

March 16, 2020

Chief Justice Saylor  
Pennsylvania Judicial Center  
601 Commonwealth Ave.  
Suite 4500  
P.O. Box 62575  
Harrisburg, PA 17106

In Re: 38th Judicial District – Request for Emergency Judicial Order, 29 MM 2020

Dear Chief Justice Saylor:

On March 12, 2020, Montgomery County President Judge DelRicci requested an emergency order that would, *inter alia*, suspend the operation of Rule 600 of the Pennsylvania Rules of Criminal Procedure (“Rules”) and would broadly authorize the use of advanced communication technologies to replace in-person participation. This Court granted Judge DelRicci’s requested relief in part but did not yet order the suspension of Rule 600. We ask this Court to deny President Judge DelRicci’s request to suspend Rule 600.

While we recognize the gravity of the circumstances that precipitated this requested emergency order, we encourage this Court to honor the time limits on detention for pretrial individuals set forth in Rule 600. Not only would suspension of Rule 600 implicate defendants’ constitutionally guaranteed speedy trial rights, it would also prolong defendants’ pretrial incarceration, increasing the grave health risks for defendants, their custodians and, ultimately, the larger society. Moreover, many of the individuals held pretrial in Montgomery County are incarcerated on cash bail. Thus, those incarcerated individuals will be exposed to an increased risk of infection simply because they cannot afford to pay for their release. The current grave health risks associated with continued detention warrant reconsideration of non-monetary conditions of release for all individuals detained pretrial.

Should the Court feel emergency action is necessary, rather than suspending the operation of the Rule, the Court could declare that, for the purposes of Rule 600(A), the time from March 13th through March 27th may not be attributed to the Commonwealth or the Court and may not be considered in the calculation of speedy trial limits.

Beyond the risks of prolonged detention, we are also concerned about the broad language of the order authorizing the use of advanced communications technology. We respectfully ask the Court to clarify that the use of this technology does not undermine or curtail, more than is absolutely necessary, defendants’ rights. We ask this court to preserve these important constitutional rights—the right to a speedy and public trial, the defendant’s right to be present for every stage of trial, and the defendant’s ability to communicate confidentially and effectively with counsel—through whatever means of technology the court employs.

Finally, we anticipate that, as reported cases of the virus increase, other counties will seek similar accommodations from the Rules. We respectfully suggest that the Court issue statewide guidance on these important matters affecting fundamental constitutional rights. Ensuring uniformity in how the Commonwealth's courts handle these significant issues will benefit all impacted parties, including judges, lawyers and, most importantly, the defendants whose rights are at stake.

## Argument

### 1. Emergency Order Section 1(b)(3)

In Part 1 Section b(3) of his request for an emergency order, President Judge DelRicci asks this Court to order the suspension of “the application of Pa. R. Crim. P. 600. Beginning date March 13, 2020, ending date March 27, 2020.” This Rule provides important protections for those awaiting trial. Granting the requested order will deprive defendants of their speedy trial rights and important liberty interests that this rule protects.

The right to a speedy trial is “one of the most basic rights preserved by our Constitution.” *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967). It protects the bedrock presumption of innocence “whose enforcement lies at the foundation of the administration of our criminal law.” *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (citing *Reed v. Ross*, 468 U.S. 1, 4 (1984)). The right provides an important safeguard “to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.” *United States v. Ewell*, 383 U.S. 116, 120 (1966).

The Pennsylvania Constitution confers on criminal defendants even greater speedy trial protections than does its federal counterpart.<sup>1</sup> See *Commonwealth v. Whitaker*, 359 A.2d 174, 176 (Pa. 1976). Recognizing the “inherent vagueness” of the balancing test the U.S. Supreme Court set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), this Court referred the matter to the Criminal Rules Committee to establish a definitive period of time for a speedy trial violation that would “more effectively protect the right of criminal defendants to a speedy trial.” *Commonwealth v. Hamilton*, A.2d 127, 133 (Pa. 1972). This Court then adopted Rule 1100, later renumbered Rule 600, as a means to protect speedy trial rights. *Whitaker*, 359 A.2d at 176. Rule 600 provides the time limits within which the trial shall commence, limits the length of pretrial incarceration, delineates computation of time, and provides the remedies for violations of the rule. See Pa. R. Crim. P. 600. The President Judge's proposed wholesale suspension of Rule 600 threatens to erode these important protections adopted by this Court to safeguard defendants' constitutional rights.

---

<sup>1</sup> “In all criminal prosecutions the accused hath a right . . . in prosecutions by indictment or information, [to] a speedy public trial by an impartial jury[.]” Pa. Const. art. I, § 9.

a. *Suspension of Rule 600(B)*

First, a suspension of Rule 600(B)'s limitations on pretrial detention would impermissibly encroach on important liberty interests. Rule 600(B) provides, *inter alia*: "Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of . . . 180 days from the date on which the complaint is filed." Pa. R. Crim. P. 600(B). The Rule explains that in calculating the time of pretrial detention, "only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Any other periods of delay shall be included in the computation." Pa. R. Crim. P. 600(C)(2). This computation metric for detained individuals is distinct from the rules that establish excludable time for the commencement of trial for all defendants, pursuant to Rule 600(A), where "any other periods of delay," excepting those where "the Commonwealth has failed to exercise due diligence," are included. Pa. R. Crim. P. 600(C)(1). Thus, the Rule already contemplates that no delay, except those caused by the defendant themselves, are excludable from the calculation of pretrial detention. The President Judge's proposed order would violate this important safeguard by denying all defendants the right to request release after 180 days where the delay is not attributable to the defendant.

Importantly, this speedy trial principle has constitutional roots. This Court has recognized that the speedy trial guarantee is such an important safeguard because "the exercise of the government's power to detain an individual pending a criminal prosecution places a heavy burden upon the accused[.]" *Commonwealth v. Barbour*, 189 A.3d 944, 954 (Pa. 2018). It is "[b]ecause the power to deprive one of his liberty is of such consequence" that "the right to a speedy, public trial is a core component of the procedural rights afforded to the accused under the Constitution." *Id.* at 954–55. The U.S. Supreme Court has likewise emphasized this heavy burden of pretrial incarceration. *See United States v. MacDonald*, 456 U.S. 1, 8 (1982) ("*The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.*") (emphasis added). This liberty interest is heightened for pretrial defendants being held during this national health emergency. Given the weight of these constitutional interests, this Court should deny the President Judge's request to suspend Rule 600(B).

It is important to note that the Rule must be read in conjunction with the constitutional right to bail. Article I, Section 14 requires that:

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

Pa. Const. art. I, § 14. This provision “mandates all persons have a right to be released on bail prior to trial in all cases except those” few who are not bailable under the Constitution. *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). The right to bail reflects “(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense.” *Id.* at 834-35. Given the sizable number of defendants detained pretrial in Montgomery County and across the Commonwealth, curtailing the Rule 600(B) 180-day limitation places additional strains on principles this Court identified in *Truesdale*.

Continuing to honor Rule 600(B) during this time of uncertainty also makes sense as a public health measure. Infectious diseases spread amongst individuals housed in jails and prisons at a rate far exceeding those in the communities from which they came. *See* Joseph A. Bick, *Infection Control in Jails and Prisons*, *Clinical Infectious Diseases*, Volume 45, Issue 8, 1047-1055, (2007). Releasing defendants when mandated by Rule 600(B) will help ensure that the health risks to jail populations and our communities are minimized. While we recognize that public health concerns may necessitate modifications to the format of the hearings, courts can find solutions that address these concerns without risking lives, such as through the use of audio-visual communications technology.

*b. Suspension of Rule 600(A)*

We also fear that categorical suspension of Rule 600(A) will interfere with the right to a speedy trial, and fail to understand why such suspension is necessary. As discussed above, Rule 600 reflects this Court’s reasoned consideration of the best way to protect a defendant’s state and federal constitutional rights to a speedy trial. The rule provides that trial must commence within 365 days of the filing of a complaint, but makes exceptions for delay not attributable to the prosecution’s failure to exercise due diligence. To grant the request to suspend it wholesale would presumably allow the Commonwealth to file a complaint against an individual defendant without the clock beginning to run for speedy trial purposes. Yet the defendants would still face all the attendant harms of an initiation of prosecution: “undue and oppressive incarceration prior to trial,” “anxiety and concern accompanying public accusation”, and “the possibilities that long delay will impair the ability of an accused to defend himself.” *Ewell*, 383 U.S. at 120.

We understand that the emergency circumstances may prevent or delay some trials from going forward. But the Rule does not require the charges to be dismissed in such a case, and thus maintaining the Rule poses no harm to the Commonwealth. Instead, the Rule already provides that delay that is not caused by failure of the prosecution to exercise due diligence is excludable from the calculation of trial time. *See* Pa. R. Crim. P. 600(C)(1). And cases have held that, where courts, and not prosecutors have caused the delay, such delay is excludable. *See Com. v. Malgieri*, 889 A.2d 604, 608 (Pa. 2005); *Com. v. Crowley*, 466 A.2d 1009, 1014 (Pa. 1983).

Moreover, this Court has directed that “[d]ue diligence is a fact-specific concept that must be determined on a case-by-case basis.” *Com. v. Hill*, 736 A.2d 578, 588 (1999). To suspend the Rule wholesale would essentially create a blanket presumption that the prosecution has exercised due diligence across all cases for the time frame that the order is in effect. Such a blanket presumption would run contrary to the case-by-case analysis into due diligence required by this Court to determine whether the right to a speedy trial has been violated. *See also Commonwealth v. Mills*, 162 A.3d 323, 326 (Pa. 2017) (Wecht, J., concurring) (“[A] linear reading of the provisions requires courts first to consider the Commonwealth's role in causing the delay at issue. Only if the Commonwealth has discharged its duties with due diligence should a court consider other causes for the delay.”).

We urge the Court to resist making such a sweeping exception to important protections. Should the Court feel action is necessary, rather than suspending the operation of the Rule, the Court could declare that, for the purposes of Rule 600, the time from March 13th through March 27th may not be attributed to the Commonwealth or the court and may not be considered in the calculation of Rule 600 time limits.

## 2. Emergency Order Section 1 (b)(2)

We also are concerned with the order’s lack of specificity regarding the scope of provision 1 section b(2). This provision asks this Court to “[a]uthorize the expanded use of advanced communication technology to conduct court proceedings.” Advanced technology is broadly defined under the Rules as “any communication equipment that is used as a link between parties in physically separate locations,” including “systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.” Pa. R. Crim. P. 103. The order does not, however, specify what kinds of advanced technology it intends this Court to authorize and in what kinds of court proceedings.

“[A] defendant's presence at all stages of his trial... has constitutional prestige in the Sixth Amendment guarantee of the right to confront adverse witnesses.” *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971). The Pennsylvania Rules of Criminal Procedure have codified this right to physical presence at multiple stages of the criminal proceedings. *See* Pa. R. Crim. P. 119(A), 602. A defendant must affirmatively waive this right in order for the court to conduct the proceedings over “two-way simultaneous audio-visual communication.” Pa. R. Crim. P. 119(B). Because the order does not clarify what proceedings would be subjected to—and exempted from—advanced communication technology, it *could* suspend the operation of the rule in a way that interferes with defendants’ rights. While defendants may choose to proceed over audio-visual systems, this Court should not allow the President Judge to suspend defendants’ rights to make such a choice.

Moreover, it is unclear from the order what kinds of communications technology can be used. The Rules define this kind of technology to include telephones, and any other technology

“used as a link between parties in physically separate locations.” Pa. R. Crim. P. 103. While audio-visual communication may be permitted in certain circumstances, *see* Pa. R. Crim. P. 571 (providing for the use of audio-visual communication at arraignment), the Rules do not contemplate other forms of technology as that may impair a defendant’s right to fair hearing.

Moreover, any use of technology must preserve the right to communicate with counsel under the Sixth Amendment, as recognized by Rule 199(C) of the Pennsylvania Rules of Criminal Procedure. *See* U.S. Const. amend. VI (“In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”) (emphasis added); Pa. R. Crim. P. 119(C) (“When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.”). The order does not adequately address how the use of advanced technology will safeguard this right.

Nor does the order make clear how it protects a defendant’s rights to a public trial. The Sixth Amendment directs, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .” *See In re Oliver*, 333 U.S. 257, 273 (1948) (extending right to the States). “The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned[.]” *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks and citation omitted). It attaches not only to the trial itself, but to proceedings where the interests of a defendant are present and the aims of the right are served by public access. *See e.g. id.* at 47 (extending the right to suppression hearings). Our state constitution further recognizes the imperatives of a defendant’s right to a public trial. *See* Pa. Const. art. I, § 9 (“In all criminal prosecutions the accused hath a right . . . to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial[.]”) While defendants may decide to waive these rights and go forward using advanced communications technology, they must be given the choice.

We ask that this Court clarify, or at a minimum request the President Judge to clarify, when electronic communications will be used and of what kind, and how defendant’s rights will be protected in this process.

We are also concerned about how this order may infringe on the rights of the public to access the courts. Beyond the Sixth Amendment’s protections for public trials, the First Amendment, as applied to the states under the Fourteenth Amendment, encompasses a right of public access to the court. *See Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982) (recognizing that the right of public access to criminal trials is “necessary to the enjoyment of other First Amendment rights” and therefore encompassed in the Amendment’s protections). This right “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984). Pennsylvania “has a concern with public trials that goes beyond even the unbroken history of public trials [in the nation]. In Pennsylvania, it is *specifically* and constitutionally mandated that courts shall be open.” *Com. v. Contakos*, 453 A.2d 578, 580 (Pa. 1982) (emphasis in original); *see also* Pa.

Const. art. I, § 11 (“All courts shall be open.”). By recognizing this right, our courts have aimed to ensure the legitimacy of the judicial processes and the integrity of our system of representative democracy. *See Contakos*, 453 A.2d at 579–80 (summarizing the “historical basis for public trials and the interests which are protected by provisions such as Pennsylvania’s open trial mandate”).

While the right is not absolute, “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enter. Co.*, 464 U.S. at 510. This analysis requires the Court to consider whether alternatives to closure will protect the interest that closure would serve. *Id.* at 511. Here, the President Judge’s order authorizing use of advanced communication technology does not address whether these technologies will be used in closed courtrooms to conduct proceedings that should be public. Yet its broad language makes such an outcome possible.

This Court should clarify that courtrooms cannot be closed where there are alternatives that could protect public health while preserving the public’s right of access to courts. Members of the public, including families of the accused, complaining witnesses, and members of the press should be given advance notice of proceedings going forward in non-traditional formats. Instead of adopting a blanket policy of closing courtrooms, advance accommodations can be made for interested members of the public to attend, to the extent feasible.

### 3. Additional Measures to Protect Against Unnecessary and Dangerous Contagion

We also encourage this Court to consider more broadly how public health concerns necessitate modifications to the existing system of pretrial detention. Many of those held in county jails are entitled to release on bail under the Pennsylvania Constitution, yet they remain detained solely because they cannot meet the monetary conditions of release. Pa. Cons. art. I, § 14; Pa. R. Crim. P. 520, 524. Their continued detention exposes them to a heightened risk of a potentially lethal illness. Willful exposure to this risk based solely on indigency verges on punishment, and implicates another set of state and federal constitutional concerns. *See* Pa. Cons. art. I, § 14; *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). This increased risk of contagion will inevitably extend to custodial staff and the community at large.

In response to this heightened danger, other jurisdictions are beginning to take measures to reduce the number of people held in custody. *See, e.g.,* Corry Shaffer, *Cuyahoga County officials will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html> (Mar. 12, 2020). We ask this court to consider similar measures and direct jurisdictions in Pennsylvania to reconsider pretrial detention for those assigned cash bail who remain in custody solely because they cannot afford to pay.

Conclusion

This Court has been given an important opportunity to make clear that, in times of crisis, our Constitution does not cease to protect the most vulnerable among us. We urge this Court to take this opportunity and reject the portion of the President Judge’s proposed order suspending Rule 600. This Rule protects weighty interests of those held in pretrial detention, including the rights to speedy trial and to release from pretrial detention. While the public health emergency will require many changes, we do not believe that at this time the circumstances justify a wholesale suspension of this important rule. Moreover, suspending the Rule will, by increasing the number of people at heightened risk of contracting a potentially lethal virus, further precipitate a public health crisis in the Commonwealth’s jails, and in our communities.

Beyond the immediate consideration of the Rule 600 suspension issue, we respectfully request that, in order to decrease the especially dangerous public health risks in the Commonwealth’s jails, that this Court consider ordering trial courts to conduct new proceedings to re-evaluate bond for all those held in pretrial detention solely because they are unable to pay cash bail.

Finally, we encourage this Court to use this opportunity to set uniform rules for courts across the Commonwealth. Montgomery County’s request is the first, but it surely will not be the last.

Respectfully submitted,

A handwritten signature in blue ink that reads "Hayden Nelson" followed by a stylized flourish.

Vic Walczak, Legal Director  
Erika Nyborg-Burch, Staff Attorney  
Hayden Nelson-Major, Independence Foundation Fellow  
Nyssa Taylor, Criminal Justice Policy Counsel  
American Civil Liberties Union of Pennsylvania

A handwritten signature in blue ink, appearing to be "Peter E. Kratsa", with a large, sweeping flourish.

Peter E. Kratsa  
President  
Pennsylvania Association of Criminal Defense Lawyers