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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 11 MM 2023

COMMONWEALTH OF PENNSYLVANIA,

PETITIONER

v.

MICHAEL NOEL YARD,
RESPONDENT

BRIEF OF THE RESPONDENT

Appeal from the Order dated January 25, 2023 granting the Defendant's Motion to Set Bail and Motion for Nominal Bail Pursuant to Rule 600, in the Court of Common Pleas of Monroe County, Forty-Third Judicial District, Commonwealth of Pennsylvania, by the Honorable Judge Jennifer Harlacher Sibum, at the case docketed at number 1222 CRIMINAL 2022.

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SUMMARY OF ARGUMENTS

In order to deny a defendant bail, the Commonwealth must present evident proof or great presumption that the defendant falls into one of three categories: that the defendant has committed a capital offense, that a defendant has committed an offense that carries a maximum sentence of life imprisonment, or that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community. Pa. Const. Art. 1 §14. The proof of proof is evident or presumption great burden of proof applies to all three categories for which bail can be denied. This interpretation is supported by this Honorable Court's reasoning in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), as well as by the examination of legislative history, and the application of the cannons of statutory construction.

When determining whether a defendant in a criminal proceeding should be denied bail under any exception to the right to bail listed in Pa. Const. Art. I §14, the bail court must consider only legally competent, credible, and admissible evidence in order to make the quantitative and qualitative assessment required by

the *Talley* court in order determine whether the Commonwealth has shown by proof evident or presumption great that a defendant should be denied bail.

ARGUMENT

I. THE HOLDING IN *COMMONWEALTH V. TALLEY*, 265 A.3D 485 (PA. 2021) APPLIES THE SAME BURDEN OF PROOF THAT "PROOF IS EVIDENT OR PRESUMPTION GREAT" WHEN THE COMMONWEALTH SEEKS TO DENY BAIL ON THE BASIS THAT DEFENDANT HAS BEEN CHARGED WITH AN OFFENSE FOR WHICH THE MAXIMUM SENTENCE IS LIFE IMPRISONMENT.

In the instant case, the Commonwealth seeks to deny Respondent's bail pursuant to the life imprisonment exception to the right to bail codified in Article 1 Section 14 of the Pennsylvania Constitution. The current version of Pa. Const. Art. I §14 provides:

> "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 presumption 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."

Though the Commonwealth concedes that a defendant charged with an offense for which the maximum penalty is life imprisonment is entitled to bail under the current amended

version Pa. Const. Art. I §14, the Commonwealth contends that "plain language" of Pa. Const. Art. I §14 separates the "proof is evident or presumption great" burden of proof from the first two exceptions to Pa. Const. Art. I §14's right of all prisoners to be bailable. The Commonwealth attempts to insert a burden of proof not contemplated in any previous version of Pa. Const. Art. I §14. This assertion is not supported by the legislative history or the legislative intent behind Pa. Const. Art. I §14, nor is it supported by this Honorable Court's reasoning in *Talley*.

The Commonwealth argues that the plain language of Pa. Const. Art. I §14, shows that the Commonwealth must meet the standard of evident proof or great presumption when the Commonwealth seeks denial of bail under the "dangerousness exception" – those cases in which no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community. In their argument, the Commonwealth depends solely on a principle of grammar. This argument lacks merit. The language of Pa. Const. Art. I §14 is not plain, which is apparent from the differences in interpretation from

this Honorable Court, the Commonwealth, the Appellee, the Office of the Attorney General, the Pennsylvania Superior Court, the Criminal Procedural Rules Committee, and other trial courts. The grammar principle relied on by the Commonwealth is that language of qualifying words apply only to words immediately preceding them. The principle should not be rigidly applied when "the intent or meaning of the context or disclosed by an examination of the entire act" shows that grammar should not prevail. *Commonwealth v. Packer*, 798 A.2d 192, 198 (Pa. 2002), quoting *John Hancock Property & Casual Ins. Co. v. Commonwealth Ins. Dep't*, 554 A.2d 618, 622 (Pa. Cmwlth. 1989).

To properly assess the construction of a constitutional provision, this Honorable Court has looked to both constitutional history and case law. *Blum v. Merrell Dow Pharmaceuticals*, 626 A.2d 537, 538 (Pa. 1993). In evaluating a separate subsection of Article I, Pa. Const. Art. I §8, this Honorable Court reviewed prior case law and the values underlying previous decisions to provide guidance on how to interpret constitutional provisions. *Com. v. Alexander*, 243 A.3d 177 (Pa. 2020).

This Honorable court examined the previous version of Pa. Const. Art. I §14 in *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1976). In *Truesdale*, this Honorable Court examined the history and case law of the pre-amended version Pa. Const. Art. I §14. The pre-amended version of Pa. Const. Art. I §14 provided that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." The *Truesdale* Court held that a person charged with an offense for which the maximum penalty is life imprisonment was entitled to the same right to bail as a person charged with any other offense. The *Truesdale* Court held that the burden of proof included in the statute of "proof is evident or presumption great" provision for limiting the right to bail applied only to capital offenses. *Id.* at 831-32, 834-35. In its reasoning, the *Truesdale* Court examined the history of the right to bail in Pennsylvania and its strong reliance on the presumption of innocence, and the related general abhorrence for the notion of preventive detention without bail. *Id.* at 834-35. The *Truesdale* Court stated that the Pa. Const. Art. I §14 bail provision

> "embodies three core tenets of our system of criminal justice: '(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to present his defense.'"
>
> *Truesdale*, 296 A.2d 824, 834-35 (Pa. 1976).

After the *Truesdale* case, Pa. Const. Art. I §14 was amended to its current version in 1998. It is this amendment that the Commonwealth believes attributed the "proof is evident or presumption great" burden of proof only to cases in which no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community, and excludes from that burden of proof the cases in which defendants were charged with a capital offense or charged with an offense that carries a maximum penalty of life imprisonment. The Commonwealth contends that its position is supported by the examination of Section 5701 of the Judicial Code. The original version of 42 Pa.C.S.A. §5701, enacted in 1976 and effective in 1978, provides that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." This section was amended in 2009 by 2009

Pa. Legis. Serv. Act 2009-39(West), which amended Section 5701 to mirror the 1998 amendment to Pa. Const. Art. I §14. The Commonwealth, however, ignores that the legislature's 2009 amendment does not reflect on any intent from the 1998 amendment made eleven years earlier. Further, the amendment Section 5701 is irrelevant to this Honorable Court's construction of Pa. Const. Art. I §14. The separation of powers prevents the legislative branch from determining how the judicial branch interprets legislation. This Honorable Court has previously held that the legislature "may not direct a statute to be construed in any certain way" by this Honorable Court. *Com. v. Sutley*, 378 A.2d 780 (Pa. 1977), quoting *Leahy v. Farrell*, 66 A.2d 577, 579 (Pa. 1949).

The Commonwealth also fails to acknowledge that "the emphasis in constitutional construction is upon the intent of the ratifying citizenry." *In re Bruno*, 101 A.3d 660 (Pa. 2014). As this Honorable Court has previously stated, "constitutional provisions are not to be read in a strained or technical manner. Rather they must be given the ordinary, natural interpretation the ratifying

voters would give them" *Commonwealth ex rel. Paulinsky v. Isaac*, 397 A.2d 760, 765 (Pa. 1979). When the Office of the Attorney General proposed the 1998 amendment to Pa. Const. Art. I §14, it was required to submit a plan English statement to Pennsylvania voters to explain the purpose, limitations, and effects of the ballot question. 25 P.S. §621.1. The Office of the Attorney General provided the following "plain English Statement" to Pennsylvania voters for the proposed 1998 amendment to Pa. Const. Art. I §14:

> The purpose of the ballot question is to amend the Pennsylvania Constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail. Presently, the Constitution allows any person accused of a crime to be released on bail unless the proof is evident or presumption great that the person committed a capital offense. A capital offense is an offense punishable by death. The Pennsylvania Supreme Court has ruled that a person accused of a crime that is not a capital offense may be denied bail only if no amount or condition of bail will assure the accused's presence at trial.
>
> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense

punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.

The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Commonwealth v. Grimaud, 865 A.2d 835, 842-43 (Pa. 2005) (quoting plain English statement).[1]

The "plain English statement" provided by the Office of the Attorney General directly contradicts both the Commonwealth's and the Office of the Attorney General's assertion that the "proof is evident or presumption great" burden of proof does not apply to defendants that are charged with offenses for which the maximum penalty is life imprisonment. The amendment, as it was presented to Pennsylvania voters, clearly and unambiguously applies the "proof is evident or presumption great" burden of proof applies to defendants who are charged with a crime for which the maximum penalty is life imprisonment, as well as the other two categories of defendants for whom bail could potentially be denied.

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[1] The *Grimaud* Court rejected a challenge to this plain English statement, contending that it was misleading and insufficient. *Id.* at 843-44. "The Attorney General here provided a sufficient explanation of the purpose, limitations, and effects of the bail amendment and thus complied with statutory requirements." *Id.*

The most recent decision rendered by this Honorable Court analyzing Pa. Const. Art. I §14 is the *Talley* case. Though the *Talley* opinion directly addresses the "dangerousness" exception In *Talley*, this Honorable Court stated in the opinion that the "proof is evident or presumption great" burden of proof applies to all three categories of exceptions to the right to bail under Pa. Const. Art. I §14. In the *Talley* opinion, this Honorable Court reviewed the text and history of Pa. Const. Art. I §14, as well as any relevant case law, policy considerations, and an extra-judicial case law from states that have similar bail provisions. *Talley*, 256 A.3d 485, 513(Pa. 2021). In its reasoning, this Honorable Court states:

> "The opening clause establishes a right to bail for all prisoners, while the remainder of the text provides an exception to the right for three classes of defendants. To satisfy one of these exceptions, the Commonwealth must offer 'evident' proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. If the Commonwealth fails to satisfy its burden of proof, the trail court cannot deny bail."
>
> *Id.,* quoting *Truesdale*, 296 A.2d at 836.

The Commonwealth erroneously argues in the instant case that this Honorable Court's reasoning in the *Talley* is merely "obiter dictum," and does not apply to the life imprisonment exception under Pa. Const. Art. I §14. This reasoning, however, is not "obiter dictum." It is the judicial analysis that is integral to interpreting exceptions to the right to under Pa. Const. Art. I §14.[2]

Ignoring the specific language of the *Talley* opinion, the Commonwealth asks this Honorable court to insert a different burden of proof for the life imprisonment exception – one that requires the Commonwealth to provide merely a *prima facie* showing that a defendant has committed an offense that carries a maximum term of life imprisonment. This Honorable Court explicitly rejected applying a *prima facie* burden of proof to show that a prisoner's bail should be denied. *Talley* at 518. As Justice Mundy notes in her concurring opinion, if the legislature, when

[2] Although it is not binding, this Honorable Court has previously noted that a court should consider "very weighty judicial dictum" when deciding a case. *Lindenmuth v. Safe Harbour Water Power*, 163 A. 159, 161 (Pa. 1932).

enacting the 1998 amendment to Pa. Const. Art. I §14, the legislature specifically did not require a different burden of proof to be applied to the life imprisonment exception, when it easily could have done so. *Id.* at 540 (Mundy, J., dissenting).

After thoroughly analyzing the history of the right to bail and the plain language of the statue, this Honorable Court found that the "proof is evident, or presumption great" standard requires more than a mere showing of evidence to establish *prima facie* case that a prisoner is not bailable. This Honorable state in *Talley*, that the language "modifying 'proof' with 'evident,' and 'presumption' with 'great,' the clause's text demonstrates that an assessment of the Commonwealth's evidence does not turn on a bare probabilistic assessment of legal sufficiency alone." *Id.* at 517. With a *prima facie* standard, the bail court would be precluded from assessing the persuasiveness or credibility. As this Honorable Court notes in *Talley*, Pa. Const. Art. I §14 requires the bail court to consider the quality of the evidence offered to support a denial of bail. *Id.* This Honorable Court ultimately concludes in *Talley*,

> "In sum, a trial court may deny bail under Article I, Section 14 when the Commonwealth's proffered evidence makes it substantially more likely than not that the accused (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. That determination requires a qualitative assessment of the Commonwealth's case. If the balance of the evidence is rife with uncertainty, legally is incompetent, requires excessive inferential leaps, or lacks any indicia of credibility, it simply is not evident proof, nor can it give rise to a great presumption, that the accused is not entitled to bail."
>
> *Id*. at 525-26.

In the wake of the *Talley* opinion, both the Pennsylvania Superior Court and the Supreme Court of Pennsylvania Criminal Rules Committee have acknowledged that the Commonwealth meet the standard of "proof is evident, or presumption great" for all three categories of the exceptions to the right to bail contained in Pa. Const. Art. I §14 in order to deny a defendant's bail. In Case 15 MDM 2023, the Superior Court in the Middle District of Pennsylvania remanded a bail proceeding in a Lancaster County criminal matter. The order from the Superior Court specifically states:

> "The instant matter is remanded to the trial court to conduct an evidentiary hearing on Petitioner's January 24, 2023 petition for writ of *habeas corpus* within 30 days of this Order. At the hearing, the trial court is directed to determine Petitioner's eligibility for bail under the standard set forth in ***Commonwealth v. Talley***, 265 A.3d 485 (Pa. 2021) (in order to deny a defendant bail, the Commonwealth must establish that a defendant has committed a nonbailable offense by the "proof is evident or presumption is great" standard).

A true and accurate copy of the Order is attached as Exhibit "A." Further, Supreme Court of Pennsylvania Criminal Rules Committee has proposed an amendment of Pa.R.Crim.P. 520.16 based on this Honorable Court's Opinion in *Talley*. A true and accurate copy of the Criminal Procedural Rules Committee Notice of Proposed Rule Making (hereinafter "Proposed Rules") is attached as Exhibit "B." The proposed change to the rule reads as follows:

> "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"

Proposed Rules at 35.

Given that multiple entities have interpreted that this Honorable Court's ruling in *Talley* applies the "proof is evident, or presumption great" standard to the life imprisonment exception to the right to bail under Pa. Const. Art. I §14, it is clear that the Commonwealth's assertion that it should merely have to present a prima facie showing of evidence to deny bail to a defendant charged with a life imprisonment offense is erroneous.

II. THE BAIL COURT SHOULD CONSIDER ONLY LEGALLY COMPETENT , CREDIBLE, AND ADMISSIBLE EVIDENCE NECESSARY TO MAKE A QUANTITATIVE AND QUALITATIVE ASSESSMENT NECESSARY TO DETERMINE IF THE COMMONWEALTH HAS MET ITS BURDEN OF PROOF TO DENY A DEFENDANT'S BAIL PURSUANT TO ARTICLE I SECTION 14 OF THE PENNSYLVANIA CONSTITUTION.

The Commonwealth did not present legally competent evidence at the bail hearing. "[T]he Commonwealth cannot sustain its burden at a bail hearing with **hearsay or otherwise legally incompetent evidence** because a jury could not consider such evidence in reaching its verdict." *Com. v. Talley*, 265 A.3d 485, 519 (Pa. 2021). Legally competent evidence comes in two forms:

> "Proof is evident or presumption great" calls for a substantial quality of legally competent evidence, **meaning evidence that is admissible under either the evidentiary rules or, or that which is encompassed in the criminal rules addressing release criteria.**

Com. v. Talley, 265 A.3d 485, 524 (Pa. 2021).

In the instant case, the bail court concluded that the Commonwealth failed to meet their burden of proof to show by evident proof, or great presumption, that Respondent committed

an offense that carries a maximum sentence of life imprisonment. The first bail hearing in the case was held on May 24, 2022, at which time the parties entered into evidence a stipulation of facts on the issue of whether Respondent was entitled to bail. It is important to note that there was no stipulation from the Respondent that deadly force was used on a vital organ. There was no testimony of an outward sign of injury; all alleged injuries were only seen by microscopic slides. There is no evidence of "repeated" or severe blows to the head, or any blow to the head, so no inference of 1st degree murder can be made viewing the evidence in the light most favorable to the Commonwealth. Respondent argued this issue at both bail hearings.

The matter was taken under advisement, and the bail court issued its decision on the record on May 27, 2022, granting Respondent's motion, and setting bail at $200,000 secured with extensive nonmonetary conditions that would appropriately address any concerns to the safety of the public. (RR 77a-85a). The Commonwealth filed an Emergency Motion for Stay and Petition for Review with the Pennsylvania Superior Court, and a

temporary stay was granted that day. In the trial court's Statement of Reason Pursuant to Superior Court Order filed June 6, 2022, the trial court specifically requested that the bail proceedings be remanded because the trial court relied on a cold record of stipulated facts rather than witness testimony. (Statement of Reason Pursuant to Superior Court Order Filed June 6, 2022, at 4). On the fourth page of the above Statement of Reason, the trial court also states that the stipulated facts presented at the time of the bail hearing did not show evident proof or presumption great that Respondent should be denied bail pursuant to *Talley*, 265 A.3d 485 (Pa. 2021). The Superior Court vacated the bail order and remanded the case for further proceedings on July 12, 2022. RR 87a. On August 15, 2022, pursuant to the Superior Court order, the trial court scheduled a hearing on the remand of Respondent's Motion to Set Bail for October 25, 2022. On October 20, 2022, Respondent filed a Motion for Nominal Bail, relying on *Com. v. Dixon*, 589 Pa. 28 (2006), 907 A.2d 468 (Pa. 2006). On October 25, 2022, the trial

court conducted the remanded hearing on Respondent's Motion to Set Bail.

At the time of the October 25, 2022 bail hearing, the Commonwealth submitted legally incompetent evidence that did not allow the bail court to assess the quality of the evidence presented pursuant to *Talley.* The only evidence presented was a recording of the preliminary hearing, the transcript of the preliminary hearing, an autopsy report, and the affidavit of probable cause – all of which are hearsay, and fall under no exception. At the time of the hearing, counsel of Respondent objected to the hearsay being submitted, relying on the trial court's Statement of Reason submitted to the Superior Court, which indicated that the trial court could not rely on a cold record to determine if Respondent should be denied bail. RR 311a-316a. It is therefore not legally competent bail hearing evidence under *Talley*. Counsel for Respondent also indicated that even if the stipulated facts and the exhibits provided by the Commonwealth at the time of the hearing were entered into evidence, the Commonwealth still could not show evident proof or presumption

great that Respondent should be denied bail pursuant to *Talley*. RR at 317a.

On January 25, 2023, the trial court correctly granted Respondent's Motion for Nominal Bail, which imposed even more extensive conditions than the previous order granting bail. RR 331a-338a.

This Honorable Court's opinion in *Talley* prohibits the Commonwealth from relying on either preliminary hearing transcripts or exhibits."[B]ecause a bail court must be able to evaluate the quality of the evidence, it also cannot rely upon a cold record or untested assertions alone." *Com. v. Talley*, 265 A.3d 485, 524 (Pa. 2021) *citing Com. ex rel. Alberti v. Boyle*, 195 A.2d 97, 98 (Pa. 1963) (admonishing courts for deciding "this very important question on basis of the testimony presented at" an earlier hearing). The Commonwealth ignores this language in *Talley*.

At the preliminary hearing, the magisterial district judge is not permitted to assess credibility. *Com. v. Carmody*, 799 A.2d 143, 149 (Pa. Super. Ct. 2002). The Defendant also did not have access

to any discovery, save for the autopsy report, which was provided during the preliminary hearing. Counsel did not have a fair and meaningful opportunity to challenge the testimony presented at the preliminary hearing, given that the evidence was not in the Defendant's possession. *Com. v. Cruz-Centeno*, 668 A.2d 536, 542-43 (Pa. Super. Ct. 1995).

The trial court cannot assess credibility from the cold record of a preliminary hearing where the defense cannot question the witnesses on discrepancies, inconsistencies, and criminal intent which are revealed by the discovery records. This is why the *Talley* court prohibits courts from denying bail outright based evidence from a prior hearing. If a *Talley* bail hearing could rely on a preliminary hearing without live evidence, the trial court would be ignoring the burden of proof recognized by the *Talley* court, and would simply be deciding the bail matter pursuant to a prima facie standard.

Further, the trial court specifically asked the Pennsylvania Superior Court to remand this case for a new bail hearing based on

live evidence. In its Statement of Reason Pursuant to Superior Court Order Filed June, 6, 2022, the trial court explicitly stated that it committed an error of law in relying on a cold record of stipulated facts based on testimony presented at the preliminary hearing. The trial court stated that it was unable to make the quantitative and qualitative analysis required by *Talley* to decide whether the Commonwealth proved by "evident" proof of "great" presumption that Defendant's bail should be denied outright. The trial court explicitly stated that listening to witness testimony would allow the Court to make the appropriate quantitative and qualitative analysis required by *Talley*. (Statement of Reason Pursuant to Superior Court Order Filed June 6, 2022, at 4).

In sum, the trial court cannot treat as either presented or proven any of the factual assertions in the exhibits presented at the hearing on Defendant's Motion to Set Bail on October 25, 2022. This would violate *Talley*'s mandate that the Court make a quantitative and qualitative analysis of whether the Commonwealth's evidence meets the standard of "proof is evident,

or presumption great" that the Defendant falls within any category in which bail can be denied outright.

Despite the fact that this case was remanded at the trial court's request for a hearing with live testimony, and that the Commonwealth again provided only a cold record of testimony provided at the time of the preliminary hearing, the Commonwealth again failed to meet its burden of proof that Defendant's bail should be denied outright. Because the Commonwealth did not submit legally competent evidence to meet the standard established in *Talley* that "proof is evident, or presumption great" that Respondent committed an offense punishable by a maximum penalty of life imprisonment, this Honorable Court should affirm the trial court's order dated January 25, 2023, granting Respondent's Motion to Set Bail and Respondent's Motion for Nominal Bail Pursuant to Rule 600.

CONCLUSION

Accordingly with the above reasons discussed in this brief, this Court should affirm the trial court's order granting Respondent's Motion to Set Bail and Motion for Nominal Bail Pursuant to Rule 600.

J. Noelle Wilkinson, Esq.
Attorney for Appellee

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 2135

I, counsel for the Appellee, hereby certify that the foregoing Brief is in compliance with Pa.R.A.P. 2135 which, among other things, requires that a principal brief shall not exceed 14,000 words and that a reply brief shall not exceed 7,000 words.

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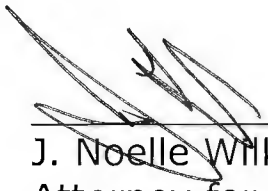
CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.



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SUMMARY OF ARGUMENTS

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ARGUMENT

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In the instant case, the Commonwealth seeks to deny Respondent's bail pursuant to the life imprisonment exception to the right to bail codified in Article 1 Section 14 of the Pennsylvania Constitution. The current version of Pa. Const. Art. I §14 provides:

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Though the Commonwealth concedes that a defendant charged with an offense for which the maximum penalty is life imprisonment is entitled to bail under the current amended

version Pa. Const. Art. I §14, the Commonwealth contends that "plain language" of Pa. Const. Art. I §14 separates the "proof is evident or presumption great" burden of proof from the first two exceptions to Pa. Const. Art. I §14's right of all prisoners to be bailable. The Commonwealth attempts to insert a burden of proof not contemplated in any previous version of Pa. Const. Art. I §14. This assertion is not supported by the legislative history or the legislative intent behind Pa. Const. Art. I §14, nor is it supported by this Honorable Court's reasoning in *Talley*.

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this Honorable Court, the Commonwealth, the Appellee, the Office of the Attorney General, the Pennsylvania Superior Court, the Criminal Procedural Rules Committee, and other trial courts. The grammar principle relied on by the Commonwealth is that language of qualifying words apply only to words immediately preceding them. The principle should not be rigidly applied when "the intent or meaning of the context or disclosed by an examination of the entire act" shows that grammar should not prevail. *Commonwealth v. Packer*, 798 A.2d 192, 198 (Pa. 2002), quoting *John Hancock Property & Casual Ins. Co. v. Commonwealth Ins. Dep't*, 554 A.2d 618, 622 (Pa. Cmwlth. 1989).

To properly assess the construction of a constitutional provision, this Honorable Court has looked to both constitutional history and case law. *Blum v. Merrell Dow Pharmaceuticals*, 626 A.2d 537, 538 (Pa. 1993). In evaluating a separate subsection of Article I, Pa. Const. Art. I §8, this Honorable Court reviewed prior case law and the values underlying previous decisions to provide guidance on how to interpret constitutional provisions. *Com. v. Alexander*, 243 A.3d 177 (Pa. 2020).

This Honorable court examined the previous version of Pa. Const. Art. I §14 in *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1976). In *Truesdale*, this Honorable Court examined the history and case law of the pre-amended version Pa. Const. Art. I §14. The pre-amended version of Pa. Const. Art. I §14 provided that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." The *Truesdale* Court held that a person charged with an offense for which the maximum penalty is life imprisonment was entitled to the same right to bail as a person charged with any other offense. The *Truesdale* Court held that the burden of proof included in the statute of "proof is evident or presumption great" provision for limiting the right to bail applied only to capital offenses. *Id.* at 831-32, 834-35. In its reasoning, the *Truesdale* Court examined the history of the right to bail in Pennsylvania and its strong reliance on the presumption of innocence, and the related general abhorrence for the notion of preventive detention without bail. *Id.* at 834-35. The *Truesdale* Court stated that the Pa. Const. Art. I §14 bail provision

> "embodies three core tenets of our system of criminal justice: '(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to present his defense.'"
>
> *Truesdale*, 296 A.2d 824, 834-35 (Pa. 1976).

After the *Truesdale* case, Pa. Const. Art. I §14 was amended to its current version in 1998. It is this amendment that the Commonwealth believes attributed the "proof is evident or presumption great" burden of proof only to cases in which no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community, and excludes from that burden of proof the cases in which defendants were charged with a capital offense or charged with an offense that carries a maximum penalty of life imprisonment. The Commonwealth contends that its position is supported by the examination of Section 5701 of the Judicial Code. The original version of 42 Pa.C.S.A. §5701, enacted in 1976 and effective in 1978, provides that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." This section was amended in 2009 by 2009

Pa. Legis. Serv. Act 2009-39(West), which amended Section 5701 to mirror the 1998 amendment to Pa. Const. Art. I §14. The Commonwealth, however, ignores that the legislature's 2009 amendment does not reflect on any intent from the 1998 amendment made eleven years earlier. Further, the amendment Section 5701 is irrelevant to this Honorable Court's construction of Pa. Const. Art. I §14. The separation of powers prevents the legislative branch from determining how the judicial branch interprets legislation. This Honorable Court has previously held that the legislature "may not direct a statute to be construed in any certain way" by this Honorable Court. *Com. v. Sutley*, 378 A.2d 780 (Pa. 1977), quoting *Leahy v. Farrell*, 66 A.2d 577, 579 (Pa. 1949).

The Commonwealth also fails to acknowledge that "the emphasis in constitutional construction is upon the intent of the ratifying citizenry." *In re Bruno*, 101 A.3d 660 (Pa. 2014). As this Honorable Court has previously stated, "constitutional provisions are not to be read in a strained or technical manner. Rather they must be given the ordinary, natural interpretation the ratifying

voters would give them" *Commonwealth ex rel. Paulinsky v. Isaac*, 397 A.2d 760, 765 (Pa. 1979). When the Office of the Attorney General proposed the 1998 amendment to Pa. Const. Art. I §14, it was required to submit a plan English statement to Pennsylvania voters to explain the purpose, limitations, and effects of the ballot question. 25 P.S. §621.1. The Office of the Attorney General provided the following "plain English Statement" to Pennsylvania voters for the proposed 1998 amendment to Pa. Const. Art. I §14:

> The purpose of the ballot question is to amend the Pennsylvania Constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail. Presently, the Constitution allows any person accused of a crime to be released on bail unless the proof is evident or presumption great that the person committed a capital offense. A capital offense is an offense punishable by death. The Pennsylvania Supreme Court has ruled that a person accused of a crime that is not a capital offense may be denied bail only if no amount or condition of bail will assure the accused's presence at trial.
>
> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense

punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.

The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Commonwealth v. Grimaud, 865 A.2d 835, 842-43 (Pa. 2005) (quoting plain English statement).[1]

The "plain English statement" provided by the Office of the Attorney General directly contradicts both the Commonwealth's and the Office of the Attorney General's assertion that the "proof is evident or presumption great" burden of proof does not apply to defendants that are charged with offenses for which the maximum penalty is life imprisonment. The amendment, as it was presented to Pennsylvania voters, clearly and unambiguously applies the "proof is evident or presumption great" burden of proof applies to defendants who are charged with a crime for which the maximum penalty is life imprisonment, as well as the other two categories of defendants for whom bail could potentially be denied.

---

[1] The *Grimaud* Court rejected a challenge to this plain English statement, contending that it was misleading and insufficient. *Id.* at 843-44. "The Attorney General here provided a sufficient explanation of the purpose, limitations, and effects of the bail amendment and thus complied with statutory requirements." *Id.*

The most recent decision rendered by this Honorable Court analyzing Pa. Const. Art. I §14 is the *Talley* case. Though the *Talley* opinion directly addresses the "dangerousness" exception In *Talley*, this Honorable Court stated in the opinion that the "proof is evident or presumption great" burden of proof applies to all three categories of exceptions to the right to bail under Pa. Const. Art. I §14. In the *Talley* opinion, this Honorable Court reviewed the text and history of Pa. Const. Art. I §14, as well as any relevant case law, policy considerations, and an extra-judicial case law from states that have similar bail provisions. *Talley*, 256 A.3d 485, 513(Pa. 2021). In its reasoning, this Honorable Court states:

> "The opening clause establishes a right to bail for all prisoners, while the remainder of the text provides an exception to the right for three classes of defendants. To satisfy one of these exceptions, the Commonwealth must offer 'evident' proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. If the Commonwealth fails to satisfy its burden of proof, the trail court cannot deny bail."
>
> *Id.,* quoting *Truesdale*, 296 A.2d at 836.

The Commonwealth erroneously argues in the instant case that this Honorable Court's reasoning in the *Talley* is merely "obiter dictum," and does not apply to the life imprisonment exception under Pa. Const. Art. I §14. This reasoning, however, is not "obiter dictum." It is the judicial analysis that is integral to interpreting exceptions to the right to under Pa. Const. Art. I §14.[2]

Ignoring the specific language of the *Talley* opinion, the Commonwealth asks this Honorable court to insert a different burden of proof for the life imprisonment exception – one that requires the Commonwealth to provide merely a *prima facie* showing that a defendant has committed an offense that carries a maximum term of life imprisonment. This Honorable Court explicitly rejected applying a *prima facie* burden of proof to show that a prisoner's bail should be denied. *Talley* at 518. As Justice Mundy notes in her concurring opinion, if the legislature, when

[2] Although it is not binding, this Honorable Court has previously noted that a court should consider "very weighty judicial dictum" when deciding a case. *Lindenmuth v. Safe Harbour Water Power*, 163 A. 159, 161 (Pa. 1932).

enacting the 1998 amendment to Pa. Const. Art. I §14, the legislature specifically did not require a different burden of proof to be applied to the life imprisonment exception, when it easily could have done so. *Id*. at 540 (Mundy, J., dissenting).

After thoroughly analyzing the history of the right to bail and the plain language of the statue, this Honorable Court found that the "proof is evident, or presumption great" standard requires more than a mere showing of evidence to establish *prima facie* case that a prisoner is not bailable. This Honorable state in *Talley*, that the language "modifying 'proof' with 'evident,' and 'presumption' with 'great,' the clause's text demonstrates that an assessment of the Commonwealth's evidence does not turn on a bare probabilistic assessment of legal sufficiency alone." *Id*. at 517. With a *prima facie* standard, the bail court would be precluded from assessing the persuasiveness or credibility. As this Honorable Court notes in *Talley*, Pa. Const. Art. I §14 requires the bail court to consider the quality of the evidence offered to support a denial of bail. *Id*. This Honorable Court ultimately concludes in *Talley*,

> "In sum, a trial court may deny bail under Article I, Section 14 when the Commonwealth's proffered evidence makes it substantially more likely than not that the accused (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. That determination requires a qualitative assessment of the Commonwealth's case. If the balance of the evidence is rife with uncertainty, legally is incompetent, requires excessive inferential leaps, or lacks any indicia of credibility, it simply is not evident proof, nor can it give rise to a great presumption, that the accused is not entitled to bail."
>
> *Id*. at 525-26.

In the wake of the *Talley* opinion, both the Pennsylvania Superior Court and the Supreme Court of Pennsylvania Criminal Rules Committee have acknowledged that the Commonwealth meet the standard of "proof is evident, or presumption great" for all three categories of the exceptions to the right to bail contained in Pa. Const. Art. I §14 in order to deny a defendant's bail. In Case 15 MDM 2023, the Superior Court in the Middle District of Pennsylvania remanded a bail proceeding in a Lancaster County criminal matter. The order from the Superior Court specifically states:

> "The instant matter is remanded to the trial court to conduct an evidentiary hearing on Petitioner's January 24, 2023 petition for writ of *habeas corpus* within 30 days of this Order. At the hearing, the trial court is directed to determine Petitioner's eligibility for bail under the standard set forth in ***Commonwealth v. Talley***, 265 A.3d 485 (Pa. 2021) (in order to deny a defendant bail, the Commonwealth must establish that a defendant has committed a nonbailable offense by the "proof is evident or presumption is great" standard).

A true and accurate copy of the Order is attached as Exhibit "A." Further, Supreme Court of Pennsylvania Criminal Rules Committee has proposed an amendment of Pa.R.Crim.P. 520.16 based on this Honorable Court's Opinion in *Talley.* A true and accurate copy of the Criminal Procedural Rules Committee Notice of Proposed Rule Making (hereinafter "Proposed Rules") is attached as Exhibit "B." The proposed change to the rule reads as follows:

> "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"

Proposed Rules at 35.

Given that multiple entities have interpreted that this Honorable Court's ruling in *Talley* applies the "proof is evident, or presumption great" standard to the life imprisonment exception to the right to bail under Pa. Const. Art. I §14, it is clear that the Commonwealth's assertion that it should merely have to present a prima facie showing of evidence to deny bail to a defendant charged with a life imprisonment offense is erroneous.

II. THE BAIL COURT SHOULD CONSIDER ONLY LEGALLY COMPETENT , CREDIBLE, AND ADMISSIBLE EVIDENCE NECESSARY TO MAKE A QUANTITATIVE AND QUALITATIVE ASSESSMENT NECESSARY TO DETERMINE IF THE COMMONWEALTH HAS MET ITS BURDEN OF PROOF TO DENY A DEFENDANT'S BAIL PURSUANT TO ARTICLE I SECTION 14 OF THE PENNSYLVANIA CONSTITUTION.

The Commonwealth did not present legally competent evidence at the bail hearing. "[T]he Commonwealth cannot sustain its burden at a bail hearing with **hearsay or otherwise legally incompetent evidence** because a jury could not consider such evidence in reaching its verdict." *Com. v. Talley*, 265 A.3d 485, 519 (Pa. 2021). Legally competent evidence comes in two forms:

> "Proof is evident or presumption great" calls for a substantial quality of legally competent evidence, **meaning evidence that is admissible under either the evidentiary rules or, or that which is encompassed in the criminal rules addressing release criteria.**

Com. v. Talley, 265 A.3d 485, 524 (Pa. 2021).

In the instant case, the bail court concluded that the Commonwealth failed to meet their burden of proof to show by evident proof, or great presumption, that Respondent committed

an offense that carries a maximum sentence of life imprisonment. The first bail hearing in the case was held on May 24, 2022, at which time the parties entered into evidence a stipulation of facts on the issue of whether Respondent was entitled to bail. It is important to note that there was no stipulation from the Respondent that deadly force was used on a vital organ. There was no testimony of an outward sign of injury; all alleged injuries were only seen by microscopic slides. There is no evidence of "repeated" or severe blows to the head, or any blow to the head, so no inference of 1st degree murder can be made viewing the evidence in the light most favorable to the Commonwealth. Respondent argued this issue at both bail hearings.

The matter was taken under advisement, and the bail court issued its decision on the record on May 27, 2022, granting Respondent's motion, and setting bail at $200,000 secured with extensive nonmonetary conditions that would appropriately address any concerns to the safety of the public. (RR 77a-85a). The Commonwealth filed an Emergency Motion for Stay and Petition for Review with the Pennsylvania Superior Court, and a

temporary stay was granted that day. In the trial court's Statement of Reason Pursuant to Superior Court Order filed June 6, 2022, the trial court specifically requested that the bail proceedings be remanded because the trial court relied on a cold record of stipulated facts rather than witness testimony. (Statement of Reason Pursuant to Superior Court Order Filed June 6, 2022, at 4). On the fourth page of the above Statement of Reason, the trial court also states that the stipulated facts presented at the time of the bail hearing did not show evident proof or presumption great that Respondent should be denied bail pursuant to *Talley*, 265 A.3d 485 (Pa. 2021). The Superior Court vacated the bail order and remanded the case for further proceedings on July 12, 2022. RR 87a. On August 15, 2022, pursuant to the Superior Court order, the trial court scheduled a hearing on the remand of Respondent's Motion to Set Bail for October 25, 2022. On October 20, 2022, Respondent filed a Motion for Nominal Bail, relying on *Com. v. Dixon*, 589 Pa. 28 (2006), 907 A.2d 468 (Pa. 2006). On October 25, 2022, the trial

court conducted the remanded hearing on Respondent's Motion to Set Bail.

At the time of the October 25, 2022 bail hearing, the Commonwealth submitted legally incompetent evidence that did not allow the bail court to assess the quality of the evidence presented pursuant to *Talley*. The only evidence presented was a recording of the preliminary hearing, the transcript of the preliminary hearing, an autopsy report, and the affidavit of probable cause – all of which are hearsay, and fall under no exception. At the time of the hearing, counsel of Respondent objected to the hearsay being submitted, relying on the trial court's Statement of Reason submitted to the Superior Court, which indicated that the trial court could not rely on a cold record to determine if Respondent should be denied bail. RR 311a-316a. It is therefore not legally competent bail hearing evidence under *Talley*. Counsel for Respondent also indicated that even if the stipulated facts and the exhibits provided by the Commonwealth at the time of the hearing were entered into evidence, the Commonwealth still could not show evident proof or presumption

great that Respondent should be denied bail pursuant to *Talley*. RR at 317a.

On January 25, 2023, the trial court correctly granted Respondent's Motion for Nominal Bail, which imposed even more extensive conditions than the previous order granting bail. RR 331a-338a.

This Honorable Court's opinion in *Talley* prohibits the Commonwealth from relying on either preliminary hearing transcripts or exhibits."[B]ecause a bail court must be able to evaluate the quality of the evidence, it also cannot rely upon a cold record or untested assertions alone." *Com. v. Talley*, 265 A.3d 485, 524 (Pa. 2021) *citing Com. ex rel. Alberti v. Boyle*, 195 A.2d 97, 98 (Pa. 1963) (admonishing courts for deciding "this very important question on basis of the testimony presented at" an earlier hearing). The Commonwealth ignores this language in *Talley*.

At the preliminary hearing, the magisterial district judge is not permitted to assess credibility. *Com. v. Carmody*, 799 A.2d 143, 149 (Pa. Super. Ct. 2002). The Defendant also did not have access

to any discovery, save for the autopsy report, which was provided during the preliminary hearing. Counsel did not have a fair and meaningful opportunity to challenge the testimony presented at the preliminary hearing, given that the evidence was not in the Defendant's possession. *Com. v. Cruz-Centeno*, 668 A.2d 536, 542-43 (Pa. Super. Ct. 1995).

The trial court cannot assess credibility from the cold record of a preliminary hearing where the defense cannot question the witnesses on discrepancies, inconsistencies, and criminal intent which are revealed by the discovery records. This is why the *Talley* court prohibits courts from denying bail outright based evidence from a prior hearing. If a *Talley* bail hearing could rely on a preliminary hearing without live evidence, the trial court would be ignoring the burden of proof recognized by the *Talley* court, and would simply be deciding the bail matter pursuant to a prima facie standard.

Further, the trial court specifically asked the Pennsylvania Superior Court to remand this case for a new bail hearing based on

live evidence. In its Statement of Reason Pursuant to Superior Court Order Filed June, 6, 2022, the trial court explicitly stated that it committed an error of law in relying on a cold record of stipulated facts based on testimony presented at the preliminary hearing. The trial court stated that it was unable to make the quantitative and qualitative analysis required by *Talley* to decide whether the Commonwealth proved by "evident" proof of "great" presumption that Defendant's bail should be denied outright. The trial court explicitly stated that listening to witness testimony would allow the Court to make the appropriate quantitative and qualitative analysis required by *Talley*. (Statement of Reason Pursuant to Superior Court Order Filed June 6, 2022, at 4).

In sum, the trial court cannot treat as either presented or proven any of the factual assertions in the exhibits presented at the hearing on Defendant's Motion to Set Bail on October 25, 2022. This would violate *Talley*'s mandate that the Court make a quantitative and qualitative analysis of whether the Commonwealth's evidence meets the standard of "proof is evident,

or presumption great" that the Defendant falls within any category in which bail can be denied outright.

Despite the fact that this case was remanded at the trial court's request for a hearing with live testimony, and that the Commonwealth again provided only a cold record of testimony provided at the time of the preliminary hearing, the Commonwealth again failed to meet its burden of proof that Defendant's bail should be denied outright. Because the Commonwealth did not submit legally competent evidence to meet the standard established in *Talley* that "proof is evident, or presumption great" that Respondent committed an offense punishable by a maximum penalty of life imprisonment, this Honorable Court should affirm the trial court's order dated January 25, 2023, granting Respondent's Motion to Set Bail and Respondent's Motion for Nominal Bail Pursuant to Rule 600.

CONCLUSION

Accordingly with the above reasons discussed in this brief, this Court should affirm the trial court's order granting Respondent's Motion to Set Bail and Motion for Nominal Bail Pursuant to Rule 600.

J. Noelle Wilkinson, Esq.
Attorney for Appellee

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 2135

I, counsel for the Appellee, hereby certify that the foregoing Brief is in compliance with Pa.R.A.P. 2135 which, among other things, requires that a principal brief shall not exceed 14,000 words and that a reply brief shall not exceed 7,000 words.

J. Noelle Wilkinson

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYVLANIA Appellant vs MICHAEL YARD Appellee	: : : : :	NO. 11 MM 2023

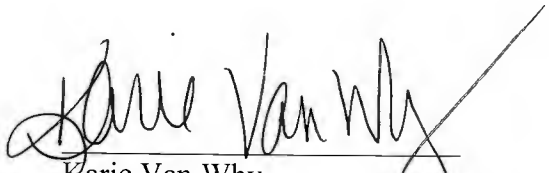
PROOF OF SERVICE

This is to certify that on this, the 29th day of September, 2023, I served a copy of the Brief upon the following persons by handing the same to them personally or to an authorized employee of their office:

Michael Mancuso, ADA
701 Main Steet, Suite 301
Stroudsburg, PA 18360

The Supreme Court of Pennsylvania
Middle District
610 Commonwealth Avenue
PO Box 62575
Harrisburg, PA 17106

Honorable Jennifer Harlacher Sibum
Monroe County Courthouse
Stroudsburg, PA 18360



Karie Van Why
Office of the Public Defender
Monroe County Courthouse
Stroudsburg, PA 18360
(570) 517- 3042

Exhibit "A"

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	Lancaster County Criminal
	:	Division
	:	CP-36-CR-0005278-2022
JERE MUSSER BAGENSTOSE	:	
	:	
Petitioner	:	
	:	No. 15 MDM 2023

ORDER

Upon consideration of Petitioner's March 21, 2023 "Petition for Specialized Review Pursuant to Rule 1610," "Application for Expedited Review," and "Application for Leave to Proceed *In Forma Pauperis*," the following is hereby **ORDERED:**

The "Application for Leave to Proceed *In Forma Pauperis*" is hereby **GRANTED**.

The "Application for Expedited Review" is hereby **GRANTED**.

The "Petition for Specialized Review Pursuant to Rule 1610," is hereby **GRANTED** as follows:

The instant matter is remanded to the trial court to conduct an evidentiary hearing on Petitioner's January 24, 2023 petition for writ of *habeas corpus* within 30 days of the date of this Order. At the hearing, the trial court is directed to determine Petitioner's eligibility for bail under the standard set forth in ***Commonwealth v. Talley***, 265 A.3d 485 (Pa. 2021) (in order to deny a defendant bail, the Commonwealth must establish that a defendant has committed a nonbailable offense by the "proof is evident or presumption great" standard).

If the trial court concludes that the Commonwealth has established by the "proof is evident or presumption great" standard that Petitioner has committed a nonbailable offense, the trial court is directed to provide a statement of reasons for the determination in writing or on the record, ***see*** Pa.R.Crim.P. 520(A), after which, Petitioner may seek relief in this Court pursuant to Chapter 16 of the Rules of Appellate Procedure.

TRUE COPY FROM RECORD
Attest: APR 28 2023
Deputy Prothonotary
Superior Court of PA - Middle District

PER CURIAM

Superior Court of Pennsylvania

Middle District

Joseph D. Seletyn, Esq.
Prothonotary
Lili Hagenbuch
Deputy Prothonotary

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(717) 772-1294
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April 28, 2023

RE: Com. v. Bagenstose, J.
No. 15 MDM 2023
Trial Court Docket No: CP-36-CR-0005278-2022

Dear Anthony John Damiano
Curt W. Schulz

Enclosed please find a copy of an order dated April 28, 2023 entered in the above-captioned matter. Pursuant to the foregoing Order, a certified copy of same is being sent to the trial court judge and the trial court.

Respectfully,

Lili Hagenbuch
Deputy Prothonotary

/vsl
Enclosure
cc: Mary Anater, Clerk of Courts
Mark David Fetterman, Esq.
Andrew James Gonzalez, Esq.
Michelle Ann Henry, Esq.
The Honorable Merrill M. Spahn, Judge
Christine Leigh Wilson

Exhibit “B”

SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Crim.P. 122; 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); 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 **Friday, September 8, 2023.** 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,

Stefanie J. Salavantis
Chair

Rule 122. Appointment of Counsel.

[(A)]__(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)]__(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)]__(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)]** **subdivision (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 Standards 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)(1)]** **subdivision (a)(1)** 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)] **Subdivision (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)]** **subdivision (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]** **commentary** 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]** **Appointed** 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.

[NOTE: Rule 318 adopted November 29, 1972, effective 10 days hence, replacing prior rule; amended September 18, 1973, effective immediately; renumbered Rule 316 and amended June 29, 1977, and October 21, 1977, effective January 1, 1978; renumbered Rule 122 and amended March 1, 2000, effective April 1, 2001; amended March 12, 2004, effective July 1, 2004; Comment revised March 26, 2004, effective July 1, 2004; Comment revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; Comment revised February 26, 2010, effective April 1, 2010.

***Committee Explanatory Reports*:**

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

Final Report explaining the March 12, 2004 editorial amendment to paragraph (C)(3), and the Comment revision concerning duration of counsel's obligation, published with the Court's Order at 34 Pa.B. 1671 (March 27, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning *Alabama v. Shelton* published with the Court's Order at 34 Pa.B. 1929 (April 10, 2004).

Final Report explaining the April 28, 2005 changes concerning the contents of the appointment order published with the Court's Order at 35 Pa.B. 2855 (May 14, 2005).

Final Report explaining the February 26, 2010 revision of the Comment adding a citation to Commonwealth v. Alberta published at 40 Pa.B. 1396 (March 13, 2010).]

—The following text is entirely new—

Part C: Bail
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.

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. "When the Commonwealth seeks to deny bail, the quality of its evidence must be such that it persuades the bail court that it is substantially more likely than not that the accused is nonbailable, which is just to say that the proof is evident or the presumption great." *Commonwealth v. Talley*, 265 A.3d 485, 524-25 (Pa. 2021).

—The following text is entirely new—

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; and

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

(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 presumption 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." *See also Commonwealth v. Talley*, 265 A.3d 485, 525 (Pa. 2021) ("[W]e hold that when the Commonwealth seeks to deny bail due to the alleged safety risk the accused poses to 'any person and the community,' those qualitative standards demand that the Commonwealth demonstrates that it is substantially more likely than not that (1) the accused will harm someone if he is released and (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm.").

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.

—The following text is entirely new—

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 temporarily 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 subdivision (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) (defendant may not be detained without a judicial determination of probable cause no less than 48 hours after arrest).

—The following text is entirely new—

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.**

(i) 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.

(ii) Except as provided in subdivision (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 subdivision (d), modifies the bail order.

(2) Except as provided in subdivision (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.

(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, subdivision (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.

—The following text is entirely new—

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 subdivision (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 subdivision (a) shall be rescinded. To eliminate unnecessary detention, the court must supervise the detention of any persons held as material witnesses. Any witness detained pursuant to subdivision (b) shall be released when the witness's presence is no longer necessary.

(f) **Status Conference.** The court shall conduct a status conference no less than every 10 days while the witness remains detained under this rule. The

purpose of the status conference is to determine the necessity of continuing to detain the witness.

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 subdivision (c), a witness may be released conditioned upon the witness' written agreement to appear as required. *See* Pa.R.Crim.P. 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.

—The following text is entirely new—

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. 103(d).

—The following text is entirely new—

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) Personal Information:

(i) the family ties of the defendant;

(ii) the defendant's employment status and history; and

(iii) the length of residence in the community.

(2) Current Charge:

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

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

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

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

(v) the victim's immediate risk of substantial physical harm.

(3) Prior Criminal History:

(i) record of convictions, relevant criminal history, and final civil protection orders against the defendant;

(ii) custody status at time of offense;

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

(iv) 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 non-appearance.

"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.

"Civil protection orders" are orders issued pursuant to 23 Pa.C.S. § 6108 (Relief) and 42 Pa.C.S. § 62A07 (Relief).

The bail authority may weigh the evidence against the defendant insofar as probable cause exists to believe that the 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.

—The following text is entirely new—

Rule 520.7. Bail Determination.

Any bail conditions beyond release with general conditions shall be imposed only upon a finding that they are necessary 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.

In making a bail determination consistent with this rule, a bail authority should first determine if releasing the defendant subject to general conditions, *see* Pa.R.Crim.P. 520.8 (Determination: Release with General Conditions), satisfies the purpose of bail. If general conditions are insufficient, the bail authority should consider releasing the defendant subject to both general conditions and nominal bail. *See* Pa.R.Crim.P. 520.9 (Determination: Release on Nominal Bail with General Conditions). If this combination of conditions is insufficient to satisfy the purpose of bail, the bail authority should consider releasing the defendant subject to both general conditions and any non-monetary special conditions necessary to fulfill the purpose of bail. *See* Pa.R.Crim.P. 520.10 (Determination: Release with Non-Monetary Special Conditions). In imposing any non-monetary special conditions, the bail authority should only impose non-monetary special conditions that are individualized to the defendant. *See* Pa.R.Crim.P. 520.10(b). If releasing the defendant subject to general conditions and non-monetary special conditions will not satisfy the purpose of bail, the bail authority should then consider imposing a monetary condition. *See* Pa.R.Crim.P. 520.11 (Determination: Release with Monetary Conditions). Finally, if 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, the defendant should be detained pursuant to Rule 520.16 (Detention).

—The following text is entirely new—

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 those identified on the bail bond 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 subdivision (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 subdivision (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.

—The following text is entirely new—

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.

—The following text is entirely new—

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 fulfill the purpose of bail as provided in Rule 520.1.

(b) **Special Conditions.** Non-monetary special conditions, individualized to the defendant, 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 substance use disorder assessment and comply with all treatment recommendations;

(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 or any witness;

(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 subdivision (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's appearance. 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, 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.

—The following text is entirely new—

Rule 520.11. Determination: Release with Monetary Conditions.

(a) **Necessity.** When general conditions and non-monetary special conditions or combination of conditions are insufficient, a bail authority may, in addition to general conditions and non-monetary special conditions or combination of conditions, impose a monetary condition on a defendant's release 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 financial disclosure form, verified by the defendant, 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 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 subdivision (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 party sureties are not liable for a defendant's new criminal act or other violations of conditions.

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

—The following text is entirely new—

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* Pa.R.Crim.P. 520.15 (Condition Review).

—The following text is entirely new—

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, the consequences of failing to comply with all the conditions of the bail bond, and to whom the defendant shall provide written notice of any change of address as required by Rule 520.8(a)(3).

(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) **Incarceration.** 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 incarcerate 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.

Subdivision (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* Pa.R.Crim.P. 536.

—The following text is entirely new—

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 subdivision (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 subdivisions (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.

—The following text is entirely new—

Rule 520.15. Condition Review.

If a defendant remains incarcerated 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 by a judge of the court of common pleas or by a judge of the Philadelphia Municipal Court no longer than five days after the initial bail determination, subject to:

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

(b) The judge shall reconsider whether the initially imposed condition is the least restrictive bail condition reasonably calculated to meet the purpose of bail, as provided 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 judge for reconsideration of the initial determination.

(e) Upon review, a judge 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 five-day 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 subdivision (a) shall not operate to release the defendant.

At a review of conditions, any information from any source that will aid the judge in conducting the review, including testimony from witnesses, may be presented.

Rule 520.12 requires the bail authority to provide "a recorded or written contemporaneous statement of reasons for any bail determination." This requirement also applies to a judge's determination pursuant to this rule, whether or not bail is modified.

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.

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.

—The following text is entirely new—

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 subdivision (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 subdivision (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.** 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 48 hours of 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 Rule 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 subdivisions (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 subdivision (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).

Regarding subdivision (c), "when the Commonwealth seeks to deny bail due to the alleged safety risk the accused poses to 'any person and the community,' those qualitative standards demand that the Commonwealth demonstrates that it is substantially more likely than not that (1) the accused will harm someone if he is released and (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm." *Commonwealth v. Talley*, 265 A.3d 485, 525 (Pa. 2021). More generally, "[w]hen the Commonwealth seeks to deny bail, the quality of the evidence must be such that it persuades the bail court that it is substantially more likely than not that the accused is nonbailable[.]" *Id.* 524-25.

—The following text is entirely new—

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* Pa.R.Crim.P. 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* Pa.R.Crim.P. 543 and 536.

Pursuant to this rule, the motion, notice, and hearing requirements in subdivisions (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. 1610 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.

—The following text is entirely new—

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 shall include one or more of the following:

(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 subdivision (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.

—The following text is entirely new—

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) When a pretrial risk assessment tool is used, the pretrial risk assessment shall be conducted 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 to a reasonable degree of statistical certainty.

(c) The pretrial risk assessment tool shall be statistically validated prior to adoption and at an established interval thereafter. Validation reports, as well as the data upon which the report is based, including, but not limited to, sufficient data to permit evaluation of the tool across racial and gender groups, 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) The person, department, or agency responsible for completing the assessment shall be designated by local order or rule.

(f) 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.

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

(h) 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. 103(d).

This rule is not intended to prohibit the use of risk assessment tools after a defendant's preliminary arraignment or preliminary hearing. Nor is this rule intended to

prohibit the defendant or the Commonwealth from asking for a reassessment on a motion to modify bail.

Pursuant to subdivision (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 non-appearance and new criminal activity. This baseline then can be compared to the incidence of pretrial failure after implementation. The requirement of subdivision (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 subdivision (f), 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 subdivision (g), a bail recommendation based upon a pretrial risk assessment tool is advisory. Per subdivision (h), the recommendation is intended to inform the bail authority, not dictate an outcome.

—The following text is entirely new—

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 in those judicial districts that have established a program pursuant to 42 Pa.C.S. § 9771.1; or

(3) lodge a detainer subject to subdivision (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 subdivision (a)(1); or

(2) lodge a detainer subject to subdivision (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, including the victim, or of non-appearance at the revocation hearing. In all other cases, the supervising authority shall serve written notice for a hearing pursuant to subdivision (a)(1).

(d) ***Gagnon* I Hearing.** Unless a defendant has requested a detainer pursuant to subdivision (b)(2)(i), a defendant subject to a detainer for a technical

violation pursuant to subdivision (a)(3) or (b)(2) shall be brought before the sentencing judge or other designated judge or authority no later than five days after being detained in the county issuing the detainer for a hearing to determine whether probable cause exists to believe that a violation of a specific condition 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 subdivision (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 subdivision (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) and *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Nothing in this rule is intended to prohibit a defendant from withdrawing a request for a detainer to be issued.

Factors when evaluating risk pursuant to subdivision (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, and the defendant's compliance history while under supervision, including reporting.

At the hearing pursuant to subdivision (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 subdivision (c), until such time as a revocation hearing can be conducted.

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

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

[(B)](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)](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)](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)](i)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)](ii)of the rights, if the defendant is indigent**[, to proceed *in forma pauperis* and]** to proceed with assigned counsel as provided in Rule 122 **(Appointment of Counsel)**.

(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)]__(i)__the record of any stipulation made at a pre-sentence conference; and

[(b)]__(ii)__a verbatim account of the entire sentencing proceeding.

[(E)]__(e)__**Motion to Modify Sentence.** A motion to modify a sentence imposed after a revocation shall be filed within **[10]** __ten__ 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)] __Subdivision (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]** __42 Pa.C.S. § 9775 (Parole without board supervision)__. *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)]** __subdivision (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]** __Pa.R.Crim.P.__ 701.

When a defendant is permitted to plead guilty to multiple offenses as provided in **[paragraph (C)]** __subdivision (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)] subdivision (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)] subdivision (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.

[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).]

SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

REPUBLICATION REPORT

Proposed Amendment of Pa.R.Crim.P. 122; 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 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.

A set of proposed rules developed by the workgroup was submitted to the Criminal Procedural Rules Committee for consideration, and, after some revisions, those rules were published for comment. *See* 52 Pa.B. 205 (January 8, 2022). The Committee received 74 responses, both from organizations and individuals. With the benefit of those comments, the Committee is proposing a number of revisions. While only rules that have been revised from the prior publication are discussed below, all of the rules comprising the January 8, 2022, proposal, except for Rule 1003, are being republished with this report.[1]

The Committee invites all comments, concerns, and suggestions.

Proposal Wide Revisions

Numerous commenters disapproved of the purpose of bail including reasonably assuring "the protection of the defendant from immediate risk of substantial physical self-harm" and reasonably assuring "the integrity of the judicial system." See Proposed Rule 502.1(A)(3) and (A)(4) as previously published. As noted by the commenters, neither is cited as a purpose of bail in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021) or in Article I, § 14 of the Pennsylvania Constitution. Moreover, incarcerating a defendant due to a risk of self-harm may violate the Mental Health Procedures Act. *See* 50 P.S. §§ 7301

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[1] Stylistic amendments have also been made to conform to the recently adopted Supreme Court of Pennsylvania Style and Rulemaking Guide for Procedural and Evidentiary Rules.

and 7302. Consequently, the Committee has removed from the Introduction and from Rules 520.1, 520.3, 520.6, 520.10, and 708.1, and the accompanying commentary, any reference to either protecting the defendant from self-harm or assuring the integrity of the judicial system. The Committee has also removed "a likelihood of the destruction of evidence" as a release factor from Rule 520.6 as also unrelated to the purpose of bail.

Part C: Bail - Introduction

The Committee revised the Introduction to cite *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), which was decided after the proposed new rules and amendments were originally drafted. The following quote from *Talley* has been included in to the Introduction: "When the Commonwealth seeks to deny bail, the quality of its evidence must be such that it persuades the bail court that it is substantially more likely than not that the accused is nonbailable, which is just to say that the proof is evident or the presumption great." The Committee concluded that a seminal decision such as *Talley* should be cited as earlier as possible in the rules governing bail.

Rule 520.1. Purpose of Bail

The Committee has revised the Comment to this rule to cite *Talley* at the conclusion of the first paragraph of the Comment. As the Comment quotes Article I, § 14 of the Pennsylvania Constitution, which includes the standard "the proof is evident or presumption great," reference to *Talley* will provide appropriate guidance to the reader regarding this longstanding standard. *See* Constitution of Pennsylvania, September 28, 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, Section 28 ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.").

Rule 520.2. Bail Determination Before Verdict

A commenter suggested amending subdivision (c)(1) of this rule to read: "At the preliminary arraignment when the bail authority does not temporarily detain the defendant pending a detention hearing . . . ." According to the commenter, denoting a detention ordered at a preliminary arraignment as "temporary" comports with the distinction between a "temporary detention" and "detention," as those terms are used in Proposed Rule 520.16 (Detention). The Committee agreed to the clarification, and subdivision (c)(1) has been revised.

Rule 520.4. Detention of Witnesses

To help prevent a witness from being unnecessarily detained, a subdivision (f) has been added to this rule: "(f) Status Conference. The court shall conduct a status conference no less than every 10 days while the witness remains detained under this

rule. The purpose of the status conference is to determine the necessity of continuing to detain the witness." Requiring a status conference every 10 days will also help avoid a witness becoming "lost," *i.e.*, mistakenly detained beyond any need for their testimony, while also motivating the preservation of the witness's testimony when possible.

Rule 520.6. Release Factors

To be more consistent with an individualized approach to determining bail, a commenter suggested subdivision (a)(2) (Personal Information) should instead be subdivision (a)(1). The Committee agreed. The subdivisions have been reordered as follows: (a)(1) Personal Information, (a)(2) Current Charge, and (a)(3) Prior Criminal History.

Subdivision (A)(1)(e) of this rule as previously published has been removed. That subdivision read: "likelihood of witness intimidation or destruction of evidence by the defendant." The Committee concluded that witness intimidation was encompassed by the safety of the community consideration, *see* Rule 520.1(a)(2), and that preventing destruction of evidence was not a proper purpose of bail.

A commenter recommended that the rule retain "employment history," *see* Pa.R.Crim.P. 523(A)(2), as a factor. As previously published, Proposed Rule 520.6(A)(2)(b), now subdivision (a)(1)(ii), would require the bail authority to consider the defendant's "employment." Consideration of a defendant's employment history was not retained over concern that a defendant's unemployment is often involuntary and, therefore, should not be weighed against the defendant. However, the Committee recognizes that employment history can give a fuller picture of a defendant for a bail authority to consider. For example, a defendant may be currently unemployed after having worked for the same employer for 15 years. Additionally, a potential unintended consequence of the previously proposed change — removing "history" — could be that judges will interpret the amendment as indicating that employment history should no longer be considered. Thus, the Committee has revised subdivision (a)(1)(ii) to include "status and history."

A commenter expressed concern about subdivision (a)(3)(i), which replaced "prior criminal record," which is currently found in Pa.R.Crim.P. 523(A)(8), with "record of convictions." Limiting subdivision (a)(3)(i) of the proposed rule to convictions avoids potential disparities that might result from the inclusion of arrests, which often reflect how communities are policed rather than differences in criminal involvement. A compromise considered by the Committee was to require the bail authority to consider convictions while leaving consideration of a defendant's criminal history discretionary. Whether the number of times a defendant has been arrested is indicative of a risk of future arrest or flight was also debated. As a middle ground, the Committee has revised subdivision (a)(3)(i) to include "relevant criminal history." Subdivision (a)(3)(i) has also been revised

to include "final civil protection orders against the defendant," which could be particularly relevant in domestic violence cases. In full, the subdivision now reads: "record of convictions, relevant criminal history, and final civil protection orders against the defendant." A corollary amendment to the Comment advises that civil protection orders are protection from abuse orders, 23 Pa.C.S. § 6108, and protection of victims of sexual violence and intimidation orders, 42 Pa.C.S. § 62A07.

Rule 520.7. Bail Determination

A commenter suggested rewriting this rule to read: "The determination, including any special conditions, shall be imposed by the bail authority following a finding that they are needed to satisfy the purpose of bail." A concern was also raised over the difficulty of defining "least restrictive." That phrase, as previously proposed, was intended to address the practice of "over-conditioning." To provide clarification, it was suggested that the Comment should explain the required progression of bail determinations as reflected in Proposed Rules 520.10(a) and 520.11(a) and in the Comment to this rule a previously published.

While not choosing to adopt the language suggested, the Committee recognizes the concern raised and has revised the rule to read: "Any bail conditions beyond release with general conditions shall be imposed only upon a finding that they are necessary to satisfy the purpose of bail as provided in Rule 520.1." The rule has also been retitled "Bail Determination," and the Comment has been revised to provide a detailed description of the bail determination process.

Rule 520.8. Determination: Release with General Conditions

As previously published, subdivision (a)(3) of Proposed Rule 520.8 would require a defendant to give notice to the District Attorney of any address change. This subdivision was borrowed from Pa.R.Crim.P. 526(A)(3). A commenter would remove this requirement, noting that a defendant should not have to provide any statement to the attorney for the Commonwealth. A further suggestion was made to move the notification requirement to subdivision (b) (Bond).

Recognizing the inappropriateness of requiring a defendant to contact the attorney for the Commonwealth, the Committee has revised subdivision (a)(3) to inform a defendant that they are required to provide notice to "those identified on the bail bond." Subdivision (c) of Proposed Rule 520.13 (Bail Bond) has been revised to require the bail bond to identify those to whom the defendant must provide written notice of any change of address as now required by this rule. This generality allows each county freedom to designate to whom notification must be provided.

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

"When the proof is evident and the presumption is great" has been removed from this rule as inconsistent with *Talley*. *See Talley*, 265 A.2d at 525 ("The 'proof is evident or presumption great' standard does not govern a bail court's discretion in setting the amount of bail."). After concluding that the above language should be removed from subdivision (a), the Committee rewrote subdivision (a) to provide:

> When general conditions are insufficient, a defendant may be released subject to both general conditions and any non-monetary special conditions necessary to fulfill the purpose of bail as provided in Rule 520.1.

Thus, rather than repeating the purpose of bail in this subdivision, the subdivision simply refers the reader to Rule 520.1.

A commenter advised that "drug or alcohol dependency assessment" in subdivision (b)(9) should be replaced with either "substance use disorder assessment" or "substance abuse assessment" to reflect current usage. The Committee agreed and opted for the former.

Another commenter recommended amending this rule to remind the bail authority that conditions need to be tailored to the particular defendant. In response, the Committee has revised subdivision (b) to read: "Non-monetary special conditions, individualized to the defendant, may include, but are not limited to, the following[.]"

Lastly, a commenter suggested including "witness" in subdivision (b)(12), which, as originally proposed, read: "no contact by the defendant with the victim." The Committee agreed. This subdivision has been revised to conclude, "or any witness."

Rule 520.11. Determination: Release with Monetary Conditions

Uncertainty over the meaning of "verified" as used in subdivision (d)(1) was expressed by a commenter. The commenter questioned whether verification of the financial disclosure form required an independent third-party verification of facts or just a statement offered under penalty of unsworn falsification, *see* 18 Pa.C.S. § 4904 (Unsworn falsification to authorities), or something else. To clarify who is verifying the information on the form, the Committee has revised this subdivision to begin: "A financial disclosure form, verified by the defendant . . . ."

As previously proposed, subdivision (h) read: "A secured monetary condition shall never be imposed for the sole purpose of detaining a defendant until trial." The

Committee has chosen to revise this subdivision to omit "sole." Modifying "purpose" by "sole" implied that detention may be one of several reasons for imposing a secure monetary condition, so long as it is not the only reason. In the Committee's view, detention is not a proper purpose, whether the only purpose or one among many, of a secured monetary condition.

According to a commenter, the last sentence of the penultimate paragraph of the Comment as previously published conflicts with current law. The contested commentary states: "a secured monetary condition should not be imposed to mitigate any other risk other than a failure to appear." This commenter read the above as reducing the purpose of bail to one purpose, ensuring the defendant's appearance. However, the above sentence begins with the clarification: "unless a defendant is the depositor." Thus, the limitation expressed only applies when the defendant is *not* the depositor. Moreover, the penultimate sentence of that paragraph clarifies that "[t]hird part[y] sureties are not liable for a defendant's new criminal act or other violations of conditions." In other words, a third-party surety's obligation is to protect against non-appearance. *See* 42 Pa.C.S. § 5747.1(b)(6) ("No third-party surety shall be responsible to render payment on a forfeited undertaking if the revocation of bail is sought for failure of the defendant to comply with the conditions of the defendant's release other than appearance."). Nonetheless, to avoid any potential confusion, the last sentence of the penultimate paragraph of the Comment, "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," has been removed. That paragraph now concludes: "Third party sureties are not liable for a defendant's new criminal act or other violations of conditions."

Several commenters suggested that subdivision (a) should refer to the imposition of general conditions, and the Committee agreed. Accordingly, subdivision (a) has been revised to read:

> When general conditions and non-monetary special conditions or combination of conditions are insufficient, a bail authority may, in addition to general conditions and non-monetary special conditions or combination of conditions, impose a monetary condition on a defendant's release to satisfy the purpose of bail, as provided in Rule 520.1.

Additionally, as seen above, "non-monetary special conditions" would be replaced with "non-monetary special conditions or combination of conditions."

Rule 520.13. Bail Bond

As noted previously, subdivision (c) of this rule has been revised to require the bail bond to identify those to whom the defendant must provide written notice of any change of address as required by Rule 520.8(a)(3).

To avoid confusion with "detention" as provided for in Rule 520.16, see below, subdivision (f) of this rule has been revised by replacing "detention" with "incarceration" and "detain" with "incarcerate."

Rule 520.15. Condition Review

Some commenters noted that increasing the time between the initial bail determination and a review hearing pursuant to this rule might ease the burden on county resources and result in more conditions being satisfied and more defendants being released without the need for a hearing. It was suggested that expanding the time beyond 72 hours would allow counties to designate a day of the week to conduct all review hearings. Conversely, any timeframe shorter than a week would likely result in review hearings being held daily. The Committee is now proposing that review hearings be held within five days of the initial determination. This timeframe would permit counties to conduct such hearings once a week and provide adequate time for victims to arrange to be present at the review hearing. *See* 18 P.S. § 11.201(2.1)(iii) (providing victims with the right to offer comment regarding a defendant's bail conditions at any proceeding where bail conditions may be modified). The Committee has also removed the language regarding the exclusion of non-business days to encourage counties to conduct hearings prior to the expiration of five days rather than after the expiration of five days when the fifth day falls on a non-business day. (For example, if hearings are regularly scheduled for Friday, but Friday would be the fourth day after a defendant's initial bail determination, that defendant should have his or her hearing on the fourth day rather than waiting an additional week.)

A commenter asked whether a condition review hearing would accommodate witnesses and whether it would be of record. The uncertainty likely resulted from the use of the term "information", *see* Proposed Rule 520.15(d), rather than "evidence." The Committee has revised the Comment to explain: "At a review of conditions, any information from any source that will aid the judge in conducting the review, including testimony from witnesses, may be presented."

The use of "detained" in this rule was questioned by some commenters. It was suggested that the use of "detained" should be limited to Proposed Rule 520.16 (Detention). The Committee agreed. "Detained" has been replaced with "incarcerated" in this rule. This revision is also consistent with the revisions made to Proposed Rule 520.13 discussed above.

A commenter suggested this rule should make clear that a reviewing judge must provide a written or recorded statement of reasons for any determination made pursuant to this rule. In response, the Committee has revised the Comment to instruct the reader that: "Rule 520.12 requires the bail authority to provide 'a recorded or written

contemporaneous statement of reasons for any bail determination.' This requirement also applies to a judge's determination pursuant to this rule, whether or not bail is modified."

The Committee has also revised this rule to require a review of conditions to be conducted by a judge of the court of common pleas or by a judge of the Philadelphia Municipal Court. As previously proposed, a review of conditions would be conducted by the bail authority. The bail authority could either be the original bail authority or another judge sitting as a bail authority as designated by the president judge. According to a commenter, confusion could arise over whether a magisterial district judge would have the authority to modify bail at the defendant's preliminary hearing, *see* Proposed Rule 520.17(b), if bail had been previously modified by a common pleas judge sitting by designation as a bail authority. In other words, would the restriction on further modification contained in Proposed Rule 520.17(d) apply when a common pleas judge sits as a bail authority rather than as a common pleas judge. By requiring a review of conditions to be conducted by either a judge of the court of common pleas or a judge of the Philadelphia Municipal Court, and removing the authority of a president judge to designate a judge to sit as a bail authority, the scenario potentially resulting in confusion can no longer occur.

Rule 520.16. Detention

In reviewing this rule, the Committee concluded that *Talley* should be cited regarding detention when "[n]o available condition or combination of conditions other than detention will reasonably assure that a defendant's release is consistent with the purpose of bail[.]" Proposed Rule 520.16(a)(2). Thus, the Committee has revised the Comment to this rule to include the following:

> Regarding subdivision (c), "when the Commonwealth seeks to deny bail due to the alleged safety risk the accused poses to 'any person and the community,' those qualitative standards demand that the Commonwealth demonstrates that it is substantially more likely than not that (1) the accused will harm someone if he is released and (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm." *Commonwealth v. Talley*, 265 A.3d 485, 525 (Pa. 2021). More generally, "[w]hen the Commonwealth seeks to deny bail, the quality of the evidence must be such that it persuades the bail court that it is substantially more likely than not that the accused is nonbailable[.]" *Id.* 524-25.

For clarity, subdivision (c)(4) has been revised to begin: "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 48 hours of the defendant's first appearance."

Rule 520.18. Responsibilities of Pretrial Services

A commenter expressed concerned that adoption of this rule could result in the elimination of or need for significant modification of current pretrial services. To avoid disrupting existing pretrial services, which may not be able to undertake all of the obligations mandated by the previously published version of this rule, the Committee has revised this rule to require such services to "include one or more of the following[.]" With this revision, counties will have more flexibility in devising their pretrial services and will not need to consider forgoing pretrial services entirely because they cannot manage or afford to provide all of the services required by subdivisions (a) through (f).

Rule 520.19. Pretrial Risk Assessment Tool Parameters

A commenter proposed prohibiting the use of risk assessment tools unless 1) the factors that are used to calculate risk are transparent and 2) data on the tool is made publically available so that experts can determine whether the tool is racially and ethnically neutral. A concern was also raised regarding due process and a defendant's ability to challenge a recommendation resulting from a risk assessment tool if the data relied on to create the algorithm are not public. Another commenter suggested removing from subdivision (c) the requirement that periodic validation demonstrate race and gender neutrality. Although misuse of information made public was a concern, the Committee concluded that the importance of transparency outweighed the possibility of publically available data being misused.

With this in mind, the Committee has revised subdivision (c) to remove the 70% minimum level of predictability requirement, to insert a requirement that data be made available to the public to assess gender and race neutrality, to remove the requirement of demonstrating racial and gender neutrality,[2] and to require data used for validation to be made public. In balance the removal of the 70% minimum level of predictability, subdivision (c) has been revised to conclude: "to a reasonable degree of statistical certainty."

As previously published, subdivision (a) of this rule would have required a pretrial risk assessment to be conducted in all criminal cases prior to the preliminary arraignment or, when no preliminary arraignment is held, prior to the preliminary hearing. Some commenters were concerned that a county incapable of conducting an assessment in

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[2] As one commenter contended, "[t]he requirement of 'racial and gender neutrality,' however, is a chimera. There is no such thing: if the base rates of the predicted outcome differ across race or gender lines in the relevant group of defendants, it is mathematically impossible for risk estimates to be 'neutral' across race/gender lines by every metric."

every criminal case, but capable of conducting an assessment in some cases, would be barred by the rule from doing so. Commenters also expressed concern regarding subdivision (a)'s requirement that a risk assessment be conducted prior to the preliminary arraignment when a preliminary arraignment will be held. These commenters contended that this requirement was not feasible without additional funding. Yet, the purpose of a pretrial risk assessment is to aid a bail authority in setting bail, which is most frequently set at the preliminary arraignment, and thus, a risk assessment tool's usefulness is significantly diminished when not used prior to the preliminary arraignment.

To accommodate those counties unable to conduct assessments in all cases, and to provide some flexibility in the rule, the Committee has revised the Comment to clarify that risk assessment tools may be used at a later time and that nothing in this rule prohibits a defendant or the Commonwealth from asking for a reassessment with the filing of a motion to modify bail. The Committee has also removed "in all criminal cases" from subdivision (a) and revised that subdivision to begin: "[w]hen a pretrial risk assessment tool is used." With these revisions, a jurisdiction would be permitted to use a risk assessment tool in a subset of all criminal cases.

The use of terms like "high, medium, and low" to characterize a defendant's risk was criticized by some commenters. Some commenters suggested using percentages instead. As previously published, subdivision (E) of this rule would have required risk of pretrial failure to be classified as high, moderate, and low. Notably, these classifications — high, moderate, and low — do not necessarily correspond to percentages in an obvious way. As the Committee discussed at length, high risk could, depending on the underlying data, indicate a 10% chance of failure. Generally, a 10% chance of failure is not viewed as a high risk of failure, and thus the use of "high" as a classification could be misleading. The Committee concluded that the designer of a risk assessment tool should determine how to classify levels of risk for their tool rather than having such classification dictated by rule.

In addition to dictating classifications, subdivision (E) as previously published would have required risk classifications to be described to users in terms of success. But as the rule will no longer dictate how risk will be classified, the rule will also no longer dictate how classifications — chosen by the designer of a tool — should be presented to the user. Thus, previously published subdivision (E) has been removed in its entirety.

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

As previously published, subdivision (D), now subdivision (d), of this rule would have required a *Gagnon* I hearing to be conducted within 14 days after the alleged violator had been detained. A commenter proposed shortening that timeframe to no later than 72 hours. As noted by several commenters, the longer an alleged violator remains detained

the more likely the alleged violator will suffer negative consequences, such as losing a job, losing an apartment, or a pet dying. Beyond such tangible losses, an alleged violator with mental health issues would likely suffer significant trauma if held for 14 days before having a *Gagnon* I hearing. The Committee was concerned, however, that 72 hours may not be sufficient time for those involved to properly prepare for a hearing. Thus, as a compromise, the Committee has reduced the timeframe for conducting a *Gagnon* I hearing from 14 days to five days after an alleged violator has been detained

In response to another commenter, the Committee has revised subdivision (c) to include "including the victim" after "ongoing risk to the public's safety."

A commenter questioned how the timeframe for conducting a *Gagnon* I hearing would be calculated if an alleged violator has multiple detainers from multiple counties. To address this concern, the Committee has revised subdivision (d) to read: "a defendant subject to a detainer for a technical violation pursuant to subdivision (a)(3) or (b)(2) shall be brought before the sentencing judge or other designated judge or authority no later than five days after being detained in the county issuing the detainer for a hearing . . . ."

To emphasize the voluntariness of a defendant's request for a detainer pursuant to subdivision (b)(2)(i), the Committee has revised the Comment to advise: "Nothing in this rule is intended to prohibit a defendant from withdrawing a request for a detainer to be issued."

A commenter suggested that subdivision (a)(2) should be amended by inserting "in those judicial districts that have established a program." With this amendment, the subdivision would read: "arrest the defendant in those judicial districts that have established a program pursuant to 42 Pa.C.S. § 9771.1." This recommendation was made in order to clarify that the sanctions provided for in subdivision (g) of § 9771.1 are only available to judicial districts that have established a program pursuant to § 9771.1(a). The Committee accepted this recommendation, and subdivision (a)(2) has been revised accordingly.

To reflect current case law, the Committee has revised subdivision (d) to require a violation to be of a specific condition: "to determine whether probable cause exists to believe that a violation of a specific condition has been committed . . . ." *Commonwealth v. Foster*, 654 A.3d 1240 (Pa. 2019) ("[A] court may find a defendant in violation of probation only if the defendant has violated one of the "specific conditions" of probation . . . .").

Lastly, the first paragraph of the Comment has been revised to include a citation to *Morrissey v. Brewer*, 408 U.S. 471 (1972), which requires a state to choose an "independent decisionmaker" to determine if "reasonable cause exists to believe that conditions of parole have been violated." *Morrissey*, 408 U.S. at 486.