## https://lh4.googleusercontent.com/smtfXXl6VunlOMDCuJrlOvSR0CU-0w2ole82NJJd45Gc0FwEO7rwdCx7TuPJoxTVrFmDpjb6j6xSLubPvDrfNNphSO1DSelDsHUGhdi2rUY5-RhLIcDg1fnDn-0APKSKfV0-dP8hCommenting on Proposed Changes to the Pennsylvania Rules of Criminal Procedure

The Pennsylvania Rules of Criminal Procedure govern bail and probation practices. The Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee drafts these rules. Late last year, the Committee published proposed changes to the rules. Many of the proposed rules, if adopted and followed, would bring about much-needed change and could reduce the number of people incarcerated in county jails on unaffordable cash bail and supervision detainers. We hope that the Supreme Court of Pennsylvania adopts the bulk of these new rules.

Unfortunately, some of the proposed changes could also do real damage. One change would expand the purposes of bail in such a way as to permit a magistrate to incarcerate pretrial anyone at risk of self-harm. This vast expansion of the purposes of bail would threaten the liberty and well-being of people struggling with substance use disorders and other mental and physical disabilities.

This document explains how you can provide public comment to the Committee, summarizes many of the proposed changes to bail and detainer rules, and offers some suggested points of emphasis should you choose to submit comments.

## How to Provide Public Comments

The public has until **March 8, 2022,** to submit comments on this proposal. The Committee invited 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**](mailto:criminalrules@pacourts.us)

Your comments do not have to be fancy or lengthy. You should explain who you are (either an individual or an organization), why you care about Pennsylvanians impacted by bail or supervision detainers, and what you want to make sure the rules say. You do not even need to say that you like or dislike a particular part of the rule – it is enough to say that it is important that the rules do, or don’t do, something specific. Please write about whichever issues are important to you. We urge you to submit comments to ensure that the Committee adopts the positive reforms to the rules governing bail and detainers without putting the well-being of people with substance use disorder or other disabilities at risk.

## Summary of Changes to the Bail Rules

### Rule 520.11 could limit the number of people assigned cash bail.

* The proposed rules prevent magistrates from assigning either money bail (both secured and unsecured) unless no other bail conditions can satisfy the purposes of bail.
* Cash bail must be “reasonably attainable” by the accused person. Before assigning cash bail, the magistrate must review a financial disclosure form for the accused person to ensure the bail is reasonable.
* When magistrate assigns monetary bail, they must note, in writing, “the specific risk that the monetary bail condition is intended to mitigate” that could not be addressed through a less restrictive, non-monetary condition.
* The proposed rule explicitly prevents a magistrate from using money bail for the “sole purpose of detaining a defendant until trial.”

**Rules 520.15 and 520.16 could reduce the number of people held in pretrial detention on unaffordable monetary bail by creating review and detention hearings.**

* Rule 520.15 creates **condition review hearings**. If a person remains confined 48 hours after their initial bail determination, the rule entitles them to a “condition review” hearing within 24 hours. At the hearing, counsel must be present and may argue for less restrictive bail conditions.
* Similarly, under Rule 520.16, if the magistrate denied a person bail altogether and ordered them incarcerated pretrial, the detained person would be entitled to a **detention hearing** within 48 or 72 hours. At this detention hearing, counsel would represent the accused person, who would have the opportunity to argue for their release.

### Rule 520.1 expands the purpose of bail in a way that could lead to judges and magistrates holding more people with mental health and addiction issues in pretrial detention.

* Under the Pennsylvania Constitution, the “fundamental purpose of bail is to secure the presence of the accused at trial.” *Com. v. Truesdale,* 296 A.2d 829, 835 (Pa. 1972). Unless the Commonwealth presents evidence that a person will flee or poses such a grave threat to another person that no conditions of release could ensure public safety – the constitutional presumption of innocence dictates that a magistrate should release the person pretrial. *See* Pa. Const. Art. 1 § 14; *Truesdale,* 296 A.2d at 835.
* Rule 520.1 would radically alter the centuries-old purposes of bail to include not just future appearance and public safety but also **“the protection of the defendant from immediate risk of substantial physical self-harm”** and **“the integrity of the judicial system.”**
* Allowing magistrates to incarcerate anyone they believe to be at risk of self-harm would permit magistrates to incarcerate people struggling with mental or physical disabilities. Under current law, a person with severe mental disabilities at risk of self-harm receives involuntary treatment *only* if a physician deems such treatment necessary. *See* 50 P.S. § 7302. Rule 520.1 would permit magistrates to act as mental health professionals without medical training.
* Additionally, the vagueness of the proposed language regarding assuring “the integrity of the judicial system” would allow magistrates to incarcerate people for just about any reason.

### Rule 520.10 would allow magistrates to assign probation-like conditions to a person before being found guilty.

* Rule 520.10 offers magistrates a laundry list of possible non-monetary special conditions that they could assign. These conditions include a requirement that an accused person maintain employment or attend an educational program, comply with a curfew, refrain from alcohol use, comply with an existing treatment plan, or be electronically monitored, among others. If an accused person violates their bail conditions, the judge may revoke their bail and incarcerate them.

### The proposed rules establish the responsibilities of pretrial services and parameters for the use of pretrial risk assessment tools.

* Rule 520.18 creates the responsibilities of pretrial services that include: preparing and disseminating pretrial risk assessments, reminding people of their upcoming court dates, establishing a system for reporting while released, and monitoring people who remain incarcerated on bail conditions.
* Rule 520.19 permits courts to adopt pretrial risk assessments tools and creates guidelines for their use.

## Changes to County Probation and Parole Rules

### Rule 708.1 creates due process protections for people accused of violating conditions of supervision and limits detainers.

* Currently, probation and parole departments regularly lodge “detainers” that incarcerate people accused of supervision violations, even when the accused violation is not serious and the supervised person presents no public safety or flight risk. People accused of supervision violations can remain detained in county jails for weeks, months, or even years before their violation allegations are resolved.[[1]](#footnote-1)
* Rule 708.1 provides much-needed restrictions on when probation officers can lodge detainers. Supervised persons accused of a violation due to a new arrest (i.e., people accused of “direct violations”) could no longer be incarcerated on a detainer unless the accused person requested the detainer.
* Persons accused of a technical violation of probation (such as failing a drug test) could only have a detainer lodged against them if the supervising authority believed the “violation creates an ongoing risk to the public’s safety, to the defendant’s safety, or of non-appearance at the revocation hearing.” Otherwise, the probation officer would have to advise the accused person of their alleged violation in writing and allow the person to remain out of jail while they awaited their supervision revocation hearing.
* While the proposed changes represent many positive steps forward, similar to the bail rules, allowing a probation officer to consider “the defendant’s safety” when making a detention decision could lead to the harmful incarceration of people affected by mental illness and addiction.

### Rule 708.1 requires counties to hold *Gagnon* I hearings within fourteen days for people incarcerated on a detainer.

* Rule 708 requires a timely preliminary probation violation hearing (or *Gagnon* I, within 14 days of arrest. At these hearings, a court official would determine whether the person can be released on any available condition pending their revocation hearing and whether probable cause exists to support the violation. The detainer automatically expires if the hearing is not held within 14 days.

Changes to Summons and Arrest Warrant Procedures in Philadelphia

Changes to Rule 1003 would bring Philadelphia’s summons practices in line with the rest of the Commonwealth’s practices. Outside of Philadelphia, following an alleged offense, police have the option of releasing people with a summons (or notice to appear at a future date) instead of arresting and detaining them. Due to a quirk in the current rules governing Municipal Court cases in Philadelphia, Philadelphia law enforcement declined to adopt summons procedures. The proposed rule changes make clear that Philadelphia police can and should issue summons instead of arresting people for most misdemeanor offenses. If Rule 1003 were adopted and followed, Philadelphia police would incarcerate and hold far fewer people charged with low-level offenses.

## A Few Suggested Points to Make in the Comments

We encourage you to review the proposed rules and make any comments you choose. We offer the following suggested points for your consideration as you draft your letter to the Committee:

* **Do not expand the purposes of bail to include the risk of self-harm.** Expanding the purposes of bail to include a defendant’s risk of self-harm would allow magistrates to warehouse people struggling with mental health and addiction issues in county jails.
* **Do not expand the purposes of bail to include the integrity of the judicial system.** Such amorphous language gives magistrates free reign to incarcerate people pretrial for no productive purpose and stands in stark contrast to the constitutional protections of liberty and the presumption of innocence. *See* *Truesdale,* 296 A.2d at 834-35.
* **People struggling with mental health disabilities or substance use disorders need access to treatment in their communities, not harmful incarceration in county jails**. County jails do not provide adequate mental health treatment for people held in pretrial detention.[[2]](#footnote-2) Additionally, conditions in county jails exacerbate detained persons’ mental illnesses and put them at significantly elevated risk of suicide while incarcerated.[[3]](#footnote-3) Moreover, jails threaten the entire community. As county jail incarceration rates rise, the mortality rate for the surrounding county also rises.[[4]](#footnote-4) The Committee’s decision to include the risk of self-harm as a purpose of bail in Rule 520.1 has the potential to do profound, irreversible harm to vulnerable populations.
* **Support the proposed changes to detainer practices, as incarcerating people on supervision detainers is often unproductive and harmful.** In Pennsylvania, one out of every 34 adults is under community supervision (one of the highest supervision rates in the county).[[5]](#footnote-5) In Philadelphia, close to 60% of the jail population is held on a detainer, at least in part.[[6]](#footnote-6) Changing the rules to ensure that individuals under supervision are not presumptively and unnecessarily confined on a detainer could save thousands of Pennsylvanians from harmful terms of incarceration each year.
* **Providing people incarcerated on detainers with a timely *Gagnon* I hearing is vital to ensuring that supervised people are not incarcerated unnecessarily.** Rule 708.1(D) requires that people held on supervision detainers receive a *Gagnon* I hearing within 14 days of detention. We commend the Committee’s decision to require this constitutionally-mandated hearing within a set time limit. However, we fear that 14 days after an arrest is too long, and people would needlessly experience the harms of incarceration. Decades of empirical research have shown that even short stints of incarceration can have severe adverse consequences on detained people’s health, employment, families, residential stability, and case dispositions. We encourage the Committee to require that this preliminary “Gagnon I” hearing be held within 72 hours of detention.

### Who should I contact if I have questions about this process or need help?

Feel free to email Nyssa Taylor, an attorney at the ACLU of Pennsylvania, at [ntaylor@aclupa.org](mailto:ntaylor@aclupa.org) or 856-244-1136. She can try to help you directly or refer you to someone else who can.

1. The ACLU of Pennsylvania filed a lawsuit in October 2021, challenging Montgomery County’s detainer practices, after finding that the county’s probation department incarcerated 89% of people accused of supervision violations on a detainer and that the jail held them for an average of 70 days before providing a hearing. *See El et. al. v. 38th Judicial District et. al.* at [aclupa.org/montco](https://aclupa.org/montco). [↑](#footnote-ref-1)
2. Ram Subramanian, et al., *Incarceration’s Front Door: The Misuse of Jail in America,* Vera Institute of Justice 12 (2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf(finding> that “83% of jail inmates with mental illness did not receive mental health care after admission”). [↑](#footnote-ref-2)
3. Meghan Novisky & Daniel Semenza, *Handbook on Pretrial Justice* 39 (2021) (finding that “a large proportion of suicides are likely carried out by pretrial detainees”); Rachel Jenkins, et al., *Psychiatric and social aspects of suicidal behaviour in prisons*, 35 Psychological Medicine 257 (2005) (estimating that the suicide rate among people awaiting trial in jail is seven and a half times higher than the general population) [↑](#footnote-ref-3)
4. See Sandhya Kajeepeta, et. al, Association between county jail incarceration and cause-specific county mortality in the USA: 1987-2017: a retrospective longitudinal study. The Lancet, vol. 6 E240-248 (Feb. 23, 2021) https://doi.org/10.1016/S2468-2667(20)30283-8 [↑](#footnote-ref-4)
5. Vincent Schiraldi, *The Pennsylvania Community Corrections Story*, Columbia University Justice Lab (2018); *see also* Danielle Kaeble, Probation and Parole in the United States, 2020, Bureau of Justice Statistics, at 18 (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf [↑](#footnote-ref-5)
6. Philadelphia Prison Population Report | July 2015 – October 2021, First Judicial District of Pennsylvania, at 12 (last visited Jan. 18, 2021), https://www.phila.gov/media/20211126121153/Full-Public-Prison-Report-October-2021.pdf [↑](#footnote-ref-6)