



The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

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August 5, 2020

President Judge Thomas M. Del Ricci
Court of Common Pleas of Montgomery County
Montgomery County Courthouse
PO Box 311
Norristown, PA 19404

Re: Proposed Local Court Rules for Reducing Pre-Trial Detention of Indigent, Non-Violent Defendants in Pennsylvania Judicial Districts

Dear President Judge Del Ricci,

We hope that you are well and that court operations in your judicial district are running as smoothly as possible in light of the COVID-19 pandemic. On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (“Commission”), we write to offer suggested local rules to aid in reducing the pre-trial incarceration of indigent, non-violent defendants charged with low-level offenses in judicial districts throughout the Commonwealth.

Initially, we want to emphasize that our suggestions, set forth at the end of this letter, are optional and were produced independently by our Commission in fulfillment of our mission to promote fairness in the Pennsylvania justice system. As an alternative to the use of the suggested local rules set forth below, other effective means of securing an indigent, non-violent defendant’s appearance in court, without the use of cash bail, can be found in our guide, *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*.¹

As you may know, our Commission was established in 2005 by the three branches of Pennsylvania’s government to implement the recommendations from a 2003 Supreme Court of Pennsylvania study on racial and gender bias in the justice system.² Among other findings, the study revealed that racial, ethnic and socio-economic disparities exist within Pennsylvania’s justice system and they operate to the detriment of all of our citizens, but especially our minority communities. Based upon these findings, our Commission has launched a number of initiatives

¹ Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform* (July 2017), http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf.

² See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003), http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

aimed at addressing disparities during various phases of criminal proceedings. In particular, the Commission conducted extensive research into the functioning of pre-trial systems within the Commonwealth and across the country, including the setting of cash bail and the jailing of indigent defendants for failure to pay fines and court fees.

During its investigation, the Commission found numerous empirical studies that have shown that pre-trial detention has severe consequences for individuals, families and the community at large. When defendants are detained pre-trial, they often lose their employment, housing, access to community services and public assistance and, in some cases, even custody of their children.³ The studies also found that those who are detained pre-trial are more likely to plead guilty or be convicted of the crimes charged, be sentenced to periods of incarceration, and receive carceral sentences that are two times longer, on average, than similarly situated defendants who are released pre-trial.⁴ Indeed, the studies concluded that even low-level offenders who are detained pre-trial are more likely to recidivate than defendants who are released pre-trial, creating a greater risk of danger to the community in the long run.⁵

In effect, the use of cash bail often creates *de facto* pre-trial detention orders for many poor, non-violent criminal defendants, who cannot afford to post the monetary amount required to secure their release. Cash bail also disproportionately impacts defendants of color, as they are less likely to be able to pay the monetary conditions of their bail compared to their white counterparts.⁶

Based upon this research, the Commission produced a guide (referenced above) for Pennsylvania judges and district magistrates that lists, among other suggestions, alternatives to setting cash bail. The purpose of the guide was to ensure that low-income, non-violent defendants do not remain

³ See e.g., Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713-15 (2017); Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, Brennan Center for Justice, 19 (2015), <https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf>. See also *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (stating that pre-trial detention “may imperil the suspect’s job, interrupt his source of income, impair his family relationships [and affect his] ability to assist in preparation of his defense.”).

⁴ See e.g., Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018) (finding that pre-trial release decreases the probability of being found guilty by 14% and decreases the probability of pleading guilty by 10.8%); Heaton, *supra* note 3, at 717 (finding that defendants who are charged with misdemeanors and are detained pre-trial are 25% more likely to be convicted, 43% more likely to be sentenced to jail, and, on average, are more likely to receive jail sentences that are more than twice as long as similarly situated defendants who are released pre-trial); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation, 11 (2013) (finding that low-risk defendants who are detained pre-trial are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than their released counterparts and also serve prison sentences that are 2.84 times longer than their released counterparts).

⁵ See e.g., Heaton, *supra* note 3, at 718; Eaglin, *supra* note 3, at 19-20.

⁶ *Id.* at 20 (“A 2012 study found that African American and Hispanic defendants were more likely to be detained pending trial, less likely to be able to afford their bail (which was assessed at higher amounts), and less likely to be granted release in comparison to similarly situated white defendants.”) (citing Isami Arifuku & Judy Wallen, *Racial Disparities at Pretrial and Sentencing and the Effect of Pretrial Services Programs* 7 (rev. 2013)).

released, solely because they cannot afford to post bail. The guide was distributed to judicial districts soon after its publication in 2017, but a copy can be found on our website at www.painterbranchcommission.com.

Following production of the guide and upon further research, the Commission decided that more needed to be done to help remedy the negative effects that pre-trial detention has on indigent, non-violent criminal defendants and the community. Consequently, the Commission drafted the enclosed suggested bail rules for judicial districts that create a strong presumption against the use of cash bail. In the limited situations that a monetary condition of release may be warranted, the suggested rules establish important procedural safeguards to ensure that defendants are not incarcerated pre-trial solely due to their inability to pay. For example, before the bail authority can impose a monetary condition of bail, we recommend that he or she be required to make findings, either in writing or memorialized on the defendant's docket sheet, about the reasons for imposing such a condition, and conduct a full accounting of the defendant's financial resources to ensure that the defendant can afford to pay the condition of release.

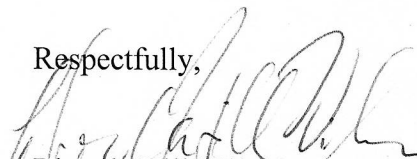
The Commission recognizes that there may be concerns among judges and magistrate judges about the additional time that such an accounting may take. However, to alleviate those concerns, we have prepared a form that can be used to assist bailing authorities in completing the financial review expeditiously. Additionally, the proposed rules list certain situations in which a defendant is presumed to be unable to pay cash bail, such as having an income at or below 125% of the Federal Poverty Guidelines or receiving income-based public assistance.

The suggested rules also propose establishing a mandate against cash bail in misdemeanor cases, unless the bail authority makes findings, either in writing or memorialized on the defendant's docket sheet, that the defendant poses a serious risk to public safety.

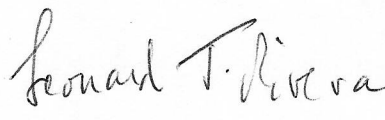
If implemented, we believe the suggested rules will help safeguard the constitutional rights of defendants, while simultaneously easing the financial burden of incarceration that unnecessary pre-trial detention places on counties. Especially during this time of crisis, the suggested rules would also likely result in a decrease of the county's jail population, thereby reducing the spread of COVID-19 throughout the jail, infecting inmates and jail staff alike.

Thank you for your time and consideration. We are available at your convenience if you wish to discuss our proposals further.

Respectfully,


Rhonda Hill Wilson, Esquire
Commission Co-Chair


Lisette McCormick, Esquire
Executive Director


Leonard J. Rivera, Esquire
Commission Co-Chair

Suggested Local Rules of Criminal Procedure Governing Bail

Local Rule¹ 520: Bail Before Verdict²

(A) If the bail authority denies bail, the bail authority shall:

- (1) state the reasons for denying bail in writing;
 - (a) because magisterial district courts are not courts of record, if the bail authority is a magisterial district judge, the reasons for denying bail shall be memorialized on the docket of the magisterial district court case pending against the defendant by inputting said reasons into the Magisterial District Judge System (“MDJS”);
- (2) appoint counsel for the defendant pursuant to Pa. R. Crim. P. 122, unless the defendant is already represented; and
- (3) inform the defendant of his or her right to seek immediate review of the bail determination made by the bailing authority under this rule.

Local Rule 524: Bail Generally³

(A) All defendants shall be presumed bailable.⁴ The bail authority may only deny bail if:⁵

- (1) the offense is a capital offense or an offense for which the maximum sentence is life imprisonment; or
- (2) no conditions or combination of conditions will reasonably assure the safety of any person and the community when the proof is evident or presumption great.

¹ Prior to their adoption and implementation, the term “Local Rule” in the title of each suggested rule should be changed to reflect the naming convention used by the judicial district for its local rules of criminal procedure.

² This rule mirrors Pennsylvania Rule of Criminal Procedure 520 and ensures that the defendant is informed of his right to review.

³ This rule restates existing United States and Pennsylvania Constitutional law and Pennsylvania Rules of Criminal Procedure relating to bail.

⁴ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII; Pa. Const. art. 1 § 13.

⁵ “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.” Pa. Const. art. 1 § 14.

- (B) A defendant who has been denied bail shall have the right to seek immediate review by motion, with the benefit of counsel, before either the issuing authority or a judge of the court of common pleas. A hearing on such motion, at which the defendant is present and represented by counsel, shall be held within 72 hours after filing such motion.
- (a) If, after hearing, the motion is denied and the hearing on said motion is presided over by a judge of the court of common pleas, then the judge of the court of common pleas shall state the reasons for denying such motion in writing.
- (b) If, after hearing, the motion is denied and the hearing on said motion is presided over by a magisterial district judge, then the magisterial district judge shall memorialize the reasons for denying such motion on the docket sheet of the magisterial district case pending against the defendant by inputting said reasons into the Magisterial District Judge System (“MDJS”).
- (C) Preference shall be given in all cases to Release on Recognizance (“ROR”).
- (D) In all cases, the bail authority shall use the least restrictive conditions of bail under Pa.R.Crim.P. 524 to ensure the defendant’s appearance at trial.⁶
- (E) No condition of release, whether nonmonetary or monetary, shall be imposed for the purpose of ensuring that a defendant remains incarcerated until trial.⁷

Local Rule 524.1: Bail for Misdemeanor Cases⁸

- (A) In cases where the defendant faces only misdemeanor charges, the bail authority shall release the defendant on recognizance or on nonmonetary conditions of bail

⁶ See Pa. R. Crim. P. 527 Comment (outlining different conditions of release).

⁷ This language is taken directly from the Comment to Pennsylvania Rule of Criminal Procedure 524.

⁸ This rule mirrors a recently enacted bipartisan bail reform bill from Connecticut, Connecticut Public Act 17-145, available at https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2017&bill_num=7044, which substantially restricts the use of monetary bail for misdemeanor defendants. The rule would allow for monetary bail for misdemeanor defendants who pose a serious risk to public safety, while providing for judicial discretion and also recognizing the special concerns for domestic violence cases that are contained within the existing Rules of Criminal Procedure. The bail authority would still be required to consider the misdemeanor defendant’s ability to pay prior to setting any monetary condition of release.

pursuant to Pa.R.Crim. P. 524 (C)(1) or (2), unless the bail authority makes findings that the defendant poses a serious risk to public safety.⁹

- (a) If the bail authority is a judge of the court of common pleas, then any findings that the defendant poses a serious risk to public safety shall be in writing.
 - (b) If the bail authority is a magisterial district judge, then any findings that the defendant poses a serious risk of public safety shall be memorialized on the docket sheet of the magisterial district court case pending against the defendant by inputting said findings into the Magisterial District Judge System ("MDJS").
- (B) If the bail authority determines that a misdemeanor defendant is a serious risk to public safety, the bail authority may only set a monetary condition of release after complying with the requirements of Local Rule 528.1(B) and (C).

Local Rule 528.1: Monetary Condition of Release on Bail

- (A) There is a strong presumption against conditioning the defendant's release upon compliance with a monetary condition pursuant to Pa. R. Crim. P. 524(C)(5). Before imposing monetary conditions of release on bail on a defendant, the bail authority shall consider imposing Release on Recognizance ("ROR") pursuant to Pa. R. Crim. P. 524(C)(1).
- (B) The bail authority shall not impose any monetary condition that results in the pretrial detention of the defendant solely because the defendant is financially unable to meet that condition.
- (C) Prior to imposing any monetary condition of release under Pa. R. Crim. P. 528, the bail authority must conduct a complete accounting of the defendant's financial ability, including, but not limited to:¹⁰
 - (1) the defendant's:
 - (a) income and assets,
 - (b) living expenses including food, rent/mortgage, utilities, medical expenses, child support and familial obligations,

⁹ See also 18 Pa. C. S. § 2711, which requires that in domestic violence cases, the bail authority must consider the threat that the defendant poses to the victim when considering public safety risk generally.

¹⁰ Pa. R. Crim. P. 528(A)(2) requires that the bail authority consider the "financial ability of the defendant" prior to setting any monetary release condition. The proposed rule provides additional guidance to magisterial district judges considering the "financial ability of the defendant."

(c) debts, and

(d) any other hardships.

(2) The bail authority shall only consider the financial resources of the defendant and the defendant's legal spouse, not the defendant's friends or other family members.

(3) This financial evaluation shall be completed on a standardized form provided by the District Court Administrator. The completed form shall be made a part of the court file, subject to the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

(D) The bail authority shall not impose a monetary condition of bail unless it finds that:

(1) no other condition or combination of conditions of release can ensure the defendant's appearance at trial.

(2) the defendant is able to afford to pay that amount.

(E) It is presumed that the defendant cannot afford to pay a monetary condition of bail if the defendant:

(1) Has an income at or below 125% of the Federal Poverty Guidelines; or

(2) Receives income-based public assistance, including, but not limited to, Supplemental Nutrition Assistance Program (SNAP or food stamps), Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits; or

(3) Is or has within the past six months been homeless or resided in a mental health facility; or

(4) Is, on his or her own, unable to meet basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support.

(F) Whenever the bail authority imposes a monetary condition of bail, the authority shall state the reasons for imposing that monetary condition and the specific facts indicating that the defendant is able to pay that bail to secure his or her release.

(1) If the bail authority is a judge of the court of common pleas, then the bail authority shall state the reasons for imposing that monetary condition and the specific facts indicating that the defendant is able to pay that bail to secure his or her release in writing.

- (2) If the bail authority is a magisterial district judge, then the bail authority shall memorialize the reasons for imposing that monetary condition and the specific facts indicating that the defendant is able to pay that bail to secure his or her release on the docket sheet of the magisterial district court case pending against the defendant by inputting said reasons into the Magisterial District Judge System ("MDJS").
- (G) A defendant who is being detained on a monetary condition of bail that he or she cannot afford shall have the right to seek immediate review by motion, with the benefit of counsel, with either the issuing bail authority or a judge of the court of common pleas. A hearing on such motion, at which the defendant is present and represented by counsel, shall be held within 72 hours after filing such motion.
- (1) If, after hearing, the motion is denied and the hearing on said motion is presided over by a judge of the court of common pleas, then the judge of the court of common pleas shall state the reasons for denying such motion in writing.
 - (2) If, after hearing, the motion is denied and the hearing on said motion is presided over by a magisterial district judge, then the magisterial district judge shall memorialize the reasons for denying such motion on the docket sheet of the magisterial district case pending against the defendant by inputting said reasons into the Magisterial District Judge System ("MDJS").

Ability-to-Pay Evaluation

Commonwealth of Pennsylvania

v.

Docket No.: _____

_____, Defendant

Section I: Identification and Employment

Name – Last, First, Middle	Date of Birth	Spouse Full Name (if married)	
Home Address	City	State	Zip
Telephone Number	Number of People in House/ Number Working		
Employer	Occupation / Date Hired	Supervisor Name and Telephone Number	
Employer Address	City	State	Zip

Section II: Monthly Income

Monthly Income (take-home income)	\$
Dates of Last Employment if Unemployed	
Legal Spouse's Income	\$
Interest/Dividends	\$
Pension/Annuity	\$
Social Security Benefits	\$
Disability Benefits	\$
Unemployment Compensation	\$
Welfare/TANF/V.A. Benefits	\$
Worker's Compensation	\$
Other Retirement Income	\$
Support from Other People (parents, children, etc.)	\$
Other Income (e.g. trust fund, estate payments)	\$
TOTAL MONTHLY INCOME	\$

Section III: Monthly Expenses

Rent/Mortgage	\$
Utilities (Gas, Electric, Water)	\$
Television/Internet	\$
Food (amount beyond what food stamps cover)	\$
Clothing	\$
Telephone	\$
Healthcare	\$
Other Loan Payments	\$
Credit Card Payments	\$
Education Tuition	\$
Transportation Expenses (car payment, insurance, transit pass, etc.)	\$
Payments to courts/probation/parole	\$
Number of Dependents (e.g. children)	
Dependent Care (including child support)	\$
Other Expenses (explain)	\$
TOTAL MONTHLY EXPENSES	\$

Section IV: Liquid Assets

Cash on Hand	\$
Money in Bank Accounts (checking and savings)	\$
Certificates of Deposit	\$
Stocks, Bonds, and Mutual Funds	\$

MONTHLY INCOME: \$ _____

MONTHLY EXPENSES: \$ _____

DISPOSABLE INCOME: \$ _____
(Income left over after expenses each month)

Signature: _____

Date: _____

125% ¹ of the 2020 Federal Poverty Guidelines: Individual: \$15,950 Family of 2: \$21,550 Family of 3: \$27,150 Family of 4: \$32,750 Family of 5: \$38,350 Family of 6: \$43,950 Family of 7: \$49,550 Family of 8: \$55,150 Family of 9: \$60,750 Family of 10: \$66,350
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¹ Recommended by the National Task Force on Fines, Fees and Bail Practices, a joint task force of the Conference of Chief Justices and the Conference of State Court Administrators, coordinated by the National Center for State Courts. See National Task Force on Fines, Fees and Bail Practices, "Lawful Collection of Legal Financial Obligations: A Bench Card for Judges," http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.