

No. 25-2762

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In the United States Court of Appeals  
for the Third Circuit

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HARTMANN ET AL.,

*Plaintiffs-Appellants,*

v.

BRIAN CHUDZIK, ET AL.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania, Case No. 5:22-cv-01588,  
Honorable John M. Gallagher, District Judge

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*Amicus Brief* on behalf of the National Association of Criminal Defense  
Lawyers in Support of Plaintiffs-Appellants to Reverse the District  
Court's Partial Dismissal Order

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## **Corporate Disclosure Statement**

Amicus curiae, the National Association of Criminal Defense Lawyers, is a non-profit entity with no parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in amici curiae.

*/s/Daniella Gordon*  
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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), is a non-profit, voluntary professional bar association working on behalf of criminal defense attorneys, ensuring justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files many amicus briefs each year in the U.S. Supreme Court and other federal and state courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal legal system.<sup>2</sup>

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<sup>1</sup> No party or its counsel authored this brief in whole or part. No party or its counsel, nor any other person, contributed money to fund its preparation or submission.

<sup>2</sup> Undersigned certifies that counsel for both appellant and appellee were notified of the intent to file this brief. All parties have consented to the filing.

## ARGUMENT

### INTRODUCTION

In Lancaster County, Pennsylvania, defendants appear at preliminary arraignments without counsel. Within minutes, a Magisterial District Judge can set bail, often without inquiring into the defendant's employment, family ties, mental health, or ability to pay. The defendant, recently arrested and appearing by video from jail, may not be permitted to speak. But law enforcement can weigh in and advocate for detention and unaffordable bail. The proceeding ends before the ink has time to dry on the bail order. And for defendants who cannot post bail, what follows is pretrial detention that sets in motion a cascade of consequences: lost jobs, separated families, abandoned defenses, and guilty pleas entered not because of evidence but because of the unbearable pressure of incarceration.

Defense practitioners see this daily: constitutional principles colliding with criminal justice realities. For our clients, the bail determination governs liberty, livelihood, and the fairness of the entire case.

But the district court dismissed Plaintiffs' Sixth Amendment claim, holding that while the right to counsel "attaches" at the preliminary arraignment, defendants are entitled to appointed counsel only at "critical stages" occurring *after* that proceeding. This framework misreads Supreme Court precedent, which provides that the critical-stage inquiry is substantive, not temporal. A proceeding does not escape Sixth Amendment scrutiny simply because it is the first adversarial proceeding rather than a later one. The question is whether the proceeding presents a substantial risk of prejudice against the defendant's rights. Lancaster County's preliminary arraignments do.

The district court's own due-process analysis underscores the point. Having recognized that Lancaster County's procedures may deny defendants any meaningful opportunity to be heard, the court cannot deem these same proceedings too inconsequential to require counsel. A hearing cannot be essential enough that due process is violated yet trivial enough to evade the Sixth Amendment. This reality is even more true in today's plea-dominated system and cannot be cured by later appointment of counsel.

Lancaster County’s preliminary arraignment, where bail is determined, is a proceeding that determines whether a person goes home or goes to jail. This consequence militates in favor of treating it as a critical stage and reversing the district court’s contrary order.

**I. Modern Bail Practice is the Starting Point for Defense.**

Defense practitioners understand this fundamental truth: *effective defense begins at the bail hearing*. The bail determination dictates not only pretrial conditions but the entire trajectory of a case.

Understanding why that is, and why, therefore, the Constitution demands counsel at Lancaster County’s preliminary arraignments—a proceeding where bail is determined—requires appreciating the transformation of bail from founding-era appearance-securing mechanisms to modern case-determinative proceedings. This evolution demonstrates why zealous advocacy by competent counsel has become essential to constitutional protection and why defense begins at the bail hearing.

At the founding, bail served a singular purpose rooted in the presumption of innocence. As scholars note, the bail law’s trajectory “from its English origins to the constitutional provision enacted by

nearly all the American states” reflects “continual efforts to restrict the power of the state to lock a person up before trial.” Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1825 (2024). Courts viewed denying bail in non-capital cases as denying the presumption of innocence itself. William F. Duker, *The Right to Bail: A Historic Inquiry*, 42 Alb. L. Rev. 68–69 (1977).

The original system was elegantly simple: bail meant “delivery” of a person to “sureties” in exchange for a pledge. 4 William Blackstone, *Commentaries on the Laws of England* 294–96 (1769); *Stack v. Boyle*, 342 U.S. 1, 5 (1951). The system operated on clear principles: “pretrial liberty was precious, nearly all accused people had a right to release on bail, and bail was carefully calibrated to a defendant’s financial circumstances.” Funk & Mayson, 137 Harv. L. Rev. at 1829. Courts considered only one factor: ensuring the defendant’s appearance at trial.

Today’s bail system bears little resemblance to its founding-era predecessor. Time and pretrial reform “expanded pretrial detention’s consideration beyond mere risk of flight toward an analysis of the nature of the offense alleged, the strength of the evidence in support of the allegation, and the potential risk the defendant posed to the

community if released pretrial.” Jenny E. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. 757, 766 (2020).

Modern practice ties “bail to the charged offense, perceived dangerousness, and the plea/trial process, often using cash bail as leverage.” Funk & Mayson, 137 Harv. L. Rev. at 1824. Most troubling, “current bail practices allow courts and the prosecution to predict guilt and weigh evidence against defendants prior to trial.” Cydney Clark, *Bailing on Cash Bail*, 29 Wash. & Lee J. Civil Rts. & Soc. Just. 111, 140 (2023).

This transformation in bail’s scope coincides with a shift in criminal defense itself. As the Supreme Court has recognized, our criminal justice system “is for the most part a system of pleas, not a system of trials,” with “97% of federal convictions and 94% of state convictions [resulting from] guilty pleas.” *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). The Court recognized that “in today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Id.*

Detained clients face pressure to accept plea bargains regardless of guilt, lose employment and housing, and cannot assist in defense preparation. Indeed, pretrial incarceration plays such a large role in plea bargaining that in 2019, the American Bar Association Criminal Justice Section created a Plea Bargain Task Force to address systemic concerns. The Task Force established fourteen principles, including that “[g]uilty pleas should not result from the use of impermissibly coercive incentives,” that “innocent people sometimes plead guilty to crimes they did not commit,” and that “[t]he use of bail or pretrial detention to induce guilty pleas should be eliminated.” Lucian E Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, Criminal Justice Magazine (Winter 2024).<sup>3</sup>

Still, these principles remain just that. Bail hearings have a significant impact on the client’s decision to plead guilty and on the ultimate outcome of the case. Zealous advocacy, accompanied by

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<sup>3</sup>[https://www.americanbar.org/groups/criminal\\_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/](https://www.americanbar.org/groups/criminal_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/).

adequate notice and meaningful participation, thus forms the constitutional foundation for all subsequent defense strategies.

## **II. The District Court Erred in Holding That Lancaster County’s Preliminary Arraignments Are Not Critical Stages Requiring Appointment of Counsel.**

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. This guarantee protects “the unaided layman at critical confrontations” with the government after “the adverse positions of government and defendant have solidified.” *McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991). The right of counsel exists “to assure that the accused’s interests will be protected consistently with our adversary theory of criminal prosecution.” *United States v. Wade*, 388 U.S. 218, 227 (1967).

Once adversarial proceedings begin, the right to counsel “attaches” and the state must provide counsel “at any critical stage” of prosecution. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). The Court defines a “critical stage” as “a step of a criminal proceeding” that holds “significant consequences for the accused.” *Bell v. Cone*, 535 U.S. 685, 696 (2002).

The central inquiry in determining whether a proceeding constitutes a critical stage is whether it presents a substantial risk of prejudice to the defendant’s rights. Courts examine various factors relevant to this determination, including whether proceedings involve confrontations “between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary.” *Rothgery*, 554 U.S. at 212 n.16. Courts also assess whether proceedings may be outcome-determinative—that is, whether counsel’s assistance is needed to help avoid prejudice to the outcome of the criminal case. *See, e.g., United States v. Ash*, 413 U.S. 300, 313, 316 (1973); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (counsel “required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected”); *Wade*, 388 U.S. at 227 (asking whether “potential substantial prejudice to defendant’s rights inheres”).

Courts must make a “pragmatic assessment” of bail hearings’ role in plea bargaining, given the “realit[y] of modern criminal prosecution.” *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). The critical stage

standard requires only risk of prejudice, not certainty. *Mempa*, 389 U.S. at 134 (“substantial rights of a criminal accused may be affected”); *Stovall v. Denno*, 388 U.S. 293, 298 (1967) (“possibility of unfairness”); *Wade*, 388 U.S. at 226 (“counsel’s absence might derogate from the accused’s right to a fair trial”); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (“available defenses may be...irretrievably lost”).

**A. The District Court’s Formalistic Framework Finds No Support in *Rothgery* or the Cases Purportedly Applying It.**

In dismissing Plaintiffs’ Sixth Amendment claim, the district court grounded its Sixth Amendment analysis in *Rothgery v. Gillespie County* and three cases—*Bronner*,<sup>4</sup> *Cronin*,<sup>5</sup> and *Padilla*<sup>6</sup>—that purportedly establish a categorical rule: while the right to counsel attaches at the preliminary arraignment, defendants are entitled to appointed counsel only at “critical stages” occurring thereafter, with the attachment proceeding itself excluded. JA 021–022. This framework

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<sup>4</sup> *Bronner v. Marsh*, No. 20-CV-2656, 2021 WL 2366949, at \*8 (E.D. Pa. Mar. 19, 2021), *report and recommendation adopted*, No. 20-CV-2656, 2021 WL 2351679 (E.D. Pa. June 9, 2021).

<sup>5</sup> *Cronin v. W. Whiteland Tp.*, 994 F. Supp. 595, 603 (E.D. Pa. 1998).

<sup>6</sup> *Com. v. Padilla*, 80 A.3d 1238, 1254 (Pa. 2013).

misconstrues *Rothgery*'s narrow holding and relies on cases that addressed different questions.

In *Rothgery*, the petitioner was arrested based on an erroneous background check and brought before a magistrate for a Texas Article 15.17 hearing. *See* 554 U.S. at 195–96. The magistrate informed Rothgery of the charges and set bail; Rothgery posted bond and was released. *See id.* at 196. He requested appointed counsel repeatedly, but the county ignored him. *See id.* Months later, he was indicted, rearrested, and detained for three weeks before receiving appointed counsel who promptly secured a bail reduction and obtained records proving Rothgery had never been convicted of a felony. *See id.* at 196–97.

The question before the Court was narrow: whether the right to counsel attached at the Article 15.17 hearing, or only later when a prosecutor became involved. *See id.* at 194. The Court held that the right attached at the initial hearing because that was when “the government has used the judicial machinery to signal a commitment to prosecute.” *Id.* at 211. The Court then declined to decide whether the Article 15.17 hearing was itself a critical stage: “We do not decide

whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." *Id.* at 213.

The Court's observation that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial," *id.* at 212, cannot be read to exclude attachment proceedings from critical-stage analysis. *Rothgery* had no need to decide that question because Rothgery's claim was that the county's failure to appoint counsel *after* attachment led to his prolonged detention, not that he was entitled to counsel *at* the Article 15.17 hearing itself.

Rather, *Rothgery* teaches that "what makes a stage critical is what shows the need for counsel's presence." *Id.* at 212. The inquiry, in other words, is substantive, not temporal. A proceeding does not escape critical-stage scrutiny merely because it is the same proceeding at which the right attaches. Instead, the question is whether the proceeding presents "trial-like confrontations" where "the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 U.S. at 224.

The district court’s reliance on the non-binding decisions in *Bronner*, *Cronin*, and *Padilla* is therefore misplaced. None analyzed whether a preliminary arraignment—where bail is set without adequate procedural protections—constitutes a critical stage.

Take *Bronner*. There, the court stated that “counsel is only required to be present during ‘critical stage’ proceedings that occur after the proceeding in which the right attached.” 2021 WL 2366949, at \*8. But this conclusory statement assumes the proposition requiring proof. *Bronner* cited *Rothgery*, yet *Rothgery* declined to decide whether the attachment proceeding could itself be a critical stage. See 554 U.S. at 213. Moreover, the petitioner in *Bronner* “was represented by counsel at the very next stage of proceedings—his preliminary hearing.” 2021 WL 2366949, at \*8. The court had no occasion to consider whether the preliminary arraignment itself—had it involved contested bail proceedings resulting in prolonged detention—might qualify as a critical stage.

*Cronin* fares no better. There, the plaintiff’s Sixth Amendment claim focused on how his legal representation was procured, specifically, that he lacked an opportunity to contact counsel, and that his attorney

was indirectly provided through a family member. *See* 994 F. Supp. at 603. The court found no violation because “plaintiff was represented by counsel at his preliminary hearing before the district justice.” *Id.* Like *Bronner*, *Cronin* addressed whether counsel was timely appointed after attachment, not whether the preliminary arraignment itself constitutes a critical stage.

*Padilla* offers even less support. There, the Pennsylvania Supreme Court declined to hold that “an entire ten-day block of time” following preliminary arraignment constituted a critical stage, “regardless of whether any actual ‘proceedings’ or ‘trial-like confrontations’ take place during that time.” 80 A.3d at 1254. The court refused to extend the critical-stage definition to a mere passage of time during which nothing occurred. This holding says nothing about whether the preliminary arraignment itself—a proceeding during which the defendant appears before a judicial officer who makes consequential bail determinations—qualifies as a critical stage.

**B. Lancaster County’s Preliminary Arraignments Are Trial-Like Confrontations That Require Counsel.**

Having established that neither *Rothgery* nor its progeny foreclose the inquiry, the question becomes whether Lancaster County’s preliminary arraignments present the kind of “trial-like confrontations” that define critical stages. They do.

Lancaster County’s preliminary arraignments require judges to engage in substantive, multi-factor analysis that directly determines pretrial liberty. *See* Pa. R. Crim. P. 523(A). Under Rule 523, bail authorities must consider all available information relevant to the defendant’s appearance at subsequent proceedings, including ten enumerated factors: the nature of the offense and factors bearing on likelihood of conviction; employment status, history, and financial condition; family relationships; residence history; age, character, reputation, mental condition, and addiction status; prior bail compliance; flight risk; prior criminal record; use of false identification; and any other relevant factors. *See id.* If monetary bail is imposed, the authority must also consider the defendant’s financial ability to post bail. *See id.*

This is not a ministerial proceeding. It is a substantive hearing requiring evaluation of evidence, assessment of individualized circumstances, and exercise of judicial discretion—precisely where counsel’s assistance proves essential.

Rule 540(F) does not alter this analysis. That rule prohibits the issuing authority from questioning “the defendant about the offense(s) charged.” Pa. R. Crim. P. 540(F). But this limitation heightens rather than diminishes the need for counsel. The MDJ still considers the “nature of the offense” and “likelihood of conviction” when setting bail under Rule 523(A)(1). Yet the defendant cannot respond to or contextualize those allegations without risk of self-incrimination. Counsel, however, could present mitigating context about the offense without the defendant making incriminating statements. Moreover, Rule 540(F) addresses only offense-related questioning; it says nothing about the other nine Rule 523 factors.

The problem is not that Rule 540(F) limits what can happen—it is that what *should* happen under Rule 523 does not occur. Unrepresented defendants face the impossible choice between saying too much or too little. Statements made at preliminary arraignments may be used at

trial, creating a substantial risk that anything defendants say in an effort to secure release may later be used against them. Defendants may become scared and unwilling to speak, or, as Plaintiffs allege, may not be permitted to speak at all. *See* JA 149–51. Those who do talk risk raising irrelevant information that irritates judges or damages their defense. Defendants trying to explain circumstances may unwittingly disclose incriminating information.

The Rule 523 factors underscore why counsel proves essential. Consider several examples from amici’s experience and practice:

*Nature of the Offense and Probability of Conviction*:<sup>7</sup> This factor implicates evidence evaluation and legal analysis beyond any layperson’s capability. As one scholar notes, “[i]n states where the judicial officer must consider the weight of the evidence against the accused or the likelihood of conviction when determining conditions of pretrial release, the initial appearance is clearly a trial-like confrontation.” John P. Gross, *The Right to Counsel but Not the Presence of Counsel*, 69 Fla. L. Rev. 831, 865 (2017). Counsel can

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<sup>7</sup> *See* R. 523(A)(1).

identify charging defects, statutory defenses, constitutional violations, and evidentiary weaknesses that unrepresented defendants cannot spot. Experienced attorneys highlight diversion program eligibility, explain local sentencing practices, and contextualize allegations within broader prosecutorial patterns—advocacy that influences both bail decisions and subsequent plea negotiations.

*Prior Criminal Record and Court Compliance*:<sup>8</sup> Unrepresented defendants often possess incomplete or inaccurate understanding of their criminal history. They may be reluctant to raise any criminal history, even though prior compliance with legal process would support release. They may fail to highlight positive compliance with previous court orders or may accept inaccurate characterizations of prior charges. Sometimes a defendant’s reported history is wrong—a matter reported as a felony when the charge was resolved as a misdemeanor, or a record that fails to show a dismissal. An attorney can identify and correct such errors while emphasizing reliability and court appearance history.

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<sup>8</sup> See R. 523(A)(6)–(9).

*Mental Health and Character*:<sup>9</sup> This factor requires counsel's trained perspective to identify mental health issues, substance abuse problems, or cognitive disabilities that defendants may not recognize or feel comfortable discussing. A defendant with mental illness or suffering withdrawal effects may be unable to understand the proceeding, respond to questions, or advocate for himself. Such defendants may be reluctant to disclose from embarrassment or lack of awareness. They may not realize that bail proceedings present an opportunity to advocate for treatment as an alternative to detention. Counsel can connect defendants to treatment alternatives and present this information to the court.

*Family Ties, Residence, and Employment*:<sup>10</sup> Effective presentation of these factors requires the narrative construction that defines skilled advocacy. Defendants may be reluctant to answer questions about residence for fear that family members could face repercussions. They may hesitate to discuss employment if paid in cash or working informally. Without counsel, defendants might not know to raise facts

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<sup>9</sup> See R. 523(A)(5).

<sup>10</sup> See R. 523(A)(2)–(4).

about community ties—engagement with a local church, children attending local schools, property ownership, or lifelong residency. Counsel can tell the court that the defendant cares for dependents, serves as primary caregiver for an elderly person, or is the sole breadwinner for a family.

The adversarial nature of these proceedings intensifies in Lancaster County, where the complaint alleges that law enforcement personnel attend preliminary arraignments and provide input to the MDJs regarding bail. JA 150. These factors—legally complex, requiring evidentiary consideration, individualized determination, and introducing adversarial dynamics—establish that preliminary arraignments constitute the kind of trial-like confrontations that require counsel’s presence.

When counsel is present at arraignment, the difference is immediate. Defense attorneys contact family members to identify bail resources, gather employment verification, locate treatment alternatives, and prepare for immediate modification if bail is set too high. They know which judges respond to which arguments, understand local bail culture, and calibrate presentations accordingly. They ensure

that the Rule 523 factors favoring release actually reach the judicial officer. None of this happens when defendants stand alone.

**C. Subsequent Proceedings Cannot Cure the Deprivation at the Preliminary Arraignment.**

The theoretical availability of bail modification and the appointment of counsel before the preliminary hearing cannot remedy the constitutional injury inflicted at the preliminary arraignment. Time destroys these remedies before they can operate.

The gap between preliminary arraignment and preliminary hearing—3 to 14 days under Rule 540(G), often longer when continued—is not inconsequential. *See* Pa. R. Crim. P. 540(G)(1). It is the period during which the most acute harms occur. Job loss happens in days. An hourly worker who misses shifts gets replaced. A salaried employee who fails to appear gets terminated. The single parent who cannot arrange childcare faces intervention from child protective services. The tenant who cannot pay rent faces eviction. These consequences occur before any counsel is appointed.

Pennsylvania's modification framework offers little relief. Under Rule 529, defendants may seek modification at any time. *See* Pa. R. Crim. P. 529. But courts apply deferential standards and require

changed circumstances to justify departing from the initial determination. *See Com. v. McKown*, 79 A.3d 678, 695 (Pa. Super. 2013) (affirming denial where defendant “did not present any new evidence or factors as to how [his] status had changed since the magisterial district judge set bail”). For indigent defendants unable to pay unaffordable bail, nothing changes except the accumulating days of detention. Inability to pay is a constant, not a change.

By the time counsel can seek modification at the preliminary hearing, defendants may have already decided to plead guilty, lost jobs, or suffered other irreversible harms. The preliminary hearing cannot undo these consequences. And even when counsel does appear, there is no record to work with because preliminary arraignments are not transcribed or recorded, and MDJs make no findings on the record supporting their bail determinations. *See* JA 008. Did the MDJ inquire into the Rule 523 factors? Was the defendant permitted to speak? Was a constitutionally infirm factor considered? Counsel is largely in the dark. They argue against an existing determination with no official recording of what the MDJ considered—or failed to consider—when ruling on bail.

These collateral consequences directly shape case outcomes. The defendant who lost his job now has weaker community ties—a factor that weighs against release at any subsequent review. The defendant who has been evicted now lacks stable housing—another factor that cuts against release. What began as a bail determination transforms circumstances in ways that make both pretrial release and favorable case resolution progressively less likely.

What is more, the same Rule 523(A) criteria apply at modification as at the initial determination. Pa. R. Crim. P. 529, cmt. This Court has held that Pennsylvania preliminary hearings are critical stages because consequential determinations occur there. *See Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007). It should follow that if defendants are entitled to counsel when the same Rule 523 factors are evaluated at modification, counsel is equally necessary when those factors are first assessed at the preliminary arraignment—the proceeding that establishes the baseline all subsequent review inherits.

**D. Lancaster County’s Preliminary Arraignments Are Outcome-Determinative.**

Beyond the adversarial nature of the proceedings, preliminary arraignments satisfy the critical-stage standard for an independent

reason: they determine case outcomes. The Supreme Court’s critical stage doctrine requires counsel when proceedings hold significant consequences for the accused and risk substantial prejudice against the defendant’s rights. *Bell*, 535 U.S. at 696; *Wade*, 388 U.S. at 227. Bail hearings satisfy both requirements by determining not merely pretrial conditions but case trajectories. In today’s system dominated by guilty pleas, bail decisions create cascading consequences that cannot be cured by subsequent counsel appointment, transforming what appears to be a preliminary determination into the functional equivalent of sentencing.

*Impaired Defense Preparation*: Courts have long recognized that “the traditional right to freedom before conviction permits the unhampered preparation of a defense.” *Stack*, 342 U.S. at 4. The Supreme Court acknowledged that if “a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.” *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

Incarcerated clients cannot thoroughly review discovery or provide crucial context about witnesses, locations, and circumstances surrounding alleged offenses. Defense attorneys rely on clients to

identify alibi witnesses, explain party relationships, or clarify timeline discrepancies. A detained client cannot visit the scene to help counsel understand the physical layout. He cannot retrieve documents or photographs from his home. He cannot meet freely with investigators. Every interaction with counsel requires working within institutional restraints.

Released clients, by contrast, actively participate in their defense. They attend mental health appointments, begin rehabilitation programs, and meet with investigators. They gather character witnesses and documentation of employment, community ties, and family responsibilities. These activities support case preparation and demonstrate rehabilitation efforts valuable in plea negotiations and sentencing.

*Coercive Effect on Plea Decisions*: The coercive power of pretrial detention on plea bargaining represents the most pernicious outcome-determining effect. Pretrial detainees are more likely to plead guilty and to receive longer sentences upon conviction, creating cycles of poverty and reincarceration. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. at 772–73.

Every experienced defense attorney has encountered a client who pleaded guilty despite valid defenses, because pleading means immediate release while demanding trial proof means spending months in jail awaiting adjudication. Consider a defendant charged with theft who maintains innocence and has alibi witnesses but faces the choice between accepting a plea to time served after three weeks in jail versus waiting six months for trial while detained on unaffordable bail. The constitutional presumption of innocence collapses under the weight of detention, and innocent defendants accept guilt to escape jail rather than vindicate their rights through trial.

Empirical evidence confirms these observations. Pretrial detainees are more likely to plead guilty than their released counterparts and more likely to receive longer sentences. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. at 772–73. These outcomes compound over time: higher probability of conviction and longer sentences serve not only as barriers to future pretrial release but increase future sentencing ranges as criminal history grows. *Id.* The detention decision reverberates through a defendant’s entire criminal justice trajectory, creating

escalating disadvantages that multiply with each subsequent encounter.

*Diminished Leverage in Plea Bargaining*: After weeks of detention on unaffordable bail, the structural dynamics of plea negotiations shift. The defendant's urgent need for release becomes the dominant factor, transforming what should be an evaluation of evidence and culpability into a process where detention status drives outcomes.

This imbalance intensifies as detention effects compound. Defendants facing daily jail conditions, family separation, and mounting collateral consequences grow focused on securing release regardless of case merits. What begins as a negotiation between parties with different but manageable circumstances becomes fundamentally unequal as detention takes its toll.

Research confirms what practitioners observe. *See* Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. at 772–73 (discussing the downstream consequences of even brief periods of detention). Research further demonstrates that detained defendants “characterized as low-risk who were detained pretrial were over five times more likely to be sentenced to jail and over three times more likely to be sentenced to

prison than defendants who were released at some point pending trial.” Gross, *The Right to Counsel but Not the Presence of Counsel*, 69 Fla. L. Rev. at 867. This disparity exists independent of case strength, defendant characteristics, or charge severity—detention itself drives harsher outcomes because of the erosion of defendants’ circumstances and capabilities. Recent research demonstrates that pretrial counsel improves outcomes for defendants, including higher likelihood of pretrial release and lower bail amounts, as well as more favorable plea negotiations. *See Farella v. Anglin*, 734 F. Supp. 3d 863, 880 (W.D. Ark. 2024) (citing studies). Bail hearings are outcome-influencing because counsel’s absence derogates from defendants’ Sixth Amendment trial rights by increasing the likelihood that defendants will plead guilty before trial. *See id.* at 884.

The constitutional injury operates with particular severity given the systematic biases embedded within pretrial detention decisions. *See Carroll, The Due Process of Bail*, 55 Wake Forest L. Rev. at 769 (explaining that “[o]ver-policing and disproportionate rates of arrests and prosecutions of poor and minority populations contribute to higher rates of pretrial detention among these populations.”). These biases

transform temporarily detained defendants into defendants with objectively worse circumstances for plea negotiations and sentencing.

The Sixth Amendment’s guarantee is prophylactic: it protects against the *risk* of an unfair proceeding, not merely the certainty of one. *See United States v. Cronin*, 466 U.S. 648, 658 (1984). The outcome-determinative nature of bail decisions and their capacity to shape case trajectories, plea decisions, and ultimate dispositions confirms that preliminary arraignments are critical stages at which counsel must be present.

### **III. The District Court’s Due Process Analysis Supports the Critical Stage Determination.**

The district court’s treatment of Plaintiffs’ due process claims provides independent support for finding that preliminary arraignments are critical stages. Having concluded that Plaintiffs stated viable claims that Lancaster County’s bail procedures fail due process requirements, (JA 020–022), the district court could not simultaneously hold that these proceedings are too inconsequential to warrant counsel.

The court recognized that “pretrial release and detention decisions implicate a liberty interest—conditional pretrial liberty—that is

entitled to procedural due process protections.” JA 016 (quoting *Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018)). The court credited allegations that MDJs “fail to consider factors laid out in Rule 523,” “do not ask questions regarding these factors during the preliminary arraignments, and often do not permit defendants to speak during the proceedings.” JA 019. These allegations stated a claim that Lancaster County’s procedures deny defendants “any meaningful opportunity to be heard,” which is the “fundamental requirement of due process.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The procedural deficiencies the court found constitutionally significant are precisely the deficiencies that counsel would remedy. An unrepresented defendant, recently arrested and appearing via video from jail, faces a proceeding lasting minutes. The MDJ does not inquire into the Rule 523 factors. The defendant may not be permitted to speak. There is no opportunity to present mitigating information, correct mischaracterizations, or identify less restrictive alternatives.

Without counsel, the defendant cannot evaluate which Rule 523 factors favor release, how to present information without self-incrimination, or how to respond to adverse characterizations from law

enforcement. The defendant lacks the training to understand what is legally relevant, the experience to know what judges find persuasive, and the advocacy skills to make an effective presentation. The “opportunity to be heard” that due process guarantees becomes an empty formality when defendants lack the assistance necessary to exercise it meaningfully.

The due process inquiry asks whether procedures are “adequate to authorize” pretrial detention. *Schall v. Martin*, 467 U.S. 253, 264 (1984). The critical stage inquiry asks whether the proceeding presents “substantial risk of prejudice” to defendant’s rights such that “the results might well settle the accused’s fate.” *Wade*, 388 U.S. at 224; *Bell*, 535 U.S. at 695–96. Both point to the same conclusion.

A proceeding cannot simultaneously be too consequential to occur without due process protections yet too inconsequential to require counsel. If preliminary arraignments implicate fundamental liberty interests requiring meaningful procedural safeguards—as the district court held—they involve the substantial rights determinations that define critical stages. The district court’s recognition that Lancaster County’s procedures may violate due process because defendants lack

meaningful opportunities to participate establishes the predicate for finding that counsel is constitutionally required to make such participation possible.

## CONCLUSION

Lancaster County's preliminary arraignments possess characteristics that distinguish them from routine booking procedures or ministerial proceedings. Defendants face substantive bail determinations under a complex ten-factor framework. These proceedings present trial-like confrontations, determine case outcomes, and inflict harm that subsequent proceedings cannot cure. They are critical stages. The Sixth Amendment requires counsel.

For these reasons, NACDL urges this Court to rule in Plaintiffs' favor and to reverse and remand for further proceedings consistent with constitutional requirements.

Respectfully submitted,

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## REQUIRED CERTIFICATIONS

A. Type-Volume. Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, and Third Circuit L.A.R. 29.1(b), I certify that, according to the word-counting function of my word processing system (Microsoft Word 2025), this Brief contains 5,498 words, including footnotes, and employs 14-Point Century Schoolbook font.

B. Bar Membership. Pursuant to Rules 28.3(d) & 46.1(e) of the Local Appellate Rules, I certify that counsel of record, Daniella Gordon, is an attorney with filing privileges in the United States Court of Appeals for the Third Circuit.

C. Electronic Filing. Pursuant to Rule 31.1(c) of the Local Appellate Rules, I certify that the text of the electronically filed Brief is identical to the text in the paper copies of this Brief as filed with the Clerk. The electronic (PDF) version of this Brief has been checked for viruses using McAfee antivirus program, with all current updates, and no virus was detected.

/s/Daniella Gordon  
Daniella Gordon

## CERTIFICATE OF SERVICE

I certify that on December 12, 2025, a true and correct copy of this *Amicus Brief* was filed with the Clerk of the Court using the CM/ECF system, which will notify this electronic filing to all counsel on record.

/s/Daniella Gordon  
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