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

Proposed Amendment of Pa.Rs.Crim.P. 542, 543, and 1003

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rules 542 (Preliminary Hearing; Continuances), 543 (Disposition of Case at Preliminary Hearing), and 1003 (Procedure in Non-Summary Municipal Court Cases) 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:

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
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All communications in reference to the proposal should be received by **no later than Wednesday, May 1, 2019.** 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.

January 2, 2019 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

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Brian W. Perry
Chair

RULE 542. PRELIMINARY HEARING; CONTINUANCES.

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

(1) assume charge of the prosecution; and

(2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is **[a *prima facie* case]** <u>probable cause</u> that (1) an offense has been committed and (2) the defendant has committed it.

(E) **[Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.]** <u>HEARSAY</u>

<u>(1) The forms of hearsay enumerated in this paragraph, that otherwise are inadmissible at trial, shall be admissible at a preliminary hearing and shall be considered by the issuing authority in determining whether the probable</u>

cause required by paragraph (D) has been established. These forms of hearsay shall include evidence relating to:

(a) ownership of, non-permitted use of, damage to, or value of property;

(b) authenticity of a written instrument;

(c) scientific/laboratory/forensic/expert reports; and

(d) chain of custody and foundational evidence relating to exhibits.

(2) Within the discretion of the issuing authority, the following forms of hearsay may be admissible at a preliminary hearing and considered by the issuing authority in determining whether the probable cause required by paragraph (D) has been established:

(a) the testimony of a victim or eyewitness where the Commonwealth has shown cause that requiring appearance at the preliminary hearing will cause an undue hardship upon the victim or eyewitness and is presented in the form of a writing signed and adopted by the declarant; or is a verbatim contemporaneous electronic recording of an oral statement; and

(b) evidence of a purely technical nature that is not included in paragraph (1).

(3) In no case shall all of the elements of the case be established by hearsay alone.

(4) Any hearsay evidence that is presented at the preliminary hearing pursuant to paragraphs (E)(1)(a) and (E)(2)(a) of this rule only shall be admitted at the preliminary hearing if the representative of the Commonwealth avers that a representative of the Commonwealth has communicated with the hearsay declarant, and determined that this declarant is available to testify at trial.

(5) If hearsay is offered at the preliminary hearing but the issuing authority refuses to admit it, the issuing authority may grant a continuance of the preliminary hearing.

(F) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(G) CONTINUANCES

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date, time, and place for the preliminary hearing, and the reasons that the particular date was chosen.

When the preliminary hearing is conducted in the court of common pleas, the judge shall record the party to which the period of delay caused by the continuance shall be attributed and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with Rule 600.

(2) The issuing authority shall give notice of the new date, time, and place for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

COMMENT: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask

questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

This rule was amended in 2019 to change the term describing the standard to be used by the issuing authority when weighing the evidence presented at the preliminary hearing from "*prima facie*" to "probable cause." The change was made because there is no material difference between the level of evidence that constitutes a *prima facie* case and that constitutes probable cause. Because the latter is more commonly understandable, the change was made to remove any confusion. The change in terminology is not intended to change the burden on the Commonwealth with regard to establishing the case at the preliminary hearing.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of **[a *prima facie* case]** **probable cause**, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the language of the rule interpreted by the Court in *Commonwealth v. Mullen*, **[460 Pa. 336,]** 333 A.2d 755 (**Pa.** 1975). This amendment was made to preserve the limited function of a preliminary hearing.

Paragraph (E) **[was amended in 2013 to]** reiterate**s** that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish **[the elements of a *prima facie* case]** **probable cause that an offense has been committed and the defendant has committed it.** *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, **those forms of** hearsay **contained in paragraph (E)(1)(a)-(d)**, whether written or oral, **[may]** **should be permitted to** establish the elements of any offense. **[The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare*]** ***See***

Commonwealth ex rel. Buchanan v. Verbonitz, **[525 Pa. 413,]** 581 A.2d 172 (Pa. 1990) (plurality) **[(disapproving reliance on hearsay testimony as the sole basis for establishing a *prima facie* case)] (in which five Justices held that "fundamental due process requires that no adjudication be based solely on hearsay evidence.")**. *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

Paragraph (E)(2) provides that, within the discretion of the issuing authority, hearsay may be permitted to establish any element of the offense in two situations: (1) where the Commonwealth has shown that requiring the appearance of the witness, either victim or eyewitness, would cause an undue hardship on that witness; and (2) evidence of a purely technical nature that is not the testimony of an eyewitness or evidence describing the criminal behavior, or identifying the perpetrators of the crime and not included in paragraph (1). Probable cause cannot be established solely on the basis of hearsay evidence. Nothing in this rule is intended to preclude the use at the preliminary hearing of hearsay evidence that would be admissible at trial under other provisions of law. When providing the averment required under paragraph (E)(4) that a representative of the Commonwealth has confirmed the witness' availability for trial, that representative does not need to be the same individual representing the Commonwealth at the preliminary hearing.

Under the provisions of paragraph (E)(5), it is expected that when an issuing authority refuses to admit hearsay that is offered at the preliminary hearing pursuant to paragraph (E) of this rule, the issuing authority should grant a continuance if it is the first occasion when this hearsay has been offered at the preliminary hearing.

If the case is held for court, the normal rules of evidence will apply at trial.

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F), during the preliminary hearing, the issuing

authority is prohibited from proceeding on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

See Chapter 5 Part E for the procedures governing indicting grand juries. Under these rules, a case may be presented to the grand jury instead of proceeding to a preliminary hearing. *See* Rule 556.2.

NOTE: Former Rule 141, previously Rule 120, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 141 and amended September 18, 1973, effective January 1, 1974; amended June 30, 1975, effective July 30, 1975; amended October 21, 1977, effective January 1, 1978; paragraph (D) amended April 26, 1979, effective July 1, 1979; amended February 13, 1998, effective July 1, 1998; rescinded October 8, 1999, effective January 1, 2000. Former Rule 142, previously Rule 124, adopted June 30, 1964, effective January 1, 1965, suspended effective May 1, 1970; present rule adopted January 31, 1970, effective May 1, 1970; renumbered Rule 142 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; effective date extended to July 1, 1982; amended July 12, 1985, effective January 1, 1986, effective date extended to July 1, 1986; rescinded October 8, 1999, effective January 1, 2000. New Rule 141, combining former Rules 141 and 142, adopted October 8, 1999, effective January 1, 2000; renumbered Rule 542 and *Comment* revised March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended January 27, 2011, effective in 30 days; amended June 21, 2012, effective in 180 days; amended October 1, 2012, effective July 1, 2013; amended April 25, 2013, effective June 1, 2013 **[.]** **;** **amended , 2019, effective , 2019.**

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COMMITTEE EXPLANATORY <u>REPORTS</u>:

<u>Final</u> <u>Report</u> explaining the February 13, 1998 amendments concerning questioning of witnesses published with the Court's Order at 28 <u>Pa.B.</u> 1127 (February 28, 1998).

<u>Final</u> <u>Report</u> explaining new Rule 141 published with the Court's Order at 29 <u>Pa.B.</u> 5509 (October 23, 1999).

<u>Final</u> <u>Report</u> explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 <u>Pa.B.</u> 1478 (March 18, 2000).

<u>Final</u> <u>Report</u> explaining the August 24, 2004 amendments concerning notice published with the Court's Order at 34 <u>Pa.B.</u> 5025 (September 11, 2004).

<u>Final</u> <u>Report</u> explaining the March 9, 2006 amendments to paragraph (D) published with the Court's Order at 36 <u>Pa.B.</u> 1392 (March 25, 2006).

<u>Final</u> <u>Report</u> explaining the May 1, 2007 amendments deleting the certified mail service requirement from paragraph (E)(2)(b) published with the Court's Order at 37 <u>Pa.B.</u> 2503 (June 2, 2007).

<u>Court's</u> <u>Order</u> of January 27, 2011 adding new paragraphs (D) and (E) concerning hearsay at the preliminary hearing published at 41 <u>Pa.B.</u> 834 (February 12, 2011).

<u>Final</u> <u>Report</u> explaining the June 21, 2012 revision of the <u>Comment</u> concerning indicting grand juries published with the Court's Order at 42 <u>Pa.B</u>. 4153 (July 7, 2012).

<u>Final</u> <u>Report</u> explaining the October 1, 2012 amendments to paragraph (G)(1) concerning computation of time and (G)(2) concerning notice of continuance published with the Court's Order at 42 <u>Pa.B.</u> 6622 (October 20, 2012).

<u>Final</u> <u>Report</u> explaining the April 25, 2013 amendments to paragraph (E) concerning hearsay at preliminary hearings published with the

Court's Order at 43 Pa.B. 2560 (May 11, 2013).

Report explaining the proposed amendments to paragraph (E) concerning hearsay at preliminary hearings published for comment at 49 Pa.B. _______ (______, 2019).

RULE 543. DISPOSITION OF CASE AT PRELIMINARY HEARING.

(A) At the conclusion of the preliminary hearing, the decision of the issuing authority shall be publicly pronounced.

(B) If the issuing authority finds that the Commonwealth has established **[a *prima facie* case]** **probable cause** that an offense has been committed and the defendant has committed it, the issuing authority shall hold the defendant for court on the offense(s) on which the Commonwealth established **[a *prima facie* case]** **probable cause**. If there is no offense for which **[a *prima facie* case]** **probable cause** has been established, the issuing authority shall discharge the defendant.

(C) When the defendant has appeared and has been held for court, the issuing authority shall:

(1) set bail as permitted by law if the defendant did not receive a preliminary arraignment; or

(2) continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A);

(3) 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 ; and

(4) advise the defendant that, if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including the trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence.

(D) In any case in which the defendant fails to appear for the preliminary hearing:

(1) if the issuing authority finds that the defendant did not receive notice of the preliminary hearing by a summons served pursuant to Rule 511, a warrant of arrest shall be issued pursuant to Rule 509(2)(d).

(2) If the issuing authority finds that there was cause explaining the defendant's failure to appear, the issuing authority shall continue the preliminary hearing to a specific date and time, and shall give notice of the new date, time, and place as provided in Rule 542(G)(2). The issuing authority shall not issue a bench warrant.

(3) If the issuing authority finds that the defendant's absence is without cause and after notice, the absence shall be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority.

(a) In these cases, the issuing authority shall proceed with the case in the same manner as though the defendant were present.

(b) If the preliminary hearing is conducted and the case held for court, the issuing authority shall

(i) give the defendant notice by first class mail of the results of the preliminary hearing and that a bench warrant has been requested; and

(ii) pursuant to Rule 547, transmit the transcript to the clerk of courts with a request that a bench warrant be issued by the court of common pleas and, if the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), with a notice to the court of common pleas of the defendant's noncompliance.

(c) If the preliminary hearing is conducted and the case is dismissed, the issuing authority shall give the defendant notice by first class mail of the results of the preliminary hearing.

(d) If a continuance is granted, the issuing authority shall give the parties notice of the new date, time, and place as provided in Rule 542(G)(2), and may issue a bench warrant. If a bench warrant is issued and the warrant remains unserved for the continuation of the preliminary hearing, the issuing authority shall vacate the bench warrant. The case shall proceed as provided in paragraphs (D)(3)(b) or (c).

(E) If the Commonwealth does not establish **[a *prima facie* case]** <u>probable cause</u> of the defendant's guilt, and no application for a continuance is made and there is no reason for a continuance, the issuing authority shall dismiss the complaint.

(F) In any case in which a summary offense is joined with misdemeanor, felony, or murder charges:

(1) If the Commonwealth establishes **[a *prima facie* case]** <u>probable cause</u> pursuant to paragraph (B), the issuing authority shall not adjudicate or dispose of the summary offenses, but shall forward the summary offenses to the court of common pleas with the charges held for court.

(2) If the Commonwealth does not establish **[a *prima facie* case]** **<u>probable cause</u>** pursuant to paragraph (B), upon the request of the Commonwealth, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

(3) If the Commonwealth withdraws all the misdemeanor, felony, and murder charges, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

(G) Except as provided in Rule 541(D), once a case is bound over to the court of common pleas, the case shall not be remanded to the issuing authority.

COMMENT: **<u>This rule was amended in 2019 to change the term describing the standard to be used by the issuing authority when weighing the evidence presented at the preliminary hearing from "*prima facie*" to "probable cause." The change was made because there is no material difference between the level of evidence that constitutes a *prima facie* case and that constitutes probable cause. Because the latter is more commonly understandable, the change was made to remove any confusion. The change in terminology is not intended to change the burden on the Commonwealth with regard to establishing the case at the preliminary hearing.</u>**

Paragraph (B) was amended in 2011 to clarify what is the current law in Pennsylvania that, based on the evidence presented by the Commonwealth at the preliminary hearing, the issuing authority may find that the Commonwealth has not made out **[a *prima facie* case]** <u>probable cause</u> as to the offense charged in the complaint but has made out **[a *prima facie* case]** <u>probable cause</u> as to a lesser offense of the offense charged. In this case, the issuing authority may hold the defendant for court on that lesser offense only. The issuing authority, however, may not *sua sponte* reduce the grading of any charge.

See Rule 1003 (Procedure In Non-Summary Municipal Court Cases) for the preliminary hearing procedures in Municipal Court, including reducing felony charges at the preliminary hearing in Philadelphia.

Paragraph (C) reflects the fact that a bail determination will already have been made at the preliminary arraignment, except in those cases in which, pursuant to a summons, the defendant's first appearance is at the preliminary hearing. *See* Rules 509 and 510.

Paragraph (C)(4) requires that the defendant be advised of

the consequences of failing to appear for any court proceeding. *See* Rule 602 concerning a defendant's failure to appear for trial; see also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.'").

If the administrative processing and identification procedures as authorized by law, such as fingerprinting required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, that ordinarily occur following an arrest are not completed previously, when bail is set at the conclusion of the preliminary hearing, the issuing authority must order the defendant to submit to the administrative processing and identification procedures as a condition of bail. *See* Rule 527 for nonmonetary conditions of release on bail.

If a case initiated by summons is held for court after the preliminary hearing is conducted in the defendant's absence pursuant to paragraph (D)(2) and the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), the issuing authority must include with the transmittal of the transcript a notice to the court of common pleas that the defendant has not complied with the fingerprint order. *See* Rule 547.

Nothing in this rule is intended to preclude judicial districts from providing written notice of the arraignment to the defendant at the conclusion of the preliminary hearing when a case is held for court. *See* Rule 571.

Paragraphs (D)(2) and (D)(3) were amended in 2013 changing the phrase "good cause" to "cause" in reference to whether the defendant's absence at the time of the preliminary hearing permits the preliminary hearing to proceed in the defendant's absence. This amendment is not intended as a change in the standard for making this determination. The change makes the language consistent with the language in Rule 602 describing the standard by which a defendant's absence is judged for the trial to proceed in the defendant's absence. In both situations, the standard is the same.

When a defendant fails to appear for the preliminary hearing, before proceeding with the case as provided in paragraph (D), the issuing authority must determine (1) whether the

defendant received notice of the time, date, and place of the preliminary hearing either in person at a preliminary arraignment as provided in Rule 540(G)(2) or in a summons served as provided in Rule 511, and (2) whether the defendant had cause explaining the absence.

If the issuing authority determines that the defendant did not receive notice, the issuing authority must issue an arrest warrant as provided in Rule 509, and the case will proceed pursuant to Rules 516 or 517. *See* paragraph (D)(1).

If the issuing authority determines that there is cause explaining why the defendant failed to appear, the preliminary hearing must be continued and rescheduled for a date certain. *See* paragraph (D)(2). For the procedures when a preliminary hearing is continued, see Rule 542(G).

If the issuing authority determines that the defendant received service of the summons as defined in Rule 511 and has not provided cause explaining why he or she failed to appear, the defendant's absence constitutes a waiver of the defendant's right to be present for subsequent proceedings before the issuing authority. The duration of this waiver only extends through those proceedings that the defendant is absent.

When the defendant fails to appear after notice and without cause, paragraph (D)(3)(a) provides that the case is to proceed in the same manner as if the defendant were present. The issuing authority either would proceed with the preliminary hearing as provided in Rule 542(A), (B), (C) and Rule 543(A), (B), (C), and (D)(3)(b) or (c); or, if the issuing authority determines it necessary, continue the case to a date certain as provided in Rule 542(G); or, in the appropriate case, convene the preliminary hearing for the taking of testimony of the witnesses who are present, and then continue the remainder of the hearing until a date certain. When the case is continued, the issuing authority may issue a bench warrant as provided in paragraph (D)(3)(d), and must send the required notice of the new date to the defendant, thus providing the defendant with another opportunity to appear.

Paragraph (D)(3)(b)(ii) requires the issuing authority to include with the Rule 547 transmittal a request that the court of common pleas issue a bench warrant if the case is held for court.

In addition to the paragraph (D)(3)(b) notice requirements, the notice may include the date of the arraignment in common pleas court.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

See Rule 571 (Arraignment) for notice of arraignment requirements.

Rule 542(F) specifically prohibits an issuing authority at a preliminary hearing from proceeding on any summary offenses that are joined with misdemeanor, felony, or murder charges, except as provided in paragraph (F) of this rule. Paragraph (F) sets forth the procedures for the issuing authority to handle these summary offenses at the preliminary hearing. These procedures include the issuing authority (1) forwarding the summary offenses together with the misdemeanor, felony, or murder charges held for court to the court of common pleas, or (2) disposing of the summary offenses as provided in Rule 454 by accepting a guilty plea or conducting a trial whenever (a) the misdemeanor, felony, and murder charges are withdrawn, or (b) **[a *prima facie* case]** **probable cause** is not established at the preliminary hearing and the Commonwealth requests that the issuing authority proceed on the summary offenses.

Under paragraph (F)(2), in those cases in which the Commonwealth does not intend to refile the misdemeanor, felony, or murder charges, the Commonwealth may request that the issuing authority dispose of the summary offenses. In these cases, if all the parties are ready to proceed, the issuing authority should conduct the summary trial at that time. If the parties are not prepared to proceed with the summary trial, the issuing authority should grant a continuance and set the summary trial for a date and time certain.

In those cases in which **[a *prima facie* case]** **probable cause** is not established at the preliminary hearing, and the Commonwealth does not request that the issuing authority proceed on the summary offenses, the issuing authority should dismiss the complaint, and discharge the defendant unless there are outstanding detainers against the defendant that would prevent the defendant's release.

Paragraph (G) emphasizes the general rule that once a case has been bound over to the court of common pleas, the case is not permitted to be remanded to the issuing authority. There is a limited exception to the general rule in the situation in which the right to a previously waived preliminary hearing is reinstated and the parties agree, with the consent of the common pleas judge, that the preliminary hearing be held before the issuing authority. *See* Rule 541(D).

Nothing in this rule would preclude the refiling of one or more of the charges, as provided in these rules.

See Rule 313 for the disposition of any summary offenses joined with misdemeanor or felony charges when the defendant is accepted into an ARD program on the misdemeanor or felony charges.

NOTE: Original Rule 123, adopted June 30, 1964, effective January 1, 1965, suspended January 31, 1970, effective May 1, 1970. New Rule 123 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 143 September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; renumbered Rule 142 October 8, 1999, effective January 1, 2000; renumbered Rule 543 and amended March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended December 30, 2005, effective August 1, 2006; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended July 10, 2008, effective February 1, 2009; amended February 12, 2010, effective April 1, 2010; amended January 27, 2011, effective in 30 days; *Comment* revised July 31, 2012, effective November 1, 2012; amended October 1, 2012, effective July 1, 2013; amended May 2, 2013, effective June 1, 2013 **[.]** **; amended , 2019, effective 2019.**

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COMMITTEE EXPLANATORY <u>REPORTS</u>:

<u>Report</u> explaining the August 9, 1994 amendments published at 22 <u>Pa.B.</u> 6 (January 4, 1992); <u>Final</u> <u>Report</u> published with the Court's Order at 24 <u>Pa.B.</u> 4342 (August 27, 1994).

<u>Final</u> <u>Report</u> explaining the September 13, 1995 amendments published with the Court's Order at 25 <u>Pa.B.</u> 4116 (September 30, 1995).

<u>Final</u> <u>Report</u> explaining the October 8, 1999 renumbering of Rule 143 published with the Court's Order at 29 <u>Pa.B.</u> 5509 (October 23, 1999).

<u>Final</u> <u>Report</u> explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 <u>Pa.B.</u> 1478 (March 18, 2000).

<u>Final</u> <u>Report</u> explaining the August 24, 2004 changes concerning the procedures when a defendant fails to appear published with the Court's Order at 34 <u>Pa.B.</u> 5025 (September 11, 2004).

<u>Final</u> <u>Report</u> explaining the December 30, 2005 changes adding references to bench warrants published with the Court's Order at 36 <u>Pa.B.</u> 184 (January 14, 2006).

<u>Final</u> <u>Report</u> explaining the March 9, 2006 amendments adding new paragraphs (E) and (F) published with the Court's Order at 36 <u>Pa.B.</u> 1392 (March 25, 2006).

<u>Final</u> <u>Report</u> explaining the May 19, 2006 amendments correcting cross-references to Rule 529 published with the Court's Order at 36 <u>Pa.B.</u> 2633 (June 3, 2006).

<u>Final</u> <u>Report</u> explaining the May 1, 2007 changes clarifying the procedures when a defendant fails to appear published with the Court's Order at 37 <u>Pa.B.</u> 2496 (June 2, 2007).

Final Report explaining the July 10, 2008 amendments to paragraphs (C) and (D)(2)(c) concerning administrative processing and identification procedures published with the Court's Order at 38 Pa.B. 3971 (July 26, 2008).

Final Report explaining the February 12, 2010 amendments adding new paragraph (G) prohibiting remands to the issuing authority published with the Court's Order at 40 Pa.B. 1068 (February 27, 2010).

Final Report explaining the July 31, 2012 revision of the Comment changing the citation to Rule 540(F)(2) to Rule 540(G)(2) published with the Court's Order at 42 Pa.B. 5340 (August 18, 2012).

Final Report explaining the October 1, 2012 amendments to paragraphs (D)(2) and (D)(3)(d) adding "place" to "date and time" for preliminary hearing notices published with the Court's Order at 42 Pa.B. 6622 (October 20, 2012).

Final Report explaining the May 2, 2013 amendments concerning notice of consequences of failing to appear published the Court's Order at 43 Pa.B. 2704 (May 18, 2013).

Report explaining the proposed amendments change the terminology "prima facie" to "probable cause" published for comment at 49 Pa.B. ________ (______, 2019).

RULE 1003. PROCEDURE IN NON-SUMMARY MUNICIPAL COURT CASES.

(A) INITIATION OF CRIMINAL PROCEEDINGS

(1) Criminal proceedings in court cases shall be instituted by filing a written complaint, except that proceedings may be also instituted by:

(a) an arrest without a warrant when a felony or misdemeanor is committed in the presence of the police officer making the arrest; or

(b) an arrest without a warrant upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when the arrest without a warrant is specifically authorized by law; or

(c) an arrest without a warrant upon probable cause when the offense is a felony.

(2) Private Complaints

(a) When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.

(b) If the attorney for the Commonwealth:

i. approves the complaint, the attorney shall indicate this decision on the complaint form and transmit it to the issuing authority;

ii. disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the President Judge of Municipal Court, or the President Judge's designee, for review of the decision. Appeal of the decision of the Municipal Court shall be to the Court of Common Pleas.

(B) CERTIFICATION OF COMPLAINT

Before an issuing authority may issue process or order further proceedings in a Municipal Court case, the issuing authority shall ascertain and certify on the complaint that:

(1) the complaint has been properly completed and executed; and

(2) when prior submission to an attorney for the Commonwealth is required, an

attorney has approved the complaint.

The issuing authority shall then accept the complaint for filing, and the case shall proceed as provided in these rules.

(C) SUMMONS AND ARREST WARRANT PROCEDURES

When an issuing authority finds grounds to issue process based on a complaint, the issuing authority shall:

(1) issue a summons and not a warrant of arrest when the offense charged is punishable by imprisonment for a term of not more than 1 year, except as set forth in paragraph (C)(2);

(2) issue a warrant of arrest when:

(a) the offense charged is punishable by imprisonment for a term of more than 5 years;

(b) the issuing authority has reasonable grounds for believing that the defendant will not obey a summons;

(c) the summons has been returned undelivered;

(d) a summons has been served and disobeyed by a defendant;

(e) the identity of the defendant is unknown;

(f) a defendant is charged with more than one offense, and one of the offenses is punishable by imprisonment for a term of more than 5 years; or

(3) when the offense charged does not fall within the categories specified in paragraph (C)(1) or (2), the issuing authority may, in his or her discretion, issue a summons or a warrant of arrest.

(D) PRELIMINARY ARRAIGNMENT

(1) When a defendant has been arrested within Philadelphia County in a Municipal Court case, with or without a warrant, the defendant shall be afforded a preliminary arraignment by an issuing authority without unnecessary delay. If the defendant was arrested without a warrant pursuant to paragraph (A)(1)(a) or (b), unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

(2) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. When counsel for the defendant is present, the defendant must

be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

(3) At the preliminary arraignment, the issuing authority:

(a) shall not question the defendant about the offense(s) charged;

(b) shall give the defendant's attorney, or if unrepresented the defendant, a copy of the certified complaint;

(c) if the defendant was arrested with a warrant, the issuing authority shall provide the defendant's attorney, or if unrepresented the defendant, with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant's attorney, or if unrepresented the defendant, shall be given copies no later than the first business day after the preliminary arraignment; and

(d) also shall inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(ii) of the day, date, hour, and place for the trial, which shall not be less than 20 days after the preliminary arraignment, unless the issuing authority fixes an earlier date for the trial upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth, and that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued;

(iii) in a case charging a felony, unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2, of the date, time, and place of the preliminary hearing, which shall not be less than 14 nor more than 21 days after the preliminary arraignment unless extended for cause or the issuing authority fixes an earlier date upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and that failure to appear without cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and that the case shall proceed in the defendant's absence, and a warrant of arrest shall be issued;

(iv) if a case charging a felony is held for court at the time of the preliminary hearing, that failure to appear without cause at any proceeding for which the defendant's presence is required, including trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence, and a warrant of arrest shall be issued; and

(v) of the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

(4) After the preliminary arraignment, if the defendant is detained, he or she shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail, as provided by law.

(E) PRELIMINARY HEARING IN CASES CHARGING A FELONY

(1) Except as provided in paragraph**[s]** (E)(2) **[and (E)(3)]**, in cases charging a felony, the preliminary hearing in Municipal Court shall be conducted as provided in Rule 542 (Preliminary Hearing; Continuances) and Rule 543 (Disposition of Case at Preliminary Hearing).

[(2) At the preliminary hearing, the issuing authority shall determine whether there is a *prima facie* case that an offense has been committed and that the defendant has committed it.

(a) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.

(b) Hearsay evidence shall be sufficient to establish any element of an offense including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.]

[(3)] <u>(2)</u> If **[a *prima facie* case]** <u>probable cause</u> is not established on any felony charges, but is established on any misdemeanor or summary charges, the judge shall remand the case to Municipal Court for trial.

(F) ACCEPTANCE OF BAIL PRIOR TO TRIAL

The Clerk of Courts shall accept bail at any time prior to the Municipal Court trial.

COMMENT: The 2004 amendments make it clear that Rule 1003 covers the preliminary procedures for all non-summary

Municipal Court cases, see Rule 1001(A), and cases charging felonies, including the institution of proceedings, the preliminary arraignment, and the preliminary hearing.

See Chapter 5 (Procedure in Court Cases), Parts I (Instituting Proceedings), II (Complaint Procedures), III(A) (Summons Procedures), III(B) (Arrest Procedures in Court Cases), and IV (Proceedings in Court Cases Before Issuing Authorities) for the statewide rules governing the preliminary procedures in court cases, including non-summary Municipal Court cases, not otherwise covered by this rule.

The 2004 amendments to paragraph (A)(1) align the procedures for instituting cases in Municipal Court with the statewide procedures in Rule 502 (Means of Instituting Proceedings in Court Cases).

The 1996 amendments to paragraph (A)(2) align the procedures for private complaints in non-summary cases in Municipal Court with the statewide procedures for private complaints in Rule 506 (Approval of Private Complaints). In all cases in which the affiant is not a law enforcement officer, the complaint must be submitted to the attorney for the Commonwealth for approval or disapproval.

As used in this rule, "Municipal Court judge" includes a bail commissioner acting within the scope of the bail commissioner's authority under 42 Pa.C.S. § 1123(A)(5).

The procedure set forth in paragraph (C)(3) allows the issuing authority to exercise discretion in whether to issue a summons or an arrest warrant depending on the circumstances of the particular case. Appropriate factors for issuing a summons rather than an arrest warrant will, of course, vary. Among the factors that may be taken into consideration are the severity of the offense, the continued danger to the victim, the relationship between the defendant and the victim, the known prior criminal history of the defendant, *etc.*

If the attorney for the Commonwealth exercises the options provided by Rule 202, Rule 507, or both, the attorney must file the certifications required by paragraphs (B) of Rules 202 and 507 with the Court of Common Pleas of Philadelphia County and with the Philadelphia Municipal Court.

For the contents of the complaint, see Rule 504.

Under paragraphs (A) and (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before the defendant may be detained. *See Riverside v. McLaughlin,* 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Within the meaning of paragraph (D)(2), counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (D)(2), the issuing authority has discretion to order that a defendant appear in person for the preliminary arraignment.

Under paragraph (D)(2), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning *venue* when proceedings are conducted pursuant to this rule using advanced communication technology.

Paragraph (D)(3)(c) requires that the defendant's attorney, or if unrepresented the defendant, receive copies of the arrest warrant and the supporting affidavits at the preliminary arraignment. This amendment parallels Rule 540(C). *See also* Rules 208(A) and 513(A).

Paragraph (D)(3)(c) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, **[515 Pa. 501,]** 530 A.2d 414 (**Pa.** 1987).

The 2012 amendment to paragraph (D)(3)(d)(iii) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed

to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Rule 556.2. *See* also Rule 556.11 for the procedures when a case will be presented to the indicting grand jury.

Paragraphs (D)(3)(d)(ii) and (D)(3)(d)(iv) require that, in all cases at the preliminary arraignment, the defendant be advised of the consequences of failing to appear for any court proceeding. *See* Rule 602 concerning a defendant's failure to appear for trial. *See also Commonwealth v. Bond*, 693 A.2d 220 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.'")**.**

Under paragraph (D)(4), after the preliminary arraignment, if the defendant is detained, the defendant must be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she must be committed to jail as provided by law.

Paragraphs (D)(3)(d)(iii) and (E) make it clear that, with some exceptions, the procedures in Municipal Court for both preliminary hearings and cases in which the defendant fails to appear for the preliminary hearing are the same as the procedures in the other judicial districts.

This rule was amended in 2019 to change the term describing the standard to be used by the issuing authority when weighing the evidence presented at the preliminary hearing from "*prima facie*" to "probable cause." The change was made because there is no material difference between the level of evidence that constitutes a *prima facie* case and that constitutes probable cause. Since the latter is more commonly understandable, the change was made to remove any confusion. The change in terminology is not intended to change the burden on the Commonwealth with regard to establishing the case at the preliminary hearing.

Paragraph (E) was amended in **[2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as**

preliminary hearings, especially with regard to the use of hearsay to establish the elements of a prima facie case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare Commonwealth ex rel. Buchanan v. Verbonitz,* 525 Pa. 413, 581 A.2d 172 (1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case). *See also* Rule 542.] **2019 to clarify that the use of hearsay at preliminary hearings must be in accordance with Rule 542(E).**

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

NOTE: Original Rule 6003 adopted June 28, 1974, effective July 1, 1974; amended January 26, 1977, effective April 1, 1977; amended December 14, 1979, effective April 1, 1980; amended July 1, 1980, effective August 1, 1980; amended October 22, 1981, effective January 1, 1982; *Comment* revised December 11, 1981, effective July 1, 1982; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; rescinded August 9, 1994, effective January 1, 1995. New Rule 6003 adopted August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; amended March 22, 1996, effective July 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; amended August 28, 1998, effective immediately; renumbered Rule 1003 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended August 24, 2004, effective August 1, 2005; amended August 15, 2005, effective February 1, 2006; amended April 5, 2010, effective April 7, 2010; amended January 27, 2011, effective in 30 days; amended June 21, 2012, effective in 180 days, *Comment* revised July 31, 2012, effective November 1, 2012; amended April 25, 2013, effective June 1, 2013; amended May 2, 2013, effective June 1, 2013 **[.]** **; amended , 2019, effective , 2019.**

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COMMITTEE EXPLANATORY <u>REPORTS</u>:

<u>Report</u> explaining the provisions of the new rule published at 22 <u>Pa.B.</u> 6 (January 4, 1992). <u>Final</u> <u>Report</u> published with the Court's Order at 24 <u>Pa.B.</u> 4342 (August 27, 1994).

<u>Final</u> <u>Report</u> explaining the September 13, 1995 amendments published with Court's Order at 25 <u>Pa.B.</u> 4116 (September 30, 1995).

<u>Final</u> <u>Report</u> explaining the March 22, 1996 amendments published with the Court's Order at 26 <u>Pa.B.</u> 1690 (April 13, 1996).

<u>Final</u> <u>Report</u> explaining the August 28, 1998 amendments published with the Court's Order at 28 <u>Pa.B.</u> 4627 (September 12, 1998).

<u>Final</u> <u>Report</u> explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 <u>Pa.B.</u> 1478 (March 18, 2000).

<u>Final</u> <u>Report</u> explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 <u>Pa.B.</u> 2591 (May 25, 2002).

<u>Final</u> <u>Report</u> explaining the August 24, 2004 changes clarifying preliminary arraignment and preliminary hearing procedures in Municipal Court cases published with the Court's Order at 34 <u>Pa.B.</u> 5025 (September 11, 2004).

<u>Final</u> <u>Report</u> explaining the August 15, 2005 amendments to paragraphs (A)(2)(b)(ii) and (D)(3)(d)(ii) published with the Court's Order at 35 <u>Pa.B.</u> 4918 (September 3, 2005).

<u>Court's</u> <u>Orde</u>r adopting the April 5, 2010 amendments to paragraph (D)(3)(d) published at 40 <u>Pa.B.</u> 2012 (April 17, 2010).

<u>Court's</u> <u>Order</u> of January 27, 2011, amending paragraph (E) concerning hearsay and reducing felony charges at preliminary

hearing published at 41 Pa.B. 834 (February 12, 2011).

Final Report explaining the June 21, 2012 amendments to paragraph (D)(3)(d)(iii) concerning indicting grand juries published with the Court's Order at 42 Pa.B. 4153 (July 7, 2012).

Final Report explaining the July 31, 2012 revision of the Comment changing the citation to Rule 540(B) to Rule 540(C) published with the Court's Order at 42 Pa.B. 5333 (August 8, 2012).

Final Report explaining the April 25, 2013 amendments to paragraph (E) concerning hearsay published with the Court's Order at 43 Pa.B. 2560 (May 11, 2013).

Final Report explaining the May 2, 2013 amendments concerning proceedings conducted in the defendant's absence published with the Court's Order at 43 Pa.B. 2704 (May 18, 2013).

Report explaining the proposed amendments to paragraph (E) concerning hearsay at preliminary hearings published for comment at 49 Pa.B. ______ (______, 2019).

REPORT

Proposed Amendment of Pa.Rs.Crim.P. 542, 543, and 1003

USE OF HEARSAY AT PRELIMINARY HEARINGS

The Committee, at the Court's direction, undertook an examination of the nature of the Commonwealth's burden at preliminary hearings and the extent to which hearsay evidence may be used in satisfying that burden in light of the Court's dismissal of the appeal in *Commonwealth v. Ricker,* 170 A.3d 494 (Pa. 2017). The relevant provisions regarding the admissibility of hearsay at the preliminary hearing are contained in Rule 542 (Preliminary Hearing; Continuances) with similar provisions for preliminary hearings in the Philadelphia Municipal Court contained in Rule 1003 (Procedure in Non-Summary Municipal Court Cases).

As a starting point, the Committee examined the history of the provision contained in Paragraph (E) of Rule 542. The current rule provisions regarding hearsay at preliminary hearings were developed in several stages. In 2011, the Court amended Rules 542 and 1003 to provide that "Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property." The *Comments* to both rules explain that the use of hearsay is not limited to these elements and offenses.

Following these amendments, there were reports of some issuing authorities interpreting this language as limiting the use of hearsay in preliminary hearings to property offenses, despite the language in the *Comment* indicating that the rule was not intended to be thus limited. In 2013, on the Committee's recommendation, the Court adopted changes to clarify this misconception, adding the phrase "including, but not limited to" to the statement in Rule 542(E) that provides that hearsay evidence may be used to "establish any element of an offense requiring proof of the ownership of, non-

permitted use of, damage to, or value of property."[1] Additionally, a cross-reference to *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990), was added to the *Comment*. *Verbonitz* stands for the proposition that, while the Commonwealth is permitted to use hearsay to establish the elements of the offense for purposes of the preliminary hearing, the Commonwealth may not establish its case exclusively by hearsay. However, in 2015, in *Commonwealth v Ricker*, 120 A.3d 349 (Pa. Super. 2015), the Superior Court held that hearsay evidence alone may be used to establish the Commonwealth's case at the preliminary hearing. As noted above, the Supreme Court of Pennsylvania subsequently dismissed the grant of appeal as improvidently granted. *Commonwealth v Ricker,* 170 A.3d 494 (Pa. 2017).

The Committee also looked at practice in other states. It was clear that there is a wide diversity in the manner in which hearsay evidence is permitted in preliminary examinations. Some states, such as Tennessee where the rules of evidence are strictly applied, are very restrictive in the use of hearsay. Other states, such as Alabama and California, permit very wide latitude in using hearsay evidence to establish probable cause at the preliminary examinations. Given this wide variety of practices and the procedural differences that many of these states have with Pennsylvania, the Committee concluded that, while some of these practices were illuminating, no single state's procedures were an adequate model. The Committee therefore concentrated efforts on finding the procedures that would be best suited for Pennsylvania.

As an initial point, the Committee examined the question of the Commonwealth's *prima facie* burden at the preliminary hearing and whether it implicated constitutional confrontation rights. The Committee concluded that there was no material difference between the *prima facie* standard and probable cause, particularly because the question of witness credibility is not at issue at the preliminary hearing. Therefore, the term "*prima facie*" has been replaced with the term "probable cause" in Rules 542 and 1003 to clarify any confusion. The *Comments* of both rules would be revised to provide further explanation with the added provision that the change in terminology is not intended to change the burden on the Commonwealth with regard to establishing the

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[1] A similar amendment was made to Rule 1003 describing the use of hearsay evidence in felony preliminary hearings in the Philadelphia Municipal Court.

case at the preliminary hearing. Similar changes also would be made to Rule 543 (Disposition of Case at Preliminary Hearing).

The Committee believes that any confrontation right at the preliminary hearing is based in the rule and the definition of that right is a matter of policy. The Committee concluded that the current language of Rule 542(E) is inadequate. The consensus of the Committee was that establishment of a *prima facie* case by hearsay alone, as held by the Superior Court in *Ricker*, was not appropriate. The Committee believes that *Verbonitz*, despite being ostensibly a plurality decision, is still good law and stands for the proposition that a *prima facie* case may not be found exclusively on hearsay evidence.

Current paragraph (E) of Rule 542 would be removed under the proposal. It would be replaced by a more detailed description of how hearsay would be permitted to be used. First, the rule would specify certain categories of evidence that always could be presented by hearsay at the preliminary hearing. This would be evidence of a technical or administrative nature, such as laboratory reports or evidence of the ownership and non-permitted use of property. New paragraph (E)(1) of Rule 542 would contain the list of these forms of hearsay that would always be admissible at the preliminary hearing.

The Committee agreed that there should also be certain forms of hearsay evidence that could be admissible at the discretion of the issuing authority. Ultimately, the Committee agreed that there should be two categories of discretionary hearsay. These would be contained in a new paragraph (E)(2) added to Rule 542.

Paragraph (E)(2)(a) would permit the admission of victim and eyewitness testimony by hearsay when appearance at the preliminary hearing would cause an undue hardship for the witness. The rule would require the Commonwealth to make a showing as to this hardship and the hearsay would be required to be in the form of either a writing signed and adopted by the witness or a verbatim contemporaneous electronic recording of the oral statement of the witness. The latter requirement is adapted from the language of Rule of Evidence 803.1(B) and (C). The Committee debated whether to include a definition of “undue hardship” but ultimately decided that this was a fact-specific concept and best left to be determined in a case-by-case manner.

The other category of discretionary hearsay, contained in paragraph (E)(2)(b), would be other hearsay of a "purely technical" nature, if not contained in the allowances already listed in paragraph (E)(1). This was intended as a catch-all for other forms of technical evidence that were not considered when the list in paragraph (E)(1) was developed. The term "purely technical" would be further defined in the *Comment* as that which "is not the testimony of an eye witness or evidence describing the criminal behavior, or identifying the perpetrators of the crime" and not included in paragraph (E)(1).

The rule would also require that, in the case of victim or eyewitness testimony or of witness testimony of ownership of, non-permitted use of, damage to, or value of property, the representative of the Commonwealth at the preliminary hearing must certify that a representative of the Commonwealth has communicated with the hearsay declarant and that the declarant is available to testify at trial. A statement in the *Comment* would clarify that the communication to verify the witness' availability may be by any representative of the Commonwealth, not just the representative at the preliminary hearing.

With regard to the denial of discretionary hearsay, paragraph (E)(5) would state that the issuing authority may grant a continuance when proffered hearsay is refused. *Comment* language would be added to indicate that it is expected that the continuance should be granted if this is the first time that the hearsay had been offered.

The rule also would contain an admonition that not all of the elements of an offense can be established exclusively by hearsay alone. The cross-reference to *Verbonitz* in the *Comment* would be retained but a new parenthetical added that more clearly reflects the holding in the case.

The Committee also considered the applicability of these changes to felony preliminary hearings in the Philadelphia Municipal Court. As mentioned above, Rule 1003(E) provides the authority for the use of hearsay at preliminary hearings held in the Philadelphia Municipal Court. The current language in the rule itself is somewhat different than that contained in current Rule 542(E), reflecting the specific problem that the 2013 amendments were meant to address, *i.e.*, the refusal of some Municipal Court judges to admit hearsay evidence regarding ownership or permissive use. The language in the *Comment* is virtually identical to that contained in the current Rule 542

Comment. The Committee concluded that there was no reason why the use of hearsay should be different in Municipal Court preliminary hearings. Therefore, the proposal would remove the current specific hearsay provisions from Rule 1003(E) and would refer to Rule 542. The *Comment* to Rule 1003 would be modified to state that the use of hearsay would be governed by Rule 542.