REPORT OF THE ADVISORY COMMITTEE ON THE CRIMINAL JUSTICE SYSTEM IN PHILADELPHIA

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The Joint State Government Commission was created by the act of July 1, 1937 (P.L.2460, No.459), as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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EXECUTIVE SUMMARY

This report is presented in response to 2010 Senate Resolution No. 344, which calls for a study of the criminal justice system in Philadelphia. The catalyst for SR 344 was a series of articles that ran in the *Philadelphia Inquirer* entitled "Justice: Delayed, Dismissed, Denied" on December 13-16, 2009. The series was a scathing indictment of that system, highlighting such deficiencies as a high violent crime rate, a low conviction rate for violent crimes other than murder, a bail system that permitted criminals to avoid trial with impunity, and numerous crimes going unpunished due to dilatory procedures that enabled the criminal element to cow victims and witnesses into silence.

The series galvanized a vigorous response from the stakeholders in Philadelphia's criminal justice system. While disagreeing with some details of the picture limned by the *Inquirer* articles, all concurred that the articles pointed out real defects and that the system would need to greatly improve its performance in order to regain the public's confidence. The Pennsylvania Supreme Court, the First Judicial District, the City Administration, the District Attorney, the Defender Association of Philadelphia, and members of the public have come together to implement a remarkable series of reforms to improve the system's effectiveness and efficiency, and this reform initiative continues apace. As this report will detail, these efforts have removed some of the logjams that impeded its effectiveness in 2009, and the measures taken promise to make the system better than ever. Since these reforms have been in place for only a short time, their long-term effectiveness remains to be seen. The early results of such measures as the Zone Court, the expansion of diversionary programs, the merger of the Clerk of Quarter Sessions into the Prothonotary, and "fugitive court" are very favorable.

Through the SR 344 study, the Pennsylvania Senate has assisted this effort by collecting an Advisory Committee of participants in and observers of the system to offer their findings and recommendations in this report. A major impediment to further improvement is the lack of resources arising in large part from the economic difficulties facing the Nation. Accordingly, the SR 344 Advisory Committee has attempted to emphasize recommendations that either will not cost very much or will draw on sources of funding other than tax revenue. As the economy recovers, the Advisory Committee urges both the Commonwealth through the General Assembly and the City itself to give a high priority to the needs of Philadelphia's criminal justice system.

FINDINGS

GENERAL

By publishing its December 2009 series of articles "Justice: Delayed, Dismissed, Denied," the *Philadelphia Inquirer* performed a vital public service by identifying serious deficiencies in Philadelphia's criminal justice system in such areas as failure to address witness intimidation, excessive delays, inability to make defendants appear at court or respond appropriately to failures to appear, lack of coordination among subsystems, and inefficiencies due to outdated technology.

Since the publication of the *Inquirer's* critique, the Pennsylvania Supreme Court, the First Judicial District, the District Attorney, the City Administration, the Defender Association, and private stakeholders have come together to formulate and implement a wide variety of measures to address the system's deficiencies. The initial results of this reform initiative have been very positive. A great deal of progress has been made in the last three years. At the same time, further measures should be considered to improve the system. Attempts to improve the City's criminal justice system face a chronic shortage of funds and other resources.

PRETRIAL RELEASE AND BAIL

Under current pretrial practices, an unacceptable number of defendants ignore proceedings by failing to appear, flee the jurisdiction, or commit new criminal acts, while other defendants who seem less likely to do those things are incarcerated before trial because they are less able to meet the financial conditions of release. These problems have helped create a culture of disrespect for the Philadelphia criminal justice system.

The set of guidelines currently used by the bail authorities is badly outdated and urgently requires an update to match the characteristics of today's defendant pool. The guidelines fail to prescribe predictable and uniform pretrial dispositions largely because they do not cover many offenses that that have been added since the guidelines were issued. The process for revising the guidelines must be open to participation by representatives of all stakeholders and should be based on solid research and data.

Currently, all pretrial releases on monetary conditions are administrated by the Pretrial Services Division (PTS) of the First Judicial District (FJD), including the deposit bail system that requires deposit of ten percent of the total monetary condition imposed by the court in order to be released. When defendants fail to appear, little attempt is made to collect the remaining 90 percent of the bail monies due the court. Because of its overburdened case load, the Sheriff's department lacks the resources to recoup those amounts from the defendants.

The Advisory Committee has deliberated whether monetary conditions for bail are appropriate to assure that defendants awaiting trial appear for all necessary proceedings and refrain from criminal activity pending disposition of their cases. It is clear that the system cannot afford to shift completely to nonmonetary conditions. While it may be useful to outline how a nonmonetary system could operate, its implementation cannot be properly considered until resources permit the establishment of the infrastructure required to administer such a system.

Court rules have recently been enacted to facilitate the participation of private bail sureties, to enable them to effectively and responsibly improve the pretrial release system, without creating a disparate impact on defendants who are unable to compensate the surety. But there is disagreement over whether the City should administer the bail system primarily through public agencies, or encourage private bail sureties to participate significantly in writing bail bonds and enforcing bail obligations. The Advisory Committee was unable to reach a consensus on this issue.

WITNESS INTIMIDATION

Witness intimidation is the often successful attempt to prevent victims and witnesses from testifying against violent criminals because the latter threaten the victims and witnesses or their families with bodily harm or harassment. Because of witness intimidation, many of the most dangerous offenders in the City remain free to prey on other victims.

The City is only beginning to respond to this long-standing problem. The FJD has written a bench book that includes suggestions that enable Common Pleas Judges to deal more effectively with intimidation. By concentrating criminal trials in the Criminal Justice Center (CJC) and enabling the court to gain greater control over how proceedings are conducted, the Zone Court system helps protect victims and witnesses. These are important steps in the right direction.

At the same time, the City's response to intimidation is hampered by several factors:

- Delay, especially between pretrial conference and trial
- Inadequate funding and support for programs to protect or relocate victims and witnesses
- Failure to vigorously prosecute persons guilty of witness intimidation and retaliation

PROCEDURE

The Supreme Court, the FJD, the District Attorney, and the City Administration have instituted a variety of measures that have effectively addressed some of the major problems faced by Philadelphia's criminal justice system:

- Using a Zone Court system to consolidate preliminary hearings and trials for greater efficiency
- Merging the Clerk of Quarter Sessions into the Office of the Prothonotary
- Adding and augmenting diversion programs to channel nonviolent offenders into rehabilitative programs and concentrate law enforcement resources on serious felonies
- Increasing the compensation of assigned private counsel for capital representation
- Improving the charging of offenses by upgrading personnel and fitting the charges more closely to the evidence
- Adopting rules and practices that encourage prompt holding of the preliminary hearing
- Streamlining the process of plea bargaining and pretrial conferences
- Expanding rapidly the use of electronic pleading and discovery
- Using video conferencing to dispose of misdemeanor cases of incarcerated defendants

The exclusive reliance of the courts on the preliminary hearing to determine probable cause to bind defendant over for trial has exposed victims and witnesses to repeated opportunities for intimidation. The Advisory Committee applauds the Supreme Court for instituting the indicting grand jury as an alternative.

Hesitancy on the part of some courts of the FJD to permit trial in absentia unwittingly assists defendants who fail to appear to flout the criminal justice system because it protects them from the consequence of their failure to appear (FTA).

TECHNOLOGY

The FJD has made great progress in implementing electronic filing and in moving toward a fully electronic document system. Further work remains to be done to integrate technology among the stakeholders and to provide prompt and complete contact information and discovery.

RECOMMENDATIONS

The following recommendations have been approved by the consensus of the Advisory Committee. Consensus reflects the views of a substantial majority of the Advisory Committee, but does not imply that every member agreed with every recommendation.

PRETRIAL RELEASE AND BAIL

1. Revision of Bail Guidelines

The guidelines and procedures governing pretrial release should be revised to more closely reflect the aims of the bail process and to use the least restrictive means that is appropriate. The current guideline matrix in Philadelphia no longer functions with acceptable efficiency and must be revised to refresh the empirical risk tool, review the ranking of offenses, include new offenses, and reweight the seriousness of older offenses. This should be accomplished through further research and assessment and a review process that includes representatives of a broad array of criminal justice stakeholders.

2. Development of Nonmonetary Terms of Release

Whether or not monetary terms of release are used, the City should develop, test, and refine nonmonetary conditions of release and define the means of enforcing those conditions. Nonmonetary conditions include monitoring, supervision, halfway houses, treatments of various sorts, veteran's court, and partial restraint, among other options. The emphasis should be on the development and refinement of category-specific conditions. The City should expand the availability and use of nonmonetary conditions.

3. Development of Supervision Strategies

The courts of the First Judicial District (FJD) should collaborate with the Pretrial Services Division to develop strategies that target the most common characteristics of those who fail to appear and fugitives among the defendant population. Such strategies can draw from an analysis using the guidelines to identify and respond to the highest risk categories and the highest crime areas that disproportionately generate failures to appear and fugitives.

4. Enforcement Capacity

The pretrial disposition system should ensure that enforcement capacity is available to apply appropriate sanctions to those who fail to comply with court orders. Before resorting to incarceration, less restrictive sanctions should be employed, such as intensified supervision and monitoring. To the extent these responses are insufficient, there must be enough available jail capacity that defendants can be incarcerated pending trial if they defy court orders that are backed by that sanction.

5. Notice to Victims and Witnesses

Victims and witnesses should be informed whenever the defendant is confined or released or any other changes occur in the defendant's status that may be germane to the safety of the community or of any person. Victims and witnesses should be afforded readily accessible means to inform the court, through the District Attorney, the Pretrial Services Division, or another responsive mechanism.

6. Training

All employees of Pretrial Services should receive continuing education and training focusing on the role of the agency and any new policies.

7. Retention of PTS Staff

The City should work to minimize employee turnover within Pretrial Services. Engaging employees and addressing reasonable salary expectations is an immediate need that must be addressed as well as possible within current budget constraints.

8. Monetary Conditions of Release

The court should adopt a modified version of the direct decision model. Based on the assessed risk presented by the defendant, the bail authorities should determine whether the defendant is eligible for release and the conditions of release. If a financial condition of release is required, the bail authority should require only the bail amount that will reasonably assure defendant's appearance for all court proceedings. Therefore in determining the financial conditions of release, the bail authority should take into consideration the defendant's income and access to other funds.

9. Avoiding Excessive Indebtedness

Where monetary bail is used as a condition of release, the amount should be fixed such that forfeited bail can realistically be collected without subjecting the defendant to heavy long-term debt.

10. Potentially Dangerous Defendants

The safety of the public should be addressed only in the determination of whether the defendant should be released, because *no* condition of release can overcome a reasonable concern that the defendant poses a substantial risk of criminal harm to the public. Defendants who present such a risk should be incarcerated pending a due process hearing.

11. Nonmonetary Conditions

In determining the conditions of release, the court should use the least restrictive condition or combination of conditions that will ensure that the defendant will appear for all court proceedings and refrain from crime pending trial. Current nonmonetary conditions practices should be improved to reflect this principle.

12. Regulating the Bail Surety Market

The deposit and multiplier required of bail surety companies should be set so as to ensure both that the surety company will be penalized if it fails to conduct business responsibly and that the company can do enough business to make a reasonable profit.

13. Bench Warrants and Bail Forfeiture

In order to minimize issuance of bench warrants for defendants who are merely tardy, the court should defer issuing bench warrants until it has finished calling the day's calendar. The court should determine whether a violation occurred and, if so, issue a bench warrant. Within 90 days after the bench warrant is issued, or a new arrest takes place, the defendant should be required to appear for a second bail hearing, accompanied by his counsel or surety, if one is employed. If the violation is minimal, terms of bail should be reinstated and the defendant released. However, if the violation is significant, such as where defendant has not been found, the bail should be revoked and the forfeited funds collected.

14. Staffing Studies

In order to begin to address the most pressing needs for administrative personnel, the FJD should commission studies to ascertain the feasibility of (1) adding staff to the Pretrial Services Division to enable it to perform its tasks effectively and (2) adding enough personnel to the fugitive warrant squad in the Police Department to enable it to keep up with the apprehension of at least those who fail to appear and are charged with violent crimes. In each case the study should include an estimate of the number of personnel and the costs required.

WITNESS INTIMIDATION

1. Witness Intimidation Unit

The District Attorney of Philadelphia should create a Witness Intimidation Unit within his Office, and the Commonwealth should appropriate as much funding as possible to defray the costs of establishing and maintaining this unit.

2. Courthouse Safety

The FJD should enhance the safety of victims and witnesses in the Criminal Justice Center by using currently decommissioned elevators, upgrading security cameras, calling witness intimidation cases ahead of other cases, and ensuring a law enforcement presence at every court proceeding.

3. Addressing Fear of Reprisal

Public authorities in the City should take the following measures to address fear of reprisal against victims and witnesses:

- Collaborate with academic institutions to collect and analyze data on victim and witness intimidation (in particular, threat assessment and lethality measures)

- Fund a community awareness campaign to educate the citizenry about available resources and accessing help

- Increase training to all stakeholders—including judges, prosecutors, police, specialty services, probation, and community-based services—regarding the identification of witness intimidation patterns, safety assessments, and safety planning

- Computerize and enforce "stay away" orders

- Earmark Philadelphia Housing Authority housing vouchers for crime victims and expedite the issuance of those vouchers

- Enable landlords, hotel chains, transportation services, and moving companies to bill Pennsylvania's Victims' Compensation Assistance Program (VCAP)[1] directly

- Authorize VCAP to advance monies for relocation expenses

- Expand VCAP eligibility requirements to include witnesses in need of relocation assistance

- Expand funding for the domestic violence shelter system

- Provide secure, dedicated, and adequate funding for services provided by systems-based and community-based programs initiated by the Victims of Juvenile Offenders (VOJO), the Rights and Services Act (RASA), and the Victims of Crime Act (VOCA).[2] These services are vital to identify intimidation, provide relocation assistance, and enable counseling and support for victims of intimidation.

4. Additional Resources

The Commonwealth should appropriate additional resources to help the City to curb victim and witness intimidation. Because the Advisory Committee recognizes funding is severely limited, the Commonwealth should also consider offering incentives to private organizations (e.g., local sports teams, charities, and community businesses) that make a long-term commitment to funding these initiatives.

[1] The program is established by chapter 7 of the act of November 24, 1998 (P.L. 882, No.111) (Crime Victims Act), 18 P.S. § 11.701—11.710.
[2] See n. 85 for citations to these statutes.

PROCEDURE

1. Indicting Grand Jury

The FJD should petition the Supreme Court to institute the indicting grand jury in accordance with the Court's amendments to the Rules of Criminal Procedure of June 22, 2012, authorizing the use of that procedure in cases involving witness intimidation.

2. Trial in Absentia

The Courts of Common Pleas of the FJD should proceed with trial in absentia where it is established by a preponderance of the evidence that the defendant has willfully failed to appear at trial. The defendant should be advised at the trial arraignment and by the trial subpoena that the trial will proceed without the defendant if he or she fails to appear at trial without excuse. If the Supreme Court does not provide for trial in absentia, the General Assembly should do so by legislation. In order to comply with the Pennsylvania Constitution, the legislation should provide that the procedure for conducting trials in absentia shall be in accordance with general rules of court.

TECHNOLOGY

1. Contact Information

Assistant District Attorneys, public defenders, and private defense counsel should be encouraged to establish contact with one another early in the process. Having contact information through the e-filing system will assist this process.

2. Content and Communication of Information

To enhance efficiency, the judges and court staff, prosecutors, and defense attorneys should cooperate so that information becomes more consistent, more accurate, and more timely disseminated.

3. Discovery

To the extent possible, the District Attorney should provide electronic discovery to defense counsel as early as possible to aid in an appropriate resolution of each case. Providing a copy of the police (PARS) report in advance of arraignment will also aid in the efficient and appropriate resolution of cases.

4. Systemic Reforms

The FJD should seek to remedy the deficiencies identified in the McCaffery Report by instituting a cross-agency governing structure for information technology, developing a strategic information plan, and further reducing reliance on paper documents, to the extent resources permit.

CHAPTER ONE
STUDY SCOPE AND METHOD

This study is done pursuant to the mandate of 2010 Senate Resolution 344, which directed the Joint State Government Commission "to establish a criminal justice advisory committee to study the issues of high violent crime rates, low convictions rates, the bail system, witness intimidation and any other relevant issues regarding the criminal justice system in Philadelphia and to develop solutions for the problems that are identified."[3] The prime sponsor of the resolution was Senator Stewart J. Greenleaf. The resolution was adopted by the Senate on June 15, 2010.

As directed by the resolution, an Advisory Committee was assembled, primarily of persons nominated by members of the Senate and representing a broad array of stakeholders in the Philadelphia criminal justice system, including judges, attorneys representing both the Commonwealth and the accused, the City Administration, the First Judicial District (FJD), and citizens. The Advisory Committee held its organizational meeting on September 24, 2010. At that meeting, it selected David Sonenshein, Professor of Law at the Beasley School of Law of Temple University, to serve as chair of the Advisory Committee. The Advisory Committee decided to divide into four subcommittees to facilitate its work, namely Pretrial Release and Bail (chaired by John S. Goldkamp), Witness Intimidation (chaired by Jonathan S. Satinsky), Procedure (chaired by Jeffrey M. Lindy, and later by Walter M. Phillips, Jr. and Ellen T. Greenlee), and Technology (chaired by Angie Halim).

The next year of the study was consumed with subcommittee meetings. Three of the subcommittees gave preliminary reports to the Advisory Committee on January 23, 2012, namely Bail and Pretrial Release, Witness Intimidation, and Technology. Because of policy differences within the Subcommittee on Pretrial Release and Bail, it produced two reports, one by its chair and one by Nicholas J. Wachinski. The report of the Subcommittee on Procedure was delayed because Mr. Lindy was occupied by the defense of a major criminal case; that Subcommittee's report was presented to the Advisory Committee on April 23, 2012, by Ms. Greenlee and Mr. Phillips. (Mr. Lindy resigned from the Advisory Committee on December 17, 2012.)

Commission staff prepared a draft report and forwarded it on June 12, 2012, to the Advisory Committee for review. Members of the Subcommittee on Pretrial Release and Bail requested redrafting of that chapter and other parts relating to that topic. A redraft of the chapter was circulated to the members of that subcommittee who had forwarded suggestions on August 21, 2012. Given the input of different members of the

[3] SR 344 is set forth at p. 93.

subcommittee, staff reorganized the Pretrial Release and Bail chapter and incorporated a variety of input to other parts of the report. The final draft of the report was circulated to the Advisory Committee for comment on December 10, 2012. Responses from the Advisory Committee were received on December 17, 2012. Dissenting statements from Advisory Committee members Brian J. Frank and Nicholas J. Wachinski were received on December 21, 2012; these are included in the report as Appendix A and Appendix B, respectively.

Because of the predominantly legal background of the Advisory Committee membership, the Advisory Committee elected to focus on problems *within* the criminal justice system. The members agree that socioeconomic factors, such as poverty, the economic recession, deficiencies in the educational system, and lack of public resources contribute greatly to the City's high crime rate. The Advisory Committee did not feel itself competent to address such issues, but thought it could contribute by studying measures to ameliorate deficiencies in the criminal justice system that contribute to crime.

During the course of the study, the Advisory Committee lost an invaluable member, Professor John S. Goldkamp, Chair of the Criminal Justice Department of Temple University. He was a nationally recognized expert on bail reform, and served as Chair of the Subcommittee on Pretrial Release and Bail. The Commission wishes to acknowledge the tremendous effort Professor Goldkamp put into chairing his subcommittee and assisting in the drafting of this report, despite severe illness.

The Commission wishes to express its appreciation to all those who participated as members of the Advisory Committee, especially to Professor Sonenshein and the chairs of the four subcommittees.

CHAPTER TWO
"JUSTICE: DELAYED, DISMISSED, DENIED"

THE *INQUIRER* ARTICLES

The SR 344 study originated in response to "Justice: Delayed, Dismissed, Denied," a series of articles in the *Philadelphia Inquirer* written by Craig R. McCoy, Nancy Phillips, and Dylan Purcell, that ran in the newspaper December 13–16, 2009. The series presented a scathing indictment of the City's criminal justice system. This chapter summarizes the deficiencies plaguing the system as described in those articles. The principal deficiencies were found to be high violent crime rates, low conviction rates, a dysfunctional bail system, and witness intimidation. This chapter briefly presents the most prominent problems with the system as related in those articles.

High Violent Crime Rates and Low Conviction Rates[4]

Among the nation's ten largest cities, Philadelphia has had the highest violent crime rate, including the highest rate for homicide, rape, robbery and aggravated assault, but the lowest violent crime conviction rate. Philadelphia has trailed the nation in convictions for rape, robbery, and serious assault. In nearly two-thirds of these cases, the defendant has walked free of all charges. As part of its analysis, the *Inquirer* reporters tracked the dispositions of 31,000 criminal court cases filed in 2006, 2007, and 2008, as of early 2009.

Only 20 percent of violent crimes in the City have resulted in felony convictions, according to federal studies. The violent crime conviction rate in other major cities was about 50 percent. The conviction rate for gun assault in the City was about 10 percent; for armed robbery, 20 percent; for rape, 25 percent. The conviction rate for robbery at gunpoint was 4 percent. Half of all people charged with illegal handgun possession went free. However, the conviction rate for murders in 2006 and 2007 was 82 percent, above the national rate of 71 percent in those years. The low conviction rate for violent offenses other than murder has contributed to the high violent crimes rate. Many of those arrested but not convicted have been released to commit more crimes, while continuing to escape conviction.

[4] This section is based on the lead article in the series, entitled "Justice: Delayed, Dismissed, Denied," *Philadelphia Inquirer*, December 13, 2009, http://www.philly.com/philly/multimedia/79211022.html.

Perpetrators have often gone unpunished because the cases against them fell apart in the course of the legal process. "Of 10,000 defendants who walked free on their violent-crime cases in 2006 and 2007, 92 percent had their cases dropped or dismissed. Only 788—8 percent—were found not guilty at trial, the *Inquirer's* analysis showed." Witnesses or defendants have often failed to show up for crucial court dates. Preliminary hearings in Municipal Court have operated under a "three-strike" system: If the prosecution failed to conduct a preliminary hearing on its third attempt, the case was dismissed. Continuances granted the defense did not count as "strikes," but they discouraged prosecution witnesses from showing up at a scheduled hearing. If an essential witness failed to show up at the crucial third hearing for the prosecution, the case died. Defense attorneys have argued, however, that most of the cases dismissed in this manner are weak.

The process has been marked by disorganization and communication difficulties among the system's components, such as problems in bringing defendants from prisons to the courtrooms. Due to the distances involved, transportation arrangements were difficult to make. (To address this problem, Graterford prison reserved beds particularly for inmates from other facilities subpoenaed to court.) In one case, a prosecutor who provided a writ of release for an inmate to testify regarding a crime never saw the witness in court. A photocopy of the writ was inserted into the person's courtroom file, but prison officials reportedly never received it. Somewhere between the courts and the prison, the writ was lost.

Not only has it been difficult for inmates to attend court, it has often been difficult for subpoenaed police to attend, and many cases have been dismissed because the police witnesses failed to arrive in court. On peak days, one out of every seven Philadelphia police officers is subpoenaed to appear in a courtroom. Often the same officer was called to appear in multiple courtrooms at the same time: one officer once was subpoenaed for 17 simultaneous hearings. An officer could be ordered to appear at a hearing in a local police district, and simultaneously downtown at the Criminal Justice Center. There was no computerized system to flag scheduling conflicts, and tracking the location of officers was difficult. To address the tracking problem, officers have been required to log into a fingerprint reader each time they enter a courtroom. Judges can determine the location of an officer so they know not to throw the case out when the officer can be retrieved.

Communication breakdowns also affected witnesses, including one who reported receiving only one subpoena despite the prosecution's claim that they used multiple subpoenas, phone calls, and bench warrants to guarantee her attendance. The case she was to testify in was eventually dropped.

On top of the other difficulties, cases have suffered multiple delays due to scheduling problems between prosecutors and defenders. Delays for various reasons have result in dropped cases as frustrated witnesses failed to appear.

The *Inquirer* articles laid much of the blame for low conviction rates at the doorstep of then-District Attorney Lynne M. Abraham. She was criticized for refusing to use data to track court dispositions and manage priorities. She responded that the conviction rate is not a fair measure of a criminal justice system, and that the numbers can be manipulated to reach any desired conclusion.

> [Prosecutors are] there to do justice.… You can't do justice by numbers. You can only do justice by doing the best you can. Walk into a courtroom and watch one of our homicide prosecutors, or family violence and sexual-assault prosecutors prosecute a case in front of a jury and decide when they're doing a good job and giving it their all and covering all of their bases.

The Bail System[5]

Bail is one of several techniques to assure that a suspect will appear for the trial. After a suspect is charged with a crime and notified of the charges, an arraignment magistrate decides his or her disposition pending trial, based on assessment of likelihood of flight and of the danger the suspect poses to the community. Of the roughly 60,000 criminal suspects Philadelphia processes in a year, about 30,000 are "released on their own recognizance."[6] These are deemed to pose a low risk of flight or crime; they are advised of their legal obligation to appear for the trial and other conditions that must be met, but are not required to post bond. On the other hand, about 9,000 suspects are considered dangerous, flight-prone, or both, and they are held in jail until the trial.

The remaining 21,000 post bail. Defendants (or family or friends on their behalf) deposit money with the court that will be returned if the suspect appears at the trial. The amount deposited is 10 percent of the bond amount. Other conditions beyond the cash deposit, such as periodic reporting to a bail officer, may be imposed. If the defendant fails to appear, he is liable to pay the bond amount, but in practice the undeposited 90 percent is rarely recovered.

In November 2009, the count of fugitives (suspects on the run for at least a year) numbered 47,801, most of whom skipped bail after 1990. The total amount of bail owed to the City was estimated at nearly $1 billion, owed by 210,000 defendants. In 2007 and 2008, 19,000 defendants each year—nearly one in three—failed to appear in court for at least one hearing. With no effective method of pursuing suspects who skip court or recovering forfeited bail funds, the system allows many defendants to skip bail with impunity.

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[5] This section is based on Dylan Purcell, Craig R. McCoy, and Nancy Phillips, "Violent Criminals Flout Broken Bail System," *Philadelphia Inquirer*, December 15, 2009, http://www.philly.com/philly/multimedia/79262252.html.

[6] A more recent report by the Pew Charitable Trusts suggests that this breakdown would be 36,000 released on bail and 24,000 released on own recognizance. See text at n. 20.

Failures to appear (FTAs) undermine the criminal justice system in several ways:

> When defendants skip court, old victims are victimized again and fresh ones are created as fugitives commit more crimes. For some fugitives, ducking out on court is a tactical step that wears down witnesses and helps set the stage for the eventual collapse of their cases.

District Attorney Abraham attempted unsuccessfully to pursue forfeited bail aggressively, but her efforts were stymied because the Clerk of Quarter Sessions failed to keep a computerized list of debtors; the only record was hand-written notations in the suspects' files. In 2009 only 200 people were tagged as new debtors, even though thousands of defendants skipped court. The warrant squad consists of 51 officers, one for every 918 suspects, and there is no unit dedicated solely to dealing with FTAs. Philadelphia holds the nation's worst long-term felony fugitive rate for an urban community (tied with Essex County, New Jersey, which includes Newark). While City officials have pledged to use collection firms to recover outstanding bail, no such contract has been let.

For most of Philadelphia's history, bail was administered by private bail bondsmen, but in the early 1970s, private bail was outlawed. Since then, court officials have administered the pretrial disposition of suspects. Because of widespread dissatisfaction with the performance of the court's system, there has been pressure to reinstate private bail. The critics of the current deposit bail system point out that Chicago, which also uses deposit bail, also has over 40,000 fugitives. A widely noted study by two economists found that fugitive rates are 30 percent higher in jurisdictions that rely on deposit bail than in those that do not. In order to keep the defendant at liberty pending trial, his or her family members and friends execute bail bonds, which makes them liable if the defendant skips, thereby giving these associates an incentive to make sure he appears. Opponents of private bail refer to the history of corruption associated with private bail and argue that it is unjust to make a defendant's freedom depend on his or her financial resources.

Beginning in 2006, there was a limited pilot program to experiment with private bail. Commercial sureties were required to advance $250,000 for each $1,000,000 of bail they were authorized to write. Only one surety company, Lexington National Insurance, wrote bail bonds in Philadelphia, and it wrote only about 24 bonds in 2009. (As further detailed in Chapter Three, the court relaxed entry requirements for commercial bail in April 2012.)

Witness Intimidation[7]

According to many who work in the Philadelphia criminal justice system, witness intimidation is endemic in the City. "Barroom shootings, common. Fifty people, nobody saw anything, nobody heard anything. Everybody was in the bathroom." The City cannot guarantee the safety of witnesses. In 2008 and 2009, 13 witnesses or their relatives were murdered, including at least one participating in the City's witness relocation program. One prosecutor called it the silent element in nearly every case. For 15 years, former District Attorney Abraham complained that the City's protection programs were underfunded and ineffective.

Witness intimidation is growing in frequency and complexity. Witnesses often fail to appear due to intimidation, or when they do appear change or recant their testimony. Only about 280 of the 1,000 defendants charged with witness intimidation from 2006 to 2008 were convicted.

Various examples of witness intimidation narrated in the *Inquirer* series include:

- A stalking victim who reported her stalker was threatened with a gun and a knife by two of his friends who told her, "Snitches get stitches."

- A man was duct taped to a chair, doused with lighter fluid and taunted with lit matches until he falsely confessed to a murder in an effort by two men to overturn their murder convictions. The torturers hoped to threaten the witness to recant his earlier testimony.

When witnesses are intimidated into silence, it is often impossible to prosecute the case, and the perpetrator of a violent crime goes unpunished and remains free to prey on other victims. Police and prosecutors have developed ways of countering witness intimidation. If a frightened witness recants testimony, the prosecution can sometimes save the case by introducing the written statement the witness initially made. To keep associates of defendants from learning the identity of witnesses, police strip files of identifying information and redact evidence provided to the defense. At times, police have resorted to jailing witnesses to assure their appearance at trial.

State funds constitute the primary source of funding for the City's witness relocation program and they have been cut considerably. Efforts to pump City money into the program have failed because the City faces more needs than it has funds to meet them. In 2009 the Philadelphia witness relocation program spent $747,000 to help 67 witnesses and their families. State funds for witness relocation were cut from $1.3 million for 2007 to $980,000 in 2009. The City witness relocation program spends just

[7] This section is based on Nancy Phillips, Craig R. McCoy, and Dylan Purcell, "Witnesses Fear Reprisals, and Cases Crumble," *Philadelphia Inquirer*, December 14, 2009, http://www.philly.com/philly/multimedia/78827362.html.

over $11,000 per witness, while the federal program provides over four times as much assistance. Because of funding limits, Philadelphia's program can generally offer assistance for only four months, whereas protection should continue at least through the trial. One witness placed in the federal relocation program was shot to death because she failed to abide by no-contact rules and visited her ailing grandmother.

Dilatory Procedure[8]

The most common reason why a seemingly solid case falls apart is that witnesses fail to come to court and testify against the accused. Besides facing fear of retaliation, many witnesses become frustrated with the process. They may repeatedly take time off from work to attend a preliminary hearing only to find out that the hearing is postponed. The "crowded and chaotic" conditions of the City courtrooms make each appearance an ordeal. This problem has often dogged prosecutions for armed robbery. "Of the 9,850 gunpoint robberies reported in the City in 2006 and 2007, only a quarter were brought to court, according to an *Inquirer* analysis. In the end, only two in ten accused armed robbers were found guilty of armed robbery." The conviction rate for all robbery in the Nation's 75 largest counties was 69 percent, but in Philadelphia, that rate was 35 percent.

Illustrative of this problem is the criminal career of John Gassew. He was arrested 44 times, mostly for robbery at gunpoint, but was never been convicted of those charges. In one weekend in December 2007, he and two other men allegedly robbed 45 people. Gassew was charged with 21 robberies. Police collected enough loot from the robberies to fill four trash bags. Prosecutors attempted to establish a common pattern to tie the serial robberies together, and this can be done only if all the witnesses testify at a preliminary hearing. Because various victims and witnesses failed to show up at the series of hearings on Gassew's case, all but one of the charges were withdrawn. Before that case was tried, he was shot four times by the police after fleeing the scene of a robbery in a truck, which smashed into a tree during the chase. He lost an eye and almost lost his arm. He was scheduled to be tried for the last of the 21 December robberies in May 2010. (In May 2012, Gassew received a prison sentence of 37 years on federal charges of robbery and possession of firearms while committing a crime.[9])

[8] This section is based on John Sullivan, Emilie Lounsberry, and Dylan Purcell, "Gun Arrests Galore, No Convictions at All," *Philadelphia Inquirer*, December 16. 2009, http://www.philly.com/philly/multimedia/79262277.html.

[9] Nathan Gorenstein, "Man Who Avoided Conviction Despite 44 Arrests Now Faces 32-Year Term" *Philadelphia Inquirer* May 8, 2012, http://articles.philly.com/2012-02-02/news/31016967_1_conviction-rate-robbery-cases-court-system; Craig R. McCoy, "Two Who Got Off Lightly in Philadelphia Courts Do So No Longer" *Philadelphia Inquirer*, June 18, 2012.

PHILADELPHIA RESPONDS

As this report will show, the Pennsylvania Supreme Court, the City Administration, the First Judicial District (FJD), and the District Attorney have all responded vigorously and impressively to the issues raised by the *Inquirer* articles. Many of the conditions reported by the *Inquirer* in December 2009 have improved as a result of that response.

Chief Justice Ronald D. Castille established the FJD Reform Initiative and delegated leadership of the Initiative to Associate Justice Seamus P. McCaffery. The inquiry proceeded under the direction of a 13-member advisory board and Chadwick Associates was engaged as an independent consultant. In July 2011, the Reform Initiative released a comprehensive interim report that detailed the reform efforts the FJD has made in the areas of case processing in Municipal Court; bail, pretrial release, and bench warrants; witness intimidation; and information technology.[10] The "McCaffery Report" has been of great assistance in informing and guiding the SR 344 Study.

[10] "The Reform Initiative: First Judicial District Criminal Courts, Commonwealth of Pennsylvania, Interim Report" (Supreme Court of Pennsylvania, July 2011) ("McCaffery Report"), 1, 2 http://criminaljusticesection.files.wordpress.com/2011/08/the-reform-initiative-interim-report.pdf.

CHAPTER THREE
PRETRIAL RELEASE AND BAIL

Prior to the completion of this report, the Advisory Committee lost a dear friend, respected colleague, and renowned scholar, Professor John S. Goldkamp. Regardless of differences of opinion, Professor Goldkamp, as Advisory Committee member and Chairman of the Subcommittee on Pretrial Release and Bail, was impeccably courteous to all members of the committee and allowed each point of view to be heard. His work shall long be remembered in the field of pretrial release, and his tireless efforts to bring efficiency and fairness to the system have greatly informed efforts to improve the pretrial systems in Philadelphia and throughout the United States.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

The Eighth Amendment to the U.S. Constitution and article I, § 13 of the Pennsylvania Constitution both state that "[e]xcessive bail shall not be required." Article I, § 14 of the Pennsylvania Constitution adds the following requirements:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community where the proof is evident and the presumption great; . . .

The statutory law directly dealing with bail is set forth in Chapter 57 of Title 42 of the Pennsylvania Consolidated Statutes. Subchapter A (42 Pa.C.S. §§ 5701 and 5702) restates article I, § 14 and provides that bail is generally governed by court rules. Subchapter B (42 Pa.C.S. §§ 5741—5749) provides for the registration and licensure of professional bondsmen. Subchapter C (42 Pa.C.S. § 5761) provides for court review of the source of collateral for bail on behalf of defendants charged with violation of the "Controlled Substances Act."[11] The Pennsylvania Rules of Criminal Procedure governing bail are Pa.R.Crim.P. 520—536.

[11] Act of April 14, 1972 (P.L.233, No.64) ("The Controlled Substance, Drug, Device and Cosmetic Act").

HISTORICAL BACKGROUND

Until the early 1970s, financial bail in Philadelphia was often transacted using private bail bondsmen. Reacting to well-documented corruption in the system of private bail sureties, a national bail reform movement took shape in the early 1960s, spearheaded by the Vera Institute based in New York City and supported by Attorney General Robert Kennedy. Philadelphia was one of the first generation of jurisdictions that adopted bail reform. Ten percent deposit bail replaced private bail sureties, and the nonrefundable bondsman fee gave way to the refundable bail deposit. The Pretrial Services Division (PTS) was established as a department of the FJD, and tasked with the responsibility to recommended pretrial release conditions and monitor defendants. PTS's recommendations regarding release conditions were based on the collection of available information, including interviews of all defendants.

Efforts to enhance the pretrial services and release function were instituted in the 1980s in response to Mayor W. Wilson Goode's initiative to address overcrowded jail conditions. Pretrial release was developed to foster a safe, fair, and rational release process at preliminary arraignment. The effort was increasingly effective during the 1990s, as drug treatment and other supervision options were put in place.[12] But their effectiveness fell off sharply after the turn of the century as the guidelines fell into disuse and PTS lacked resources to fully respond to the rise of drug trafficking and substance abuse. The Goldkamp Report of 2006 called for revision of pretrial release practices centering on the bail guidelines.[13] Lack of attention to pretrial release impeded the use of effective methods and led to a reversion to deposit bail. The pretrial release program fell into disuse with the result that FTAs continued apace.

CURRENT PRETRIAL RELEASE SYSTEM

As was pointed out in Chapter One, "Justice: Delayed, Dismissed, Denied" depicted the City's bail system as deeply flawed, as evidenced by the 19,000 defendants that annually fail to appear in court for at least one hearing, the total of nearly 47,000 fugitives and the large amount of forfeited but uncollected bail. *The Inquirer* depicted the City's system as unable to pursue suspects who fail to appear for court or recover forfeited bail funds, permitting many defendants to flout the criminal justice system with impunity.

[12] John S. Goldkamp and Michael D. White, "Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments," *Journal of Experimental Criminology* 2:143-181 (2006), 174.
[13] John S. Goldkamp, E. Rely Vîlcicã, Doris Weiland, and Wang Ke, "Confinement and the Justice Process in Philadelphia: Its Features and Implications for Planning" (Philadelphia: Temple University, 2006), 94.

The true rate of FTAs is difficult to determine because the poor record keeping by the former Clerk of Quarter Sessions does not permit a meaningful analysis of the performance of the City's pretrial system at the time the Clerk served. Comparison to other criminal justice systems is further impaired by the differing methods and definitions that jurisdictions and commentators use to count "failures to appear." The *Inquirer* series noted that the accumulated number of fugitives had grown to 46,801 and that court officials found that the City had failed to collect $1 billion in forfeited bail money as computed by court officials.[14] (Several members of the Advisory Committee claimed that the reported amount of $1 billion is much larger than the actual amount, but there was wide agreement within the Committee that the actual amount is unacceptably large.) The poor performance of the City's system in these respects has contributed to a widespread culture of disrespect that undermines judicial authority. Among the consequences of the widespread dissatisfaction with the pretrial release system's performance has been pressure to reinstate private bail.

As of 2009, there was a limited pilot program in the City reintroducing the use of private bail sureties. Under that program, private bail sureties were required to provide an advance security deposit of $250,000 for each $1,000,000 of bail bonds provided to the public. On April 3, 2012, the FJD changed the security deposit for private bail sureties. The deposit was lowered to $100,000, which permits the surety to provide up to $1 million in bail bonds to the public. The surety may deposit additional increments of $200,000, and each such deposit authorizes the surety to provide up to an additional $5 million in bail bonds to the public.[15]

The District Attorney and the courts have taken a number of steps to address the fugitive problem, including review of fugitive cases and withdrawal of a large number of old or minor cases. In April 2012 the FJD instituted "Fugitive Court" or "Bench Warrant Court," presided over by the Hon. Joseph C. Waters, Jr. The purpose of Fugitive Court is to improve the effectiveness of sanctions for failure of fugitive defendants to abide by conditions of release and to deter violations of the conditions. This program enables Common Pleas Judges to hold hearings in which they can increase bail amounts of fugitives and rule them in contempt of court, which subjects the fugitive to additional criminal penalties, modified release conditions, or bail revocation. (Before the court's action, all bail hearings were held by arraignment court magistrates, who are not empowered to adjudicate contempt.)

The current pretrial release system should be evaluated in terms of how its budget and staffing compare with its workload, i.e., the annual intake of cases and its dispositions in each of the major categories of disposition that will be enumerated below. Commission staff requested this information from the administrative judge of FJD's Trial Division. The request was denied because the judge and staff were unable to devote the time needed to compile this information.

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[14] Dylan Purcell, Craig R. McCoy, and Nancy Phillips, "Violent Criminals Flout Broken Bail System," *Philadelphia Inquirer,* December 15, 2009.

[15] First Judicial District, Administrative Governing Board, Administrative Order No. 01 of 2012, "*In Re:* Corporate Sureties and Professional Bondsmen," April 3, 2012.

As part of its analysis of the problems with the court system in Philadelphia and the measures the FJD Reform Initiative has taken and plans to take to address them, the McCaffery Report identifies the single most central change affecting bail practices: the review and updating of the charging unit within the District Attorney's Office.[16] Since the "nature of the offense charged" is a very important element of the pretrial disposition,[17] more accurate charging can lead to more appropriate conditions of release.

PRETRIAL DISPOSITIONS

Below are the six major alternative pretrial dispositions under Pennsylvania law:

Release on recognizance (ROR). The defendant is released on his or her promise to return for all court proceedings. This type of release is used for defendants who show no indicia of risk of flight, no history of failure to appear for court proceedings, and pose no apparent threat of harm to the public.

Conditional release. The defendant is released subject to an order either to perform or refrain from certain activities designed to create a likelihood that the defendant will return for all court proceedings and will not pose a threat to the public. This option is generally used to motivate the defendant to cooperate when the court finds some indication that measures are required to prevent FTA or to protect the community.

Unsecured bail. The defendant is released under a fixed bail amount, but the defendant is not required to provide financial security to the court prior to release. If the defendant violates the terms of release, the court may collect the amount from the defendant. This is appropriate when the defendant is charged with a serious offense, but is otherwise considered a low risk to harm the public or to FTA.

Deposit bail.[18] The defendant must post a percentage of the value of the monetary condition of release bail assessed against the defendant in order to be released. The amount of the deposit is almost always ten percent of the full bail amount—the default maximum percentage under Pa.R.Crim.P. 528(C). If the defendant fails to appear, he or she is theoretically liable for the full value of the monetary condition of release. This is considered appropriate when the defendant poses an appreciable risk of flight or threat of harm to the public. Bail may be posted directly by the defendant or by sureties.

Fully secured bail. The defendant must provide financial security for the full value of the monetary condition of release in order to be released from incarceration pending trial. Generally, the court will accept cash, property, or a bond or other financial

[16] McCaffery Report, 26-28.
[17] Pa.R.Crim.P. 523(A)(1). Charging is discussed in more detail at pp. 68-69.
[18] Deposit bail is further discussed on p. 30.

instrument as financial security. This option is considered appropriate when the defendant poses a significant risk of flight or threat of harm to the public. Bail may be posted directly or by sureties.

Detention. The defendant is incarcerated pending trial. This is mandatory in first or second degree murder cases, and is imposed for other crimes when the bail authority (in Philadelphia, the Arraignment Court Magistrate) finds that no set of conditions for release will guarantee appearance or protect the community from the threat of harm posed by the defendant.[19]

In practice, the great majority of dispositions in Philadelphia are either ROR or deposit bail. The use of conditional release or fully secured bail is very rare. A report on prison population by the Pew Trust observes that 60 percent of defendants are released under a financial condition of release and 40 percent are released under ROR.[20]

Aims and Values Governing Pretrial Release and Detention

The Advisory Committee agrees that the guidelines and procedures governing pretrial release should be revised to more closely reflect current best practices. There was broad agreement that the guidelines should implement the following principles:

Aims of pretrial release. The purposes of pretrial release "include providing due process to those accused of crime; maintaining the integrity of the judicial process by securing defendants for trial; and protecting victims, witnesses, jurors, and the community from threats, danger, or interference."[21]

Least restrictive conditions. In deciding on conditions of pretrial release the judicial officer should assign the least restrictive conditions of release that will reasonably assure a defendant's appearance at court proceedings and protect the community, victims, witnesses, and others.[22]

These principles undergird the original pretrial release guidelines and must be implemented in any revision of them.

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[19] Pa. Const. art. I, § 14; 42 Pa.C.S. § 5701. See 18 Pa.C.S. § 1102.

[20] Pew Charitable Trusts, "Philadelphia's Less Crowded, Less Costly Jails: Taking Stock of a Year of Change and the Challenges That Remain" (Philadelphia: Pew Charitable Trusts, July 20, 2011), 18, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphia-Jail-Population.pdf.

[21] American Bar Association, *Criminal Justice Section Standards: Pretrial Release*, ("*ABA Pretrial Release Standards*"), Standard 10-1.1, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html.

[22] Ibid., Standard 10-1.2.

Current Deposit Bail System

Under deposit bail, defendants have an incentive to comply with release conditions because the bail deposit of ten percent of the total bail amount is returned (minus a service charge) once final adjudication occurs. A defendant who fails to attend court or commits a crime while on release may forfeit the deposit and is liable to the court for the entire bail amount. PTS administers and enforces deposit bail. The City has had difficulty in keeping track of noncompliance and forfeitures and has failed to pursue the full bail amounts when absconding defendants are apprehended. However, problems managing cash from the bail process have been addressed by closing the office of the Clerk of Quarter Sessions and the use of more advanced accounting systems by the Prothonotary's office. It remains to be seen whether the City will become more effective in collecting the forfeited bail amounts that are not on deposit.

John S. Goldkamp,[23] Chair of the Subcommittee on Pretrial Release and Bail, rated Philadelphia's PTS average to above average for a large urban center in the generation of numbers of FTAs and new arrests of defendants for crimes committed during their pretrial release for earlier crimes. He observed that it is difficult to compare Philadelphia with other courts because the data are not comparable: courts differ significantly in structure, workload, process, and even in how they measure FTAs. In his view, the ingredients of a sound and effective pretrial release system for the City have been in place for a long time, but the pretrial release system needs strong support, enforcement, impact assessment, and revision.

Other members of the Advisory Committee were far more critical in their appraisal of the pretrial system's performance. In their view, a system where about one-third of the defendants FTA and the amount of uncollected forfeitures may run as high as $1 billion must be considered a complete failure. One reason for failure is the heavy reliance on ten percent deposit bail. Since the 90 percent is almost never collected, the deposit amount is in practice the full amount of the bail obligation, and irresponsible defendants often find it more advantageous to abandon the deposit than to face criminal penalties. One member of the Advisory Committee argued that deposit bail may violate article I, § 14 of the Pennsylvania Constitution because it does not constitute "sufficient surety" under that provision.[24]

[23] The late Professor John S. Goldkamp of Temple University served as the chair of the Subcommittee on Pretrial Release and Bail. He was a nationally recognized expert on bail reform, serving as Reporter for the ABA's Task Force on Pretrial Release, which formulated the *ABA Pretrial Release Standards*.

[24] Staff is not aware of any judicial authority supporting this position.

REFORMING PRETRIAL RELEASE

The recommendations in this chapter pertain to improving the pretrial release and detention system in the areas of decision making, supervision and accountability, protecting public safety, and reducing defendant flight. On several issues relating to the pretrial release system, the Advisory Committee reached substantial agreement. These included the need for improved decision-making information, linking supervision to consequences, accountability, and the pretrial release system's impact on public safety, defendant flight, witness intimidation, and victims' rights.

The most important suggestions covered in this chapter pertain to reducing the number of fugitives and preventing defendants from committing new crimes while released pending trial. These can be broken down into four topics:

- **Decision improvement.** A thorough review and revision of the FJD's pretrial release guidelines is needed based on empirical risk and impact assessment.

- **Development of nonmonetary conditions of release.** These conditions should be linked to the nature and magnitude of risk the defendant poses.

- **Targeting and supervision strategy.** There needs to be a collaborative effort among criminal justice stakeholders to refine the supervision of defendants on pretrial release based on their individual characteristics.

- **Monetary terms.** The Advisory Committee was divided over what place, if any, monetary terms should have in the pretrial stage. The current system relies heavily on deposit bond, whereby the defendant pays a given amount into court, and if the defendant skips bail, that amount is forfeited to the court. As mentioned above, the City's deposit bail system requires the defendant to post ten percent of the bond amount. The remaining 90 percent is subject to forfeiture as well, but that amount is rarely collected; in most cases no attempt to collect is made.

Decision Making

The anchor of Philadelphia's pretrial release system is its decision making. The decision by the bail authority should be supported by in-depth and validated information prepared in advance of preliminary arraignment, and by effective options for monitoring and supervising defendants awaiting trial.

The determination of the pretrial disposition by Municipal Court is subject to three important due process safeguards:

- Magistrates must provide reasons for any deviation from the suggested disposition under the guidelines. This helps to adjust categories based on decision-making experience over time.

- Each defendant has the right to immediately appeal a bail decision to a judge when dispositions deviate from those suggested by the guidelines.

- The structure of the guidelines addresses the problem of equity among defendants: like defendants are, within reason, treated similarly.

Risk Assessment. For the purposes of determining whether and under what conditions to grant pretrial release, risk assessment considers two factors: the likelihood the defendant will fail to make his court appearances, and the threat the defendant poses to the public of committing a criminal offense while released pending trial. In making this determination, the bail authority is governed by Pa.R.Crim.P. 523, which requires him or her to "consider all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the bail bond[,]" including a nonexhaustive list of nine specific criteria. The purpose of this provision and of bail guidelines is not to exact punishment from the accused prior to adjudication of guilt, but rather to identify the best conditions of release to prevent flight and crime by defendants during the pretrial stage.

The risk of flight or crime by defendants under the bail guidelines is best formulated based on a statistical analysis of large samples of defendants in Philadelphia, using methods designed to identify the most accurate predictors of noncompliance. Issues regarding particular predictors have been discussed by the City's bail guidelines committee. Data analysis provides empirical evidence of which attributes of defendants and their cases actually increase the effectiveness of prediction, including prior involvement by the defendant in the criminal justice system. Some attributes may affect pretrial release decisions even though they may not be good predictors because they are important to sound pretrial release decision making; these are indicated under the "unusual circumstances" section of the guidelines. The relative probability that the defendant will commit a violent crime as opposed to a less serious offense is a key risk factor.

Philadelphia's pretrial release guidelines offer a framework for concisely compiled information that classifies defendants according to probability of flight or crime during release, weighs the stakes involved in the decision with a "seriousness" dimension, and provides for unusual circumstances that require special attention. The guidelines are in the form of a two-dimensional grid that creates 40 categories providing a suggested pretrial disposition for all offenses. The vertical axis assigns a risk score

based on the defendant's characteristics, ranging from 1 (least risk) to 4 (most risk). The horizontal axis is called the charge seriousness level (CSL) and reflects the gravity of the charged offense. The box where the risk score and the applicable CSL meet provides the suggested disposition.

This framework enables bail authorities and PTS to document the performance and impact on defendants of dispositions in each guideline category, thereby generating data that permits comparison of recent decisions for similar categories of defendants. The guidelines are designed to link to a data generation and analysis capability that allows for periodic assessment of the effectiveness of release options, thereby permitting correction of options that seem less effective than others in the category.

Selection of Pretrial Disposition. Once the guidelines have been applied to arrive at a tentative disposition, the bail authority must then assign the defendant appropriate bail to guarantee appearance and protect the community. Bail authorities should find the suggested options under the guidelines effective and appropriate in most cases. However, other information prepared by PTS pursuant to the guidelines may indicate that the appropriate disposition is more or less stringent than the disposition ordinarily applied. In such a case, the bail authority may choose a different release condition from the one indicated by the guidelines, but he or she must state reasons for the exception.

Revision of Bail Guidelines

The Advisory Committee agreed that the current guideline matrix no longer functions with acceptable efficiency and must be revised to refresh the empirical risk assessment, review the ranking of offenses, and include or reweight the CSL of new offenses. The guidelines have fallen into disuse over time. The impact assessment function has failed to become institutionalized. Formulated in 1995, the guidelines have not been refreshed to keep up with the changes in the offenses prescribed by the Crimes Code, nor has the risk element been updated to reflect the changes in life in the 21st century. For example, when the guidelines were drafted, all telephones were landline; now many defendants have cell phones, smart phones, or even disposable cell phones, no longer providing information relating to the defendant's residence. As the guidelines have become outdated and the resources to support their effectiveness have diminished, bail authorities have come to view them as less useful and credible. They frequently ignore the guidelines and resort to intuitive decision making and reliance on monetary bail that the guidelines were designed to replace or enhance. Consequently, the guidelines need to be revised to address current realities.

One member of the Subcommittee on Pretrial Release and Bail suggested that the risk assessment range must be expanded from four to ten ratings because the four scores under the risk assessment cannot properly summarize the enumerated risk criteria under Rule 523. He further proposed that the risk assessment should be expanded to mirror the prior record score ranges as used to compute sentencing ranges under the Pennsylvania sentencing guidelines. A high risk assessment score should be assigned to a defendant

who lacks ties to the community, is currently unemployed, has significant prior contract with the criminal justice system, and has demonstrated a wanton disregard for the safety of others. Numerical values for aggravating and mitigating factors should also be included.

The Advisory Committee recommends that the FJD undertake a thorough and comprehensive revision of its pretrial disposition guidelines. This task will require further research and assessment by knowledgeable observers and the participation and input of representatives of a broad array of criminal justice stakeholders. These should include current and senior Arraignment Court Magistrates, the District Attorney, the Defender Association, Pretrial Services, court administration, the Police Department, and victim representatives. In order to emphasize the importance of pretrial disposition in enhancing the effectiveness of the judicial process, this effort should be led by one or more Judges of the Court of Common Pleas.

Development of Nonmonetary Terms of Release

Whether or not monetary terms of release are used, the Advisory Committee agrees that developing and refining nonmonetary conditions of release and defining means of enforcing those conditions are essential to modernizing the pretrial disposition system. Nonmonetary conditions include monitoring, supervision, halfway houses, treatment of various sorts, veteran's court, and partial restraint, among other options. Although Philadelphia is not currently equipped to move to direct decision making, those opposing monetary conditions of release advocate that the City craft the guidelines to relegate the use of such conditions to restricted groups for whom the data suggests a high risk of flight or crime.

The development of pretrial supervisory options through testing and experimentation will increase options to control defendants on release (thereby reducing flight and crime) and provide for greater accountability. Experiments conducted in the Philadelphia courts serve as a sound basis for establishing more effective release options.[25] Moving toward a direct detention-or-release decision will improve public safety and court attendance by permitting the detention of defendants for whom no condition or combination of conditions can ensure safe release or return to court.

A major purpose of the guidelines approach is to permit careful, category-specific programming. Data will show that certain categories of defendants benefit from substance abuse treatment, thereby reducing their risk to the community. The data may also show that such an approach has proven ineffective with other groups of defendants, who instead need close monitoring and supervision. Category-specific analysis permitted by the guidelines can show where greater resources are needed, or, if the data shows good compliance with conditions, indicate categories of defendants who have been detained unnecessarily. The guidelines classification, the magistrate's reasons for disagreeing or making other suggestions, and category-specific analysis enables periodic data review,

[25] Goldkamp and White.

incremental progress, minor adjustments, and careful testing and experimentation to occur as necessary. Categorical analysis also prevents large, possibly ill-informed changes from being made on a general, anecdotal basis. When adjustments are required, the guidelines permit targeting and strategizing for safer release or detention within given categories, as opposed to a broad-brush response.

Targeting and Supervision

Perhaps the most valuable way to assure defendant compliance in the pretrial period is to monitor him or her continuously from the preliminary arraignment stage on, with the level of monitoring reflecting the nature of the risk posed. The McCaffery Report notes that about 56 percent of new defendants fail to appear if they are ordered to orientation at PTS within four days after release from preliminary arraignment.[26] In these studies, it was found that only some of these defendants appear in court in a short period of time, and most of the pretrial no-shows were classified by the guidelines as medium risk or higher.[27] Therefore, orientation is the stage at which supervision of the high-risk defendants on pretrial release should begin.

The judges of the FJD and the staff of PTS should collaborate to develop supervision strategies targeting the most common characteristics of fugitives among the defendant population. This analysis should use the guidelines to identify the highest risk categories and highest crime areas that disproportionately generate fugitives. Such strategies should focus supervisory resources where they are most needed, and link up with other resources and partners in areas with high rates of recidivism and fugitivity to reduce the risks of pretrial flight and crime posed by incoming defendants. Targeting strategies may include development of proactive measures, such as the changes to the rules for preliminary hearing described in the McCaffery Report,[28] or measures directed at other stages of criminal processing, particular courtrooms, or particular functions associated with high rates of absconding.

Effective Sanctions for Noncompliance. For several decades the culture of the streets has known that a defendant has little to worry about if a defendant simply walks away from court; this immunity from effective consequences combines with "don't snitch" to exacerbate witness intimidation. It is difficult to recommend strong and testable methods for supervision and managing defendants on pretrial release if consequences for failure to comply are negligible.[29]

Since the first major litigation on overcrowding in the City's institutions, the system has often instituted policies regarding confinement and other sanctions with little enforcement capacity. During the years of overcrowding, the pretrial release system was upended, and it was difficult to enforce the court's authority against those who wished to

[26] McCaffery Report, 31.
[27] Goldkamp and White, 160.
[28] McCaffery Report, 13-15.
[29] Ibid., 31.

ignore the law. It was widely believed, for example—and perhaps still is—that there will be no consequence to a recently arrested defendant if he or she fails to appear in court. Sufficient jail space should be reserved for defendants who have failed to comply with the court's conditional release orders to make potential scofflaws aware that confinement is a real possibility.

Administration

Notice to Victims and Witnesses. Victims and witnesses should be informed whenever the defendant is confined or released or any other changes occur in the defendant's status that may be germane to the safety of the community or of any person. A victim or witness who becomes aware of a change in circumstance regarding a defendant who poses a threat to safety should have readily accessible means to inform the court, through the District Attorney, PTS, or another responsive mechanism.

Defendant Indebtedness. "For various reasons— poor record keeping by the Clerk of Quarter Sessions, the age of most of the debt, and a 70 percent unemployment rate among defendants—a large portion of the outstanding debt [from forfeited bail] realistically will never be collected."[30] A side effect of the cash bail system that should be avoided is that defendants who forfeit bail and then are rereleased quickly find themselves overwhelmed with debt that cannot be repaid, even under a long-term repayment plan. As with other failures to meet the obligations of release, failure to repay forfeited bail should lead to strict conditions of release, unless it is likely that the bail amount can realistically be collected without subjecting the defendant to heavy long-term debt.

Training and Retention of Personnel. Once the pretrial guidelines are revised, the key users will need a brief refresher course on their purpose, preparation, and use. Implementation of the data feedback function will require special attention to ensure capture of the data needed and the use of the data as previously discussed. All employees of PTS should receive continuing education on the role of the agency and the new policies.

Without question, employee turnover in PTS is a pressing concern. The role of a PTS employee requires a significant amount of training, and the benefit of that training and experience is lost when the employee leaves the agency. The City should work to minimize employee turnover and focus on training employees to serve more effectively; it must engage PTS employees and address their reasonable salary expectations as well as possible.

[30] Ibid., 38.

OPTION OF ELIMINATING MONETARY CONDITIONS

There was a difference of opinion within the Advisory Committee as to whether the pretrial disposition system should continue to base dispositions on financial terms. Those who favor minimizing the role of cash bail argue that it does not serve as an incentive to appear in court and does not prevent crime by defendants on pretrial release (though it does offer a means for a defendant to purchase freedom).

Direct Decision Making

In the view of the Advisory Committee members who wish to transition away from cash bail, the guidelines governing the pretrial disposition should be revised to move toward a direct decision procedure. This approach focuses on two issues: (1) should the defendant be detained or released? and (2) if defendant is released, under what conditions? Direct decision implies that whether a defendant is detained or released should be determined by the actual risk of flight or crime and not by the defendant's ability to raise financial assets or by the entrepreneurial decisions of compensated corporate or private sureties. The pretrial disposition system should aim to eventually do away with monetary bail terms entirely or almost entirely, in favor of effective nonmonetary release conditions that meet the McCaffery Report criterion by "impos[ing] meaningful sanctions on those who violate the conditions of release."[31]

Advocates of elimination of monetary bail claim that direct decision making should permit improvement in safe release and court attendance. Nonmonetary bail has been implemented by the District of Columbia and Federal criminal law.[32] Best practices were developed in the American Bar Association standards on pretrial release,[33] two landmark statutes of the District of Columbia,[34] the Federal Bail Reform Act of 1984,[35] and most recently, the U.S. Attorney General's National Symposium on Pretrial Justice held May 31–June 1, 2011, in Washington, D.C.[36] Proponents of this approach maintain that it is firmly backed by criminological research and field experience.

A basic premise of direct decision is that "financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person."[37] If no other conditions of release can ensure public safety, the defendant should be detained after a due process hearing. The pretrial

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[31] Ibid., 33.
[32] The McCaffery Report references a presentation by Thomas McCaffrey, Director of Pretrial Services, Allegheny County, regarding Allegheny County's transition to a nonmonetary bail system. Ibid.
[33] *ABA Pretrial Release Standards*.
[34] D. C. Code §§ 23-1301—1309 and §§ 23-1321—1333, both enacted July 29, 1970.
[35] 18 U.S.C. §§ 3141—3156.
[36] Pretrial Justice Institute and Bureau of Justice Assistance, National Symposium on Pretrial Justice, "Summary Report of Proceedings" (Washington, D.C.: PJI, 2011). http://pretrial.org/NSPJ%20Report%202011.pdf.
[37] *ABA Pretrial Release Standards*, Standard 10-5.3 (b).

disposition should determine whether a defendant poses a threat and, if so, what kind of threat—not how much he or she can afford to pay. "Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. *The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.*"[38] (This is directly contrary to the way most state jurisdictions handle bail.) Under the traditional cash bail system, a majority of the confined defendants are poor or members of racial or ethnic minorities. In order to reduce this apparent discrimination, pretrial disposition should rely on effective nonmonetary conditions of release.

Stuart H. Shuman, Chief of the Municipal Court Unit for the Defender Association of Philadelphia observes that indigent defendants often face excessive bail requirements. This is largely due to the rapid processing of preliminary arraignments.

> The typical bail arraignment in Philadelphia is very brief, usually lasting no longer than a minute or two. Considering that the magistrate must read the charges, assure that the defendant has counsel, and set a court date, very little time remains for an in-depth consideration of the wide range of factors relevant to a fair bail determination. As a result, it is hardly surprising that magistrates set bail above—and often dramatically above—the bail guidelines in approximately 40-50% of the cases. Additionally, arraignments in Philadelphia are done by video. Although video has the efficiency benefit of decreasing arrest-arraignment delay time (Philadelphia's arrest-arraignment delay time has for many years been 16-20 hours which is excellent), the out of sight–out of mind presence of the video defendant does not allow for the personal interaction between the defendant and bail magistrate, which is so important to a fair and accurate bail decision.[39]

Mr. Shuman adds that bail amounts will be further increased by the FJD's interim bail guidelines, which mandate a cost of living adjustment to the standard bail amounts. Alternatives to cash bail remain unavailable in the City's Arraignment Courts.[40]

The pretrial release guidelines should replace the traditional "bond schedules"—pricing bail release per offense—with a more comprehensive approach to assessment of defendants in formulating release options. Although both the traditional approach and the more current pretrial release matrix include a charge seriousness dimension, the latter provides much more than a ranking of the cost of release for types of offenses. (In fact, the seriousness of the current charge is not a straightforward predictor of a defendant's probable behavior, though it is certainly relevant to pretrial disposition.) Sound guidelines provide risk and related information germane to safe

[38] Ibid., Standard 10.5-5.3 (a) (emphasis supplied).
[39] Memo to Commission staff from Stuart H. Shuman, September 24, 2012.
[40] Ibid.

release and represent a more sophisticated classification of defendants according to their risks, while respecting due process for the accused and giving public safety a high priority.

For defendants who can be released, direct decision prescribes that the bail authority impose conditions that will ensure that the risks of flight and crime can be neutralized, while permitting the defendant to remain in the community awaiting trial. In short, defendants are either released or held, and if released, carefully chosen conditions of release are imposed. If no release condition or combination of conditions can be identified at the hearing to ensure the defendant's appearance in court and to protect the community or specific persons from threat of danger, the bail authority determines that the defendant shall be held, at least until new information convinces him or her that safe arrangements for release can be identified.

Effectiveness of Cash Bail

Cash Bail and the FTA Rate. The ABA Standards and bail reform legislation are based on the premise that manipulation of cash bail amounts has little empirical connection with preventing pretrial crime. Opponents of monetary conditions claim that bail research fails to support the ability of cash bail to safeguard against either flight or crime. For this reason, the more advanced laws and standards prohibit the detention of defendants on the grounds that they cannot pay a given amount of cash bail. In the view of bail reform supporters, cash bail permits the purchase of freedom by the type of defendant who may pose a high risk and should not be released at all (e.g., drug and gun dealers), merely because he or she has access to funds.

The first-hand testimony before the Advisory Committee of the administrators of the Washington, D.C. system of supervised release without monetary bail evidences that their system provides a lower FTA rate (viz., twelve percent) than any other state or local system in the nation, including those that rely on private bail sureties.[41] This supplies a basis for concluding that the Washington D.C. program can lower the FTA rates better than private bail. However, the D.C. program costs about $58 million per year[42] for a city with less than half the population of Philadelphia.[43] Bail reform proponents concede that the current PTS system has failed, but attribute the failure to underfunding.

Cash Bail as Preventive Detention. Cash bail has also been criticized for effecting a defendant's detention in a devious manner because the bail authority can set bail at an amount the defendant will be unable to afford. Such a defendant will be incarcerated unless he or she is able to meet bail through compensated sureties or elsewhere. Theoretically, judges should not need to effect detention by setting unobtainable bail.

[41] Remarks of Clifford T. Keenan, Director, Pretrial Services Agency for the District of Columbia, meeting of SR 344 Subcommittee on Pretrial Release and Bail, April 20, 2011.
[42] Mr. Keenan said the budget for Washington's PTS agency was "in the high 50s."
[43] The amount required for Philadelphia to spend as much per capita on pretrial services as Washington, D.C. is about $144 million, based on population figures for 2011.

Starting with the federal Bail Reform Act of 1984,[44] bail authorities across the U.S. were given the discretion to take the safety of the community into account in determining whether a defendant is detained or released.[45] This principle was included in article I, § 14 of the Pennsylvania Constitution by a 1998 amendment making an exception to the right to bail where "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community . . ." An amendment enacted in 2009 added parallel language to the statutory law.[46] Nevertheless, the use of high bail amounts to detain defendants thought to be high risks for flight or crime remains a common practice in Philadelphia and elsewhere in the U.S. "This is so, . . . because the procedural requirements to hold defendants without bail are viewed as being too cumbersome, and it is easier to just set a high bail and hope that the defendant doesn't post it."[47] Detention through high bail avoids holding the evidentiary hearing required to establish the risk of flight or crime as a basis for the direct decision to detain.

Transition to Nonmonetary System

In view of the lack of funds and the resulting impracticality of moving to a direct detain-or-release approach, even those who wish to eliminate financial conditions of release recognize that they will continue to play a significant role in the City's criminal justice system, at least in the near term. In moving from the current system toward their eventual ideal of direct decision making without monetary bail, the guidelines should recommend targeted use of monetary bail in various categories. At the same time the guideline revision should address the real or alleged problems cash bail has presented, such as discrimination, corruption, poor financial management, due process violations for those subject to restrictive conditions, and emphasis on revenue collection for courts and bail sureties.

Opponents of private bail recommend that the pretrial disposition system should aim to greatly reduce or do away entirely with monetary bail terms in favor of effective nonmonetary release conditions that impose meaningful sanctions on those who violate the conditions of release. If no other conditions of release can ensure public safety, the defendant should be detained after a due process hearing. Depending on the circumstances of the case, the response to a defendant's failure to meet the obligations of release should be the imposition of more restrictive conditions of release, including bail revocation or pretrial incarceration.

[44] 18 U.S.C. §§ 3141-3156. The use of public safety as a criterion for determining whether a defendant is released was upheld in *U.S. v. Salerno*, 481 U.S. 739 (1987).
[45] *ABA Pretrial Release Standards*, 37.
[46] Act of August 27, 2009 (P.L.376, No.39), amending 42 Pa.C.S. § 5701.
[47] Pretrial Justice Institute and Bureau of Justice Assistance, National Symposium on Pretrial Justice, "Summary Report," 15 (remarks of Prof. Stephen A. Saltzburg).

OPTION OF RETAINING MONETARY CONDITIONS

Effectiveness of Cash Bail

Some members of the Advisory Committee believe that monetary conditions are needed to ensure appearance in court of some defendants. Considering the volume of cases in Philadelphia (or any county with a population large enough to justify a pretrial services agency), it is evident to them that there is a role for private bail sureties. Bail sureties have been actively and constructively involved in the other courts of Pennsylvania. But, as with other professions, a few undesirable practitioners have created a negative stereotype. Unlike the bail bondsman of yesteryear, today's surety is usually a professional person more akin to a corporate insurance agent than a gun-wielding cowboy focused only on making money at the defendant's expense.

Despite 50 years of vigorous advocacy for the elimination of monetary terms of release by the ABA and most of the legal academy, the pretrial disposition system in most U.S. jurisdictions continues to rely heavily on surety bail.[48] In the 75 U.S. counties with the largest populations, surety bail accounted for about 41 percent of pretrial releases in 2006 (up from 25 percent in 1992), and ROR accounts for 30 percent (down from 40 percent in 1992). Conditional release has remained steady at about 18 percent from 1990 through 2006.[49]

Proponents of commercial bail argue that heavy reliance on nonmonetary conditions of release and the elimination of commercial bail leads to higher rates of FTA and fugitivity.

> [C]ompared with surety release, the FTA rate is approximately 18 percent higher under cash bond, 33 percent higher under deposit bond, and more than 50 percent higher under own recognizance. [50]

> [S]tates that ban commercial bail pay a high price. We estimate that FTA rates are 7-8 percentage points, or approximately 30 percent, higher for individuals released on deposit or own recognizance than if the same individuals were released on surety bond. . . . [W]e find that cash bond is about as effective as surety bond in controlling FTA rates. The fugitive rate conditional on FTA[51] is much higher under own recognizance, deposit, or cash release than under surety—higher by some 15, 20, and 36 percentage points, or 78, 85, and 93 percent, respectively . . . .[52]

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[48] Ibid., 10.
[49] National Conference of State Legislatures (NCSL), "Bailing Out," *State Legislatures* (December 2010), 6.
[50] Eric Helland and Alexander Tabarrok, "The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping" *Journal of Law and Economics* 47: 93-122 (2004), 103.
[51] This term appears to refer to the rate of defendants who FTA and remain at large for at least one year.
[52] Helland and Tabarrok, "The Fugitive," 114.

Although proponents of a nonmonetary system argue that a direct decision model should do away with financial terms of release, direct decision need not be incompatible with financial terms of release. If the bail authority determines that the defendant is eligible for release, then the conditions of release, including financial terms of release, must be appropriately assessed. While opponents of cash bail argue that setting cash bail at an amount estimated to be unaffordable for the defendant is common practice in a system employing financial conditions of release, doing so is unconstitutional, and an aggrieved defendant may move for a reduction in bail when such an abuse occurs.[53]

Commercial Bail

Closely related to the debate about the justice and usefulness of monetary terms of release is the issue of whether private or commercial bail agents and bail bondsmen have any useful place in the enforcement of bail. The Advisory Committee was sharply divided on whether private bail sureties have a legitimate permanent role in the administration of pretrial release in the FJD. The issue of whether private bail will have a significant role has been resolved for the time being by the FJD's liberalization of entry requirements for private bail sureties. Proponents of private bail proposed that private bail sureties should be an option used for suitable cases, not that it should replace PTS. Table 1 summarizes some points in the debate on the role of private bail sureties.

Those supporting the use of private bail sureties argue that private bail sureties offer closer supervision of released defendants than government funded pretrial services agencies, thereby reducing the number of FTAs. The usefulness of the private bail industry is supported by the high number of fugitives in jurisdictions like Chicago, which rely heavily on deposit bail and pretrial supervision through the courts. Commercial bail agents claim that their system is superior to PTS in minimizing FTAs and fugitivity.

> The answer as to why corporate surety bail works better than any other form of pretrial release is really quite simple: by integrating family and friends into the "circle of responsibility," as guarantors on the bond, the corporate surety bail process sufficiently "invests"—and, thus, instills financial incentive in—those guarantors, as well as the defendant and bail agent, to assure that the defendant appears, as required and, if he does FTA, there is active and concerted pursuit of the defendant until he is located and returned to the Court's jurisdiction. Moreover, the willingness on the part of certain sureties and their bail agents to partially finance the payment of the premium charged on the bail bond often enables defendants (who are presumed innocent) to be released sooner, allowing

[53] *Stack v. Boyle*, 342 U.S. 1, 4 -6 (1951); *United States v. Salerno*, 481 U.S. 739, 754 (1987).

Table 1

PROS AND CONS OF COMMERCIAL BAIL[54]

Issue	Proponents	Opponents
Jail Crowding	Reduces jail population by providing a means for defendants to obtain pretrial release.	Increases jail population because indigent defendants cannot afford commercial bail services. Others are denied private bail because they are seen as flight risk.
Private Enterprise	Provides pretrial release and monitoring services at no cost to taxpayers.	A private, for-profit entity should not be involved in the detention/release decision process.
Performance Incentives	Creates an incentive that results in the majority of defendants being returned to court because the bail agent is liable for defendants who fail to appear.	Bail agents do not always have their bonds forfeited or actively pursue absconders.
Value of Service	Provides the opportunity for many defendants to secure their freedom while awaiting disposition of their case.	The fee and collateral are typically more than indigent defendants can afford. Defendants who have the money would be better off spending it on legal representation.

[54] Bureau of Justice Statistics (Thomas H. Cohen and Brian A. Reaves), "Pretrial Release of Felony Defendants in State Courts" (BJS, November 2007, revised January 17, 2008), 4.

> them to return to their families and perhaps back to gainful employment. Finally, many sureties and their bail agents use electronic monitoring, including global positioning satellite devices, particularly in connection with large bonds.[55]

Opponents of private bail refer to the widely publicized history of corruption associated with private bail sureties that led to the complete prohibition of the private bail surety business in Philadelphia. They also argue that it is unjust to make a defendant's freedom depend on his or her financial resources.

Those who support commercial bail claim that bail bond agents are significantly more effective in addressing flight and fugitivity (the latter defined as flight over a period of one year or more) than public pretrial service agencies. Only four states (Illinois, Kentucky, Oregon, and Wisconsin) have actually outlawed commercial bail.[56] In a peer-reviewed study, economists Helland and Tabarrok claim that "the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods." They attribute this result in part to selection of defendants less likely to skip bail, but also due to measures at bondsmen's disposal to "create appropriate incentives for borrowers." In order to keep the defendant out of jail, family members and friends of the defendant cosign his or her bail bonds, which makes them liable if the defendant fails to appear; these associates thus have an incentive to make sure the defendant appears. Bail sureties refer to this involvement of the defendant's associates as a "circle of responsibility." "If hardened criminals do not fear the law, they may yet fear their mother's wrath should the bond dealer take possession of their mother's home because they fail to show up for trial." [57] Bond agents monitor defendants and remind them and cosigners on their bonds of trial dates. If defendant FTAs, sureties generally have 90-180 days to track down the defendant or face forfeiture of their surety bond. Bondsmen have ways of bringing obligees to justice:

> Bond dealers and their agents have powerful legal rights over any defendant who fails to appear, rights that exceed those of the public police. Bail enforcement agents, for example, have the right to break into a defendant's home without a warrant, make arrests using all necessary

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[55] Brian J. Frank, "Improving the Philadelphia County Bail System: Proposals for Statutes, Court Rules, and Protocols," Testimony submitted to Pennsylvania Senate Judiciary Committee, August 9, 2010.

[56] National Conference of State Legislatures (NCSL), "Bailing Out," *State Legislatures* (December 2010), 6.

[57] Helland and Tabarrok, "The Fugitive," 97. For other evaluations of the performance of private bail sureties, see Thomas H. Cohen, "Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention" (June 2, 2008), Third Annual Conference on Empirical Legal Studies Papers, available at SSRN: http://ssm.com/abstract=1130964 or http://dx.doi.org/10.2139/ssm.1130964; David E. Krahl and New Direction Strategies, "An Analysis of the Financial Impact of Surety Bonding on Aggregate and Average Detention Costs and Cost Savings in the State of Florida for 2010 by a Single Florida Insurance Company: Continuities from Earlier Research and Extensions in the Development and Utilization of Statistical Models to Determine the Utility and Effectiveness of Surety Bonding" (June 2011) http://www.asc-usi.com/userfiles/BailResources/Dr.%20Krahl%20-%20Special%20Report%202010.pdf.

> force including deadly force if needed, temporarily imprison defendants, and pursue and return a defendant across state lines without the necessity of entering into an extradition process.[58]

Bond agents use information about the defendant collected as part of the bond approval process, as well as contacts and investigative techniques useful in locating missing persons. But their biggest advantage over public agencies is that they have more time and smaller caseloads. In many jurisdictions around the U.S., the backload of arrest warrants has become so overwhelming that police agencies "have largely abandoned their job of serving warrants in all but the most serious cases."[59]

The proponents of commercial bail claim that because of the activity of private bail sureties, surety bail performs better than deposit bail in discouraging FTA and fugitivity. For state court felony defendants in the 75 largest population counties during 1990-2004, the FTA rate was about 20 percent lower for surety bonds as against deposit bond (18 percent vs. 22 percent, respectively), and the fugitivity rate was less than half (3 percent vs. 7 percent, respectively).[60] While the twelve percent FTA rate for Washington, D.C.'s well-funded PTS system is better than other public systems, a commercial bail company could not function at that rate.[61]

Other Advantages of Private Bail. Supporters of private bail sureties point out that sureties do not play a role in the release decision making process, nor does their practice disadvantage the indigent. Private bail sureties serve as a risk management tool, once the court determines that the defendant should be released subject to a financial condition. The court weighs the risk presented by the defendant and imposes the conditions of release without any involvement by the private bail surety. Only after the decision is made by the court does the private bail surety become involved to assist a defendant, otherwise unable to afford bail, to obtain sufficient means to secure his or her freedom. Private bail sureties have adopted payment plans and similar mechanisms to help the defendant or the family finance pretrial release. A defendant who is unable to afford even the deposit amount on a deposit bond may be able to secure release through a private bail surety.

Arguments for Abolishing Private Bail Sureties. The ABA's Standards for Pretrial Release recommend that "compensated sureties should be abolished."[62] The comment to the applicable Standard states the bill of particulars:

> There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail

[58] Helland and Tabarrok, "The Fugitive," 97.
[59] Ibid., 99 (quotation marks omitted).
[60] Bureau of Justice Statistics (Cohen and Reaves), 9.
[61] E-mail from Brian J. Frank to Commission staff, September 6, 2012.
[62] *ABA Pretrial Release Standards*, Standard 10-1.4(f), p. 42.

> bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks—based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, the decisions of bondsmen—including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond—are made in secret, without any record for the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the nonrefundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsmen's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.[63]

The ABA Task Force on Pretrial Release did not include any representatives from the commercial bail industry.[64]

Supporters of private bail cite the Helland and Tabarrok study in support of two propositions: (1) that private bail agents have a significantly better record than public agencies of apprehending fugitives who have failed to appear for trial or other significant court appearances; and (2) that "defendants released via surety bonds have lower [FTA] rates than defendants released under other methods."[65] These conclusions are likely correct as far as the study goes—particularly in light of the small commitment made by local police agencies to capturing fugitives. However, the Helland and Tabarrok study does not compare the FTA rates of defendants under private surety bond with the FTA rates under a supervised pretrial release system that uses direct decision, real supervision, and nonmonetary conditions for released defendants. Instead, this study compares FTA rates for private sureties against an amalgam of ROR releases, deposit bail systems, and cash bond systems. The authors admit that they "classif[ied] supervised release with own recognizance."[66] As the authors themselves point out, RORs make up the largest percentage of this amalgam, and to include them in the comparison group with defendants under bond biases the study against supervised release, since RORs are generally minor offenders with the least incentive to show up for trial and have little or no supervision. Therefore, the study gives no real basis of comparison of the FTA rates between supervised release as opposed to surety bonds.

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[63] Ibid., 45.
[64] See ibid., vii, viii.
[65] Helland and Tabarrok, "The Fugitive," 96.
[66] Ibid., 102.

Administration of Private Bail

Licensure. The FJD has required bail sureties to maintain deposit accounts with the court to assure sufficient collateral to cover their liability on the bail bonds the surety holds. These conditions should be sufficient to guarantee that bail sureties who assist the court in administering the bail system will be responsible and accountable, but they should not be so excessive as to discourage responsible sureties from entering the Philadelphia market. Until April 2012, the $250,000 deposit with the court that was required in the City, combined with the condition that the deposit amount entitled the surety company to write bonds for only four times the deposit amount, discouraged many potential sureties from entering the City's market. To open that market, the conditions for entry have been liberalized by reducing the initial deposit to $100,000 and increasing the amounts the surety is authorized to write bail to $1 million; $5 million of bail is authorized for each additional incremental deposit of $200,000. Under current law, all bail agents who are supported by corporate sureties must be licensed by the Insurance Department.[67]

Regulation. Advisory Committee member Brian J. Frank outlined a regulatory scheme for the commercial bail industry in testimony before the Senate Judiciary Committee. This program included the following points:

- Reliance on clear, bright line rules
- Diligent and equal enforcement of statutes, court rules, and protocols
- Surety is liable only for FTA, not for defendant's breach of other conditions
- Court must notify the bail agent of all appearances required of defendant
- Bail agent should have a defined time period of at least 90 days to return an FTA to court without forfeiture
- No forfeiture of the bond if the surety's failure to perform is justified by defined circumstances, such as incarceration, deportation, or death of the defendant
- Forfeiture is remitted to the surety if forfeiture is timely made and circumstances that would justify failure to perform occur within two years of payment of the forfeiture[68]

[67] 42 Pa.C.S. § 5742(a).

[68] Brian J. Frank, "Improving the Philadelphia County Bail System: Proposals for Statutes, Court Rules, and Protocols," Testimony submitted to Pennsylvania Senate Judiciary Committee, August 9, 2010.

Forfeiture of Surety Bond. Monetary bail terms imposed on a defendant become enforceable only if the defendant violates bail. Under current practice, bail forfeiture is referred to the City Solicitor to address at his or her discretion, and bail is litigated in civil court. It may be worth considering whether this process can be better handled in criminal court by the District Attorney.

The determination of when bail should be forfeited is within the discretion of the trial court. The initial determination may be overturned for abuse of discretion where the trial court "misapplied the law, exercised manifestly unreasonable judgment, or acted on the basis of bias, partiality, or ill-will to [the appellant's] detriment."[69] The Superior Court has formulated the following test for forfeiture of a surety bond after a defendant breaches his or her obligations:

> When a defendant breaches a bail bond, without a justifiable excuse, and the government is prejudiced in any manner, the forfeiture should be enforced unless justice requires otherwise. When considering whether or not justice requires the enforcement of a forfeiture, a court must look at several factors, including 1) the willfulness of the defendant's breach of the bond, 2) the cost, inconvenience and prejudice suffered by the government, and 3) any explanation or mitigating factors.[70]

The surety may contest the forfeiture on the grounds that it fails to meet this test, or may petition for "exoneration, set-aside, or remission by the court." If the defendant is returned to the court, the surety may obtain remission of the forfeiture, but "[t]he apprehension or return of the defendant must be effected by the efforts of the bondsman, or those efforts must at least have a substantial impact on the apprehension and return." "Mere participation in the search for the defendant is not enough."[71]

Procedure for FTAs. In order to minimize issuance of bench warrants for defendants who are merely tardy, commercial bail proponents suggest that the court defer issuing bench warrants until the close of the call of the list of matters before it. The court should determine whether a violation occurred and, if so, issue a bench warrant. Within 90 days after the bench warrant is issued or a new arrest takes place, the defendant should be required to appear for a second bail hearing, accompanied by his counsel or surety. If the violation was minimal, terms of bail should be reinstated and the defendant released. However, if the violation was significant, as where a defendant cannot be found, the bail should be revoked and the funds collected pursuant to Pa.R.Crim.P. 536. This process accommodates both the due process rights of the defendant and the interests of law enforcement. (Whether bail monies should be remitted following forfeiture if the defendant is returned shortly after the second bail hearing is a close question. Many

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[69] *Commonwealth v. Hernandez*, 886 A.2d 231, 235 (Pa. Super. Ct. 2005), appeal denied, 899 A.2d 1122 (Pa. 2006); *Commonwealth v. Riley*, 946 A.2d 696, 698 (Pa. Super. Ct. 2008).

[70] *Commonwealth v. Mayfield*, 827 A.2d 462, 468 (Pa. Super. Ct. 2003). See also Pa.R.Crim.P. 536.

[71] *Riley*, 700 (surety apprehended the defendant, remission of forfeiture ordered). See also *Hernandez* (surety failed to apprehend the defendant, remission denied).

jurisdictions permit the return of funds if the defendant is returned within one year. This issue is not addressed in this report but is noted for discussion by the Supreme Court or the General Assembly.)

McCAFFERY REPORT RECOMMENDATIONS

The McCaffery Report has made the following recommendations[72] with regard to pretrial release and bail:

- Authorize more aggressive use of trial in absentia through amendments to Pa.R.Crim.P. 526 and 602.

- PTS should be allocated funding to conduct a cost-benefit study of (1) expanding pretrial release options based on risk posed by defendant and (2) using an exclusively noncash bail system.

- The court should establish "meaningful, swift, and certain responses" to violations of release requirements.

- The court should develop benchmarks for measuring effectiveness in assuring defendants' appearance and for quantifying the impact of reforms, especially trial in absentia.

SR 344 ADVISORY COMMITTEE RECOMMENDATIONS

1. Revision of Bail Guidelines

The guidelines and procedures governing pretrial release should be revised to more closely reflect the aims of the bail process and use the least restrictive means that is appropriate. The current guideline matrix in Philadelphia no longer functions with acceptable efficiency and must be revised to refresh the empirical risk tool, review the ranking of offenses, include new offenses, and reweight the seriousness of older offenses. This should be accomplished through further research and assessment and a review process that includes representatives of a broad array of criminal justice stakeholders.

[72] McCaffery Report, 40-42.

2. Development of Nonmonetary Terms of Release

Whether or not monetary terms of release are used, the City should develop, test, and refine nonmonetary conditions of release and define the means of enforcing those conditions. Nonmonetary conditions include monitoring, supervision, halfway houses, treatments of various sorts, veteran's court, and partial restraint, among other options. The emphasis should be on the development and refinement of category-specific conditions. The City should expand the availability and use of nonmonetary conditions.

3. Development of Supervision Strategies

The courts of the FJD should collaborate with the Pretrial Services Division (PTS) to develop strategies that target the most common characteristics of those who fail to appear and fugitives among the defendant population. Such strategies can draw from an analysis using the guidelines to identify and respond to the highest risk categories and the highest crime areas that disproportionately generate failures to appear and fugitives.

4. Enforcement Capacity

The pretrial disposition system should ensure that enforcement capacity is available to apply appropriate sanctions to those who fail to comply with court orders. Before resorting to incarceration, less restrictive sanctions should be employed, such as intensified supervision and monitoring. To the extent these responses are insufficient, there must be enough available jail capacity that defendants will be incarcerated pending trial if they defy court orders that are backed by that sanction.

5. Notice to Victims and Witnesses

Victims and witnesses should be informed whenever the defendant is confined or released or any other changes occur in the defendant's status that may be germane to the safety of the community or of any person. Victims and witnesses should be afforded readily accessible means to inform the court, through the District Attorney, PTS, or another responsive mechanism.

6. Training

All employees of PTS should receive continuing education and training focusing on the role of the agency and new policies.

7. Retention of PTS Staff

The City should work to minimize employee turnover within PTS. Engaging employees and addressing reasonable salary expectations is an immediate need that must be addressed as well as possible within current budget constraints.

8. Monetary Conditions of Release

The court should adopt a modified version of the direct decision model. Based on the assessed risk presented by the defendant, the bail authorities should determine whether the defendant is eligible for release and the conditions of release. If a financial condition of release is required, the bail authority should require only the bail amount that will reasonably assure defendant's appearance for all court proceedings. Therefore, in determining the financial condition of release, the bail authority should take into consideration the defendant's income and access to other funds.

9. Avoiding Excessive Indebtedness

Where monetary bail is used as a condition of release, the amount should be fixed such that forfeited bail can realistically be collected without subjecting the defendant to heavy long-term debt.

10. Potentially Dangerous Defendants

The safety of the public should be addressed only in the determination of whether the defendant should be released, because *no* conditions of release can overcome a reasonable concern that the defendant poses a substantial risk of criminal harm to the public. Defendants who present such a risk should be incarcerated pending a due process hearing.

11. Nonmonetary Conditions

In determining the conditions of release, the court should use the least restrictive condition or combination of conditions that will ensure that the defendant will appear for all court proceedings and refrain from crime pending trial. Current nonmonetary conditions practices should be improved to reflect this principle.

12. Regulating the Bail Surety Market

The deposit and multiplier required of bail surety companies should set so as to ensure both that the surety company will be penalized if it fails to conduct business responsibly and that the company can do enough business to make a reasonable profit.

13. Bench Warrants and Bail Forfeiture

In order to minimize issuance of bench warrants for defendants who are merely tardy, the court should defer issuing bench warrants until it has finished calling the day's calendar. The court should determine whether a violation occurred and, if so, issue a bench warrant. Within 90 days after the bench warrant is issued, or a new arrest takes place, the defendant should be required to appear for a second bail hearing, accompanied by his counsel or surety, if one is employed. If the violation is minimal, terms of bail should be reinstated and the defendant released. However, if the violation is significant, such as where defendant has not been found, the bail should be revoked and the forfeited funds collected.

14. Staffing Studies

In order to begin to address the most pressing needs for administrative personnel, the FJD should commission studies to ascertain the feasibility of (1) adding staff to the PTS Division to enable it to perform its tasks effectively and (2) adding enough personnel to the fugitive warrant squad in the Police Department to enable it to keep up with the apprehension of at least the FTAs charged with violent crimes. In each case the study should include an estimate of the number of personnel and the costs required.

CHAPTER FOUR
WITNESS INTIMIDATION

As referenced in Chapter Two, witness intimidation plagues the City's criminal justice system.[73] Defendants and their associates are too often able to silence victims and potential witnesses by threatening them or their families with bodily harm or murder. The inability of law enforcement to protect witnesses undermines the community's trust in the criminal justice system. As a result, witnesses often either refuse to testify or recant their testimony. If witnesses do not cooperate with law enforcement, prosecution of the case may be impossible. The problem is compounded by inadequate support for witness protection programs and the failure to prosecute and convict persons guilty of witness intimidation.

Recognizing the threat witness intimidation poses to the maintenance of the rule of law in Philadelphia, the stakeholders in the City's criminal justice system have taken important measures to address it since the publication of "Justice: Delayed, Dismissed, Denied." Perhaps the most important of these is the development of a bench book entitled "Free to Tell the Truth—Preventing and Combating Intimidation in Court: A Bench Book for Pennsylvania Judges." The bench book was compiled under the leadership of then-Common Pleas Court Judge Renée Cardwell Hughes, with the support of the Pennsylvania Commission on Crime and Delinquency and its then-Director Michael Kane. It provides an array of suggestions on how to deal with witness intimidation, with particular emphasis on techniques to counteract intimidation in the courtroom.[74]

ENCOURAGING CIVILIAN COOPERATION

Fear of reprisal for cooperating with law enforcement pervades the City's criminal justice system and its streets. The lives of victims, witnesses, and their family members are disrupted because of their role in assisting public authorities in bringing criminal suspects to justice. The Advisory Committee finds this unacceptable. Witness intimidation and the perceived lack of a solution contribute to the belief that the system is a failure. In order to successfully remedy this problem, all stakeholders, including

[73] This chapter is largely based on the report of the Subcommittee on Witness Intimidation.
[74] McCaffery Report, 47. The bench book may be found at http://www.google.com/search?q=Free+to+speak+the+truth+first+judicial+district&sourceid=ie7&rls=com.microsoft:en-US&ie=utf8&oe=utf8.

prosecutors, defense attorneys, police, probation, victim services, judges, and legislators must acknowledge that witness intimidation and fear of reprisal are serious issues in need of a solution.

Victims and witnesses fear that if they come forward, they will be called "rats" and will be ostracized within their community (and sometimes even within their own families). The Victim/Witness Services (VWS) Unit of the District Attorney's office has attempted to combat this distrust with outreach initiatives, including its "Step Up, Speak Up" campaign.

Stay-away orders[75] require the defendant and his or her associates to stay away from the victim. (They do not apply to counsel for the defendant or investigators working for defense counsel.) Such orders are not as effective as they could be, however, because police often do not know they exist or what each order specifically requires. The orders often do not appear on the police report and are not in computerized records. There is also an issue under the Confrontation Clause[76] regarding whether, or to what extent, the orders can be enforced.

A potentially powerful weapon against witness intimidation is the use of the indicting grand jury in certain circumstances to determine probable cause to bring charges against a defendant, which is currently done by a preliminary hearing. Utilizing the indicting grand jury procedure reduces the exposure of victims and witnesses to violent crime suspects before the trial. This topic is considered in more detail in Chapter Five.

CRIMINAL PENALTIES FOR WITNESS INTIMIDATION

Witness intimidation is a violation of 18 Pa.C.S. § 4952, which reads as follows:

§ 4952. Intimidation of witnesses or victims.

(a) Offense defined.—A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:

(1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.

[75] Stay-away orders are authorized by 18 Pa.C.S. § 4954. Protection from abuse (PFA) orders are enforced more effectively than stay-away orders, but PFA orders apply only in domestic abuse and sex offender cases.

[76] U.S Const. amend. VI; Pa. Const. art. I, § 9.

(2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.

(3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

(4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant.

(5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence.

(6) Absent himself from any proceeding or investigation to which he has been legally summoned.

(b) Grading.—

(1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if:

(i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.

(ii) The actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.

(iii) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim.

(iv) The actor accepts, agrees or solicits another to accept any pecuniary or other benefit to intimidate a witness or victim.

(v) The actor has suffered any prior conviction for any violation of this section or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this section if committed in this State.

(2) The offense is a felony of the first degree if a felony of the first degree or murder in the first or second degree was charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

(3) The offense is a felony of the second degree if a felony of the second degree is the most serious offense charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

(4) The offense is a felony of the third degree in any other case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

(5) Otherwise the offense is a misdemeanor of the second degree.

The Advisory Committee has no recommendation for amending this provision. However, one member argued strongly that the grading of the offense under subsection (b) was irrational because the grading of witness intimidation should be independent of

the seriousness of the underlying offense. In this member's view, witness intimidation is a very serious offense even if the underlying offense is relatively minor. Pennsylvania's statute is unusual in providing for different grades based on the underlying offense.[77]

Prosecution of Witness Intimidation

The criminal justice system must strive to create an environment of accountability by aggressively prosecuting the intimidators of victims and witnesses to violent crimes. This will increase the number of witnesses who come forward, reduce the number of unsolved crimes, and ultimately reduce the violent crime rate.

Currently, the detection, prevention, and prosecution of witness intimidation is only one of the many duties of detectives and prosecutors. As a result, witness intimidation cannot possibly receive the attention it requires. Only about 800 witness intimidation cases were prosecuted in 2008 and 2009: 412 in 2008 and 388 in 2009.

VWS has advocated for the creation of a separate Witness Intimidation Unit within the Office of the District Attorney that will enable detectives to efficiently investigate suspected cases of witness intimidation and increase the number of successful prosecutions for that offense. The unit would be headed by two prosecutors who would devote their time exclusively to witness intimidation cases.

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[77] Only four states besides Pennsylvania provide for varying the grade of witness or victim intimidation based on both the nature of the intimidating conduct and the seriousness of the offense charged: Florida (Fla. Stat. § 914.22), Maine (Me. Rev. Stat. tit. 17-A, §§ 753, 754), New Jersey (N.J. Rev. Stat. § 2C:28-5), and Virginia (Va. Code § 18.2-460).

Eleven states provide for different grades depending on the means used to intimidate the target or on repeat offenses: California (Cal. Penal Code §§ 136.1, 136.5, 136.7, 137, 140, 186.22, and 14029.5), Colorado (Colo. Rev. Stat. §§ 18-8-704, 18-8-705), Delaware (Del. Code tit. 11, §§ 3532, 3533, and 3534), Kansas (Kan. Stat. § 21-5909), Minnesota (Minn. Stat. § 609.498), New York (N.Y. Penal Law §§ 215.11, 215.12, 215.13, 215.15, 215.16, and 215.17), Nevada (Nev. Rev. Stat. §§ 199.230, 199.240, and 199.305), Ohio (Ohio Rev. Code §§ 2921.03, 2921.04), Rhode Island (R.I. Gen. Laws § 11-32-5), West Virginia (W. Va. Code § 61-5-27), and Wisconsin (Wis. Stat. §§ 940.42—940.45).

Five states provide for differential grading based on the seriousness of the underlying offense: Louisiana (La. Rev. Stat. § 14:129.1), Maryland (Md. Crim. Law Code § 9-302), Missouri (Mo. Rev. Stat. § 575.270), New Hampshire (N.H. Rev. Stat. §§ 642:3, 642:10), and Texas (Tex. Penal Code § 36.05).

The remaining 30 jurisdictions provide for only one grade for the offense: Alabama (Ala. Code § 13A-10-123), Alaska (Alaska Stat. § 11.14.530), Arizona (Ariz. Rev. Stat. § 13-2802), Arkansas (Ark. Code §§ 5-53-109, 5-53-114), Connecticut (Conn. Gen. Stat. § 53a-151a), District of Columbia (D.C. Code § 22-722), Georgia (Ga. Code § 16-10-93), Hawaii (Haw. Rev. Stat. §§ 710-1071), Idaho (Idaho Code § 18-2604), Illinois (720 Ill. Comp. Stat. §§ 5/32-4(b)), Indiana (Ind. Code § 35-44-3-4), Iowa (Iowa Code § 720.4), Kentucky (Ky. Rev. Stat. § 524.040), Massachusetts (Mass. Gen. Laws ch. 268, § 13B), Michigan (Mich. Comp. Laws § 750.122), Mississippi (Miss. Code § 97-9-113), Montana (Mont. Code § 45-7-206), Nebraska (Neb. Rev. Stat. § 28-919), New Mexico (N.M. Stat. § 30-24-3), North Carolina (N.C. Gen. Stat. § 14-226), North Dakota (N.D. Cent. Code §§ 12.1-09-01, 12.1-09-02), Oklahoma (Okla. Stat. tit. 21, § 455), Oregon (Or. Rev. Stat. § 162.285), South Carolina (S.C. Code § 16-9-340), South Dakota (S.D. Codified Laws § 22-11-19), Tennessee (Tenn. Code § 39-16-507), Utah (Utah Code § 76-8-508), Vermont (Vt. Stat. tit. 13, § 3015), Washington (Wash. Rev. Code § 9A.72.110), and Wyoming (Wyo. Stat. 6-5-305).

The Advisory Committee recommends that the District Attorney establish such a Witness Intimidation Unit. After consulting with persons familiar with the organizational structure of the District Attorney's Office, the Advisory Committee suggests that Philadelphia's Witness Intimidation Unit should be staffed as follows:

- Two prosecutors (at $60,000 per year each)
- Two detectives (at $50,000 per year each)
- One victim advocate (at $45,000 per year)
- One social worker (at $45,000 per year)
- One paralegal (at $40,000 per year)
- One administrative assistant (at $40,000 per year)

RELOCATION ASSISTANCE

Purpose. On September 5, 2006, then-Attorney General Tom Corbett sent a letter to Philadelphia VWS recounting the creation of the statewide Witness Relocation Program in 2002 and describing its scope and function:

> This program enables law enforcement throughout the Commonwealth of Pennsylvania to relocate witnesses and their immediate family members, either temporarily or permanently, to other areas to ensure their safety pending their testimony in felony criminal cases. This program acknowledges the value of witnesses in making an arrest or convicting a violent criminal. Witnesses need to know that law enforcement will do everything possible to ensure their safety, which includes a new place to live.

Mr. Corbett further remarked that, "This program will help [law enforcement] encourage witnesses to come forward and put violent criminals behind bars."[78]

Under our current system, VWS is able to assist in relocating a small number of witnesses. This alone has not and will not stop witness intimidation. There is also a need to improve trust and communication between law enforcement and the community. This becomes increasingly evident when we look at jury participation and victim and witness cooperation (or the lack thereof) in all three categories. As long as there is crime, there will be a need to protect victims and witnesses. VWS struggles with the citizenry's lack

[78] Letter from Attorney General Tom Corbett to Victim/Witness Services, Philadelphia, September 5, 2006.

of knowledge about the criminal justice system. Witnesses who volunteer information to authorities often do not know about the resources available to assist them. It is therefore necessary to educate the public about those services.

Relocating witnesses and addressing the issues that surround relocation are key components of the system's crime reduction efforts. Protecting the security of crime victims and witnesses is vitally important. In the most serious situations, victim relocation is key to ensuring safety. Victims and witnesses are the unwilling participants of the justice system—none have asked to be victimized or to witness a violent crime. Having been victimized, or having witnessed such a crime, though, makes them vulnerable. Testifying in court can be worrisome, but the biggest fear is being victimized again by the same criminal offender trying to prevent the witness's testimony.

Structure. Three levels of relocation assistance are provided by VWS: emergency, short-term, and permanent.[79] When a victim or other witness offers to testify under threat of retaliation by the perpetrator or the community, VWS writes a report, which includes an evaluation and investigation of the threat. Relocation assistance is only available to people under "imminent threat," which is a very strict standard because the agency lacks the funding to aid in less urgent cases. Short-term relocation assistance covers up to four months of expenses, including moving and storage expenses, a security deposit or advance rent to private housing, and assistance in finding a new job.[80] The time limit on assistance leaves victims or witnesses to fend for themselves from the cutoff date through the trial. With the resources available, VWS can offer permanent assistance to 90-100 people per year, at a cost of $10,000-$11,000 per case, about one-fourth of what the federal government provides for relocation assistance. VWS makes every effort to connect people to appropriate services if they do not meet the "imminent danger" test. VWS has discussed financing its program through drug forfeitures or private contributions from corporate donors (including sports teams) and foundations, but these ideas are still in the planning stage.

The transition housing voucher program is offered through HUD and provides a section 8 voucher paid directly to private landlords, redeemable up to two years after issuance and valid anywhere in the continental U.S. (A victim or witness cannot be provided with a lifetime voucher, because that would constitute an illegal benefit in exchange for testimony.) There have been discussions with HUD to provide 25 to 50 such vouchers per year. VWS has also worked with the Federal Department of Justice's Office for Victims of Crime (OVC) to receive federal assistance. OVC emphasizes collaboration between cities and is attempting to formulate a best practices

[79] The information in this section was provided by Tami Levin, Director of VWS, who served on the SR 344 Advisory Committee, and Leland Kent, Executive Director, Victim, Witness, and Neighborhood Services. Both are officials of the District Attorney's Office.

[80] Victims or witnesses who wish to permanently relocate to another city in response to intimidation must do so on their own, unless they receive a section 8 subsidy from the U.S. Department of Housing and Urban Development (HUD). Relocation to another city is often necessary because the victim or witness is likely to be subject to retaliation if moved from one part of Philadelphia to another.

model. VWS might be able to work with HUD and corresponding offices in other East Coast cities (e.g., Boston, Atlanta, Brooklyn, and Pittsburgh) to enhance the transitional housing program.[81]

A useful resource for individuals and families affected by crime in the Commonwealth is the Victim Witness Services Fund.[82] It provides financial assistance for medical and counseling services, loss of earnings, and funeral expenses, among other things. However, the fund's operational rules require even indigent clients to advance their own money and await reimbursement.

Resources. VWS has always been hampered by a lack of resources. Table 2 shows the Commonwealth's appropriation for victim and witness services, most of which was used by the City's agency. For FY 2011-12, VWS received approximately $1,000,000 in funding: $800,000 from the Commonwealth and approximately $200,000 from Philadelphia. The City's appropriation does not represent additional funds; rather, it offsets a cut of the same amount in the state appropriation for VWS.

Current funding for service provision to victims has been cut. State funding for procedural services for victims of juvenile offenders (VOJO) was eliminated in the 2011-12 budget and then reinstated in the 2012-13 budget, but reduced by more than 50%. The state funding for procedural services for victims of adult offenders (RASA) has sustained a 20% cut, and federal funding for provision of direct services to crime victims through nonprofit agencies (VOCA) has been steadily decreasing: a 9% cut in FY 2012-13 and an anticipated 15% cut in FY 2013-14. The Victims' Compensation Assistance Program (VCAP) has sustained an almost 70% decrease in annual revenue since 2007.

Advisory Committee Analysis. The Advisory Committee suggests that the current amount of $1.1 million in the Attorney General's budget for the entire Commonwealth, and the partnership between the Attorney General and the counties be maintained, but this program and the monies allocated to it are insufficient to address the overwhelming need in Philadelphia alone.

The Subcommittee on Witness Intimidation discussed a suggestion to permit victims and witnesses to collect relocation expenses by billing VCAP directly. (At present, clients must advance monies to the providers and await reimbursement, or the provider can provide service and await payment directly from the fund.) It was determined however, that regardless of whether payments are allowed prior to or after service, declining revenue and the eligibility and financial payout limits constrain this fund as a viable option to cover all relocation expenses.

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[81] This description of the VWS relocation program was provided by Ms. Levin and Leland Kent to the witness intimidation subcommittee on April 28 and May 6, 2011.

[82] The Crime Victim's Compensation Fund and the Victim Witness Services Fund are established by § 1101(b) of the act of November 24, 1998 (P.L.882, No.111), known as the Crime Victims Act; 18 P.S. § 11.1101(b).

Table 2

COMMONWEALTH STATEWIDE APPROPRIATIONS FOR WITNESS RELOCATION SERVICES

Fiscal year	Source	Line items	Amount
2008-09	Act 38A of 2008, § 204	Witness relocation programs	$437,000
		Violence reduction witness relocation program	556,000
		Total	993,000
2009-10	Act 1A of 2009, § 204	Witness relocation programs	428,000
		Violence reduction witness relocation program	545,000
		Total	973,000
2010-11	Act 1A of 2010, § 204	Witness relocation programs	717,000
		Violence reduction witness relocation program	476,000
		Total	1,193,000
2011-12	Act 1A of 2011, § 204	Witness relocation programs	1,133,000
2012-13	Act 9A of 2012, § 204	Witness relocation programs	1,099,000

Supplemental funding for VWS beyond the Attorney General's program is absolutely necessary in order to ensure justice for individual crime victims and for the safety and survival of the community at large by ensuring the safety of witnesses and victims (including relocation). To prosecute witness intimidation and related offenses effectively, an additional amount of about $400,000 would be necessary for the creation of the prosecution team as specified on p. 57.

COURTROOM SECURITY

Much of the intimidation of victims and witnesses occurs in the courtroom, and they will not cooperate if they do not feel secure there, but security in the City's courtrooms is difficult to establish and maintain. The largest problems relating to courthouse safety include: 1) the fact that a witness is offered little protection from the perpetrator from the moment he or she steps into the Criminal Justice Center (CJC) until just before the case is called; and 2) the lack of monitoring of witness intimidation in the CJC.

There is no separate entrance or dedicated elevator for victims and witnesses at the CJC, but there is a bank of elevators at the CJC that sits behind plaster walls and is therefore inaccessible, but could be put into use by simply removing the walls. Courtrooms are packed, and people frequently experience confusion and delay in getting into the building in the morning when court is in session. The court begins calling cases at 8:00, but proceedings sometimes do not actually begin until 10:00 or 10:30. Courtrooms handle 40-50 cases every day. Because trials of violent crimes are interspersed with other proceedings, victims and witnesses must frequently stay in court all day. During this time, the defendant's friends and associates use subtle intimidation tactics that are difficult to combat. Because each judge calls cases in whatever order he or she desires there is no way to ensure victim intimidation cases are called first.

Before a judge takes the bench, it is left to the sheriffs to maintain order. (Police officers in court are there primarily to testify.) The zone court system seems to have helped some, because it increases the likelihood that police witnesses are available, which reduces the risk of a delay.[83] Witness intimidation could be further reduced if sheriffs were given additional training in techniques to combat it.

Communication between courtrooms and witness waiting rooms can be challenging because there is usually only one phone in each courtroom. Sometimes cases are called before witnesses have enough time to get from the waiting room to the courtroom.[84]

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[83] The zone court system is described at pp. 53-54.

[84] This description of security at the CJC is based on the discussions of the witness intimidation subcommittee and remarks of then-Judge Renée Cardwell Hughes at the meeting of the Advisory Committee held on February 28, 2011.

The Advisory Committee offers the following proposals that the FJD should implement, with the assistance of funds from the Commonwealth:

- As mentioned above, bring the decommissioned elevators in the CJC back into use by removing the plaster walls that currently block them. This would help to alleviate congestion in the ground floor elevator bank, where witnesses are sandwiched between perpetrators and their entourages, as well as other courthouse visitors.

- Upgrade security cameras in the CJC because they are stationary and provide still pictures in grainy black and white. Hence they are unable to show potential witness intimidation that may be taking place. There are no visible security cameras in the stairwells, where intimidation often occurs. Updating the security camera system in the CJC will enhance the Court's enforcement capabilities and deter would-be perpetrators.

- Require—or at least request—that judges call those cases first where witness intimidation has occurred or is very likely to occur. This will minimize the amount of time the witness has to sit in the courtroom with the perpetrator and his or her associates.

- Ensure that at least one police officer or sheriff is always in a courtroom while court is in session. This will enhance the judges' ability to monitor witness intimidation in their courtrooms, and it likely will have an added deterrent effect.

RESOURCES

The Advisory Committee recognizes that, in the current economic climate, requesting additional resources is likely to encounter resistance. However, if the Commonwealth is committed to eradicating witness intimidation in the Philadelphia criminal justice system, additional funding is absolutely necessary. With this in mind, the question for the General Assembly and the Governor becomes how high a priority they place on curbing witness intimidation.

RECOMMENDATIONS

The Advisory Committee recommends the following measures to address witness intimidation:

1. Witness Intimidation Unit

The District Attorney of Philadelphia should create a Witness Intimidation Unit within his Office as described above, and the Commonwealth should appropriate as much funding as possible to defray the costs of establishing and maintaining this unit.

2. Courthouse Safety

The FJD should enhance the safety of victims and witnesses in the Criminal Justice Center by using currently decommissioned elevators, upgrading security cameras, calling witness intimidation cases ahead of other cases, and ensuring a law enforcement presence at every court proceeding.

3. Addressing Fear of Reprisal

Public authorities in the City should take the following measures to address fear of reprisal against victims and witnesses:

- Collaborate with academic institutions to collect and analyze data on victim and witness intimidation (in particular, threat assessment and lethality measures)

- Fund a community awareness campaign to educate the citizenry about available resources and accessing help

- Increase training to all stakeholders—including judges, prosecutors, police, specialty services, probation, and community based services—regarding the identification of witness intimidation patterns, safety assessments, and safety planning

- Computerize and enforce "stay away" orders

- Earmark PHA housing vouchers for crime victims and expedite issuance of the vouchers

- Enable landlords, hotel chains, transportation services, and moving companies to bill Pennsylvania's Victims' Compensation Assistance Program (VCAP) directly

- Authorize VCAP to advance monies for relocation expenses

- Expand VCAP eligibility requirements to include witnesses in need of relocation assistance

- Expand funding for the domestic violence shelter system

- Provide secure, dedicated, and adequate funding for services provided by systems-based and community-based programs initiated by the Victims of Juvenile Offenders (VOJO), the Rights and Services Act (RASA), and the Victims of Crime Act (VOCA).[85] These services are vital to identify intimidation, provide relocation assistance, and enable counseling and support for victims of intimidation.

4. Additional Resources

The General Assembly should appropriate additional resources to help the City curb victim and witness intimidation. Because the Committee recognizes funding is severely limited, the Commonwealth should also consider offering incentives to private organizations (e.g., local sports teams, charities, and community businesses) that make a long-term commitment to funding these initiatives.

[85] Victims of Crime Act of 1984 (federal) (Pub.L. 98-473, Title II); 42 U.S.C. § 10601—10608. See also act of November 24, 1998 (P.L.882, No.111), known as the Crime Victims Act; 18 P.S. § 11.101—11.1302. The Crime Victims Act is sometimes referred to as the Rights and Services Act.

CHAPTER FIVE
PROCEDURE

The *Philadelphia Inquirer* series "Justice: Delayed, Dismissed, Denied" focused the public's attention on a number of serious problems in the pretrial procedure in the City's criminal courts that hinder the system's efficiency. The Advisory Committee finds that the wide variety of measures that have been taken by the various stakeholders have markedly improved the system's performance since 2009.[86] In addition, the Advisory Committee commends the Supreme Court for permitting the use of indicting grand juries and urges the Supreme Court or the General Assembly to provide for expanded and uniform use of trial in absentia.

EXISTING MEASURES

Zone Court

Since November 2, 2010, the FJD has operated under a Zone Court system. The McCaffery Report describes this system as follows:

> Zone Court organizes criminal cases geographically by police division and vertically by prosecutors; it enables the same team of assistant district attorneys to handle all cases from a particular police division from the first listing in Municipal Court through Common Pleas Court to final disposition. The structure also enables prosecutors to become familiar with specific neighborhoods in order to identify crime patterns as they develop.
>
> Implementing Zone Court required moving preliminary hearings from outlying police districts into the Criminal Justice Center so that all cases from a particular police division could be heard on the same floor with the same prosecutors. Centralizing victims, witnesses, police, and prosecutors on the same floor of the CJC is believed to reduce witness intimidation, continuances caused by unavailability of police witnesses, and police overtime costs.[87]

[86] Material for this chapter was supplied by the report of the Subcommittee on Procedure, submitted by Ellen T. Greenlee and Walter M. Phillips, Jr. on March 22, 2012, and comments from the meeting of the Advisory Committee on April 23, 2012.
[87] McCaffery Report, 26.

The Zone Court system allows the District Attorney to implement community based prosecution, which enables a prosecutor to handle a preliminary hearing and a trial from a particular zone because he or she can handle both at the CJC and does not have to travel out to a hearing room in that zone. Police witnesses usually stay on one floor of the CJC, rather than attending preliminary hearings at scattered locations across the City or different floors of the CJC.

Although Zone Court has added 25,000 preliminary hearings to the number formerly held at the CJC, the court has made adjustments to accommodate the increased traffic, and there have not been overcrowding and long lines, as had been anticipated.[88] Although statistics are not available, the consensus among practitioners in the criminal justice system (including those on the Advisory Committee) is that the Zone Court system has been successful so far.

Elimination of Clerk of Quarter Sessions

In April 2010, the Prothonotary of the Civil Division assumed the duties of the Clerk of Quarter Sessions, who had come under criticism for ineffective performance. The Prothonotary commenced a number of initiatives to improve the administrative arm of the criminal courts, including organizational restructuring, revised communication procedures, enhancements to information technology, and improved training. The office is planning to implement an electronic document management system.[89] One of the initiatives of the merged office is rectifying the accounts of the criminal court, including payment of bail refunds (less fines, costs, and restitution) and collecting forfeitures and other amounts owed the court.[90]

Diversion Programs

The FJD has instituted two diversion programs to promote summary disposition of relatively minor cases. The Accelerated Misdemeanor Program (AMP) is patterned after a program started at the Red Hook Community Justice Center in Brooklyn. The program permits first-time misdemeanor offenders to accept a sentence of community service and payment of court costs. As part of the disposition, the judge may direct the offender to such resources as "educational workshops, General Equivalency Diploma classes, drug treatment, and mental health counseling, all with rigorous monitoring."[91] Where it applies, AMP reduces costs by obviating the need for police to attend misdemeanor trials and to incarcerate and transport defendants. It has been expanded from four districts to the whole City, and is expected to save $1.4 million.[92]

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[88] Ibid., 26.
[89] Ibid., 19.
[90] Remarks of Joseph Evers and Deborah Daily, SR 344 Advisory Committee meeting, February 28, 2011 (on file with the Joint State Government Commission).
[91] McCaffery Report, 20.
[92] Ibid., 20, 21; Remarks of Hon. Marsha Neifeld, SR 344 Advisory Committee Meeting, February 28, 2011.

The other diversion program for minor cases is called Small Amounts of Marijuana (SAM). Under SAM, the District Attorney diverts cases involving less than 30 grams of marijuana, and the offender is required to attend classes and pay fines and court fees. Upon meeting these requirements, "the criminal charges are dismissed and the defendant's record can be expunged." SAM is expected to divert 4,000 cases per year that would otherwise have to be tried. Estimated savings are $2.5 million per year in police overtime, laboratory analysis, and incarceration and transportation of defendants. However, because there has been a high rate of failures to appear in court or for the mandatory classes, the District Attorney is working with the FJD to develop effective sanctions.[93]

Diversion programs have been put in place at various times, primarily for misdemeanor offenders: DUI treatment court, drug treatment court, accelerated rehabilitative disposition (ARD), Project Dawn, mental health court, veteran's court, Intermediate Probation, and The Choice Is Yours.[94] The object of the diversion programs is to rehabilitate offenders through responses outside the criminal justice system where the offenders have committed nonviolent misdemeanors that may be attributable to substance abuse, untreated mental health conditions, or sociological factors. A second goal of these programs is to concentrate criminal justice resources on violent felony cases. Only two diversion programs admit felons: The Choice Is Yours and the Intermediate Punishment Program, and for both of these, admittance is carefully scrutinized by senior assistant DAs.[95]

Indigent Defense

Efforts have been made to streamline the assignment of counsel to indigent defendants. In cases where there is more than one defendant, a conflict may arise that requires private attorneys to represent any defendants not represented by the Defender Association. Often, this problem is not raised until the first listing, and a case that is otherwise ready for trial is continued. The time for the first listing of the preliminary hearing has been moved back, partly to enable the Defender Association to identify conflicts.[96] Municipal Court judges are lately required to "examine conflict claims more closely at preliminary hearings to ensure that only cases with actual conflicts are continued."[97] The FJD is considering a proposal to transfer responsibility for the administration of conflict counsel from the FJD to the City administration, because this will help ensure that the appointment of counsel is independent of judicial influence.[98]

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[93] McCaffery Report, 22, 23.
[94] These programs are described in a brochure by the Philadelphia District Attorney's Office, entitled "Pre-Trial Diversion Programs."
[95] The description of the diversion programs was provided by Laurie Malone and Kirsten Heine of the District Attorney's office at the Advisory Committee meeting held on April 23, 2012.
[96] See pp. 70-71.
[97] McCaffery Report, 24.
[98] Ibid., 25.

The chronic underfunding of indigent defense provided by private attorneys has been among the most serious shortcomings of the system. For most cases, the fees paid to court appointed counsel have not increased since 1997, and the City paid less for this service than any city in the nation or any county in Pennsylvania.[99] On February 22, 2012, the FJD increased the fees paid for private counsel in capital cases to "a flat fee of $10,000 (lead counsel) and $7,500 (penalty phase counsel), irrespective of whether the case is tried to verdict or otherwise disposed or resolved."[100] The American Bar Association opposes flat fees for capital representation as inimical to the goal of providing high quality representation for criminal defendants. "When assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee."[101]

Charging Policies

A crucial step in initiating a criminal case is determining what charges to bring against a suspect. This task involves considerable discretion because it is common for an incident to come under several different offenses in the Crimes Code. While in most Pennsylvania counties the police determine which crimes defendants will be charged with, in Philadelphia the District Attorney undertakes the charging function after receiving the charge recommended by the Police Department.

The McCaffery Report observes that that the held-for-court rate in Philadelphia was about 50 percent from 2007 through 2009, while in other counties that rate is 80-90 percent.[102] Some Municipal Court officials attributed this rate to indiscriminate charging and overcharging by the District Attorney's office. To respond to this complaint, current District Attorney R. Seth Williams revamped the charging unit. In January 2010, he placed an Assistant District Attorney with courtroom experience to oversee the unit, which comprises 13 Assistant DAs and three supervisors. The goal of the unit has become to make charges that are likely to be provable rather than bringing the maximum charge that could possibly succeed.

Charging generally takes place between arrest and the preliminary arraignment, a time span that now averages 18 hours. The preliminary arraignment is the stage where the accused is brought before a Trial Commissioner and advised of the charges against him

[99] Remarks of then-Common Pleas Judge Renée Cardwell Hughes, SR 344 Advisory Committee Meeting, February 28, 2011.
[100] Notice, Administrative Governing Board, FJD, February 22, 2012.
[101] American Bar Association, "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" *Hofstra Law Review* 31:914 (2003), 981 (Guideline 9.1), 987-88.
[102] McCaffery Report, 11-12.

or her and is notified of the pretrial disposition. Since March 2012, the prosecution gives the defense the PARS report at this hearing,[103] redacted to remove personal and confidential information about victims and witnesses.

The District Attorney staff reported that the staff communicates more openly with police investigators to frame a sustainable charge and to verify that the evidence that has been gathered actually proves the charge. For instance, the victim's written statement must be as accurate and complete as possible, so that it can prove the offense even if the victim stops cooperating due to intimidation or for some other reason. The District Attorney's office has worked closely with the Police Department to develop investigative protocols to ensure that cases presented to the District Attorney are thoroughly investigated and supported by sound evidence.[104] The staff has developed detailed protocols that guide police investigations and the charging decisions. At every stage of the case, there is open discussion among the different levels of prosecutors about how to respond to new evidence that comes to light as each case proceeds. The representatives from the District Attorney and the Defender Association both reported that there is a more collegial relationship between prosecution and defense than in 2009, and that cooperation has contributed to more efficient administration of the system.[105]

More accurate charging reduces delays, withdrawals, dismissals, and recharging. It also leads to early identification of cases appropriate for the ten diversion programs.[106] While statistics are inconclusive regarding whether there has been a decrease in the rate of withdrawals and dismissals, other measures have shown improvement.[107] The SR 344 Advisory Committee finds that the District Attorney's performance of the charging function has improved dramatically.

Preliminary Hearings

The Supreme Court's Reform Initiative reached a consensus that "Philadelphia's unique procedural practices in conducting preliminary hearings . . . impair the fairness, promptness, and cost-effectiveness of preliminary hearings while not necessarily advancing the underlying legal purposes for affording defendants preliminary hearings as to the charges."[108]

[103] The Preliminary Arraignment Reporting System (PARS) refers to the automated processing of police arrests and other information gathered pretrial. The "PARS Report" contains the incident and arrest information, and is equivalent to the "police report" in other Pennsylvania judicial districts.
[104] McCaffery Report, 27.
[105] This description of the charging unit was provided by Laurie Malone and Kirsten Heine of the District Attorney's office at the Advisory Committee meeting held on April 23, 2012. The evaluation by the Defender Association was provided by its Director, Ellen T. Greenlee.
[106] McCaffery Report, 26-28.
[107] Ibid., 27-28.
[108] Ibid., 12.

The preliminary hearing is the hearing where the judicial system determines whether probable cause exists to require the defendant to stand trial. In Philadelphia, this hearing is held before a Municipal Court Judge. "Justice: Delayed, Dismissed, Denied" described how multiple preliminary hearings can cause meritorious prosecutions to collapse by facilitating witness intimidation and causing victims and witnesses intolerable delay and inconvenience. Recognizing this, the Reform Initiative identified the preliminary hearing as a major focus of its attention. "Preliminary hearings in felony cases were prioritized because of the seriousness of the charges, the high withdrawal and dismissal rates for violent felony cases at this stage of the proceedings, and the consensus of the initiative that this was the critical area with the greatest need for immediate improvement."[109] Philadelphia's procedure for the preliminary hearing is different from that of other counties in Pennsylvania. The McCaffery Report notes that the prosecution at this hearing needs only to clear the barrier of proving a prima facie case, which is "among the lowest burdens in the law." Nevertheless, "[i]n Philadelphia, . . . preliminary hearings have become a battlefield where defense attorneys often succeed in having their cases withdrawn or dismissed, and held-for-court rates hovered around 50 percent in the years prior to the initiative." In other counties, that rate lies between 80 and 90 percent.[110]

The Supreme Court addressed this problem by issuing an administrative directive imposing the following requirements on the Municipal Court:

- The court must determine first whether defense counsel is ready to proceed and may then determine whether the Commonwealth is ready to proceed

- Cases cannot be continued prior to 11 a.m. without prior approval of all counsel

- The list of cases must be called at least three times, and no case can be marked "ready not reached" (i.e., every case that is ready to proceed must be heard by the court that day)

- Preliminary hearings "have the first priority of cases being heard," which requires a defense attorney to attend FJD preliminary hearings before attending any other proceeding in any other judicial district in the Commonwealth or in federal court, unless the court has given prior approval or the defense attorney is participating at a trial[111]

The Supreme Court also amended the Rules of Criminal Procedure to move the first listing of a preliminary hearing back to 14 to 21 days after preliminary arraignment.[112] (The time period between preliminary arraignment and preliminary hearing was formerly three to ten days.) The purpose of this change was to bring cases to the preliminary hearing stage more promptly; formerly 87 percent of those hearings were

[109] Ibid., 11.
[110] Ibid., 11-12.
[111] Ibid., 14.
[112] Pa.R.Crim.P. 1003(D)(3)(d)(iii).

postponed from the first listing because the attorneys lacked sufficient time to prepare.[113] With the revised timing, prosecution and defense can determine whether attorneys may have a conflict of interest and arrange for conflict counsel, interview the people involved and otherwise do the needed preparation for a meaningful hearing. Because of the greater preparation time, there is more pressure on the parties to be ready to proceed at the first preliminary hearing.

In January 2011, the Supreme Court amended Pa.R.Crim.P. 542 and 1003 to allow hearsay testimony in preliminary hearings for the purposes of establishing ownership, non-permission, valuation, or damage in property crime cases.[114] These exceptions to the hearsay evidence rule were designed to reduce the need for victims or eyewitnesses to appear at the hearing. Although these exceptions have been in effect for about ten years, Municipal Court judges varied greatly on whether and to what extent they observed them. (The hearsay rule does apply with full force at any trial of such offenses.)

Since these changes have been instituted by the Court, the held-for-court rate has increased and the rate of cases terminated by dismissal or withdrawal has decreased. The rise in the held-for-court rate and the decline in dismissals continues a trend that goes back to at least 2007.[115] According to the McCaffery Report, these rule changes and administrative directives have resulted in an increase in the held-for-court rates. In 2009, 41 percent of felony cases were either withdrawn or dismissed by the court at the preliminary hearing stage, whereas in the first quarter of 2011 that number fell to 30 percent.[116] The Report cautions that "more time is needed to gauge the full impact of these rule changes."[117]

Pretrial Procedures

If a case is held for trial at the preliminary hearing on a felony charge, an "information" is issued by Municipal Court and the trial arraignment takes place three weeks later. (The trial arraignment is commonly referred to as the "formal arraignment.") The District Attorney's office provides all discovery to the defense one or two days before this arraignment. Based on the Assistant District Attorney's review of the case, a one-time plea offer is extended at the trial arraignment, and the defendant is given the three weeks from trial arraignment to the pretrial conference to consider the offer. The pretrial conference takes place in the SMART (Strategic Management ARC (Advance Review and Consolidation) Readiness and Trial) Room located in each of the judicial zones. A judge is present in each SMART Room to resolve open issues, including the finalization of plea agreements. If the offer is rejected, the case is listed for trial. The case is designated for a felony waiver list room or the major case program. The felony waiver

[113] McCaffery Report, 14.
[114] Ibid., 14-15; Pa.R.Crim.P. 542(E) and 1003(E)(2)(b).
[115] McCaffery Report, 15, 16.
[116] Ibid., 15.
[117] Ibid., 17.

list comprises the cases where the charge has been reduced from felony to misdemeanor. A trial date is given by the Trial Commissioner, the status of bail is reviewed, and the determination of who represents the defendant is confirmed. Prosecution and defense also confirm whether discovery is complete; if it is not, the matter is resolved in Discovery Court or the SMART Room conference is continued to a later date.

The District Attorney's policy is to make the best offer at the formal arraignment. It is the prosecution's view of the fairest and most generous offer that can be made, consistent with public safety. Any later offer is always less favorable to the accused, because the purpose of the policy is to encourage early and less costly disposition of cases.[118]

A report for 2011 prepared by Court Administration shows a total of 14,238 cases arraigned, with a relatively small number for which discovery was not complete at arraignment: 1,293 major cases and 1,228 felony waiver list cases.[119] Discovery Court statistics for 2011 show a total of 1,636 cases listed, with 1,305 resolved and 155 moved forward by agreement.[120]

Electronic Discovery

In the Court of Common Pleas Criminal Trial Division, the transition from paper-based to electronic discovery is nearly completed. The Police Department and the District Attorney's office are working together with assistance from the Criminal Justice Advisory Board and the SEARCH Team from the National Consortium for Justice Information and Statistics to establish the necessary policies, procedures, and mechanisms to accomplish this goal. The system must reflect the different levels of security and confidentiality among the police, the prosecution, and the court. Five of the Common Pleas courtrooms now operate completely paperless. In addition to digitizing the discovery process, efforts are underway to eliminate paper transactions wherever possible throughout the court system, including the Clerk's office and the Probation Department of the FJD. Furthermore, there has been great improvement in the performance of the functions that were formerly done by the Clerk of Courts and are now done by the Prothonotary. The ability to e-file documents with the courts is now complete.[121]

[118] The account of pretrial procedures was given by Assistant District Attorney Laurie Malone at the Advisory Committee meeting held on April 23, 2012.
[119] First Judicial District, Common Pleas Court, Criminal Trial Division, "Discovery Stats from Arraignment—Year to Date 2011" (January 15, 2012).
[120] First Judicial District, Common Pleas Court, Criminal Trial Division, "Discovery Stats from Discovery Court—Year to Date 2011" (January 15, 2012).
[121] This section is based on the progress report given by Deborah Dailey from the Office of the Prothonotary at the Advisory Committee meeting held on April 23, 2012.

Video Crash Court

In February 2010, the FJD started using video conferencing for "crash court," where court is held in prison for open misdemeanor cases against incarcerated defendants. This further expedites the cases and saves the cost of transporting judges, attorneys, and court personnel to prison. Since the implementation of video crash court, negotiated pleas have more than doubled, even as the number of misdemeanor cases fell. Estimated savings from this innovation are $2.3 million, primarily from reducing the time defendants are held in custody.[122]

PROPOSED REFORMS

Indicting Grand Jury

New Supreme Court Rules. On June 21, 2012, the Pennsylvania Supreme Court adopted new Rules of Criminal Procedure that authorize judicial districts to commence prosecutions through an indicting grand jury as an alternative to the preliminary hearing in cases where "witness intimidation has occurred, is occurring, or is likely to occur." A judicial district wishing to institute the indicting grand jury must petition the Supreme Court for specific authorization.[123]

As of this writing, only Pennsylvania and Connecticut do not use indicting grand juries, and they are used in the Federal system, the District of Columbia, and 48 states. Until the 1970s, Pennsylvania operated under the indicting grand jury system, but it was abolished by a constitutional amendment, adopted on November 6, 1973. This amendment added the following provision to art. I, § 10 of the Pennsylvania Constitution: "Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law." The legislation enacted under that provision is codified as 42 Pa.C.S. § 8931. The theory behind the change was that indicting grand juries were not needed because a preliminary hearing could establish probable cause.[124]

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[122] McCaffery Report, 23.

[123] Administrative Office of Pennsylvania Courts (AOPC), Press Release: "Pennsylvania Supreme Court Strengthens Witness Protection" (AOPC, June 22, 2012), http://www.pacourts.us/OpPosting/Supreme/out/414crim.pdf; The amendments to the rules are available at http://www.pacourts.us/OpPosting/Supreme/out/414crim.attach.pdf. The Final Report to the Supreme Court relating to indicting grand juries is available at http://www.pacourts.us/OpPosting/Supreme/out/414crim.rpt.pdf. The Supreme Court added Pa.R.Crim.P. 556—556.12 and made conforming changes to 13 other Rules.

[124] *Commonwealth v. Webster*, 337 A.2d 914 (Pa. 1975).

A report was prepared for the McCaffery Committee[125] on the issue of whether the District Attorney should have the discretion to present cases directly after preliminary arraignment to an indicting grand jury, rather than proceeding through a preliminary hearing. The report was forwarded to Chief Justice Ronald D. Castille, who sent it to the Supreme Court Rules Committee for its consideration. The Rules Committee published proposed rules for the indicting grand jury in the *Pennsylvania Bulletin*.[126] The proposed rules were approved almost unanimously in November by the Rules Committee; however, instead of allowing the District Attorney to present any felony case he or she wishes to the indicting grand jury, the proposed rules require the District Attorney to move ex parte for an indicting grand jury.[127] As related above, the proposed rules were adopted by the Supreme Court on June 21, 2012, and will take effect 180 days later, on December 18, 2012.

Prior to the adoption of the new rules by the Court, the SR 344 Advisory Committee discussed, but did not formally endorse a proposal to permit the FJD to use the indicting grand jury to combat witness intimidation at the election of the District Attorney. A summary of this discussion may explain the policy behind the indicting grand jury.

Advantages of Indicting Grand Jury. The McCaffery Report summarizes how an indicting grand jury can ameliorate the problem of witness intimidation:

> [P]roceeding by grand jury indictment rather than by preliminary hearing in certain cases could substantially address the problem of witness intimidation in several ways. First, the victim and witnesses would no longer have to interact directly with the defendant prior to trial. In addition, prosecutors would be able to use grand jury testimony in future proceedings in the event a victim or witness subsequently changed his or her testimony. As a result, witness intimidation would be less effective and therefore less likely to occur. Finally, allowing the use of indicting grand juries would reduce the number of times victims and witnesses must appear since, unlike preliminary hearings, grand jury proceedings are rarely postponed.[128]

Testimony before an indicting grand jury is less demanding on witnesses and victims because defense witnesses are not present and no cross-examination is allowed. However, the accused has the right to testify before the grand jury. The grand jury does not always approve the indictment, but the rate of refusal is lower than for a preliminary hearing.

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[125] A. Roy DeCaro and Walter M. Phillips, Jr., "Grand Jury Subcommittee Report," 2010. See McCaffery Report, 44-46.
[126] 41 Pa. Bull. 5538 (October 15, 2011), http://www.pabulletin.com/secure/data/vol41/41-42/1762.html.
[127] Pa.R.Crim.P. 556.2.
[128] McCaffery Report, 45-46, citing A. Roy DeCaro and Walter M. Phillips, Jr., "Grand Jury Subcommittee Report," 2010.

One of the root causes in Philadelphia of witness reluctance to testify, either as a victim or eyewitness, is the process from arrest, arraignment, preliminary hearing, and finally, the filing of an information by the District Attorney. It is at the preliminary hearing stage where victims and witnesses first encounter the adversarial criminal justice system. The Commonwealth must present sufficient evidence to make out a prima facie case to proceed to the next stage, and the victim must testify if a crime of violence is charged.

Under the City's current system, witnesses and victims of a crime often have to appear multiple times at preliminary hearings, because it is not uncommon for hearings to be postponed several times. Each time, they must go to the police district office or the CJC, where most preliminary hearings are held, and where they find themselves in close quarters with the defendants against whom they are to testify, and with the defendant's friends and associates. When the hearing does take place, victims and witnesses are subjected to harsh cross-examination by hostile defense counsel.

If the District Attorney has the option to proceed directly from arraignment to an indicting grand jury as an alternative to the preliminary hearing, these problems would be eliminated. There is no constitutional impediment to instituting such a change. Both state and federal courts have universally held that denying a defendant a preliminary hearing does not violate the Sixth Amendment right of confrontation.[129] That right does not arise until trial.

Proceeding directly to a grand jury indictment rather than going through a preliminary hearing followed by an information: (1) allows victims and the identity of witnesses to be protected until well along in the process; (2) enables the prosecutor to lock in a witness's testimony for future use if there is a chance the victim or a witness may recant their testimony; (3) obviates the need for the victim to appear in person, since the law allows the prosecutor to use hearsay testimony before the grand jury; (4) lessens the chance the victim will have any interaction with the defendant before trial; and (5) reduces the number of times that victims and witnesses must appear since, unlike preliminary hearings, grand jury proceedings are rarely postponed. Such a system would help greatly to reduce the public's skepticism and negativity toward the current criminal justice system, which has resulted in their failure to report many crimes to the authorities. Finally, use of the indicting grand jury would result in cost savings by reducing police overtime paid to officers who must appear at several scheduled preliminary hearings.

Motion for Indicting Grand Jury. Under the new Rules, an indicting grand jury can hear a case only if the District Attorney has filed a motion with the court requesting grand jury proceedings. The motion can be filed after the arrest or the filing of a criminal complaint against the suspect, and it must allege that witness intimidation has occurred, is occurring, or is likely to occur in the case. The motion is presented ex parte to the president judge or that judge's designee, and the judge decides whether to grant the

[129] See *Commonwealth v. Ruza,* 511 A.2d 808, 810 (Pa. 1986) (no constitutional right to a preliminary hearing). See also *United States v. Verkuilen,* 690 F.2d 648, 660 (7th Cir. 1982) (no right to preliminary hearing once indictment is filed).

motion based on whether the allegations in the motion establish probable cause that witness intimidation is involved in the case. The motion and the ruling on the motion must be sealed, and the prosecutor must file those documents with the clerk of courts.[130]

The proposed requirement of an ex parte motion raises the possibility that the defense can defeat the charge by inducing the witnesses to deny intimidation at the trial and moving to dismiss the indictment as improperly brought. It has also been suggested that requiring an ex parte showing could lead to inconsistent rulings by different judges. Furthermore ex parte rulings are disfavored in the criminal justice system because they cannot be challenged by the defense until after the fact. The motion for an indicting grand jury would need to be supported by affidavits by law enforcement officers alleging intimidation; this could lead to false swearing, as has allegedly occurred occasionally in connection with applications for search warrants. In other states that use the indicting grand jury, the District Attorney has complete discretion to present any felony case to an indicting grand jury.

Most cases will continue to proceed through the preliminary hearing because the workload of the grand juries would otherwise become excessive; the indicting grand jury would be used only for witness intimidation cases and large scale investigations. In order to accommodate the defense interest in prompt discovery, the provision enabling the indicting grand jury could include a requirement that the grand jury testimony be turned over to the defense at least 30 days before the start of the trial.[131] However, the Rules adopted by the Supreme Court provide only for mandatory disclosure of the defendant's own testimony. The Rules shield from disclosure any testimony that might reveal the identity of a witness who has been, may have been, or is likely to be intimidated, subject to disclosures ordered by the supervising judge. Otherwise, discovery of testimony before the indicting grand jury is under the existing Rule.[132]

Because indicting grand juries are an effective procedure for dealing with witness intimidation, the Advisory Committee recommends that the FJD should promptly petition the Supreme Court for authorization to use the indicting grand jury under new Pa.R.Crim. P. 556—556.12. The Court may wish to consider adding a requirement that the grand jury testimony be provided to the defendant at least 30 days before the commencement of the trial, where failure to make such disclosure would be deemed withdrawal of the indictment.

[130] Pa.R.Crim.P. 556.2(A), eff. December 18, 2012.
[131] This discussion of the indicting grand jury is based on remarks made at the Advisory Committee meeting of April 23, 2012 by Walter M. Phillips, Jr. and written materials he prepared for that meeting.
[132] Pa.R.Crim.P. 556.10(B), 573.

Trial in Absentia

Pennsylvania case law has long provided that where a defendant makes it clear, either on the record or by deliberately not showing up for trial without cause, that he does not wish to be present at trial, the trial may go forward without violating the defendant's right to confrontation under the Sixth Amendment and article I, section 9 of the Pennsylvania Constitution.[133]

> A contrary rule [preventing trial in absentia when the defendant never appears] . . . would be a travesty of justice. It would allow an accused at large upon bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience. It would permit a defendant to play cat and mouse with the prosecution to delay the trial in an effort to discourage the appearance of prosecution witnesses. . . . A defendant has a right to his day in court, but he does not have the right unilaterally to select the day and hour.[134]

While the authority to proceed with trial in absentia is clear, the courts in the FJD vary greatly in their practice, with some judges refusing to proceed in absentia under any circumstances and others only rarely.

On December 22, 2010, the Supreme Court mandated trial in absentia for summary offenses in Municipal Court. The judge is directed to issue a bench warrant "if there is a likelihood that the sentence will be imprisonment" or other "good cause" not to try the defendant in absentia. The defendant must be warned at the time of issuance of the citation that failure to appear at trial constitutes consent to proceeding without him or her. The amendment to the rule also permits a "representative or designee" to testify at the summary trial in lieu of the "observing law enforcement officer." As a result of these changes, most summary trials where defendant fails to appear are conducted in absentia and the judgment is referred to a private collection agency. The result of these changes has been a reduction in outstanding bench warrants and "increased collection of fines, fees, and court costs." [135]

With respect to felony and misdemeanor cases, Pa.R.Crim.P. 602 provides that where a defendant fails to appear for trial, the trial *may* go forward, including the return of a verdict and the imposition of sentence. Currently, when the defendant receives a subpoena advising him or her of the date and place of trial, the subpoena merely advises the defendant that a bench warrant "may" issue if he fails to show up for trial. In its report to the McCaffery Committee, its Subcommittee on Trying Fugitives in Absentia

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[133] *Commonwealth v. Vega*, 719 A.2d 227 (Pa. 1998); *Commonwealth v. Sullens*, 619 A.2d 1349 (Pa. 1992); *Commonwealth v. Johnson*, 734 A.2d 864 (Pa. Super. Ct. 1999); *Commonwealth v. Hill*, 737 A.2d 255 (Pa. Super. Ct. 1999). Federal case law also allows for trials in absentia where the defendant deliberately fails to show up for trial. *Smith v. Mann*, 173 F.3d 73 (2nd Cir. 1999), cert. denied, 528 U.S. 884 (1999).

[134] *Sullens*, 619 A.2d 1349, at 1352, (quoting *Government of Virgin Islands v. Brown,* 507 F.2d 186, 189-90 (3d Cir. 1975)).

[135] McCaffery Report, 17-18.

called for mandatory language in Rule 602 (i.e., changing the "may" to "shall").[136] The trial subpoena should also make clear that trial will go forward if the defendant does not appear. These two measures should help reduce the fugitivity rate.

Those favoring trials in absentia reason that it is constitutionally valid because a defendant or suspect can waive Fifth Amendment self-incrimination rights after receiving the *Miranda* warnings. It follows that a defendant who fails to show up for trial, having been advised that the trial will proceed without the defendant if he or she fails to attend it, can be deemed to have waived the Sixth Amendment right of confrontation.

If a defendant fails to appear for trial, the prosecution must show that the absence is without cause in order to proceed in absentia. The prosecution must make a reasonable effort to locate the defendant by checking with hospitals, morgues, the attorney for the defendant, and the defendant's family, friends, and other known associates; the District Attorney generally follows a standard procedure for attempting to locate a no-show defendant. If these efforts fail, there must be a hearing before the trial judge to establish an unexcused FTA and therefore a basis on which to proceed in absentia; this hearing should take place on the trial date a few hours after the FTA to allow time for the search for the defendant. Trial in absentia should proceed if the prosecution can establish a willful failure to appear, either by direct or circumstantial evidence. Proof that the defendant was notified as explained above will help establish the willfulness of the absence. Despite his or her absence, the defendant must be represented by counsel. If the defendant later establishes that the absence was excused, the verdict should be set aside.

The rule controlling trial in absentia in New York State is known as the "Parker Rule," named after the decision that propounded it.[137] The rule states that if a defendant has been advised on the record that he or she will be tried in absentia upon failure to show up for the trial, the defendant may be tried in absentia if he or she nevertheless fails to appear. The New York appellate courts have upheld trial in absentia convictions where the Parker warnings were given on the record and have overturned them where the record failed to show compliance with *Parker*. According to a Pew-sponsored research study in 2010, New York City's trial FTA rate is about half of Philadelphia's—15 percent versus 30 percent[138]—and the use of trial in absentia may account, at least in part, for that difference. The warning should be given at the trial arraignment concurrently with the setting of the trial date.

Trial in absentia can also deal a major blow to witness intimidation. When a defendant fails to show for trial and a bench warrant issues, but no trial takes place, there is an indeterminate time period that could be as long as years during which the victim or witness has to live with a real threat of intimidation, which may diminish once the victim or witness has testified.

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[136] McCaffery Report, 40.
[137] *People v. Parker*, 440 N.E.2d 1313 (N.Y. 1982).
[138] Pew Charitable Trusts, "Philadelphia's Less Crowded, Less Costly Jails: Taking Stock of a Year of Change and the Challenges That Remain" (Philadelphia: Pew Charitable Trusts, July 20, 2001), 18.

"Justice: Delayed, Dismissed, Denied" reported that, with 47,000 fugitives as of the time of its publication, Philadelphia had the highest per capita fugitivity rate in the country, along with Essex County, New Jersey, which includes Newark. The *Inquirer* further reported that fugitivity had become a bureaucratic nightmare in Philadelphia, as the 51 officers assigned to enforce bench warrants struggled to deal with a caseload of more than 900 fugitives per officer. In addition, there was approximately $1 billion in uncollected bail in default.[139]

A report prepared for the McCaffery Committee's Subcommittee on Trying Fugitive Defendants in Absentia urged uniform use of trial in absentia whenever a defendant fails to show up for trial without a reasonable excuse. [140] Procedures should be implemented to assure that the defendant is made fully aware that trial will proceed in absentia if he or she fails to attend the trial and that the defendant should advise counsel if circumstances arise that may excuse failure to appear. Upon an FTA at trial, the prosecution should make a reasonable effort to locate the defendant before moving for trial in absentia. The Advisory Committee agrees with the conclusions of that report.

RECOMMENDATIONS

The Advisory Committee makes the following recommendations with regard to procedure:

1. Indicting Grand Jury

The FJD should petition the Supreme Court to institute the indicting grand jury in accordance with the Court's amendments to the Rules of Criminal Procedure of June 22, 2012, authorizing the use of that procedure in cases involving witness intimidation.

2. Trial in Absentia

The Courts of Common Pleas of the FJD should proceed with trial in absentia where it is established by a preponderance of the evidence that the defendant has willfully failed to appear at trial. The defendant should be advised at the trial arraignment and by the trial subpoena that the trial will proceed without the defendant if he or she fails to appear at trial without excuse. If the Supreme Court does not provide for trial in absentia, the General Assembly should do so by legislation. In order to comply with the Pennsylvania Constitution, the legislation should provide that the procedure for conducting trials in absentia shall be in accordance with general rules of court.

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[139] "Justice Delayed, Dismissed, Denied," *Philadelphia Inquirer* (December 13, 2009).
[140] McCaffery Report, 34, n. 32.

CHAPTER SIX
TECHNOLOGY

The Advisory Committee's findings and recommendations[141] in this chapter are in accordance with those in the McCaffery Report, which are listed below. The recommendations are limited to addressing readily identifiable problems relating to information technology that can be implemented quickly and relatively inexpensively. Formulating and implementing a comprehensive plan to integrate information technology for the benefit of all participants is highly desirable, but requires a concerted and continuing effort by the participants who can commit the needed resources, and the Advisory Committee is skeptical that those resources are available at this time.

McCAFFERY REPORT

The McCaffery Report chapter on information technology examined whether information technology was used effectively by Philadelphia's criminal justice system focusing particularly on the following three topics: "the integrity and accuracy of case activity information available to FJD officials; the FJD's capabilities for analyzing data and producing standardized, replicable management reports; and the sharing of information among criminal justice agencies."[142] The Report based its findings and recommendations on a detailed report prepared by the SEARCH Team of the National Consortium for Justice Information and Statistics, a consulting group based in Sacramento, California.[143] The McCaffery Report made the following observations as of its release date of July 2011:

- The replacement of the Clerk of Quarter Sessions by the Prothonotary improved the reliability of case activity information. The FJD is working on the streamlining of redundant and confusing case activity codes and is developing guidebooks and training materials to improve data entry.

[141] The findings and recommendations in this chapter were developed by the technology subcommittee under the leadership of its chair, Angie Halim. The subcommittee was assisted by Clerk of Courts Joseph H. Evers, Deputy Clerk of Courts Deborah Daily, Ron Greenblatt from the Pennsylvania Association of Criminal Defense Lawyers, and Assistant District Attorney Lauren Baraldi.

[142] McCaffery Report 48-49. The Information Technology chapter is pp. 48-54 of that Report.

[143] National Consortium for Justice Information and Statistics, "Information Sharing Assessment of the First Judicial District of Pennsylvania" (Sacramento, Cal.: September 9, 2010) ("FJD Assessment"), http://www.courts.phila.gov/pdf/report/ri/Information-Sharing-Assessment-of-the-First-Judicial-District-of-Pennsylvania.pdf.

- The trial courts of Pennsylvania's Unified Judicial System use the Common Pleas Case Management System (CPCMS), developed since 2006 by the Administrative Office of the Pennsylvania Courts (AOPC). The complexity and volume of cases in the FJD "require resources beyond those available from AOPC." AOPC is assisting FJD by supporting the hiring of an additional statistician. The McCaffery Committee's Court Data Working Group (CDWG) identified and corrected a chronic error that misclassified certain misdemeanor cases as felonies.

- The Municipal Court plans to change its case numbering system to coordinate with Common Pleas. CDWG is implementing practices that will address the double-counting of cases that has resulted from the FJD's two-tiered structure.

- Improved accuracy and analysis of data lay a sound foundation for performance-based management.

- The Technology Subcommittee of the Criminal Justice Advisory Board is working with the Consortium to develop its strategic information sharing plan.

- The Supreme Court is overseeing efforts within the judicial administration to coordinate Pennsylvania's reporting of individual criminal history records with the FBI's database.[144]

TECHNOLOGICAL INTEGRATION

In addition, the McCaffery Report identifies three major gaps in the system's information sharing process: "lack of a formalized, cross-agency governance structure dedicated to information sharing and technology management; lack of a strategic plan for information sharing; and a heavy reliance on paper-based transactions."[145] An overhaul of the court's computer and networking systems that would integrate all departments would be of great assistance to the smooth and efficient administration of the criminal justice system; however, it seems to be cost-prohibitive at this time. Implementation of a large judicial information sharing system requires forethought and careful monitoring by court staff possessing a high degree of expertise in information technology. For example, the judicial system in California failed to implement its statewide information sharing and reporting system; as a result, the Golden State spent over $528 million on a system that was not adopted by any of its 58 county courts.[146]

[144] McCaffery Report, 49-54.
[145] Ibid., 52.
[146] Bill Girdner, "Funeral for a Tech System," *Courthouse News Service*, April 4, 2012 http://www.courthousenews.com/2012/04/04/45336.htm.

The McCaffery Report further identified the unavailability of police witnesses due to scheduling conflicts as a factor contributing to systemic failure.[147] Courts have access to scheduled vacations of officers but not their scheduled shifts;[148] Municipal Court has listed formulation and access to a complete police officer schedule as a priority to assist its own scheduling.[149]

"Improving Philadelphia's criminal justice system requires the more widespread and intelligent use of technology to replace paper files and enable the interface of the records of the courts, police, the Philadelphia Prison System, defense counsel, and prosecutors."[150] Electronic information is often not shared between agencies, except by the physical transport of paper documents. Snags in the scheduling of discovery and hearings lead to unnecessary continuances.[151] Sharing information manually by physical documents leads to significant problems in timely locating specific documents, requires large amounts of costly physical storage space, and wastes staff time and resources.[152]

Electronic Documents

Electronic filing in the criminal court system was implemented in the spring of 2012. Consistent use of e-filing by the District Attorney, the Defender Association of Philadelphia, private counsel, and court staff will aid in the efficient flow of information to all necessary parties. E-filing should be used for filing entries of appearance, continuance and scheduling requests, motions, notices, and other court filings and litigation documents, and should also provide contact information for designated attorneys of record, including e-mail addresses.

The FJD implemented an electronic document management system in the fall of 2011. All paper filings are scanned into an electronic database. Having documents and records in electronic format is expected to increase efficiency and accuracy of the filing and record-keeping process, and to provide stricter security and expanded data backup.[153]

While an effective exchange for court scheduling information requires more resources than the Advisory Committee believes is currently available, expanded access to reports, contact information, and case filings should help to reduce the number of requests to continue cases and alleviate problems in scheduling witnesses.

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[147] McCaffery Report, 6.
[148] FJD Assessment, 11.
[149] Ibid., 18.
[150] Amaris Elliott-Engel, "Technology, Funding Needed to Improve Courts, Witnesses Say," *Legal Intelligencer* (Philadelphia), April 20, 2010, http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202448303374.
[151] FJD Assessment, 2.
[152] Ibid., 13.
[153] "Criminal Document Management to Become Operational in September," *Philadelphia Bar Reporter* 9 (July 2011).

A discovery package has been created within the Police Integrated Information Network (PIIN), which interfaces with PARS.[154] The FJD has appropriately placed a high priority on expanding "evidence tracking in PIIN to support pretrial conferences and discovery reporting."[155] While the District Attorney receives this discovery electronically, defense counsel gets redacted discovery on paper.[156] Inability to provide complete discovery is the leading cause of case continuances requested by the District Attorney, which in turn leads to difficulties in scheduling witnesses.[157]

RECOMMENDATIONS

The Advisory Committee makes the following recommendations with respect to the use of information technology:

1. Contact Information

Assistant District Attorneys, public defenders, and private defense counsel should be encouraged to establish contact with one another early in the process. Having contact information through the e-filing system will assist this process.

2. Content and Communication of Information

To enhance efficiency, the judges and court staff, prosecutors, and defense attorneys should cooperate so that information becomes more consistent, more accurate, and more timely disseminated.

3. Discovery

To the extent possible, the District Attorney should provide electronic discovery to defense counsel as early as possible to aid in an appropriate resolution of each case. Providing a copy of the PARS report in advance of arraignment will also aid in the efficient and appropriate resolution of cases.

[154] FJD Assessment, 6.
[155] Ibid., 19.
[156] Ibid., 7.
[157] Ibid., 15.

4. Systemic Reforms

The FJD should seek to remedy the deficiencies identified in the McCaffery Report by instituting a cross-agency governing structure for information technology, developing a strategic information plan, and further reducing reliance on paper documents, to the extent that resources can be marshaled to attain those objectives.

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GLOSSARY

CJC	Criminal Justice Center
FJD	First Judicial District
Pa.R.Crim.P.	Pennsylvania Rules of Criminal Procedure
PARS	Preliminary Arraignment Reporting System
PARS report	The police report of an incident
PTS	Pretrial Services Division
ROR	Release on recognizance
VWS	Victim/Witness Services Unit of the Office of the District Attorney

SENATE RESOLUTION NO. 344 OF 2010
(PRINTER'S NO. 2067)

PRIOR PRINTER'S NO. 1982 PRINTER'S NO. 2067

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION

No. 344 Session of 2010

INTRODUCED BY GREENLEAF, RAFFERTY, O'PAKE, WASHINGTON, TARTAGLIONE, FONTANA, LEACH, ALLOWAY, WILLIAMS AND FARNESE, MAY 13, 2010

AMENDED, JUNE 15, 2010

A RESOLUTION

Directing the Joint State Government Commission to establish a criminal justice advisory committee to study the issues ~~raised by *The Philadelphia Inquirer*~~ OF HIGH VIOLENT CRIME RATES, LOW CONVICTION RATES, THE BAIL SYSTEM, WITNESS INTIMIDATION and any other relevant issues regarding the criminal justice system in Philadelphia to develop solutions for problems that are identified and to make a report to the Senate with recommendations.

WHEREAS, From December 13 through December 16, 2009, *The Philadelphia Inquirer* published a series of articles entitled "Justice: Delayed, Dismissed, Denied," ~~describing a criminal justice system in disarray~~ REGARDING THE PHILADELPHIA CRIMINAL JUSTICE SYSTEM; and

WHEREAS, ~~*The Philadelphia Inquirer*~~ IT WAS reported that ~~"For three consecutive years,~~ Philadelphia has had the highest violent crime rate among the nation's 10 largest ~~cities"~~ CITIES IN THE LAST THREE YEARS but, with the exception of murder cases, ~~"Philadelphia~~ ITS conviction rates trail the nation's in rape, robbery, and serious assault ~~cases",~~ CASES; and

Whereas, ~~*The Philadelphia Inquirer* reported that~~

~~"Philadelphia defendants are thumbing their noses at the city's judges and victims, given a free pass by the system's ineffective bail program -- and skipping court in huge numbers";~~
IT WAS STATED THE BAIL PROGRAM IS INEFFECTIVE; and

WHEREAS, ~~*The Philadelphia Inquirer* reported that "Witness intimidation pervades the Philadelphia criminal courts, increasingly extracting a heavy toll in no-show witnesses, recanted testimony -- and collapsed cases";~~
IT IS ALLEGED THAT WITNESS INTIMIDATION IS COMMON; and

~~WHEREAS, *The Philadelphia Inquirer* reported that many cases fall apart in Municipal Court, "Of robbery and aggravated assault cases filed in 2006 and 2007 in Municipal Court, about half were immediately tossed or withdrawn -- and never went to Common Pleas Court, where felonies are decided"; and~~

WHEREAS, On April 19, 2010, as a follow-up to *The Philadelphia Inquirer*'s series, the Senate Judiciary Committee held a public hearing in Philadelphia to receive testimony relating to the Philadelphia criminal justice system; and

WHEREAS, Witnesses told committee members that they would welcome a forum that would include all stakeholders in which they could discuss Philadelphia's criminal justice system with the other stakeholders and develop solutions; and

WHEREAS, The Joint State Government Commission has a history of success in bringing together all stakeholders on a particular issue and developing a consensus on how best to move forward in resolving the issue; and

WHEREAS, Study of the criminal justice system in Philadelphia would not only benefit Philadelphia, but the lessons learned and recommendations made could benefit the criminal justice systems in counties throughout Pennsylvania; therefore be it

RESOLVED, That the Senate direct the Joint State Government Commission to establish a criminal justice advisory committee to study the issues ~~raised by *The Philadelphia Inquirer*~~ OF HIGH VIOLENT CRIME RATES, LOW CONVICTION RATES, THE BAIL SYSTEM, WITNESS INTIMIDATION and any other relevant issues regarding the criminal justice system in Philadelphia and to develop solutions for the problems that are identified; and be it further

RESOLVED, That the advisory committee be comprised of approximately 30 members and include persons representing all relevant aspects of and participants in the criminal justice system in Philadelphia, including, but not limited to, law enforcement, prosecutors, criminal defense attorneys, the judiciary, crime victims and witnesses, probation and corrections; and be it further

RESOLVED, That the advisory committee may receive input from academia, private and public organizations involved in criminal justice issues, other criminal justice experts and the general public; and be it further

RESOLVED, That the advisory committee make a report to the Senate with recommendations no later than 18 months from the date that this resolution is adopted.

APPENDIX A.
DISSENTING STATEMENT BY BRIAN J. FRANK

Dissenting Statement
(Submitted by Brian J. Frank, Esquire)

Regrettably, I must issue this Dissenting Statement in regards to the "Pretrial Release and Bail" Section of the Report. In my view, the Committee has not accomplished the task assigned, at least as to bail related matters, and I further note that references in the Report to "approvals" or "agreement" on the part of the Committee may be misleading, as no votes – to my knowledge – were taken in the process, despite my request for certain votes relating to bail matters.

As set forth below, the Report fails to focus on central issues relating to bail in Philadelphia – ***the chronic and abysmal failure to appear rate of criminal defendants and the utter lack of accountability for those failures to appear***; and, instead, in substantial parts of the Report, regurgitates impractical and ineffective approaches, largely espoused by those that abhor the notion of commercial surety bail and who only want wholesale **TAXPAYER FUNDED BAIL FOR ALL**. There are numerous assertions made in the Report that are easily refuted, however, it is simply not productive to do so in this Dissenting Statement. The Report offers little in the way of any pragmatic suggestions to address the systemic problems with bail in Philadelphia, despite the empirical data and suggestions from me and others in the bail industry that have a wealth of experience nationwide in bail related matters.

In this Dissenting Statement, I have highlighted the abysmal failure to appear rate existing in Philadelphia and the utter lack of accountability. A brief discussion relating to the existing 10% Deposit System follows, so as to give a context for other possible improvements to the bail process in Philadelphia. Lastly, certain suggestions – a couple of which were offered to the Committee for consideration, but not included in the Report – are discussed.

1. Chronic and abysmal failure to appear rate of criminal defendants; Lack of accountability.

Remarkably, the Report fails to truly acknowledge and emphasize the disgraceful failure to appear rate – **an initial FTA rate of *at least* 28% and an ultimate FTA rate (namely, a criminal defendant remaining a fugitive after 1 year) of 10%** – that has long existed in Philadelphia under its current pretrial release system. In a disingenuous attempt to minimize the failures, the Report

states that the "true rate of FTA's is difficult to determine because the poor record keeping by the former Clerk of Quarter Sessions…" and asserts that comparisons to other criminal justice systems may not be insightful because of "differing methods and definitions that jurisdictions and commentators use to count 'failures to appear.'" These explanations are nothing more than rubbish. **The *Philadelphia Inquirer* series of articles entitled "Justice: Delayed, Dismissed, Denied," which led to the formation of this Committee and the issuance of the within Report, disclosed that there were 47,000 criminal fugitives on the streets of Philadelphia and those fugitives owed taxpayers an astonishing One Billion Dollars ($1,000,000,000.00) in unpaid forfeiture judgments.**

The Report's efforts to marginalize these deplorable statistics – and to otherwise fail to offer concrete suggestions (including possible pilot programs) – demonstrates the Committee's failure to truly tackle the problem. Indeed, a considerable number of pages in the Report are devoted to the discussion of "Development of Nonmonetary Terms of Release" (See page 35-36) and the "Option of Eliminating Monetary Conditions" (See pages 37-40), which are not only unwise but also are not pragmatic. This extensive discussion of some "feel good" implausible (and extraordinarily expensive) system is nothing more than a diversion on the part of those that do not wish to see, for purely ideological reasons, commercial surety bail truly reintroduced and expanded in Philadelphia. The discussion on nonmonetary terms of release and elimination of monetary conditions could and should have been relegated to a couple of paragraphs, given that, among other things, there is no real likelihood of implementation of such a system in the near future; however, the aforementioned opponents of commercial surety bail on the Committee have used "the best defense is an offense" strategy to thwart meaningful decisions. Those advocating the wholesale use of nonmonetary terms of release and the elimination of monetary conditions point to the pretrial system used in Washington D.C., funded by the Federal Government, as a model system. **Apart from the fact that the Report fails to truly recognize that decades of governmentally generated statistics (and academic studies) unequivocally demonstrate that commercial surety bail performs at a much better rate than any form of pretrial release, including the D.C. system, the Report inconspicuously acknowledges, in footnote 43, that it would costs on the order of *One Hundred Forty-Four Million Dollars ($144,000,000.00) annually* for Philadelphia to implement a D.C. like system.**

Ironically enough, those that chose to ignore the statistics in terms of failures to appear want to employ so called "empirically based risk assessment tools" – a system that uses statistics in its modeling and application for pretrial release decisions – to implement their wholesale system of nonmonetary conditions of release. Of course, the personnel that would implement and administer these types of programs come from the same pool of personnel – namely, government employees who lack true accountability,

particularly financial accountability – that were charged with the responsibilities of the current system, whose past performance has been abysmal. **Contrariwise, in a system with checks and balances as has been suggested to the Committee, commercial surety bail offers superior performance, accountability, and enhanced public safety, all at no cost to the taxpayers.**

As for indigent defendants, the original mission of pretrial service agencies was to address those constituents. Like so many other government programs, its bureaucracy begot more bureaucracy, with all of its attending costs and inefficiencies, and needless expansion beyond its real purpose. No one disputes that there is a need and obligation to address those that are truly indigent – along the same lines as exists in providing legal counsel. Pretrial service agencies should remain true to serving the indigent and should not be expanded as envisioned by those seeking to impose only nonmonetary terms of release and eliminating monetary conditions.

2. <u>The 10% Deposit System is Fundamentally Unsound and likely Unconstitutional</u>.

The current system in Philadelphia allows a criminal defendant to post 10% of the bond amount set, with a promise to pay the remaining 90% if he fails to honor his promise to appear as required. **On its face and IN PRACTICE, the notion that a criminal defendant will make good on his promise to pay the remaining 90%, if he fails to appear in Court as required, is "Alice in Wonderland" thinking.** Although 10% Deposit Bail is better than no security at all, the evidence demonstrates – and Philadelphia's experience confirms -- that 10% Deposit Bail is neither effective nor efficient. The reality is that a definite fixed amount (which may well be the actual 10% that would have needed to be deposited) – not some *faux* amount – should be the bail amount.

Given that the defendant's promise to pay the additional 90% bond amount is, in theory and in reality, illusory – something that the Report fails to take note of – the system and the defendant may be better served by simply having the bail amount set at a fixed sum (instead of the artificial amount, with 10% being the deposit amount). Under that circumstance, the defendant would have more OPTIONS – more particularly the possibility of utilizing a commercial surety – which would likely expedite his release pending trial (for many of the reasons enumerated in the Report, including the possibility of the surety allowing for the payment of its premium in installments) and undoubtedly would lead to improved appearance rates. Recognizing that change often comes slow and in incremental steps, one of the suggestions offered to the Committee, but not included in the Report, is consideration of a Twenty-Five Percent (25%) Alternative Bail Surety Program, as a part of the 10% Deposit System.

As existing, the current 10% Deposit System is likely unconstitutional. As the Report noted, Article I, §14 of the Pennsylvania Constitution states that "[a]ll prisoners shall be bailable by **sufficient sureties** …." (emphasis added). Since no determination appears to be made in any instance as to whether or not the remaining 90% is collectable, the deposit program, as operating in Philadelphia, likely runs afoul of the "sufficient sureties" provision. The magnitude of the debts owed as well as the inability to collect as outlined by the *Philadelphia Inquirer* articles speaks volumes to this point. Although no legal challenge has ever been asserted as to this issue, that does not justify ignoring the plain meaning of the Constitutional provision, particularly in light of the open forfeiture judgments – namely, One Billion Dollars ($1,000,000,000) in such judgments – and the acknowledged lack of collectability on most, if not all, of those judgments.

3. Suggestions that were Offered to the Committee.

Suggestions for Rule and protocol changes that would lead to the expansion of commercial surety bail in Philadelphia were offered to the Committee. Although the Report acknowledges that commercial surety bail exists on a limited basis in Philadelphia, it fails to acknowledge that the FTA rate for those released on commercial surety bail has been stellar (initial FTA rate of approximately 1% and zero ultimate FTA rate). Apart from that performance, the Report also fails to include the "pilot type" suggestions that were made by the bail industry to the Committee for consideration, namely:

a. Twenty-Five Percent (25%) Alternative Bail Surety Program. Although the 10% Deposit System is largely illusory – because a bond that is set at $10,000 is really just a $1,000 bond – its elimination at this point is unlikely given that it is statutorily permitted and engrained in the Philadelphia criminal justice system. One possible alternative that was offered for consideration would allow a commercial surety to post 25% of the bond amount (as opposed to the 100%) to effectuate the defendant's release. This proposal would provide criminal defendants an additional option, expediting or otherwise increasing the likelihood of being released on bail, and, at the same time, provide 2.5 times the financial security that is currently given by the defendant, with even greater assurance that he will appear as required (or be returned promptly if he fails to appear).

b. Joint Courtesy Supervision. One additional suggestion that was offered included combining a commercial surety bail bond with some supervision by the Pretrial Services Agency, to the extent ordered by the Court in the appropriate circumstances. This type of program, which has been used in Houston, Texas (Harris County), would provide the financial security and accountability of a commercial surety bond with the supervision the Court deemed appropriate for a given defendant. Indeed, this might lead to a lower bond amount being set, given the joint involvement.

4. Conclusion.

Buried within the Report is the data, including reports from the United States Bureau of Justice Statistics, that demonstrates that commercial surety bail is the most effective and cost efficient form of pretrial release in assuring that defendants appear in Court, as required. Moreover, if a defendant does fail to appear, commercial surety bail has been shown to be the most effective at promptly locating and returning fugitives to the Court's jurisdiction. Even with the handicap of having those defendants that have been judicially determined to be the "least reliable," commercial surety bail has outperformed all other forms of pretrial release, all at no expense to the taxpayers. Choosing to ignore the facts and statistics, and instead relying on stereotypes, innuendo and faulty suppositions, opponents of commercial surety bail present an alternative – Taxpayer Funded Bail – that is ineffective and costly.

APPENDIX B.
DISSENTING STATEMENT BY NICHOLAS J. WACHINSKI

DISSENT TO THE REPORT
OF THE ADVISORY COMMITTEE
ON THE CRIMINAL JUSTICE SYSTEM IN PHILADELPHIA
DECEMBER 2012

Submitted by Nicholas J. Wachinski, Esquire

Please accept "dissent" to the form and content of the report prepared as responsive to Senate Resolution 344 of 2010 prepared by the Joint State Government Commission. Specifically, this dissent addresses only the subordinate issue of Pretrial Release and Bail.

Firstly, no consensus was reached regarding the need to develop nonmonetary conditions of release. The subcommittee agreed that a need existed to revise and rehabilitate the entire system of releasing defendants awaiting trial. When first convened, the Committee of the Whole resolved to investigate the subordinate issues with a goal of determining remedies that created a system of "best practices" within current operational limitations. Throughout the entirety of our meetings on the issue of Pretrial Release and Bail, a great many hours of discussion and testimony were consumed with moving to an entirely nonmonetary system of supervising defendants awaiting trial. Despite those hours, the Committee never moved from the focus that Monetary Conditions of Release would remain, the Report, as it exists, suggests otherwise.

There is no system, including Wisconsin, Oregon[158], Illinois and Kentucky, that has eliminated Monetary Conditions of Release as a viable and functional means for release of defendants pending trial. Although Pittsburgh advertises itself to be a "nonmonetary system", a great many number of surety bail bonds and fully financially secured (cash) bail bonds are levied against defendants there.

Opponents of monetary bail, both in Philadelphia and elsewhere, ignore the impact infringed finances have on all aspects of life. One need not conduct an in depth research project to determine how important money, finances and the economy are to the United States population, including Philadelphia. The recent election focused on economic stimulus, the financial cliff, creation of new jobs and the overall worry of being able to afford the lifestyles that the electorate has been accustomed to know.

[158] It is noteworthy that surety bail bonding is not illegal or abolished in the state of Oregon. Surety bail is merely not an option in that state because no logistical infrastructure exists for the implementation of said form of release. Furthermore, the lack of education of both the bar and bench as relates surety bonding in that jurisdiction has further compounded surety bail industry inability to serve as a vested and equal criminal justice partner.

Shifting entirely to a nonmonetary system of release will consume, at minimum, in excess of $144,000,000 per annum in administrative costs. This figure does not include the costs to build a day reporting center, to finance a fully educated staff for that center, to establish a system of half way houses and to fully integrate an infrastructure that can address swift, certain and absolute consequences for failures to comply with the conditions of release. Such figures for an entire integration are unavailable but will far exceed the $144,000,000 figure that has been assessed thus far.

Due to the current operational limitations placed on the First Judicial District, the implementation of Monetary Conditions of Release has been and will continue to remain a large element of addressing defendant release pending trial. The ongoing research and evaluation cited in the Report should include the development of a system of best practices which maximizes the efficacy of assessing monetary values appropriately matched to the individualized financial ability of the defendant in comparison to the offense charged consistent with the auspices of Pennsylvania Rule of Criminal Procedure 523, rather than just attempting to minimize judicial discretion and inconsistent results from defendant to defendant.

Additionally, the stakeholders who are conducting the research and evaluation should explore a bail guideline tool that relies on a "cash" or "noncash" classification as the optimal series of conditions for defendant release, while leaving the determination of the individualized monetary amount or nonmonetary conditions to the bail authority. The bail authority will then make a bail recommendation relying on the confirmed information presented the bail authority at the time of preliminary arraignment. Such a recommendation will yield a more individualized result that addresses the specific risk that has been posed by the defendant rather than focusing on the concern of treating all "like defendants alike.

Any statistical data derived from classes of defendants would be used merely as an instruction tool to the bail authority in assessing the appropriate conditions. Monetary conditions of release should be relied on to guarantee defendant appearance at court alone. If safety concerns or concerns of re-offense are posed by the defendant, then additional nonmonetary conditions of release should be implemented to address those concerns. In the event that no condition or set of conditions will guarantee appearance or protect the victim or community, then all conditions of release should be denied consistent with Article I, Section XIV of the Pennsylvania Constitution and the direct decision model.

The First Judicial District should continue to refine and test the appropriate nonmonetary conditions relied upon by the bail authorities based on the statistical results provided in ongoing research and evaluations. The emphasis of the studies relating to nonmonetary conditions of release should focus on ensuring that the bail authorities are aware of the category specific conditions that control or address certain patterns of behavior with the goal of minimizing the risk of repetition of those disfavored patterns of behavior in a pool of defendants.

It should be noted, that while nonmonetary conditions of release are laudable and useful at times, improperly levied nonmonetary conditions of release may likely be unlawful. If a defendant is ORDERED into alcohol or drug treatment as a condition of release, he or she is being forced to admit that they have in fact used alcohol or drugs and they may be forced to admit when they used those substances. Such an admission may be in violation of the Miranda

protections, although no case specifically addresses the same. As it pertains to "halfway houses" and "day reporting centers", the restrictions placed on a defendant by these types of release may in fact be tantamount to incarceration or at least more restrictive than release on bail, there are constitutional concerns surrounding these forms of release as well, although I do not go as far as to suggest that they are "unconstitutional".

Without question, the private bail industry should be engaged in Philadelphia to provide a system of support for those defendants who have monetary conditions of released assessed as a part of his or her release. While the private bail industry need not be involved in *every* bail where a monetary condition of release assessed, the industry should be involved in all situations where a full monetary condition of release is required and in many instances where a deposit monetary condition of release[159] is assessed. The private bail industry provides assurances of defendant appearance or return of defendant in the event of a nonappearance at no costs to the system or the taxpayers who fund it. It should be noted that considerable training, education and infrastructure must be an ongoing portion of the use of the private bail industry.

The private bail industry and a pretrial services division can work together. The private bail industry will guarantee appearance or return, while the pretrial services division can ensure defendant compliance with performance conditions (nonmonetary conditions) implemented to ensure that the defendant poses no more threat to the community or to victims. Working jointly, these two entities can maximize efficiency not only in the supervision of the defendant awaiting trial, but they can also maximize the dollars spent by the system in addressing the defendant. By implementing such a system, Philadelphia can augment the current system, without a tremendous influx of monies being required.

Clearly, there is a role for improvement in Philadelphia. Much of that improvement comes as a means of "common sense" and simple adjustment, within current operational limits, that will increase efficiency and guarantee defendant appearance. The tenor and feeling of the report on the issue of Pretrial Release and Bail does not reflect the wishes or feelings of the subcommittee. It seems as though the report suggests a total shift away from monetary conditions of release and asks for a huge sum of money to be incurred to make improvements. The subcommittee was vested in change at no costs, or change at minimal costs. The suggestions offered in this dissent are not dissimilar from the report, but merely focus on the minimization of costs for improvement. In my view, this dissent most accurately reflects the sense of the subcommittee.

[159] It is unquestionable that the deposit system is a failure, not only in Philadelphia, but also in Chicago. The system is misleading and is not accurately administered due to the overwhelming costs associated with the return of defendants who fail to appear but also those costs associated with recovering the remaining monies associated with the bonds.