

THE COURTS

Title 210—APPELLATE PROCEDURE

PART III. APPEALS FROM THE COURT OF JUDICIAL DISCIPLINE

[210 PA. CODE CH. 101]

Amendment of Rule 5 of the Rules Governing Appeals from the Court of Judicial Discipline; No. 503 Supreme Court Rules

Order

Per Curiam

And Now, this 30th day of September, 2010, upon the recommendation of the Court of Judicial Discipline; the proposal having been submitted without publication pursuant to Pa.R.J.A. No. 103(a)(3) in the interest of efficient administration:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Rule 5 of the Rules Governing Appeals from the Court of Judicial Discipline is amended in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective in 30 days.

Annex A

TITLE 210. APPELLATE PROCEDURE

PART III. APPEALS FROM THE COURT OF JUDICIAL DISCIPLINE

CHAPTER 101. APPEALS FROM THE COURT OF JUDICIAL DISCIPLINE

APPEALS GENERALLY

§ 101.5. Briefing.

(a) Within thirty (30) days of the filing of the record as required in Section 101.4(a), the appellant shall file ten (10) copies of the appellant's brief with the Reviewing Court, **shall serve one (1) copy on the Court of Judicial Discipline** and shall serve two (2) copies on the appellee.

(b) Within thirty (30) days of the filing of appellant's brief, the appellee shall file ten (10) copies of the appellee's reply brief with the Reviewing Court, **shall serve one (1) copy on the Court of Judicial Discipline** and shall serve two (2) copies on the appellant.

[Pa.B. Doc. No. 10-1960. Filed for public inspection October 15, 2010, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 5]

Proposed Amendments to Pa.R.Crim.P. 541

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule 541 to (1) require the issuing authority to address bail when accepting a defendant's waiver of the

preliminary hearing, and (2) preclude subsequent challenges to the *prima facie* case when the preliminary hearing was waived. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Anne T. Panfil, Counsel
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Criminal Procedural Rules Committee
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fax: (717) 231-9520
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no later than Friday, November 12, 2010.

By the Criminal Procedural Rules Committee

RISA VETRI FERMAN,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

PART D. Proceedings in Court Cases Before Issuing Authorities

Rule 541. Waiver of Preliminary Hearing.

(A) The defendant who is represented by counsel may waive the preliminary hearing at the preliminary arraignment or at any time thereafter.

(B) The defendant who is not represented by counsel at the preliminary arraignment may not at that time waive the preliminary hearing.

(C) If the defendant waives the preliminary hearing and consents to be bound over to court, [**the**]

(1) the defendant thereafter is precluded from raising the sufficiency of the Commonwealth's prima facie case. If the defendant waives the preliminary hearing by way of an agreement and the agreement is not accomplished, the defendant may challenge the sufficiency of the Commonwealth's prima facie case.

(2) The defendant and defense attorney, if any, shall certify in writing that

(a) the issuing authority told the defendant of the right to have a preliminary hearing, [and that]

(b) the defendant understands that by waiving the right to have a preliminary hearing, he or she is thereafter precluded from raising challenges to the sufficiency of the prima facie case, and

(c) the defendant voluntarily waives the hearing and consents to be bound over to court.

(D) Once a preliminary hearing is waived and the case bound over to the court of common pleas, if the right to a preliminary hearing is subsequently reinstated, the preliminary hearing shall be held at the court of common pleas unless the parties agree, with the consent of the common pleas judge, that the preliminary hearing be held before the issuing authority.

(E) When the defendant waives the preliminary hearing, the case shall proceed as provided in Rule 543(C).

Comment

While the rule continues to require a written certification incorporating the contents set forth in paragraph (C), the form of certification was deleted in 1985 because it is no longer necessary to control the specific form of written certification.

Under paragraph (B), it is intended that the defendant who elects to proceed *pro se* may waive the preliminary hearing at a time subsequent to the preliminary arraignment.

Paragraph (C)(1) is intended to address the recurring issue that arises when a defendant waives the preliminary hearing in exchange for a *quid pro quo* benefit, such as a reduction in bail or withdrawal of charges, and thereafter, the defendant challenges the sufficiency of the Commonwealth's *prima facie* case through pre-trial means such as *habeas corpus* hearings. Furthermore, paragraph (C)(2) recognizes that by waiving the preliminary hearing, the defendant and defense counsel are acknowledging that sufficient evidence exists to make out a *prima facie* case, and by prohibiting a subsequent and unwarranted challenge, promotes judicial economy.

Nothing in this rule is intended to preclude a waiver of the preliminary hearing by way of agreement in which both parties agree to the preservation of the defendant's ability to raise the sufficiency of the Commonwealth's *prima facie* case at a subsequent proceeding.

Paragraph (E) was added in 2010 to clarify that bail must be set at the time of the waiver of the preliminary hearing in those cases, such as those initiated by summons, in which no preliminary arraignment has been held.

Official Note: Rule 140A adopted April 26, 1979, effective July 1, 1979; amended November 9, 1984, effective January 2, 1985; renumbered Rule 541 and amended March 1, 2000, effective April 1, 2001; amended February 12, 2010, effective April 1, 2010; **amended 2010, effective 2010.**

Committee Explanatory Reports:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

Final Report explaining the February 12, 2010 amendments adding new paragraph (D) concerning reinstatement of a waived preliminary hearing published with the Court's Order at 40 Pa.B. 1068 (February 27, 2010).

Report explaining the proposed amendments to paragraph (C) related to the effects of the waiver of the preliminary hearing and new paragraphs (E) related to setting bail published at 40 Pa.B. 5901 (October 16, 2010).

REPORT

Proposed Amendments to Pa.R.Crim.P. 541

Waiver of Preliminary Hearing

Over the past few years, the Committee has studied several issues related to Rule 541 (Waiver of Preliminary Hearing). The Committee has developed proposed amendments to address two of these issues: (1) a requirement that the issuing authority address bail when accepting a defendant's waiver of the preliminary hearing; and (2) a preclusion of subsequent challenges to the sufficiency of the Commonwealth's *prima facie* case when the defendant waived the preliminary hearing.

I. Addressing Bail at Time of Waiver

The Committee initiated its review of Rule 541 related to expanding the methods by which the preliminary hearing might be waived. Rule 541 currently provides that a represented defendant may waive the preliminary hearing at the preliminary arraignment or at any time thereafter and that an unrepresented defendant may not waive at the preliminary arraignment but may do so at any time subsequent to the preliminary arraignment. In either case, the rule contemplates that the defendant must be present before the issuing authority in order to waive the preliminary hearing. As discussed in more detail below, the Committee reviewed proposals that would have permitted options for waiving the preliminary hearing without the defendant being present.

The Committee noted that one of the main obstacles to most of the proposed methods was the need to set bail in cases that were not initiated by an arrest with the subsequent preliminary arraignment at which bail would be set. More significantly, it was reported that some jurisdictions did not permit defendants to waive the preliminary hearing when the case was initiated by summons because there is no provision in Rule 541 addressing the imposition of bail and, in summons cases, bail is ordinarily set at the preliminary hearing.

The Committee concluded that the best way to address this issue is to have bail set at the time that the waiver of the preliminary hearing is entered. The Committee based this conclusion on an analogy with the provision in Rule 543(C) that requires bail to be set when the defendant is held for court after the preliminary hearing since, after a defendant waives the preliminary hearing, the case is also held for court.

A proposal to this effect was published for comment at 37 Pa.B. 1026 (March 3, 2007). At that time, all of the publication comments received approved the change but also raised different suggestions for permitting waiver of the preliminary hearing without requiring the defendant to be present. As a result, the Committee did not proceed with the proposal at that time and undertook a study of these additional suggestions. The post-publication suggestions for changes by which the preliminary hearing may be waived that the Committee reviewed included one that would have permitted a counseled defendant to waive the preliminary hearing by mail. Other suggestions (1) would have permitted an uncounseled defendant to waive the preliminary hearing at the preliminary arraignment, and (2) would have permitted a counseled defendant to waive his or her presence at the preliminary hearing while permitting the defendant's attorney to participate in the preliminary hearing.

Ultimately, the Committee rejected these suggestions as unworkable due to the difficulty in ensuring that all appropriate certifications and documents required by

Rule 541 are executed properly, and, therefore, decided to include in the proposal only the provisions related to setting bail.¹

Therefore, the Committee is proposing to add new language as paragraph (E) of Rule 541 stating, "When the defendant waives the preliminary hearing, the case shall proceed pursuant to Rule 543(C)." In other words, the issuing authority would set bail, if it had not already been set, at the time that the defendant presents himself or herself to waive the preliminary hearing. This would be consistent with the longstanding policy under the rules that, in a case initiated by summons, the defendant may not be required to appear for a preliminary arraignment. It is contemplated that bail would be set at the time of the waiver of the preliminary hearing in a manner similar to that which occurs when a defendant's bail is set at a preliminary arraignment following arrest.

II. Waiver and Subsequent Challenges to the *Prima Facie* Showing

The other issue that has come to the Committee's attention is the problem that arises after a defendant, who is represented by counsel, waives the preliminary hearing, and subsequently challenges the Commonwealth's establishment of a *prima facie* case. The Committee considered that a knowing waiver of the preliminary hearing pursuant Rule 541 is a tacit acknowledgment that the Commonwealth can establish a *prima facie* case and an agreement to move the case to the court of common pleas. In some cases, however, a defendant who enters an agreement to waive the preliminary hearing will later file motions challenging the sufficiency of the Commonwealth's evidence to support a *prima facie* case. Because the rules do not provide for an explicit statement of the effect of a waiver, courts often reach different decisions about whether defendants have the right to a *habeas corpus* hearing on these claims. The Committee concluded that this lack of definition encourages "gamesmanship" and places an undue burden on the Commonwealth, law enforcement, witnesses, and victims, as well as being an inefficient use of judicial resources. In view of these considerations, the Committee agreed Rule 541 should be amended to prohibit specifically prohibit a later challenge to the preliminary hearing.

¹ The provisions described below in Part II related to the preclusion of subsequent challenges to the *prima facie* case after the preliminary hearing also are included in this proposal.

Originally, the Committee contemplated that this proposed amendment be limited to the situation in which a defendant is represented by counsel at the time of waiver. However, some members argued that no distinction existed between counseled and uncounseled defendants with regard to the ability to waive the preliminary hearing. They noted that a defendant may act *pro se* in the entry of waivers of much more significant weight, such as the waiver of right to counsel or the entry of a guilty plea. The Committee is therefore proposing that a new paragraph (C)(1) be added to the rule that would make it clear that a waiver by the defendant, whether with counsel or *pro se*, precludes a later challenge to the *prima facie* showing.

However, there would be one exception to this preclusion. The members acknowledge that often the waiver of the preliminary hearing was made as part of an agreement in which the defendant receives a *quid pro quo*, such as an agreement to be released on bail, in exchange for the waiver. Additionally, there are cases in which both sides agree to a waiver of the preliminary hearing while recognizing that the defendant will preserve his or her ability to challenge the sufficiency of the evidence or other issues at subsequent proceedings. The Committee does not intend that these types of agreements be precluded by the proposed amendments and so has included language in new paragraph (C)(1) stating that, when the waiver is by agreement, a failure to abide by the agreement will restore the defendant's ability to raise challenges to the *prima facie* case.

In developing this proposal, it was noted that, in procedures such as entry of a plea or waiver of counsel, a colloquy is required to ensure that the plea or waiver is entered knowingly. Current Rule 541(C) provides similar protection by requiring a written certification by the defendant and counsel, if any, that the issuing authority has advised the defendant of the right to have a preliminary hearing and that the defendant is waiving the hearing voluntarily and consents to be bound over to court. Paragraph (C) would be amended to include, as part of the certification, the defendant understands that a waiver of the preliminary hearing also will preclude later challenges to the sufficiency of the *prima facie* case.

[Pa.B. Doc. No. 10-1961. Filed for public inspection October 15, 2010, 9:00 a.m.]