

THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 5]

Order Amending Rule 541 of the Rules of Criminal Procedure; No. 413 Criminal Procedural Rules Doc.

Order

Per Curiam

And Now, this 26th day of April, 2012, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been published before adoption at 40 Pa.B. 5900 (October 16, 2010), and in the *Atlantic Reporter* (Third Series Advance Sheets, Vol. 3), and a Final Report to be published with this Order:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pennsylvania Rule of Criminal Procedure 541 is amended in the following form.

This Order shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective in 180 days.

Annex A

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

PART D. Proceedings in Court Cases Before Issuing Authorities

Rule 541. Waiver of Preliminary Hearing.

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

(1) The defendant thereafter is precluded from raising the sufficiency of the Commonwealth's *prima facie* case unless the parties have agreed at the time of the waiver that the defendant later may challenge the sufficiency.

(2) If the defendant waives the preliminary hearing by way of an agreement, made in writing or on the record, and the agreement is not accomplished, the defendant may challenge the sufficiency of the Commonwealth's *prima facie* case.

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

(C) If the defendant waives the preliminary hearing and consents to be bound over to court, the defendant and defense attorney, if any, shall certify in writing that

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

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

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

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

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

Comment

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

Nothing in this rule is intended to preclude a waiver of the preliminary hearing by way of agreement in which both parties agree to the preservation of the defendant's ability to raise the sufficiency of the Commonwealth's *prima facie* case at a subsequent proceeding. Any such agreement must be in writing or made on the record. However, this provision is not intended to require the creation of a record in those proceedings before an issuing authority, such as a magisterial district judge, whose court is not one of record. In those situations, there would be no record unless a stenographer is available and any agreement would have to be in writing.

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

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

Paragraph (E) was added in 2012 to clarify that bail must be set at the time of the waiver of the preliminary hearing in those cases, such as those initiated by summons, in which no preliminary arraignment has been held.

Official Note: Rule 140A adopted April 26, 1979, effective July 1, 1979; amended November 9, 1984, effective January 2, 1985; renumbered Rule 541 and amended March 1, 2000, effective April 1, 2001; amended February 12, 2010, effective April 1, 2010; amended April 26, 2012, effective in 180 days.

Committee Explanatory Reports:

* * * * *

Final Report explaining the April 26, 2012 amendments related to the effects of the waiver of the

preliminary hearing and new paragraph (E) related to setting bail published at 42 Pa.B. 2466 (May 12, 2012).

FINAL REPORT¹

Amendments to Pa.R.Crim.P. 541

Waiver of Preliminary Hearings: Bail; Subsequent Challenges

On April 26, 2012, effective in 180 days, upon the recommendation of the Criminal Procedural Rules Committee, the Court amended Rule 541 (Waiver of Preliminary Hearing). The amendments (1) require the issuing authority to address bail when accepting a defendant's waiver of the preliminary hearing; and (2) preclude subsequent challenges to the *prima facie* case when the preliminary hearing has been waived.²

I. Bail at Time of Waiver

The Committee has examined the procedures for waiving a preliminary hearing set forth in Rule 541 in response to various communications the Committee received. Rule 541 currently provides that a represented defendant may waive the preliminary hearing at the preliminary arraignment or at any time thereafter, and that an unrepresented defendant may not waive at the preliminary arraignment but may do so at any time subsequent to the preliminary arraignment. In either case, the rule contemplates that the defendant must be present before the issuing authority in order to waive the preliminary hearing.

One of the Committee's concerns with Rule 541 related to setting bail in cases initiated by summons rather than by arrest. In summons cases, there is no preliminary arraignment, and bail ordinarily is addressed at the preliminary hearing. If the preliminary hearing is waived, the setting of bail is delayed until after the case is in the court of common pleas. The Committee learned that, because of the inability to set bail at this early stage in the proceedings, some jurisdictions do not permit defendants to waive the preliminary hearing when the case is initiated by summons.

The Committee concluded that the best way to address this issue is to have bail set at the time that the waiver of the preliminary hearing is entered. The Committee based this conclusion on an analogy with the provision in Rule 543(C) that requires bail to be set when the defendant is held for court after the preliminary hearing since, after a defendant waives the preliminary hearing, the case also is held for court. In other words, if bail had not already been set, the issuing authority would set bail at the time that the defendant presents himself or herself to waive the preliminary hearing. This would be consistent with the longstanding policy under the rules that, in a case initiated by summons, the defendant may not be required to appear for a preliminary arraignment. It is contemplated that bail would be set at the time of the waiver of the preliminary hearing in a manner similar to that which occurs when a defendant's bail is set at a preliminary arraignment following arrest. Accordingly, Rule 541 has been amended by the addition of a new

paragraph (E) stating, "When the defendant waives the preliminary hearing, the case shall proceed pursuant to Rule 543(C)."³

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

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

The published version of the Committee's proposal provides that the challenge preclusion provisions would apply to all defendants, both counseled and *pro se*, based on the argument that a defendant may act *pro se* in the entry of waivers of much more significant weight, such as the waiver of the right to counsel or the entry of a guilty plea. Upon further consideration in response to concerns raised in the publication responses, the Committee agreed the change be limited to the situation in which a defendant waived the preliminary hearing with the assistance of counsel.

As published, this proposed amendment was contained in paragraph (C). However, with the limitation of the provision to counseled defendants, the Committee agreed the new provision made more sense in paragraph (A) that relates directly to waiver by counseled defendants. Accordingly, a new paragraph (A)(1) describes the consequences of such a waiver.

Additionally, there would be one exception to the preclusion against later challenging the Commonwealth's *prima facie* case. The Committee acknowledged that often the waiver of the preliminary hearing is made as part of an agreement in which the defendant receives a *quid pro quo*, such as an agreement to be released on bail, in exchange for the waiver. Additionally, there are cases in which both sides agree to a waiver of the preliminary hearing while recognizing that the defendant will preserve his or her ability to challenge the sufficiency of the evidence or other issues at subsequent proceedings. The Committee does not intend that these types of agreements be precluded by the amendments. Accordingly, new paragraph (A)(2) provides that, when the waiver is by agreement, a failure to abide by the agreement will restore the defendant's ability to raise challenges to the

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² Several other issues concerning Rule 541 have been raised with the Committee over time. These include permitting a counseled defendant to waive the preliminary hearing by mail, permitting an uncounseled defendant to waive the preliminary hearing at the preliminary arraignment, and permitting a counseled defendant to waive his or her presence at the preliminary hearing while permitting the defendant's attorney to participate in the preliminary hearing. During the development of this proposal, the Committee considered these other suggestions but rejected them as unworkable, at least at this time, due to the difficulty in ensuring that all appropriate certifications and documents required by Rule 541 are executed properly.

³ Rule 543(C) requires the issuing authority to "set bail as permitted by law if the defendant did not receive a preliminary arraignment; continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A); and, if the defendant has not submitted to the administrative processing and identification procedures as authorized by law, such as fingerprinting pursuant to Rule 510(C)(2), make compliance with these processing procedures a condition of bail."

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The Committee concluded that the best way to address this issue is to have bail set at the time that the waiver of the preliminary hearing is entered. The Committee based this conclusion on an analogy with the provision in Rule 543(C) that requires bail to be set when the defendant is held for court after the preliminary hearing since, after a defendant waives the preliminary hearing, the case also is held for court. In other words, if bail had not already been set, the issuing authority would set bail at the time that the defendant presents himself or herself to waive the preliminary hearing. This would be consistent with the longstanding policy under the rules that, in a case initiated by summons, the defendant may not be required to appear for a preliminary arraignment. It is contemplated that bail would be set at the time of the waiver of the preliminary hearing in a manner similar to that which occurs when a defendant's bail is set at a preliminary arraignment following arrest. Accordingly, Rule 541 has been amended by the addition of a new

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prima facie case. Also, the rule requires that any such agreement must be in writing or on the record. Recognizing that most of the time these waivers will be before a magisterial district judge and therefore no record would be available, language has been added to the Comment clarifying that the agreement would not be on the record if no stenographer is present.

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

[Pa.B. Doc. No. 12-825. Filed for public inspection May 11, 2012, 9:00 a.m.]

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Homicide Appointment System Committee; Administrative Order No. 04 of 2012

Order

And now, this 20th day of April, 2012, it is hereby *Ordered, Adjudged and Decreed* that the Homicide Appointment System ("HAS") Committee is suspended indefinitely and for all purposes.

It is further *Ordered, Adjudged and Decreed* that, until further notice, the Honorable Benjamin Lerner and the Honorable Jeffrey P. Minehart are appointed to select, with such assistance as they may request, sufficient qualified attorneys to provide representation to indigent defendants in all homicide cases, including capital cases, in which the Defender Association of Philadelphia cannot be appointed to represent an indigent defendant.

This Administrative Order is issued in accordance with the April 11, 1986 order of the Supreme Court of Pennsylvania, Eastern District, No. 55 Judicial Administration, Docket No. 1; and with the March 26, 1996 order of the Supreme Court of Pennsylvania, Eastern District, No. 164 Judicial Administration, Docket No. 1, as amended. This Order shall be filed with the Prothonotary and the Clerk of Courts in a docket maintained for Orders issued by the First Judicial District of Pennsylvania; and, as required by Pa.R.Crim.P. No. 105(E), two certified copies of this Order and a copy on a computer diskette, shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. This Order will become effective immediately. As required by Pa.R.Crim.P. No. 105(F) one certified copy of this Order shall be filed with the Administrative Office of Pennsylvania Courts and will also be published on the Unified Judicial System's web site at <http://ujportal.pacourts.us/localrules/ruleselection.aspx> and posted on the First Judicial District's website at <http://courts.phila.gov>. Copies shall be published in *The Legal Intelligencer* and will be submitted

to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE JOHN W. HERRON,
Administrative Judge, Trial Division

[Pa.B. Doc. No. 12-826. Filed for public inspection May 11, 2012, 9:00 a.m.]

PHILADELPHIA COUNTY

Renumbering and Amendment of Comment to Philadelphia Criminal Division Rule 506; Administrative Order No. 03 of 2012

Order

And now, this 20th day of April, 2012, it is hereby *Ordered, Adjudged and Decreed* that effective immediately, Philadelphia Criminal Division Rule 506 is renumbered Philadelphia Criminal Division Rule 528, and the Comment to Philadelphia Criminal Division Rule 528 is amended as follows (deleted text is bold and in brackets and new text is bold):

Comment: [**Effective June 1, 1988**] The minimum retention figures designated pursuant to subsection (B) are a fee equal to 30% (thirty percent) of the amount of the deposit or 3% (three percent) of the total amount of the bail. However, the maximum amount retained shall not exceed [**\$750**] **\$1,500** regardless of the total amount of the bail or the amount of the cash deposit. In no event shall the amount retained by the Court be less than \$10 (ten dollars).

This Administrative Order is issued in accordance with the April 11, 1986 order of the Supreme Court of Pennsylvania, Eastern District, No. 55 Judicial Administration, Docket No. 1; and with the March 26, 1996 order of the Supreme Court of Pennsylvania, Eastern District, No. 164 Judicial Administration, Docket No. 1, as amended. As required by Pa.R.Crim.P. No. 105(D), this Order has been submitted to the Supreme Court's Criminal Procedural Rules Committee for review and written notification has been received from the Committee certifying that this Order is not inconsistent with any general rule of the Supreme Court. This Order shall be filed with the Prothonotary and the Clerk of Courts in a docket maintained for Orders issued by the First Judicial District of Pennsylvania, and, as required by Pa.R.Crim.P. No. 105(E), two certified copies of this Order and a copy on a computer diskette, shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. This Order will become effective immediately. As required by Pa.R.Crim.P. No. 105(F) one certified copy of this Order shall be filed with the Administrative Office of Pennsylvania Courts and will also be published on the Unified Judicial System's web site at <http://ujportal.pacourts.us/localrules/ruleselection.aspx> and posted on the First Judicial District's website at <http://courts.phila.gov>. Copies shall be published in *The Legal Intelligencer* and will be submitted to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE JOHN W. HERRON,
Administrative Judge, Trial Division

[Pa.B. Doc. No. 12-827. Filed for public inspection May 11, 2012, 9:00 a.m.]