THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 1, 5, 7 AND 10]

Proposed Amendment of Pa.R.Crim.P. 122 and 1003; Rescission of Pa.R.Crim.P. 520—529 and Replacement with Pa.R.Crim.P. 520.1—520.19; Adoption of Pa.R.Crim.P. 708.1, and Renumbering and Amendment of Pa.R.Crim.P. 708.

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the proposed amendment of Pa.R.Crim.P. 122 (Appointment of Counsel) and 1003 (Procedure in Non-Summary Municipal Court Cases); rescission of Pa.R.Crim.P. 520—529 and replacement with Pa.R.Crim.P. 520.1—520.19 governing bail proceedings; adoption of Pa.R.Crim.P. 708.1 (Violation of Probation or Parole: Notice, Detainer, *Gagnon* I Hearing, Disposition, and Swift Sanction Program), and renumbering and amendment of Pa.R.Crim.P. 708 (Violation of Probation or Parole: *Gagnon* II Hearing and Disposition), for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

Joshua M. Yohe, Counsel
Criminal Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
FAX: (717) 231-9521
criminalrules@pacourts.us

All communications in reference to the proposal should be received by Tuesday, March 8, 2022. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Criminal Procedural Rules Committee

BETH A. LAZZARA,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 1. SCOPE OF RULES, CONSTRUCTION AND DEFINITIONS, LOCAL RULES

PART B. Counsel

Rule 122. Appointment of Counsel.

(A) Counsel shall be appointed:

(1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed;

(2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources **[or],** who are otherwise unable to employ counsel**, or as required by rule**;

(3) in all cases, by the court, on its own motion, when the interests of justice require it.

(B) When counsel is appointed,

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

(2) **unless otherwise provided in these rules,** the appointment shall be effective until final judgment, including any proceedings upon direct appeal.

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

Comment

This rule is designed to implement the decisions of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Coleman v. Alabama*, 399 U.S. 1 (1970), that no defendant in a summary case be sentenced to imprisonment unless the defendant was represented at trial by counsel, and that every defendant in a court case has counsel starting no later than the preliminary hearing stage.

No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. See *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Scott v. Illinois*, 440 U.S. 367 (1979). See Rule 454 (Trial in Summary Cases) concerning the right to counsel at a summary trial.

Appointment of counsel can be waived, if such waiver is knowing, intelligent, and voluntary. *See Faretta v. California*, 422 U.S. 806 (1975). Concerning the appointment of standby counsel for the defendant who elects to proceed *pro se*, see Rule 121.

In both summary and court cases, the appointment of counsel to represent indigent defendants remains in effect until all appeals on direct review have been completed.

Ideally, counsel should be appointed to represent indigent defendants immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases. This rule strives to accommodate the requirements of the Supreme Court of the United States to the practical problems of implementation. Thus, in summary cases, paragraph (A)(1) requires a pretrial determination by the issuing authority as to whether a jail sentence would be likely in the event of a finding of guilt in order to determine whether trial counsel should be appointed to represent indigent defendants. It is expected that the issuing authorities in most instances will be guided by their experience with the particular offense with which defendants are charged. This is the procedure recommended by the ABA Stan-

dards Relating to Providing Defense Services § 4.1 (Approved Draft 1968) and cited in the United States Supreme Court's opinion in *Argersinger*, *supra.* If there is any doubt, the issuing authority can seek the advice of the attorney for the Commonwealth, if one is prosecuting the case, as to whether the Commonwealth intends to recommend a jail sentence in case of conviction.

In court cases, paragraph (A)(2) requires counsel to be appointed at least in time to represent the defendant at the preliminary hearing. Although difficulty may be experienced in some judicial districts in meeting the *Coleman* requirement, it is believed that this is somewhat offset by the prevention of many post-conviction proceedings that would otherwise be brought based on the denial of the right to counsel. However, there may be cases in which counsel has not been appointed prior to the preliminary hearing stage of the proceedings, *e.g.*, counsel for the preliminary hearing has been waived, or a then-ineligible defendant subsequently becomes eligible for appointed counsel. In such cases**,** it is expected that the defendant's right to appointed counsel will be effectuated at the earliest appropriate time.

Counsel must be appointed for a defendant, regardless of financial resources, for a hearing to review bail conditions pursuant to Rule 520.15 or impose pretrial detention pursuant to Rule 520.16. *See* Rule 520.5.

An attorney may not be appointed to represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Paragraph (A)(3) retains in the issuing authority or judge the power to appoint counsel regardless of indigency or other factors when, in the issuing authority's or judge's opinion, the interests of justice require it.

Pursuant to paragraph (B)(2) counsel retains his or her appointment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. *See Commonwealth v. Liebel*, **[573 Pa. 375,]** 825 A.2d 630 (**Pa.** 2003). Concerning counsel's obligations as appointed counsel, see *Jones v. Barnes*, 463 U.S. 745 (1983). See also *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001). **The scope and term of counsel's representation may also be limited by rule. For example, see Rule 520.5(D) that provides for limited representation for initial bail determination, review of bail conditions, and pretrial detention.**

See *Commonwealth v. Alberta*, **[601 Pa. 473,]** 974 A.2d 1158 (**Pa.** 2009), in which the Court stated that "[a]ppointed counsel who has complied with *Anders* [*v. California*, 386 U.S. 738 (1967),] and is permitted to withdraw discharges the direct appeal obligations of counsel. Once counsel is granted leave to withdraw per *Anders*, a necessary consequence of that decision is that the right to appointed counsel is at an end."

For suspension of Acts of Assembly, see Rule 1101.

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CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

Part C. Bail

(*Editor's Note*: Rules 520—529 of the Rules of Criminal Procedure, which appear in 234 Pa. Code pages 5-24.12 to 15-39, serial pages (395172) to (395174), (312439) to (312440), (395665) to (395666), (382199) to (382200), (312441) to (312444), (335941) to (335942), (376049) to (376052) and (383601) are proposed to be rescinded and replaced with the following proposed new rules.)

Introduction

In accordance with Section 5702 of the Judicial Code, 42 Pa.C.S. § 5702, which provides that "all matters relating to the fixing, posting, forfeiting, exoneration, and distribution of bail and recognizances shall be governed by general rules," the rules in this subchapter govern the bail determination procedures for the release of a defendant from custody pending the full and final disposition of the defendant's case. In 202 ___ , Pa.R.Crim.P. 520—529 were rescinded and replaced with Pa.R.Crim.P. 520.1—520.19 effective _____ _____ , 202 ___ .

The goal of the bail determination procedures is for the least number of people being detained, through timely release at the earliest stage, as is necessary to reasonably ensure appearance for court and the safety of the community, including the victim, defendant, and judicial system.

All defendants will receive a determination of bail eligibility. Unless the defendant is charged with a disqualifying offense, the process begins with an individualized assessment of release factors to determine whether a defendant is bailable. After considering these factors, the bail authority shall make a determination of the least restrictive necessary and available conditions to reasonably assure the purpose of bail, if any. The purpose of this determination is not to impose punishment. A defendant may not be eligible for bail following a detention hearing.

(*Editor's Note*: The following rules are proposed to be added and printed in regular type to enhance readability.)

Rule 520.1. Purpose of Bail.

(A) *Purpose.* The purpose of bail is to release timely a defendant at the earliest stage with any conditions to reasonably assure:

(1) the defendant's appearance for court;

(2) the safety of the community, including the victim, from harm by the defendant;

(3) the protection of the defendant from immediate risk of substantial physical self-harm; and

(4) the integrity of the judicial system.

(B) *Detention.* A defendant shall not be detained unless no available condition or combination of conditions can fulfill the purpose of bail.

(C) *Agreements.* A bail authority shall accept no agreement of the parties concerning bail conditions unless the bail authority is satisfied the agreement is consistent with the purpose of bail.

Comment

Article I, § 14 of the Pennsylvania Constitution states: "All prisoners shall be bailable 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 presump-

tion great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."

The purpose of bail is derived from Article I, § 14 and intended to "reasonably assure the safety of any person and the community." An immediate risk of physical self-harm may include crisis induced by alcohol, drug, or mental health issues requiring emergent intervention.

Reasonably assuring the integrity of the judicial system includes protection against likely witness intimidation and destruction of evidence.

A defendant charged with a capital offense or an offense having a maximum sentence of life imprisonment is not bailable regardless of any available condition. *See also* Rule 520.16.

Rule 520.2. Bail Determination Before Verdict.

(A) Bail before verdict shall be determined in all cases.

(B) A defendant may be admitted to bail on any day and at any time.

(C) Unless otherwise provided by rule, the initial determination of bail shall occur:

(1) At the preliminary arraignment when the bail authority does not detain the defendant pending a detention hearing pursuant to Rule 520.16; or

(2) At the preliminary hearing when a defendant does not receive a preliminary arraignment.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 520.

For the minor judiciary's authority to set bail, see the Judicial Code, 42 Pa.C.S. §§ 1123(a)(5), 1143(a)(1), and 1515(a)(4).

See Pa.R.J.C.P. 396, which provides that, at the conclusion of a transfer hearing, the juvenile court judge is to determine bail pursuant to these bail rules for a juvenile whose case is ordered transferred to criminal proceedings.

Rule 117(C) requires the president judge to ensure coverage is provided to satisfy the requirements of paragraph (B).

For the initial determination of bail otherwise provided by rule, see Rule 517 (Procedure in Court Cases When Warrant of Arrest is Executed Outside of Judicial District of Issuance).

For the release by the arresting officer of a defendant arrested without a warrant, see Pa.R.Crim.P. 519(B). A preliminary arraignment shall be afforded without unnecessary delay. *See* Pa.R.Crim.P. 519(A). It is best practice to hold the preliminary arraignment within 24 hours of arrest to minimize the period of detention before the initial determination of bail. *See also Commonwealth v. Yandamuri*, 159 A.3d 503, 529 (Pa. 2017) (recognizing abrogation of the bright-line rule of inadmissibility of statements made more than six hours after arrest in favor of a totality-of-the-circumstances approach, although "unnecessary delay between arrest and arraignment remains a factor to consider in the voluntariness analysis"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (a defendant may not be detained without a judicial determination of probable cause no less than 48 hours after arrest).

Rule 520.3. Bail Determination After Finding of Guilt.

(A) *Before Sentencing*.

(1) *Capital and Life Imprisonment Cases.* When a defendant is found guilty of an offense, which is punishable by death or life imprisonment, the defendant shall be detained.

(2) *Other Cases.*

(a) The defendant shall have the same right to bail after verdict and before the imposition of sentence as the defendant had before verdict when the aggregate of possible sentences to imprisonment on all outstanding verdicts against the defendant within the same judicial district cannot exceed three years.

(b) Except as provided in paragraph (A)(1), when the aggregate of possible sentences to imprisonment on all outstanding verdicts against the defendant within the same judicial district can exceed three years, the defendant shall have the same right to bail as before verdict unless the judge makes a finding that no condition of bail will reasonably assure the purpose of bail, as provided in Rule 520.1. The judge may revoke bail or detain the defendant based upon such a finding.

(B) *After Sentencing.*

(1) When the sentence imposed includes imprisonment of less than two years, the defendant shall have the same right to bail as before verdict, unless the judge, pursuant to paragraph (D), modifies the bail order.

(2) Except as provided in paragraph (A)(1), when the sentence imposed includes imprisonment of two years or more, the defendant shall not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge.

(3) When the defendant is released on bail after sentencing, the judge shall require as a condition of release that the defendant either file a post-sentence motion and perfect an appeal or, when no post-sentence motion is filed, perfect an appeal within the time permitted by law.

(C) *Reasons for Revoking Bail or Detention.* Whenever bail is revoked or the defendant detained under this rule, the judge shall state on the record the reasons for this decision.

(D) *Modification of Bail Order After Verdict or After Sentencing.*

(1) When a defendant is eligible for release on bail after verdict or after sentencing pursuant to this rule, the conditions of the existing bail order may be modified by a judge of the court of common pleas, upon the judge's own motion or upon motion of counsel for either party with notice to opposing counsel, in open court on the record when all parties are present.

(2) The decision whether to change the type of release on bail or what conditions of release to impose shall be based on the judge's evaluation of the information about the defendant as it relates to the release factors set forth in Rule 520.6. The judge shall also consider whether there is an increased likelihood of the defendant's fleeing the jurisdiction or whether the defendant is a danger to any other person or to the community or to himself or herself.

(3) The judge may change the type of release on bail and conditions, as appropriate.

(E) *Municipal Court.* Bail after a finding of guilt in the Philadelphia Municipal Court shall be governed by the rules set forth in Chapter 10.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 521.

For post-sentence procedures generally, see Rules 704 and 720. For additional procedures in cases in which a sentence of death or life imprisonment has been imposed, see Rules 810 and 811. "Life imprisonment cases" include those cases where the defendant is subject to a potential sentence of life imprisonment due to prior convictions.

For purposes of this rule, "verdict" includes a plea of guilty or *nolo contendere* that is accepted by the judge.

Whenever the trial judge sets bail after sentencing pending appeal, paragraph (B)(3) requires that a condition of release be that the defendant perfect a timely appeal. However, the trial judge cannot, as part of that condition, require that the defendant perfect the appeal in less time than that allowed by law.

Unless bail is revoked, the bail bond is valid until full and final disposition of the case. *See* Rule 534. The Rule 534 *Comment* points out that the bail bond is valid through all avenues of direct appeal in the Pennsylvania courts, but not through any collateral attack.

Rule 520.4. Detention of Witnesses.

(A) *Timing and Application.* After a defendant has been arrested for any offense, upon application of the attorney for the Commonwealth or defense counsel, and subject to the provisions of this chapter, a court may determine bail for any material witness named in the application. The application shall be supported by an affidavit setting forth adequate cause for the court to conclude that the witness will fail to appear when required if not held in custody or released on bail. The application shall also identify the proceeding for which the witness's presence is required. If the court grants the application, then the court shall issue process to bring any named witnesses before it for the purpose of determining bail.

(B) *Detention.* If the material witness is unable to satisfy the conditions of release after having been given immediate and reasonable opportunity to do so, the court shall order the witness detained, provided that at any time thereafter and prior to the term of court for which the witness is being held, the court shall release the witness when the witness satisfies the conditions of release. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be preserved, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the witness's testimony can be preserved.

(C) *Further Application.* Upon application, a court may release a witness from detention with or without conditions, or grant other appropriate relief.

(D) *Minors.* If process has been issued pursuant to paragraph (A) for a material witness who is under the age of 18 years, the procedures provided in Rule 151 shall apply.

(E) *Rescission and Release.* At the conclusion of the criminal proceeding for which process has been issued, any process for a witness to appear pursuant to paragraph (A) shall be rescinded. To eliminate unnecessary detention, the court shall supervise the detention of any persons held as material witnesses. Any witness detained pursuant to paragraph (B) shall be released when the witness's presence is no longer necessary.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 522.

This rule does not permit a witness to be detained prior to the arrest of the defendant, since an arrest might never take place and the witness could be held indefinitely.

See Pa.R.Crim.P. 500 and 501 (Preservation of testimony).

Pursuant to paragraph (C), a witness may be released conditioned upon the witness' written agreement to appear as required. *See* Rule 520.8.

This rule does not affect the compensation and expenses of witnesses under the Judicial Code, 42 Pa.C.S. § 5903, or the provisions of the Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. *See* 42 Pa.C.S. §§ 5963(c) and 5964(b) relating to bail.

In determining bail for a material witness pursuant to this rule, the court should consider all available conditions pursuant to Rules 520.8—520.11. When a material witness' presence is required, the court should impose the least restrictive means of assuring the witness' presence.

Rule 520.5. Counsel.

(A) *Bail Determination.* A defendant may be represented by counsel at the initial bail determination.

(B) *Review of Conditions.* If a defendant remains in detention 48 hours following an initial bail determination, the defendant shall be eligible for the appointment of counsel regardless of the defendant's financial resources for the review of conditions.

(C) *Detention.* When a defendant is detained for detention hearing pursuant to Rule 520.16, the defendant shall be eligible for the appointment of counsel regardless of the defendant's financial resources for the detention hearing.

(D) *Limited Representation.* Counsel may represent a defendant for the limited purpose of the initial bail determination, review of conditions, or a detention hearing.

Comment

A defendant may be represented at the initial bail determination. If a judicial district elects to have a representative from the Public Defender's Office at the preliminary arraignment, the bail authority shall appoint the Public Defender, regardless of the defendant's financial resources, to represent the defendant for the purpose of a bail determination, except when the defendant requests to proceed *pro se*, the defendant has private counsel, or the Public Defender asserts a conflict of interest.

In the absence of private counsel, counsel will be appointed to represent the defendant for the review of conditions or detention hearing. The process for identifying defendants remaining in detention and requiring the appointment of counsel is a matter of local practice, subject to the time requirement for condition review pursuant to Rules 520.15. For the responsibility of pretrial services for identifying such defendants, see Rule 520.18(F).

To permit prompt bail determinations, the appointment of counsel should not operate to delay review of conditions or a detention hearing.

For privately retained counsel, the extent of counsel's representation should be set forth in the entry of appearance. For appointed counsel, the extent of counsel's representation should set forth in the order of appointment or by local rule adopted pursuant to Rule 105 and Pa.R.J.A. No. 103(d).

Part C(1). Release Procedures

Rule 520.6. Release Factors.

(A) *Factors.* In determining whether a defendant is bailable and what, if any, conditions to impose consistent with Rule 520.1, the bail authority shall consider all available relevant information, including, but not limited to:

(1) Current Charge:

(a) the nature and circumstances of the crime charged;

(b) whether a firearm or other deadly weapon was involved;

(c) the possibility and duration of statutorily mandated imprisonment;

(d) whether the crime charged was committed against a victim with intent to hinder prosecution;

(e) likelihood of witness intimidation or destruction of evidence by the defendant; and

(f) the victim's risk of harm by the defendant.

(2) Personal Information:

(a) the family ties of the defendant;

(b) the defendant's employment;

(c) the length of residence in the community; and

(d) the defendant's immediate risk of substantial physical self-harm.

(3) Prior Criminal History:

(a) record of convictions;

(b) custody status at time of offense;

(c) history of compliance with court-ordered probation, parole, and prior bail conditions;

(d) record of appearances at court proceedings or of flight to avoid prosecution or willful failure to appear at court proceedings.

(4) Pre-Trial Risk Assessment, if available.

(5) Whether the prosecution has provided notice seeking pretrial detention pursuant to Rule 520.16.

(B) *Non-Cooperation.* A defendant's decision neither to admit culpability nor to assist in an investigation shall not be a reason to impose additional or more restrictive conditions of bail on the defendant.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 523.

To the extent that a pre-trial risk assessment may reflect some of these factors, such as prior criminal history, the bail authority should not assign additional weight to those factors absent compelling reasons for doing so.

When deciding whether to release a defendant on bail and what conditions of release to impose, the bail authority must consider all the criteria provided in this rule, rather than considering, for example, only the designation of the offense or the fact that the defendant is a nonresident. Generally, the graver an offense involving danger to a person, including those allegedly committed with a firearm, the greater the potential risk to the community upon release. Further, the more severe a potential sentence, the greater the risk of nonappearance.

"Custody status" includes a defendant released on bail, probation, or parole. When a defendant who has been released on bail and awaiting trial is arrested on a second or subsequent charge, the bail authority may consider that factor in conjunction with other release criteria in determining bail for the new charge. For alleged technical violations of a condition of county probation or parole, see Rule 708.1.

The bail authority may weigh the evidence against the defendant insofar as probable cause exists to believe that defendant committed the acts charged, but no farther regardless of the sufficiency of the evidence.

When the prosecution has provided notice seeking pretrial detention, a detention hearing may be scheduled. *See* Rule 520.16 for detention hearing.

Rule 520.7. Least Restrictive Bail Determination.

The bail determination, including the conditions imposed, shall be the least restrictive to satisfy the purpose of bail, as provided in Rule 520.1.

Comment

The least restrictive bail determination is release subject to general conditions. Progressively stricter determinations include release on nominal bail with general conditions, release with non-monetary special conditions, and release with monetary conditions. The most restrictive determination is that the defendant is not eligible for bail and is detained.

Rule 520.8. Determination: Release with General Conditions.

(A) *General Conditions.* In every case in which a defendant is released on bail, the general conditions of the bail bond shall be that the defendant will:

(1) appear at all times required until full and final disposition of the case;

(2) obey all further orders of the bail authority;

(3) give written notice to the bail authority, the clerk of courts, the district attorney, and the court bail agency or other designated court bail officer, of any change of address within 48 hours of the date of the change;

(4) neither do, nor cause to be done, nor permit to be done on his or her behalf, any act proscribed by 18 Pa.C.S. § 4952 (relating to intimidation of witnesses or victims) or 18 Pa.C.S. § 4953 (relating to retaliation against witnesses or victims); and

(5) refrain from criminal activity.

(B) *Bond.* The bail authority shall set forth in the bail bond all conditions of release imposed pursuant to this rule.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 526.

All the conditions of the bail bond set forth in paragraph (A) must be imposed in every criminal case in which a defendant is released on bail. If a defendant fails to comply with any of the conditions of the bail bond in

paragraph (A), the defendant's bail may be modified or revoked. For additional sanctions for failing to appear in a criminal case when required, see 18 Pa.C.S. § 5124.

Rule 520.9. Determination: Release on Nominal Bail with General Conditions.

A defendant may be released on a nominal bail and subject to general conditions upon the defendant's depositing $1.00 with the bail authority and the agreement of a designated person, organization, or bail agency to act as surety for the defendant.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 524(C)(4).

Nominal bail may be used as an alternative when it is desirable to have a surety. It may be used when the bail authority believes the defendant poses a risk for non-appearance due to transience or a residence outside of Pennsylvania. The purpose of the surety is to facilitate interstate apprehension of any defendant who absconds by allowing the nominal surety the right to arrest the defendant without the necessity of extradition proceedings. *See, e.g., Frisbie v. Collins*, 342 U.S. 519 (1952). A bail agency may be the nominal bail surety, as well as private individuals or acceptable organizations. In all cases, the surety on nominal bail incurs no financial liability for the defendant's failure to appear for court.

Rule 520.10. Determination: Release with Non-Monetary Special Conditions.

(A) *Necessity.* When general conditions are insufficient, a defendant may be released subject to both general conditions and any non-monetary special conditions necessary to mitigate the defendant's risk of non-appearance, the safety of the community, substantial physical self-harm, or the integrity of the judicial system risk, when the proof is evident and the presumption is great.

(B) *Special Conditions.* Non-monetary special conditions may include, but are not limited to, the following:

(1) remaining in the custody of a designated person;

(2) maintaining employment, or, if unemployed, actively seeking employment;

(3) maintaining or commencing an educational program;

(4) abiding by specified restrictions on personal associations, place of abode, or travel;

(5) reporting on a regular basis to a designated law enforcement agency, or other agency, or pretrial services program;

(6) complying with a specified curfew;

(7) refraining from possessing a firearm, destructive device, or other dangerous weapon;

(8) refraining from the use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription;

(9) submission to a medical, psychological, psychiatric, or drug or alcohol dependency assessment;

(10) compliance with any existing treatment plan or service plan;

(11) a protective order pursuant to 18 Pa.C.S. § 4954 when a potential risk of witness or victim intimidation is present;

(12) no contact by the defendant with the victim;

(13) refraining from entering the residence or household of the victim and the victim's place of employment when there is a potential risk of danger to the victim in a domestic violence case pursuant to 18 Pa.C.S. § 2711(c)(2);

(14) returning to custody of the person designated in paragraph (B)(1) for specified hours following release for employment, schooling, or other limited purposes;

(15) being placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device; or

(16) satisfying any other condition that is necessary to reasonably assure the purpose of bail, as provided in Rule 520.1.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 527.

The bail authority may determine that, in addition to general conditions, it is necessary to impose non-monetary special conditions on release to reasonably assure the safety of the community and the defendant from immediate physical self-harm, the defendant's appearance, and integrity of the judicial system. The special conditions should be tailored to the specific risks posed by the defendant's release. The bail authority should clearly state on the bail bond all special conditions of release in specific detail. The availability of pretrial services among judicial districts may vary some conditions.

The bail authority should consider any reasonable suggestions for non-monetary special conditions of release on bail in an effort to establish the most suitable and least restrictive conditions necessary for a particular defendant. It would be appropriate in some circumstances for the defendant and counsel to offer suggestions about types of conditions that would help the defendant appear and comply with the conditions of the bail bond.

The following are a few examples of conditions that might be imposed to address specific situations. In some circumstances, a combination of such conditions might also be considered. This is not intended to be an exhaustive list of appropriate conditions.

When the defendant poses a risk of non-appearance, the bail authority could require that the defendant report by phone or in person at specified times to pretrial services, or that the defendant be supervised by pretrial services. Pretrial services may maintain close contact with the defendant, assist the defendant in making arrangements to appear in court, and, if appropriate, accompany the defendant to court. It might also be helpful to require that the defendant maintain employment or continue an educational program.

When the defendant is known to have an alcohol or a drug problem posing an immediate risk of harm to the defendant, the bail authority could require the defendant to submit to drug or alcohol screening, avail to cessation or rehabilitative services as recommended by the screening, and refrain from the use of alcoholic beverages or illegal drugs.

When the defendant has a recent or substantial history of failing to comply with less restrictive conditions of the bail bond, the bail authority might limit travel, restrict the defendant to his or her residence or supervised housing, or place the defendant on electronic monitoring.

There may be cases when the relationship between the defendant and another person is such that the bail authority might require that the defendant refrain from contact with that other person.

When a case proceeds by summons, the issuing authority must require that the defendant submit to required administrative processing and identification procedures, such as fingerprinting required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, which ordinarily occur following an arrest. Rule 510(C)(2) requires an order directing the defendant to be fingerprinted be issued with the summons. If the defendant has not completed fingerprinting by the date of the preliminary hearing, completion of these processing procedures must be made a condition of release.

Rule 520.11. Determination: Release with Monetary Conditions.

(A) *Necessity.* A bail authority may impose a monetary condition on a defendant's release only when proof is evident and the presumption is great that no non-monetary special conditions exist to satisfy the purpose of bail, as provided in Rule 520.1.

(B) *Securitization.* A monetary condition may be secured or unsecured.

(C) *Deposit.* The bail authority may require a monetary condition to be secured by either the entire amount or a deposit of a sum of money not to exceed 10% of the full amount of the monetary condition if the bail authority determines that such a deposit is sufficient to ensure the defendant's compliance with non-monetary conditions.

(D) *Amount.* The amount of security required for the monetary condition, whether the entire amount or a percentage, shall be reasonably attainable by the defendant.

(1) A verified financial disclosure form setting forth a defendant's income, expenses, assets, and debts shall be completed whenever the imposition of a monetary condition is deemed necessary.

(2) The bail authority shall consider the information contained on the form when determining the amount of a monetary condition and the defendant's ability to satisfy that condition.

(E) *Source.* The bail authority may inquire as to the defendant's source of security for a monetary condition.

(F) *Risk.* The amount of a monetary condition shall be reasonably correlated with the defendant's risk.

(G) *Bail Schedule.* The use of a bail schedule is not permitted to determine the amount of a monetary bail condition. The determination shall be based upon the defendant's ability to pay.

(H) *Not in Lieu of Detention.* A secured monetary condition shall never be imposed for the sole purpose of detaining a defendant until trial.

(I) *Written Reason.* The bail authority shall indicate in writing the specific risk that the monetary bail condition is intended to mitigate.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 528.

The use of a monetary bail condition is permitted only when non-monetary conditions cannot reasonably assure a defendant's release consistent with the purpose of bail. A monetary condition may be used in conjunction with non-monetary special conditions. A monetary condition is intended to incentivize a defendant's willingness to comply with non-monetary conditions by subjecting the amount of the monetary condition to forfeiture. The strength of the incentive, as represented by the amount of a monetary condition, should bear a reasonable relationship with the defendant's risk, which is based, in part, on the severity of the charge. Whether a monetary condition is secured or unsecured is relevant to forfeiture, not incentive.

Release on an unsecured monetary condition requires the defendant's written agreement to be liable for a fixed sum of money if the defendant fails to comply with the non-monetary special conditions, as well as general conditions. No money or other form of security is required to be deposited for an unsecured monetary condition. Release may be revoked for a defendant who fails to satisfy a liability arising from non-compliance.

"Reasonably attainable" in paragraph (D) should include not only consideration of the amount of the security, but also include the timeliness in which the security can be attained by the defendant.

A monetary condition shall not be imposed on a defendant unable to satisfy the condition at any amount. *See* Pa. Const. art. 1, § 13 (excessive bail shall not be required). Under that circumstance, the defendant may be released with sufficient non-monetary special conditions or scheduled for a detention hearing.

When a defendant is charged with a violation of The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §§ 780-101 *et seq.*, the bail authority shall inquire as to the source of currency, bonds, realty or other property used to secure the monetary condition. *See* 42 Pa.C.S. § 5761. Further, for any charge, when the surety is a third party, the security may only be forfeited for a failure of the defendant to appear at a scheduled court proceeding. *See* Rule 536(A)(2)(a). Third parties sureties are not liable for a defendant's new criminal act or other violations of conditions. Therefore, unless a defendant is the depositor, a secured monetary condition should not be imposed to mitigate any other risk other than a failure to appear.

For permitted forms of security and related procedures, see Rule 520.14.

Rule 520.12. Statement of Reasons.

Other than release with general conditions or a release on nominal bail, the bail authority shall provide a recorded or written contemporaneous statement of reasons for any bail determination.

Comment

The bail authority should identify the specific factors and supporting information relied upon for the determination. This statement is intended to assist in expediting review, if required, and modification of the determination, if warranted. *See* Rule 520.15 (Condition Review).

Rule 520.13. Bail Bond.

(A) *Written Agreement.* A bail bond is a document whereby the defendant agrees to comply with all the imposed conditions of the bail while at liberty after being released on bail.

(B) *Timing.* At the time the bail is set, the bail authority shall:

(1) have the bail bond prepared; and

(2) sign the bail bond verifying the imposed conditions.

(C) *Conditions.* The bail bond shall set forth the determination of bail, including the general conditions set forth in Rule 520.8, any other conditions ordered by the bail authority, and the consequences of failing to comply with all the conditions of the bail bond.

(D) *Defendant's Signature.* The defendant shall not be released until he or she signs the bail bond.

(E) *Other Signatures.* To be released, the defendant shall sign the bail bond. Sureties shall also sign the bond when a monetary condition has been imposed. The official who releases the defendant also shall sign the bail bond witnessing the defendant's signature.

(F) *Detention.* If the defendant is unwilling to agree to comply with all the imposed conditions of the bail at the time bail is set, then the bail authority shall detain the defendant. The unexecuted bail bond and the other necessary paperwork shall accompany the defendant to the place of incarceration.

(G) *Recording.* After the defendant signs the bail bond, a copy of the bail bond shall be given to the defendant, and the original shall be included in the record.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 525.

Paragraph (G) requires the court official who accepts a deposit of bail and has the defendant sign the bail bond to include the original of the bail bond in the record of the case. *See* Rule 535(A) for the other contents of the record in the context of the bail deposit.

For some of the consequences when a defendant fails to appear or fails to comply as required, see the Crimes Code, 18 Pa.C.S. § 5124. *See also* Rule 536.

Rule 520.14. Secured Monetary Conditions—Security; Recording; Liability.

(A) *Security.* One or a combination of the following forms of security shall be accepted to satisfy a monetary condition:

(1) Cash or when permitted by the local court a cash equivalent.

(2) Bearer bonds of the United States Government, of the Commonwealth of Pennsylvania, or of any political subdivision of the Commonwealth, in the full amount of the monetary condition, provided that the defendant or the surety files with the bearer bond a sworn schedule that shall verify the value and marketability of such bonds, and that shall be approved by the bail authority.

(3) Realty located anywhere within the Commonwealth, including realty of the defendant, as long as the actual net value is at least equal to the full amount of the monetary condition. The actual net value of the property may be established by considering, for example, the cost, encumbrances, and assessed value, or another valuation formula provided by statute, ordinance, or local rule of court. Realty held in joint tenancy or tenancy by the entirety may be accepted provided all joint tenants or tenants by the entirety execute the bond.

(4) Realty located anywhere outside of the Commonwealth but within the United States, provided that the person(s) posting such realty shall comply with all reasonable conditions designed to perfect the lien of the county in which the prosecution is pending.

(5) The surety bond of a professional bondsman licensed under the Judicial Code, 42 Pa.C.S. §§ 5741—5749, or of a surety company authorized to do business in the Commonwealth of Pennsylvania.

(B) *Recording.* The bail authority shall record on the bail bond the amount of the monetary condition imposed and the form of security that is posted by the defendant or by an individual acting on behalf of the defendant or acting as a surety for the defendant.

(C) *Liability of Depositor.* Except as limited in Rule 531, the defendant or another person may deposit the cash percentage of the bail. If the defendant posts the money, the defendant shall sign the bond, thereby becoming his or her own surety, and is liable for the full amount of bail if he or she fails to appear or to comply. When a person other than the defendant deposits the cash percentage of the bail, the clerk of courts or issuing authority shall explain and provide written notice to that person that:

(1) if the person agrees to act as a surety and signs the bail bond with the defendant, the person shall be liable for the full amount of bail if the defendant fails to appear; or

(2) if the person does not wish to be liable for the full amount of bail, the person shall be permitted to deposit the money for the defendant to post, and will relinquish the right to make a subsequent claim for the return of the money pursuant to these rules. In this case, the defendant would be deemed the depositor, and only the defendant would sign the bond and be liable for the full amount of bail.

(3) Pursuant to Rule 535(E), if the bail was deposited by or on behalf of the defendant and the defendant is the named depositor, the amount otherwise returnable to the defendant may be used to pay and satisfy any outstanding restitution, fees, fines, and costs owed by the defendant as a result of a sentence imposed in the court case for which the deposit is being made.

Comment

This rule was adopted in 20 ___ and is derived, in part, from prior Rule 528(D)—(F).

When the bail authority authorizes the deposit of a percentage of the cash bail, the defendant may satisfy the monetary condition by depositing, or having an individual acting as a surety on behalf of the defendant deposit, the full amount of the monetary condition. Additionally, there may be cases when a defendant does not have the cash to satisfy a monetary condition, but has some other form of security, such as realty. In such a case, the defendant must be permitted to execute a bail bond for the full amount of the monetary condition and deposit one of the forms or a combination of the forms set forth in paragraph (A) as security.

If a percentage of the cash bail is accepted pursuant to these rules, when the funds are returned at the conclusion of the defendant's bail period, the court or bail agency may retain as a fee an amount reasonably related to the cost of administering the cash bail program. *See Schilb v. Kuebel*, 404 U.S. 357 (1971).

Pursuant to paragraph (C), written notice is required be given to the person posting the bail, especially a third party, of the possible consequences if the defendant receives a sentence that includes restitution, a fine, fees, and costs. *See also* Rule 535 for the procedures for retaining bail money for satisfaction of outstanding restitution, fines, fees, and costs.

The defendant must be permitted to substitute the form(s) of security deposited as provided in Rule 532.

The method of valuation when realty is offered to satisfy the monetary condition pursuant to paragraphs (A)(3) and (A)(4) is determined at the local level. If no satisfactory basis exists for valuing particular tracts of offered realty, especially tracts located in remote areas, acceptance of that realty is not required by this rule.

Rule 520.15. Condition Review.

If a defendant remains detained after 48 hours following the initial bail determination because the defendant has not satisfied a bail condition, then a review of conditions shall be conducted no longer than 72 hours, or the close of the next business day if the 72 hours expires on a non-business day, after the initial bail determination by a designated bail authority, subject to:

(A) The defendant shall be appointed counsel for the condition review.

(B) The bail authority shall reconsider whether the initially imposed condition is the least restrictive bail condition reasonably calculated to meet the purpose of bail, as provide in Rule 520.1.

(C) The defendant, defendant's counsel, and the Commonwealth may appear via audio-visual communication technology.

(D) The parties may present additional information to the bail authority for reconsideration of the initial determination.

(E) Upon review, a bail authority may modify the bail order establishing the initial bail determination.

Comment

This rule is applicable to defendants who are able to be released subject to conditions. Condition review proceedings are intended to afford defendants detained due to an unsatisfied bail condition an expedited review of the initial bail determination. Nothing in this rule is intended to prevent a judicial district from conducting a review prior to the 72-hour threshold. Jail staff or pretrial services should identify defendants remaining in detention after the initial determination. While time is of the essence, the failure to conduct a review within the time specified in paragraph (A) shall not operate to release the defendant.

See Rule 520.5 for right to counsel. The Commonwealth may, but is not required to, appear.

An unsatisfied bail condition does not mean that the condition is not reasonably calculated to meet the purpose of bail. This review is to consider whether a less restrictive condition may be available that will meet the purpose of bail.

As designated by the president judge, a review may be conducted by the original bail authority or another judge sitting as a bail authority. Any further modification of a bail order modified subject to this rule or modification of a bail order not subject to this rule shall proceed in accordance with Rule 520.17.

Rule 520.16. Detention.

(A) *Permitted Bases for Detention.* All defendants shall be released subject to conditions except when proof is evident and presumption is great of:

(1) *Offense.* Capital offenses or for offenses for which the maximum sentence is life imprisonment; or

(2) *No Condition.* No available condition or combination of conditions other than detention will reasonably assure that a defendant's release is consistent with the purpose of bail, as provided in Rule 520.1.

(B) *Offense Basis.*

(1) *Temporary Detention.* A defendant charged with a qualifying offense pursuant to paragraph (A)(1) shall be ordered temporarily detained at the defendant's first appearance until a detention hearing can be held before a judge of the court of common pleas or a judge of the Philadelphia Municipal Court.

(2) *Detention Hearing.* A detention hearing before a judge of the court of common pleas or a judge of the Philadelphia Municipal Court shall be scheduled to occur within 72 hours of the defendant's first appearance.

(C) *No Condition Basis.* At a defendant's first appearance, a bail authority, may *sua sponte*, and shall, when requested by the Commonwealth, inquire and determine whether no available condition or combination of conditions exist other than detention pursuant to paragraph (A)(2).

(1) *Bail Authority Notice.* A bail authority, possessing a reasonable belief that no available condition or combination of conditions may exist other than detention, shall give notice of such to the defendant and the prosecution at the time of the defendant's first appearance. Notice shall include the initial reason(s) for seeking detention.

(2) *Commonwealth Notice and Request*: The Commonwealth may give notice, either orally or in writing, no later than the time of the defendant's first appearance that it requests the bail authority inquire and determine that no available condition or combination of conditions may exist other than detention and shall set forth the basis for the request. Notice shall include the initial reason(s) for seeking detention.

(3) *Temporary Detention.* Upon such notice, the bail authority shall permit the defendant or defendant's counsel, and the Commonwealth to address the court on the issue. If, after argument, upon a sufficient showing that no condition or combination of conditions will assure the purposes of bail, a bail authority shall order the temporary detention of the defendant until a detention hearing can be held.

(4) *Scheduling.* The detention hearing shall be scheduled to occur no later than 48 hours from the defendant's first appearance. The parties may seek a single three-day continuance of the hearing for cause or by agreement.

(5) *Defendant's Statements*: Any statement made by the defendant after notice is given by a bail authority or the Commonwealth for the purpose of securing release during the first appearance shall not be admissible against the defendant in any criminal proceeding or at trial except for the purpose of impeachment, nor shall any evidence derived from that statement be admissible.

(D) *Counsel.* The defendant shall be appointed counsel for the detention hearing.

(E) *No Default.* The failure to conduct a detention hearing in the time prescribed by this rule shall not result in the defendant's release.

(F) *Written Reason.* The bail authority shall indicate in writing the reason(s) for detaining a defendant following the hearing.

(G) *Subsequent Review.*

(1) *Offense Basis.* A defendant ordered detained on the basis of a charged offense following a detention hearing may seek review of that order pursuant to Pa.R.A.P. 1762.

(2) *No Condition Basis.* A defendant ordered detained on the basis of no available condition following a detention hearing may seek modification of the order pursuant to Pa.R.Crim.P. 520.17(C) by motion to a judge of the court of common pleas.

Comment

For permitted bases of detention, see Pa. Const. art. 1, § 14. Detention may also subsequently be sought through a modification of the bail order pursuant to Rule 520.17.

The temporary detention permitted by paragraphs (B) or (C) is to allow the scheduling of a detention hearing, appointment of counsel for the defendant, and the consultation and preparation of the defendant and defendant's counsel. Nothing in this rule is intended to delay the issuing authority from addressing other matters scheduled to occur at a defendant's first appearance. *See generally County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (requiring probable cause determination for detention within 48 hours of arrest); Pa.R.Crim.P. 540(E) (requiring determination of probable cause when defendant is arrested without a warrant; otherwise defendant shall not be detained).

Murder of the first or second degree, 18 Pa.C.S. § 2502(a)-(b), murder of an unborn child of the first or second degree, 18 Pa.C.S. § 2604(a)-(b), and murder of a law enforcement officer of the first or second degree, 18 Pa.C.S. § 2507(a)-(b), are offenses subject to paragraph (A)(1). *See* 18 Pa.C.S. §§ 1102(a)-(b) & 1102.1(a), (c). Given the gravity of the underlying charges and potential for life imprisonment, the defendant's initial bail determination is to be made by a judge of the court of common pleas. *See also* 42 Pa.C.S. § 1515(a)(4) (requiring bail determination for certain offenses, including murder, to be performed by a judge of the court of common pleas).

Rule 520.17. Modification of Bail Order Prior to Verdict.

(A) *Permitted Modification.* A bail order may be modified at any time before the preliminary hearing by:

(1) The issuing authority who is the magisterial district judge who was elected or assigned to preside over the jurisdiction where the crime occurred, upon request of the defendant or the attorney for the Commonwealth, or by the issuing authority *sua sponte*, and after notice to the defendant and the attorney for the Commonwealth and an opportunity to be heard; or

(2) A bail authority sitting by designation and pursuant to Rule 520.15.

(B) *Issuing Authority.* A bail order may be modified by an issuing authority at the preliminary hearing.

(C) *Judge.* The existing bail order may be modified by a judge of the court of common pleas:

(1) at any time prior to verdict upon motion of counsel for either party with notice to opposing counsel and after a hearing on the motion; or

(2) at trial or at a pretrial hearing in open court on the record when all parties are present.

(D) *Further Modification.* Once bail has been set or modified by a judge of the court of common pleas, it shall not be modified except:

(1) by a judge of a court of superior jurisdiction, or

(2) by the same judge or by another judge of the court of common pleas either at trial or after notice to the parties and a hearing.

(E) *Explanation.* When bail is modified pursuant to this rule, the modification shall be explained to the defendant and stated in writing or on the record by the issuing authority or the judge.

Comment

This rule is derived, in part, from prior Rule 529.

In making a decision whether to modify a bail order, the issuing authority or judge should evaluate the information about the defendant as it relates to the bail factors and conditions.

In Municipal Court cases, the Municipal Court judge may modify bail in the same manner as a common pleas judge may under this rule. *See* Rule 1011.

Once bail has been modified by a common pleas judge, only the common pleas judge subsequently may modify bail, even in cases that are pending before a magisterial district judge. *See* Rules 543 and 536.

Pursuant to this rule, the motion, notice, and hearing requirements in paragraphs (C) and (D) must be followed in all cases before a common pleas judge may modify a bail order unless the modification is made on the record in open court when all parties are present either at a pretrial hearing, such as a suppression hearing, or during trial.

See Pa.R.A.P. 1762 for the procedures to obtain appellate court review of an order of a judge of the court of common pleas granting or denying release, or modifying the conditions of release.

Rule 520.18. Responsibilities of Pretrial Services.

A president judge may establish pretrial services, and subject to the supervision of the president judge or designee, such services, at a minimum, shall be responsible for:

(A) Advising the president judge on the feasibility of adopting and maintaining a validated risk assessment tool and recommendation matrix.

(B) Preparing and disseminating pretrial risk assessments, if adopted.

(C) Reminding every defendant on release at least once of an upcoming court appearance within 48 hours of the scheduled appearance.

(D) Establishing capacity for telephonic and in-person reporting of defendants on release when reporting is a condition of release.

(E) Identifying and referring defendants with mental health and alcohol/substance abuse issues posing an immediate risk to the defendant for appropriate services.

(F) Identifying, monitoring, and reporting any defendants remaining in detention 48 hours after the initial bail determination.

Comment

The provision of pretrial services is a best practice, but not a requirement. While limitations may be placed on the range of available pretrial services due to resource constraints, this rule imposes minimum responsibilities for the provision of those services.

In paragraph (C), reminders may include telephone calls, email, or text messaging. Depending on the method

of communication, additional contact information may need to be collected at the time of the initial bail determination.

Providers of pretrial services should be encouraged to affiliate with a professional organization such as the Pennsylvania Pretrial Services Association to exchange information, participate in educational programs, and share best practices.

Rule 520.19. Pretrial Risk Assessment Tool Parameters.

A president judge may authorize the adoption and use of a pretrial risk assessment tool by local rule, subject to these parameters:

(A) The pretrial risk assessment shall be conducted in all criminal cases prior to the preliminary arraignment or, when a preliminary arraignment is not held, the preliminary hearing.

(B) At a minimum, the pretrial risk assessment tool shall determine a risk of failure to appear and new criminal activity.

(C) The pretrial risk assessment tool shall be statistically validated prior to adoption and at an established interval thereafter to demonstrate racial and gender neutrality, and meet a minimum level of predictability of no less than 70%. Validation reports shall be made public.

(D) A report of aggregate outcomes of pretrial risk shall be made public at least annually following adoption of a pretrial risk assessment tool.

(E) At a minimum, the pretrial risk assessment tool shall classify risk of pretrial failure as high, moderate, and low risk. Further sub-classifications are subject to local option. Risk classifications shall be described to users in terms of success.

(F) The person, department, or agency responsible for completing the assessment shall be designated by local order or rule.

(G) The bail authority, defendant, defendant's counsel if known, and the Commonwealth shall receive the pretrial risk assessment report and bail recommendation. Reports for individual defendants shall not be publically accessible.

(H) A bail recommendation based upon a pretrial risk assessment tool shall be clearly marked as advisory of release and bail conditions.

(I) A bail recommendation based upon a pretrial risk assessment tool shall not be the sole determinate for making a bail determination.

Comment

For local procedural rulemaking, see Rule 105 and Pa.R.J.A. No. 103(d).

Pursuant to paragraph (B), a judicial district is not restricted in the use of a pretrial risk assessment for only determining a risk of failure to appear and new criminal activity. A judicial district may also use a pretrial risk assessment tool to determine the risk of domestic violence and new violent criminal activity, provided the tool satisfies the other parameters set forth in this rule.

Prior to implementation of a pretrial risk assessment tool, the judicial district should establish a baseline for the rate of pretrial failure in the category of nonappearance and new criminal activity. This baseline then can be compared to the incidence of pretrial failure after implementation. The requirement of paragraph (D) is intended to report annually the rate of pretrial failure. Such reports can be helpful in determining whether the use of a pretrial risk assessment tool has affected the historical rate of pretrial failure.

Reports generated by pretrial risk assessment tools may contain confidential information about a defendant that is necessary for the bail authority to make an informed bail determination. Pursuant to paragraph (G), those reports are available to the parties, but not publically accessible. However, the recommended bail determination and any conditions based upon the report are publically accessible, provided the recommendation is separate from the report.

As set forth in paragraph (H), a bail recommendation based upon a pretrial risk assessment tool is advisory. Per paragraph (I), the recommendation is intended to inform the bail authority, not dictate an outcome.

CHAPTER 7. POST-TRIAL PROCEDURES IN COURT CASES

PART A. Sentencing Procedures

Rule 708. **[Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition] Rescinded and Renumbered**.

[(A) A written request for revocation shall be filed with the clerk of courts.

(B) Whenever a defendant has been sentenced to probation or intermediate punishment, or placed on parole, the judge shall not revoke such probation, intermediate punishment, or parole as allowed by law unless there has been:

(1) a hearing held as speedily as possible at which the defendant is present and represented by counsel; and

(2) a finding of record that the defendant violated a condition of probation, intermediate punishment, or parole.

(C) Before the imposition of sentence,

(1) the defendant may plead guilty to other offenses that the defendant committed within the jurisdiction of the sentencing court.

(2) When such pleas are accepted, the court shall sentence the defendant for all the offenses.

(D) Sentencing Procedures

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

(2) The judge shall state on the record the reasons for the sentence imposed.

(3) The judge shall advise the defendant on the record:

(a) of the right to file a motion to modify sentence and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal; and

(b) of the rights, if the defendant is indigent, to proceed in forma pauperis and to proceed with assigned counsel as provided in Rule 122.

(4) The judge shall require that a record of the sentencing proceeding be made and preserved so that it can be transcribed as needed. The record shall include:

(a) the record of any stipulation made at a pre-sentence conference; and

(b) a verbatim account of the entire sentencing proceeding.

(E) Motion to Modify Sentence

A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period.

Comment

This rule addresses *Gagnon* II revocation hearings only, and not the procedures for determining probable cause (Gagnon I). *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Paragraph (A) requires that the *Gagnon* II proceeding be initiated by a written request for revocation filed with the clerk of courts.

The judge may not revoke probation or parole on arrest alone, but only upon a finding of a violation thereof after a hearing, as provided in this rule. However, the judge need not wait for disposition of new criminal charges to hold such hearing. *See Commonwealth v. Kates*, 452 Pa. 102, 305 A.2d 701 (1973).

This rule does not govern parole cases under the jurisdiction of the Pennsylvania Board of Probation and Parole, but applies only to the defendants who can be paroled by a judge. *See* 61 P.S. § 314. *See also Georgevich v. Court of Common Pleas of Allegheny County*, 510 Pa. 285, 507 A.2d 812 (1986).

This rule was amended in 1996 to include sentences of intermediate punishment. *See* 42 Pa.C.S. §§ 9763 and 9773. Rules 704, 720, and 721 do not apply to revocation cases.

The objective of the procedures enumerated in paragraph (C) is to enable the court to sentence the defendant on all outstanding charges within the jurisdiction of the sentencing court at one time. *See* Rule 701.

When a defendant is permitted to plead guilty to multiple offenses as provided in paragraph (C), if any of the other offenses involves a victim, the sentencing proceeding must be delayed to afford the Commonwealth adequate time to contact the victim(s), and to give the victim(s) an opportunity to offer prior comment on the sentencing or to submit a written and oral victim impact statement. *See* the Crime Victims Act, 18 P.S. § 11.201(5).

Issues properly preserved at the sentencing proceeding need not, but may, be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived. *See Commonwealth v. Jarvis*, 444 Pa. Super. 295, 663 A.2d 790, 791-2, n.1 (1995). As a general rule, the motion to modify sentence under paragraph (E) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. *See, e.g., Commonwealth v. Jones*, 520 Pa. 385, 554 A.2d 50 (1989) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 437 Pa. 288, 263 A.2d 339 (1970) (inherent power of the court to correct obvious and patent mistakes).

Under this rule, the mere filing of a motion to modify sentence does not affect the running of the 30-day period for filing a timely notice of appeal. Any appeal must be filed within the 30-day appeal period unless the sentencing judge within 30 days of the imposition of sentence expressly grants reconsideration or vacates the sentence. *See Commonwealth v. Coleman*, 721 A.2d 798, 799, fn.2 (Pa. Super. 1998). *See also* Pa.R.A.P. 1701(b)(3).

Once a sentence has been modified or re-imposed pursuant to a motion to modify sentence under paragraph (E), a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or re-imposed.

Official Note

Former Rule 1409 adopted July 23, 1973, effective 90 days hence; amended May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; Comment revised November 1, 1991, effective January 1, 1992; amended September 26, 1996, effective January 1, 1997; Comment revised August 22, 1997, effective January 1, 1998; renumbered Rule 708 and amended March 1, 2000, effective April 1, 2001; amended February 26, 2002, effective July 1, 2002; amended March 15, 2013, effective May 1, 2013.

***Committee Explanatory Reports*:**

Report explaining the January 1, 1992 amendments published at 21 Pa.B. 2246 (May 11, 1990); Supplemental Report published with the Court's Order at 21 Pa.B. 5329 (November 16, 1991).

Final Report explaining the September 26, 1996 amendments published with the Court's Order at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the August 22, 1997 Comment revision that cross-references Rule 721 published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the February 26, 2002 amendments concerning the 30-day appeal period published with the Court's Order at 32 Pa.B. 1394 (March 16, 2002).

Final Report explaining the March 15, 2013 amendments to paragraph (C) concerning multiple guilty pleas and the Comment concerning the Crime Victims Act published at 43 Pa.B. 1705 (March 30, 2013).]

(*Editor's Note*: The following rule is proposed to be added and printed in regular type to enhance readability.)

Rule 708.1. Violation of Probation or Parole: Notice, Detainer, *Gagnon* I Hearing, Disposition, and Swift Sanction Program.

(A) *Technical Violation.* Upon belief that the defendant has violated a technical condition of probation or parole, the authority supervising the defendant may:

(1) serve a written notice upon the defendant containing a time and location for the defendant's appearance before the supervising judge for a revocation hearing under Rule 708.2;

(2) arrest the defendant pursuant to 42 Pa.C.S. § 9771.1; or

(3) lodge a detainer subject to paragraph (C).

(B) *New Criminal Charge.* Following institution of a new criminal charge against the defendant, the authority supervising the defendant may:

(1) serve written notice for a hearing pursuant to paragraph (A)(1); or

(2) lodge a detainer subject to paragraph (C) if:

(i) the defendant requests; or

(ii) the defendant is not detained on the new criminal charge pursuant to Rule 520.16; and

(iii) the supervising authority believes the defendant has committed a technical violation beyond the fact of the new criminal charge.

(C) *Detainer.* Unless a defendant requests, a detainer shall not be lodged unless the supervising authority believes the alleged conduct resulting in the technical violation creates an ongoing risk to the public's safety, to the defendant's safety, or of non-appearance at the revocation hearing. In all other cases, the supervising authority shall serve written notice for a hearing pursuant to paragraph (A)(1).

(D) *Gagnon* I Hearing. Unless a defendant has requested a detainer pursuant to paragraph (B)(2)(i), a defendant subject to a detainer for a technical violation pursuant to paragraph (A)(3) or (B)(2) shall be brought before the sentencing judge or other designated judge or authority no later than 14 days after detention for a hearing to determine whether probable cause exists to believe that a violation has been committed and if the defendant can be released on any available condition. If hearing is not held within this time period, the detainer shall expire by operation of law.

(E) *Disposition.* Upon a judicial finding of the existence of such probable cause under paragraph (D), the authority supervising the defendant may file a request to revoke probation or parole pursuant to Rule 708.2(A).

(F) *Swift Sanction Program.* A defendant arrested pursuant to paragraph (A)(2) may proceed in accordance with 42 Pa.C.S. § 9771.1 and local rule.

Comment

This rule addresses the lodging and review of detainers, and the "*Gagnon* I" procedures for determining probable cause, see *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Factors when evaluating risk pursuant to paragraph (C) include, but are not limited to, the seriousness of the alleged violation such as a new criminal charge involving the use of a weapon or physical assault, the immediate risk of self-harm due to non-compliance with terms of probation or parole, and the defendant's compliance history while under supervision, including reporting.

At the hearing pursuant to paragraph (D), if probable cause exists, the issue is not whether the defendant should be released on the new charge—that is determined by the bail authority. Rather, the question is whether the defendant should continue to be detained, consistent with paragraph (C), until such time as a revocation hearing can be conducted.

Rule 708.**2.** Violation of Probation **[, Intermediate Punishment,]** or Parole: ***Gagnon* II** Hearing and Disposition.

A. ***Revocation Request.*** A written request for revocation shall be filed with the clerk of courts.

B. ***Record Hearing.*** Whenever a defendant has been sentenced to probation or placed on parole, the judge shall not revoke such probation or parole as allowed by law unless there has been:

1. a hearing held as speedily as possible at which the defendant is present and represented by counsel; and

2. a finding of record that the defendant violated a condition of probation or parole.

C. ***Plea.*** Before the imposition of sentence,

1. the defendant may plead guilty to other offenses that the defendant committed within the jurisdiction of the sentencing court.

2. When such pleas are accepted, the court shall sentence the defendant for all the offenses.

D. *Sentencing Procedures.*

1. At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement **[in]** **on** his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

2. The judge shall state on the record the reasons for the sentence imposed.

3. The judge shall advise the defendant on the record:

(a) of the right to file a motion to modify sentence and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal; and

(b) of the rights, if the defendant is indigent, to proceed *in forma pauperis* and to proceed with assigned counsel as provided in Rule 122.

4. The judge shall require that a record of the sentencing proceeding be made and preserved so that it can be transcribed as needed. The record shall include:

(a) the record of any stipulation made at a pre-sentence conference; and

(b) a verbatim account of the entire sentencing proceeding.

E. *Motion to Modify Sentence.* A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period.

Comment

This rule addresses *Gagnon* II revocation hearings. **[only, and not the procedures for determining probable cause (*Gagnon* I)]**. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Paragraph (A) requires that the *Gagnon* II proceeding be initiated by a written request for revocation filed with the clerk of courts.

The judge may not revoke probation or parole on arrest alone, but only upon a finding of a violation thereof after a hearing, as provided in this rule. However, the judge need not wait for disposition of new criminal charges to hold such hearing. *See Commonwealth v. Kates*, **[452 Pa. 102,]** 305 A.2d 701 (**Pa.** 1973).

This rule does not govern parole cases under the jurisdiction of the Pennsylvania Board of Probation and Parole, but applies only to the defendants who can be paroled by a judge. *See* 61 P.S. § 314. *See also Georgevich v. Court of Common Pleas of Allegheny County*, **[510 Pa. 285,]** 507 A.2d 812 (**Pa.** 1986).

[This rule was amended in 1996 to include sentences of intermediate punishment. *See* 42 Pa.C.S. §§ 9763 and 9773.] Rules 704, 720, and 721 do not apply to revocation cases.

The objective of the procedures enumerated in paragraph (C) is to enable the court to sentence the defendant on all outstanding charges within the jurisdiction of the sentencing court at one time. *See* Rule 701.

When a defendant is permitted to plead guilty to multiple offenses as provided in paragraph (C), if any of the other offenses involves a victim, the sentencing proceeding must be delayed to afford the Commonwealth adequate time to contact the victim(s), and to give the victim(s) an opportunity to offer prior comment on the sentencing or to submit a written and oral victim impact statement. *See* **[the]** Crime Victims Act, 18 P.S. § 11.201(5).

Issues properly preserved at the sentencing proceeding **may, but** need not, **[but may,]** be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived. *See Commonwealth v. Jarvis*, **[444 Pa. Super. 295,]** 663 A.2d 790, 791-2, n.1 (**Pa. Super.** 1995). As a general rule, the motion to modify sentence under paragraph (E) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. *See, e.g., Commonwealth v. Jones*, **[520 Pa. 385,]** 554 A.2d 50 (**Pa.** 1989) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, **[437 Pa. 288,]** 263 A.2d 339 (**Pa.** 1970) (inherent power of the court to correct obvious and patent mistakes).

Under this rule, the mere filing of a motion to modify sentence does not affect the running of the 30-day period for filing a timely notice of appeal. Any appeal must be filed within the 30-day appeal period unless the sentencing judge within 30 days of the imposition of sentence expressly grants reconsideration or vacates the sentence. *See Commonwealth v. Coleman*, 721 A.2d 798, 799, **[f]**n.2 (Pa. Super. 1998). *See also* Pa.R.A.P. 1701(b)(3).

Once a sentence has been modified or re-imposed pursuant to a motion to modify sentence under paragraph (E), a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or re-imposed.

CHAPTER 10. RULES OF CRIMINAL PROCEDURE FOR THE PHILADELPHIA MUNICIPAL COURT AND THE PHILADELPHIA MUNICIPAL COURT TRAFFIC DIVISION

PART A. Philadelphia Municipal Court Procedures

Rule 1003. Procedure in Non-Summary Municipal Court Cases.

(A) **[INITIATION OF CRIMINAL PROCEEDINGS]** ***Initiation of Criminal Proceedings.***

(1) Criminal proceedings in court cases shall be instituted by filing a written complaint, except that proceedings may be also instituted by:

(a) an arrest without a warrant when a felony or misdemeanor is committed in the presence of the police officer making the arrest; or

(b) an arrest without a warrant upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when the arrest without a warrant is specifically authorized by law; or

(c) an arrest without a warrant upon probable cause when the offense is a felony.

(2) *Private Complaints.*

(a) When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.

(b) If the attorney for the Commonwealth:

(i) approves the complaint, the attorney shall indicate this decision on the complaint form and transmit it to the issuing authority;

(ii) disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the President Judge of Municipal Court, or the President Judge's designee, for review of the decision. Appeal of the decision of the Municipal Court shall be to the Court of Common Pleas.

(B) **[CERTIFICATION OF COMPLAINT]** ***Certification of Complaint.***

Before an issuing authority may issue process or order further proceedings in a Municipal Court case, the issuing authority shall ascertain and certify on the complaint that:

(1) the complaint has been properly completed and executed; and

(2) when prior submission to an attorney for the Commonwealth is required, an attorney has approved the complaint.

The issuing authority shall then accept the complaint for filing, and the case shall proceed as provided in these rules.

(C) **[SUMMONS AND ARREST WARRANT PROCEDURES]** ***Summons and Arrest Warrant Procedures.***

When an issuing authority finds grounds to issue process based on a complaint, the issuing authority shall:

(1) issue a summons and not a warrant of arrest when **[the offense charged is punishable by imprisonment for a term of not more than 1 year]** **the most serious offense charged is a misdemeanor of the second degree or a misdemeanor of the first degree in cases arising under 75 Pa.C.S. § 3802**, except as set forth in paragraph (C)(2);

(2) issue a warrant of arrest when:

(a) **[the offense charged is punishable by imprisonment for a term of more than 5 years]** **one or more of the offenses charged is a felony or murder**;

(b) the issuing authority has reasonable grounds for believing that the defendant will not obey a summons;

(c) the summons has been returned undelivered;

(d) a summons has been served and disobeyed by a defendant;

(e) the identity of the defendant is unknown; **or**

[(f) a defendant is charged with more than one offense, and one of the offenses is punishable by imprisonment for a term of more than 5 years; or]

(3) when the offense charged does not fall within the categories specified in paragraph (C)(1) or (2), the issuing authority may, in his or her discretion, issue a summons or a warrant of arrest.

(D) **[PRELIMINARY ARRAIGNMENT]** ***Preliminary Arraignment.***

(1) **Except as provided in paragraph (D)(2), [W]**when a defendant has been arrested within Philadelphia County in a Municipal Court case, with or without a warrant, the defendant shall be afforded a preliminary arraignment by an issuing authority without unnecessary delay.

(2) The arresting officer shall promptly release from custody a defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met:

(a) the most serious offense charged is a misdemeanor of the second degree or a misdemeanor of the first degree in cases arising under 75 Pa.C.S. § 3802;

(b) the defendant poses no threat of immediate physical harm to any other person or to himself or herself; and

(c) the arresting officer has reasonable grounds to believe that the defendant will appear as required.

When a defendant is released pursuant to paragraph (D)(2), a complaint shall be filed against the defendant within five days of the defendant's release. Thereafter, the issuing authority shall issue a summons, not a warrant of arrest, and shall proceed as provided in Rule 510.

(3) If the defendant was arrested without a warrant pursuant to paragraph (A)(1)(a) or **(A)(1)**(b), unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

[(2)] (4) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. 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 preliminary arraignment.

[(3)] (5) At the preliminary arraignment, the issuing authority:

(a) shall not question the defendant about the offense(s) charged;

(b) shall give the defendant's attorney, or if unrepresented the defendant, a copy of the certified complaint;

(c) if the defendant was arrested with a warrant, the issuing authority shall provide the defendant's attorney, or if unrepresented the defendant with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant's attorney, or if unrepresented the defendant, shall be given copies no later than the first business day after the preliminary arraignment; and

(d) also shall inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(ii) of the day, date, hour, and place for the trial, which shall not be less than 20 days after the preliminary arraignment, unless the issuing authority fixes an earlier date for the trial upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth, and that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued;

(iii) in a case charging a felony, unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2, of the date, time, and place of the preliminary hearing, which shall not be less than 14 nor more than 21 days after the preliminary arraignment unless extended for cause or the issuing authority fixes an earlier date upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and that failure to appear without cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and that the case shall proceed in the defendant's absence, and a warrant of arrest shall be issued;

(iv) if a case charging a felony is held for court at the time of the preliminary hearing, that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued; and

(v) of the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

[(4)] (6) After the preliminary arraignment, if the defendant is detained, he or she shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail, as provided by law.

(E) **[PRELIMINARY HEARING IN CASES CHARGING A FELONY]** ***Preliminary Hearing in Cases Charging a Felony.***

(1) Except as provided in paragraphs (E)(2) and (E)(3), in cases charging a felony, the preliminary hearing in Municipal Court shall be conducted as provided in Rule 542 (Preliminary Hearing; Continuances) and Rule 543 (Disposition of Case at Preliminary Hearing).

(2) At the preliminary hearing, the issuing authority shall determine whether there is a *prima facie* case that an offense has been committed and that the defendant has committed it.

(a) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.

(b) Hearsay evidence shall be sufficient to establish any element of an offense including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(3) If a *prima facie* case is not established on any felony charges, but is established on any misdemeanor or summary charges, the judge shall remand the case to Municipal Court for trial.

(F) **[ACCEPTANCE OF BAIL PRIOR TO TRIAL]** ***Acceptance of Bail Prior to Trial.***

The Clerk of Courts shall accept bail at any time prior to the Municipal Court trial.

Comment

The 2004 amendments make it clear that Rule 1003 covers the preliminary procedures for all non-summary Municipal Court cases, see Rule 1001(A), and cases charging felonies, including the institution of proceedings, the preliminary arraignment, and the preliminary hearing.

See Chapter 5 (Procedure in Court Cases), Parts I (Instituting Proceedings), II (Complaint Procedures), III(A) (Summons Procedures), III(B) (Arrest Procedures in Court Cases), and IV (Proceedings in Court Cases Before Issuing Authorities) for the statewide rules governing the preliminary procedures in court cases, including non-summary Municipal Court cases, not otherwise covered by this rule.

The 2004 amendments to paragraph (A)(1) align the procedures for instituting cases in Municipal Court with the statewide procedures in Rule 502 (Means of Instituting Proceedings in Court Cases).

The 1996 amendments to paragraph (A)(2) align the procedures for private complaints in non-summary cases in Municipal Court with the statewide procedures for private complaints in Rule 506 (Approval of Private Complaints). In all cases in which the affiant is not a law enforcement officer, the complaint must be submitted to the attorney for the Commonwealth for approval or disapproval.

As used in this rule, "Municipal Court judge" includes a bail commissioner acting within the scope of the bail commissioner's authority under 42 Pa.C.S. § 1123(A)(5).

The procedure set forth in paragraph (C)(3) allows the issuing authority to exercise discretion in whether to issue a summons or an arrest warrant depending on the circumstances of the particular case. Appropriate factors for issuing a summons rather than an arrest warrant will, of course, vary. Among the factors that may be taken into consideration are the severity of the offense, the continued danger to the victim, the relationship between the defendant and the victim, the known prior criminal history of the defendant, etc.

If the attorney for the Commonwealth exercises the options provided by Rule 202, Rule 507, or both, the attorney must file the certifications required by paragraphs (B) of Rules 202 and 507 with the Court of Common Pleas of Philadelphia County and with the Philadelphia Municipal Court.

For the contents of the complaint, see Rule 504.

Under paragraphs (A) and (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before the defendant may be detained. *See* ***County of*** *Riverside v. McLaughlin*, 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Within the meaning of paragraph (D)(**[2]**4), counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (D)(**[2]**4), the issuing authority has discretion to order that a defendant appear in person for the preliminary arraignment.

Under paragraph (D)(**[2]**4), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning venue when proceedings are conducted pursuant to this rule using advanced communication technology.

Paragraph (D)(**[3]**5)(c) requires that the defendant's attorney, or if unrepresented the defendant, receive copies of the arrest warrant and the supporting affidavits at the preliminary arraignment. This amendment parallels Rule 540(C). *See also* Rules 208(A) and 513(A).

Paragraph (D)(**[3]**5)(c) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, **[515 Pa. 501,]** 530 A.2d 414 (**Pa.** 1987).

The 2012 amendment to paragraph (D)(**[3]**5)(d)(iii) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Rule 556.2. *See also* Rule 556.11 for the procedures when a case will be presented to the indicting grand jury.

Paragraphs (D)(**[3]**5)(d)(ii) and (D)(**[3]**5)(d)(iv) require that, in all cases at the preliminary arraignment, the defendant be advised of the consequences of failing to appear for any court proceeding. *See* Rule 602 concerning a defendant's failure to appear for trial. *See also Commonwealth v. Bond*, 693 A.2d 220 (Pa. Super. 1997) ("[A]

defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.'")

Under paragraph (D)(**[4]**6), after the preliminary arraignment, if the defendant is detained, the defendant must be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she must be committed to jail as provided by law.

Paragraphs (D)(**[3]**5)(d)(iii) and (E) make it clear that, with some exceptions, the procedures in Municipal Court for both preliminary hearings and cases in which the defendant fails to appear for the preliminary hearing are the same as the procedures in the other judicial districts.

Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare Commonwealth ex rel. Buchanan v. Verbonitz*, **[525 Pa. 413,]** 581 A.2d 172 (**Pa.** 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a *prima facie* case. *See also* Rule 542.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

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PUBLICATION REPORT

Proposed Amendment of Pa.R.Crim.P. 122 and 1003; Rescission of Pa.R.Crim.P. 520—529 and Replacement with Pa.R.Crim.P. 520.1—520.19; Adoption of Pa.R.Crim.P. 708.1, and Renumbering and Amendment of Pa.R.Crim.P. 708.

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court a set of statewide procedural rules governing bail proceedings, summons and arrest warrant procedures in the First Judicial District, and technical violations of county probation and parole.

Beginning in 2018, a workgroup was formed to review criminal pretrial detention practice in Pennsylvania. The workgroup identified the goal of the pretrial process as detaining the least number of people—through timely release at the earliest stage of the proceedings—as is necessary to reasonably ensure both the safety of the community and that defendants appear for court. Substantial strides toward meeting that goal could be achieved through a three-prong effort involving procedural amendments, risk assessment tools, and pretrial services. However, risk assessment tools and pretrial services carried a resource requirement that prohibited any mandate absent additional funding.

The scope of the workgroup's effort expanded to include matters raised in *Commonwealth v. Davis*, 68 EM 2019, concerning procedures for holding defendants on parole detainers. That scope was further expanded by matters raised in *Philadelphia Community Bail Fund v. Arraignment Court Magistrates of the First Judicial District*, 21 EM 2019.

This set of proposed rules were prepared by the workgroup and submitted to the Criminal Procedural Rules Committee for consideration. Some aspects of the proposed rules refine and reinforce existing procedures. Other aspects introduce new procedures, such as review of bail conditions and detention hearings, and new requirements, such as providing a statement of reasons for conditions and obtaining information about a defendant's ability to afford a monetary bail condition. The rules are also arranged for consideration of bail conditions from the least restrictive to the most restrictive.

The proposed process for determining bail entails the following: At the defendant's initial appearance, the bail authority determines whether the defendant will be detained or released. That determination begins with consideration of whether there are any bail conditions reasonably calculated to meet the purpose of bail. If not, then the defendant should be detained. If such bail conditions do exist, then the bail authority must release the defendant with the least restrictive conditions. If a defendant remains detained 48 hours after their initial appearance, a detention review is conducted. The defendant is appointed counsel for that review. At the review, the bail authority reconsiders whether a defendant initially detained should be released and, if so, the least restrictive bail condition reasonably calculated to meet the purpose of bail. For a defendant who remains detained due to release conditions that the defendant has not met, the bail authority reconsiders whether the conditions are reasonably calculated to meet the purpose of bail. Subsequent modifications of bail orders would proceed in accordance with Pa.R.Crim.P. 529, although the detention review is anticipated to reduce the frequency of bail modification motions.

The proposed rules also address pretrial services and pretrial risk assessment tools. The rules do not mandate these services or use of any such tools; rather, the rules are intended to establish minimum requirements for when the services are provided or the tools are used. The goal of these requirements is to establish statewide consistency.

To further promote statewide consistency, procedural amendments to rules concerning summons and arrest warrants in the First Judicial District have been proposed. The proposal provided an opportunity to reexamine prior rationale for the marked divergence in procedure between the most populous judicial district and the other 59 judicial districts.

While many of the proposed rules address bail, those rules share a common element with rules regarding technical violations of county probation and parole: affording a defendant due process where detention, or continued detention, is a possible outcome. Accordingly, a new rule governing the use of detainers and *Gagnon* I hearings aims to provide such due process. The rule also establishes objective criteria for the lodging of a county probation or parole detainer and a deadline for judicial review of detainers.

Corollary amendment of other rules may be necessary to update citations and title references. However, given the size of the proposal, corollary amendments have been omitted for the purpose of comments. Those amendments will be incorporated post-publication if the proposal advances.

As noted, the proposed rulemaking would rescind Rules 520—529 concerning bail and replace them with an entirely new set of rules. The current rules are bookended with other rules, which limit expansion. Accordingly, the proposed rules are numbered using a decimal, similar to

the indicting grand jury rules. The rules follow the basic structure of rule text containing procedural requirements with Comments containing statements and references to assist in the application or interpretation of the rule text. Rather than renumber existing Rule 708 in its entirety, the rule will be renumbered as Rule 708.2 to permit expansion for New Rule 708.1. Rule 122 and Rule 1003 are amended using textual indicators.

The Committee invites all comments, concerns, and suggestions.

Rule 122. Appointment of Counsel

Given the provision of counsel in bail proceedings both for the limited purpose of reviewing conditions, *see* Rule 520.15, and for detention hearings, *see* Rule 520.16, this rule was revised in two parts. First, paragraph (A)(2) created a rule-based exception to the appointment of counsel based on financial eligibility. Second, paragraph (B)(2) created a rule-based exception to the term of counsel's appointment. The Comment was also revised to explain that the "bail rules" are a source for those exceptions.

Further discussion of counsel in bail proceedings can be found in this Publication Report regarding Rule 520.5.

Part C. Bail—Introduction

The current introduction describing the rulemaking history and arrangement of the rules was replaced with a discussion of the purpose of the rules and a brief overview of the bail determination process. Retained from the current introduction was the citation to the statutory authority for rulemaking on this subject. Retention of the statutory citation was not intended to impinge upon the Court's constitutional rulemaking authority.

The second paragraph is a restatement of the goal of the bail determination procedures that was prepared by the workgroup. This restatement is intended to guide interpretation and application of the rules.

The third paragraph is intended to generally describe the bail determination process. It also reinforces that a bail determination should impose the least restrictive conditions necessary to address risk; a determination should not be punitive.

Rule 520.1. Purpose of Bail

The proposed expansion of the purpose of bail includes the protection of the defendant from immediate risk. The expansion is arguably a substantive matter, but the defendant remains part of the community, so enumeration of the defendant's risk of self-harm was believed to be a reasonable interpretation of "any person and the community." *See* Pa. Const. art. I, § 14. Paragraph (A)(2) clarifies that the "safety of the community" specifically includes the victim.

Some concern was expressed about paragraph (A)(3) regarding the protection of the defendant from immediate risk of substantial physical self-harm. The concern centered on whether bail authorities have the necessary information, ability, or training to clinically assess addictions or mental illnesses that might underlie such risk. Moreover, the criminal justice system may not be the appropriate forum to address medical issues, especially at the time of setting bail. This concern, while not unfounded, was overridden by the notion that the criminal justice system, even during the bail process, can assist in offering critical services to people in need. Additionally, many communities are just not able to actively provide these services absent intervention from the criminal justice system. This issue arose again in the context of Rule 520.10 and release with non-monetary conditions.

The purpose of bail was also expanded to include reasonable assurances of the integrity of the judicial system. Such safeguarding of the integrity of the judicial system includes preventing both witness intimidation and the destruction of evidence. While this purpose of bail may not be traced to the language of Article I, § 14, the workgroup believed the courts have an inherent authority to ensure a full and fair trial, including adopting measures designed to thwart efforts to deny a full and fair trial.

The phrasing in paragraph (B) of "no available condition" is intended to recognize that the availability of conditions may vary among judicial districts.

Discussed was whether the rule should include a statement indicating that the bail authority, and not the parties, is the final arbiter of release and imposition of any necessary conditions. Paragraph (C) was added to indicate that the bail authority will not accept an agreement between the parties concerning bail conditions unless the bail authority is satisfied that the agreement is consistent with the purpose of bail. Hence, the bail authority is not simply a "rubber stamp" for whatever is agreed upon by the parties.

The Pennsylvania Constitution is quoted in the Comment, similar to current Rule 520. The placement of this language in the first "bail rule" seemed appropriate.

Rule 520.2. Bail Determination Before Verdict

This rule was formerly Pa.R.Crim.P. 520. Paragraph (C) was added to indicate when the initial bail determination should occur. "Unless otherwise provided by rule" was intended to acknowledge that some rules, such as Rule 517 concerning out-of-county warrants, may apply with regard to timing. A reference to Rule 517 was also added to the Comment.

The absence of a deadline, such as 48 hours, is reflective of discussions about time requirements for preliminary arraignments. A deadline was not believed attainable in all counties, and a maximum might operate to delay determinations in counties that currently make them in less than 48 hours. Notwithstanding those concerns, the Comment identifies holding the hearing within 24 hours of arrest as best practice. A citation to *Commonwealth v. Yandamuri*, 159 A.3d 503, 529 (Pa. 2017) was also added to inform law enforcement that lack of a prompt preliminary arraignment might be a factor in suppression. A citation to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) was added to the Comment—the case is codified at Pa.R.Crim.P. 540(E), but that rule does not contain a time limitation.

Rule 520.3. Bail Determination After Finding of Guilt

This rule was formerly Pa.R.Crim.P. 521. Paragraphs (A)(2)(b) and (D)(2) were revised from the current rule to incorporate by reference the purpose of bail announced in Rule 520.1. Otherwise, no substantive change to the current rule was intended.

A sentence was added to the 2nd paragraph of the Comment to indicate that "life imprisonment cases" include cases where the potential sentence is life imprisonment due to prior convictions. *See, e.g.*, 42 Pa.C.S. §§ 9714, 9715.

Rule 520.4. Detention of Witnesses

This rule was formerly Pa.R.Crim.P. 522. Paragraph titles were added to assist readers.

The last sentence in paragraph (A) of the current rule suggested that the issuing of process was discretionary before bail was set. It further suggested that all a court needed before issuing process was to receive an application. This sentence was revised to state: "If the court grants the application, then the court shall issue process to bring any named witnesses before it for the purpose of determining bail."

The language in paragraph (B) was revised to change "bail bond" to "release" and "commit the witness to jail" to "order the witness detained." These changes were not intended to be substantive. Discussed was whether a detained witness, as permitted in paragraph (B), should be provided with a detention hearing, similar to that proposed for defendants. The present rule does not provide such procedural protections for a witness nor does it provide for the appointment of counsel. In the absence of a need for such protections, they were not added.

Rather, to limit the need and extent of any necessary detention, paragraph (B) of the rule now allows for a witness's testimony to be preserved pursuant to Pa.R.Crim.P. 500 and 501, thereby possibly obviating the need to detain the witness. This provision is based largely upon 18 U.S.C. § 3144.

A new paragraph (E) was added to provide for the rescission of any process at the conclusion of the criminal proceeding and the release of any detained witness when that witness's presence is no longer necessary. Discussed was whether the "conclusion of the criminal proceeding" was too vague. Resultantly, paragraph (A) was further revised to require the application to detain a material witness to identify the proceeding for which the witness's presence is required. Similarly, discussed was whether "presence is no longer necessary" was too vague for determining when to release a witness. However, identifying a specific triggering event that would accommodate all cases was not possible, and the use of "no longer necessary" provides a judge flexibility based upon the circumstances.

Added to paragraph (E) was a provision requiring the judge to supervise the witness's detention to eliminate any unnecessary detention. This provision was based largely on Fed.R.Crim.P. 46(h)(1).

Rule 520.5. Counsel

The current rules governing bail do not specifically address the right to counsel. Pa.R.Crim.P. 540(F)(1) requires the issuing authority to advise the defendant of the right to counsel at the preliminary arraignment—the same proceeding in which bail is set. Generally, the Pennsylvania Rules of Criminal Procedure require counsel to be provided prior to the preliminary hearing if a defendant is unable to afford counsel. Pa.R.Crim.P. 122(A)(2). Additionally, a court may appoint counsel "when the interests of justice require it." Pa.R.Crim.P. 122(A)(3).

In *Rothgery v. Gillespie Co.*, 554 U.S. 191, 213 (2008), the Supreme Court of the United States held that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *See also Kuren v. Luzerne Co.*, 146 A.3d 715 (Pa. 2016). Arguably, a defendant has a right to counsel at the time of the initial bail determination, which could occur at a defendant's preliminary arraignment, if the defendant's liberty is subject to restriction.

Within the context of the bail process, the appointment of counsel prior to bail determinations was considered along a continuum, from counsel being appointed in every case to counsel never being appointed prior to a determination. Presumably, if appointed prior to the bail determination, counsel could meet and consult with the defendant in preparation for that determination. Such consultation and preparation would enhance the reliability of the bail determination through counsel's cogent presentation of facts and argument to the bail authority. The best practice would therefore be to have counsel prior to the initial bail determination. The benefit of counsel being appointed at the earliest possible stage would not be limited to minimizing detention; early legal representation and consultation would also be beneficial to the preparation of a defendant's defense and increase judicial efficiency.

However, there is a practical restraint on requiring the appointment of counsel prior to every bail determination: a lack of resources in all counties for the timely appointment of counsel in all cases. In larger counties with greater resources and higher volume that justify coverage, counsel may be available at the preliminary arraignment for all defendants regardless of the defendant's financial wherewithal. When resources are limited, it may take days for the public defender to interview a defendant, assuming the defendant applies for services and qualifies for services. This may have unintended consequences, such as delaying the bail determination and prolonging detention until counsel is present. However, the necessity of counsel at the preliminary arraignment generally decreases when bail determinations result in the release of defendants.

Proposed is a requirement that a defendant who remains detained more than 48 hours after the initial bail determination be represented by counsel at the detention review. Counsel's representation would be limited to the detention review and not based upon the defendant's financial wherewithal. This requirement would be the minimum for representation and is not intended to preclude representation of all defendants at preliminary arraignment in those counties that can provide such coverage.

Recognized within this rule-based requirement for the appointment of counsel regardless of a defendant's financial resources is potential tension with the Public Defender Act, 16 P.S. § 9960.6(b) and the authority it bestows upon the public defender to determine eligibility for services. While responsibility for determining a defendant's eligibility for appointed counsel may be shared with the courts, see *Dauphin Cty. Pub. Def.'s Off. v. Ct. of Common Pleas of Dauphin Cty.*, 849 A.2d 1145, 1151 n.7 (Pa. 2004), and while the Act has been subject to suspension in the rulemaking context, see Pa.R.Crim.P. 1101(4), the Committee especially seeks the input of public defenders about this aspect of the proposal.

Paragraph (A) is a recognition that there is a role for counsel at the initial bail determination. Paragraph (B) requires the appointment of counsel if the defendant is still detained 48 hours after the initial bail determination. *See also* Rule 520.15 (Condition Review). Paragraph (C) also requires the appointment of counsel if the defendant is detained for a detention hearing. These two instances for the appointment of counsel were intended to impose a minimum requirement. If a county wished to provide counsel for all bail determinations, the rule would not proscribe that practice.

Paragraphs (B) and (C) provide for the defendant's eligibility for the appointment of counsel, without regard to the defendant's financial resources, to eliminate the process of financial qualification and acceptance prior to appointment. Removing the financial threshold for eligibility serves to expedite the appointment of counsel for the upcoming proceeding, thus allowing representation to begin sooner rather than later. Neither paragraph is intended to preclude the use of private counsel or impinge upon a defendant's right of self-representation. Both paragraphs appear somewhat in tension with Rule 122, which provides for the appointment of counsel to defendants without financial resources and for those appointments to be effective until final judgement. Hence, the proposed amendments to Rule 122.

Paragraph (D) specifically permits limited representation. This paragraph was intended to provide for expedited representation for the purpose of bail whereby matters related to eligibility for public defender services and conflicts could be addressed afterward. Ideally, such issues would be determined prior to the bail determination, but they may operate to delay a review of conditions or a detention hearing, which would operate to prolong a defendant's detention.

The Comment defers to local practice for the appointment of counsel. This approach is intended to accommodate both large and small counties with different resources and availability. Additionally, the commentary indicates that the extent of counsel's representation can be set forth in the appointment order or by local rule. This approach was intended to limit the administrative burden of withdrawing an appearance.

Rule 520.6. Release Factors

This rule was formerly Rule 523. The enumerated factors were intended to be a substantial restatement of the "release criteria" found in Rule 523, together with the addition of several new factors. The factors concerning a defendant's financial condition, age, reputation, and character were removed.

"Financial condition" was removed because a defendant's ability to pay only arises in the context of a monetary condition. This factor should not be considered in the release/detention decision. Notably, some may argue that "financial condition" is relevant to flight risk because wealth might provide a means for evasion.

The defendant's age was removed because 1) age is not necessarily a proxy for maturity, reliability, or wisdom; and 2) a factor without guidance can be subjectively and inconsistently applied. Some pretrial risk assessment tools may use age as one variable in a multi-variant calculation. The elimination of age as a factor in Rule 520.6 is not intended to preclude the use of age in a pretrial risk assessment tool, provided the tool is validated in accordance with Rule 520.19(C).

The defendant's reputation was removed as a factor because reputation evidence at the initial bail determination would not be limited by the Rules of Evidence.

"Character" was also removed as a factor, but an argument was recognized for its retention. In one aspect, "character" is redundant of the other factors because the bail authority is asked to determine whether the defendant has the character (or propensity) to comply with the conditions of bail. In another aspect, "character" represents the bail authority's unquantifiable assessment of a defendant's risk. The tension in using "character" is that a bail authority's perception may be based on stereotype or experience, which may be inaccurate, rather than on an individualized assessment.

Paragraph (A)(5) instructs the bail authority, when making a determination of whether a defendant is bailable, to consider whether the prosecution has sought pretrial detention. If the prosecutor has given notice, the bail authority should proceed to Rule 520.18 to determine detention.

Paragraph (B) is largely based on the wording of the existing rule with revisions to improve readability.

The Comment carried over some existing commentary and added guidance when considering the gravity of the offense charged and the severity of a potential sentence. This guidance was intended to temper the possibility of detaining a high risk defendant facing relatively minor charges. The Comment also cautions the bail authority to not "double count" a defendant's prior criminal history and other factors if using a risk assessment report because the assessment will already reflect these factors.

"Custody status" was defined in the Comment. While typically a prior arrest for unrelated charges is not a factor to consider in determining bail, the Comment notes that the bail authority is permitted to consider a defendant's prior arrest insofar as the defendant is currently released on bail for that arrest. This language is carried over from the current rule.

Rule 520.7. Least Restrictive Bail Determination

This is an entirely new rule. This rule is less procedure and more policy. It is intended to require the bail authority to impose sufficient conditions to meet the purpose of bail while simultaneously using the least restrictive conditions necessary. The goal is to address and hopefully eliminate the over-conditioning of release. The Comment informs the reader of the increasing restrictiveness of determinations which is also reflected in the ordering of the rules, beginning with Rule 520.8 (Determination: Release with General Conditions) and culminating in Rule 520.16 (Detention).

Rule 520.8. Determination: Release with General Conditions

This rule was formerly Pa.R.Crim.P. 526. As indicated in the prior rule, this determination is the least restrictive. This type of determination is intended to be similar to release on recognizance. The conditions in this rule were carried over from current Rule 526. The Comment to this rule is derived from the current Comment to Rule 526 with some editing, including the removal of content that can be found in other rules.

Rule 520.9. Determination: Release on Nominal Bail with General Conditions

This rule was based on current Rule 524(C)(4). The rule indicates that $1.00 is sufficient for nominal bail. This is a change from the current language, which also allows for release on a nominal amount of cash but only suggests $1.00, leaving the bail authority to determine what is sufficient security.

The commentary discusses the purpose of nominal bail and the circumstances when it might be imposed. "Transience" was used to indicate a person who is staying or working in a place for only a short time. The term was not used to suggest homeless persons.

Carried over from the current Comment was the following statement: "The purpose of the surety is to facilitate interstate apprehension of any defendant who absconds

by allowing the nominal surety the right to arrest the defendant without the necessity of extradition proceedings. *See, e.g., Frisbie v. Collins*, 342 U.S. 519 (1952)." However, this statement should not be read to supersede any foreign jurisdiction's extradition requirements. *See, e.g.*, Uniform Criminal Extradition Act, 42 Pa.C.S. §§ 9121 *et seq*.

Rule 520.10. Determination: Release with Non-Monetary Special Conditions

This rule was formerly Pa.R.Crim.P. 527. Paragraph (A) (Necessity) specifies that special conditions are applicable only when general conditions are insufficient. This reinforces that release with special conditions is progressively more restrictive relative to general conditions.

The most significant change in this rule is the expanded list, in paragraph (B), of potential special conditions that may be imposed. As indicated in the commentary, the availability of special conditions may be contingent on the availability of pretrial services in a particular judicial district. While no attempt was undertaken to order the special conditions from least restrictive to most restrictive, electronic monitoring does appear as the second to last condition on the list.

Regarding paragraph (B)(8), the special condition of refraining from the use of alcohol, there was discussion concerning whether this condition should prohibit "excessive" use of alcohol. Including that qualification, however, might suggest that a bail authority can only prohibit the excessive use of alcohol. On the other hand, eliminating the qualification might suggest that a bail authority must either permit the consumption of any amount of alcohol or prohibit the use of alcohol entirely. Ultimately, the calibrating of permissible alcohol consumption was left to the bail authority's discretion.

The interplay between the purpose of bail to protect a defendant from immediate risk of self harm and the imposition of special conditions was also discussed. Concerns were expressed that bail authorities were untrained to diagnose medical and psychological issues, including alcohol/drug dependency. Understanding that bail authorities are unable to render a clinical diagnosis from subtle signs and symptoms, they are able to detect immediate risk based upon more obvious actions and statements made by a defendant or observed by law enforcement. This detection would permit the bail authority to order the defendant to submit to an assessment, as provided for in paragraph (B)(9), but the bail authority could not order treatment based upon their detection of an immediate risk absent an existing treatment or service plan.

Several of the examples from the Comment to Rule 527 were carried over, and some of the examples were modified.

Rule 520.11. Determination: Release with Monetary Conditions

This rule was formerly Pa.R.Crim.P. 528. This rule represents a significant change from the current rule concerning the imposition of monetary conditions. Paragraph (A) limits the availability of this condition to circumstances where non-monetary conditions cannot address the risk. Paragraph (B) is intended to extend the limitation in paragraph (A) to both secured and unsecured monetary conditions. Paragraph (C) permits a secured monetary condition to be satisfied with a deposit. Note that "non-monetary conditions" in paragraph (C) could either be general conditions only or general conditions and special conditions. The use of non-monetary special conditions and monetary conditions are not mutually exclusive. For example, a high risk of non-appearance may warrant safekeeping of the defendant's passport and a substantial monetary bail condition.

Paragraph (D) requires the defendant to complete and verify a financial disclosure form and for the bail authority to consider it when determining the amount of the monetary condition. The requirement that the bail authority consider "the financial ability of the defendant" is currently imposed by Rule 528(A)(2). Paragraph (D) goes further to require that any amount be attainable by the defendant. It is anticipated that a statewide form would be created to ensure uniformity in the reporting of financial information.

Discussed was the requirement that the bail authority rely upon a defendant's self-reporting even though a strong incentive exists for the defendant to understate their wealth. However, aside from self-reporting, there was no other practical mechanism available to permit a timely bail determination and to include an ability-to-pay finding in setting amounts. If a defendant is rational and wishes to avoid the risk of detention, then the defendant would be incentivized to accurately self-report wealth. Moreover, an assessment of wealth based only upon a defendant's appearance, accoutrements, or occupation is fraught with subjectivity and undercut by incompleteness.

Also discussed was whether paragraph (D) should be revised so the amount of security reflects what is "reasonably immediately attainable" by the defendant. This revision would address the liquidity of the security and a defendant's ability to raise security immediately. To avoid detention being a function of liquidity, which has no bearing on risk, timeliness should be a factor in determining the reasonable attainability of the amount. As such, the Comment was revised to add the 4th paragraph discussing timeliness. Rule 520.14(A) discusses the forms of security that will be accepted for a monetary condition. These forms of acceptable security inform the reader about the liquidity of the security.

Paragraph (D)(1) refers to the defendant's wealth and not to other sources, such as family members, when determining the defendant's ability to pay.

Paragraph (E) permits the bail authority to inquire into the source of the defendant's security. This paragraph is not intended for the bail authority to inquire about other sources, but to delve into the source of the defendant's self-reported wealth. As indicated in the Comment, this is required by statute for charges under Title 35; however, paragraph (E) does not limit the inquiry based on the charges. The purpose of this permitted inquiry is to provide a bail authority with a more complete picture before imposing a monetary bail condition.

Paragraph (F) is more a statement of policy than procedure. It requires the amount to be correlated to the defendant's risk and is intended as a check against unreasonably high amounts notwithstanding a defendant's ability to pay.

Paragraph (G) eliminates the use of bail schedules and requires the bail authority to make an individualized assessment of a defendant's ability to pay before imposing a monetary condition.

Paragraph (H) is a statement of policy carried over from the current rule.

Paragraph (I) is arguably duplicative of the requirement of Rule 520.12 to provide a statement of reasons, although it explicitly requires the reason to be in writing

to facilitate review and to memorialize the rationale for possible future comparative analysis. However, the paragraph is intended to reinforce that a monetary bail condition must be related to risk and operate to mitigate that risk.

The Comment indicates that whether a monetary condition is secured or unsecured is relevant to forfeiture, not incentive. However, one could argue that there is a difference between a loss and a debt. A loss is immediate while a debt must be collected. Yet, the bail authority's determination should be informed by whether a defendant has a means of satisfying the debt based upon an ability to pay determination. As a matter of policy, the bail authority should not set a monetary condition that would exceed what is reasonably attainable by a defendant regardless of whether the condition is unsecured, partially secured, or fully secured. In theory, it is the amount of the condition, and not the amount of security, that mitigates the risk. The ability of a defendant to fundraise should have no connection to whether the defendant presents a risk.

The Comment also states that a monetary condition is not available for a defendant unable to pay the total amount of the condition. An amount above what a defendant can afford does not provide an incentive for lawful behavior because, when a defendant has nothing, the risk of losing anything is meaningless. The alternative is for indigent defendants to be released on nonmonetary conditions or scheduled for a detention hearing.

Furthermore, the Comment informs the reader that a third party surety should only be used to address a risk of non-appearance because the third party surety is not liable for other violations of conditions of bail.

Consideration was given to whether minor-defendants should be "presumed indigent" for the purpose of imposing a monetary bail condition. For the purpose of appointing counsel for juveniles in delinquency proceedings, the Juvenile Act states:

> In delinquency cases, all children shall be *presumed indigent.* If a child appears at any hearing without counsel, the court shall appoint counsel for the child prior to the commencement of the hearing. The presumption that a child is indigent may be rebutted if the court ascertains that the child has the financial resources to retain counsel of his choice at his own expense. The court may not consider the financial resources of the child's parent, guardian or custodian when ascertaining whether the child has the financial resources to retain counsel of his choice at his own expense.

42 Pa.C.S. § 6337.1(b)(1) (emphasis added). Accordingly, a juvenile's wealth is presumed to be nil when appointing counsel unless there is information that suggests otherwise.

Conceptually, this approach is not very different from that in Rule 520.11(D), which would require the defendant's financial disclosure and the bail authority's consideration of that information when setting the amount of a monetary condition. Thus in either case, appointing counsel or setting a monetary condition, the court is to consider available information before determining a juvenile's ability to pay. The primary difference is that, in the absence of such information, wealth is zero for a juvenile in need of counsel, while there is no such presumption when determining bail. Section 6337.1(b)(1) also prohibits the court from considering third party sources of financial resources when determining whether a juvenile can afford private counsel. Rule 520.11(D)(1) does not contain such a prohibition.

There was a concern that a presumption of indigence would operate to foreclose the possibility of monetary bail conditions for a youth, which could result in more youths being detained, especially when these young defendants are often involved in more severe offenses that are either directly filed or transferred to criminal court. Additionally, a presumption of indigence was believed to be unnecessary since Rule 520.11(D) requires a defendant to self-report wealth. If a youth truthfully and accurately reports no wealth, then there is no need for a presumption.

Rule 520.12. Statement of Reasons

This is an entirely new rule. The rule requires the bail authority to provide reasons for any bail determination that imposes special conditions. These reasons need to be contemporaneously provided with the bail determination so as not to delay review if the defendant is detained due to a failure to satisfy a condition.

Fundamentally, if a defendant is presumed to be innocent and is subject to judicially imposed pretrial restrictions that impinge upon their liberty, then a reason should be provided for those restrictions. Reasoned action defeats claims of arbitrariness and fosters public confidence through increased accountability and consistency.

Requiring a statement of reasons for the imposition of special conditions presents an increased administrative burden. Discussed was whether a statement of reasons should be required for all bail determinations, even those when a defendant is released on general conditions. While such information may be helpful if the Commonwealth seeks modification or if a situation arises because of the defendant's release, in light of the anticipated burden for special conditions, an expanding of the requirement to all bail determinations was not favored.

A requirement for written reason(s) for the detention of a defendant is covered by Rule 520.16(F).

Rule 520.13. Bail Bond

This rule is substantially the same as current Pa.R.Crim.P. 525. Titles were added and some paragraphs re-ordered. A paragraph in the Comment concerning 1995 rulemaking was removed as historical.

Paragraph (C) of current Rule 525 states, in part, "If the defendant is unable to post bail at the time bail is set. . . ." This rule moves that language to paragraph (F) and rephrases it, "If the defendant is unwilling to agree to comply with all the imposed conditions of the bail at the time bail is set. . . ." "Unable" was changed to "unwilling" to indicate that the imposed conditions must be attainable, a recognition that unattainable conditions are tantamount to detention. "Post bail" was replaced with "agree to comply" to remove the suggestion that secured monetary conditions were the norm.

Rule 520.14. Secured Monetary Conditions—Security; Recording; Liability

Portions of this rule are substantially the same as current Pa.R.Crim.P. 528(D)—(F). Titles were added. Current paragraphs (A)—(C) and corresponding commentary were removed because that subject matter is addressed in Rule 520.13.

To more accurately reflect the Act of July 2, 2015, P.L. 110, paragraph (C)(1) was revised to remove the defendant's noncompliance as a basis for third-party liability.

Rule 520.15. Condition Review

This is an entirely new rule intended to provide judicial review of any condition imposed at the initial bail determination that remains unsatisfied, causing a defendant to remain detained. The first paragraph includes the phrase "designated bail authority" to permit the president judge to designate a magisterial district court judge or a court of common pleas judge to act as the bail authority for purposes of review. This designation is intended to address the possible conflict with Rule 520.17 concerning bail modification, which limits who can modify bail before a preliminary hearing and the "once up, always up" aspect of court of common pleas' modifications. *See* Pa.R.Crim.P. 529(D). Rule 520.17 is proposed to replace Pa.R.Crim.P. 529. A separately designated bail authority sitting in review of conditions is an alternative to the initial bail authority simply reviewing its prior determination.

A condition review is designed to be less procedurally rigorous than a detention hearing. As with both procedures, the defendant is appointed counsel. A defendant may remain detained due to either an unwillingness or inability to satisfy bail conditions. An aspect of this review includes the reasons for failing to satisfy bail conditions and reconsideration of whether initially imposed conditions remain necessary.

In paragraph (C), appearance by advanced communications technology ("ACT") is permissive for all counsel and the defendant. Paragraph (D) allows the parties to present additional information to the bail authority. "Information" was used to avoid "evidence," which might imply that the Rules of Evidence are to be enforced. In paragraph (E), a bail authority is permitted to modify the initial determination.

The commentary also clarifies that a failure to comply with the time requirements of review should not result in the release of the defendant by default.

Rule 520.16. Detention

This is an entirely new rule. This rule "bookends" the range of restrictiveness as being the most restrictive. Paragraph (A) sets forth the bases for detention and is taken from the Pennsylvania Constitution. The paragraph also contains the constitutional clause "proof is evident and presumption is great." *See also Commonwealth v. Talley*, 14 MAP 2021.

In practice, the only information required for paragraph (A)(1) is often the charge itself. Yet, for a charged offense of murder with an unspecified degree, the bail authority must examine the alleged circumstances to determine whether there is sufficient evidence of culpability to establish a *prima facie* offense of murder of the first or second degree. Generally, murder of only the third degree would not be subject to paragraph (A)(1). *See* 18 Pa.C.S. § 2502(c) (murder of the third degree is a felony of the first degree); 18 Pa.C.S. § 1103 (Sentence of Imprisonment for Felony). To that end, the bail authority could examine the probable cause affidavit for additional information.

As indicated in the Comment, paragraph (A)(1)—offenses with sentencing of death or life imprisonment—is intended to include capital offenses and offenses that may result in a sentence of life imprisonment. Discussed was whether charges that do not have a life sentence, *per se*, but may result in a life sentence due to prior convictions, should be subject to paragraph (A)(1). For example, a defendant's prior criminal history may also subject the defendant to a maximum sentence of life imprisonment for the current offense. *See* 42 Pa.C.S. § 9714 (Sentences for Second and Subsequent Offenses); 42 Pa.C.S. § 9715 (Life Imprisonment for Homicide). While it is believed the risk of nonappearance is impacted by the potential sentence, regardless of the offense, the applicability of paragraph (A)(1) in those instances should be decided on appeal and not by the rules.

A magisterial district judge does not have authority to fix bail for offenses under 18 Pa.C.S. § 2502 (murder) and § 2503 (voluntary manslaughter). *See* 42 Pa.C.S. § 1515(a)(4). Therefore, in paragraph (A)(1) matters, the magisterial district judge should order the defendant detained until a detention hearing can be heard by a judge of the court of common pleas or a judge of the Philadelphia Municipal Court pursuant to paragraph (B). The offenses that may form the basis for detention are not identical to the limitation on magisterial district judge jurisdiction. For example, "voluntary manslaughter" is a felony of the first degree, which is not an offense serving as a basis *per se* for detention. In those cases, the common pleas judge is sitting as the bail authority, but those cases are not subject to this rule.

Paragraph (A)(2) matters concerning available conditions can be heard by magisterial district judges pursuant to paragraph (C). In cases where both paragraphs (A)(1) and (A)(2) may offer a basis for a defendant's detention, it was presumed for the purpose of rulemaking that the Commonwealth would pursue detention on both grounds before a judge of the court of common pleas in light of 42 Pa.C.S. § 1515(a)(4).

In matters concerning available conditions, paragraph (C)(4) requires a detention hearing to be held within 48 hours, which is 24 hours less than required by paragraph (B)(2) for a detention hearing based upon the offense. However, paragraph (C)(4) also contains a provision for an additional 3-day continuance for cause or by agreement when it is alleged that no available conditions exist other than detention. That provision is not limited to requests by the defendant but is also available to the prosecution.

Paragraph (C)(3) permits the bail authority to order the defendant to be temporarily detained if the bail authority possesses a reasonable belief that no other conditions are available except detention. Because a prosecutor may not always be present for the defendant's first appearance, the bail authority should be able to order a detention hearing *sua sponte.* Alternatively, the bail authority may reject a bail agreement among the parties to not seek detention.

Discussed was whether the notice given for the detention hearing should contain the reason for seeking detention. The reason would be necessary if the parties are going to be able to argue whether a detention hearing is warranted. Further, knowing the reason would allow the parties to prepare for the detention hearing, especially if the detention hearing was ordered *sua sponte.* However, there was concern about limiting the reasons for detention at the hearing to only those provided with the notice. A party should not be precluded from offering a new reason if additional information comes to light after further investigation. Accordingly, paragraphs (C)(1) and (C)(2) require that notice include the initial reason for seeking detention. There should be no incentive for less than candid disclosure of all reasons known at the time of the detention request given the ability of the defendant to challenge the sufficiency of the showing pursuant to paragraph (C)(3). If reasons later surface prior to the

detention hearing, then a party may seek a continuance if necessary. If those reasons surface after the detention hearing, then a modification may be sought.

Paragraph (C)(3) provides a defendant the opportunity to argue that a reasonable basis for a detention hearing does not exist. The opportunity for such argument is intended to prevent a mere request from the prosecution for a detention hearing from causing the detention of the defendant until the hearing. Without this opportunity, the interim detention decision would be removed from the bail authority. If the bail authority denies a request for a detention hearing due to a lack of reasonable basis, the prosecution is not precluded from later seeking detention through a modification of the bail order. A Comment to this effect was added to the rule.

Paragraph (D) provides for the appointment of counsel, which may be a limited appointment similar to other bail determinations due to the uncertainty of capital case qualified counsel being available in all counties on short notice.

Paragraph (E) was added to emphasize there are no default releases for untimely hearings. This is a matter of policy. Reasonable arguments can be made that liberty, rather than detention, should be the default. Such an approach would be consistent with a presumption of innocence. Further, defaulted release could be a strong incentive for timely bail hearings. Conversely, the defendants subject to detention hearings, especially on an offense basis, are alleged to have committed some of the worst crimes and, presumably, pose the greatest risk.

Paragraph (F) requires the bail authority to state in writing the reasons for detaining a defendant after a hearing. If the bail authority does not order detention and releases the defendant subject to special conditions, then the bail authority must provide a statement of reasons pursuant to Rule 520.12.

Paragraph (G) addresses where to seek further review. Again, the procedure is driven by the basis for detention. Because the offense-based detention hearings are going to be heard by a court of common pleas judge, the appeal would lie with the Superior Court subject to the Rules of Appellate Procedure. For a no-condition basis for detention, those hearings are not necessarily heard in the first instance by a court of record. Therefore, those decisions are subject to modification by a court of common pleas judge pursuant to the Rules of Criminal Procedure. Thereafter, the decision can be appealed to the Superior Court.

Rule 520.17. Modification of Bail Order Prior to Verdict

This rule was formerly Pa.R.Crim.P. 529. Paragraph (A) is amended to add new subparagraphs (1) and (2). Currently, paragraph (A) provides the issuing authority the ability to modify bail any time before the preliminary hearing. This is provided for in subparagraph (1).

Subparagraph (2) now provides a "bail authority sitting by designation" with the same authority to review conditions. This provision is intended to permit a court of common pleas judge, sitting by designation, to modify bail conditions upon review pursuant to Rule 520.15, but not to thereafter preclude a magisterial district judge from further modifying the conditions at the preliminary hearing. *Cf.* Pa.R.Crim.P. 520.17(D) (proposed).

Rule 520.18. Responsibilities of Pretrial Services

This is an entirely new rule. This rule is intended to establish minimum services for pretrial services. Robust, objective, informed, and innovative pretrial services is critical to risk mitigation, appropriate conditioning, and consistency of outcomes. However, the ability of the rules to mandate the provision of pretrial services, in the absence of additional funding, was considered foreclosed and beyond the scope of rulemaking. Additional funding was believed necessary lest a county feel compelled to impose user fees on defendants to fund pretrial services.

At a minimum, pretrial services would be required to consider and advise the president judge about the feasibility of adopting a risk assessment tool. Pretrial services would also be required to provide basic services, including reminders of court dates, reporting capabilities, referrals for services, and identification of detained defendants. The technology for telephonic, text, and email reminders exists in Pennsylvania, and results indicate that such reminders reduce the number of missed court appearances. Reporting capabilities may also exist through adult probation. The identification of detained defendants is essential for triggering the condition review for defendants who remain detained due to unsatisfied conditions. However, in the absence of pretrial services, this need may be met by prison reporting.

The benefit of effective, neutral pretrial services cannot be overstated.

Rule 520.19. Pretrial Risk Assessment Tool Parameters

The use of pretrial risk assessment tools (PRATs) in making bail determinations is acknowledged in the Comment to Pa.R.Crim.P. 523, as revised in 2016, but not required: "Nothing in this rule prohibits the use of a pretrial risk assessment tool as one of the means of evaluating the factors to be considered under [Pa.R.Crim.P. 523](A). However, a risk assessment tool must not be the only means of reaching the bail determination."

A PRAT is intended to provide a statistically valid and objective analysis of whether an arrested person is likely to appear in court and not reoffend if released before trial. It is also intended to reduce bias and subjectivity in court decisions about who should be detained before trial and which conditions, if any, should be imposed on those who are released. Moreover, when paired with a scaled matrix setting forth escalating release conditions, it also can provide consistency, objectivity, and predictability in bail recommendations and determinations.

PRATs have been adopted in many jurisdictions, including counties within Pennsylvania. Advocates contend that the use of PRATs represent a best practice. Yet, support for these tools is not universal; there was also a lack of unanimity about the value of recommendations derived from assessments.

The Committee believes, with certain reservations and necessary assurances, that the rules should facilitate the use of PRATs. Accordingly, Rule 520.19 is intended to establish parameters on current risk assessment tools and inform counties contemplating the adoption of PRATs. Notably, in paragraph (A), the adoption and use of a PRAT is left to local decision-making. As noted, the mandated statewide use of a PRAT is constrained by funding and is a policy-based decision that should more appropriately involve state or local legislative bodies.

This rule is more administrative or technical than procedural, but it is intended to ensure that only validated PRATs are used. What the rule does not address is significant. It leaves to local decision-making the setting of risk classification thresholds, allowing a county to decide which scores are considered high, medium, or low. Additionally, the rule does not address the matrix of release options based on risk classifications. The options

depend largely on the availability of pretrial services and the extent to which pretrial services offers supervision options.

In paragraph (B), PRATs, at a minimum, must determine the risk of new criminal activity and failure to appear. Note that a PRAT meeting only this minimum standard would be inadequate to ensure that the purpose of bail is completely satisfied insofar as it does not capture the defendant's immediate risk of self-harm or safeguard the integrity of the judicial system.

The requirement of paragraph (C) is intended to ensure that only validated and neutral PRATs are used. The paragraph proposes a minimum level of predictability of 70%, but the Committee welcomes informative comments about the attainability and appropriateness of that level.

Rule 708.1. Violation of Probation or Parole: Notice, Detainer, Gagnon I Hearing, Disposition, and Swift Sanction Program

The petition in *Commonwealth v. Davis*, 68 E.M. 2019, noted that "[t]here are no statutes or Rules of this Court authorizing or governing detainers for defendants on county probation and parole." In *Davis*, the petitioner sought to bar the use of risk assessment tools for the automatic lodging of detainers. Instead, a defendant believed to have violated county probation and parole should only be detained upon a showing of significant risk to the safety of the community based on an assessment of all relevant evidence.

Risk assessment tools, consonant with Rule 520.19, should not be used as the sole basis for decision-making. When properly validated, such tools may be used as one factor of many to inform decision-making, but never as a substitute.

The proposed rule governs the lodging of detainers when the supervising authority believes that the alleged conduct of the defendant creates an ongoing risk to the public's safety or to the defendant's safety or creates a risk of non-appearance at the revocation hearing. In that vein, the court should have authority to release a detained defendant subject to conditions in a manner similar to bail. Additionally, decisions to detain a defendant should be subject to judicial review. *See, e.g., Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The rule is intended to address the procedure when an authority supervising a defendant on county probation or parole believes the defendant has violated a condition of probation or parole. Those violations are grouped as either technical violations or new criminal charges. This grouping serves to separate new criminal charges from other technical violations because this type of violation has more often resulted in the lodging of a detainer.

The options appearing under each grouping are not mandated; a supervising authority can always choose not to proceed with further action. The supervising authority can also take the informal action of counseling or warning the defendant if the supervising authority believes the defendant violated a term. Because "no action" or "informal action" does not implicate court procedures, those options are not included in the rule.

Per paragraph (A), the supervising authority has three escalating options when a technical violation is alleged: 1) serve notice to appear for a revocation hearing; 2) arrest pursuant to 42 Pa.C.S. § 9771.1; or 3) lodge a detainer. The arrest option was included because of the amendment of 42 Pa.C.S. § 9771.1 by Act 115 of 2019. The Committee is not aware of any judicial districts that promulgated an implementing local rule, as permitted by Section 9913(j) and required by Rule 105. Of course, the rule does not provide the exclusive basis for a supervising authority to arrest a defendant for a violation—that is also provided for generally by 42 Pa.C.S. § 9913.

While there may be few instances warranting a detainer for technical violations, the rule contemplates some scenarios where a detainer may be justified. Accordingly, this option is reflected in paragraph (A)(3).

Per paragraph (B), the probation or parole officer has two options with a new criminal arrest: 1) serve notice to appear for a revocation hearing; or 2) lodge a detainer. The arrest option was not included because the defendant would likely be arrested on a new criminal charge or served a summons. In the matter of a summons, the supervising authority could arrest the defendant pursuant to 42 Pa.C.S. § 9913.

Paragraph (B)(2)(i) permits a defendant to request a detainer. This would allow the defendant to receive credit for the time in detention and have that credit applied to any sanction for the violation if the defendant is not sentenced to prison on the new criminal charge. This would avoid "dead time," which is time in detention that is neither applied to the new criminal charge nor to the violation. In practice, some judges may factor in "dead time" at sentencing for the violation, but this provision would make that practice applicable statewide. Preserving the time under a detainer may be particularly relevant if there is a "Daisy Kates" hearing whereby the Commonwealth proceeds with the violation before the new criminal charge is disposed. *See Commonwealth v. Kates*, 305 A.2d 701 (Pa. 1973).

Paragraphs (B)(2)(ii) and (iii) permit the lodging of a detainer only if the defendant is not detained on the new charge and the supervising authority believes the defendant has committed a technical violation beyond the fact of the new criminal charge. This restriction on lodging a detainer accommodates the fact that the new charge will be the subject of a bail determination specific to that charge. This provision was not intended to affect the possibility of revocation as a sanction; rather, it operates to limit the circumstances for detaining a defendant prior to revocation.

Regarding paragraph (C), the bases for a detainer are similar to the purpose of bail in Rule 520.1: 1) risk to public safety; 2) risk to the defendant's safety; and 3) risk of failure to appear at the revocation hearing.

Paragraph (D) provides for a *Gagnon* I hearing within 14 days of detention unless a defendant has requested a detainer. The rule provides for the expiration of the detainer if a hearing is not held within that time.

Concerning the timing of the *Gagnon* I hearing, a 72-hour requirement, similar to Rule 150, was considered, but rejected because it might conflict with the operation of specialty courts where judges have dedicated oversight of a defendant. Bringing a defendant before another judge who may not be familiar with the defendant or the program seemed antithetical to the concept of specialized courts. Bringing the defendant before a judge other than the one supervising the defendant's release would also increase the probability that the defendant will be either released or detained without full consideration of defendant-specific risks and needs.

Further, the principle catalyzing expedited pretrial bail determinations, *i.e.*, a presumption of innocence, did not extend to matters involving a convicted defendant. While the defendant's interest in liberty may be as great in

either scenario, the weight to be given to that interest is lightened in post-conviction proceedings. *Compare* Rule 520.2 (Bail Determination Before Verdict) *with* Rule 520.3 (Bail Determination After Finding of Guilt).

Ultimately, a 14-day hearing deadline ("no later than") is proposed for the purpose of comments. This time limit is intended to allow sufficient time for the defendant to appear before the proper judge, while addressing concerns about prolonged and unnecessary detention. With this relatively wider window for a hearing, the language providing for the expiration of the detainer after 14 days without a hearing was thought more acceptable. This mandate was intended to be incentive for courts to conduct timely hearings. Of course, there is nothing to stop the Commonwealth from seeking a continuance or the supervising authority from lodging another detainer.

Rule 708.2. Violation of Probation or Parole: Gagnon II Hearing and Disposition

This rule is based largely on current Rule 708 and concerns *Gagnon* II hearing procedures. The only significant changes have been to the Comment.

Rule 1003(C) (Summons and Arrest Warrant Procedures)—(D) (Preliminary Arraignment)

Rule 1003 was reviewed in light of Rule 509 (Use of Summons or Warrant of Arrest in Court Cases) and Rule 519 (Procedure in Court Cases Initiated by Arrest Without Warrant). The review focused on two aspects of Rule 1003: the use of summons in paragraph (C) and the requirement of a preliminary arraignment in paragraph (D).

Currently, Rule 1003(C)(1) gives the issuing authority in the First Judicial District ("FJD") the discretion to proceed with a summons rather than an arrest warrant when the offense is punishable for a term of imprisonment not more than one year. Rule 509(1) affords an issuing authority outside of the FJD greater discretion, including when the offense is punishable for a term of imprisonment not more than two years. In other words, the issuing authority can proceed with a summons in the FJD in the case of a misdemeanor of the 3rd degree while the issuing authority can proceed with a summons outside the FJD in the case of a misdemeanor of the 2nd or 3rd degree.

As proposed, Rule 1003(C)(1) and Rule 509(1) would be consistent, and issuing authorities in the FJD and outside the FJD would have the same authority. This approach would be in harmony with other changes to bail practice intended to foster consistent, statewide practice. Any justification to maintain this dissimilarity is specifically invited via comment.

Current Rule 1003(C)(2)(a) requires an issuing authority in the FJD to issue a warrant of arrest when an offense charged is punishable by imprisonment for a term of more than five years. Outside of the FJD, an issuing authority is required to issue a warrant of arrest when one or more of the offenses charged is a felony or murder. *See* Pa.R.Crim.P. 509(2)(a). For consistency, proposed Rule 1003(C)(2)(a) would be made consistent with Rule 509(2)(a). Additionally, this revision would make it easier for the reader to understand the rule without having to consult 18 Pa.C.S. §§ 1103 (Sentence of Imprisonment for Felony) and 1104 (Sentence of Imprisonment for Misdemeanors). Such a revision would also obviate the need for Rule 1003(C)(2)(f).

The revision to Rule 1003(C)(2), however, would impact current practice in the FJD. Referring to the offense grading rather than to the possible sentence will result in requiring an arrest warrant in some cases where a summons is currently permitted. For example, under the Controlled Substance, Drug, Device and Cosmetic Act, there are felony offenses that provide for a maximum sentence of five years. *See, e.g.*, 35 P.S. § 780-113(f)(2). Under the current rule, a summons would be permitted because the maximum sentence could not be more than five years. However, the proposed amendment would require the issuance of an arrest warrant as the offense is a felony. Comments favoring the disparate treatment of defendants based upon geography—where location determines if you are summoned or if you are arrested—are welcome.

Next considered was whether Rule 1003(D) should be revised to give an arresting officer in Philadelphia County discretion to release a defendant following a warrantless arrest rather than requiring the defendant to be brought before the issuing authority for a preliminary arraignment. The Committee is unaware of the rationale for not having Rule 1003(D) be the same as Rule 519(B). The District Attorney may continue to make charging decisions before a summons is issued through the local option pursuant to Rule 507 (requiring district attorney approval of police complaints prior to filing). Therefore, paragraph (D) is proposed to be bifurcated into paragraph (D)(1) and paragraph (D)(2) based upon the language of Rule 519(B). All comments are welcome particularly on this aspect of the proposal.

The Committee takes note that the Comment to Rule 1003 concerning paragraph (E) and the use of hearsay to establish a *prima facie* case could be updated in light of *Commonwealth v. McClelland*, 233 A.3d 717 (Pa. 2020) (*prima facie* case may not be established solely on hearsay evidence). However, updating rules, including Rule 542, that govern preliminary hearings is a separate matter for consideration by the Criminal Procedural Rules Committee.

[Pa.B. Doc. No. 22-47. Filed for public inspection January 7, 2022, 9:00 a.m.]

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Amendment of Phila.R.J.A. No. *401; Administrative Order No. 44 of 2021

Order

And Now, this 14th day of December, 2021, in compliance with the October 6, 2021 order of the Supreme Court of Pennsylvania (Judicial Administration Docket No. 556) which amended the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania to require the statewide use of the Confidential Information Form, it is *Ordered* and *Decreed* that Philadelphia Rules of Judicial Administration No. *401 is amended, as follows, effective January 1, 2022.

This Order is issued in accordance with Pa.R.J.A. 103 and shall be filed with the following rule with the Office of Judicial Records (formerly the Prothonotary, Clerk of Courts and Clerk of Quarter Sessions) in a docket maintained for Orders issued by the First Judicial District of Pennsylvania. As required by Pa.R.J.A. 103(d)(5)(ii), two certified copies of this Order and rule shall be distributed to the Legislative Reference Bureau,

together with a copy on a computer diskette, for publication in the *Pennsylvania Bulletin*. As required by Pa.R.J.A. 103(d)(6) one certified copy of this Order and rule shall be filed with the Administrative Office of Pennsylvania Courts, shall be published on the website of the First Judicial District at http://courts.phila.gov, and shall be incorporated in the compiled set of Philadelphia local rules no later than 30 days following publication in the *Pennsylvania Bulletin*. Copies of the Order and rules shall also be published in *The Legal Intelligencer* and will be submitted to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE IDEE C. FOX,
President Judge
Court of Common Pleas

First Judicial District of Pennsylvania

Philadelphia Rules of Judicial Administration

Amendment to Philadelphia Rule of Judicial Administration *401.

Note: New text is bold and underscored; deleted text is bolded and bracketed.

Rule *401. Policy Concerning Access to Case Records of the Court of Common Pleas and Philadelphia Municipal Court, in Conjunction with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania ("Case Records Policy of the UJS").

(a) *Confidential Information.* **[When a document (including exhibits) contains any of the confidential information listed in Section 7.0 of the Case Records Policy of the UJS, the filer shall file a Redacted Version and an Unredacted Version of the document, as provided below.**

(1) ***Redacted Version*. The Redacted Version of the document shall not include any of the confidential information listed in Section 7.0 (A) and must be redacted in a manner that is visibly evident to the reader. The Redacted Version of the document shall be accessible by the public.**

(2) ***Unredacted Version*. The Unredacted Version of the document shall contain all information, including the confidential information listed in Section 7.0 (A). The Unredacted Version of the document shall not be accessible by the public.**

(3) **A Redacted Version of a document which contains confidential information does not need to be filed for case types that are sealed or exempt from public access pursuant to applicable authority.]**

The confidential information listed in Section 7.0 of the Case Records Policy of the Unified Judicial System of Pennsylvania ("Case Records Policy of the UJS") shall not be included in (or shall be redacted from) any document filed with a court or custodian and shall instead be included on the court-approved Confidential Information Form which must be filed contemporaneously with the document.

* * * * *

Note: Adopted by the Administrative Governing Board of the First Judicial District of Pennsylvania on November 13, 2017, effective January 6, 2018. See Administrative Governing Board Order No. 02 of 2017. Published in the *Pennsylvania Bulletin* on December 2, 2017. Amended by Order dated May 10, 2018, effective on July 1, 2018. **Amended by Order dated December 14, 2021, effective January 1, 2022.**

[Pa.B. Doc. No. 22-48. Filed for public inspection January 7, 2022, 9:00 a.m.]

Title 255—LOCAL COURT RULES

BUCKS COUNTY

Promulgation of Rule of Criminal Procedure 576.1—Electronic Filing and Service of Legal Papers; Administrative Order No. 104

Order

And Now, this 17th day of December, 2021, Bucks County Rule of Criminal Procedure No. 576.1—Electronic Filing and Service of Legal Papers, is promulgated as follows:

Bucks County Rule of Criminal Procedure No. 576.1. Electronic Filing and Service of Legal Papers.

(A) *Authorization of Electronic Filing System*

Pursuant to Pennsylvania Rule of Criminal Procedure 576.1(A), electronic filing of legal papers through the PACFile electronic filing system is hereby authorized in the Bucks County Court of Common Pleas, Criminal Division. The Administrative Office of Pennsylvania Courts and the Seventh Judicial District, through the Office of the Clerk of Courts ("Clerk of Courts"), have agreed upon an implementation plan for PACFile in the Bucks County Court of Common Pleas.

Note: For the purposes of this rule, authorization for use of PACFile in the "Criminal Division" of the Court shall, subject to any requirements of the Clerk of Courts and the limitations set forth in section (B) hereof, include all legal papers that may be appropriately filed with the Clerk of Courts, including but not limited to those related to criminal, juvenile and dependency matters.

(B) *Legal Papers*

(1) "Legal papers" are pleadings or other submissions to the court, including motions, answers, notices, or other documents, of which filing is required or permitted, including orders, exhibits and attachments, but excluding:

(a) applications for search warrants;

(b) applications for arrest warrants;

(c) any grand jury materials, except the indicting grand jury indictment or the investigating grand jury presentment;

(d) submissions filed ex parte as authorized by law;

(e) submissions filed or authorized to be filed under seal;

(f) exhibits offered into evidence, whether or not admitted, in a court proceeding; and

(g) Wiretap Act, tracker, cell phone and internet surveillance petitions.

(2) The applicable rules of procedure, general rules of court, and court policies that implement such rules shall continue to apply to the filing of all legal papers regardless of the method of filing.

(3) Any legal paper submitted for filing to the Clerk of Courts in a physical paper ("hard-copy") format shall be accepted by the Clerk of Courts in that format and shall be retained by the Clerk of Courts as may be required by applicable rules of court and record retention policies. The Clerk of Courts shall convert such hard-copy legal paper to .pdf and add it to the system, except those legal papers excluded from electronic filing pursuant to Pa.R.Crim.P. 576.1(C) and this rule.

(C) *PACFile*

(1) The exclusive system for electronic filing in the Bucks County Court of Common Pleas, Criminal Division, shall be the PACFile System, developed and administered by the Administrative Office of the Pennsylvania Courts and located on Pennsylvania's Unified Judicial System Web Portal at https://ujsportal.pacourts.us/PACFile.aspx.

(2) Pursuant to Pa.R.Crim.P. 576.1(D)(2), establishment of a PACFile account constitutes consent to participate in electronic filing, including acceptance of service electronically of any document filed on the PACFile system in any judicial district that permits electronic filing.

(3) Use of the PACFile System is permissive and voluntary. Any party who declines to participate in the PACFile electronic filing system, who is unable to electronically file or accept service of legal papers which were filed electronically, or who is otherwise unable to access the PACFile system, shall be permitted to file legal papers in hard copy format and shall be served legal papers as required by Pa.R.Crim.P. 576 in a hard copy format by the Clerk of Courts and other parties, regardless of whether such legal papers are electronically filed or in a hard copy format.

(4) Upon submission of a legal paper for electronic filing, the PACFile system shall provide an electronic notification to other parties and attorneys to the case who are participating in electronic filing that the legal paper has been submitted. This notification upon submission shall satisfy the service requirements of Rules 114(B) and 576(B) on any attorney or party who has established a PACFile system account.

(D) *Filing Fees*

Applicable filing fees shall be paid through procedures established by the Clerk of Courts and at the same time and in the same amount as required by statute, Court rule or order, or published fee schedule.

(E) *Record on Appeal*

Electronically filed legal papers, and copies of legal papers filed in a hard copy format as provided in subsection (B)(3), shall become the record on appeal.

(F) *Confidential Information*

Counsel and unrepresented parties shall adhere to the Public Access Policy of the Unified Judicial System of Pennsylvania and refrain from including confidential information in legal papers filed with the Clerk of Courts or the Court whether filed electronically or in a hard copy format.

(G) *Provision of Hard Copy Legal Papers to Court*

The Clerk of Courts shall provide hard copies of any filed legal papers to the Court as required by the Court, regardless of the format in which such legal papers are filed and/or maintained by the Clerk of Courts.

This rule shall be effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

By the Court

WALLACE H. BATEMAN, Jr.,
President Judge

[Pa.B. Doc. No. 22-49. Filed for public inspection January 7, 2022, 9:00 a.m.]

Title 255—LOCAL COURT RULES

CUMBERLAND COUNTY

Local Rule 1910.12; Civil 96-1335

Order of Court

And Now, this 20th day of December, 2021, and effective January 18, 2022, or thirty (30) days after publication in the *Pennsylvania Bulletin*, whichever is later, Cumberland County Local Rule of Court 1910.12 is amended to read as follows:

Rule 1910.12. Conduct of Hearing: Exceptions.

(a) Hearings shall be conducted by the Support Master.

(b) The Support Master shall engage the services of a Court Reporter or a Courtroom Technician; however, the notes of testimony shall not be transcribed unless:

(1) required by the Support Master to prepare the report and recommendation to the Court, or

(2) ordered by the Court following the filing of exceptions.

(c) It shall be the responsibility of the party who first files exceptions to obtain an order directing that the notes of testimony be transcribed. The party filing the exceptions shall bear the cost of the original transcript. If both parties file exceptions, the cost of the original transcript shall be shared equally. Nothing herein shall prevent the Court from thereafter reallocating the costs of the transcript as part of a final order.

(d) When exceptions are filed, the Domestic Relations Office shall forthwith forward the cases to the Court Administrator who shall assign them to the Judges of the Court of Common Pleas on a rotating basis.

Note: In Cumberland County the "Hearing Officer" referred to in Rule 1910.12 Pa.R.C.P. is designated as the Support Master.

Amended December 20, 2021, effective January 18, 2022.

The Cumberland County District Court Administrator is Ordered and Directed to do the following:

1. File one (1) copy to the Administrative Office of Pennsylvania Courts via email to adminrules@pacourts.us.

2. File two (2) paper copies and one (1) electronic copy in a Microsoft Word format only to bulletin@palrb.us with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

3. Publish these Rules on the Cumberland County Court website at www.ccpa.net.

4. Incorporation of the local rule into the set of local rules on www.ccpa.net within thirty (30) days after the publication of the local rule in the *Pennsylvania Bulletin*.

5. File one (1) copy of the local rule in the appropriate filing office for public inspection and copying.

6. Forward one (1) copy to the *Cumberland Law Journal*.

By the Court

EDWARD E. GUIDO,
President Judge

[Pa.B. Doc. No. 22-50. Filed for public inspection January 7, 2022, 9:00 a.m.]

Title 255—LOCAL COURT RULES

DAUPHIN COUNTY

Promulgation of Local Rules; No. 1793 S 1989

Order

And Now, this 21st day of December, 2021, Dauphin County Local Rule of Civil Procedure 1915.13 is amended as follows:

Rule 1915.13. **[Applications]** **Petitions** for Special Relief **and** Emergency Petitions for Custody.

[a. An original and one copy of the application for special relief shall be filed with the Prothonotary simultaneously with the custody complaint or petition for modification or contempt of a custody order.

b. The attorney or pro se party shall promptly notify the Deputy Civil Court Administrator's Office by telephone as soon as it is determined that an application for special relief will be filed and shall give the Deputy Civil Court Administrator's Office a realistic estimate of the date and time of the intended filing.

c. The application for special relief shall state, in detail, the facts alleged to warrant the special relief.

d. The application for special relief shall be served on all parties.

e. An administrative fee of $150.00 shall be paid to the Prothonotary in accordance with Rule 1915.3(a) or 1915.3(b). The filing party need only pay the administrative fee associated with the custody complaint or petition for modification or contempt. There shall be no additional administrative fee associated with the filing of the application for special relief.

f. The Prothonotary shall forward both the original custody complaint or petition for modification or contempt of the custody order and the application for special relief to the Court Administrator's Office. The custody complaint or the petition for modification or contempt of the custody order shall be assigned to a Custody Conference Officer. The application for special relief shall be assigned to the judge who is assigned to handle emergency custody matters or to the judge who has handled the case on a previous assignment.]

a. *Definitions*

1. Petitions for Special Relief shall be filed to address a specific circumstance that does not necessitate the modification of an existing Custody Order and does not involve the violation of the existing Custody Order.

2. Emergency Petitions for Custody shall be filed when there is an immediate threat to the health, safety, or welfare of the child.

b. *New Cases with Emergency Petition*

1. An original and one copy of the Emergency Petition for Custody shall be filed with the Prothonotary simultaneously with the Custody Complaint. The Emergency Petition for Custody must be a separate document apart from the Custody Complaint.

2. In addition to the filing fees assessed for the filing of Custody Complaints, an additional administrative fee in the amount of $150.00 shall be paid to the Prothonotary simultaneously with the filing of the Custody Complaint in accordance with Local Rule 1915.3.

3. The Prothonotary shall immediately forward the Custody Complaint and the Emergency Petition for Custody to the Court Administrator's Office. The Emergency Petition for Custody shall be immediately assigned to a Family Court Judge and the Custody Complaint will be scheduled for a Custody Conference with a Custody Conference Officer.

c. *Existing Cases—No Change Requested to Existing Custody Order and No Violation of Existing Custody Order*

1. An original and one copy of the Petition for Special Relief or Emergency Petition for Custody shall be filed with the Prothonotary. The filing of a Petition for Modification or a Petition for Contempt is not required.

2. The Prothonotary shall immediately forward the Petition for Special Relief or Emergency Petition for Custody to the Court Administrator's Office. The Petition for Special Relief or Emergency Petition for Custody shall be immediately assigned to a Family Court Judge.

3. The assigned Family Court Judge shall review the filing and either schedule a hearing, enter an Order, or direct that a Petition for Modification and/or a Petition for Contempt be filed so that the matter may be assigned to the Conference Officer with the goal of reaching a resolution at the conference. If a Petition for Modification and/or a Petition for Contempt is to be filed, the filing party shall pay an administrative fee of $150.00 to the Prothonotary.

d. *Existing Cases—Modification of Existing Custody Order Requested or Contempt of Existing Custody Order*

1. An original and one copy of the Emergency Petition for Custody shall be filed with the Prothonotary simultaneously with the Petition for Modification or Petition for Contempt. The Emergency Petition for Custody must be a separate document apart from the Petition for Modification or Petition for Contempt.

2. An administrative fee of $150.00 shall be paid to the Prothonotary in accordance with Local Rules 1915.3.1 or 1915.3.2.

3. The Prothonotary shall immediately forward the Petition for Modification or Petition for Con-

tempt and the Emergency Petition for Custody to the Court Administrator's Office. The Emergency Petition for Custody shall be immediately assigned to a Family Court Judge and the Petition for Modification or Petition for Contempt will be scheduled for a Custody Conference with a Custody Conference Officer.

e. The attorney or self-represented party shall promptly notify the Deputy Civil Court Administrator's Office by telephone or email as soon as it is determined that a Petition for Special Relief or Emergency Petition for Custody will be filed and shall give the Deputy Civil Court Administrator's Office a realistic estimate of the date and time of the intended filing.

The previously listed amendments shall be published in the *Pennsylvania Bulletin* and will become effective thirty days from the date of publication.

By the Court

JOHN F. CHERRY,
President Judge

[Pa.B. Doc. No. 22-51. Filed for public inspection January 7, 2022, 9:00 a.m.]