

# THE COST OF BUYING FREEDOM

Strategies for Cash Bail Reform  
and Eliminating Systemic Injustice

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## ABOUT THE CONTRIBUTORS

This report was prepared by Adorah Nworah, Paige Joki, and John Farrell, students from Justice Lab, a clinic at the Sheller Center for Social Justice at Temple University Beasley School of Law. The report's analysis and findings are based on information from legal research, conversations with a range of criminal justice stakeholders within and outside Pennsylvania, and conversation with community members who have been directly affected by Pennsylvania's cash bail system.

## JUSTICE LAB at the SHELLER CENTER FOR SOCIAL JUSTICE TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW

Justice Lab is a clinic at the Sheller Center for Social Justice at Temple University Beasley School of Law. Justice Lab represents client organizations (including community groups, nonprofit organizations, and governmental agencies) in a range of systemic advocacy matters. Students develop and advance policy campaigns, design and pilot legal services and access to justice programs, draft legislation and provide legislative advocacy tools, and act as problem solvers and strategic planners. Through this social justice advocacy, Justice Lab students develop expertise in finding creative solutions to legal problems, reflect on the complex social and political aspects of legal problems, and develop strengths in interviewing, research and information gathering, policy, legislative, and strategic analysis, written and oral advocacy, collaboration, project planning and management, professional ethics, negotiation, and media advocacy skills.

The Sheller Center for Social Justice at Temple University Beasley School of Law, created in 2013 by a generous gift from Stephen and Sandy Sheller, is a hub for social justice inquiry and advocacy. The Center's faculty, staff and affiliated faculty work with law students, the Law School's other legal clinics and experiential programs, others at the University, community organizations, and external partners to seek justice for disadvantaged populations in Philadelphia and across Pennsylvania.

## REDEEMED PA

Redeemed PA is a local community organization dedicated to eliminating systemic employment discrimination practices aimed at people living with arrest and convictions. William Cobb is the director of Redeemed Pa. His charismatic leadership style and passion for advocating on behalf of the rights and dignities of people who are returning from incarceration has resulted in powerful changes to decrease discrimination and increase opportunities for Pennsylvanians. Cobb himself is a person returning from incarceration, and his steadfast commitment to ensuring that the voice of those most directly impacted guides the direction of this organization.

## EXECUTIVE SUMMARY

Cash bail conditions an accused person's freedom on his or her ability to pay a sum imposed, often arbitrarily, by the court. Despite being presumed innocent until proven guilty, people who are accused must pay for their own release. While often characterized as a way to enhance public safety and ensure prompt and regular appearances in court, cash bail does neither of these things. Instead it simply distinguishes among people by their ability to pay. In Pennsylvania, cash bail persists even though it is not required by law. It can and should end.

**PENNSYLVANIA'S BAIL PROCESS IS FLAWED.** The imposition of cash bail takes place during a hearing, usually as brief as a few minutes. Hearings are conducted without the accused and the judge in the same room, on nearly no information, yet determine whether that person will be free or faced to stay in jail. Bond agencies keep every dollar of the 10% bail amount paid to them, regardless of the resolution of the case. Philadelphia also keeps 30% of the 10% even after a finding of innocence.

**CASH BAIL COSTS TOO MUCH.** Research has definitively exposed cash bail as a financially irresponsible option that costs all community members. Tax dollars are used to build and maintain facilities where people who are presumed innocent are held, only because they are too poor to pay. Taxpayers are forced to pay the heavy cost of \$40,000 for a year of pretrial incarceration of a person who has been accused. A single day of detention costs \$134 dollars per person. When we incarcerate individuals who cannot afford bail, we pay thousands to jail someone just because they don't have a few hundred dollars.

**CASH BAIL ISN'T FAIR.** The Supreme Court of the United States has explicitly stated that a court may not impose a large sum simply to ensure an accused person remains in jail before his or her trial. Rather, the purpose of bail is to allow someone to be released prior to trial, as they are presumed to be innocent. Yet, in reality cash bail conditions ability to be released on the ability to pay. Pretrial detention thwarts the ability of an accused person to get a fair trial. Individuals are incentivized to plead out to a lesser crime under the promise of time-served, which may be the only option an accused person feels he or she may have in order to keep their family and household intact. These pleas are agreed to, not out of guilt, but out of financial necessity.

**CASH BAIL UNDERMINES SAFETY.** If a determination has been made that an individual poses a serious risk to the community, that person can be detained under Pennsylvania's preventative detention law. This law allows courts to hold individuals in jail who pose a risk to the community that could not be otherwise mitigated by the imposition of pretrial conditions. Because we have the ability to detain people for public safety reasons without involving money, the only group that benefits from the cash bail system is bail bond agencies. This industry actively promotes policies that increase their profits while doing nothing to keep the public safe. In fact, they have stated specifically that more violent, dangerous crimes are a boon to their industry because of how much they stand to gain.

**PENNSYLVANIA CAN END CASH BAIL TODAY.** Pennsylvania has the immediate opportunity to join the ranks of other forward thinking jurisdictions that are leading the nation towards a more just system of pretrial release by ending cash bail. Pennsylvania law does not require cash bail, so judges could stop imposing it today. A few key statutory changes would eliminate the option of cash bail entirely, and we can replace it with more efficient and inexpensive alternatives. Statistically validated risk assessment tools, expanded pretrial services, and new methods of preventative detention would enhance public safety and improve the integrity and legitimacy of courts.

## INTRODUCTION

Cash bail, sometimes called money bail or a secured bond, is a system of pretrial release that forces a person who has been accused but not yet found guilty of a crime to ‘temporarily’ pay a fee to be released from custody prior to additional proceedings or trial. There is a growing awareness among criminal justice stakeholders, community organizations, and the general American public of cash bail’s failure to protect society or ensure that people who are accused of a crime show up to court. Numerous studies indicate that cash bail unleashes huge human, financial, and social costs on the unwitting residents of jurisdictions that continue to use it.

Human rights organizations including the American Civil Liberties Union and Pretrial Justice Institute have dedicated their efforts to ending the system of cash bail.<sup>1</sup> The National Association of Counties and the National District Attorneys Association have also condemned this system that discriminates against the poor and threatens their civil liberties.<sup>2</sup> The Internal Association of Chiefs of Police has called for the use of alternative measures instead of money, expressing concerns over the public safety issues that cash bail inherently raises.<sup>3</sup> The American Bar Association has said money bail “should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant’s appearance in court.”<sup>4</sup> Furthermore, “the judicial officer should not impose a financial condition that results in the pre-trial detention of the defendant solely due to an inability to pay.”<sup>5</sup>

The U.S. Department of Justice, in a federal lawsuit, wrote, “(f)undamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.”<sup>6</sup> The White House Council of Economic Advisors released an issue brief that described financial bonds as

“regressive, leading to pretrial detention of the poorest rather than the most dangerous defendants.”<sup>7</sup>

These groups have differing interests and reasoning, all of which lead to the same conclusion that cash bail has no place in our criminal justice system. This insight has prompted a wave of cash bail reform across U.S. jurisdictions including the District of Columbia, New York, Kentucky, Maryland, Chicago, and New Jersey. Yet, Pennsylvania, its taxpayers, and its residents, continue to bear the yoke of an outdated and ineffective system.

In drafting this report, we read and analyzed statutes and secondary sources on Pennsylvania’s cash bail system. We spoke to criminal justice stakeholders such as pretrial services practitioners, public defenders offices, prosecutors, as well as everyday Pennsylvanians who have been directly impacted by the Commonwealth’s cash bail system.<sup>8</sup> We critically studied bail reform efforts in other U.S. jurisdictions. This report captures our findings and issues an urgent call to action for Pennsylvania, its legislators, criminal justice players, community organizations, and residents to work together to put a complete end to Pennsylvania’s harmful and wasteful cash bail system.

This report explains the current state of cash bail in Pennsylvania by examining Pennsylvania laws on cash bail and how these laws work in practice. By drawing on the real-life experiences of individuals with Pennsylvania’s cash bail system, it exposes the far-reaching human, financial, and social costs of Pennsylvania’s cash bail system. Finally, it outlines a comprehensive, common-sense pathway to ending cash bail in Pennsylvania without sacrificing the safety of the community or impeding the return of a person who is accused to court. This report provides Pennsylvanian lawmakers, pretrial service divisions, criminal justice players,

community organizations, and everyday people with a clear pathway to completely dismantling Pennsylvania's oppressive and ineffective cash bail system.

## THE LAW OF CASH BAIL IN PENNSYLVANIA

Cash bail is never required, and is one of numerous monetary and non-monetary conditions that may be imposed for pretrial release in Pennsylvania. The stated purpose of cash bail is to ensure that people who are accused of crimes attend future proceedings. However, in actuality a person's ability to pay is the only factor that determines who is released and who stays in jail in a cash bail system. In essence, this practice fails to separate people based on the risk that they will fail to return to court or will commit another crime. Rather, cash bail separates people who can pay from people who cannot.

### Process for Imposing Pretrial Conditions of Release

In Pennsylvania, pretrial conditions for release, including the amount of cash bail imposed, can vary drastically. Judges have broad discretion to impose non-monetary conditions of release or set a bail amount required for pretrial release.

If a judge decides that a person should not be detained, the magistrate judge then makes the determination about what type or types of bail will be imposed, based on distressingly little information about either the person or the crime.<sup>9</sup>

The imposition of bail takes place during a very brief hearing that usually lasts no more than a few minutes.<sup>10</sup> In Philadelphia, bail hearings often occur on video with the person who is accused and the judge in two different locations, a practice that has been shown to increase bail amounts.<sup>11</sup> In the overwhelming majority of cases, the person who is accused does not have legal representation present.<sup>12</sup> Each aspect of this hearing is significant, as it is the initial determination of whether someone can retain or must surrender their liberty.

Dennis was arrested on drug charges in Philadelphia. After a video hearing that lasted one minute, in which he was not permitted to speak, he was issued a \$250 bond amount. Even after his charges were dismissed, and despite being legally entitled to receive a portion of his bond back, and asking on numerous occasions, the bond he posted was never returned.<sup>13</sup>

During this hearing, the person who is accused is informed of the charges upon which they were arrested and is told the date of the next court appearance. Next, he or she is informed whether or not they qualify for publicly appointed counsel based on income. Last, they are informed of the bail condition, if any, being offered for their pretrial release.

This decision "is first made at the defendant's initial appearance in court. This typically occurs within a day or two of arrest. Defendants who are given nonfinancial conditions of release are released as quickly as they can be processed out of the jail—usually within hours of the hearing. Thus, the length of stay for this population should be no more than a day or two."<sup>14</sup> People who are accused should only be detained for short periods, but a faulty cash bail system keeps them in jail for weeks or longer at a time, taking resources from the state the entire time.

### Pretrial Options Other than Cash Bail

Cash bail is an unnecessary condition of pretrial release in Pennsylvania. Different release options are already available



according to statute: people who can be released prior to trial can have either monetary terms that are distinct from cash bail, non-monetary terms, or a combination of both terms imposed, if the person is deemed eligible for pre-trial release.<sup>15</sup>

In Pennsylvania, all persons who are accused in a criminal matter are required under 234 Pa. Code Rule 524(b), to sign a “written agreement” that he or she will “appear... and comply” with conditions set by the hearing judge.<sup>16</sup> This promise is required in all cases of pretrial release, regardless of the type of bond imposed.

#### PREVENTATIVE DETENTION AND NONMONETARY CONDITIONS OF RELEASE

Like many other states, Pennsylvania already has a “Preventative Detention Law,” which provides for detaining individuals in a narrow class of cases. If a person is accused of a “capital crime,” or a crime that carries a sentence of “life imprisonment”, the person is held without the possibility of bail.<sup>17</sup> Similarly, if the magistrate determines that “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and community when proof is evident or the presumption great,” no conditions of release can be offered.<sup>18</sup> Likewise, if a person is found guilty of “an offense punishable by death or life imprisonment,” bail can be revoked.<sup>19</sup> Cash bail has no place as a public safety measure, because other options such as pretrial detention are available in the cases where public safety is most at risk.

If the magistrate determines that “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and community when proof is evident or the presumption great,” no conditions of release can be offered.<sup>20</sup>

The likelihood of appearance and adherence to the conditions of their release are the primary factors that determine whether a person is released with conditions.<sup>21</sup> In making these determinations, the “bail authority shall consider all available information that is relevant,” to either release or compliance with terms of release.<sup>22</sup>

Under non-monetary terms of bail, a person may be released on his or her own recognizance (ROR), or with pretrial release conditions that are non-monetary and are reasonably calculated to ensure the accused person’s appearance and compliance with the terms of the bail bond.<sup>23</sup> Non-monetary conditions can include reporting requirements or prohibitions on traveling prior to trial.<sup>24</sup>

#### MONETARY CONDITIONS OTHER THAN CASH BAIL

Under Pennsylvania law, there are several monetary conditions of bail – other than cash bail – that can be imposed alongside or independent of non-monetary conditions.<sup>25</sup> An “unsecured bond” can be ordered, which requires a person who is accused to sign an “agreement to be liable for a fixed sum of money if he or she fails to appear as required, or fails to comply with the conditions of the bail bond.”<sup>26</sup> With an unsecured bond, a person who is accused is not required to pay any amount of bond

prior to release. Rather, a financial burden is only imposed if the person fails to appear, or otherwise violates conditions of release. Thus, someone can be financially incentivized to appear without pretrial detention or the imposition of cash bail.

A magistrate may also impose “nominal bail” which can be as low as “\$1.00” if the amount is “determined to be sufficient security for the defendant’s release,” which is determined by the bail authority.<sup>27</sup>

### Imposition of Cash Bail

The final pretrial condition allowed – but not required – under Pennsylvania law is a secured bond, also known as cash bail.<sup>28</sup> A secured bond conditions the “defendant’s release upon compliance with a monetary condition.”<sup>29</sup> Despite the many alternatives, secured bonds or cash bail is an overwhelmingly popular type of monetary bail imposed in Pennsylvania.

THERE IS CLEAR LAW THAT MONEY SHOULD NOT KEEP PEOPLE IN JAIL

In the 1951 case of *Stack v. Boyle*, the United States Supreme Court held that cash bail “set at a figure higher than the amount reasonably calculated’ to ensure the appearance of the accused,” runs afoul of the Constitution’s Excessive Bail Clause.<sup>30</sup> The Supreme Court further highlighted that the original purpose and “spirit” of cash bail is to enable people who are accused to “stay out of jail until a trial has found them guilty.”<sup>31</sup> Bail cannot simply be used to “hold persons in jail... until it is found convenient to give them a trial.”<sup>32</sup> Despite the Court’s unequivocal mandate over 60 years ago, the bail system has been used for exactly that purpose.

Bail cannot simply be used to “hold persons in jail... until it is found convenient to give them a trial.”<sup>33</sup>

-*Stack v. Boyle*

The Pennsylvania Constitution affirms that “excessive bail shall not be required.”<sup>34</sup> Under Pennsylvania statute, a secured bond “shall not be greater than is necessary to reasonably ensure a defendant’s appearance and compliance with the conditions of bail.”<sup>35</sup> Further, “no condition of release, either nonmonetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.”<sup>36</sup> If a monetary condition of pretrial release is imposed, the “financial ability of the defendant” must be considered, in all cases.<sup>37</sup>

“No condition either monetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.”

-Pa. R. Crim. Proc. 524

### EXPLOITATIVE NATURE OF BAIL FINANCING IN PENNSYLVANIA

However, in the majority of cases, a person who is accused of a criminal offense will not be able to pay the entire monetary condition, despite the Supreme Court’s explicit mandate to consider a person’s socioeconomic status.<sup>38</sup> To account for this likely prospect, Pennsylvania law authorizes the bail authority to determine “if a deposit of a sum of money not to exceed 10%” of the secured bond is “sufficient to ensure the defendant’s appearance and compliance” at

future proceedings.<sup>39</sup> If the amount is deemed to be sufficient, a person may go to a bail authority or licensed agency and put up 10% of the cost of the bond, and then be released.<sup>40</sup>

If that person fails to appear at future proceedings, the entire bail amount may be forfeited, depending on the length of absence, regardless of if the person is found not guilty or charges are ultimately withdrawn.<sup>41</sup> For example, even in cases where a person's fails to report to court for less than 24 hours and charges are withdrawn, 10% of the overall bail amount is forfeited to the courts.<sup>42</sup>

In all cases where a person uses a bail agency, a significant portion of the person's money or collateral is never returned. Even when a person on bail does return to subsequent proceedings and follows conditions of bail, 10% of the total amount for release is never returned. This amount is retained by the bail agency as the "cost" of putting up the remainder of the bail. Additionally, this fee is still assessed even if charges are dropped or the person is found not guilty.

While there are statewide statutes governing some aspects of bail and court procedures, each jurisdiction in Pennsylvania promulgates local rules governing court procedures and rules, including bail processes. The result is a patchwork of laws and procedures that differ across the state. Philadelphia local court rules are an example of this variation.

### **The Law in Philadelphia**

In Philadelphia, a person accused of a crime must pay the Court Clerk 10% of the overall sum required for release.<sup>43</sup> Upon paying this amount, the person who is accused is assessed a "fee" that is at "minimum" 30% of the overall deposit paid for release.<sup>44</sup> The remainder of the payment is returned if the person appears. In other words, a person must pay a fee in order to pay for their

freedom regardless of guilt or charge withdrawal. Thus, a person can be found innocent of a crime but be in jail for months and forced to pay the state for the privilege of having been wrongly accused.

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The assessed fee is never less than \$10 and can be as high as \$1,500.<sup>45</sup> To further complicate matters, there are no clear guidelines or public rules that outline where these funds are funneled after being extracted from accused people, the accused person's family, or their community. However, conversations with criminal justice stakeholders, including members of the District Attorney's office and defense attorneys, suggest these funds may be going to the general fund.

### **DETERMINING BAIL AMOUNTS**

Pennsylvania law establishes ten criteria to assist a decision-maker in assigning the amount of bail.<sup>46</sup> Cash bail could end today if judges decided to stop imposing it. The recent requirement that Pennsylvania judges attend Continuing Legal Education courses is an opportunity to educate judges about their power to end the cash bail system and true depth of its negative impact on Pennsylvania.

Cash bail could end today if judges decided to stop imposing it.

Pennsylvania law allows a magistrate or judge to use specific factors along with his or her discretion in determining who should be detained prior to the final resolution of a case, as well as to determine which services are best suited to each person accused.<sup>47</sup> These criteria are considered by the judge but are not otherwise statistically assessed, nor do we have any guarantee that they are actually being used. Some examples of the criteria are the “nature of the offense charged and any aggravating or mitigating factors,” “employment history” and “financial condition, “if the person previously appeared after being released with pretrial conditions in another matter,” “whether the person had attempted to flee or escape, and “prior criminal record.”<sup>48</sup> The law specifically states that these factors, including risk assessment tools, must not be the only tools utilized in reaching the bail determination.<sup>49</sup>

#### RISK ASSESSMENT TOOLS

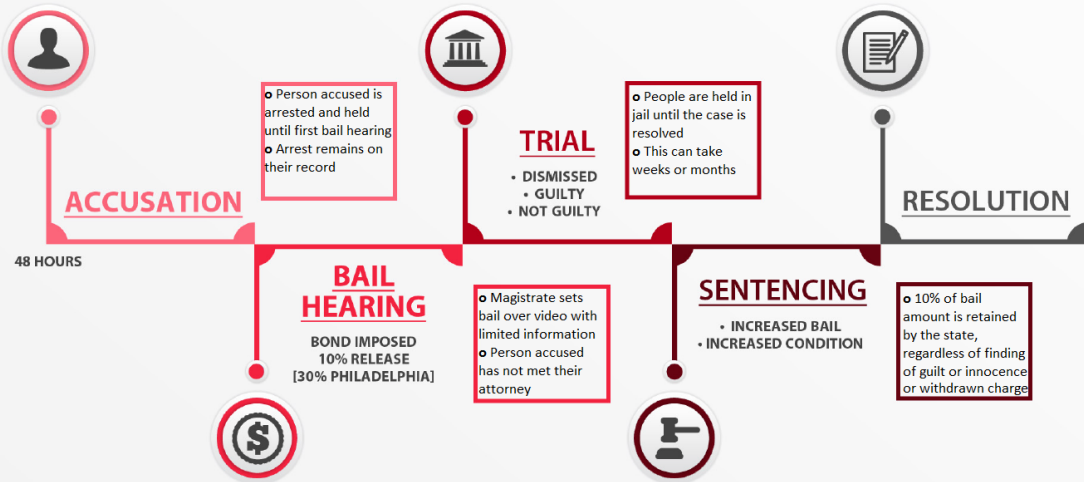
In addition to permitting broad judicial discretion in determining pretrial release, certain jurisdictions in Pennsylvania also use tools called risk assessments to help determine the likelihood that a particular person, with particular characteristics, accused of a particular crime, will show up to future proceedings or commit additional crimes. Risk assessments are statistically generated metrics that take into consideration some characteristics of the person who is accused, but relies upon the behavior of groups of similarly situated people to assign a ‘risk score’ to a person. This determination is not individualized, as bail decisions need to be if they are to

promote justice and public safety. The ‘risk score’ is factored into release decisions such as the imposition of cash bail as a condition of pretrial release.

When used properly, rigorously validated risk assessments may help effectively and scientifically predict the risk associated with an individual’s release, and preserve public safety. Validated assessments are tested after a significant period of implementation, and do not improperly rely on characteristics such as race or gender – or proxies for them – to determine the likelihood of recidivism or reappearance. These assessments have the potential to help counter implicit and explicit biases that can creep into judicial decision making, compared to when judicial discretion alone is used to assign “risk.”

Unfortunately, Pennsylvania has no requirement that risk assessments be rigorously validated prior to implementation, or tested throughout their implementation to ensure discrimination is not being passed off as science. When faulty assessments are used, men of color are disproportionately held, as the measures improperly and discriminatorily ascribe risk based on these characteristics.<sup>50</sup> Within these assessments race and gender become faulty proxies for criminality and dangerousness. As a result, risk assessments can cast entire communities of color as more prone to crime, and imminent risks to public safety overall. It is imperative to our communities and our criminal justice system that we undergo individualized review so that we do not jail pointlessly or release without recognition of potential risk.

# FROM INJUSTICE TO INCARCERATION: A TIMELINE OF THE PENNSYLVANIA CASH BAIL SYSTEM



## CASH BAIL IS FAILING PENNSYLVANIA

Nearly 6 of every 1000 Philadelphia residents is currently being held behind bars.<sup>51</sup> The cash bail system is a significant part of this problem. The drive to rampantly incarcerate using the cash bail system has not always been part of the criminal justice system. In the 1970s, there was a movement towards modifying statutes to allow decision makers to consider the safety of the community when making pretrial release decisions.<sup>52</sup> However today, judges and magistrates impose cash bail to ensure a person who is accused appears in court and ostensibly to keep the community safe, but this purpose is not being served and the public is no more safe.

The cash bail system in Pennsylvania is inherently flawed; it neither guarantees that a person will appear in court nor keeps society safe from people accused of a serious offense who are affluent enough to pay their way out of jail.<sup>53</sup> On the contrary, imposing cash bail actually increases an accused person's likelihood of failing to appear in court.<sup>54</sup> Detaining people who have been found to be "low" and "moderate-risk" for as little as two days, which is the average time it takes most people to post bail, increases failure to appear rates.<sup>55</sup> Furthermore, it has not led to a decline in pretrial re-arrest rates in the State.<sup>56</sup>

Cash bail guarantees that we will have to jail people accused of crimes, in already overflowing and expensive facilities. Pennsylvania continues this expensive system despite the availability of fast, inexpensive alternatives. Even if bail amounts were affordable, unsecured bonds still produce better public safety outcomes and better encourage appearance in court.

## Cash Bail Costs Too Much

The system of cash bail is fiscally unsustainable. It wastes funds not only for accused individuals, but for the taxpayers who have to support a failing and ineffective system.

Average bail amounts have been drastically increasing. They are 270% higher since 1990.<sup>57</sup>

### FINANCIAL COSTS TO INDIVIDUALS

Before guilt or innocence is ever determined, being accused of a crime is extremely expensive. The costs to individuals alone make the bail system more destructive and more punitive than it was ever intended to be. And it is getting worse: average bail amounts have been drastically increasing. They are up 270% since 1990.<sup>58</sup>

Even setting aside the injustice of being forced to pay for one's freedom, the cost of bail has been steadily increasing across the state, mirroring national trends. From 2003 to 2009 the mean bail in PA rose nearly 39% from \$14,445 to \$20,008.<sup>59</sup>

For individuals these costs increase after their initial detention. Pretrial detention leads to an average increase of \$129 in non-bail court fees owed, regardless of whether the person who is accused is convicted of his or her crime.<sup>60</sup> If convicted, court fees average between \$775 and \$1250.<sup>61</sup> For the tens of thousands of people unable to pay their bail to begin with, these amounts provide impossible hurdles.<sup>62</sup> Court fees have been on the rise in Pennsylvania since 2010.<sup>63</sup>

In addition, detained persons are more likely to be convicted than those who secure their release.<sup>64</sup> Cash bail not only puts people in jail who may have no reason to be there, but

it keeps them there regardless of the likelihood they could pose a risk to society.

Even minimal bail amounts have been shown to be unpayable for many people who are accused, regardless of whether the crime is serious or trivial. Functionally, Pennsylvania is detaining the poorest people before trial, rather than the most dangerous.<sup>65</sup> A bond amount as low as \$50 forces over half of people who are accused in Philadelphia to remain in detention for more than three days, and 25% of accused persons in Philadelphia can never make bail at all.<sup>66</sup>

A bond amount as low as \$50 forces over half of people who are accused in Philadelphia to remain in detention for more than three days, and 25% of accused persons in Philadelphia can never make bail at all.<sup>67</sup>

People who are accused and cannot afford cash bail risk losing their jobs, homes, and educational opportunities while they are in jail, and many do.<sup>68</sup> Additionally, their arrest records serve as a barrier to employment upon their release. This was the case for Joshua, a Philadelphia native who was arrested at 16 and spent 18 months in jail because he could not afford the \$2,000 bail.<sup>69</sup> He lost his job while he was in jail. Moreover, it was difficult to find a new job after release because of his arrest record. He was also forced to re-earn all of his high school credits as his school failed to accept them, even though at the time of his incarceration he was three credits from graduating.<sup>70</sup> Joshua had to rebuild his future with few resources and an education system and employment market that repeatedly discriminated against him, because he had been charged with an

offense. He says that the system of cash bail is “wasting human capital and tax dollars... taking much needed funds from the community into the prison industrial complex.”<sup>71</sup>

#### COSTS TO THE TAXPAYERS

Philadelphia has the highest incarceration rate of the ten largest cities in the United States.<sup>72</sup> Pennsylvania also has among the longest wait times for adjudication and release in the country, forcing it to spend more than other states on incarceration.<sup>73</sup> In Philadelphia’s crowded jails, 59.3% of people are being held for pretrial detention.<sup>74</sup> As many as half of Philadelphia’s 6,600 inmates are there because they cannot afford to post bail.<sup>75</sup> Of those detained pretrial, 75% remain in detention for more than 30 days.<sup>76</sup> The average stay in jail is as high as 185 days for a person who is accused, regardless of whether that individual is ever found guilty. Around a third of those held pretrial are waiting for the outcome of a single case and would be eligible to be released, if only they had the financial means to pay the bail amount.<sup>77</sup>

This is especially troubling considering that it costs an average of \$120 per day to house an inmate in Philadelphia.<sup>78</sup> In 2009, Philadelphia spent an estimated \$290 million on incarcerating its residents, with 57% of those in jail detained awaiting trial.<sup>79</sup> Our City’s leaders are recognizing this doesn’t make financial sense. Philadelphia Councilman Curtis Jones recently explained we are “holding people on \$100 bail which [if they paid, they] could go home. Instead we pay \$134 a day to incarcerate them pretrial.”<sup>80</sup> On average, Philadelphia taxpayers pay \$40,000 to incarcerate someone before the court decides if they are guilty or not.<sup>81</sup> Eliminating cash bail would reduce the Philadelphia prison population by as much as 70% and save the city \$247 million per year, only a fraction of which

would be required to implement alternative pretrial services.<sup>82</sup>

### Cash Bail Isn't Fair

Pennsylvania's cash bail system is inconsistent with the legal requirement that people have a meaningful opportunity to remain out of custody prior to trial. Instead, it has been a mechanism to profit off of warehousing human beings prior to any determination of guilt, under the guise of public safety and business as usual. The cost of bail ensures many people are forced to languish in jail, despite not being found guilty of any crime. In fact, many people who are in jail because they cannot afford bail have their charges dropped or are found not guilty. This phenomenon has devastating consequences for people who have been accused of crimes, their families, and their communities as a whole. As one Philadelphia resident explained, people are "languishing in an 8 x 8 or 8x10 cell simply because they could not afford to pay a hundred dollars to get out."<sup>83</sup>

#### CASH BAIL INCREASES LIKELIHOOD OF CONVICTION

Cash bail has been shown to result in a less fair process for people who are accused of a crime. Detention for failure to post bail increases an accused person's likelihood of a jail and prison sentence.<sup>84</sup> This is especially true in cases that would otherwise have been dropped or ended in acquittals.<sup>85</sup> In Philadelphia, people who are accused of a crime and detained prior to their trial have a 12% higher likelihood of being convicted.<sup>86</sup> Those charged with misdemeanors are 8% more likely to be convicted.<sup>87</sup>

The increased conviction rates for individuals subject to cash bail is exacerbated by the high case volumes for public defenders.<sup>88</sup> A defender may not have the time and resources to conduct a thorough investigation. A person who is accused and waiting in jail

cannot assist the defender by way of contacting eyewitnesses and gathering other exculpatory evidence that may improve his or her chances of an acquittal.<sup>89</sup>

An accused person who cannot pay cash bail has strong incentives to plead guilty in a bid to escape a harsh sentence or secure release in exchange for time-served.<sup>90</sup> Prosecutors often make deals with people who are accused where guilty pleas are exchanged for a sentence of time-served.<sup>91</sup> Sadly, many innocent people who are accused of committing a crime have a high incentive to plead guilty when a guilty plea is the only barrier between them and their freedom.<sup>92</sup> One individual with whom we spoke in Philadelphia explained, "what happened to me happens to everyone...they try to get you to plead out. Most people can't afford to go to trial."<sup>93</sup>

Likewise, institutional actors such as prosecutors, judges, and jurors may harbor negative biases against a person who is accused of a crime and detained prior to trial. Viewing such an individual as a criminal makes it easier to convict him or her.<sup>94</sup> The result is that under the cash bail system, cases that would have ended in acquittals or been dropped result in convictions.<sup>95</sup>

"What happened to me happens to everyone...they try to get you to plead out. Most people can't afford to go to trial."  
-Reuben

In line with the increased likelihood of conviction for an accused person who is detained, pretrial detention due to an inability to post bail increases the likelihood that a person who is accused would get a harsher sentence upon conviction. On



average, people who are accused of a crime in Philadelphia and detained due to an inability to post bail receive sentences that are 5 months longer than those who post bail.<sup>96</sup>

**CASH BAIL KEEPS PEOPLE IN JAIL LONGER**  
People who have secured bonds, regardless of the offense, wait longer for release than those with unsecured bonds, as the process of securing bail can be complicated, and requires relinquishing cash or other collateral.<sup>97</sup>

People are “languishing in an 8 x 8 or 8x10 cell simply because they could not afford to pay a hundred dollars to get out.”  
-Reuben

The Pretrial Justice Institute found that people with a secured bond had to wait an average of five days prior to release, while 80% of people with unsecured bonds were able to leave jail on the first day of pretrial detention.<sup>98</sup> The difference between the two is people who get to remain free, and have more economic security. Cash bail keeps people in jail longer, which run directly counter to the narrative put forth by bail agencies.

Shannon, a Philadelphia resident, had to pay \$500 to be released on a \$5,000 bond.<sup>99</sup> While Shannon would have been able to pay on her own, her time in detention made it impossible to assemble her funds and she was forced to rely on family members with lesser means just to get her out of jail. Her family had to go through a bail agency and “scramble up” the amount necessary to pay for her bail.<sup>100</sup> This process required her mother to make many phone calls on her behalf to come up with the money, which she

later had to reimburse to all the people from whom her family had to borrow.<sup>101</sup> This whole process meant Shannon sat in jail longer – even though she had not been found guilty.<sup>102</sup>

**CASH BAIL DOESN'T ENSURE REAPPEARANCE**

In direct contrast to the stated justification for cash bail, high cash bail amounts do not increase the likelihood of a person who has been accused of a crime showing up to court.<sup>103</sup>

People who are accused of crimes generally appear for future proceedings, making bonds essentially no risk for a bondsman because there is such little risk of their customers fleeing.<sup>104</sup> Moreover, simply imposing higher bail, and then seeking the assistance of a bond agency results in “more pretrial incarceration, but not more court appearances.”<sup>105</sup> Individuals released on personal recognizance with an unsecured bond return to court at the same rates as those released on cash bail.<sup>106</sup>

The Pretrial Justice Institute’s “Unsecured Bonds: The Effective and Most Efficient Pretrial Option,” which had both independent findings and conducted a literature review of earlier studies, revealed that bond agencies have been unable to show that they have meaningfully assisted in getting people who have failed to appear to reappear in court.<sup>107</sup> This debunks bond agencies’ assertion that they provide a public safety benefit by being able to “locate and capture defendants who fail to appear or who are ... on the run.”<sup>108</sup> In reality, in the vast majority of cases, people who are accused of crimes either return on their own or are arrested by police. Bail agencies do not assist in meaningful ways.<sup>109</sup>

In addition, jurisdictions have found that something as simple as sending a reminder can increase appearance rates. This measure is not connected to monetary conditions of

release. Nebraska, for instance, performed an experiment and found that sending postcards alone to remind accused people of their court dates increased appearance rates by 35%.<sup>110</sup>

#### CASH BAIL DISCRIMINATES

Pennsylvania's cash bail system is racially discriminatory. It has led to the overwhelming mass incarceration of racial minorities.<sup>111</sup> In fact, a 2014 study found that "9 Black people were incarcerated for every White person in Pennsylvania."<sup>112</sup> In Philadelphia alone, 30,000 black men are considered "missing" because incarceration denies them the chance to participate in society.<sup>113</sup> Their absence has far-reaching consequences for society.<sup>114</sup> Nonwhite people who are accused of crimes are more likely to be assessed money bail yet they are less likely to be found guilty when compared to their white counterparts.<sup>115</sup>

"Poor folks stay in jail and rich folks don't."<sup>116</sup>  
-Patrick J. Egan

In Philadelphia, 80% of people who are accused of crimes are assessed money bail of \$10,000 or less.<sup>117</sup> An affluent person who is accused of a crime is likely to have such a sum in a savings account.<sup>118</sup> This is not the case for less affluent people who are accused of a crime as evidenced by the 60% of Philadelphians unable to pay the amount within three days and the 34% of Philadelphians who remain in jail until the disposition of their case.<sup>119</sup> Furthermore, wealthier people can afford to pay for legal representation at their bail hearings which in turn improves their chances of obtaining a nonmonetary release condition, and avoiding cash bail entirely. They are also assessed lower bail amounts than their less affluent counterparts even when

controlling for a wide array of factors.<sup>120</sup> A 10% increase in zip code wealth correlates with a .4% decrease in bail amount and a .2% decrease in likelihood of pretrial detention.<sup>121</sup> As Philadelphia attorney said, "poor folks stay in jail and rich folks don't."<sup>122</sup>

#### CASH BAIL IS ARBITRARY

Bail decisions are often made in an arbitrary manner.<sup>123</sup> Magistrates cannot make truly informed decisions based on the limited information they often receive on the people who are accused.<sup>124</sup> In some jurisdictions, magistrates are only provided with an accused person's previous criminal history and his or her current charges.<sup>125</sup> This has led to magistrates imposing high bail without taking into account certain mitigating factors.<sup>126</sup> It has also led to inconsistencies, which exacerbate the discriminatory nature of the system. In one instance, a magistrate set a \$20,000 bond for an accused person while another individual facing similar charges was released with no bond.<sup>127</sup>

#### CASH BAIL DOESN'T GIVE AN ACCUSED PERSON A FAIR CHANCE

In Philadelphia, bail hearings are conducted through video conference rather than in the presence of the person who is accused of a crime. People who are accused are represented by public defenders who have limited resources and rarely meet their clients before bail hearings due to high caseloads. A single attorney handles bail amounts for every accused person before the court that day. That defender has limited information (and thus so do judges and magistrates), usually a summary of the charges against the accused person and the accused person's criminal history. As discussed above, research shows that each of these factors results in higher bail and less fair processes for people who are accused of a crime.

Research has shown that video bail hearings, instead of hearings where the accused person is present, result in increased bail amounts for people who are accused regardless of the charges or factual situation.<sup>128</sup>

Other research found that an accused person represented by legal counsel was 2.5 times more likely to be released on his own recognizance, instead of cash bail, than an accused person without representation.<sup>129</sup> This further discriminates against the poor, increasing the likelihood that those who cannot afford attorneys will lose their freedom as a result.<sup>130</sup> As one individual told us about her experience with cash bail, “when you have a lawyer, you have money and you have a better chance.”<sup>131</sup>

#### CASH BAIL STIGMATIZES INDIVIDUALS AND FAMILIES

The Pennsylvania cash bail system undermines the notion of “innocent until proven guilty” that is a cornerstone of the U.S. criminal justice system by detaining people who are accused but have not been found guilty of a crime. It unfairly criminalizes people who are accused but poor. As a result they are more likely to be presumed guilty because of their time in jail.<sup>132</sup> Many accused people spend weeks and months behind bars notwithstanding the fact that they have not been convicted of a crime.

“People are being forced to pay for a crime for which they have not been found guilty.”  
-Philadelphia Resident<sup>133</sup>

To compound their financial struggles, those in the bail system may be subject to other financial obligations, such as child support payments and restitution requirements, for

which they cannot earn money to pay while locked away during pretrial detainment.<sup>134</sup> Failure to pay these fines can also result in jail time, forcing people into what are essentially debtors’ prisons before they have been convicted of a single crime.

In the meantime, people who are accused and detained for an inability to post bail cannot provide family members and dependents with love and support.<sup>135</sup> Spouses, children, parents, and loved ones are left without their loved one for an indefinite period of time.<sup>136</sup>

#### Cash Bail Undermines Safety

Despite being one of many methods of release available, cash bail is a system that is widely used but not required by law. Cash bail is only used when a judge orders its use, and judges in Pennsylvania are not required to impose it. Proponents of cash bail often claim that its usage enhances public safety, as it helps ensure that persons accused of crimes will make future court appearances. However, other types of pretrial release, such as unsecured bonds (an amount owed only if an accused person fails to attend future proceedings) and robust pre-trial services (both discussed in-depth later in this report) have been proven to be more effective and better at improving public safety.<sup>137</sup>

If cash bail is imposed, regardless of the nature of the offense or likelihood of flight from future proceedings, a person is released if a full bail payment is made. Nationally, this outcome leads to up to half of all high-risk people who are accused being released from pretrial detention, simply because they can afford the cost.<sup>138</sup> A select class of people who are accused face bail in the hundreds of thousands of dollars, but even bail this high has no power to prevent crime if the people who are accused have the resources to pay their way out.<sup>139</sup> The Director of D.C.’s pretrial services noted

a reduction in crime rates in their city and that “people who are dangerous need to be held and cash bail doesn’t fix that.”<sup>140</sup>

“People who are dangerous need to be held and cash bail doesn’t fix that”  
-Director of D.C. Pretrial Services<sup>141</sup>

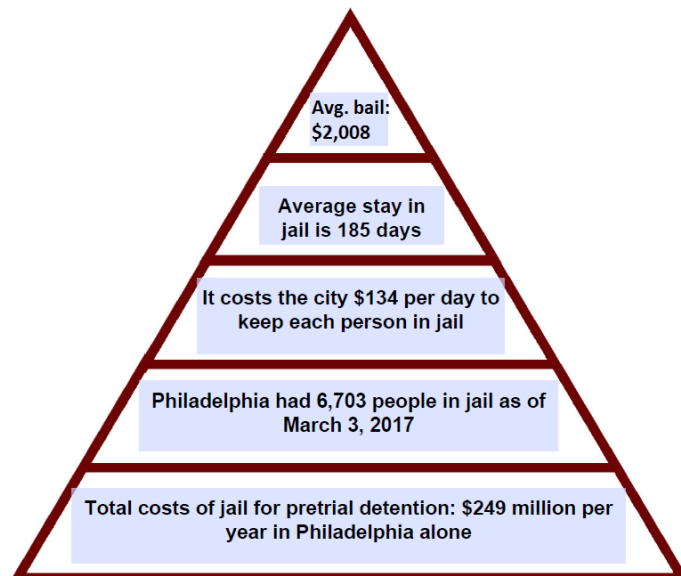
#### CASH BAIL PROMOTES RECIDIVISM

A 2016 study found that people who are accused of crimes and detained prior to their trial have a 6% to 9% higher likelihood of recidivating compared to those who are not detained.<sup>142</sup> Pretrial detention for failure to post bail also increases recidivism rates

among low and moderate-risk people.<sup>143</sup> Detaining such individuals for as little as two days increases their chances of committing new crimes in the present and in the future.<sup>144</sup> These findings are unsurprising given that pretrial detention increases an accused person’s financial strain.<sup>145</sup> The cash bail system “is designed to create more crime. It’s a vicious cycle and we have to stop it.”<sup>146</sup>

In Pennsylvania, a brief pretrial detention of 3 days correlates with an astounding 40% higher chance of being rearrested.<sup>147</sup> Each day of detention heightens the likelihood of rearrests in Pennsylvania, with the one-month mark of pretrial detention bringing the rearrests rate up to 74% likelihood for accused persons who are unable to pay for their release.<sup>148</sup>

## CASH BAIL'S UNBEARABLE COST TO FAMILIES, SOCIETY, AND FINANCES



## Arguments by Bail Agencies Don't Justify Cash Bail

Cash bail is an archaic system that hurts individual community members, the state's financial status, and safety overall. The only group that it helps is bail bond agencies. Their only goal is for profit, and in seeking it they have no incentive to ensure the return of accused persons to trial or for public safety. In fact, they profit from both of these important functions of pretrial service going wrong.

While cast as a system that allows for speedy release, lower rates of recidivism, and guaranteed appearance, cash bail is a system that makes freedom unaffordable for community members and their families. Bail agencies profit off of this misfortune. One Philadelphia resident explained, "actors in the cash bail system are interwoven in a way that makes it have the appearance of impropriety."<sup>149</sup>

Bail agencies tout two main social benefits, neither of which actually results in social good: First, bail agencies claim that they make release from jail possible, affordable, and easy. The unaffordability of the cash bail system undergirds the need for bail agencies and urges people who are accused and their families to put up their wages and valuables as collateral. Bail agencies charge for this service, directly benefitting from pretrial detention. Money and valuables from community members are infused into bail agencies' profit margins.

"Actors in the cash bail system are interwoven in a way that makes it have the appearance of impropriety."<sup>150</sup>

-Reuben

By design, bail agencies profit directly from brokering access to liberty. In fact, the higher the bail amount, the more the bail agencies seek to gain from accepting a bond. In this way, bail agencies are able to profit off of the most serious criminal offenses as "the highest bonds typically set are for those charged with the most serious crimes" as people "who have lower bonds are not financially attractive to bonding companies."<sup>151</sup> Presently, there is little regulation or oversight of bail agencies, which allows them to choose which bonds to take based only on profit.<sup>152</sup>

Bail agencies couch their financial gain in terms of excellent customer service and community benefit. An accused person's financial hardships are further exacerbated by the practices of the bail bond industry in Pennsylvania. Many bail bond agencies in the Commonwealth offer so-called flexible payment plans that give people who are accused of a crime a false sense of security. Many others allow accused people to make payments using credit cards.<sup>153</sup> These practices are promoting a culture of indebtedness among people who are accused of a crime.

Even the way these groups present themselves makes their practices suspect. Pennsylvania based "A+ Bail Bonds" website boasts that it offers "flexible payment plans" that are less expensive and easier to afford, when "the bail bond fee is too much to pay all at once."<sup>154</sup> Further, it questions the reader: "Do you have a friend, family member, or other loved one in jail? Don't let them sit there any longer than they have to. Call A+ Bail bonds PA to get them released quickly, we offer fair prices, excellent customer service, and a fast release for your loved one."<sup>155</sup>

Similarly, Philadelphia Bail Bonds LLC capitalizes on the pretrial incarceration of community members. Its website states that

agents are available “24/7” and may even be willing to come to people’s home to collect a bond.<sup>156</sup> The site also contains a disturbing “educational video,” explaining what a bail bond is, while framing the need for a bond agency by stating “when a person gets arrested and booked for a serious crime,” a bond can be issued and “payments can be handled electronically and over the phone” to facilitate a speedy release.<sup>157</sup> The video is illustrated with whimsical comic book-like illustrations, featuring a client depicted as an elderly woman, who is forced to watch her collateral of her house, jewelry, car and money, disappear with comic book bubble “poofs” after the “defendant” fails to attend a court hearing.<sup>158</sup> Paying a bond is characterized as a “better option” than “waiting in jail.”<sup>159</sup>

ABC Bail Bonds of Philadelphia prides itself on being a “father and son” establishment that was created to “meet the needs of friends and families to get their loved ones out of jail”.<sup>160</sup> The cash bail system is the direct cause of the “unexpected emergencies and unfortunate arrests” and a “confusing court system” which “creates general needs for a bail bondsman,” as stated on the ABC’s webpage.<sup>161</sup>

Despite their marketing, bail bond agencies do not serve as a protective force for public safety. Under Pennsylvania Law, bail bond companies are not required to perform any public safety functions. They are not required to supervise those on bail unless “designated by a bail authority,” nor are they required to ensure the appearance of someone on bond.<sup>162</sup>

In this system, bail bond agencies maintain an extraordinary degree of control over which people get released and which ones stay behind bars.<sup>163</sup> The decisions such agencies make regarding which individuals they give bonds to and thus release are rooted in profit as opposed to the safety of society or fairness.<sup>164</sup>

Given that a high bail increases a bail bond agency’s non-refundable fee, bail bond agencies are attracted to serving people who are accused and assessed high bail amounts.<sup>165</sup> These individuals are the type to be charged with some of the most serious crimes.<sup>166</sup> Yet bail bond agencies are not dissuaded from doing business with people who may be likely to recidivate, because the bail is not forfeited when such individuals are rearrested for new crimes.<sup>167</sup> If anything, they profit from the individuals who have been accused of the most serious crimes, reoffending. As one bail bondsman put it, “If someone doesn’t come to court, by the time we go to their house, track them down and get them back in court, it’s not worth the \$75 we get from a \$500 bond. Let’s face it. It’s just not good economics.”<sup>168</sup> Bondsman can also choose to incarcerate people who secure their release on bond at any time and for any reason.<sup>169</sup> This has led to a system where bondsmen ultimately “hold the keys to the jails in their pockets.”<sup>170</sup>

## SOLUTIONS TO END CASH BAIL

Not only is replacing the bail system possible, it has proven to be effective and efficient in enhancing public safety and reducing financial costs. The tools to create safer, more financially responsible alternatives already exist, and their results speak for themselves. We have the benefit of learning from the experiences of other states and cities that have succeeded where Pennsylvania lags behind.

### Pass Feasible Statutory Reform

Statutory reform is the most comprehensive and permanent way to end cash bail in Pennsylvania. Pennsylvania legislators could end cash bail through a series of changes to the statutory framework. Rule 524 of the Pennsylvania Code and Philadelphia Local Criminal Court Rule 528 can both be altered to authorize unsecured bonds as the only monetary condition of pretrial release permitted by law.

First, legislators should amend Rule 524 of the Pennsylvania Code “Types of Bail On Release” to eliminate Rule 524(C)(5). This would permit only unsecured bonds under the category of monetary conditions for release. At present, bail and bond can also refer to a secured bond. The remainder of the statute could remain intact. Under this change release on one’s own recognizance, release on an unsecured bond, and release with non-monetary conditions, would all remain lawful conditions for release. In cases that meet the legal threshold under the “Preventative Detention” statute, 234 Pa Code 521(A)(2)(b)(i), persons who are accused but are likely unable to be released as will be held without the imposition of a release condition. Second, legislators should amend Rule 520(A) of the Pennsylvania Code to define bail as unsecured bond or nonmonetary conditions.

Other relevant provisions of the Pennsylvania Code could also be amended to reflect the changes made in Rule 520(A) and create uniform definitions throughout the code, such as Rule 528 “Monetary Condition of Release on Bail and Rule 536(A)(2)(a), which concerns “Forfeiture.” By making these changes, the word bail would be redefined to mean either an unsecured bond or a non-monetary pretrial condition, and not a secured bond. That way, the law would comply with the constitution but eliminate cash bail system.

On the local level, the elimination of Philadelphia Criminal Court local rule 528 would remove the necessity for the collection of 10% of bail, when occurring in conjunction with the revision of Rule 524 of the Pennsylvania Code. This change could also revoke the authorization of Philadelphia Criminal Courts to retain at least 30% of the cost of a bond. Similar to Rule 536(A)(2)(a) of the Pennsylvania Code on “Forfeiture,” Philadelphia local rule 536 authorizes forfeiture in the case of failure to appear while on a secured bond and should be eliminated.

Each of these changes would ensure that the statutory framework for the Commonwealth and the city of Philadelphia, better preserve both public safety and the livelihood and dignity of the accused.

### Use Validated Tools and Standards to Prevent Arbitrary Pretrial Detention

Pennsylvania’s bail system relies entirely on judicial discretion to set the conditions for release. The absence of standards in an overtaxed system mean there is nothing to prevent capricious determinations or to create just ones. Research has suggested that bail decisions are made arbitrarily when only previous criminal history and current charges are provided to judicial officers to help in their determining appropriate

pretrial release conditions.<sup>171</sup> Ideally, we can eliminate cash bail and implement fair, consistent decisions about pretrial conditions, but even if cash bail continues, Pennsylvania can balance judicial discretion with fair, individualized, consistent decisions.

Unfortunately, magistrates follow recommended guidelines in only 50% of cases, and when they do not follow them, they usually set higher bail.<sup>172</sup> The results are unfair, inconsistent, and nonsensical. People accused of similar crimes can face wildly different bail amounts, and judges run the risk of placing high bail on people who have been determined to be “low risk” while letting out “high risk” accused people with relatively few barriers.<sup>173</sup> These bail decisions, which are at best arbitrary and at worst dangerous, can be replaced by statistical tools that have already proven to be effective and inexpensive.

The use of scientifically generated, validated risk assessment tools can help address these fundamental concerns. A risk assessment tool uses a set of criteria to evaluate how much of a threat an individual person who is accused poses of committing another crime and failing to appear at a future trial. Further, it can be essential to determining which services are necessary to ensure appearance, or if no such services are necessary.<sup>174</sup> Functionally, these risk assessments require careful consideration both in how they are used and how they are constructed. Their purpose is to make bail determinations less arbitrary, but applying a formula to wide classes of people poses risks to the community and the integrity of the criminal justice system.

Validated risk assessments help counter implicit and explicit biases that can creep into judicial decision making, compared to when judicial discretion alone is used to assign “risk.” An empirically validated risk assessment tool is one that has demonstrated its ability to accurately predict a person’s

likelihood of recidivating and appearing in court. Verified assessments have been tested after a significant period of implementation, and do not improperly rely on characteristics such as race or gender to determine the likelihood of recidivism or reappearance.

Numerous studies have shown that empirically-derived pretrial risk assessment tools can accurately differentiate the “risk” to society posed by a person who is accused.<sup>175</sup> Kentucky and Virginia both use tools to assess the ‘risk’ that people who are accused pose of recidivating or failing to appear. These tools have proven to be statistically valid. Further, after controlling for factors such as gender and race, the tools have been found to not discriminate on these grounds.<sup>176</sup>

Time and experience have shown those assessments to be reliable, non-discriminatory, and inexpensive.<sup>177</sup>

Experience has also shown that when these options are available and staff are trained, judges tend to use them in changing their bail practices.<sup>178</sup> The tools not only changed judicial behavior but that of people who have been accused, who were more likely to appear overall than they were under a cash bail system.<sup>179</sup> Upon using its tool, as well as implementing other changes, Kentucky found that it was able to release more people who are accused, while reducing recidivism and increasing appearance rates to 91%.<sup>180</sup> The Kentucky tool has been released for free use to interested jurisdictions.<sup>181</sup>

New Jersey is an example of reforming pretrial detention decisions that holds lessons for Pennsylvania. Beginning with a small pilot program, New Jersey has now implemented a new statewide system using evidence based tools to help assess the risk of any individual of recidivism and restructure pretrial detention.<sup>182</sup> The system also reduces the time defendants have to wait in jail before their initial appearance. These measures are expected to release nearly all



people prior to their trials, holding only those that pose a genuine threat to society.<sup>183</sup>

Pennsylvania's Allegheny County also uses a research-based and validated pretrial risk assessment to guide pretrial release recommendations, and has done so since 2006.<sup>184</sup> The risk assessment consists of factors related to the seriousness of the charge, prior criminal history, substance abuse, age, residence, and employment. Its tool successfully avoids the racist and disproportionate detention of people of color.<sup>185</sup>

The Arnold Foundation developed the Public Safety Assessment tool using data from 750,000 accused persons who were released from 350 U.S. jurisdictions.<sup>186</sup> Most U.S. jurisdictions can easily adopt it since it has been so widely-tested and validated.<sup>187</sup> Furthermore, it is cost-effective because it is free of charge and does not require pretrial services to conduct interviews of people who are accused.

Unfortunately, there is no requirement that risk assessments be rigorously validated prior to implementation, or tested throughout the implementation to ensure discrimination is not being passed off as science. When faulty assessments are used, people of color (particularly black men) are disproportionately held, as the measures improperly and discriminatorily ascribe risk based on these characteristics. Within these assessments race and gender become faulty proxies for 'criminality' and 'dangerousness.' As a result, faulty assessments can cast entire communities of color as more prone to crime, and imminent risks to public safety overall. For example, a Baltimore risk assessment tool gave black people higher risk scores under its risk assessment algorithm because it uses factors such as drug arrests and earliest age of arrest, both of which are known to disproportionately target black people who are accused.<sup>188</sup> In Broward County, Florida, the risk assessment tool was biased against

black people who are accused of crimes.<sup>189</sup> It branded black people who were accused as 'high risk' even when compared to similarly situated white people and given far lower 'risk' scores.<sup>190</sup> Philadelphia is also exploring the creation of a risk assessment tool, but it poses serious concerns, including using the individual's zip code as a means of evaluating future threat.<sup>191</sup>

## **Use Nonmonetary Release Conditions and Pretrial Services**

Expanding nonmonetary release conditions and pretrial services can be more successful at guaranteeing that people return to trial and reducing recidivism. Validated risk assessments can help determine which services are necessary, and pretrial service providers can tailor specific services to promote an effective justice system.

Assessing risk of flight is only a small part of effective alternatives to cash bail. These validated approaches must be coupled with identifying necessary interventions, including pretrial services. Risk assessment tools make it easier to use these services by determining what services are necessary for individuals. By getting appropriate information for people in the system, they allow criminal justice practitioners to tailor the services to each person. This makes it easier to treat each individually and more fairly, while only expending resources that are shown to be necessary.

Pretrial services can include home monitoring, drug rehabilitation services, counseling, and reminders as well as simple methods to ensure that people make all of their court appearances. Services should be tailored to each individual who is accused to ensure that resources are only expended when necessary to ensure appearance and provide supportive services. These reforms do not have to be expensive or time consuming in order to be successful. National numbers put the average cost of supervising

individuals at 9.3% of the cost of jailing them.<sup>192</sup>

Philadelphia is already recognizing this need. The city's Pretrial Services plans to introduce alternatives as part of the city's comprehensive reform plan.<sup>193</sup> The lack of viable supervision alternatives leads to unnecessary pretrial detention of accused persons who could be safely released with appropriate conditions but are instead, held on bail amounts that they cannot post. In addition, when there are no options between reporting into Pretrial Services by telephone and electronic monitoring, those who do not need the intensity of electronic monitoring supervision are nonetheless ordered into it. People who are accused and over-supervised are more prone to failure than their counterparts who receive the appropriate supervision.<sup>194</sup>

In many cases persons who are accused will require only occasional check-ins and drug monitoring, but for those who concern the court more, instituting Day Reporting Centers could take the place of incarceration. These centers would be a nexus of social service and the justice system, ensuring that each person receives individualized attention but is held accountable to their obligations. Philadelphia is exploring the possibility of creating these centers over the next three to four years, and this effort must be expanded to the entire State if it is to fix the problems it has created for itself.<sup>195</sup>

Philadelphia has seen successes as well, finding that more restrictive supervision does not necessarily lead to less misconduct.<sup>196</sup> Even minimal measures prove effective, and reporting more or less frequently or adding other conditions did not appear to affect outcomes noticeably.<sup>197</sup> A separate initiative to replace detention with in home monitoring has successfully aided reduction in the city's jail population.<sup>198</sup>

This measure will require specialized training by pretrial services staff, but compared to the costs of incarceration it needs be neither expensive nor excessively time consuming. One member of the Philadelphia city council posited that it might be done at a net zero cost to the city.<sup>199</sup>

Washington D.C. is a key example of these kinds of changes. It has made enormous changes to its bail system, including use of the least restrictive conditions of release to reasonably assure public safety and appearance in court, the use of detention when those assurances cannot be met, the sparing use of financial bail, and the abolition of commercial surety bail.<sup>200</sup> The results have been overwhelmingly positive: 80% of all defendants are currently released without a money bond. As to the remainder, 15% are held by the court without bail. Only five percent have financial bail. None are out on commercial surety bail.<sup>201</sup> Those five percent are imposed only in cases where the person accused has a hold in another case, and only upon their request, so that they can receive credit for time served if ultimately convicted.<sup>202</sup>

The high non-financial release rate has been accomplished without sacrificing the safety of the public or the appearance of accused persons in court. Agency data show that 88% of people released make all court appearances, and 88% complete the pretrial release period without any new arrests.<sup>203</sup> In fact, safety has actually increased in the city; Washington D.C. was suffering from a high violent crime rate in part because the most dangerous offenders were able to pay their bail and leave jail to reoffend.<sup>204</sup> Washington D.C. has made substantial additions to its pretrial services, implementing High Intensity Supervision Program, which uses electronic monitoring (EM), including wireless cellular EM, and Global Positioning System (GPS) technology to monitor people who pose a high risk. Most

importantly, 90% of those released did not commit new crimes, proving that bail is not necessary as a safety measure.<sup>205</sup>

It is also possible to maintain many of the systems on which bail relies without placing the same burden of detention on individuals. Secured bonds require payment before a person can be released, and force multitudes of people into jail based on poverty alone. Unsecured bonds, however, function as a penalty for failure to appear, and do not require detention if they cannot pay before their hearings.<sup>206</sup> The data is clear that there is no difference between the two in terms of final appearance rates.<sup>207</sup> There is no need for maintaining a system that forces people who are accused into jail based not on guilt or innocence but ability to pay.<sup>208</sup>

There is also no necessity to hold people accused of crimes for long for the purposes of processing if a jurisdiction uses nonfinancial conditions of release. “The pretrial release decision is first made at the defendant’s initial appearance in court. This typically occurs within a day or two of arrest.” Accused people who at that hearing are given nonfinancial conditions of release are released as quickly as they can be processed out of the jail—usually within hours of the hearing.<sup>209</sup>

## Steps in the Path to Eliminate Cash Bail

While the measures we have proposed are comprehensive, there are intermediary steps that could improve the bail system quickly in the interim. Pennsylvania has immediate ways that it can move forward, and the successes of other jurisdictions show how easily small changes can have enormous and effective impact on the criminal justice system.

The most important immediate goal should be training magistrates and prosecutors who already enforce the bail guidelines in

Pennsylvania. They must be made aware of both the impact and the futility of their decisions in light of the effects of the cash bail system. More importantly, they must understand the many alternatives already at their disposal that could alleviate some of the worst impacts of this issue. Of course, it requires a greater restructuring to fix the core problem leading to these decisions: an overtaxed system with magistrates who do not see another way out. They must be given systemic supports to give them the resources they need to make individualized determinations with more options than “jail or bail.”

The Bronx Public Defenders performed an experiment where it began a charity to pay bail for those too poor to pay it.<sup>210</sup> The results were that 98% of people who were accused made every court appearance. These defendants would have otherwise pleaded guilty just to leave jail. In more than 50% of their cases the charges were entirely dismissed.<sup>211</sup> The remaining cases mostly resulted in noncriminal dispositions, and not a single recipient returned to jail on the case in which the Freedom Fund posted bail. The average amount of bail paid by the fund was only \$750.<sup>212</sup> This model has been followed in other cities like St. Louis, Miami, Cincinnati, Oakland, and Austin, and Philadelphia has considered adopting it.<sup>213</sup>

Jefferson County, Colorado’s Fail To Appeal Pilot Project shows that a court can reduce its overall failure to appear rate by using a live caller to remind defendants of their upcoming court dates. Moreover, the project shows that telephone notification is also successful in bringing people who are accused with warrants back into court within a five-day window.<sup>214</sup>

People who are accused must also receive proper counsel at their hearings, during the pendency of the current bail system. The effects of representation are enormous, leading to a 250% increase of release

without bail or conditions for people with representation.<sup>215</sup> These people who have been released can care for their families, work to support themselves, and most importantly participate in their own defense.

Pennsylvania must immediately eliminate video hearings, a practice that strips an accused of their humanity. These hearings increase bail amounts for those who are accused regardless of offense or dangerousness, and pose a direct threat to the integrity of our judicial system.

Finally, all counties in Pennsylvania must embrace early bail review, a new initiative in Philadelphia aimed at increasing the chance of release for nonviolent individuals who are held in jail for failing to post bail amounts of \$50,000 or less.<sup>216</sup> Under the Philadelphia program, 309 individuals have gained their freedom.<sup>217</sup> Of those released, 92.3% appeared at their subsequent court hearing.<sup>218</sup>

## CONCLUSION

Pennsylvania must end its archaic and oppressive cash bail system. Altering this system is achievable, and more effective and less costly than the present system. The complex web of social problems buttressed by the cash bail system, are consequences that Pennsylvanians should no longer be forced to bear.

People who are accused in Pennsylvania should not be forced to live in fear of detention, simply because they cannot buy their freedom. They should not be forced to endure increased, disproportionate convictions because they choose to plead guilty instead of stay in jail. Families should not be forced to watch their loved ones lose

their liberty, employment, property, and in some cases, their futures and children. Nor should they have to turn to predatory cash bail companies. Communities should not have to watch their members detained without convictions, or taken advantage of by bail companies. Tax paying community members should not be forced to foot the enormous and wasteful bill generated by the cash bail system, or be complicit in the over-incarceration of community members.

Pennsylvania must institute a humane and effective system of pretrial release that puts people over profit and makes fairness affordable for all our residents.

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# THE COST OF BUYING FREEDOM

## What is Cash Bail?

- Cash bail asks persons accused of crime to pay the state until the resolution of their case. If you cannot pay, you have to remain in jail, often for weeks and months until your trial.
- Cash bail is not required in Pennsylvania, and it is the least efficient pretrial option to protect the public and ensure that defendants appear in court.
- Pennsylvania can end cash bail now and save taxpayer money.

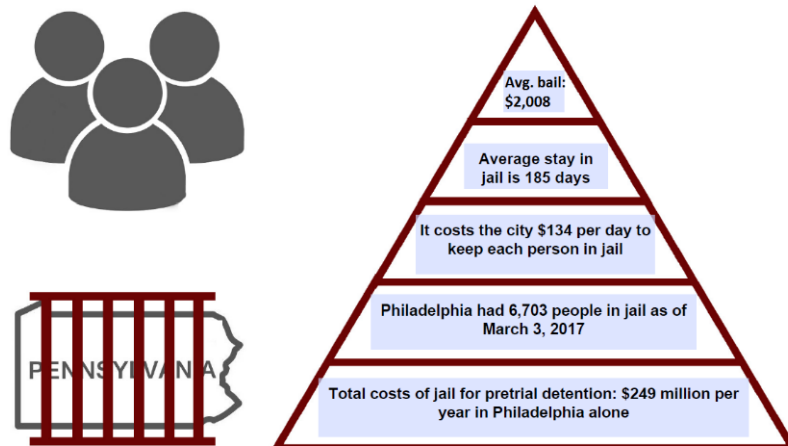
## Problem

- The process is flawed. People go to jail because they can't pay – not because they are dangerous – based on a few minute hearing.
- Cash bail costs too much. Philadelphia pays \$40,000 per year to incarcerate one person, because that person can't pay a few hundred dollars. Even if your charges are dropped or you are found innocent, bail agencies keep 10% of your bail amount.
- Cash bail isn't fair. Staying in jail means you are less likely to get a fair trial and more likely to take a plea deal just to go home.
- Cash bail isn't safe. Pennsylvania law already has a way to keep the individuals accused of the most dangerous crimes in jail. Cash bail has also been shown to increase the likelihood of a new crime, regardless of guilt of the original charge.

## Solutions

- Judges should stop using cash bail today, and use the tools the law already gives them to make consistent, fair, safe determinations.
- Amend Pennsylvania law to eliminate cash bail.
- Expand pretrial services to use release conditions that fit the defendant and society's needs.

## CASH BAIL'S UNBEARABLE COST TO FAMILIES, SOCIETY, AND FINANCES



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