

FOR IMMEDIATE RELEASE
Dec. 17, 2018

Judiciary Adopts Interim Rule for Implementation of Fundamental Bail Reform

In 2018, the General Assembly enacted legislation to reform the system under which courts subject defendants to pretrial conditions of release (House Bill 204 which is now the “Bail Reform Act” or “Act”). Under the Act, the Judiciary was required to come up with a uniform rule by January 1, 2019 to implement the Act’s requirements for bail reform. Working under this tight deadline, the Judiciary has crafted an interim rule, the Interim Special Rule of Criminal Procedure for Pretrial Release, to implement the Act.

“The interim rule is a product of a collaborative effort of all of the courts involved with making bail decisions,” said Superior Court President Judge Jan R. Jurden. “This is an important reform and we look forward to working with our system partners as we implement this improved approach to pretrial release.”

Codified in Chapter 21, Title 11 of the Delaware Code, the Bail Reform Act encourages the use of non-monetary conditions of release when those conditions reasonably assure the defendant’s appearance at court proceedings, public safety, and the integrity of the judicial process. In particular, the Act was intended to prevent defendants from being subjected to excessive financial conditions of release, traditionally referred to as money bail. By this means, the Act sought to reduce the

unnecessary pretrial incarceration of defendants who are not wealthy enough to pay money bail, as well as reduce the resulting loss in employment, the pressure to plead guilty, the economic toll on non-affluent defendants and their families, and other substantial harm that results from the excessive use of money bail.

To accomplish those goals, this rule requires courts to impose the least restrictive conditions necessary to reasonably assure the defendant's appearance in court, public safety, and the integrity of the judicial process.

The interim rule has commentary that more fully explains the purposes behind the Act and rule, and can be found at: <https://courts.delaware.gov/rules/index.aspx#pretrial>.

To increase the reliability and equity of decisions about conditions of pretrial release, the Act and the rule require the use of an empirically developed pretrial assessment instrument. Consistent with that requirement, a diverse group of constituencies, with the aid of qualified academic and professional advisors, developed the Delaware Pretrial Assessment Tool, or "DELPAT." The DELPAT takes into account factors relevant to whether defendants (when compared to other defendants) are at greater risk of failing to appear at trial or endangering public safety. It is therefore designed to provide a reliable basis for setting conditions of release. The pretrial assessment took into consideration nationally available models and has been tested preliminarily for reliability and validity, and designed to ensure

that the assessment is not affected by bias based on race, gender, wealth, or other inappropriate grounds.

“The risk assessment instrument and the new court rule provide us with an evidence based method to make sound bail decisions in a systematic way,” said Chief Judge Alex J. Smalls of the Court of Common Pleas.

To further address the important risk of domestic violence, the Act and thus the rule, authorize the court to consider the results of a separate domestic violence assessment in cases where the State contends that the defendant has committed domestic or intimate partner violence and presents the results of that assessment to the court. A more complete summary of the role of the pretrial risk assessment and the domestic violence assessment in the process of setting conditions of release is available at the commentary to Rule 5.2.

Consistent with the requirements of the Act, the rule addresses the three categories of risk that pretrial conditions of release seek to address: i) the risk that the defendant will fail to appear; ii) the risk that the defendant will be a threat to public safety or a particular person; and iii) the risk that a defendant will obstruct justice.

As to the risk of non-appearance, the Judiciary is implementing an enhanced system of notifications to make sure that defendants are frequently reminded of court dates and, consistent with the intent of the Act, the rule discourages the use of

monetary conditions of release to address the risk of non-appearance in the current case. In general, to address the risk of non-appearance, the court shall follow the conditions of release indicated by the pretrial risk assessment (DELPAT). The imposition of more stringent conditions of release to address this risk may only be made upon special findings by the court. When, however, a defendant has been given a chance for conditions of release without monetary conditions and fails to appear in court, the rule gives the court discretion to impose monetary conditions of release as a consequence for the violation. A more complete summary of how the rule addresses the risk of non-appearance can be found at Rule 5.2(g) and its commentary.

As to the risk that a defendant will be a danger to public safety or a particular person, the rule identifies a number of very serious “signal crimes” (*e.g.*, homicide, violent crimes, sex crimes, gun crimes, domestic violence crimes, and high-level drug offenses). In these cases, the court need not give presumptive weight to the results of the risk assessment, but is given discretion to impose the conditions of release it deems reasonably necessary to assure public safety. In cases involving other charges, the court may also impose more stringent conditions of release than the risk assessment score suggests, by making special findings indicating the basis for imposing them. The rule also addresses the unique risk posed by recidivist drunk drivers, and gives the court discretion to address this risk. A more complete

summary of how the rule addresses the risk that a defendant will be a danger to public safety or a particular person is at Rule 5.2(h) and its commentary.

As to the risk that a defendant will obstruct justice by, for example, threatening a witness, the rule allows the State to make a specific showing and for the court to impose conditions of release necessary to address that misconduct. A more complete summary of how the rule addresses the risk that a defendant will obstruct justice can be found at Rule 5.2(i) and its commentary.

To ensure that defendants are treated fairly, the rule provides protections to ensure that a defendant's wealth will not be taken into account in determining whether to impose conditions of release, including monetary conditions of release. But for the same reason of fairness, the rule requires that the court must consider the defendant's resources in setting the amount of any monetary conditions of release and requires the court to develop a form for defendants to present that information.

As a further assurance of due process, the rule also provides procedures for defendants to seek review of the initial conditions of release imposed upon them, and for any party to a case to seek review if there has been a material change in circumstances.

Finally, the rule gives the court discretion to impose more stringent conditions of release if a defendant breaches the conditions initially imposed. The rule recognizes that although the Act is designed to give defendants more access to

pretrial release without onerous conditions, particularly monetary ones, in the first instance, a defendant who has been given that chance and breaches the conditions of release is in a categorically different position. Upon a violation of conditions of release, the court need not order a new pretrial assessment and has the discretion to order the conditions of release, including monetary conditions, it deems appropriate to address the breach.

Under the Act, the collection of data about the implementation of the risk assessment and how the courts have applied it is required. For that reason, the rule requires the reporting of key information necessary to enable the State to assess how the new approach dictated by the Act is working and to enable policymakers, including the Judiciary itself, to consider the need for improvements in approach.

“The Justice of the Peace Court is pleased that the Supreme Court has adopted a rule implementing pretrial reform that puts appropriate weight on an empirically derived assessment tool and yet preserves adequate judicial discretion so that individual cases can be judged individually,” said Chief Magistrate Alan Davis of the Justice of the Peace Court. “Both of these are hallmarks of a healthy pretrial system. I look forward to the implementation and monitoring of the system this creates so that it can be continually improved over time.”

Because the Act involves a fundamental change in how our State sets pretrial conditions of release, the various constituencies—police officers, prosecutors,

defense attorneys, correction personnel, judicial staff, and judges—who must implement the new system will learn by doing in the first stages of implementation. For that reason, the Judiciary has styled the rule as an interim one, signaling our commitment to review feedback on how the Act and rule are being implemented, and to consider alterations and improvement in approach based on experience. During this period of implementation, intensive efforts at training will be undertaken, which will build on prior efforts. The Judiciary recognizes that the implementation of a fundamental reform of this nature will require patience on the part of everyone involved during the early stages of the reform, and that includes the court being patient with its constituents as they adapt to this new rule.

“The Act presents a major opportunity to improve the quality of justice in our State, and the Judiciary applauds the efforts of all the stakeholders who have worked so hard to make this reform a reality,” said Supreme Court Chief Justice Leo E. Strine, Jr. “The rule represents a good faith effort to implement the Act in an efficient and equitable manner by the deadline the Act imposes. The Judiciary and its constituents must now pull together to make the Act and the rule work as well as possible, and to improve it further based on the experience we gain during the next year.”

For more information, please contact:

Sean O’Sullivan, Chief of Community Relations

(302) 255-0093 or Sean.O’Sullivan@state.de.us