

Proposed Amendments to Pa.R.Crim.P. 535

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule 535 (Receipt for Deposit; Return of Deposit) to permit the clerk of courts to apply any bail monies that would be returnable to the defendant after full and final disposition of the case to any of the defendant's outstanding court fees, fine, costs, restitution, and bail judgments. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

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no later than Friday, November 23, 2012.

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BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Philip D. Lauer, Chair

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RULE 535. RECEIPT FOR DEPOSIT; RETURN OF DEPOSIT.

(A) Any deposit of cash in satisfaction of a monetary condition of bail shall be given to the issuing authority, the clerk of courts, or another official designated by the president judge by local rule pursuant to Rule 117(C). The issuing authority, clerk, or other official who accepts the deposit shall give the depositor an itemized receipt, and shall note on the bail bond the amount deposited and the name of the person who made the deposit. The defendant shall sign the bail bond, and be given a copy of the signed bail bond.

(1) When the issuing authority accepts a deposit of bail, the issuing authority shall note on the docket transcript the amount deposited and the name of the person who made the deposit. The issuing authority shall have the deposit, the docket transcript, and a copy of the bail bond delivered to the clerk of courts.

(2) When another official is designated by the president judge to accept a bail deposit, that official shall deliver the deposit and the bail bond to either the issuing authority, who shall proceed as provided in paragraph (A)(1), or the clerk of courts, who shall proceed as provided in paragraph (A)(3).

(3) When the clerk of courts accepts the deposit, the clerk shall note in the list of docket entries the amount deposited and the name of the person who made the deposit, and shall place the bail bond in the criminal case file.

[(4) At the time bail is being deposited, no inquiry shall be made of the depositor whether he or she consents to have the deposit retained to be applied toward the defendant's fines, costs, or restitution, if any.]

(B) When the deposit is the percentage cash bail authorized by Rule 528, the depositor shall be notified that by signing the bail bond, the depositor becomes a surety for the defendant and is liable for the full amount of the monetary condition in the event the defendant fails to appear or comply as required by these rules.

(C) The clerk of courts shall place all cash bail deposits in a bank or other depository approved by the court and shall keep records of all deposits.

(D) Within 20 days of the full and final disposition of the case, the deposit shall be returned to the depositor, less any bail-related fees or commissions authorized by law, and the reasonable costs, if any, of administering the percentage cash bail program.

Unless otherwise ordered by the court, if the bail was deposited by or on behalf of the defendant and the defendant is the named depositor, the amount otherwise

returnable to the defendant shall be used to pay and satisfy any outstanding fees, fines, costs, and restitution owed by the defendant in connection with any criminal or delinquency case in which the defendant owes fees, fines, costs, and restitution, as well as any bail judgment that may have been entered against a defendant pursuant to Rule 536.

(E) When a case is transferred pursuant to Rule 130(B) or Rule 555, the full deposit shall be promptly forwarded to the transfer judicial district, together with any bail-related fees, commissions, or costs paid by the depositor.

COMMENT: When the president judge has designated another official to accept the bail deposit as provided in Rule 117, the other official's authority under Rule 117 and this rule is limited to accepting the deposit, having the defendant sign the bail bond, releasing the defendant, and delivering the bail deposit and bail bond to the issuing authority or the clerk of courts.

[Paragraph (A) was amended in 2006 to make it clear that the clerk of courts or other official accepting a deposit of cash bail is not permitted to request that the depositor agree to have the cash bail deposit retained after the full and final disposition of the case to be applied toward the payment of the defendant's fines, costs, or restitution, if any. See, e.g., Commonwealth v. McDonald, 476 Pa. 217, 382 A.2d 124 (1978), which held that a deposit of cash to satisfy a defendant's monetary bail condition that is made by a person acting as a surety for the defendant may not be retained to pay for the defendant's court costs and/or fines.]

Paragraph (D) was amended in 2012 to permit the court, after the full and final disposition of the case, to apply money deposited as bail to be applied to any owed fees, fines, costs, and restitution. This amendment, adopted pursuant to the authority granted in 42 Pa.C.S. § 5702, is a procedural mechanism by which the court may retain money the defendant previously deposited with the court to satisfy the defendant's obligations but only in criminal or delinquency cases.

Given the complexities of posting real estate to satisfy a monetary condition of release, posting of real estate may not be feasible outside the normal business hours.

Paragraph (B) requires the issuing authority or the clerk of courts who accepts a percentage cash bail deposit to explain to the person who deposits the money the consequences of acting as a surety. There will be cases in which a person merely deposits the money for the defendant to post, and is not acting as the defendant's surety. In this situation, the defendant is the depositor and should receive the receipt pursuant to paragraph (A). See Rule 528.

When cash bail that is deposited in a bank pursuant to paragraph (C) is retained by a county in an interest-bearing account, case law provides that the county retains the earned interest. See *Crum v. Burd*, 131 Pa.Cmwlth. 550, 571 A.2d 1 (1989), *allocatur* denied 525 Pa. 649, 581 A.2d 574 (1990).

The full and final disposition of a case includes all avenues of direct appeal in the state courts. Therefore, the return of any deposits would not be required until after either the expiration of the appeal period or, if an appeal is taken, after disposition of the appeal. See Rule 534.

Any fees, commissions, or costs assessed pursuant to paragraph (D) must be reasonably related to the county's actual bail administration costs. Each county should establish local procedures to ensure adequate notice and uniform application of such fees, commissions, or costs. See, e.g., *Buckland v. County of Montgomery*, 812 F.2d 146 (3rd Cir. 1987).

When a case is transferred pursuant to Rules 130(B) and 555, paragraph (E) and Rules 130(B) and 555 require that any bail-related fees, commissions, or costs collected pursuant to paragraph (D) be forwarded to the transfer judicial district. Fees, commissions, or costs that have been assessed but not paid at the time of transfer may not be collected in the transferring judicial district.

When bail is terminated upon acceptance of the defendant into an ARD program, such action constitutes a "full and final disposition" for purposes of this rule and Rule 534 (Duration of Obligation). See Rule 313.

NOTE: Former Rule 4015, previously Rule 4009, adopted November 22, 1965, effective June 1, 1966; renumbered Rule 4015, former paragraph (b) integrated into paragraph (a) and new paragraph (b) adopted July 23, 1973, effective 60 days hence; rescinded September 13, 1995, effective January 1, 1996, and replaced by present Rule 4015. Present Rule 4015 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; renumbered Rule 535 and amended March 1, 2000, effective April 1, 2001; amended April 20, 2000, effective July 1, 2000; amended March 3, 2004, effective July 1, 2004; amended June 30, 2005, effective August 1, 2006; amended March 9, 2006, effective August 1, 2006 [.] ; amended , 2012, effective , 2012.

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COMMITTEE EXPLANATORY REPORTS:

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

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).

Final Report explaining new paragraph (E) concerning the interplay with Rules 130(B) (former Rule 21(B)) and 555 (former Rule 300) published with Court's Order at 30 Pa.B. 2219 (May 6, 2000).

Final Report explaining the March 3, 2004 changes to paragraph (A) published with Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the June 30, 2005 changes to the rule correlative to new Rule 117 published with the Court's Order at 35 Pa.B. 3911 (July 16, 2005).

Final Report explaining the March 9, 2006 changes to paragraph (A) concerning deposits of bail published with the Court's Order at 36 Pa.B. (, 2006).

Report explaining the proposed changes to paragraph (D) concerning defendant's deposits of bail to be applied to fees, fines, costs, and restitution published for comment at 42 Pa.B. (, 2012).

REPORT

Proposed Amendments to Pa.R.Crim.P. 535

RULE 535: USE OF BAIL MONEY FOR PAYMENT OF FEES, FINES, COSTS, AND RESTITUTION

Background

The Committee has been examining a proposal to amend Rule 535 to permit the clerk of courts to apply any bail monies that would be returnable to the defendant after full and final disposition of the case to any of the defendant's outstanding court fees, fine, costs, restitution, and bail judgments.

The Rules of Criminal Procedure traditionally have precluded directly applying bail money in this manner. This position was based on the concept that the purpose of bail is to ensure the presence of the defendant during the pendency of the case and not to obtain a "deposit" on future fine, costs, *etc.* One of the underlying concerns is that the ability of ensuring future payment of potential fine, costs, *etc.* will influence the bail determination inappropriately so that bail would be set higher than otherwise would be the case. Nevertheless, the Committee recognized that such a change might be a useful tool in collecting outstanding restitution and other costs.

The first question that the Committee considered was whether distribution of bail money in this manner fell within the purview of the Rules of Criminal Procedures. As part of this review, the Committee examined the current law in Pennsylvania on the return of bail, as well as the practice in other jurisdictions with regard to this question.

Under the common law, the purpose of bail was to ensure the appearance of the defendant and courts did not have the inherent power to apply bail money to another purpose.

In terms of constitutional concerns, the Eight Amendment of U.S. Constitution prohibits excessive bail. A U.S. Supreme Court case, *Cohen v. United States*, 7 L.Ed. 518, 82 S.Ct. 526 (1962), held that conditioning bail on the payment of a fine is excessive and in violation of the Eighth Amendment.

Several decades after the *Cohen* decision, a federal statute, 28 U.S.C. §2044, was adopted that permits the use of deposited bail money to be applied to a defendant's costs, fines, restitution and other assessments. Constitutional challenges to this provision have been rejected because, unlike as in the *Cohen* case, Section 2044 does not precondition bail on the payment of any fine but rather is a procedural mechanism by which the court, after the defendant has appeared and the purpose of bail has been served, may disburse deposited money to those with claims on the funds. See *United States v Higgins*, 987 F2d 543 (1993).

Numerous states also have adopted statutes authorizing this practice. See, e.g., California Penal Code §1297, Florida Statutes Annotated §903.286, Illinois Compiled Statutes §5/110-7(f), Minnesota Statutes Annotated §629.53, Nevada Revised Statutes §178.522, New York Criminal Procedure Law §420.10(1)(e), Tennessee Code §40-11-121, Wisconsin Statutes §969.03(4).

In instances where specific statutory authority existed, courts have been very likely to allow the application of the bail to fines or costs. For example, in *State v Iglesias*, 185 Wis. 2d 118, 517 N.W.2d 175 (1990), cert. den. (US) 130 L Ed 2d 547, 115 S Ct 641, the Wisconsin Supreme Court found that bail is not excessive if it is used for a purpose which the legislature has deemed to be a compelling state interest and the amount is not excessive relative to the interest sought to be furthered.

Rather uniquely, Pennsylvania's Bail Statute delegates all authority over bail to the Supreme Court through its rule-making authority. Section 5702 of the Judicial Code, 42 Pa.C.S. §5702, provides:

Except as otherwise provided by this title and the laws relating to the regulation of surety companies, all matters relating to the fixing, posting, forfeiting, exoneration and distribution of bail and recognizances shall be governed by general rules. (Emphasis added.)

While there are no Pennsylvania cases addressing the propriety of retaining returnable bail money for payment of fines, costs, or restitution, there have been a few cases that dealt with certain aspects of this issue, usually involving cases in which third parties were seeking the return of money they had posted on behalf of a defendant. For example, in *Commonwealth v McDonald*, 476 Pa 217, 382 A2d 124 (1978), the

Pennsylvania Supreme Court held that the trial court erred in refusing to return the bail deposit after the defendant was taken into custody after allegedly committing a new offense, concluding that the bail was revoked when the defendant was placed in custody, and the trial court no longer had the authority to retain it. The Court specifically reserved judgment on the question of “whether and to what extent the Rules of Criminal Procedure allow bail deposits to be applied to the collection of fines imposed upon the defendant.”

Based upon the foregoing, the Committee concluded that a change that would permit the retention of returnable bail money to satisfy a defendant’s existing obligations to the court was a valid exercise of the rule-making authority. Furthermore, the Committee agreed that the change has the potential to be a useful tool for the more efficient collection of owed moneys, including restitution, reducing collection costs for the court and even for the defendant who would otherwise face additional costs where the court forced to seek collections processes.

Proposed Rule Changes

The proposed amendment to Rule 535 would give the clerk of courts the authority to retain the returnable bail to pay any outstanding fines, costs, fees, and restitution ordered in any criminal or delinquency cases of the defendant statewide. The Committee rejected a suggestion to permit application of the bail money to other outstanding obligations such as for support and judgments for arrearages, concluding that expanding the provision beyond cases that are essentially criminal in nature would be beyond the Criminal Rules’ authority.

Additionally, the Committee also believed that this provision should provide some form of relief where its application would work a hardship on the defendant. The prefatory language in the proposed amendment, “unless otherwise ordered by the court,” is intended to provide the authority to the court to order the return of bail money where such a hardship would occur by retention of the bail money

The applicability of this provision is limited to only money that has been deposited by the defendant and the language “deposited by or on behalf of the defendant and the defendant is the named depositor” has been added to reflect this limitation.

An additional change would be the removal of paragraph (A)(4), that prohibits inquiring whether the defendant consents to applying deposited bail money towards fines, costs, *etc.*, because the defendant’s consent to having the bail money retained would no longer be needed.

Finally, the language of the *Comment* would be revised to further explain the change.