DEFENDER ASSOCIATION OF PHILADELPHIA

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Memorandum
November 6, 2017

To: Honorable Sheila Woods-Skipper, President Judge, Court of Common Pleas
Honorable Marsha H. Neifield, President Judge, Municipal Court

CC: Honorable Leon W. Tucker, Supervising Judge
Honorable Jacqueline Allen, Administrative Judge
Charles J. Hoyt, Chief Probation & Parole Officer
Richard McSorely, Deputy Court Administrator

Re: Changes in Detainer Procedures

This memorandum addresses proposed changes in practice for the imposition and review of detainers. Currently, probation detainers are automatically lodged in a number of instances, including, but not limited to: those classified as "high risk" who are arrested for a new offense, or are charged with specific enumerated offenses (i.e. murder, robbery, aggravated assault, rape or involuntary deviate sexual intercourse). For the reasons stated herein, this process is against the law and raises a number of public policy concerns. This memo also offers an alternative process which, if adopted, will be fairer and more efficient, significantly reduce the jail population, comply with legal requirements, and be more cost effective.

A. Introduction

It is the exclusive province of the judge to initially decide on what conditions to impose on a probationer or parolee. 42 Pa.C.S. § 9754. See, e.g., Commonwealth v. Vilsaint, 893 A.2d 753, 755-57 (Pa. Super. 2006) (probation officers have no authority to impose conditions of probation).

Even when it is established at a final hearing that a violation of conditions did occur it is solely the judge's decision whether incarceration is necessary because of the violation. Pa.R.Crim.P. 708. See also Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation").

It is axiomatic that before a violation of probation or parole is established, as after, it is the judge's decision whether the probationer or parolee should be detained based on an alleged violation. That it is solely a judicial function whether to lodge a detainer is made clear by the unambiguous terms of the controlling Rule, Phila. Co. Crim. Div. Rule 910, discussed infra.

The elimination of automatic detainers is not only legally required, but is also good policy. The result will be fewer individuals who are needlessly incarcerated - those for whom an individual consideration of their overall performance on probation would lead to the conclusion by a Judge that incarceration is not now necessary for an alleged violation. This would help not only individuals, but also a costly and overburdened prison system.

For those individuals charged with new offenses, the fact that an individual is on probation or parole is already a factor in the bail decision, and the bail set will reflect this, as well as the circumstances of the new offense (a factor that cannot be taken into account with an automatic detainer system). Those defendants on probation or parole who warrant detention after an individual determination will be kept in custody. Further, there is nothing to prevent the Probation Department in individual cases from contacting the probation judge to seek the lodging of a detainer.

Eliminating automatic detainers will result in fewer detainees. This will enable the entire process for a proper judicial Gagnon I determination to be made speedier. What follows are specific proposals for modifying current practices.

B. 'Detainers' Are A Judicial Function, And Automatic Detainers Are Only Permissible After A Preliminary Hearing Has Been Held On New Charges.

1. Phila. Co. Crim. Div. Rule 910.

Philadelphia Rule 910 must be followed. It is a valid local rule, and it is not inconsistent with any statute or statewide rule. See, e.g., Pa.R.J.A. 103 (d); Commonwealth v. Williams, 125 A.3d 425, 428 (Pa. Super. 2015).

a. Violation as the Result of a Subsequent Arrest (Rule 910 (A))

Rule 910 unambiguously provides that whether a detainer is lodged is a judicial decision, and that automatic detainers can only be imposed in limited circumstances after a defendant is held for court following a preliminary hearing. The plain and unambiguous language of the court rule cannot be ignored, nor any part of it. See, e.g., Commonwealth v. Lassiter, 722 A.2d 657, 660-61 (Pa. 1998) (language of statute must be followed, and no part is superfluous); Commonwealth v. Wendel, 165 A.3d 952, 959 (Pa. Super. 2017) (criminal procedure rules interpreted like statutes; plain meaning controls).

The Rule provides that when an individual is arrested notice will be sent to the probation judge. The notice provided after arrest is only for certain specified serious offenses, and should state that an automatic detainer will be lodged if the defendant is held for Court at the Preliminary Hearing. The Rule further provides that after the preliminary hearing with a crime other than those enumerated, no automatic detainer will be lodged. Even with the enumerated offenses, the lodging of the detainer is, in reality, not automatic under Rule 910. It provides that the probation

judge must respond to the notice of arrest by providing notification that he approves of the lodging of an automatic detainer if the defendant is held for court at the preliminary hearing. Aside from these provisions addressing automatic detainers, there is the residual power of the probation judge to, at any time, schedule the probationer before himself for a detainer hearing.

To sum up, Rule 910 is unambiguous in two respects. First, it provides that judges, and not the Probation Department, have the authority to make decisions concerning whether an individual is to be detained following an arrest on a new case. Second, 'automatic' detainers can only be lodged for specific enumerated serious offenses, and only after a defendant has been held for court following a preliminary hearing on the new case.

b. Technical Violations (Rule 910 (B))

Rule 910 unambiguously provides that the Probation Department has no authority to issue 'wanted cards' for a defendant for a technical violation. Its function is only to notify the judge of an alleged technical violation. As Rule 910 states, "the Probation Judge shall direct whether or not 'wanted cards' shall be placed". If the judge directs the Probation Department to lodge wanted cards, and an arrest results, the Rule provides for a prompt 72 hour determination of whether the probationer should be detained pending further hearings. Thus, according to the plain and unambiguous terms of Rule 910 (B), it is the judge, and not the Probation Department, who determines whether a probationer is to be arrested for an alleged technical violation, and whether he should be detained pending a hearing if an arrest follows from a judicial order.

We recognize that there may be exceptional, exigent circumstances that could require an arrest for a technical violation without prior authorization form the judge. However, following the arrest, a judicial decision whether to detain would still have to be made very promptly. Cf. Rule 910 (B). See also County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (warrantless

arrest requires judicial determination within 48 hours of whether arrest is justified).

2. Due Process Protections Prohibit Automatic Detainers Before A Preliminary Hearing.

In addition to Rule 910, there is a constitutional bar to the lodging of automatic detainers. An arrest for an offense is something that happens to an individual. It is not conduct by the defendant, only the consequence of a decision by police or prosecutors. "An arrest is equally consistent with either guilt or innocence." Commonwealth v. Scott, 436 A.2d 607, 612 (Pa. 1981). Therefore, the mere fact of an arrest may never be considered as evidence against an individual for any purpose. E.g., Commonwealth v. Scott, supra; Commonwealth v. Jones, 50 A.3d 342, 344 (Pa. 1947). The automatic lodging of a detainer based on an arrest, without considering all relevant individual considerations, including the probationer's adjustment on probation, therefore violates state law and due process. Further, it amounts to an irrebuttable presumption of guilt and a need for immediate detention. Irrebuttable presumptions such as this violate due process rights when, as here, they are not almost universally true. See generally, e.g., Stanley v. Illinois, 405 U.S. 645 (1972); Commonwealth v. Clayton, 684 A.2d 1060, 1063 (Pa. 1996).

C. There Should Be A Single Detainer Hearing Held Before A Judge Within Seven (7) Working Days.

Under current practice there is an initial prison detainer hearing that is not before the probation judge. That hearing provides minimal rights that do not comport with Gagnon I due process requirements. See Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972) (outlining due process rights at initial probation violation hearings). A second hearing is later scheduled before a judge. We propose removing this 10-day hearing, and providing a true Gagnon I hearing before a judge. This change, along with other modifications (supra and infra), should help speed the

process for holding meaningful hearings before the assigned judge, or a judge designated by the Court to hear the case. The reduction in automatic detainers would reduce the volume of summaries needed, and allow for more hearings to take place while someone is out of custody.

Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), held that due process guarantees a "preliminary hearing" on a detainer (Gagnon I hearing), and Morrissey requires that it be held "as promptly as convenient after arrest while information is fresh and sources are available." Morrissey, 40 U.S. at 485. Morrissey did not state a specific time limit for holding this hearing. Those courts that have considered the due process issue have generally held that the hearing should be held within 10 calendar days.[1] Our proposal of a hearing within 7 working days would be the equivalent because it would average to about 10 working days.

1. Prompt Specific Notice of the Violation Should Be Provided Within Three (3) Working Days.

If copies of the violation notice are distributed to the detained probationer and counsel within 3 working days this would generally provide enough time to prepare for a Gagnon I hearing within 7 days. This is particularly so, if one needed change is made to the current violation notice

[1] See, e.g., Commonwealth v. Ferguson, 761 A.2d 613, 619 (Pa. Super. 2000) (A reasonable time standard; fifteen day delay was reasonable here, particularly where there was only a 9 day delay after petitioner advised that he had changed his previous decision indicating that he would waive the hearing); Luther v. Molina, 627 F.2d 71, 74 n. 3 (7th Cir. 1980) ("It is possible that a ten day delay between detention and the preliminary hearing does not meet...constitutional requirements"); Valdivia v. Davis, 206 F.Supp.2d 1068, 1078 (E.D. Cal. 2002) (holding that delay of over 30 days was unconstitutional; remedy ordered was a preliminary hearing within 10 days); L.H. v. Schwarzenegger, 519 F.Supp.2d 1072, 1085-86 (E.D. Cal. 2008) (holding 60 day delay rule unconstitutional, but noting that adopting Valdivia 10 day due process requirement was premature because detained juveniles here may not have same rights as adults); Pinzon v. Lane, 675 F.Supp. 429, 435-36 (N.D. Ill. 1987) (due process requires preliminary hearing within 10 days of detention).

summaries that would enable counsel and the court to better focus on the initial issue at the Gagnon I hearing of whether there is probable cause to believe that a condition of probation has been violated. See Morrissey supra.

The current violation notice form should be modified to also contain a clear specific succinct statement of the condition(s) allegedly violated, and the alleged conduct constituting the alleged violation. An example is provided below:

Violation Charge

Condition *- You are not to possess any firearm*

Alleged Violation *- You did possess a rifle in your home at 1350 Elm Avenue on August 29, 2016*

Specific written charge notice (like a criminal complaint) better enables the defendant and his counsel to know what to defend against, and to prepare for the hearing. The written charge notice also aids the court by focusing in advance on the precise issues the court will have to resolve at the hearing. Further, the United States Supreme Court has held that Due Process Clause guarantees specific "written notice of the claimed violations of probation." Gagnon, 411 U.S. at 786. E.g., Commonwealth v. Alexander, 331 A.2d 836 (Pa. Super. 1974). See 42 Pa.C.S. §9771 (b) ("The court may revoke an order of probation upon proof of the violation of specified conditions of the probation").

D. Conclusion

For the reasons stated herein, it is our belief that changes are needed to bring Philadelphia procedure into compliance with the law of Rule 910 and the protections of the Pennsylvania and Federal Constitutions.

I look forward to meeting with you to discuss these issues.

Keir Bradford-Grey
Chief Defender