

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

KEISHA HUDSON,

Plaintiff,

v.

MONTGOMERY COUNTY,

Defendant.

:
:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO. 20-1487

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT
PURSUANT TO RULES 12(b)(6) and 12(b)(1)**

Defendant Montgomery County, by and through its undersigned counsel, moves for dismissal of Plaintiff’s Complaint pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure and rely on the Memorandum of Law in Support of Defendant’s Motion to Dismiss Plaintiff’s Complaint Pursuant to Rules 12(b)(6) and 12(b)(1) filed contemporaneously herewith.

Respectfully submitted,

Date: May 18, 2020

/s/ Raymond McGarry

Mary Kay Brown, Esquire

Raymond McGarry, Esquire

Jami B. Nimeroff, Esquire

Brown McGarry Nimeroff LLC

2 Penn Center, Suite 610

1500 John F. Kennedy Boulevard

Philadelphia, PA 19102

T: (267) 861-5330

Attorneys for Defendant Montgomery County

CERTIFICATE OF SERVICE

I, Raymond McGarry, hereby certify that on the 18th day of May, 2020, I caused a true and correct copy of the foregoing to be electronically filed with the Court using the CM/ECF System and served upon those parties requesting service therefrom. The document is available for viewing and downloading.

/s/ Raymond McGarry
Raymond McGarry

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

KEISHA HUDSON,

Plaintiff,

v.

MONTGOMERY COUNTY,

Defendant.

:
:
:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO. 20-1487

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF’S COMPLAINT PURSUANT TO RULES 12(b)(6) and 12(b)(1)**

BROWN MCGARRY NIMEROFF LLC
Mary Kay Brown, Esquire
Raymond McGarry, Esquire
Jami B. Nimeroff, Esquire
2 Penn Center, Suite 610
1500 John F. Kennedy Boulevard
Philadelphia, PA 19102
T: (267) 861-5330

Attorneys for Defendant

Dated: May 18, 2020

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	ARGUMENT.....	1
A.	Standard on a 12(b)(6) Motion	1
B.	Counts I and II of Plaintiff’s Complaint for First Amendment Retaliation Should be Dismissed with Prejudice Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).	3
1.	The Speech At-Issue is Not Speech of Plaintiff Keisha Hudson	5
2.	The Speech At-Issue is not Citizen Speech	6
a.	The Brief was Prepared by the OPD as a part of its Professional Duties	7
b.	The Brief Was Prepared By the OPD Using Its Specialized Knowledge.....	9
C.	Count III of Plaintiff’s Complaint for Wrongful Discharge Should be Dismissed with Prejudice Pursuant to Fed. R. Civ. P. 12(b)(6).	10
1.	Count III is Barred by the Pennsylvania Political Subdivision Tort Claims Act.....	10
2.	Count III Does Not State a Valid Claim for Relief Since it Does Not Set Forth a Clearly Defined Public Policy.	13
D.	Plaintiff’s Request To Be Reinstated With a Guaranty that She May Operate Independently Must Be Stricken.....	16
E.	The Court Should Refrain From Exercising its Supplemental Jurisdiction.....	17
III.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)	1
<i>Ayala v. Philadelphia Board of Public Education</i> , 453 Pa. 584, 305 A.2d 877 (1973)	11
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 556 (2007)	1, 2
<i>Clark v. Modern Grp. Ltd.</i> , 9 F.3d 321 (3d Cir. 1993)	14
<i>Clay v. Advanced Computer Applications, Inc.</i> , 522 Pa. 86, 559 A.2d 917 (1988).....	13
<i>DeMuro v. Philadelphia Housing Authority</i> , No. 98-3137 1998 WL 962103 (E.D. Pa. Dec. 22, 1998).....	12
<i>DeSimone v. Coatesville Area School District</i> , 248 F.Supp.2d 387 (E.D. Pa. 2003)	12
<i>Dougherty v. School Dist. of Philadelphia</i> , 772 F.3d 979 (3d Cir. 2014)	3
<i>Field v. Phila. Elec. Co.</i> , 388 Pa.Super. 400, 565 A.2d 1170 (1989)	14
<i>Finn v. City of Philadelphia</i> , 541 Pa. 596, 664 A.2d 1342 (1995)	11
<i>Foraker v. Chaffnich</i> , 501 F.3d 231 (3d Cir. 2007).....	4, 5
<i>Fraser v. Nationwide Mut. Ins. Co.</i> , 352 F.3d 107 (3d Cir.2003)	15
<i>Fraternal Order of Police, Lodge 1 v. City of Camden</i> , 842 F.3d 231 (3d Cir. 2016).....	4
<i>Garcetti v. Ceballos</i> , 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).....	3, 4, 5, 7
<i>Golding v. County of Butler</i> , No. 89-632, 1990 WL 309411 (Pa. Com. Pl. September 6, 1990)	12
<i>Gorum v. Sessoms</i> , 561 F.3d 179 (3d Cir. 2009)	5
<i>Greenwood Partners, L.P. v. Cimnet, Inc.</i> , 2003 WL 22238981 (E.D.Pa. Sept. 2003)	17
<i>Growth Horizons, Inc. v. Delaware Cty., Pa.</i> , 983 F.2d 1277 (3d Cir. 1993).....	17
<i>Haiden v. Greene Cty. Career and Tech. Ctr.</i> , No. 08-1481, 2009 WL 2341922 (W.D.Pa. July 27, 2009).....	12
<i>Hennessy v. Santiago</i> , 708 A.2d 1269, 1273 (Pa.Super. 1998)	15, 16
<i>Hill v. Borough of Kutztown</i> , 455 F.3d 225 (3d Cir. 2006)	3
<i>Hunger v. Grand Central Sanitation</i> , 670 A.2d 173 (Pa. Super. 1996).....	14
<i>Katzenmoyer v. City of Reading</i> , 158 F. Supp 2d 491 (E.D. Pa. 2001)	12
<i>Kiley by Kiley v. City of Philadelphia</i> , 537 Pa. 502, 645 A.2d 184 (1994)	11
<i>Kroen v. Bedway Security Agency</i> , 633 A.2d 628 (Pa. Super. 1993)	14
<i>Lancine v. Giles</i> , 132 Pa.Cmwlt. 255, 572 A.2d 827 (Pa. Commw. Ct. 1990)	12
<i>Mascaro v. Youth Study Center</i> , 514 Pa. 351, 523 A.2d 1118 (1987).....	11
<i>McLaughlin v. Gastrointestinal Specialists, Inc.</i> , 561 Pa. 307, 750 A.2d 283 (2000)	13
<i>McNichols v. Commonwealth, Dep't. Of Transportation</i> , 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002)	12
<i>Munroe v. Central Bucks School Dist.</i> , 805 F.3d 454 (3d Cir. 2015).....	3
<i>Pension Benefit Guar. Corp. v. White Consol. Indus.</i> , 998 F.2d 1192 (3d Cir. 1993)	2
<i>Phillips v. Cnty. of Allegheny</i> , 515 F.3d 224 (3d Cir. 2008).....	2
<i>Plaza v. Herbert, Rowland & Grubic, Inc.</i> , No. 344 C.D. 2016, 2017 WL 519827 (Pa. Commw. Ct. Jan. 30, 2017).....	12
<i>Polite v. Rendell</i> , 2010 WL 1254334 (E.D. Pa. Apr. 1, 2010).....	18
<i>Pryor v. Nat'l Collegiate Athletic Ass'n</i> , 288 F.3d 548 (3d Cir. 2002)	2
<i>Rankin v. McPherson</i> , 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)	3
<i>Reuther v. Fowler & Williams, Inc.</i> , 386 A.2d 119 (Pa. Super. 1977)	14
<i>Rooney v. City of Phila.</i> , 623 F.Supp.2d 644 (E.D. Pa. 2009).....	12
<i>Rothrock v. Rothrock Motor Sales, Inc.</i> , 810 A.2d 114 (Pa. Super. 2002).....	13, 17

<i>Sands v. McCormick</i> , 502 F.3d 263 (3d Cir.2007)	2
<i>Shick v. Shirey</i> , 716 A.2d 1231 (Pa. 1998)	14, 15, 16
<i>Snavely v. Arnold</i> , No. 08–2165, 2009 WL 1743737 (M.D. Pa. June 18, 2009).....	12
<i>Swift v. Department of Transportation</i> , 937 A.2d 1162 (Pa. Cmwlt. 2007).....	12
<i>United Mine Workers of Am. v. Gibbs</i> , 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) .	18
<i>Weaver v. Harpster</i> , 601 Pa. 488, 975 A.2d 555 (2009).....	14
<i>Woodson v. AMF Leisureland Centers, Inc.</i> , 842 F.2d 699 (3d Cir. 1988).....	13

Statutes

16 P.S. §9960.1 <i>et seq.</i>	17
23 P.S. § 6311	16
42 Pa.C.S. § 8541-8564	11, 12
28 U.S.C. § 1367.....	17

Rules

Fed. R. Civ. P. 12(b)(1).....	1, 18
Fed. R. Civ. P. 12(b)(6).....	1, 3, 10

Defendant Montgomery County (the “County”), pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, files the within Motion to Dismiss Plaintiff’s Complaint, and in support thereof, states as follows.

I. BACKGROUND

Plaintiff Keisha Hudson (“Plaintiff” or “Hudson”) filed this lawsuit against the County seeking damages in connection with the termination of her employment with Montgomery County as the Deputy Chief Public Defender. Plaintiff contends that she was fired in retaliation for the filing by the Montgomery County Office of Public Defender (“OPD”) of an Amicus Curiae Brief (the “Brief”) with the Pennsylvania Supreme Court on issues related to the bail practices of the courts located within Montgomery County and throughout the Commonwealth. The Complaint alleges causes of action for First Amendment Retaliation (Counts I and II) and for Wrongful Discharge in Violation of Public Policy (Count III). For the reasons set forth below, Plaintiff’s claims must be dismissed with prejudice.

II. ARGUMENT

A. Standard on a 12(b)(6) Motion

Federal Rule of Civil Procedure 12(b)(6) provides that a cause of action may be dismissed when the complaint fails to state a claim upon which relief can be granted. To survive such a motion, the complaint must meet two criteria: (1) it must assert a plausible claim; and (2) it must set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1941, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Neither a “formulaic recitation of the elements of a cause of action nor naked assertions of fact devoid of further factual enhancement” is sufficient to withstand dismissal. *Id.* To satisfy the *Twombly* and *Iqbal* standard, “a complaint must contain sufficient factual matter, accepted as

true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (citing *Twombly*, 550 U.S. at 570). A claim has facial plausibility when enough factual content is plead that allows the court to draw the reasonable inference that the defendant is liable under the alleged claim. *Id.* (citing *Twombly*, 550 U.S. at 556). “A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1950. In addition, those facts constituting more than mere conclusions, and thus assumed true, must also “plausibly suggest an entitlement to relief.” *Id.* at 1951. The plaintiff must describe “‘enough facts to raise a reasonable expectation that discovery will reveal evidence of’ [each] necessary element” of the claims alleged in the complaint and that justifies “moving the case beyond the pleadings to the next stage of litigation.” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. *See Sands v. McCormick*, 502 F.3d 263 (3d Cir. 2007). The court may also consider “undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the [attached] documents.” *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, “documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered.” *Pryor v. Nat’l Collegiate Athletic Ass’n*, 288 F.3d 548, 560 (3d Cir. 2002). Therefore, the Court may consider the Amicus Brief, attached hereto as Exhibit “A,” because Counts I and II of the Complaint are based precisely on what is stated in the Brief, who made those statements and the fact that it was filed with the Pennsylvania Supreme Court.

B. Counts I and II of Plaintiff's Complaint for First Amendment Retaliation Should be Dismissed with Prejudice Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

To establish a First Amendment retaliation claim, “a public employee must show that (1) his activity is protected by the First Amendment and (2) the activity was a substantial or motivating factor in the alleged retaliatory action, which, if both are proved, shifts the burden to the employer to prove that (3) the same action would have been taken even if the activity had not occurred.” *Munroe v. Central Bucks School Dist.*, 805 F.3d 454, 466 (3d Cir. 2015) (*quoting Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979, 986 (3d Cir. 2014)).

With respect to the first element, a public employee’s speech is protected by the First Amendment when: (1) the employee spoke as a citizen; (2) the statement involved a matter of public concern; and (3) the government employer did not have ‘an adequate justification for treating the employee differently from any other member of the general public’ as a result of the statement he made.” *Hill v. Borough of Kutztown*, 455 F.3d 225, 241–42 (3d Cir. 2006) (*quoting Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)). A public employee does **not** speak “as [a] citizen” when he makes a statement “pursuant to [his] official duties.” *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Rankin v. McPherson*, 483 U.S. 378, 384–85, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (*quoting Connick v. Myers*, 461 U.S. 138, 147–48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)).

In *Garcetti*, the Supreme Court described this inquiry as “a practical one,” noting that “[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the

employee's professional duties for First Amendment purposes.” *Id.* at 424–25, 126 S.Ct. 1951.

Put another way, the First Amendment does not shield the consequences of “expressions employees make pursuant to their professional duties.” *Id.* at 426, 126 S.Ct. 1951.

Following *Garcetti*, the Third Circuit Court of Appeals held that an employee does not speak as a citizen if the mode and manner of his speech were possible only as an ordinary corollary to his position as a government employee. For example, police officers do not speak as citizens when they object to police department policies by means of “police department counseling forms,” as “[c]itizens do not complete internal police counseling forms.” *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 243–44 (3d Cir. 2016).

The Third Circuit Court of Appeals has further held that a public employee’s speech does not constitute citizen speech if the activity or speech performed is within the “scope of their routine operations.” *See Foraker v. Chaffnich*, 501 F.3d 231, 241–42 (3d Cir. 2007).

In *Foraker*, three State Police firearms instructors complained to their superiors about intolerable conditions at the firing range. The HVAC system did not work properly, the bullet trap was malfunctioning, and officers and students at the range were suffering contamination effects, including elevated levels of heavy metals in their blood. *Id.* at 233. The officers complained up the chain of command and also met with the State Auditor investigating the facility. After this meeting, the officers’ attorney read the statements they had made to the Auditor, verbatim, to the media. *Foraker*, 501 F.3d at 233. In affirming the grant of judgment as a matter of law to the Defendants, the court analyzed *Garcetti* and held that the officers' complaints to supervisors were made pursuant to their official duties because the issues they complained of related to their day-to-day employment responsibilities:

[The officers] were acting within their job duties when they expressed their concerns up the chain of command because they needed to have a functioning bullet

trap to conduct their educational programs and it was their special knowledge and experience with the bullet trap that demonstrated their responsibility for ensuring its functionality by reporting problems to their superiors.

Id. at 240. The court noted that “[t]he special knowledge and experience referenced here is their daily interaction with the equipment, which puts them in the position to know when problems arose.” *Id.* at 204 n. 6.

In *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009), the Third Circuit Court of Appeals further refined its *Foraker* analysis. In *Gorum*, a tenured faculty member of a state university argued that he was dismissed in retaliation for advising an All–American football player in connection with a disciplinary hearing for violating the school’s weapons possession policy, and for disinviting the school’s President to speak at a prayer breakfast. The court rejected plaintiff’s argument that, because he went above and beyond his specified job responsibilities, he was speaking as citizen rather than as an employee. Relying on its decision in *Foraker*, the court found that it was “Gorum’s special knowledge of, and experienced with” the school’s disciplinary code that gave him the opportunity to speak on the student’s behalf, and it was his position as faculty advisory to the fraternity that allowed him to rescind the President’s invitation to speak. *Gorum*, 561 F.3d at 186. In reaching this conclusion, the court relied on the Supreme Court’s direction in *Garcetti* that the “proper inquiry” into an individual’s official duties “is a practical one.” *Id.* at 185 (quoting *Garcetti*, 547 U.S. at 424).

1. The Speech At-Issue is Not Speech of Plaintiff Keisha Hudson

In this case, Plaintiff alleges that the Amicus Brief constitutes her expression of free speech. (ECF #1, Complaint ¶¶ 116-118). Yet, as Plaintiff readily admits, the Brief was not filed by or on behalf of Plaintiff; but rather, on behalf of the OPD. (ECF #1, Complaint ¶ 32). More precisely, the Brief was filed on behalf of the OPD by Lee Awbrey, Chief of Appeals, Office of the Public Defender. Plaintiff admits she did not draft the Brief, did not file the Brief and is not

even a signatory to the Brief. (ECF #1, Complaint, ¶¶ 31, 116; Ex. A, Brief, p. 20). The introduction to the Brief leaves no doubt as to whose interest is being advanced: “[t]he Montgomery County Office of the Public Defender represents indigent individuals facing criminal charges in all stages of their proceedings. Our office has a substantial interest in this matter.” (Ex. A, Brief, p. 1). Thus, Plaintiff has no standing to seek the protections of the First Amendment for speech that factually is not even her speech. Thus, in addition to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiff’s Complaint must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure. “Under Fed.R.Civ.P. 12(b)(1), a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim. “A motion to dismiss for want of standing is ... properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.” *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012) (citing *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)).

2. The Speech At-Issue is not Citizen Speech

Plaintiff alleges that the Amicus Brief constitutes her expression of free speech. (ECF #1, Complaint, ¶¶ 116-118). According to the Complaint and the Brief, the Brief:

- was not prepared by Plaintiff, but rather was prepared by the staff of the Montgomery County Public Defenders’ Office at the direction of Plaintiff, specifically by the Chief of Appeals, Lee Awbrey (ECF #1, Complaint, ¶¶ 31 and 116);
- outlines the practices of the courts in Montgomery County and discusses specific cases handled by the OPD, as examples to support the arguments in the brief. (ECF #1, Complaint, ¶ 25; Ex. A, *Brief*, generally);

- was filed by the OPD, and not Plaintiff (ECF #1, Complaint, ¶116 and Ex. A, *Brief*, p. 1) (“Amicus Curiae **Brief of The Montgomery County Office of The Public Defender** In Support Of Petitioners”);
- was signed by Lee Awbrey, Chief of Appeals for the OPD, and not Plaintiff (Ex. A, *Brief*, p. 20);
- was filed because the OPD determined that it had a “substantial interest in the matter” because the OPD “represents indigent individuals facing criminal charges at all stages of their proceedings.” (Ex. A., *Brief* p. 1);
- was filed because the OPD determined that it had “a direct interest in the petition for judicial intervention that seeks to curb improper and excessive bail determinations, increase accountability, promote uniform practices amongst the counties, and fortify Pennsylvania’s existing law.” (Ex. A., *Brief* p. 1).
- was not the first Amicus Brief ever filed by the OPD. In fact, the OPD had recently filed other Amicus Curiae briefs on issues surrounding the imposition of fees and fines on criminal defendants. (ECF #1, Complaint, ¶¶ 26 and 29; Ex. B., Docket Entries).

Given those undisputed facts, the Brief was undeniably prepared for and submitted by the OPD for the benefit of its indigent clients. As such, under no circumstances could the Brief constitute “citizen speech” of Plaintiff as defined by the United States Supreme Court in *Garcetti* and binding caselaw developed in the wake of that decision.

a. The Brief was Prepared by the OPD as a part of its Professional Duties

Plaintiff alleges that the filing of the Brief was not a part of her “ordinary job duties at the Office.” (ECF #1, Complaint, ¶117). This allegation, however, belies the facts set forth in the Brief and contradicts allegations contained in the Complaint.

There is no question that the ordinary job duties of a public defender include advocating on behalf of the indigent defendants in their County. Here, that is exactly what the OPD did when it made the decision to file this Brief. In fact, the OPD confirmed as much in the Brief itself. The OPD made a representation to the Supreme Court of Pennsylvania that it had a “direct interest” in the litigation and that the bail practices at issue “affects our clients”. (Ex. A., Brief p. 1). The Brief reiterates that “[o]ur office has a substantial interest in this matter.” On its face, the Brief makes clear, that this is not the speech of Plaintiff as a citizen, but rather, the speech of the OPD on behalf of its clients. The fact that it advanced the interests of many of the OPD’s clients - as opposed to a single client - is of no import in the analysis of whether the Brief constitutes “citizen speech.”

Moreover, Plaintiff concedes in her Complaint that the OPD has, as a practice, filed amicus briefs in the past. Specifically, in paragraphs 26 and 29 of the Complaint, Plaintiff concedes that “the Office’s prior amicus briefs...” and “Beer had never before sent a copy of an amicus brief to Soltysiak, Stein, or anyone else in the County administration.” In fact, in the 12 months prior to the filing of the Brief relevant to this matter, the OPD participated as an amicus in two other cases. (See the publicly available docket entries attached as Exhibit “B” hereto). This makes it clear that the filing of amicus briefs is not outside the scope of the OPD’s course of conduct in advancing the interests of its indigent clients. As such, the filing of an amicus brief by the OPD cannot be considered “citizen speech” of the Plaintiff, especially where here, the Plaintiff did not even participate in the drafting of the Brief, nor did she sign the Brief.

Moreover, Plaintiff concedes that the Brief was filed in connection with her official duties in Count III of the Complaint where she asserts that the County improperly interfered with

the independence of the OPD by terminating her employment purportedly in retaliation for filing the Brief. Specifically, Plaintiff alleges that:

Firing Hudson for presenting arguments to the Supreme Court of Pennsylvania, in interference with the independence of the Office, is repugnant to the public policy of the Commonwealth of Pennsylvania as reflected in its Constitution and statutes, and the judicial decisions interpreting its Constitution and statutes.

(ECF #1, Complaint, ¶128).

Certainly, the County could not interfere with the independence of the OPD if the filing of the Brief was done as a citizen, and not as a part of the operations of the OPD.

Taking all of these factors into consideration, and applying a very “practical approach” as urged by the Supreme Court, there is no question that Plaintiff was acting in her official capacity as Deputy Chief Public Defender, and not as a private citizen, when she directed the OPD to file the Brief. Thus, Plaintiff’s actions are not protected by the First Amendment and her claim must fail.

b. The Brief Was Prepared By the OPD Using Its Specialized Knowledge

As the Third Circuit Court of Appeals in *Foraker* and *Gorum* held, speech based upon a public employee’s specialized knowledge and experience gained on the job is not speech protected by the First Amendment. In *Gorum*, the court found that it was “Gorum’s special knowledge of, and experienced with” the school’s disciplinary code that gave him the opportunity to speak on the student’s behalf; it was his position as faculty advisory to the fraternity that allowed him to rescind the President’s invitation to speak. *Gorum*, 561 F.3d at 186.

Here, the Brief was clearly written based upon the specialized knowledge and experience of the OPD, gained during the representation of indigent defendants. As alleged in both the Complaint and the Brief, the OPD used specific examples of cases handled by OPD attorneys to

support the arguments in the Brief. (ECF #1, Complaint ¶¶ 35-38; Ex. A, Brief, pp 2-5) The OPD’s knowledge of these specific examples, and their experience with the cash bail system in the Courts located in Montgomery County, could only have been acquired as a result of the specialized knowledge and experience gained during the course and scope of employment at the OPD. Thus, under *Foraker* and *Gorum*, the Brief cannot be considered “citizen speech,” and is not protected by the First Amendment.

For all of these reasons, Counts I and II of Plaintiff’s Complaint must be dismissed.

C. Count III of Plaintiff’s Complaint for Wrongful Discharge Should be Dismissed with Prejudice Pursuant to Fed. R. Civ. P. 12(b)(6).

Count III of Plaintiff’s Complaint is entitled “Wrongful Discharge in Violation of Public Policy.” Other than incorporating prior factual allegations, it is very short. In asserts that by firing Plaintiff allegedly in retaliation for the filing of the Brief, the County violated Pennsylvania public policy. (ECF #1, Complaint ¶¶127-128). This Court should dismiss Count III since the County has immunity for a claim of wrongful discharge, and the claim itself does not state a viable claim for relief under Pennsylvania law.

Plaintiff’s counsel has stated that they will not oppose the County’s Motion to Dismiss this claim to the extent it seeks money damages because the County has immunity for such claims.¹ (*see* Certification of Raymond McGarry attached as Exhibit “C”). However, Plaintiff does intend to oppose this motion to the extent her Complaint seeks reinstatement. (*Id.*)

1. Count III is Barred by the Pennsylvania Political Subdivision Tort Claims Act

In response to the Supreme Court’s abrogation of government immunity in *Ayala v.*

¹ In light of the fact that Plaintiff agreed only that she would not oppose a motion to dismiss Count III to the extent Plaintiff seeks damages from Defendant, Defendant makes its substantive arguments regarding immunity below.

Philadelphia Board of Public Education, 453 Pa. 584, 305 A.2d 877 (1973), the Pennsylvania Legislature enacted the Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541-8564 (“PTSCA”). *See Mascaro v. Youth Study Center*, 514 Pa. 351, 355, 523 A.2d 1118, 1120 (1987). The Act “raises the shield of governmental immunity against any damages on account of any injury to a person or property caused by any act of a local agency or employee thereof or any other person, except as otherwise provided in 42 Pa.C.S. § 8542.” *Id.*

Since the Legislature intended through the enactment of PSTCA to provide governmental immunities, exceptions to such immunity should be narrowly construed. *Finn v. City of Philadelphia*, 541 Pa. 596, 601, 664 A.2d 1342, 1344 (1995). *See also Kiley by Kiley v. City of Philadelphia*, 537 Pa. 502, 506, 645 A.2d 184, 185–86 (1994) (“Because of the clear intent to insulate government from exposure to tort liability for any of its acts, exceptions carved out by the Legislature from this general rule are strictly construed.”).

Under PSTCA, local agencies are generally exempt from damages for any injuries caused by the agency or its employees. 42 Pa.C.S. § 8541. An injured party may recover in tort from a municipality only if: (1) damages would be otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated categories. *Id.* The eight exceptions to local agency immunity are: (1) vehicle liability; (2) care, custody or control of personal property; (3) care, custody, or control of real property; (4) trees, traffic controls, and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody, or control of animals. 42 Pa.C.S. § 8542.

It is well-settled that a wrongful discharge claim does not fall within any of the exceptions to immunity laid out in PSTCA § 8542. *See, e.g., DeSimone v. Coatesville Area*

School District, 248 F.Supp.2d 387 (E.D. Pa. 2003) (*citing DeMuro v. Philadelphia Housing Authority*, No. 98-3137 1998 WL 962103 at *4 (E.D. Pa. Dec. 22, 1998) (the tort of wrongful discharge is not recognized as an exception to sovereign immunity in the PSTCA)); *Haiden v. Greene Cty. Career and Tech. Ctr.*, No. 08-1481, 2009 WL 2341922, at *2 (W.D.Pa. July 27, 2009); *Snavely v. Arnold*, No. 08-2165, 2009 WL 1743737, at *6, fn. 8 (M.D. Pa. June 18, 2009) (*citing Lancine v. Giles*, 132 Pa.Cmwlth. 255, 572 A.2d 827, 830 (Pa. Commw. Ct. 1990) (wrongful discharge is not one of the articulated exceptions to 42 Pa.C.S. § 8541-8542)); *Katzenmoyer v. City of Reading*, 158 F. Supp 2d 491, 502-03 (E.D. Pa. 2001) (dismissed claim for wrongful discharge as to the city because PSTCA bars claims for intentional torts); *McNichols v. Commonwealth, Dep't. Of Transportation*, 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002) (same); *Goldinger v. County of Butler*, No. 89-632, 1990 WL 309411 (Pa. Com. Pl. September 6, 1990) (the tort of wrongful discharge is not listed as an exception to immunity).

Even to the extent that Plaintiff seeks reinstatement of his employment via a request for injunctive relief, the County remains immune under PSTCA because such immunity applies both to damages claims and to claims for injunctive relief that require the government agency to take affirmative action. *See Plaza v. Herbert, Rowland & Grubic, Inc.*, No. 344 C.D. 2016, 2017 WL 519827, at *3 (Pa. Commw. Ct. Jan. 30, 2017) (*citing Swift v. Department of Transportation*, 937 A.2d 1162, 1168 & n.7 (Pa. Cmwlth. 2007)) (“The General Assembly has not waived immunity for equitable claims seeking affirmative action by way of injunctive relief”); *see also Rooney v. City of Phila.*, 623 F.Supp.2d 644 (E.D. Pa. 2009) (city and SEPTA immune from suit for affirmative action by way of injunctive relief under PSTCA).

Here, Count III asserts a common law claim for wrongful discharge in violation of Pennsylvania public policy. The County is broadly immune from such claim under PSTCA, and

none of the Complaint's allegations take Count III outside of the immunity.

2. Count III Does Not State a Valid Claim for Relief Since it Does Not Set Forth a Clearly Defined Public Policy.

Plaintiff asserts that her termination violated Pennsylvania public policy. The Complaint does not, however, define with any clarity the public policy allegedly violated or the source of that public policy. It cites only to a generalized policy of independence of public defenders' offices within the Commonwealth "as reflected in its Constitution and statutes, and the judicial decisions interpreting its Constitution and statutes." (ECF #1, Complaint ¶128). The Complaint allegations do not state a valid claim for wrongful discharge in violation of public policy.

Pennsylvania is an at-will employment state. In general, "an employer may discharge an employee with or without cause, at pleasure, unless restrained by some contract." *Rothrock v. Rothrock Motor Sales, Inc.*, 810 A.2d 114, 117 (Pa. Super. 2002). As the Pennsylvania Supreme Court has stated, "[a]s a general proposition, the presumption of all non-contractual employment relations is that it is *at-will* and that this presumption is an extremely strong one. An employee will be entitled to bring a cause of action for a termination of that relationship only in the most limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth." *McLaughlin v. Gastrointestinal Specialists, Inc.*, 561 Pa. 307, 314, 750 A.2d 283, 287 (2000); *see also Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917, 918 (1988) (while there is no common law cause of action for termination of an at-will employment relationship, there are "the most limited of circumstances, where discharges of at-will employees threaten clear mandates of public policy."); *see also Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699, 701 (3d Cir. 1988) (A wrongful discharge claim under

Pennsylvania law sounds in tort and may be maintained “only when important and well recognized facets of public policy [are] at stake.”) (citations omitted).

In order to state a claim for wrongful discharge based on the public policy exception to the at-will-employment doctrine, “the employee must point to a clear public policy articulated in the constitution, in legislation, an administrative regulation, or a judicial decision.” *Hunger v. Grand Central Sanitation*, 670 A.2d 173, 175 (Pa. Super. 1996). Courts should find that a termination violates Commonwealth public policy “only in the clearest of cases.” *Weaver v. Harpster*, 601 Pa. 488, 975 A.2d 555, 563 (2009). Accordingly, violations of public policy sufficient to state a claim for wrongful discharge have been found only in certain, very specific circumstances, *e.g.*, when an employee was terminated for applying for worker’s compensation benefits, *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998); when an employee was terminated for refusing to submit to a polygraph test; *Kroen v. Bedway Security Agency*, 633 A.2d 628 (Pa. Super. 1993); when an employee was terminated for serving on a jury, *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1977); and when an employee was terminated for making a report mandated by federal law. *Field v. Phila. Elec. Co.*, 388 Pa.Super. 400, 565 A.2d 1170, 1180 (1989).

In fact, courts have been reluctant to recognize a public policy sufficient to give rise to a wrongful discharge claim unless the discharge is a result of the employee’s compliance with or refusal to violate the law. “Absent a violation of law, it is difficult for an at-will employee seeking recovery for wrongful discharge to point to a common law, legislative or constitutional principle from which a clear public policy exception to Pennsylvania's doctrine of at-will employment could be inferred.” *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 328 (3d Cir. 1993).

The Third Circuit Court of Appeals has observed that the narrow exceptions to the at-will employment doctrine in Pennsylvania generally fall into three categories: “an employer (1) cannot require an employee to commit a crime; (2) cannot prevent an employee from complying with a statutorily imposed duty; and (3) cannot discharge an employee when specifically prohibited from doing so by statute.” *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 111-12 (3d Cir. 2003) (“[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring”) (citing *Hennessy v. Santiago*, 708 A.2d 1269, 1273 (Pa.Super. 1998)). See also *Shick v. Shirey*, 456 Pa.Super. 668, 691 A.2d 511, 513–14 (1997), *rev’d*, 552 Pa. 590, 716 A.2d 1231 (1998).

Here, the Complaint fails to set forth conduct by Plaintiff that falls within the recognized public policy exceptions. Plaintiff does not allege that she was compelled by the County to commit a crime. Nor does she cite to any specific statute prohibiting the County from terminating her employment. According to the Complaint, the conduct giving rise to Plaintiff’s termination was the filing of the Brief, which was done on behalf of the OPD. (ECF #1, Complaint ¶¶31, 126). While that conduct was taken in her official capacity as a representative of the OPD, she does not allege, nor could she allege that the filing of the Brief by the OPD was required by any statutory or regulatory duty placed upon her.

Contrast this case with those where a plaintiff complains of being terminated for engaging in conduct compelled by statute or law. Even there, courts have not recognized a viable wrongful discharge claim when the specific statutes relied upon did not create an actual affirmative duty to engage in the conduct that gave rise to the termination. For example, in *Hennessy*, a counselor was terminated after reporting a patient’s rape to the local district

attorney. 708 A.2d at 1272. The plaintiff claimed that different Pennsylvania statutes, parts of the administrative code, and her national association's code of ethics imposed an affirmative duty upon her to report the rape of a client. *Id.* at 1273-74. The Superior Court declined to find a valid wrongful discharge claim existed because none of the statutes or codes cited actually imposed an affirmative obligation upon the plaintiff to report violations. *Id.* Contrasting the case before it with a statute that imposed an affirmative duty to report, the *Hennessy* Court cited a section titled, "Persons required to report suspected child abuse." *Id.* at 1274 (*citing* 23 P.S. § 6311). "As its title suggests, this section [explicitly] requires certain people, including mental health professionals, to report suspected child abuse." *Id.* That was not the case with the statute and codes cited by the *Hennessy* plaintiff, and thus, a wrongful discharge in violation of public policy claim did not exist. *Id.*

Plaintiff fails to identify with any specificity the alleged Commonwealth policy regarding independence of public defenders' offices and how her termination violated such policy. Simply stated, Plaintiff has not alleged any Commonwealth public policy sufficient to give rise to a valid wrongful discharge claim, certainly not any defined policy that is extremely clear with virtual unanimity of opinion in regard to it. *Shick*, 716 A.2d at 1235–36 (quotation omitted). Thus, Plaintiff's claim should be dismissed.

D. Plaintiff's Request To Be Reinstated With a Guaranty that She May Operate Independently Must Be Stricken

Plaintiff's Complaint seeks an order requiring "Montgomery County to reinstate Hudson to her prior position and to guarantee that she may operate independently in that position." The Court should strike this requested relief from the Complaint as Plaintiff was an employee at will, not entitled to any guarantees on the terms of her employment, especially one that vaguely would require the County to guarantee that she may operate independently in that position.

Under the Public Defender Act, 16 P.S. §9960.1 *et seq*, the County Board of Commissioners have the right to appoint the Chief Public Defender. Under that same Act, the right of the Chief Public Defender to hire other attorneys in the office derives from the Board of Commissioners. The Act does not provide for the right to any guarantees of the terms of employment - and it certainly does not guarantee that the County would have no control over the OPD. In fact, the opposite must be inferred since it is the Board of Commissioners that have the right to appoint the Chief Public Defender. Thus, under the very Act that establishes the public defender, the County has the right to control the operations of the OPD.

Moreover, under Pennsylvania law, Plaintiff was an at-will employee of the County. As discussed in Section D(1)(c) of this Memorandum *supra*, “an employer may discharge an employee *with or without cause*, at pleasure, unless restrained by some contract.” *Rothrock v. Rothrock Motor Sales, Inc.*, 810 A.2d 114, 117 (Pa. Super. 2002). There is no legal authority for abrogating the provisions of the Public Defender Act and imposing any guarantees on the terms of Plaintiff’s employment. As such, the requested relief is inappropriate and must be stricken.

E. The Court Should Refrain From Exercising its Supplemental Jurisdiction.

Should the Court dismiss Counts I and II of the Complaint as a matter of law, it should refrain from exercising its supplemental jurisdiction over the remaining state claim. When the district court has dismissed all claims over which it has original jurisdiction, the district court has the express authority to decline to exercise supplemental jurisdiction over any related state law claims. 28 U.S.C. § 1367(c)(3); *Growth Horizons, Inc. v. Delaware Cty., Pa.*, 983 F.2d 1277, 1284 (3d Cir. 1993) (“a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction”); *See also Greenwood Partners, L.P. v. Cimnet, Inc.*, 2003 WL 22238981, at *4 (E.D. Pa. Sept. 26, 2003). “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by

procuring for them a surer-footed reading of applicable law.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725–26, 86 S. Ct. 1130, 1138–39, 16 L. Ed. 2d 218 (1966). Here, Plaintiff’s Section 1983 claim was the sole basis of the Court’s original jurisdiction. For reasons already discussed, that claim fails as a matter of law. As a result, the Court is well within its right to refuse to exercise supplemental jurisdiction over Plaintiff’s remaining state law claims. This is particularly called for when the claim involves a matter of state public policy such as Count III, and where the action is in its early procedural stages. *Cf. Growth Horizons, supra*, 983 F.2d at 1284-85 (no dismissal of state claims where trial on merits had already occurred). As such, the Court should dismiss Count III under Rule 12(b)(1) for lack of subject matter jurisdiction. *See Polite v. Rendell*, 2010 WL 1254334, at *4–5 (E.D. Pa. Apr. 1, 2010).

III. CONCLUSION

For the reasons set forth above, Defendant Montgomery County respectfully requests that the Court dismiss Plaintiff’s Complaint in its entirety and for such other relief the Court deems just and appropriate.

Respectfully submitted,

Date: May 18, 2020

/s/ Raymond McGarry
 Mary Kay Brown, Esquire
 Raymond McGarry, Esquire
 Jami B. Nimeroff, Esquire
 Brown McGarry Nimeroff LLC
 2 Penn Center, Suite 610
 1500 John F. Kennedy Boulevard
 Philadelphia, PA 19102
 T: (267) 861-5330

Attorneys for Defendant

EXHIBIT A

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

21 EM 2019

**THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*,
*Petitioners,***

v.

**ARRAIGNMENT COURT MAGISTRATES OF THE FIRST
JUDICIAL DISTRICT OF THE COMMONWEALTH
OF PENNSYLVANIA,
*Respondents.***

**AMICUS CURIAE BRIEF OF THE
MONTGOMERY COUNTY OFFICE OF THE PUBLIC DEFENDER
IN SUPPORT OF PETITIONERS**

**On Petition for Extraordinary Relief
Under the Court's King's Bench Jurisdiction**

Lee Awbrey, Pa. Atty. ID 313083
Chief of Appeals
Dean Beer, Pa. Atty. ID 37313
Chief Public Defender
OFFICE OF THE PUBLIC DEFENDER
Montgomery County Courthouse
Norristown, Pennsylvania 19404-0311
Phone: (610) 278-3320
lawbrey@montcopa.org

February 3, 2020

TABLE OF CONTENTS

STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION.....	2
ARGUMENT.....	6
A. THE PROBLEMS IDENTIFIED BY THE PARTIES AND THE SPECIAL MASTER ARE NOT ISOLATED TO PHILADELPHIA.....	6
B. DE-FACTO INCARCERATION IS <i>DE RIQUEUR</i>	10
C. THERE IS INSUFFICIENT ACCOUNTABILITY.....	12
D. THE HARMS ARE REAL.....	14
E. PRE-TRIAL INCARCERATION UNDENIABLY IMPLICATES LIBERTY INTERESTS THAT TRIGGER STRINGENT DUE PROCESS PROTECTIONS.....	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Addington v. Texas</i> , 441 U.S. 418 (1979).....	17, 19
<i>Commonwealth v. Fountain</i> , CP-46-CR-0003966-2019.....	7
<i>Stack v. Boyle</i> , 342 U.S. 1 (1951)	19
<i>Tippett v. Maryland</i> , 436 F.2d 1153 (4th Cir.1971).....	17

Constitutions and Statutes

Pa. Const. art. I § 14.....	18, 19
-----------------------------	--------

Rules

Pa.R.Crim.P. Rule 523(A)	12, 13
Pa.R.Crim.P. Rule 524	7, 10
Pa.R.Crim.P. Rule 528	6
Pa.R.Crim.P. Rule 540	9

Other Authorities

Malcolm Burnley, <i>Staying Connected: Moms Who Pump in Prison</i> , NEXT MEN (Feb. 4, 2019)	3
Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, <i>Investigating the Impact of Pretrial Detention on Sentencing Outcomes</i> , L. & J. Arnold Found'n. (Nov. 2013).....	14

Craig Haney, <i>The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment</i> (Dec. 2001).....	16
Mary T. Phillips, <i>A Decade of Bail Research in New York City</i> , New York City Criminal Justice Agency, Inc. (2012).....	14
Mika'll Deveau, <i>The Trauma of the Incarceration Experience</i> , Harvard Civil Rights – Civil Liberties Law Review (Dec. 2013).....	16
Paul Heaton <i>et al.</i> , <i>The Downstream Consequences of Misdemeanor Pretrial Detention</i> , 69 Stanford L. Rev. 711 (July 2017)	16
Pennsylvania Justice Reinvestment Working Group, <i>Justice Reinvestment in Pennsylvania: Policy Framework</i> , CSG Justice Center (June 2017).....	10, 14, 15, 20
Vera Institute of Justice, Pre-trial Jail Incarceration Rate, Incarceration Trends by County, <i>available at</i> http://trends.vera.org/incarceration-rates?data=pretrial	18

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Montgomery County Office of the Public Defender represents indigent individuals facing criminal charges at all stages of their proceedings. Our office has a substantial interest in this matter.

The law governing bail practices directly affects our clients, their families, and the communities we serve. We are a community-oriented defender organization that recognizes the inherent link between access to justice and access to healthcare, housing, education, and employment—all of which are hindered when cash bail is improperly and excessively imposed on clients. We witness first-hand the multitude of individual and community harms caused by dysfunctional bail practices that result in unnecessary and prolonged pretrial detention. In addition to the human cost of unnecessary and disproportionate over-incarceration, such practices create obstacles to the preparation of the defense, negatively affect case outcomes, and cost our office and the county taxpayer money. We thus have a direct interest in the petition for judicial intervention that seeks to curb improper and excessive bail

determinations, increase accountability, promote uniform practices amongst the counties, and fortify Pennsylvania's existing law.

INTRODUCTION

While specific approaches to cash bail practices may differ between counties, the systemic failures found in Philadelphia's current cash bail practices are ubiquitous throughout the state. Montgomery County is one of many in which the judicial decision-makers of minor courts frequently fail to consider alternatives to cash bail, do not take into account the accused's ability to pay, and impose excessive bail for the purpose of ensuring pretrial incarceration.

Exemplifying the need for counseled, evidentiary- and rule-based bail determinations that provide for swift reviewability is the case of a teenaged nursing mother who was incarcerated in Montgomery County for over a month due to her indigency.¹ Bail for the teen mother was set at \$50,000. It was her first time entering the criminal justice system—she had no prior arrest records. Before the county incarcerated her she breastfed her baby, lived with family, attended high school, and kept a

¹ The anecdote herein is provided with permission from the client but the name of the juvenile mother and related docket number is withheld to preserve her confidentiality.

low-wage job. She had no history of violence other than the incident for which she was arrested, which did involve a violent altercation with another girl. The facts surrounding the altercation were disputed and unproven. She had strong family supports who attended courtroom proceedings with her. She was an indigent minor who qualified for the legal services of the Office of the Public Defender.

The county incarcerated the new teen mother at an adult facility. The monetary conditional bail of \$50,000 was an amount that was set as “cash” or “good” bail, meaning she would not be returned to community unless she paid the full amount. The adult jail in which she was housed provided her with no accommodation for nursing, breast milk preservation, or automatic pumping machine to utilize for expressing milk so that her body would continue to produce enough to feed her baby in the future if she were released.²

² Nursing mothers also need to express milk to prevent and relieves engorgement, a painful condition that can occur when breastfeeding schedules are interrupted. When unaddressed, engorgement can lead to the common infection that is known as mastitis. For more information regarding the relevant terminology and the topic of breastfeeding while incarcerated in general see Malcolm Burnley, *Staying Connected: Moms Who Pump in Prison*, NEXT MEN (Feb. 4, 2019), <https://nextcity.org/features/view/staying-connected-moms-who-pump-in-prison> (“The medical consensus is that babies who consume breast milk are at lower risk of asthma, diabetes, and sudden infant death syndrome, while mothers are less likely to develop breast and ovarian cancers. But the practice also promotes more stable

Counsel was not present at the initial bail determination. Upon learning of the teen mother's case, the assigned Assistant Public Defender filed an emergency petition seeking a bail reduction to \$50,000 unsecured bail. By then the teen had already been incarcerated for over two weeks. At the hearing on the motion, the girl's public counsel argued to a Court of Common Pleas judge that her young client posed no flight risk and would reside with a local family member while awaiting trial. In the alternative, counsel requested that the mother be permitted to be home on house arrest.

The prosecution argued that the mother should remain on \$50,000 cash bail because of the nature of the alleged crime. Prosecution also raised a common assertion that house arrest was not an option for pretrial detention in Montgomery County. The judge denied the request for less restrictive conditions, informing defense counsel that the mother would just have to express her milk by hand (ostensibly to be discarded, as no means of preserving the milk and transferring it to the baby were available). The judge also denied defense counsel's request for a reduction in bail to \$10,000.

family units, strengthening an emotional bond between child and caretaker. That bond can be strengthened even when mom is behind bars.”).

The Office of the Public Defender immediately began to prepare a petition for review to the Superior Court. The timeline for such a petition, however, did not meet the urgent needs of the mother and her baby. The young mother was eventually released, but not because of any ruling of the court. After the Court of Common Pleas denied the request for modification her family secured Philadelphia-based counsel who approached the National Community Bail Fund- Black Mama's Bail Out on her behalf. That national organization posted the excessive bail—assistance that is rarely seen in Montgomery County and is unlikely to be available to the vast majority of individuals who are incarcerated pending trial. After more than thirty-eight days of pre-trial incarceration in an adult prison, the teenage mother reunited with her infant. Supported by her family, she continues to reside in her community and is actively pursuing her GED. Unfortunately, her journey through local bail practices was not an outlier.

ARGUMENT

A. THE PROBLEMS IDENTIFIED BY THE PARTIES AND THE SPECIAL MASTER ARE NOT ISOLATED TO PHILADELPHIA

In Montgomery County, defendants' bail determinations are before Magisterial District Judges ("MDJs") in courtrooms located throughout the county.³ Similar to the problematic Philadelphia County practices raised in this case, Montgomery County bail determinations rarely consist of informed, evidence-based analyses of individualized circumstances in accordance with the mandates of the Pennsylvania Constitution and the rules of criminal procedure.

Similar to Philadelphia, Montgomery County's MDJs routinely impose cash bail on indigent defendants without any inquiry into their ability to pay. *But c.f.* Pa.R.Crim.P. Rule 528 (stating the bail authority shall consider, inter alia, the "financial ability of the defendant" and requiring the amount to be reasonable). Similar to Philadelphia, Montgomery County's MDJs regularly impose excessive bail amounts

³ Consistent with the description set forth by Amicus PACDL in their brief, Montgomery County's thirty MDJs are elected officials who are not required to have formal legal training or licensure. *See*, Unified Judicial System of Pennsylvania, Magisterial District Judges of Montgomery County, available at <http://www.pacourts.us/courts/minor-courts/magisterial-district-judges/Default.aspx>.

for the sole purpose of ensuring pretrial incarceration, as opposed to providing assurance of future court appearances upon release. *But c.f.* Pa.R.Crim.P. Rule 524(C)(5) (“The amount of monetary condition shall not be greater than is necessary to reasonably ensure the defendant’s appearance and compliance with the conditions of the bail bond.”). Bail amounts are typically set as “cash amounts,” which means the accused is required to pay the full 100% of the bond amount prior to release from jail, as opposed to the 10% nonrefundable surety option preferred in many jurisdictions. Similar to Philadelphia, bail determinations are regularly made in cursory hearings that are not recorded, do not follow any normative evidentiary standards, and do not consider alternative conditions, such as home arrest, that could reasonably assure community safety.⁴

Unlike Philadelphia, however, representatives from the Montgomery County public defender’s office are rarely present during bail determinations. *But c.f.* Report of the Special Master, at 7, 8

⁴ Indeed, Montgomery County probation representatives have historically argued that they do not provide pretrial electronic monitoring services. *See, e.g., Commonwealth v. Fountain*, CP-46-CR-0003966-2019, Order of Nov. 1, 2019 (mandating that county probation place the accused on electronic monitoring after a hearing on the issue when county probation asserted that they could not impose pretrial electronic monitoring).

(describing presence and appointment of PD representatives at ACM hearing). Juxtaposed against defense counsel's lack of participation is the common practice of local police to present bail recommendations to Magisterial District Judges along with the criminal complaint submitted to the District Judge. Copies of police department bail recommendations are not provided to public defense counsel. *But c.f.* Report of the Special Master at 8 ("Before the hearing...defense counsel [is] electronically provided with the Pretrial Service Division Investigation Report .").

Unlike Philadelphia, there are no local procedures in Montgomery County offering on-call judges to rapidly consider oral bail modification requests. Nor are there any automatically scheduled bail modification hearings. *C.f.* Report of the Special Master at 9 (describing on-call judges and Early Bail Review hearings). Instead, unrepresented detainees typically stay in jail until their cases are scheduled for preliminary hearings.

Preliminary hearings in Montgomery County rarely occur within a week of the bail determination. It is common practice for Montgomery County MDJs to initially schedule preliminary hearings within the

fourteen-day window required by Pa.R.Crim.P. Rule 540, but then continue the hearings in a manner that may, or may not, be in compliance with the procedures set forth in Rule 542(G). It is thus not uncommon for Montgomery County detainees to sit for a month or more before getting the opportunity to request bail modification with the assistance of counsel at a preliminary hearing. By then, the well-documented negative consequences of any period of extended incarceration are in full force and effect.

Given the lengthy wait for preliminary hearings, detained individuals often agree to waive those hearings to expedite their case and, in many instances, gain release. When detained individuals agree to waive their preliminary hearings, many MDJs will swiftly execute orders permitting release and setting a date for future appearances, in spite of having previously set unreasonable monetary bail in the earlier instance.

B. DE-FACTO INCARCERATION IS *DE RIQUEUR*

“No condition of release, whether monetary or non-monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial.”

- Pa.R.Crim.P. 524 (comment).

In spite of the plain language of Rule 524, it is common practice for the minor courts of Montgomery County to impose monetary conditions of bail for the purpose of ensuring that a defendant remains incarcerated until trial. Even when authorities do not intend for monetary bail to result in prolonged pre-trial incarceration, its imposition has that result. The Pennsylvania Justice Reinvestment Working Group reported that “more than half of the people who are required to pay monetary bail are unable to do so—a total of almost 43,000 people.” *Reinvestment in Pennsylvania: Policy Framework*, Key Findings, at 4, CSG Justice Center (June 2017).⁵

Sadly, individual, evidence-based assessments of accused persons’ ability to pay are not routine. The regular assignment in Montgomery County of a \$5,000 flat bail amount for retail theft charges reveals such

⁵ Available at <https://csgjusticecenter.org/jr/pennsylvania/publications/justice-reinvestment-in-pennsylvania-policy-framework>. The Pennsylvania Justice Reinvestment working group was established specifically for the purpose of developing policies that increase the state’s return on correction investments and reduce prison populations while improving public safety.

absence of individualized determinations, as does the routine imposition of bail amounts exceeding one thousand dollars on public defender clients who qualify for indigent legal services.

There is no shortage of anecdotal evidence of routine pre-trial incarceration that results from bail determinations that fail to take into account the finances of the accused. An indigent minor with significant mental health needs remained incarcerated after participating in a fight in his residential youth placement because he could not pay \$50,000 cash bail. Another indigent client recently spent 64 days in jail awaiting trial on a minor charge of marijuana possession because cash bail was set at \$5,000. An impoverished elderly woman was held on \$5,000 bail after being accused of taking a bottle of wine without paying. And an indigent man with documented mental illness remained incarcerated on \$250 bail after being charged with shoplifting Oil of Olay products that he could not afford. For those with sufficient disposable income to take a vacation, purchase non-essential luxury goods, or donate to charity, a cash bail amount that is set at \$250 may seem reasonable. For the impoverished defendant who cannot afford to

buy lotion, however, that amount is an insurmountable barrier to freedom.

Minor courts need more than a reminder that the law requires them to consider a defendant's financial ability when setting monetary bail. To ensure that individuals are not incarcerated for indigency, bail-setting authorities need to be able to identify predictable and uniform factors to inform their ability-to-pay determinations. Fortunately, as argued by Petitioners, such factors are already present in other contexts of existing Pennsylvania law.

C. THERE IS INSUFFICIENT ACCOUNTABILITY

Rule 523 requires MDJs to consider “all available information ... relevant to the defendant's appearance or nonappearance at subsequent proceedings” including:

- The nature of the offense and “any mitigating or aggravating” factors;
- The accused's employment status, history, and financial condition;
- Family relationships;
- Connection to community (length of residence, past residences);
- Age, character, reputation, mental condition, addiction;
- Prior compliance or non-compliance with bail bond and conditions;
- Record of flight or attempted escape;
- Prior criminal record;

- Use of false identification;
- And “any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.”

Pa.R.Crim.P. Rule 523(A). Because bail proceedings are not recorded or even observed by most defense counsel, however, there is no record of which of these factors bail-setting authorities rely upon when making their determinations or whether those determinations are sufficiently supported by evidence.

The absence of any statewide, fixed timeline to ensure timely review of bail decisions that result in detention is also problematic. In Montgomery County, the burden of requesting such reviews for indigent clients falls on strained public defender resources.

In order to identify individuals who are incarcerated as a result of excessive monetary bail conditions or bail denials, staff from the Office of the Public Defender search through county databases to monitor for newly incarcerated persons. After interview with intake staff, those individuals are assigned to an Assistant Public Defender who must review their file in order to determine whether to file an emergency petition for bail modification, file a standard petition for bail modification that may take weeks to get scheduled, or request

modification at the preliminary hearing. Such requests for modification are frequently denied in any instance, and subsequent appellate review is not predictably entertained by the Superior Court and is time consuming. The result is a system that lacks uniformity and accountability and, unfortunately, one that lacks reliable levels of compliance with the United States and Pennsylvania Constitutions as well as the Rules of Criminal Procedure.

D. THE HARMS ARE REAL

Even short periods in jail have long-term detrimental effect. Accused persons who are detained pending their opportunity to prove their innocence in court are more likely to be convicted and to receive lengthier sentences. *See* Christopher T. Lowenkamp, Marie VanNostrant, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation, (Nov. 2013);⁶ *see also* Mary T. Phillips, *A Decade of Bail Research in New York City*, at 127, New York City Criminal Justice Agency, Inc. (2012). These effects cut disproportionately along race lines. *See*, Pennsylvania Justice Reinvestment Working Group, *Justice*

⁶ Available at https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf

Reinvestment in Pennsylvania: Policy Framework, Key Findings at 4. (“Across all offense types, black defendants are far more likely than white defendants to receive a monetary bail decision, especially when charged with a felony involving a weapon.”).

Those awaiting trial on criminal accusations include single parents with young dependents; adult caregivers of the ailing, elderly and disabled; disabled persons in need of continuity of care; primary earners; rent-payers; pet owners; bill payers; college students with exams; employees; bosses; husbands, wives, and significant others. Removed from community, detained individuals are hindered and often altogether precluded from meeting familial and communal responsibilities. As a result, all of those who depend on them suffer.

In many cases, the resulting damage is irreversible. Sometimes the damage is permanent but hard to quantify, such as the young Montgomery County student who missed their high school graduation awaiting a hearing on a small amount of marijuana possession because they could not pay \$1,000 in bail. Another example is the indigent person with a documented seizure disorder and mental health needs who was incarcerated on \$250,000 bail on charges relating to a fight

that defense maintains was initiated by others. All of that person's medical and mental health benefits were cut off as a result of the pretrial detention. Incarcerated persons miss holidays, funerals, opportunities to be present with dying loved ones, and other major life milestones. Even short periods of incarceration can trigger a downward spiral into deep poverty or cause other life-changing events such as the loss of custody over beloved children. *See generally*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stanford L. Rev. 711, 720 (July 2017).

Losses are not limited to circumstances beyond prison walls. Incarceration is a traumatic event. *See* Mika'll Deveaux, *The Trauma of the Incarceration Experience*, Harvard Civil Rights – Civil Liberties Law Review (Dec. 2013); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, (Dec. 2001).⁷ Montgomery County saw 4 in-custody suicide deaths in 2019. *See* Montgomery County 2019 Coroner's Office Annual Report. The actual death count does not include the multiple suicide attempts that occur throughout the year. The harms of flawed bail determinations are real.

⁷ Available at <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment>

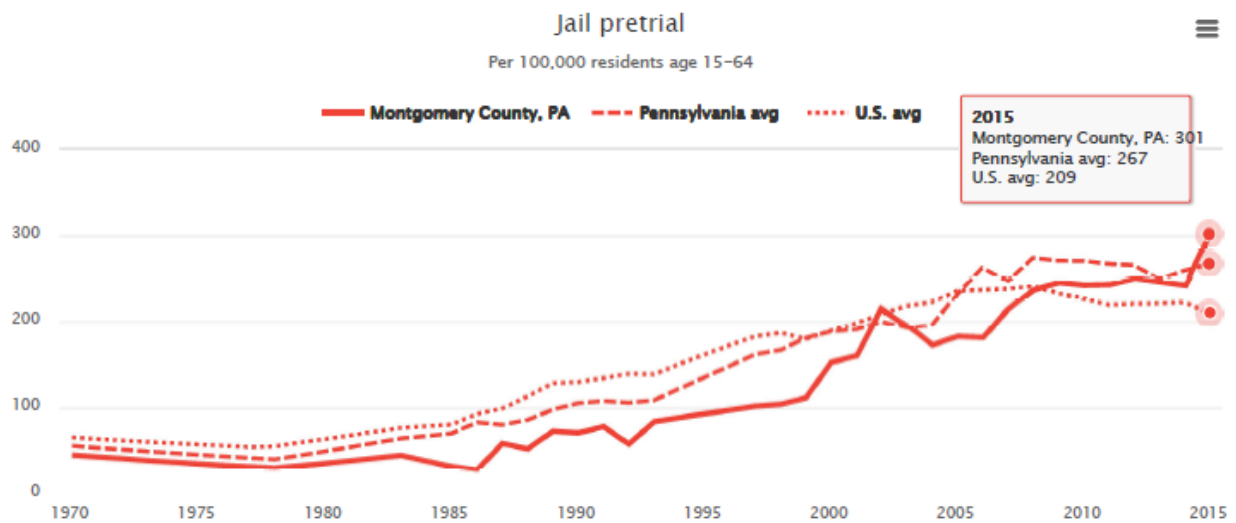
**E. PRE-TRIAL INCARCERATION UNDENIABLY
IMPLICATES LIBERTY INTERESTS THAT TRIGGER
STRINGENT DUE PROCESS PROTECTIONS**

“In cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’ ”

Addington v. Texas, 441 U.S. 418, at 425 (1979) (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir.1971)).

The sheer number of individuals who are incarcerated on unproven charges for substantial periods of time renders the relationship between liberty interests and bail determinations undeniable. Based on data collected by the Vera Institute of Justice,⁸ Montgomery County followed general statewide trends of increased pretrial incarceration from 1985 through 2015. Montgomery County surpassed statewide averages for pretrial detention in 2015 and significantly bucked national trends of declining rates of pretrial detention between 2010 and 2015:

⁸ The Institute compiled data from the U.S. Department of Justice Bureau of Justice Statistics as well as state and local corrections data, up to year 2015.



Vera Institute of Justice, *Incarceration Trends by County*, *available at* <http://trends.vera.org/rates/montgomery-county-pa>. This Court should disavow minor courts of any notion that such incarceration is permissible absent clear and convincing evidence that incarceration is the only option that can reasonably ensure the safety of persons or community. *See*, Pa. Const. art. I § 14.

Apparent from the Report of the Special Master and the briefing of Petitioners and *amici*, minor courts often fail to follow the plain meaning of the applicable Rules of Civil Procedure when determining bail eligibility and setting conditions of release. It is thus unlikely that they will unilaterally and uniformly apply a meaningful evidentiary standard to bail determinations absent guidance from this Court.

Both the plain language of the Pennsylvania Constitution and the liberty interests in stake call for the application of stringent evidentiary standards for bail determinations. The Pennsylvania Constitution calls for “proof” to be “evident.” Pa. Const. art. I, § 14. Even if that were not the case, the clear and convincing evidentiary standard is appropriate where the determination at stake involves a “significant deprivation of liberty,” “adverse social consequences ... [that have] a very significant impact on the individual,” and “the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.” *Addington v. Texas*, 441 U.S. 418, 425-427 (1979). All of those factors are present during bail determinations.

The harms of incarceration attach to all of those on whom it is imposed, whether or not their term of incarceration is before or after trial. “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

CONCLUSION

The call for clear judicial directives and uniform practices for bail determinations throughout Pennsylvania cannot be understated. The

bi-partisan Pennsylvania Justice Reinvestment Working Group expressly recommended that this Court review rules related to bail decisions, observing that, currently, “[t]here are 67 different approaches to pretrial practices in Pennsylvania’s 67 counties” *Policy Framework*, at 11. This case offers an immediate opportunity for this Court to fortify the existing rules and address the legal gaps identified by the parties and the Special Master. Meaningful implementation of the parties’ agreements, ensured through consistent monitoring, will provide a much-needed model for the rest of the state. Further clarification of the applicable rules and standards can provide accused persons throughout the state with the basic protections that they are due while they await their opportunity for a full and fair trial to address the unproven accusations lodged against them.

Respectfully Submitted,

/s/ Lee Awbrey

Lee Awbrey (313083)

Chief of Appeals

OFFICE OF THE PUBLIC DEFENDER

Montgomery County Courthouse

Norristown, Pennsylvania 19404-311

(610) 278-3320

Lawbrey@montcopa.org

Date: February 3, 2020

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.Ps. 531 and 2135 that this brief does not exceed 7,000 words. Specifically, relying on a computer-generated word count that includes all captions, tables, certifications, and signature blocks, the total word count is 4042 words.

/s/ Lee Awbrey

Lee Awbrey (313083)

Chief of Appeals

OFFICE OF THE PUBLIC DEFENDER

Montgomery County Courthouse

Norristown, Pennsylvania 19404-0311

Phone: (610) 278-3320

Fax: (610) 278-5941

lawbrey@montcopa.org

Date: February 3, 2020

CERTIFICATE OF COMPLIANCE

I certify 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.

/s/ Lee Awbrey

Lee Awbrey (313083)

Chief of Appeals

OFFICE OF THE PUBLIC DEFENDER

Montgomery County Courthouse

Norristown, Pennsylvania 19404-0311

Phone: (610) 278-3320

Fax: (610) 278-5941

lawbrey@montcopa.org

Date: February 3, 2020

EXHIBIT B

Appeal Docket Sheet

Superior Court of Pennsylvania

Docket Number: 849 WDA 2019

Page 1 of 4

May 15, 2020



CAPTION

Commonwealth of Pennsylvania

v.

Secada Deminica Black
Appellant

CASE INFORMATION

Initiating Document: Notice of Appeal IFP

Case Status: Active

Case Processing Status: January 22, 2020 Awaiting Consideration

Journal Number: J-A14016-20

Case Category: Criminal Case Type(s): Theft

CONSOLIDATED CASES

RELATED CASES

SCHEDULED EVENT

Next Event Type: Next Event Due Date:

COUNSEL INFORMATION

Appellant Black, Secada Deminica

Pro Se:	No
IFP Status:	Yes
Attorney:	Ruggiero, Melissa Rose
Law Firm:	Allegheny County Office of Conflict Counsel
Address:	564 Forbes Ave Ste 600 Pittsburgh, PA 15219
Phone No:	(412) 350-4850
Fax No:	
Attorney:	Christy, Andrew Chapman
Law Firm:	ACLU of Pennsylvania
Address:	Aclu Of Pa Po Box 60173 Philadelphia, PA 19103
Phone No:	(215) 592-1513
Fax No:	
Attorney:	Szemanski, Ali Nicole
Law Firm:	ACLU of Pennsylvania, et al
Address:	247 Fort Pitt Blvd Pittsburgh, PA 15222
Phone No:	(412) 681-7736
Fax No:	

Appeal Docket Sheet**Superior Court of Pennsylvania****Docket Number: 849 WDA 2019****Page 2 of 4****May 15, 2020****COUNSEL INFORMATION****Amicus Montgomery County Public Defender's Office**

Pro Se: No

IFP Status:

Attorney: Parris, Jason Edward
 Address: 100 S Broad St
 Ste 1216
 Philadelphia, PA 19110
 Phone No: (267) 478-2076

Fax No:

Appellee Commonwealth of Pennsylvania

Pro Se: No

IFP Status: No

Attorney: Streily, Michael Wayne
 Law Firm: Allegheny County District Attorney's Office
 Address: 401 Courthouse 436 Grant St
 Pittsburgh, PA 15219
 Phone No: (412) 350-3101

Fax No:

Attorney: Ivory, Margaret B.
 Law Firm: Allegheny County District Attorney's Office
 Address: Allegheny Co Da's Office
 303 Crthse436 Grant St
 Pittsburgh, PA 15219
 Phone No: (412) 350-4407

Fax No:

AGENCY/TRIAL COURT INFORMATION

Order Appealed From: May 21, 2019 Notice of Appeal Filed: June 7, 2019
 Order Type: Judgment of Sentence Entered
 Documents Received: June 11, 2019

Court Below: Allegheny County Court of Common Pleas
 County: Allegheny Division: Allegheny County Criminal Division
 Judge: Zottola, John A. OTN: G8291813
 Docket Number: CP-02-CR-0002172-2019 Judicial District: 05

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
Original Record	August 20, 2019	
Testimony	August 20, 2019	
Trial Court Opinion	August 20, 2019	

Date of Remand of Record:**BRIEFING SCHEDULE****Amicus****Montgomery County Public Defender's Office****Brief**

Due: January 21, 2020

Filed: January 21, 2020

Appellee**Commonwealth of Pennsylvania****Brief**

Due: April 6, 2020

Filed: May 6, 2020

Appellant**Black, Secada Deminica**

Appeal Docket Sheet

Superior Court of Pennsylvania

Docket Number: 849 WDA 2019

Page 3 of 4

May 15, 2020



BRIEFING SCHEDULE

Appellant

Black, Secada Deminica

Brief

Due: January 21, 2020

Filed: January 21, 2020

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
June 11, 2019	Notice of Appeal IFP Docketed	Appellant	Black, Secada Deminica
	Comment: Post-Sentence Motions were denied by the trial court on 5/29/19.		
June 11, 2019	Docketing Statement Exited (Criminal)		Superior Court of Pennsylvania
June 24, 2019	Docketing Statement Received (Criminal)	Appellant	Black, Secada Deminica
August 20, 2019	Trial Court Record Received		Allegheny County Criminal Division
August 20, 2019	Transcripts of Testimony		Allegheny County Criminal Division
August 20, 2019	Trial Court Opinion Received		Allegheny County Criminal Division
August 20, 2019	Briefing Schedule Issued		Superior Court of Pennsylvania
September 23, 2019	Application for Extension of Time to File Brief - First Request	Appellant	Black, Secada Deminica
September 23, 2019	Order Granting Application for Extension of Time to File Appellant Brief		Per Curiam
November 25, 2019	Application for Extension of Time to File Brief - Second Request	Appellant	Black, Secada Deminica
November 26, 2019	Order Granting Application for Extension of Time to File Appellant Brief		Per Curiam
	Comment: AND NOW, upon consideration of Melissa Ruggiero, Esquire's November 25, 2019, "Motion for Extension of Time," filed on behalf of Appellant Black, the motion is GRANTED such that Appellant's brief shall be due in this Court no later than January 21, 2020. NO FURTHER EXTENSIONS OF TIME TO FILE APPELLANT'S BRIEF SHALL BE GRANTED and this appeal shall be subject to immediate dismissal by this Court, without further notice to the parties, if Appellant's brief is not filed by the newly established date.		
January 21, 2020	Amicus Curiae Brief	Amicus	Montgomery County Public Defender's Office
January 21, 2020	Entry of Appearance - Private Black, Secada Deminica	Appellant	Christy, Andrew Chapman

Appeal Docket Sheet

Superior Court of Pennsylvania

Docket Number: 849 WDA 2019

Page 4 of 4

May 15, 2020



DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
January 21, 2020	Appellant's Brief and Reproduced Record Combined	Filed	
		Appellant	Black, Secada Deminica
January 22, 2020	Reply Letter(s) Printed		Superior Court of Pennsylvania
January 22, 2020	Reply Received (Argument)	Appellant	Black, Secada Deminica
January 28, 2020	Paper Version of PACFiled Document Received	Appellant	Black, Secada Deminica
	Document Name: Appellant's Brief and Rep. Rec.		
February 3, 2020	Entry of Appearance - District Attorney Commonwealth of Pennsylvania	Appellee	Ivory, Margaret B.
February 3, 2020	Paper Version of PACFiled Document Received	Amicus	Montgomery County Public Defender's Office
	Document Name: Amicus Curiae Brief		
February 4, 2020	Entry of Appearance - Private Black, Secada Deminica	Appellant	Szemanski, Ali Nicole
February 20, 2020	Application for Extension of Time to File Brief - First Request	Appellee	Commonwealth of Pennsylvania
February 20, 2020	Order Granting Application for Extension of Time to File Appellee Brief		Per Curiam
May 6, 2020	Appellee's Brief Filed	Appellee	Commonwealth of Pennsylvania
May 6, 2020	Other		Corsetti, Nicholas V.
	Document Name: A14 notice		

SESSION INFORMATION

Journal Number: J-A14016-20
 Consideration Type: Submitted on Briefs-Panel
 Listed/Submitted Date: June 9, 2020

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 1 of 8

May 15, 2020

CAPTION

Commonwealth of Pennsylvania, Appellant

v.

Christian Lee Ford, Appellee

CASE INFORMATION

Initiating Document: Order Granting Petition for Allowance of Appeal

Case Status: Closed

Journal Number: J-37-2019 March 18, 2019

Case Category: Criminal Case Type(s): PCRA
Driving Under the Influence
Possession with Intent to Deliver

CONSOLIDATED CASES

RELATED CASES

COUNSEL INFORMATION

Attorney: Hinsey, Jared Lee
Lancaster County District Attorney's Office

Address: Lancaster CO District Attorney
50 N Duke St 5th Fl
Lancaster, PA 17603

Phone No: (717) 299-8100

Receive Mail: Yes

Receive EMail: Yes Email:

Representing: Commonwealth of Pennsylvania, Appellant

Pro Se: No

IFP Status:

Attorney: Anderson, Travis Scott
Lancaster County District Attorney's Office

Address: Lancaster County Da's Ofc
50 N Duke St
Lancaster, PA 17602-2805

Phone No: (717) 299-8100

Receive Mail: Yes

Receive EMail: Yes Email:

Representing: Commonwealth of Pennsylvania, Appellant

Pro Se: No

IFP Status:

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 2 of 8

May 15, 2020

COUNSEL INFORMATION

Attorney: Stedman, Craig William

Address: Lancaster County District Attorney's Office
50 N. Duke Street
Lancaster, PA 17602

Phone No: (717) 299-8100

Receive Mail: Yes

Receive EMail: Yes Email:

Representing: Commonwealth of Pennsylvania, Appellant

Pro Se: No

IFP Status:

Attorney: Tauber, Alan J.

Address: Lindy And Tauber
1600 Locust St
Philadelphia, PA 19103

Phone No: (215) 575-0770

Receive Mail: Yes

Representing: Ford, Christian Lee, Appellee

Pro Se: No

IFP Status:

Attorney: Christy, Andrew Chapman

ACLU of Pennsylvania

Address: Aclu Of Pa
Po Box 60173
Philadelphia, PA 19102

Phone No: (215) 592-1513

Receive Mail: Yes

Receive EMail: Yes Email:

Representing: ACLU of Pennsylvania, et al., Amicus Curiae

Pro Se: No

IFP Status:

Attorney: Sosnov, Leonard

Defender Association of Philadelphia

Address: 1441 Sansom St
Philadelphia, PA 19102

Phone No: (267) 765-6502

Receive Mail: Yes

Receive EMail: Yes Email:

Representing: Defender Association of Philadelphia, Amicus Curiae

Pro Se: No

IFP Status:

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 3 of 8

May 15, 2020

COUNSEL INFORMATION

Attorney: Winnick, Bradley Adam
 Dauphin County Public Defender's Office
 Address: Dauphin Co Pd's Office
 2 S 2ND St Fl 2
 Harrisburg, PA 17101-2047
 Phone No: (717) 780-6393
 Receive Mail: Yes
 Representing: Pennsylvania Association of Criminal Defense Lawyers, Amicus Curiae
 Pro Se: No
 IFP Status:

SUPREME COURT INFORMATION

Appeal From: the order of the Superior Court at No. 620 MDA 2017 dated November 30, 2017, reconsideration denied February 9, 2018, Reversing the PCRA order of the Lancaster County Court of Common Pleas, Criminal Division, at Nos. CP-36-CR-0001443-2016, CP-36-CR-0001496-2016, and CP-36-CR-0002530-2016 dated March 10, 2017 and remanding.

Probable Jurisdiction Noted: Docketed Date: August 22, 2018
 Allocatur/Miscellaneous Granted: August 22, 2018 Allocatur/Miscellaneous Docket No.: 170 MAL 2018
 Allocatur/Miscellaneous Grant Order: AND NOW, this 22nd day of August, 2018, the Petition for Allowance of Appeal is GRANTED. The issue, as stated by petitioner, is:

Where a defendant bargains for and agrees to pay a specific fine as part of a negotiated plea agreement, must the sentencing court conduct a separate inquiry into the defendant's ability to pay the agreed-upon fine?

FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
12/17/2018	2nd Motion for Extension of Time	10.00	12/18/2018	2018-SUP-M-001574	10.00
01/22/2019	3rd Motion for Extension of Time	25.00	01/22/2019	2019-SUP-M-000076	25.00

INTERMEDIATE APPELLATE COURT INFORMATION

Court Name: Superior Docket Number: 620 MDA 2017
 Date of Order: November 30, 2017 Rearg/Recon Disp Date: February 9, 2018
 Rearg/Recon Disposition: Denied.
 Judge(s): Lazarus, Anne E.
 Dubow, Alice B.
 Strassburger, Gene
 Intermediate Appellate Court Action: Reversed/Remanded
 Referring Court:

AGENCY/TRIAL COURT INFORMATION

Court Below: Lancaster County Court of Common Pleas
 County: Lancaster Division: Lancaster County Criminal Division
 Date of Agency/Trial Court Order: March 10, 2017
 Docket Number: CP-36-CR-0001443-2016
 Judge(s): Ashworth, David L. OTN:

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 4 of 8

May 15, 2020

Order Type: Order

Court Below: Lancaster County Court of Common Pleas

County: Lancaster

Division: Lancaster County Criminal Division

Date of Agency/Trial Court Order: March 10, 2017

Docket Number: CP-36-CR-0001496-2016

Judge(s): Ashworth, David L.

OTN: T6865670

Order Type: Order

Court Below: Lancaster County Court of Common Pleas

County: Lancaster

Division: Lancaster County Criminal Division

Date of Agency/Trial Court Order: March 10, 2017

Docket Number: CP-36-CR-0002530-2016

Judge(s): Ashworth, David L.

OTN: X0168464

Order Type: Order

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content/Description
Part(s)	August 23, 2018	1
Transcript(s)	August 23, 2018	1

Record Remittal: October 18, 2019

BRIEFING SCHEDULE

Amicus Curiae

ACLU of Pennsylvania, et al.

Brief

Due: March 4, 2019

Filed: March 4, 2019

Appellee

Ford, Christian Lee

Brief

Due: March 4, 2019

Filed: March 4, 2019

Defender Association of Philadelphia

Brief

Due: February 26, 2019

Filed: February 26, 2019

Supplemental Reproduced Record

Pennsylvania Association of Criminal Defense Lawyers

Brief

Due: February 26, 2019

Filed: February 26, 2019

Appellant

Commonwealth of Pennsylvania

Brief

Due: November 5, 2018

Filed: November 1, 2018

Reply Brief

Due: March 21, 2019

Filed: March 18, 2019

Reproduced Record

Due: November 5, 2018

Filed: November 1, 2018

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 5 of 8

May 15, 2020

REARGUMENT / RECONSIDERATION / REMITTAL

Filed Date:

Disposition:

Date:

Reargument Order:

Record Remittal: October 18, 2019

SESSION INFORMATION

Journal Number: J-37-2019

Listed/Submitted Date: March 18, 2019

Consideration Type: Submit on Briefs Supreme

DISPOSITION INFORMATION

Related Journal No: J-37-2019 Judgment Date: September 26, 2019

Category: Decided Disposition Author: Wecht, David N.

Disposition: Affirmed/Remanded Disposition Date: September 26, 2019

Dispositional Filing: **Majority Opinion** Author: Wecht, David N.

Filed Date: September 26, 2019

Justice: Saylor, Thomas G. Vote: Joins

Justice: Baer, Max Vote: Joins

Justice: Todd, Debra Vote: Joins

Justice: Donohue, Christine Vote: Joins

Justice: Dougherty, Kevin M. Vote: Joins

Dispositional Filing: **Dissenting Opinion** Author: Mundy, Sallie

Filed Date: September 26, 2019

DOCKET ENTRY

Filed Date Docket Entry / Representing Participant Type Filed By

August 22, 2018 Allocatur Granted

Per Curiam

Comments:

AND NOW, this 22nd day of August, 2018, the Petition for Allowance of Appeal is GRANTED. The issue, as stated by petitioner, is:

Where a defendant bargains for and agrees to pay a specific fine as part of a negotiated plea agreement, must the sentencing court conduct a separate inquiry into the defendant's ability to pay the agreed-upon fine?

August 23, 2018 Superior Court Record Received

Superior Court of Pennsylvania

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 6 of 8

May 15, 2020

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
August 31, 2018	Designation of Contents of Reproduced Record	Appellant	Commonwealth of Pennsylvania
September 10, 2018	Praecipe for Appearance Ford, Christian Lee	Appellee	Tauber, Alan J.
September 10, 2018	Praecipe for Withdrawal of Appearance Ford, Christian Lee	Appellee	Pugh, Richard Russell
September 17, 2018	Untimely Counter Designation Received and Returned	Appellee	Ford, Christian Lee
October 1, 2018	Application for Extension of Time to File Brief - First Request	Appellant	Commonwealth of Pennsylvania
October 4, 2018	No Answer Letter	Appellee	Ford, Christian Lee
October 5, 2018	Order Granting Application for Extension of Time to File Appellant Brief		Dreibelbis, Amy
Comments: AND NOW, this 5th of October, 2018, Appellant's application for extensions of time is granted to the extent that Appellant's Brief shall be filed on or before November 5, 2018.			
October 5, 2018	Order Exited		Office of the Prothonotary
November 1, 2018	Appellant's Brief	Appellant	Commonwealth of Pennsylvania
November 1, 2018	Appellant's Reproduced Record Filed	Appellant	Commonwealth of Pennsylvania
November 19, 2018	Application for Extension of Time to File Brief - First Request	Appellee	Ford, Christian Lee
November 20, 2018	Order Granting Application for Extension of Time to File Appellee Brief		Dreibelbis, Amy
Comments: AND NOW, this 20th day of November, 2018, Appellee's application for extension of time is granted to the extent that Appellee's Brief shall be filed on or before January 3, 2019.			
November 20, 2018	Order Exited		Office of the Prothonotary
December 17, 2018	Application for Extension of Time to File Brief - Second Request	Appellee	Ford, Christian Lee
December 18, 2018	Order Granting Application for Extension of Time to File Appellee Brief		Dreibelbis, Amy
Comments: AND NOW, this 18th day of December, 2018, Appellee's second application for extension of time is granted. Appellee's Brief shall be filed on or before February 4, 2019.			

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 7 of 8

May 15, 2020

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
December 18, 2018	Order Exited		Office of the Prothonotary
January 22, 2019	Application for Extension of Time to File Brief - Third Request	Appellee	Ford, Christian Lee
January 23, 2019	Order Granting Application for Extension of Time to File Appellee Brief		Dreibelbis, Amy
Comments: AND NOW, this 23rd day of January, 2019, Appellee's third application for extension of time is granted. Appellee's Brief shall be filed on or before March 4, 2019. Absent exigent circumstances, further extensions of time will not be granted.			
January 23, 2019	Order Exited		Office of the Prothonotary
February 26, 2019	Amicus Curiae Brief	Amicus Curiae Amicus Curiae	Defender Association of Philadelphia Pennsylvania Association of Criminal Defense Lawyers
March 4, 2019	Amicus Curiae Brief	Amicus Curiae	ACLU of Pennsylvania, et al.
Comments: Amicus Brief of behalf of: American Civil Liberties Union of Pennsylvania, The Public Defender Association of Pennsylvania, The Lancaster County Public Defender's Office, and the Montgomery County Public Defender's Office.			
March 4, 2019	Appellee's Brief	Appellee	Ford, Christian Lee
March 18, 2019	Appellant's Reply Brief	Appellant	Commonwealth of Pennsylvania
March 18, 2019	Submitted on Brief		Supreme Court of Pennsylvania
September 26, 2019	Affirmed/Remanded		Wecht, David N.
Comments: Thus, we affirm the Superior Court in part and remand for further proceedings consistent with this opinion . Chief Justice Saylor and Justices Baer, Todd, Donohue and Dougherty join the opinion. Justice Mundy files a dissenting opinion.			
September 26, 2019	Judgment Entered		Office of the Prothonotary
October 18, 2019	Remitted		Office of the Prothonotary
Comments: Original Record Remitted to the Superior Court.			

Supreme Court of Pennsylvania



Appeal Docket Sheet

Docket Number: 46 MAP 2018

Page 8 of 8

May 15, 2020

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
October 18, 2019	Acknowledgement of Record Remittal		Superior Court of Pennsylvania

CROSS COURT ACTIONS

Docket Number: 170 MAL 2018
Docket Number: 620 MDA 2017

