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THE JUSTICE OF THE PEACE COURT

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POLICY DIRECTIVE 11-242 (5th Supplement)

TO: ALL JUSTICE OF THE PEACE COURT EMPLOYEES

FROM: ALAN G. DAVIS 
CHIEF MAGISTRATE

DATE: MARCH 15, 2022

**RE: BAIL REFORM: SUPREME COURT SPECIAL RULE OF CRIMINAL
PROCEDURE FOR PRETRIAL RELEASE RULES 5.2, 5.2B, 5.3, AND 5.4;
UPDATED JUDICIAL ACTION ON DELPAT RECOMMENDATION;
UPDATED AUTOMATED ORDER TO OVERRIDE; AND
UPDATED PRETRIAL SERVICES REFERRAL WORKSHEET**

SCOPE

The most current bail reform derives from changes to Supreme Court Interim Special Rule 5.2 “Pretrial Release;” Schedule 5.2B “Signal Offenses;” Rule 5.3 “Modification of Conditions of Release;” and Rule 5.4 “Hearings for Violation of Pretrial Supervision.” This supplement discusses changes from the Interim Special Rules in the newly finalized “Special Rule of Criminal Procedure for Pretrial Release” and how they affect the bail-setting process.¹ In addition, this policy directive introduces updated versions of the “Judicial Action on DELPAT Recommendation,” the “Automated Order to Override” program in the DELJIS Web Portal, and the “Pretrial Services Referral” worksheet, consistent with these changes.

¹ The Interim Special Rule was approved by Chief Justice Strine and in effect on January 1, 2019. The Supreme Court Special Rule of Criminal Procedure for Pretrial Release Rule was approved by Chief Justice Seitz on February 28, 2022, and is effective on April 4, 2022.

JUSTICE OF THE PEACE COURT POLICY

It is the policy of the Justice of the Peace Court that judges shall apply the Supreme Court Special Rule of Criminal Procedure for Pretrial Release (hereinafter referred to as “Pretrial Release Rule”) in response to the numerical scores assigned by the DELPAT when making decisions on conditions of bail for all initial cases that include any of the following charges: any Title 11 offense; any Title 16 offense, except for civil offenses; and any 21 *Del. C.* § 4177 offense.²

THIS POLICY IS FOR USE WITH ADULT DEFENDANTS ONLY.

EFFECTIVE DATE

This policy shall take effect on April 4, 2022.

POLICIES AFFECTED

PD 11-242 (3rd Supplement) “Bail Reform: Implementation of House Bill 204, with DELPAT and Decision-Making Process” and PD 11-242 (4th Supplement) “Bail Reform: Senate Bill No. 7; Modified DELPAT and Worksheets for the Decision-Making Process.” Some of the instructional material contained in the 3rd and 4th Supplements is modified or updated in this 5th Supplement.

DISCUSSION

➤ **PRETRIAL RELEASE RULES: *RETENTIONS* FROM THE INTERIM SPECIAL RULES**

The finalized Pretrial Release Rules 5.2 “Pretrial Release;” Schedule 5.2B “Signal Offenses;” Rule 5.3 “Modification of Conditions of Release;” and Rule 5.4 “Hearings for Violation of Pretrial Supervision” *retain* the following basic foundations for pretrial release decisions, reporting requirements, pretrial supervision, bail reviews, and motions to amend conditions of release that are in the Interim Special Rules:

- Judges shall use the DELPAT to help assess a defendant’s likelihood of pretrial success;
- There is an initial presumption for pretrial release with reasonable non-guaranteed financial conditions of release;
- The Court must document the reasons for a decision to order a level of conditions of release other than the level prescribed by the DELPAT;
- The Court must consider a defendant’s financial circumstances when ordering a guaranteed financial condition on any bond;

² The Supreme Court Special Rule of Criminal Procedure for Pretrial Release was preliminarily referred to as the “Modified Interim Supreme Court Rule” in PD 11-242 (4th Supplement) when introducing changes made due to passage of Senate Bill 7 (S.B. 7.)

- Copies of all judges’ “Order to Override” decisions must be sent to presiding judges. *The Chief Justice will no longer receive copies of the Order to Override decisions;*
- The Court must review conditions of release if a defendant, as a result of the inability to meet a required or guaranteed financial conditions of release, remains detained for more than 72 hours from the initial presentment;
- The entirety of Rule 5.3. “Modification of Conditions of Release” is retained without substantive revision. All parties have the right to file a motion in the Court to modify any condition of release; and
- The entirety of Rule 5.4. “Hearings for Violation of Conditions of Release” is retained without substantive revision. **The title has been modified to “Proceedings for Violation of Pretrial Supervision” to more accurately reflect the nature of the process.**³ Rule 5.4 applies to defendants who have been ordered by the Court to report to Pretrial Services and allegedly breach any condition of release ordered by the court or set by Pretrial Services.

➤ **PRETRIAL RELEASE RULES: CHANGES FROM THE INTERIM SPECIAL RULES**

The Pretrial Release Rules 5.2 “Pretrial Release” and Schedule 5.2B “Signal Offenses” **change** the Interim Special Rule in the following material ways:

❖ **Changes in Rule 5.2. Pretrial Release**

- The section titled “Definitions” **has been deleted;**⁴
- The discussion on the DELPAT Matrix itself (i.e. color classifications and corresponding recommended bail types) **has been deleted;**⁵
- The names for the types of bonds **have been changed** to names consistent with statutory language as follows:⁶
 - (1) A conditions of release bond with no financial terms (commonly known as an OR bond;)
 - (2) A conditions of release bond not guaranteed by secured financial terms (commonly known as an unsecured bond;)
 - (3) A conditions of release bond guaranteed by secured financial terms (commonly known as a secured bond;) and
 - (4) A conditions of release bond guaranteed by financial terms secured by cash only (commonly known as a cash bond;)

³ The title of Rule 5.4 in the Interim Special Rule was “Hearings for Violation of Conditions of Release.” Questions arose about whether this section applied to hearings on 11 *Del. C. § § 2109* or 2113 Breach of Release charges.

⁴ Interim Special Rule 5.2(a).

⁵ Interim Special Rule 5.2(b).

⁶ 11 *Del. C. 2102(2)*. Interim Special Rule 5.2(c). Pretrial Release Rule 5.2(b).

- The terms “the State makes a special showing” and “the Court makes special findings” ***have been changed*** to the terms “(t)he State makes a recommendation” and “(t)he Court makes findings of fact;”⁷
- The references to the “Domestic Violence Assessment” form and the trigger for a referral (to victim services) protocol with the subsequent presumption for a secured or cash bond ***have been deleted.***⁸ (*Judges’ pretrial release decisions for Domestic Violence offenses are discussed in more detail under the heading “Changes in the Decision-Making Process” below;*)
- The recommendations for conditions of release for “recidivist impaired drivers” ***have been deleted.***⁹ (*Judges’ pretrial release decisions for “Felony Impaired Driving Charges” are discussed in more detail under the heading “Changes in the Decision-Making Process” below;*)
- The section on signal offenses ***has added*** a condition that “the State shall expressly move for application of § 2107(c) of Title 11 to the setting of the terms of the defendant’s conditions of release bond” in order for the presumption of cash-only bail set out in S.B. 7 to apply.¹⁰ (*This will be discussed in more detail under the heading “Changes in the Decision-Making Process” below;*)
- The section on signal offenses ***has added*** two other factors that the judge may consider when determining the type and amount of bond: “a risk of failure to appear at court proceedings” and “any other specific risk of pretrial failure” the court determines to exist.¹¹ In the Interim Special Rule, the judge had the discretion to require any type and amount of release bond necessary, but only to reasonably assure public safety.¹² (*These factors are discussed in more detail under the heading “Changes in the Decision-Making Process” below;*)
- The entire section titled “Conditions of release for risk of obstruction of justice” ***has been deleted;***¹³

⁷ Interim Special Rule 5.2(g); 5.2(h)(3); and 5.2(n). Pretrial Release Rule 5.2(i).

⁸ Interim Special Rule 5.2(b)(2) and 5.2(h)(2)(A). Pretrial Release Rule 5.2(f).

⁹ Interim Special Rule 5.2((h)(2)(C). Pretrial Release Rule 5.2(g).

¹⁰ Pretrial Release Rule 5.2(h)(1).

¹¹ Pretrial Release Rule 5.2(h)(2).

¹² Interim Special Rule 5.2((h)(2)(B). “The court may require any type of conditions of release bond that is necessary to reasonably assure public safety, including a secured conditions of release bond. In determining the amount of any unsecured or secured conditions of release bond, the court shall, consistent with the current SENTAC bail guidelines, set an amount that is substantial enough to sufficiently: (i) deter the defendant from harming the public or a specific person; or (ii) ensure that the surety will supervise the defendant intensely enough to reasonably assure public safety. The court may also require any other conditions of release necessary to reasonably assure public safety.”

¹³ Interim Special Rule 5.2(i). In Pretrial Release Rule 5.2, the phrase “to maintain the integrity of the judicial process” has been inserted earlier in the Rule and appears only once: Rule 5.2(b) “Release should be on the least restrictive conditions necessary: to assure the defendant’s appearance in court when required; to assure the protection of the community, victims,

- A requirement ***has been added*** in the section on “Downward Departures from the Initial Recommended Response” to provide written documentation of the reasons for any such departure (using a check-off system¹⁴) ***or*** to write an Order to Override, if one or more of the parties raises an objection to the departure.¹⁵ (*This requirement is discussed in more detail under the heading “Changes in the Decision-Making Process” below;*)
- A new section ***has been added*** titled “Court Must State Reasons for Conditions Imposed.”¹⁶ This section refers to the documentation required for judicial decisions on the conditions of bond, the level/type of monetary bail, and on the amount of any monetary bail. *Updated forms with a check-off style of documentation were discussed in PD 11-242 (4th Supplement);*
- The limitations on the Court when ordering Pretrial Services to monitor conditions of release that are in addition to the standard conditions of release used by the Department of Correction ***have been deleted;***¹⁷ and
- The requirement that the Court, when considering a defendant’s financial circumstances, give the defendant a “standard form to use to provide that information” ***has been deleted.***¹⁸

❖ **Changes in Schedule 5.2B. Signal Offenses**

- The legislature, using a draft of the Pretrial Release Rule, incorporated a *draft* list of signal offenses into S.B. 7 *almost* verbatim. **Charges and circumstances in the updated signal offense list that are NOT included in S.B. 7** are marked with an asterisk in Pretrial Release Rule Schedule 5.2B;
- In addition, the list enumerated in Schedule 5.2B has been expanded. The new list is as follows:

(a) “A signal offense shall include any of the following offenses or circumstances, or an attempt to commit any of the following offenses or circumstances (items with an asterisk are in addition to those referenced in § 2107(c)):

- (1) Any Title 11 Class A felony;
- (2) Any of the following other Title 11 felonies:
 - § 606: Abuse of a Pregnant Female in the First Degree;
 - § 607: Strangulation;
 - § 612: Assault in the Second Degree;
 - § 613: Assault in the First Degree;

witnesses, or any other persons; to avoid any identified specific risk of pretrial failure; and to maintain the integrity of the judicial process.”

¹⁴ Refer to PD 11-242 (4th Supplement), p. 7-8.

¹⁵ Pretrial Release Rule 5.2(j).

¹⁶ Pretrial Release Rule 5.2(k).

¹⁷ Interim Special Rule 5.2(k). Pretrial Release Rule 5.2(l).

¹⁸ Interim Special Rule 5.2(l). Pretrial Release Rule 5.2(m).

* **§ 616: Gang Participation**¹⁹

- § 632: Manslaughter;
- § 633: Murder of a Child by Abuse or Neglect in the Second Degree;
- § 770(a)(1) and (a)(3): Rape in the Fourth Degree;
- § 771: Rape in the Third Degree;
- § 772: Rape in the Second Degree;
- § 776: Continuous Sexual Abuse of a Child;
- § 777A: Sex Offender Unlawful Sexual Conduct Against a Child;
- § 778: Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision in the First Degree;
- § 783A: Kidnapping in the First Degree;
- § 787(b)(1) – (b)(3): Trafficking an Individual, Forced Labor, and Sexual Servitude
- § 803: Arson in the First Degree;
- § 826: Burglary in the First Degree;
- § 832: Robbery in the First Degree;
- § 1103B: Child Abuse in the First Degree;
- § 1108: Sexual Exploitation of a Child;
- § 1109: Unlawfully Dealing in Child Pornography;

* **§ 1112A: Sexual Solicitation of a Child (subsection (h) listed in § 2107(c));**²⁰

* **§ 1112B: Promoting Sexual Solicitation of a Child (subsection (g) listed in § 2107(c));**²¹

- § 1253: Escape After Conviction;
- § 1312: Stalking;
- § 1447: Possession of a Deadly Weapon During Commission of a Felony;
- § 1447A: Possession of a Firearm During Commission of a Felony;
- § 1448(a)(1), (a)(4), (a)(6), and (a)(7): Possession and Purchase of Deadly Weapon (Firearm) by a Person Prohibited;
- § 1503: Racketeering;
- § 2109(c)(1): Felony Noncompliance with Bond when Defendant has been Committed in lieu of Bail Involving a (Violent) Felony Offense;
- § 2113(c)(1): Felony Noncompliance with Bond when Defendant has been Released on Bail Involving a (Violent) Felony Offense;
- § 3533: Aggravated Act of Intimidation;

(3) Any violent felony, as defined by 11 *Del. C.* § 4201(c), allegedly committed while the defendant is pending adjudication on a previously charged violent felony;

(4) Any offense under one of the following Domestic Violence circumstances:

¹⁹ Emphasis added.

²⁰ Referred to in PD 11-242 (4th Supplement), p. 5. Emphasis added.

²¹ *Id.* Emphasis added.

- (a) Any violent felony, as defined by 11 *Del. C. § 4201(c)*, allegedly committed against the petitioner with an active Protection from Abuse order against the defendant;
- (b) Any violent felony, as defined by 11 *Del. C. § 4201(c)*, allegedly committed against a victim while the defendant is pending adjudication on a previously charged domestic violence offense, as defined by 10 *Del. C. § 1041(2)*, allegedly committed against the same victim;
- (c) Any domestic violence offense, as defined by 10 *Del. C. § 1041(2)*, allegedly committed while the defendant is pending adjudication on a previously charged violent felony allegedly committed against the same victim;
- (d) Any felony domestic violence offense, as defined by 10 *Del. C. § 1041(2)*, in which physical injury, as defined by 11 *Del. C. § 222(23)*, or serious physical injury, as defined by 11 *Del. C. § 222(26)*, was alleged to be caused;

(5) Any felony drug offense as follows:

- (a) 16 *Del. C. § 4652*: Drug Dealing (Tier 3).

➤ **CHANGES IN THE DECISION-MAKING PROCESS**

- **Domestic Violence Offenses (Pretrial Release Rule 5.2(f)):**

- Judges shall check off mitigating and/or aggravating factors determined to be relevant to the bail decision:
- If the case involves a Domestic Violence (DV) charge or circumstance included in the Signal Offense list, the case is to be handled in the same manner as a Signal Offense case. If not, then the judge shall make a bail determination with ***heightened scrutiny***, making an individualized assessment, using a “totality of the circumstances” analysis; and
- The DELPAT is only advisory in DV cases.²² Consequently, judges are not “departing from the DELPAT recommendation,” regardless of the type of bond ordered and are therefore not required to write an Order to Override when setting a secured or cash-only monetary condition of bail;

- **Felony DUI Offenses (Pretrial Release Rule 5.2(g)):**

- Judges shall check off mitigating and/or aggravating factors determined to be relevant to the bail decision; and

²² Pretrial Release Rule 5.2(f)(1). “Because no risk assessment tool successfully captures risk in cases of domestic violence, the pretrial assessment [*the DELPAT*] is intended to be advisory in these matters...”

- The DELPAT is only advisory in DUI cases.²³ Consequently, judges are not “departing from the DELPAT recommendation,” regardless of the type of bond ordered and are therefore not required to write an Order to Override when setting a secured or cash-only monetary condition of bail;
- **Signal Offenses (Pretrial Release Rule 5.2(h)):**
 - 1) **Differences between the SB 7 and the Signal Offenses lists:**
 In 2020, the legislature modified 11 *Del. C.* § 2701(c) via S.B. 7, by creating a statutory presumption of a cash-only monetary bail condition for a list of specific charges and circumstances. This list was taken *almost* verbatim from a draft copy of Pretrial Release Rule 5.2B “Signal Offenses.” The differences between the S.B. 7 and the Signal Offences lists are as follows:
 - 11 *Del. C.* § 616 “Gang Participation” is on the Signal Offenses list, but is ***not*** on the S.B. 7 list. Therefore, there is no statutory presumption of a cash-only bail condition for a charge of “Gang Participation.”
 - 11 *Del. C.* § 1112A “Sexual Solicitation of a Child” (class C felony) is on the Signal Offenses list. Subsection (a) is the chargeable subsection; however, ***subsection (h) is specifically listed instead*** on the S.B. 7 list. Therefore, in order for the presumption of a cash-only bail condition to apply, the police officer must allege in the probable cause statement of the arrest warrant, the additional element contained in subsection (h). The additional element is “...if the defendant meets in person or attempts to meet in person with the child for the purpose of engaging in a prohibited sexual act.” When this element is proven at trial, the defendant is subject to the enhanced penalties of a class B felony. ***If the additional element is not contained in the warrant, the cash only bail presumption does not apply.***²⁴
 - 11 *Del. C.* § 1112B “Promoting Sexual Solicitation of a Child” (class C felony) is on the Signal Offenses list. Subsection (a) is the chargeable subsection; however, ***subsection (g) is specifically listed instead*** on the S.B. 7 list. Therefore, in order for the presumption of a cash-only bail condition to apply, the police officer must allege in the probable cause statement of the arrest warrant, the additional element contained in subsection (g). The additional element is “...if the defendant meets in person or attempts to meet in person with another

²³ Pretrial Release Rule 5.2(g)(1). “Because no risk assessment tool successfully captures risk in cases of impaired driving, the pretrial assessment [*the DELPAT*] is intended to be advisory in these matters.”

²⁴ Refer to PD 11-242 (4th Supplement), p. 5.

person and a child, or otherwise produces or delivers a child to another person, for the purpose of the person engaging in a prohibited sexual act with the child.” When this element is proven at trial, the defendant is subject to the enhanced penalties of a class B felony. **If the additional element is not contained in the warrant, the cash only bail presumption does not apply.**²⁵

2) **The State’s Additional Responsibility:**

If the State believes that § 2107(c) applies (presumption of cash-only bail) to the defendant’s case, **he/she “shall expressly move for application of § 2107(c) to the setting of the terms” of bail.**²⁶ The “motion” must be presented to the judge on the “Initial Presentment Information Form,” or by other written means, and the judge must be satisfied that the “motion” is truthful and appropriate, for the presumption of cash-only bail to restrict the judge’s bail-setting options.

The State’s “motion” must “be supported by specific averments” that:

- (T)he “State has conducted a diligent review of the probable cause alleged for the present charge(s);”
- (T)he State has conducted a diligent review of “the defendant’s criminal history;” and
- (T)here is “a good faith basis to believe that probable cause exists for the charge(s) or circumstances alleged that would trigger application of § 2107(c) of Title 11 in the present case.”²⁷

3) **The Court’s Response to the State’s Petition:**

- The judge may decide to grant the State’s “motion”. If the judge grants the State’s “motion” and finds that § 2107(c) is applicable, then the presumption of cash-only bail applies²⁸; or
- The judge may decide to not grant the State’s “motion”. If the judge does not grant the State’s “motion,” the terms of the defendant’s conditions of release bond “shall be in the court’s discretion.”²⁹ (Refer to the process stated below in #4 “When the State *does not* Provide a Written Motion.”) **The judge shall**

²⁵ Refer to PD 11-242 (4th Supplement), p. 5.

²⁶ Pretrial Release Rule 5.2(h)(1).

²⁷ Id.

²⁸ Id. “If it shall appear to the satisfaction of the court at a hearing to determine the terms of a conditions of release bond that the State’s motion should be granted and that the defendant falls within § 2107(c) of Title 11, the court shall apply § 2107(c) of Title 11 and shall set the terms of the defendant’s conditions of release bond accordingly.”

²⁹ Pretrial Release Rule 5.2(h)(2).

provide written documentation for the reasons for the decision to not grant the State's "motion".

4) **When the State does not Provide a Written "Motion":**

If the defendant is charged with one of the Signal Offenses in Schedule 5.2B and the State has not presented a written "motion" containing the necessary averments, the terms of the defendant's conditions of release bond "shall be in the court's discretion."³⁰ (Refer to the list of necessary averments stated above in #2 "The State's Additional Responsibility.")

The judge shall:

- Review the defendant's entire file, to include, but is not limited to: the DELPAT score; the Defendant History form; the adjudication summary; the probable cause statement of the arrest warrant; and any other factor the judge determines to be relevant;
- "(C)onsider whether a conditions of release bond guaranteed by financial terms (including a bond...secured by cash only) is appropriate;"
- Consider if imposing "conditions of release other than financial terms...to address a substantial danger to public or specific-victim safety, a risk of failure to appear at court proceedings, or any other specific risk of pretrial failure specified by the court to exist" is appropriate.³¹

While the Interim Special Rule required that the judge only consider the type and amount of bond to reasonably assure public safety, Pretrial Release Rule 5.2(h)(2) includes two (2) additional considerations: 1) the risk of a failure to appear at future court proceedings; and 2) any other risk of pretrial failure.³²

The defendant's "risk of failure to appear at future court proceedings" has already been taken into consideration three (3) times by the DELPAT: two (2) times in the "Failure to Appear (FTA)" scale AND one (1) time in the "New Criminal Arrest (NCA)" scale. However, if at the time of presentment, the judge is presented with an explicit indication of either a higher risk or a lower risk of the defendant's FTA than the DELPAT indicates, the judge has the discretion to adjust the type and/or amount of bail accordingly. An explicit indication may be presented to the judge by the defendant, the police agency, the probable cause statement in the arrest warrant, the totality of the circumstances, etc.

The phrase "any other risk of pretrial failure" is broad and could include findings of fact or circumstance that become known to the judge at the time of

³⁰ Id.

³¹ Id.

³² Id.

presentment, an unusual allegation or circumstance articulated in the probable cause of the warrant, the totality of the circumstances, etc.

- **Downward Departures From the Initial Recommended Response (Pretrial Release Rule 5.2(j)):**

- 1) *An Order to Override requirement has been added* to Pretrial Release Rule 5.2(j) for downward departures (less intensive conditions of release than indicated by the Matrix) ***ONLY WHEN*** a party objects to the judge's downward departure from the DELPAT recommendation and the judge maintains the downward departure over the objection.³³
 - Under the Interim Special Rule, judges did not need to document reasons for a downward departure from the DELPAT recommendation in any manner;³⁴
 - After the passage of S.B.7, and requests from both the Attorney General's Office and the Office of Defense Services, judges currently need to document reasons for a downward departure using a check-off list;³⁵
 - After the Pretrial Release Rule effective date of April 4, 2022, judges shall: 1) *continue to use the check-off list to document reasons for an uncontested downward departure and document the Judicial Action on DELPAT Recommendation to indicate "Less Intensive Conditions of Release than indicated by the DELPAT Matrix;"* ***or*** 2) *write an Order to Override if a party objects to a downward departure and the judge maintains the downward departure over the objection;*
 - Downward departures from the DELPAT recommendation per Pretrial Release Rule 5.2(j) **do not apply** to decisions on Signal Offenses, Domestic Violence Offenses, or Felony DUI offenses.
 - For J.P. Court, this new requirement will be germane for a very limited set of scenarios;
 - The party making an objection will more than likely be the State;
 - The party must either articulate the objection orally to the judge with the other party present, in order for the other party to have the opportunity to respond; ***or*** in writing after the presentment has concluded. If the objection is presented in writing after the presentment has concluded, the parties ***shall reconvene*** in order for the judge to ensure the other party understands the objection and is given an opportunity to respond;
 - If the judge maintains that less intensive conditions are "adequate to reasonably assure the defendant's appearance at court proceedings and

³³ Pretrial Release Rule 5.2(j).

³⁴ Interim Special Rule 5.2(j).

³⁵ PD 11-242 (4th Supplement), p.7.

ensure public and specific victim safety”³⁶ over the party’s objection, *an Order to Override is required and the judge shall articulate with specificity the contents of the party’s objection, the response from the other party, and the judge’s findings. The judge shall document the Judicial Action on DELPAT Recommendation to indicate “Less Intensive Conditions. Order to Override Required due to party’s objection;”*

- If the judge agrees with the party presenting the objection and amends the bail decision to Conditions of Release as indicated by the DELPAT Matrix, *no Order to Override is required, but the judge shall amend the Judicial Action on DELPAT Recommendation to indicate “Conditions of Release as indicated by the DELPAT Matrix;”* and
- If the judge agrees with the party presenting the objection and amends the bail decision to More Intensive Conditions of Release than indicated by the DELPAT Matrix, *an Order to Override is required and the judge shall amend the Judicial Action on DELPAT Recommendation to indicate “More Intensive Conditions of Release than indicated by the DELPAT Matrix.”*

****POINT TO REMEMBER: PRETRIAL RELEASE RULE 5.2(J) DOES NOT APPLY TO A JUDGE’S DECISION ON A DEFENDANT’S CONDITIONS OF RELEASE FOR SIGNAL OFFENSES, DOMESTIC VIOLENCE CHARGES, AND FELONY DUI CHARGES.³⁷**

****POINT TO REMEMBER: PRETRIAL RELEASE RULE 5.2(J) REFERS TO A JUDGE OVERRIDING THE DELPAT MATRIX RECOMMENDATION, NOT THE STATE’S RECOMMENDATION.**

Examples of Downward Departures Germane to Pretrial Release Rule 5.2(j).

Example #1: A defendant’s DELPAT score recommends that the judge order the defendant to Pretrial Services, but the judge finds that pretrial supervision would not be beneficial to the defendant and may cause harm. The judge orders the defendant to be released on his own recognizance or on unsecured bail, with relevant no contact and/or statutorily mandated conditions. The judge does *not* order Pretrial Services.

Example #2: A defendant’s DELPAT score recommends that the judge order the defendant to be released on unsecured bail, but the judge finds that releasing the defendant on her own recognizance, with relevant no contact and/or statutorily mandated conditions, would be reasonably sufficient to ensure pretrial success.

³⁶ Pretrial Release Rule 5.2(j).

³⁷ Pretrial Release Rules 5.2(f) (Domestic Violence Charges), 5.2(g) (Felony Impaired Driving Charges), and 5.2(h) (Signal Offenses.)

➤ **CHANGES IN THE JUDICIAL ACTION ON DELPAT RECOMMENDATION**

The Judicial Action on DELPAT Recommendation has been updated in the following ways:

- Section A: Added numbers (with corresponding numbers on the computer screen for clerks) indicating the now five (5) choices available to the judge. The judge must check off ***only one (1)*** of the five (5) main choices:
 1. _____ Conditions of Release as indicated by the DELPAT Matrix;
 2. _____ Less Intensive Conditions of Release than indicated by the DELPAT Matrix;
 3. _____ Less Intensive Conditions. Order to Override Required due to party's objection (*refer to last Section above titled "Downward Departures from the Initial Recommended Response;"*)
 4. _____ More Intensive Conditions of Release than indicated by the DELPAT Matrix; or
 5. _____ Order to Override Not Required: Domestic Violence offenses, Felony DUI offenses, and Signal offenses.

- Section B: Mitigating Factors:
 - Added numbers to each Mitigating factor 1-8; and
 - Item #7: Condensed to read "Defendant has strong incentives for pretrial success" with "Explain" on the following line.

- Section B: Aggravating Factors:
 - Added numbers to each Aggravating factor 1-10;
 - Modified item #3: to read "Subsequent violent felony (revoke bail on original offense re Section 2116);" and
 - New item #7: "State's recommendation on the record or motion re Section 2107(c) (*refer to Section on page 9 of this policy directive titled "Signal Offenses: The State's Additional Responsibility."*)"

➤ **CHANGES IN THE AUTOMATED ORDER TO OVERRIDE PROGRAM IN THE DELJIS WEB PORTAL**

- Sentence #1:
 - Currently the first sentence reads "The Court has ordered that more intensive conditions of release are necessary than the initial recommended response provided by the DELPAT and Supreme Court Interim Rules 5.2, 5.3, and 5.4;"
 - A ***new drop-down box (Table 1)*** has been created for sentence #1. The drop-down box will replace the static "more intensive conditions" with a choice of two (2) options: "more intensive conditions" or "less intensive conditions" to accommodate the possibility of an Order to Override per Pretrial Release Rule 5.2(j) (refer to section titled "Downward Departures

From the Initial Recommended Response (Pretrial Release Rule 5.2(j))” above;

- The word “appropriate” replaces the word “necessary;” and
 - The phrase “Supreme Court Special Rule of Criminal Procedure for Pretrial Release 5.2” replaces the phrase “Supreme Court Interim Rules 5.2, 5.3, and 5.4.”
- Sentence #2:
 - Currently the second sentence begins “[Drop-down box (Table 2): After a review of a special showing by the State or On its own initiative], the Court, has made a special finding(s), to wit;
 - The phrase “recommendation” replaces “special showing;”
 - The phrase “To overcome a party’s objection” is added to the drop-box options (refer to section titled “Downward Departures From the Initial Recommended Response (Pretrial Release Rule 5.2(j))” above;) and
 - The phrase “findings of fact” replaces the phrase “a special finding(s).”
 - Sentence #3:
 - Currently the third sentence reads “The Court is departing from the initial recommended response by [Drop-down box (Table 3): currently six (6) options];”³⁸and
 - The phrases “imposing a release on own recognizance condition” and “not imposing pretrial services” are added to the drop-down box options (refer to section titled “Downward Departures From the Initial Recommended Response (Pretrial Release Rule 5.2(j))” above.)

➤ CHANGES IN THE PRETRIAL SERVICES REFERRAL

The Pretrial Services Referral worksheet has been updated to conform with changes made in the Pretrial Release Rule in the following ways:

- The limitations on the Court when ordering Pretrial Services to monitor conditions of release that are in addition to the standard conditions of release used by the Department of Correction have not been included in the Pretrial Release Rule.³⁹ Therefore, the check off section on the Pretrial Services Referral worksheet citing those limitations from the Interim Special Rule has been deleted.⁴⁰

³⁸ The current options offered are: “imposing a secured monetary condition;” “imposing a cash monetary condition;” “imposing an unsecured monetary condition;” “imposing pretrial services with standard conditions;” “imposing pretrial services with special conditions;” “imposing additional conditions.”

³⁹ Interim Special Rule 5.2(l)(3)(b). Pretrial Release Rule 5.2(l)

⁴⁰ A sample updated Pretrial Referral Worksheet is attached.

- Judges are permitted by the Pretrial Release Rule to order Pretrial Services to monitor additional specific conditions of release that are “appropriately tailored to the defendant.”⁴¹ These conditions are in addition to Pretrial Services’ standard conditions.⁴² Judges shall check off “The defendant is placed under the supervision of Pretrial Services” on the Pretrial Conditions Worksheet, then document their orders for additional conditions with specificity on the Pretrial Services Referral worksheet. Extra lines are included on the updated worksheet for judges’ convenience and efficiency.

***Judges are not required to enter any standard pretrial services conditions on the Pretrial Service Referral worksheet.*

***When judges order additional conditions on the Pretrial Services Referral worksheet for Pretrial Services to monitor, judges are not required to document these additional conditions on the B&D. It is sufficient that: 1) the documentation on the Pretrial Conditions Worksheet shows that Pretrial Services was ordered; and 2) the documentation on the Pretrial Services Referral worksheet shows the additional conditions for Pretrial Services to monitor.*

- # 7 “No Contact with _____ except for _____”
“No Unlawful Contact with _____;”
replaces
- The phrase “(per Criminal Rules 5.2(i) or (j))” is added to the “Order to Override Attached” check-off box.

CONCLUSION

Judges shall apply the Supreme Court Pretrial Release Rule when making pretrial release decisions in response to the numerical scores assigned by the DELPAT for all initial cases that include any of the following charges: any Title 11 offense; any Title 16 offense, except for civil offenses; and any 21 *Del. C.* § 4177 offense.

The Interim Special Rule moved the courts further along the path of bail reform toward providing equal justice for all parties. However, the Pretrial Release Rule has modified the Interim Special Rule in several ways:

- It is written in a more familiar rules format and is an easier document for judges to read, understand, and apply;
- It has deleted explanatory information originally designed for public consumption and consolidated some material;

⁴¹ Pretrial Release Rule 5.2(1)(2).

⁴² Refer to PD 11-242 (3rd Supplement), p. 13. Sample from Pretrial Services provided on 4th attachment.

- It has added some new documentation requirements for both the State and the court, creating a greater level of accountability for bail recommendations from the State and for bail decisions from the court. And solutions were worked out among stakeholders when conflicts between practice and concept (in the Interim Special Rule) occurred;
- Some areas of the Pretrial Release Rule create additional requirements for written documentation, other areas eliminated a requirement for a written order of override:
 - Judges shall use a system of check-offs for bail decisions under the categories “Less Intensive Conditions of Release than indicated by the DELPAT Matrix” and “Order to Override Not Required: Domestic Violence offense, Felony DUI, and Signal Offense;”
 - Judges shall write an Order to Override for bail decisions under the category “Less Intensive Conditions. Order to Override required due to party’s objection;” and
 - An Order to Override is no longer required for bail decisions on Domestic Violence charges and for Felony DUI charges, just as it has not been required for Signal Offense charges.
- In addition, the Pretrial Release Rule provides a method for a judge’s quick comparison between the Signal Offenses list of Schedule 5.2B and the list of charges/circumstances prompting the statutory presumption of cash-only monetary bail by adding an asterisk to all charges/circumstances for which 11 *Del. C* § 2107(c) does not apply.

ATTACHED: Sample Updated Judicial Action on DELPAT Recommendation
 Sample automated Order to Override format with drop-down table options
 Sample Pretrial Services Referral worksheet

Cc: Honorable Collins J. Seitz, Jr.
 Honorable Kathaleen S. McCormick
 Honorable Jan R. Jurden
 Honorable Carl C. Danberg
 Honorable Michael K. Newell
 Gayle P. Lafferty, State Court Administrator
 Mark Hitch, Justice of the Peace Court Administrator
 Elizabeth Petrick, Justice of the Peace Court Deputy Court Administrator
 Rebecca Trifillis, Justice of the Peace Court Staff Attorney
 Regina Elliott, Operations Manager
 Stephanie Parker, Operations Manager
 Kevin Jackson, Chief of Uniformed Services
 Spencer Price, DELJIS Executive Director
 Law Libraries: New Castle County, Kent County, Sussex County,
 Widener University School of Law

Judicial Action on DELPAT Recommendation

Defendant: MISS FISH

Case Number: 2106003797

A. CHECK ONLY ONE:

- 1) Conditions of Release as indicated by the DELPAT Matrix.
- 2) Less Intensive Conditions of Release than indicated by the DELPAT Matrix. Judges shall check off mitigating factors below relevant to the bail decision.
- 3) Less Intensive Conditions. ORDER TO OVERRIDE REQUIRED due to party's objection.
- 4) More Intensive Conditions of Release than indicated by the DELPAT Matrix. ORDER TO OVERRIDE REQUIRED. Judges shall check off M1 thru M4 as applicable.
 - M1 Specific findings that the defendant poses a risk of flight in the current case.
 - M2 Specific findings that releasing the defendant would pose a substantial danger to the public or victim.
 - M3 Specific findings that releasing the defendant would pose some other risk of pretrial failure.
 - M4 Other: _____
- 5) ORDER TO OVERRIDE NOT REQUIRED. Judges shall check off mitigating/aggravating factors below relevant to the bail decision. Check type of offense.
 - Domestic Violence Offense Felony DUI SIGNAL Offense

B. MITIGATING AND AGGRAVATING FACTORS:

Mitigating Factors: (Check all that apply.)

- 1) Little or no criminal history
- 2) Defendant is currently engaged in mental health or substance abuse services
- 3) Pretrial incarceration would negatively impact Defendant's physical or mental conditions
- 4) Defendant was not the primary aggressor
- 5) Defendant is the sole caregiver for children/elderly
- 6) DUI felony case: Significant time between charges relative
- 7) Defendant has strong incentives for pretrial success
- Explain: _____
- 8) Other: _____

Aggravating Factors: (Check all that apply.)

- 1) Committing a violent felony involving a firearm.
- 2) Committing a violent felony while on probation or pretrial release.
- 3) Subsequent violent felony (revoke bail on original offense re Section 2116)
- 4) Safety of the victim
- 5) Escalation (severity or quantity) in crimes of violence involving victims
- 6) DUI felony case: Short time between charges
- 7) State's recommendation on the record or motion re Section 2107 (c)
- 8) Info from the State or the defendant indicates an increased risk of flight
- Explain: _____
- 9) Out of state criminal record excluded from DELPAT
- Explain: _____
- 10) Other: _____

C. CASH BAIL: If cash bail is ordered for any defendant, judges shall explain why secured bail insufficiently addresses the defendant's risk factors:
 Statutory Bail Presumption Other: _____

Date

Justice of the Peace

**JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
COURT NO. 11**

CASE NO.: 1903100553

DATE: April 5, 2019

DEFENDANT: MICHAEL SMALLS

LEAD CHARGE: OFFENSIVE TOUCHING

**ORDER TO OVERRIDE
PRESUMPTIVE BAIL DECISION**

The Court has ordered that **TABLE 1** of release than recommended by the DELPAT and Supreme Court Special Rule of Criminal Procedure for Pretrial Release 5.2 are appropriate. **TABLE 2**, the Court has made findings of fact to wit:

The Defendant was before the Court and scored a **2** on the FTA scale and a **8** on the NCA scale on the DELPAT. The Court is departing from the initial recommended response by **TABLE 3**. The Court finds, by a preponderance of the evidence, that the departure is necessary for the following reasons:

FREE TEXT TO BE ENTERED BY THE JUDGE

IT IS SO ORDERED.

/s/ Marie E. Page

Justice of the Peace

Cc: Chief Magistrate's Office
File

THIS IS NOT PART OF THE DOCUMENT
JUST WANTED TO SHOW THE DROP-DOWN TABLES WE WOULD NEED

TABLE 1 (New):

Choose an item
more intensive conditions
less intensive conditions

TABLE 2: (Modified)

Choose an item
After a review of a recommendation by the State
On its own initiative
To overcome a party's objection

TABLE 3: (Modified)

Choose an item
imposing a secured monetary condition
imposing a cash monetary condition
imposing an unsecured monetary condition
imposing pretrial services with standard conditions
imposing pretrial services with special conditions
imposing additional conditions
imposing a release on own recognizance condition
not imposing pretrial services

Note:

- Items highlighted in 'yellow' is information that will be auto generated by the system
- Item highlighted in 'blue' is a free text field for the judge to manually enter information
- Items in 'red' are changes from previous version of document

JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
COURT NO. 11

PRETRIAL SERVICES REFERRAL

DEFENDANT NAME: MISS FISH
CASE NUMBER: 2110004862

Pretrial Supervision Level will be determined by the Department of Corrections (DOC). While released on bond, the defendant shall be placed on Pretrial Supervision subject to the following special conditions:

1. Do Not Drive a Motor Vehicle until case is fully disposed
(11 Del. C. Section 2108(c))
2. Domestic Violence Evaluation
3. Mental Health Evaluation
4. Relinquish Firearms
5. No Contact with anyone under the age of 18 until case is fully disposed
(11 Del. C. Section 2108(b))
6. No Contact with _____
7. No Contact with _____ except for _____
8. Substance Abuse Evaluation and Testing
9. Electronic Monitoring
10. Sex offender registration 11 Del.C Section 4120
11. Other _____

ORDER TO OVERRIDE ATTACHED (per Pretrial Release Rule 5.2 (i) or (j))

Date

Justice of the Peace

Defendant is to report in person to the Pretrial Services Office indicated below by 9:00 a.m. the first business day after release

New Castle County
314 Cherry Lane
New Castle DE 19720
Phone: (302) 577-3443
Fax: (302) 577-3670

Kent County
511 Maple Parkway
Dover DE 19904
Phone: (302) 739-5387
Fax: (302) 739-6198

Sussex County
Admin Services
22883 DuPont Blvd
Georgetown DE 19947
Phone: (302) 856-5795
Fax: (302) 856-5133

Send Pretrial referral form along with Bond/Commitment to the following resource email boxes:

New Castle County: [DOC PrettrialCherryLn Reports@Delaware.gov](mailto:DOC_PrettrialCherryLn_Reports@Delaware.gov)
Kent County: [DOC KentPTS@Delaware.gov](mailto:DOC_KentPTS@Delaware.gov)
Sussex County: [DOC SussexPTS@Delaware.gov](mailto:DOC_SussexPTS@Delaware.gov)