to what occurs during arraignments and in arraignment court.

Conclusion

Judicial Appellants respectfully request that this Honorable Court reverse the District Court's Order granting summary judgment in the Bail Fund's favor and remand this case to the District Court for an order granting Judicial Appellants' Motion for Summary Judgment and denying the Bail Fund's summary judgment motion.

Respectfully submitted,

S/Michael Daley
MICHAEL DALEY, ESQUIRE
Attorney I.D. No. PA 77212
MEGAN L. DAVIS, ESQUIRE
Attorney I.D. No. PA 321341
Supreme Court of Pennsylvania
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6326, Fax: (215) 560-5486

Certifications

1. The undersigned counsel certifies that he is a member in good standing of the Bar of this Court.
2. The Brief contains 1259 words, not including the Title Page, Table of Contents, Table of Authorities, and Certificates. Certification is based on the word processor used to prepare the Brief.
3. The electronic brief's text is identical to the text in the paper copies filed with the Court.
4. A virus detection program has been run on the electronic brief filed in this Court and no virus has been detected. The virus protection program used is McAfee Virus Scan – Enterprise Version.

S/Michael Daley
MICHAEL DALEY, ESQUIRE

Certificate of Service

The undersigned certifies that on *June 12, 2020*, he caused the foregoing *Reply Brief of Appellants* to be served upon Appellee by CM/ECF.

S/Michael Daley
MICHAEL DALEY, ESQUIRE