

**SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING**

Proposed Revision of the *Comment* to Pa.R.Crim.P. 523

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the revision of the *Comment* to Rule 523 (Release Criteria) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 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 reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially 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:

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Criminal Procedural Rules Committee
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All communications in reference to the proposal should be received by **no later than Friday, January 29, 2016**. 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.

December 10, 2015

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Paul M. Yatron
Chair*

RULE 523. RELEASE CRITERIA.

(A) To determine whether to release a defendant, and what conditions, if any, to impose, the bail authority shall consider all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:

- (1) the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- (2) the defendant's employment status and history, and financial condition;
- (3) the nature of the defendant's family relationships;
- (4) the length and nature of the defendant's residence in the community, and any past residences;
- (5) the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- (6) if the defendant has previously been released on bail, whether he or she appeared as required and complied with the conditions of the bail bond;
- (7) whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
- (8) the defendant's prior criminal record;
- (9) any use of false identification; and
- (10) any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

(B) The decision of a defendant not to admit culpability or not 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 clarifies present practice, and does not substantively alter the criteria utilized by the bail authority to determine the type of release on bail or the conditions of

release reasonably necessary, in the bail authority's discretion, to ensure the defendant's appearance at subsequent proceedings and compliance with the conditions of the bail bond.

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. **Nothing in this rule prohibits the use of a pretrial risk assessment tool as one of the means of evaluating the factors to be considered under paragraph (A). However, a risk assessment tool must not be the only means of reaching the bail determination.**

In addition to the release criteria set forth in this rule, in domestic violence cases under Section 2711 of the Crimes Code, 18 Pa.C.S. § 2711, the bail authority must also consider whether the defendant poses a threat of danger to the victim.

When a defendant who has been released on bail and is awaiting trial is arrested on a second or subsequent charge, the bail authority may consider that factor in conjunction with other release criteria in setting bail for the new charge.

NOTE: Previous Rule 4002, formerly Rule 4003, adopted November 22, 1965, effective June 1, 1966; renumbered Rule 4002 and amended July 23, 1973, effective 60 days hence; *Comment* revised January 28, 1983, effective July 1, 1983; rescinded September 13, 1995, effective January 1, 1996, and not replaced. Present Rule 4002 adopted September 13, 1995, effective January 1, 1996. The January 1, 1996 effective dates extended to April 1, 1996; the April 1, 1996 effective dates extended to July 1, 1996; amended September 3, 1999, effective immediately; renumbered Rule 523 and *Comment* revised March 1, 2000, effective April 1, 2001 [.]; **Comment revised _____, 2016, effective _____, 2016.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the September 3, 1999 amendment concerning the 1998 constitutional amendment providing for preventive detention and deleting "but only" published with the Court's Order at 29 Pa.B. 4862 (September 18, 1999).

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).

Report explaining the proposed Comment revisions regarding the use of risk assessment tools published for comment at 46 Pa.B. (, 2016).

REPORT

Proposed Revision of the Comment to Pa.R.Crim.P. 523

RISK ASSESSMENT TOOLS FOR BAIL DETERMINATION

Recently, representatives of the First Judicial District (FJD) in Philadelphia had requested that the Committee consider clarifying that risk assessment tools may be used as part of the determination when setting bail. The FJD is in the process of developing a risk tool to assist Arraignment Court Magistrates and Judges in determining whether defendants at the time of their arrest should be held in custody, released under House Arrest/Electronic Monitoring, released under special conditions or released on their own recognizance.

This effort in the FJD is consistent with a national trend in moving from a “cash-based release system,” which is believed to be more burdensome on lower income defendants, to a “risk-based release system,” that attempts to assess the likely danger of non-appearance or other misconduct. In particular, risk assessment tools are intended to use quantifiable statistics in an attempt to determine the potential risk that the defendant may pose and then use that as a basis for determining what conditions should be placed on release. The ultimate goal is to try to add more objectivity to the bail decision.

Simply put, a risk assessment tool is developed by studying cases in the past in which the defendants have committed misconduct while on pretrial bail and determining what factors, like drug addiction, unemployment, or prior criminal history, are present. Usually, some type of point system is then developed from this data that will be used to “score” a new defendant as a means of predicting whether the defendant will commit misconduct while on bail.

The risk assessment tool being implemented in Philadelphia is a good example of how such an analysis is developed. It is based on data of defendants in Philadelphia from 2007-2014 who were arrested and released on pretrial status. The data was analyzed to determine which defendants committed new crimes and the types of characteristics these defendants who were arrested for new crimes possess. The types

of new crimes for which these defendants were arrested while on pretrial status were also analyzed. Over 200,000 defendants' cases were studied. The factors studied included a defendant's criminal history, age at time of first adult arrest, previous time in jail, current and new charges, and length of previous time in jail.

Risk assessment tools are already in use in a number of jurisdictions, such as Colorado, Florida, and Kentucky. Use of risk assessment tools is also encouraged in the ABA's Standard on Pretrial Release 10-1.10(i) that urges each jurisdiction, *inter alia*, to:

- (i) develop and operate an accurate information management system to support prompt identification, information collection and presentation, risk assessment, release conditions selection, compliance monitoring and detention review functions essential to an effective pretrial services agency;...

The consensus of the Committee was that currently nothing in the rules precludes the use of such a tool so long as it is not the exclusive means of making the assessment regarding bail. However, the Committee concluded that a clarification on this point would be helpful. Therefore, the *Comment* to Rule 523 would be revised to state that the rule does not forbid the use of a risk assessment tool but that the tool must not be the only means of reaching the bail decision.