

Nyssa Taylor, Pa. ID 200885
Molly Tack-Hooper, Pa. ID 307828
Hayden Nelson-Major, Pa. ID 320024
**American Civil Liberties Union
of Pennsylvania**
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
ntyalar@aclupa.org
mtack-hooper@aclupa.org
hnelson-major@aclupa.org

Mary M. McKenzie, Pa. ID 47434
Benjamin Geffen, Pa. ID 310134
The Public Interest Law Center
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
267-546-1308
BGeffen@pubintl.org
mmckenzie@pubintl.org

Counsel for Amicus Curiae

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

TYJEAR DAVIS,

Petitioner,

v.

**COMMONWEALTH OF
PENNSYLVANIA,**

Respondent.

No. 68 EM 2019

**APPLICATION FOR LEAVE TO FILE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AS
AMICUS CURIAE IN SUPPORT OF PETITIONER TYJEAR DAVIS**

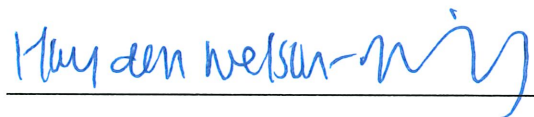
Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, the American Civil Liberties Union of Pennsylvania respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioner Tyjear Davis’

request that this Court grant leave to file original process and consider his challenge to the detainer scheme at issue.

1. On June 20, 2019, Petitioner Tyjear Davis filed the instant Petition for Writ of Habeas Corpus or Extraordinary Relief.
2. In support of Petitioner's request for leave to file original process, the American Civil Liberties Union of Pennsylvania seeks to file the accompanying brief in order to provide context regarding the scope of probation in Pennsylvania, the profound consequences of detention, and the important state constitutional questions involved in the detainer scheme at issue.
3. The American Civil Liberties Union of Pennsylvania has substantial experience and expertise in the constitutional, statutory, and rules-based frameworks governing pretrial detention, bail, and probation.

WHEREFORE, the American Civil Liberties Union of Pennsylvania respectfully requests that this Honorable Court grant the requested leave and accept the accompanying *amicus curiae* brief.

Respectfully Submitted,



Nyssa Taylor, Pa. ID 200885
Molly Tack-Hooper, Pa. ID 307828
Hayden Nelson-Major, Pa. ID 320024

**American Civil Liberties Union
of Pennsylvania**

P.O. Box 60173

Philadelphia, PA 19102

215-592-1513

ntyalor@aclupa.org

mtack-hooper@aclupa.org

hnelson-major@aclupa.org

Mary M. McKenzie, Pa. ID 47434

Benjamin Geffen, Pa. ID 310134

The Public Interest Law Center

United Way Building, 2nd Floor

1709 Benjamin Franklin Parkway

Philadelphia, PA 19103

267-546-1308

BGeffen@pubintl.org

mmckenzie@pubintl.org

Dated: July 2, 2019

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents

Dated: July 2, 2019



Hayden Nelson-Major

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 68 EM 2019

TYJEAR DAVIS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

**AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA IN SUPPORT OF PETITIONER**

Nyssa Taylor, Pa. ID 200885
Molly Tack-Hooper, Pa. ID 307828
Hayden Nelson-Major, Pa. ID 320024
**American Civil Liberties Union
of Pennsylvania**
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
ntyalor@aclupa.org
mtack-hooper@aclupa.org
hnelson-major@aclupa.org
Counsel for Amicus Curiae

Benjamin Geffen, Pa. ID 310134
Mary M. McKenzie, Pa. ID 47434
The Public Interest Law Center
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
267-546-1308
bgeffen@pubintl.org
mmckenzie@pubintl.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT 3

 I. High Rates of Community Supervision and the Unrestrained Use of Probation Detainers Are Major Contributors to Pennsylvania’s Disproportionately High Incarceration Rate3

 II. Detention Profoundly Harms Individual Defendants, Families and Communities7

 III. The Detainer Scheme at Issue Violates the Pennsylvania Constitution Because it Fails to Provide Necessary Due Process and Relies on an Unconstitutional Irrebuttable Presumption that for People on Probation a Mere Arrest Necessitates Pretrial Detention.12

 a. The Pennsylvania Constitutions require due process before the state may deprive a person on probation of their liberty..... 12

 b. For over thirty years, a local rule articulated some due process for probation detainers. 14

 c. The First Judicial District employs an unconstitutional irrebuttable presumption that a mere arrest for those on probation requires immediate detention. 16

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

<i>Barker v. Wingo</i> , 407 U.S. 514 (1972).....	11
<i>Bell v. Burson</i> , 402 U.S. 535 (1971)	16
<i>Commonwealth v. Davis</i> , 336 A.2d 616 (Pa. Super. Ct. 1975).....	18
<i>Commonwealth v. Davis</i> , 586 A.2d 914 (Pa. 1991).....	13
<i>Commonwealth v. Scott</i> , 436 A.2d 607 (Pa. 1981)	18
<i>Commonwealth v. Warren</i> , 378 A.2d 1271 (Pa. Super. Ct. 1977).....	18
<i>DOT v. Clayton</i> , 684 A.2d 1060 (Pa. 1996).....	16, 17, 18
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	12
<i>In the Interest of J.B.</i> , 107 A.3d 1 (Pa. 2014).....	16, 17, 18, 19
<i>Schwartz v. Bd. of Bar Exam'rs of N.M.</i> , 353 U.S. 232 (1957).....	18

Statutes

42 Pa.C.S. § 9754(c)(6)	4
-------------------------------	---

Rules

Philadelphia Court of Common Pleas Criminal Rule 708	15
Philadelphia Court of Common Pleas Criminal Rule 910	13, 19

Other Authorities

Alexander Holsinger, <i>Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes, Crime and Justice</i> Institute (June 2016).....	7, 8
---	------

Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, Prison Policy Initiative, (Dec. 2018)..... 6

Arpit Gupta *et al.*, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471 (2016)..... 11

Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, (Jun. 14, 2016)..... 10

•

Chris Lowenkamp *et al.*, *The Hidden Costs of Pretrial Detention*, The Laura and John Arnold Foundation, 3 (Nov. 2013)..... 8

Christopher T. Lowenkamp *et al.*, *Investigating the Impact of Pretrial Detention on Sentencing Schemes*, Laura & John Arnold Foundation, 14 (Nov. 2013) 11

Danielle Kaebler & Mary Cowhig, U.S. Dep’t of Justice, NCJ 251211, *Correctional Populations in the United States, 2016* (Apr. 2018)..... 3, 5

Danielle Kaebler and Thomas Bonczar, U.S. Dep’t of Justice, NCJ 250230, *Probation and Parole in the United States, 2015* (Feb. 2, 2017)..... 6, 7

Danielle Kaebler, U.S. Dep’t of Justice, NCJ 251148, *Probation and Parole in the United States, 2016* 11-12 (Apr. 2018)..... 5

Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* (Aug. 2017) 11

Jack Norton, *Why Are There So Many People in Jail in Scranton, PA*, VERA Institute (Jan. 4, 2017)..... 10

Jessica Eaglin & Danyelle Solomon, <i>Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice</i> , Brennan Ctr. for Justice, 19-20 (2015).....	9
Justice Center, The Council of State Governments, <i>Pennsylvania Supervision Violation Data Snapshot</i>	3, 4
Margaret E. Noonan, U.S. Dep’t of Justice, NCJ 248756, <i>Mortality in Local Jails and State Prisons, 2000-2013 - Statistical Tables</i> (Aug. 2015).....	8
Megan T Stevenson, <i>Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes</i> , 34 J.L. Econ. & Org. 511 (2018)	11
Paul Heaton et al., <i>The Downstream Consequences of Misdemeanor Pretrial Detention</i> , 69 Stan. L. Rev. 711 (2016)	11
Pennsylvania Board of Probation and Parole, <i>County Adult Probation and Parole Annual Statistical Report 2016</i> (2017)	6, 20
<i>Philadelphia’s Jail Population April 2019</i> , MacArthur Safety and Justice Challenge and the First Judicial District of Pennsylvania, 6 (2019)	5
Prison Policy Initiative, <i>Pennsylvania Profile 2018</i> , https://www.prisonpolicy.org/profiles/PA.html (last visited Jul. 1, 2019).....	7, 20
Robynn Cox & Sally Wallace, <i>Identifying the Link Between Food Security and Incarceration</i> , 82 S. Econ. J. 1062, 1074 (2016).....	9
Rosenberg, Alana, Groves, Allison, and Blankenship, Kim, <i>Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming</i> , J. Drug Issues Vol. 47 (December 2016).....	9

Sandra Mayson & Megan Stevenson, <i>Misdemeanors by the Numbers</i> , Boston College Law Review, Forthcoming (April 18, 2019)	9
Seth F. Kreimer, <i>Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968</i> , 71 Rutgers U. L. Rev. 287 (2018)	13
<i>The Reality of Pre-Trial Detention: Colorado Jail Stories</i> , Colorado Criminal Defense Institute, 6-9 (2015)	9
Traci Schlesinger, <i>Racial and Ethnic Disparity in Pretrial Criminal Processing</i> , 22 Just. Q. 170 (2005)	9
U.S. Census Bureau, <i>American Community Survey, American Community Survey 5-Year Estimates, 2013-2017</i>	6, 7
University of Pittsburgh Institute of Politics, Criminal Justice Task Force, <i>Criminal Justice in the 21st Century: Allegheny County Jail</i> (Nov. 2016)	10
Vera Institute, <i>Incarceration Trends</i> , http://trends.vera.org/incarceration- rates?data=pretrial&geography=states (last visited Jul. 1, 2019)	10
York County Adult Probation Department, Court of Common Pleas, <i>Regulations & Conditions of Probation, Parole, and Intermediate Punishment</i> , (Oct. 18, 2005)	4
Zhen Zeng, U.S. Dep't of Justice, NCJ 251210, <i>Jail Inmates in 2016</i> , (Feb. 2018)	10

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization of over 1.75 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the Pennsylvania Constitution, the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with approximately 40,000 members throughout Pennsylvania.

The ACLU of Pennsylvania promotes the protection of fundamental rights in the criminal justice system at all stages of proceedings. The ACLU of Pennsylvania has substantial experience and expertise in the constitutional, statutory, and rules-based frameworks governing pretrial detention, bail, and probation.

The ACLU of Pennsylvania urges the Court to grant Petitioner’s request for leave to file original process. In support of this request, the ACLU of Pennsylvania separately submits this brief to provide context regarding the scope of probation in Pennsylvania, the profound consequences of detention, and the important state constitutional questions involved in the detainer scheme at issue.

SUMMARY OF THE ARGUMENT

Probation detainers affect thousands of people across Pennsylvania.

Pennsylvania has the highest incarceration rate in the Northeast and the second highest rate of community supervision in the country. Probation violations drive Pennsylvania's mass incarceration crisis—probation revocations send thousands of people to state prison each year and probation detainers lodged against those charged with, but not convicted of, probation violations hold thousands in pretrial status.

Pretrial detention inflicts profound harms on individuals and their families and disproportionately affects communities of color. Pretrial detention also leads to worse case outcomes including higher rates of conviction and longer sentences for those held pretrial.

The detainer scheme at the heart of Petitioner's claims fails to provide the requisite due process. Rather, the system relies on an irrebuttable presumption that pretrial detention is necessary based on the sole fact that a person on probation has a new arrest. The assumption underlying this detainer practice fails to pass constitutional muster.

Although the federal and Pennsylvania constitutions both require due process protections before depriving a probationer of his or her liberty, the Pennsylvania Constitution provides even more robust constitutional protections

than federal law. Reasonable alternative means exist that provide a viable alternative to this unconstitutional practice.

This matter has profound, statewide importance. Therefore, the American Civil Liberties Union of Pennsylvania urges the court to accept jurisdiction and address the unconstitutional detainer practices challenged by Petitioner.

ARGUMENT

I. High Rates of Community Supervision and the Unrestrained Use of Probation Detainers Are Major Contributors to Pennsylvania's Disproportionately High Incarceration Rate.

Pennsylvania has the highest incarceration rate in the Northeast.¹ Data demonstrates that probation, originally designed as a way to keep prison populations down and help people succeed in their communities, has in fact had the opposite effect.² Those charged with supervision violations fill our jails and prisons and drive Pennsylvania's mass incarceration crisis.³ Probation revocations

¹ Danielle Kaeble & Mary Cowhig, U.S. Dep't of Justice, NCJ 251211, *Correctional Populations in the United States, 2016* 11-2 (Apr. 2018), available at <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

² In 2017, fifty-four (54) percent of prison admissions in Pennsylvania were for supervision violations. Justice Center, The Council of State Governments, *Pennsylvania Supervision Violation Data Snapshot*, <http://csgjusticecenter.org/confinedandcostly/?state=PA> (last visited Jul. 1, 2019).

³ Justice Center, The Council of State Governments, *Justice Reinvestment in Pennsylvania: Policy Framework*, 5 (June 2017), <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Justice-Reinvestment.aspx>.

send thousands of people to state and local prisons every year. As noted in a recent report from the Council for State Governments, “[o]n any given day in Pennsylvania, 7,443 people are incarcerated as a result of a supervision violation at an annual cost to the state of \$334 million.”⁴

Probation is correctional supervision and comes with onerous conditions. Probationers must meet regularly with an officer, pay supervision fees, find and maintain employment, undergo repeated and random drug testing, and open their home to random searches. Probationers may be forbidden from “consorting with disreputable people,”⁵ which can include a blanket prohibition against visiting anyone with a prior criminal history, even the probationer’s own family members. Conditions of probation typically include a prohibition against travel outside the supervising county without prior approval. If a change of residence or employment occurs, probationers must notify their probation officer within seventy-two hours. Probationers may be required to take certain medications, maintain a strict curfew, or refrain from consuming alcohol.⁶

⁴ Justice Center, The Council of State Governments, *supra* note 2.

⁵ 42 Pa.C.S. § 9754(c)(6) (“*Order of Probation*”).

⁶ See, e.g., York County Adult Probation Department, Court of Common Pleas, *Regulations & Conditions of Probation, Parole, and Intermediate Punishment*, (Oct. 18, 2005), <https://yorkcountypa.gov/forms/send/91-probation-conditions/251-probation-conditions-english.html>.

Failure to comply with any of these numerous supervisory conditions can lead to incarceration. Detainers—which are requests for holds lodged by probation and parole departments following an allegation of a violation of the terms of probation or parole—can keep people incarcerated for months or even years and are a major contributor to the massive number of people held in county jails. As of April 2019, fifty-seven percent of the people in Philadelphia’s jails (2,649 people) were incarcerated as a result of detainers.⁷ These people, who have not been found guilty of any new crime, sit in limbo for months awaiting the resolution of their new case.

In Pennsylvania, one out of every thirty-four adults is under “community supervision,” meaning probation or parole supervision.⁸ Pennsylvania’s community supervision rate is significantly higher than the national average.⁹ Of the fifty states, Pennsylvania has the second highest percentage of its citizens on community supervision.¹⁰

⁷ *Philadelphia’s Jail Population April 2019*, MacArthur Safety and Justice Challenge and the First Judicial District of Pennsylvania, 6 (2019), <https://www.phila.gov/media/20190513143811/April-2019-Jail-Population-Report.pdf>.

⁸ Kaeble & Cowhig, *supra* note 1.

⁹ *Id.* (One out of every fifty-five adults in the United States is supervised by probation and parole annually).

¹⁰ Danielle Kaeble, U.S. Dep’t of Justice, NCJ 251148, *Probation and Parole in the United States, 2016* 11-12 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>. In addition to having the second highest percentage of people under community supervision (both probation and parole), Pennsylvania stands out when looking at parole alone. Pennsylvania has both the

In 2017, county probation and parole departments supervised 250,136 people.¹¹ In Philadelphia alone, the Adult Probation and Parole Department supervises over 42,000 people, which means approximately one out of every twenty-nine adults in Philadelphia is under some form of county supervision.¹² 5.4% of Philadelphia's adult population is on some form of community supervision.¹³

Pennsylvania's total correctional control over its citizens (including both incarceration and community supervision) is disturbingly high, we have the second highest rate of correctional control in the United States.¹⁴ In 2018, with approximately 380,000 people under correctional control, Pennsylvania had more

highest number of people on parole and the highest rate of parole supervision in the United States. Danielle Kaeble and Thomas Bonczar, U.S. Dep't of Justice, NCJ 250230, *Probation and Parole in the United States, 2015 18-19* (Feb. 2, 2017), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

¹¹ Pennsylvania Board of Probation and Parole, *County Adult Probation and Parole Annual Statistical Report 2016*, 5 (2017), <https://www.pbpp.pa.gov/Information/Documents/CAPP%20Reports/2017%20County%20Adult%20Probation%20and%20Parole.pdf>.

¹² *Id.* at 17; U.S. Census Bureau, *American Community Survey, American Community Survey 5-Year Estimates, 2013-2017*, <https://factfinder.census.gov/>. When parole is factored in, these numbers are even higher – one out of every twenty-two adults in Philadelphia is currently under some form community supervision. *Id.*

¹³ *Supra* note 11 at 35.

¹⁴ Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, Prison Policy Initiative, (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>. Only Georgia has a higher rate of correctional control. *Id.*

people under correctional control than the entire population of Pittsburgh (305,928).¹⁵

II. Detention Profoundly Harms Individual Defendants, Families, and Communities.

Extensive empirical research documents the profound harms that pretrial detention inflicts on individuals and their families as well as the disproportionate impact those harms have on low-income communities of color.

People detained for even a few days may lose employment, their homes, and access to their children. Even if detention lasts only a couple of days, it can have “serious deleterious effects . . . on outcomes such as job loss, residential instability, negative financial impacts and loss of social support.”¹⁶

In one study, after three days of detention, thirty percent of incarcerated parents were concerned about their ability to support their children and approximately sixteen percent of incarcerated parents feared losing custody of their

¹⁵ Prison Policy Initiative, *Pennsylvania Profile 2018*, <https://www.prisonpolicy.org/profiles/PA.html> (last visited Jul. 1, 2019); Danielle Kaeble & Lauren Glaze, U.S. Dep’t of Justice, NCJ 250374, *Correctional Populations in the United States, 2015*, 12 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>; U.S. Census Bureau, *American Community Survey, American Community Survey 5-Year Estimates, 2015*, <https://factfinder.census.gov/>.

¹⁶ Alexander Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, Crime and Justice Institute, 1 (June 2016), http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf.

children.¹⁷

Detention has such a profoundly destabilizing impact on a person's life that incarceration for as few as two or three days actually *increases* the likelihood of future criminal activity by forty percent for even low-risk defendants.¹⁸

Detainees who suffer from chronic physical or mental illnesses often experience gaps in medication and lose access to their medical providers. Given this interruption in medical care and the stress caused by admission, suicide is the leading cause of death in local jails and is more prevalent in local jails than state prisons.¹⁹ Nationwide, three quarters of jail deaths occur among people who are awaiting resolution of their case.²⁰

Detention also negatively affects the families of those who are incarcerated.

¹⁷ *Id.* at 9.

¹⁸ Chris Lowenkamp *et al.*, *The Hidden Costs of Pretrial Detention*, The Laura and John Arnold Foundation, 3 (Nov. 2013), <https://bit.ly/2u0Lj5d>.

¹⁹ Margaret E. Noonan, U.S. Dep't of Justice, NCJ 248756, *Mortality in Local Jails and State Prisons, 2000-2013 - Statistical Tables*, 1 (Aug. 2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>.

²⁰ Margaret E. Noonan, U.S. Dep't of Justice, NCJ 250169, *Mortality in Local Jails, 2000-2014 - Statistical Tables*, 7 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/mlj0014st.pdf>; Maurice Chammah & Tom Meagher, *Why Jails Have More Suicides Than Prisons*, Marshall Project, (Aug. 4, 2015), <https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons> (“One reason why jails have a higher suicide rate . . . than prisons . . . is that people who enter a jail often face a first-time ‘shock of confinement’; they are stripped of their job, housing, and basic sense of normalcy. Many commit suicide before they have been convicted at all.”).

For example, detention of a parent has been linked to food insecurity for the family.²¹

Research demonstrates that pretrial detention disproportionately impacts communities of color.²² Pervasive racial disparities exists in arrest rates— people of color are more likely to be arrested than their white counterparts for the same conduct.²³ Nationwide, Black defendants are sixty-six percent more likely to be detained before trial than whites and Hispanic defendants ninety-one percent more likely.²⁴ The situation only gets worse in Pennsylvania, where we, unfortunately,

²¹ Families with an incarcerated parent are almost 1.5 times more likely to suffer food insecurity than families that do not report a parental incarceration *See* Robynn Cox & Sally Wallace, *Identifying the Link Between Food Security and Incarceration*, 82 S. Econ. J. 1062, 1074 (2016); *The Reality of Pre-Trial Detention: Colorado Jail Stories*, Colorado Criminal Defense Institute, 6-9 (2015), <https://bit.ly/2Hr8Jst> (collecting testimony about the effects of detention on families including creating confusion in children, separation of families, and loss of home).

²² *See, e.g.*, Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, Brennan Ctr. for Justice, 19-20 (2015), <https://bit.ly/1fGM4XN> (surveying research documenting the existence of racial disparities in pretrial detention); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Just. Q. 170, 181-83 (2005).

²³ *See, e.g.*, Sandra Mayson & Megan Stevenson, *Misdemeanors by the Numbers*, Boston College Law Review, Forthcoming (April 18, 2019), <https://ssrn.com/abstract=3374571>; Rosenberg, Alana, Groves, Allison, and Blankenship, Kim, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, J. Drug Issues Vol. 47 (December 2016) (finding that Blacks were significantly more likely to be arrested than white people for drug dealing, despite no race difference in self-reports of having sold drugs).

²⁴ Eaglin & Solomon, *supra* note 22 at 20.

rank eleventh in the nation when it comes to racial disparities in the criminal justice system overall.²⁵

When it comes to county jails, where the majority of inmates are pretrial, the racial disparities are painfully stark.²⁶ For example, in Lackawanna County, Black people are jailed at more than twelve times the rate of white people.²⁷ In Allegheny County, where those in pretrial status make up 81 percent of the jail, the confinement rate for Black men is 1,543 per 100,000 compared with 187 for white men.²⁸

Being detained pretrial also leads to worse case outcomes. In a study of Philadelphia cases filed from 2006 to 2013, researchers found that pretrial detention led to a thirteen percent increase in the likelihood of conviction of at

²⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

²⁶ Nationwide, sixty-five (65) percent of those in county jails are in pretrial status. Zhen Zeng, U.S. Dep't of Justice, NCJ 251210, *Jail Inmates in 2016*, 4, (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf>. Moreover, a 2015 report from the Vera Institute showed that Pennsylvania ranked tenth in the nation in terms of the rate of pretrial incarceration. Vera Institute, *Incarceration Trends*, <http://trends.vera.org/incarceration-rates?data=pretrial&geography=states> (last visited Jul. 1, 2019).

²⁷ Jack Norton, *Why Are There So Many People in Jail in Scranton, PA*, VERA Institute (Jan. 4, 2017), <https://www.vera.org/in-our-backyards-stories/why-are-there-so-many-people-in-jail-in-scranton-pa>.

²⁸ University of Pittsburgh Institute of Politics, Criminal Justice Task Force, *Criminal Justice in the 21st Century: Allegheny County Jail*, 3 (Nov. 2016), <http://d-scholarship.pitt.edu/33651/1/Criminal%20Justice%20in%20the%2021st%20Century%20-%20Allegheny%20County%20Jail.pdf>.

least one charge and an increase of 124 days in the length of the maximum incarceration sentence, a forty-two percent increase over the mean.²⁹ Studies analyzing court data from other jurisdictions have similarly found that pretrial detention is associated with higher rates of conviction and longer sentences.³⁰

These connections are not surprising because, if detained, a defendant “is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”³¹ Moreover, pretrial detention induces people to plead guilty.³²

²⁹ Megan T Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511, 512-13, 534-535 (2018).

³⁰ See, e.g., Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713-15 (2016) (respondents detained on misdemeanor charges in Harris County are 25% more likely than similarly situated releases to be convicted); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, 3 (Aug. 2017), http://econweb.umd.edu/~pope/pretrial_paper.pdf (New York City pretrial detention increases the probability that a felony Respondent will be convicted by thirteen percent); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Schemes*, Laura & John Arnold Foundation, 14 (Nov. 2013), <https://bit.ly/2VLUYZc> (“[C]ontrolling for the effects of all other predictors in the model, Respondents detained for the entire pretrial period received jail sentences that were 2.78 times longer than sentences received by Respondents who were released at some point”).

³¹ *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

³² Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 473 (2016) (“Many Respondents who are detained on money bail before trial may consequently choose to plead guilty to avoid or minimize further detention. Prosecutors commonly offer detained Respondents a plea of ‘time-served,’ where Respondents will receive credit for time already spent in detention and will therefore be released immediately upon conviction.”).

III. The Detainer Scheme at Issue Violates the Pennsylvania Constitution Because it Fails to Provide Necessary Due Process and Relies on an Unconstitutional Irrebuttable Presumption that for People on Probation a Mere Arrest Necessitates Pretrial Detention.

The ACLU of Pennsylvania urges the court to accept jurisdiction and address the ways in which the current practice of lodging and maintaining probation detainees in Philadelphia violates due process. The detainer scheme at the heart of Petitioner's claims fails to provide necessary due process and relies on an unconstitutional irrebuttable presumption that pretrial detention is necessary based on the sole fact that a person on probation has been arrested.

a. The Pennsylvania Constitution requires due process before the state may deprive a person on probation of their liberty.

The Pennsylvania Constitution provides greater due process protections for probationers and parolees facing revocation than the United States Constitution. Under the United States Constitution, probationers and parolees are entitled to a preliminary and a final revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

Pennsylvania courts have recognized more robust due process protections in the probation and parole revocation context. This Court, analyzing the due process necessary for a probation revocation, has held that “[w]henver the liberty of an individual . . . is at risk, fundamental due process is essential.” *Commonwealth v.*

Davis, 586 A.2d 914, 917 (Pa. 1991) (emphasis added). Our state constitution provides “a stronger textual basis for substantive protection of important interests than do the federal due process clauses.”³³

In *Commonwealth v. Arter*, this Court held that Article I, Section 8 of the Pennsylvania Constitution provides broader privacy rights than the Fourth Amendment of the United States Constitution and, thus, the exclusionary rule applies to probation and parole revocation hearings, unlike the federal exclusionary rule. *Commonwealth v. Arter*, 151 A.3d 149, 158 (Pa. 2016) (noting Pennsylvania courts “have given greater weight to an individual's privacy interests when balancing the importance of privacy against the needs of law enforcement.”).

Likewise, in *Commonwealth v. Davis*, the Court emphatically pronounced that the Pennsylvania Constitution provides more robust due process protection than federal law in the context of probation revocation proceedings:

If there is doubt that the due process clause of the Fourteenth Amendment of the United States Constitution forbids the use of hearsay in a juvenile probation revocation hearing, there is no doubt that the due process clause of the Pennsylvania Constitution prohibits the deprivation of liberty solely on the basis of hearsay evidence.

586 A.2d at 917.

³³ Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 327 (2018).

b. For over thirty years, a local rule mandated some level of due process for the issuance and maintenance probation detainers.

Prior to October 11, 2018, the First Judicial District had a longstanding local court rule that required at least some level of due process before the Adult Probation and Parole Department could lodge a detainer against a probationer. Philadelphia Court of Common Pleas Criminal Rule 910, entitled *Probation Detainer and Violation Procedure*, prohibited the automatic lodging of detainers except in the narrow situation in which an individual on probation, charged with an enumerated felony, was held for court following a preliminary hearing.³⁴

³⁴ Rule 910 provided:

(A) Rule Violation as the Result of a Subsequent Arrest

When an individual who is on probation is arrested, the computer will print a notice of this fact, which will be sent to the Judge who imposed the original probation (Probation Judge). The notice will state that if the defendant is charged with the crime of murder, robbery, aggravated assault, rape or involuntary deviate sexual intercourse, and is held for Court at the Preliminary Hearing, an automatic detainer will be lodged.

If the defendant is charged with a crime other than those enumerated, no automatic detainer will be lodged.

The Probation Judge, upon receiving this notice, who determines that he wishes a detainer to be lodged against the defendant if held for Court at the Preliminary Hearing, should notify the Assistant Records Coordinator at the number listed on the computer notice within forty-eight (48) hours of the receipt of the original notice. This notice will then be communicated to the Judge presiding at the Preliminary Hearing.

When the detainer, other than an automatic detainer, has been lodged at the Preliminary Hearing, the defendant will be scheduled automatically for a detainer hearing within seventy-two (72) hours. When a defendant who is on probation is convicted in the Municipal Court or in the Common Pleas Court, Criminal

Moreover, the rule mandated a detention hearing within seventy-two hours of the lodging of a detainer. At this detention hearing, a trial judge was supposed to make an individualized determination whether or not to detain the defendant pending the violation of probation hearing. In October 2018, the First Judicial District eliminated this due process.

On March 6, 2019, the First Judicial District adopted Philadelphia Court of Common Pleas Criminal Rule 708, which now governs detainers and probation

Listings shall fix a date for a violation of probation hearing before the Probation Judge. The Trial Judge shall determine whether or not the defendant shall be detained pending the violation of probation hearing. The Probation Judge may, at any time, schedule the probationer before himself for a detainer hearing or for a violation of probation hearing.

In order to facilitate the above procedure, the computer department will furnish detainer forms for all defendants appearing on a Preliminary Hearing List, a Common Pleas Court Trial List, or a Municipal Court Trial List, for use as described above.

(B) Technical Violations

The Probation Department is charged with the responsibility of bringing to the attention of the Probation Judge any activity which constitutes a technical violation of probation. Upon receipt of such information, the Probation Judge shall direct whether or not “wanted cards” shall be placed or the defendant scheduled for a technical violation hearing.

When an individual is arrested as a result of “wanted cards,” he shall receive a hearing within seventy-two hours of the arrest and a determination shall be made as to whether the defendant shall be detained pending hearings by the Probation Judge. This decision shall be communicated to the Probation Judge and the Probation Department within forty-eight (48) hours, and the Probation Judge may then take whatever action he deems appropriate.

Phila. Crim. R. 910 (rescinded by Joint Administrative Order No. 08-2018 (Oct. 9, 2018)).

violation hearings. As outlined in the Petition for Habeas Corpus or Extraordinary Relief, Rule 708 fails to provide the level of process previously afforded under Rule 910 or required by the Pennsylvania Constitution.

c. The detainer scheme employs an unconstitutional irrebuttable presumption that for those on probation a mere arrest requires immediate detention.

Irrebuttable presumptions violate due process where the presumption interferes with a protected interest, the presumption employed is “not universally true,” and “reasonable alternative means of ascertaining that presumed fact are available.” *In the Interest of J.B.*, 107 A.3d 1, 14 (Pa. 2014); *see also DOT v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996). Irrebuttable presumptions offend the “essential requisites” of due process—notice and a meaningful opportunity to be heard—and a process which “excludes consideration of an element essential to the [relevant] decision” does not satisfy due process. *Clayton*, 684 A.2d at 1064-1065 (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971)).

Clayton involved a regulation that mandated an automatic one-year suspension of a person’s driver license following a single epileptic seizure. *Id.* at 1060-61. This Court held that the provision violated due process because it deprived someone of a license without providing for a meaningful or individualized determination of the fact at issue—fitness to drive—and instead

created an irrebuttable presumption that any person who had suffered a seizure is categorically unfit to drive for one year. *Id.* at 1062-63.

Relying on *Clayton*, this Court subsequently held that certain provisions of the Sex Offender Registration and Notification Act (“SORNA”) as applied to juvenile offenders violated due process. *In the Interest of J.B.*, 107 A.3d at 20. The SORNA provisions at issue imposed lifetime reporting requirements on juveniles based solely on the fact of a prior adjudication for an enumerated sexual offense.

First, this Court found juveniles had an inherent right to reputation under the Pennsylvania Constitution. *Id.* at 21. Second, the lifetime registration provisions relied on an irrebuttable presumption that all juveniles adjudicated of certain sexual offenses pose a high risk of committing additional sexual offenses. Drawing on research documenting the developmental distinctions between juveniles and adults as well as the fact that recidivism rates for juvenile sexual offenders are far lower than the rates of adult sexual offenders, this Court held that the presumption is not universally true. *Id.* at 17-19. Third, the Court held that reasonable alternative means existed to determine which juveniles were likely to offend. *Id.* at 23. As such, the Court held that SORNA’s automatic imposition of lifetime registration upon adjudication of certain offenses violates those juveniles’ due process rights by employing an irrebuttable presumption. *Id.* at 19-20.

The detainer scheme at issue similarly applies an unconstitutional irrebuttable presumption to those on probation charged with a new offense. First, an inherent right and fundamental protected interest—liberty—is at stake.

Second, the detainer practice universally and automatically presumes those on probation require incarceration following a new arrest. It reflects an assumption that all individuals on probation charged with a new offense are so dangerous or such a flight risk that pretrial release must be denied. Regardless, as was the case with the presumptions at issue in *Clayton* and *JB*, the presumption here—that detention of certain groups of defendants is necessary to protect the community or prevent flight or is justified based on the commission of new crimes—is not universally true of all people on probation arrested on new charges.

Moreover, under Pennsylvania law, in the context of probation revocation, an arrest alone has no probative value.³⁵ Likewise under federal law, “The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.” *Schware v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 241 n.6 (1957) (“Arrest, by itself, is not

³⁵ This raises additional constitutional concerns because an arrest is not evidence that a defendant committed a crime or is likely to commit crimes. *Commonwealth v. Scott*, 436 A.2d 607, 609 (Pa. 1981); see also *Commonwealth v. Davis*, 336 A.2d 616, 619 (Pa. Super. Ct. 1975) (holding that decisions to revoke probation “must be based on evidence of probative value” and that “[m]ere arrests . . . have no value as probative matter”); *Commonwealth v. Warren*, 378 A.2d 1271, 1274 (Pa. Super. Ct. 1977) (“a mere arrest does not constitute a violation of probation”).

considered competent evidence either in a criminal or civil trial to prove that a person did certain prohibited acts.”).

To the extent the presumption is based on safety or risk of flight, it is demonstrably untrue for the Petitioner in this case. When Petitioner appeared for preliminary arraignment on his new case, the judicial officer, aware of the fact that Petitioner is on probation, nonetheless made a determination to set bail and allow for Petitioner’s release. The decision to set bail reflects a judicial determination that available conditions of release were sufficient to address any potential flight risk or public safety issue.

In addition, as noted above, a mere arrest is not evidence of guilt nor a reliable indicator of the likelihood of future offending. As such, neither basis is universally true and the presumption fails to pass constitutional muster.

Third, reasonable alternative means exist to vindicate any governmental interest that might be served by the use of probation detainers. In *JB*, the Court held that individualized hearings were a viable alternative to the irrebuttable presumption that all juveniles adjudicated of certain sexual offenses were at risk to reoffend. As in *JB*, here, reasonable alternatives exist to the irrebuttable presumption that detention is appropriate. The Pennsylvania Rules of Criminal Procedure that govern bail provide a framework for determining whether an individual should be released pending a final revocation hearing.

Likewise, in this matter, individualized detention hearings provide a reasonable alternative means. The existence of the previous Rule 910 demonstrates the viability of alternative means.

As discussed *infra*, Pennsylvania has a disproportionately large number of people on probation. The state has approximately 178,000 people on probation.³⁶ In Philadelphia alone, 42,000 people are under some form of county supervision.³⁷ For those 42,000 Philadelphians, a mere arrest creates an irrebuttable presumption of detention. The detainer practice at issue here violates thousands of people's due process rights by employing an irrebuttable presumption of detention.

For these reasons, the ACLU of Pennsylvania contends that the detainer scheme deprives Petitioner and those similarly situated of their liberty and relies on an irrebuttable presumption that detention is necessary for those on probation because of a new offense.³⁸ The detainer scheme violates due process because, the presumption that detention is necessary is not universally true (as evidenced by the judicial officer's decision to set bail in Petitioner's new case), and because there

³⁶ Prison Policy Initiative, *Pennsylvania Profile 2018*, <https://www.prisonpolicy.org/profiles/PA.html> (last visited Jul. 1, 2019).

³⁷ Pennsylvania Board of Probation and Parole, *County Adult Probation and Parole Annual Statistical Report 2016*, 17 (2017), <https://www.pbpp.pa.gov/Information/Documents/CAPP%20Reports/2017%20County%20Adult%20Probation%20and%20Parole.pdf>; U.S. Census Bureau, *American Community Survey*.

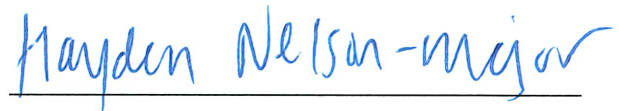
³⁸ Petition for Writ of Habeas Corpus, *Commonwealth v. Tyjean Davis*, p. 22-24.

exists a reasonable alternative means of making a proper individualized determination.

CONCLUSION

For the aforementioned reasons, the ACLU of Pennsylvania respectfully urges this Court to grant Petitioner's request for leave to file original process and address the important questions regarding the detainer scheme at issue.

Respectfully Submitted,



Nyssa Taylor, Pa. ID 200885
Molly Tack-Hooper, Pa. ID 307828
Hayden Nelson-Major, Pa. ID 320024
**American Civil Liberties Union
of Pennsylvania**
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
ntyalor@aclupa.org
mtack-hooper@aclupa.org
hnelson-major@aclupa.org

Benjamin Geffen, Pa. ID 310134
Mary M. McKenzie, Pa. ID 47434
The Public Interest Law Center
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
267-546-1308
bgeffen@pubintl.org
mmckenzie@pubintl.org

Dated: July 2, 2019

CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 4,909 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: July 2, 2019

Hayden Nelson-Major

Hayden Nelson-Major

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 2, 2019



Hayden Nelson-Major

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing Amicus Brief to be served upon the persons indicated below by PACFile and First Class Mail, which service satisfies the requirements of Pennsylvania Rules of Appellate

Procedure 121:

Lawrence Krasner
District Attorney's Office of Philadelphia
3 S. Penn Square
Philadelphia, PA 19107

Keir Bradford-Grey
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102

Dated: July 2, 2019



Hayden Nelson-Major