THE COURTS

Title 207—JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

New Rules of Procedure; Doc. No. 1 JD 94

Order

And Now, this 7th day of May, 1996, pursuant to Article V, Section 18(b)(4) of the Constitution of Pennsylvania, and in accordance with this Court's Order of March 27, 1996, proposing to adopt new Rule 113, the Court of Judicial Discipline hereby adopts new Rule 113, in the following form, effective immediately.

Annex A

TITLE 207. JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

ARTICLE I. PRELIMINARY PROVISIONS

Rule 113. Lodging of Transcripts.

When the Court or a party direct the court reporter to transcribe the notes of testimony taken at a hearing or trial, the Clerk, upon receiving the transcript, shall notify the parties that the transcript has been lodged with the Court. The parties shall have 10 days from the date of notification to file objections to the transcript. The parties shall serve copies of objections upon the other party. The Court may conduct a hearing on the objections. If no objections or exceptions are filed, the transcript will be approved by the Court as of course.

By the Court

JOSEPH F. MCCLOSKEY,
President Judge

[Pa.B. Doc. No. 96-800. Filed for public inspection May 17, 1996, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

[234 PA. CODE CH. 1500]

Proposed Amendments to Chapter 1500

Introduction

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend the rules in Chapter 1500 (Post-Conviction Collateral Proceedings) to align the Chapter with recent amendments to the Post Conviction Relief Act, Act 1995-32(SS1),[1] 42 Pa.C.S. §§ 9542—9546, effective January 16, 1996.

The following explanatory Report highlights the issues considered in formulating this proposal. As such, the Report 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*.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel: Anne T. Panfil, Chief Staff Counsel, Criminal Procedural Rules Committee, P. O. Box 1325, Doylestown, PA 18901, no later than June 21, 1996.

By the Criminal Procedural Rules Committee

FRANCIS BARRY MCCARTHY,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 1500. POST-CONVICTION COLLATERAL PROCEEDINGS

Committee Note: The rules in this Chapter apply to capital and noncapital cases under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9542—9546, as amended by Act 1995-32 (SS1), effective January 16, 1996. They do not apply to proceedings under the Capital Unitary Review Act, 42 Pa.C.S. §§ 9570—9579.

Rule 1501. Initiation of Post-Conviction Collateral Proceedings.

(1) A petition for post-conviction collateral relief shall be filed within one year of the date the judgment becomes final, except as otherwise provided by statute.

(2) A proceeding for post-conviction collateral relief shall be initiated by filing a **[motion] petition** and 3 copies with the clerk of the court in which the defendant was convicted and sentenced. The **[motion] petition** shall be verified by the defendant.

Official Note: Previous Rule 1501 adopted January 24, 1968, effective August 1, 1968; amended November 25, 1968, effective February 3, 1969; amended February 15, 1974, effective immediately; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded November 9, 1984, effective January 2, 1985. Former Rule 1501 adopted November 9, 1984, effective January 2, 1985; rescinded February 1, 1989, effective July 1, 1989; and replaced by present Rule 1502. Present Rule 1501 adopted February 1, 1989, effective July 1, 1989; amended March 22, 1993, effective January 1, 1994**; amended _____, effective _____.**

Comment

The rules in Chapter 1500 govern proceedings to obtain relief authorized by the Post Conviction Relief Act, 42 Pa.C.S. § 9451 et seq. **(hereinafter PCRA).**

By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction collateral relief. 42 Pa.C.S. § 9545(a).

The **[motion] petition** for post-conviction relief under these rules is not intended to be a substitute for or a limitation on the availability of appeal or a post-sentence motion. See Pa.**[Rs] R.Crim.P. [320 and]** 1410. Rather, the Chapter 1500 Rules are intended to require that, in a single proceeding, the defendant must raise and the judge must dispose of all grounds for relief available

[1] A copy of Act 1995-32(SS1) has been included as an Appendix to this Report.

after conviction, and exhaustion of the appellate process, either by affirmance or by the failure to take a timely appeal.

Under the 1995 amendments to the PCRA, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. 42 Pa.C.S. § 9545(d)(2).

As used in the Chapter 1500 Rules, "**[motion] petition** for post-conviction collateral relief" and "**[motion] petition**" are intended to include an amended **[motion] petition** filed pursuant to Rule 1505, except where the context indicates otherwise.

Under the 1995 amendments to the PCRA, a petition for post-conviction relief, including second and subsequent petitions, must be filed within one year of the date the judgment becomes final, 42 Pa.C.S. § 9545(b)(1), unless one of the statutory exceptions applies, see 42 Pa.C.S. § 9545(b)(1)(i)—(iii). Any petition invoking one of these exceptions must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

The 1995 amendments to the PCRA apply to petitions filed on or after January 16, 1996. A petitioner whose judgment has become final on or before the effective date of the Act is deemed to have filed a timely petition under the Act if the first petition is filed within one year of the effective date of the Act. See sections 3 and 4 of Act 1995-32(SS1).

For the purposes of the PCRA, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. 42 Pa.C.S. § 9545(b)(3).

Committee Explanatory Reports:

Final Report explaining the March 22, 1993 amendments published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1502. Content of **[Motion] Petition** for Post-Conviction Collateral Relief.

(a) A **[motion] petition** for post-conviction collateral relief shall bear the caption, number, and court term of the case or cases in which relief is requested and shall contain substantially the following information:

* * * * *

(13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case; **[and]**

(14) a verification by the defendant that the facts set forth in the **[motion] petition** are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties **[of Section 4904]** of the Crimes Code**, [( ]**18 Pa.C.S. § 4904**[ )]**, relating to unsworn falsification to authorities**; and**

(15) if applicable, any request for an evidentiary hearing. The request for an evidentiary hearing shall include a signed certification as to each intended witness stating the witness's name, address, and date of birth, and the substance of the witness's testimony. Any documents material to the witness's testimony shall also be included in the petition.

The **[motion] petition** may, but need not, include concise argument or citation and discussion of authorities.

(b) Each ground relied upon in support of the relief requested shall be stated in the **[motion] petition**. Failure to state such a ground in the **[motion] petition** shall preclude the defendant from raising that ground in any **[subsequent]** proceeding for post-conviction collateral relief **[under these rules]**.

(c) The defendant shall state in the **[motion] petition** the name and address of the attorney who will represent the defendant in the post-conviction collateral proceeding. If the defendant is unable to afford or otherwise procure counsel, and wants counsel appointed, the defendant shall so state in the **[motion] petition** and shall request the appointment of counsel.

(d) The defendant shall attach to the **[motion] petition** any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the **[motion] petition** shall state why they are not attached.

Official Note: Previous Rule 1502 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989; and replaced by present Rules 1503 and 1505. Present Rule 1502 adopted February 1, 1989, effective July 1, 1989**; amended _____; effective _____.**

Comment

[This rule is derived from former Rule 1501.]

Pursuant to paragraph (a)(6), the **[motion] petition** should include specific information about the sentence imposed, including **whether the defendant is currently serving a sentence of imprisonment or probation for the crime; awaiting execution of a sentence of death for the crime; or serving a sentence which must expire before the defendant may commence serving the disputed sentence;** the minimum and maximum terms of the sentence**[,];** the amount of fine **or restitution**, if any**[,];** and whether the defendant is released on **[probation or]** parole. See **[also, Section 9543(a) of the PostConviction Relief Act,]** 42 Pa.C.S. § 9543(a) **[(Supp 1988)]**.

[Section] Sections 9543(a)(2), (3), and (4) of the PostConviction Relief Act**, [( ]**42 Pa.C.S. § 9543(a)(2), (3), and (4)**, [(Supp. 1988)) requires] require** that to be eligible for relief, the defendant must plead and prove by a preponderance of the evidence **all of** the following:

[1. "That the conviction or sentence resulted from one or more of the following:

(I) A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(II) Ineffective assistance of counsel which, in the circumstances of the particular case, so under-

mined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(IV) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(V) A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner.

(VI) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(VII) The imposition of a sentence greater than the lawful maximum.

(VIII) A proceeding in a tribunal without jurisdiction."

2. "That the allegation of error has not been previously litigated and one of the following applies:

(I) The allegation of error has not been waived.

(II) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(III) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a state procedural default barring federal habeas corpus relief."

3. "That the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel."]

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the constitution of this Commonwealth or the constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

Under the 1995 amendments to the PCRA, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. 42 Pa.C.S. § 9545(d)(2).

It is expected that a form **[motion] petition** will be prepared incorporating the required contents set forth herein which will be available for distribution to uncounseled defendants. This rule is not intended to require an attorney to use a printed form or any other particular format in preparing a **[motion] petition** or an amended **[motion] petition** for post-conviction collateral relief, provided, of course, that the attorney must include in a **[motion] petition** or amended **[motion] petition** substantially all of the information set forth in this rule.

The **[motion] petition** should be typewritten or legibly handwritten.

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1503. Docketing and Assignment.

(a) Upon receipt of a **[motion] petition** for post-conviction collateral relief, the clerk of court shall immediately docket the **[motion] petition** to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the **[motion] petition** and the record to the trial judge, if available, or to the administrative judge, if the trial judge is not available. If the defendant's confinement is by virtue of multiple indictments and sentences, the case shall be docketed to the same term and number as the indictment upon which the first unexpired term was imposed, but the court may take judicial notice of all proceedings related to the multiple indictments.

(b) When the **[motion] petition** is filed and docketed, the clerk shall transmit a copy of the **[motion] petition** to the attorney for the Commonwealth.

(c) The trial judge, if available, shall proceed with and dispose of the **[motion] petition** in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified.

(d) When the trial judge is unavailable or disqualified, the administrative judge shall promptly assign and transmit the **[motion] petition** and the record to another judge, who shall proceed with and dispose of the **[motion] petition** in accordance with these rules.

Official Note: Previous Rule 1503 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989; and replaced by present Rule 1504. Present Rule 1503 adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

[This rule replaces paragraphs (a) and (b) of former Rule 1502.]

As used in this rule, "trial judge" is intended to include the judge who accepted a plea of guilty or nolo contendere.

The transmittal of the **[motion] petition** to the attorney for the Commonwealth does not require a response unless one is ordered by the judge as provided in these rules.

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1504. Appointment of Counsel; **In** Forma Pauperis.

(a) When an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first **[motion] petition** for post-conviction collateral relief.

(b) On a second or subsequent **[motion] petition**, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 1508, the judge shall appoint counsel to represent the defendant.

(c) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(d) An appointment of counsel shall be effective throughout the post-conviction proceedings, including any appeal from disposition of the **[motion] petition** for post-conviction collateral relief.

(e) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis.

Official Note: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989; and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

[This rule replaces former Rule 1503.]

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. See Rule 318.

Consistent with Pennsylvania post-conviction practice under former Rules 1503 and 1504, it is intended that counsel be appointed in every case in which a defendant has filed a **[motion] petition** for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent **[motion] petitions** so that counsel should be appointed only if the judge determines that an evidentiary hearing is required. Of course, the judge has the discretion to appoint counsel in any case when the interests of justice require it.

A PCRA petition filed after final disposition under the Capital Unitary Review Act, 42 Pa.C.S. §§ 9570—9579, constitutes a second petition.

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1505. Amendment and Withdrawal of **[Motion] Petition** for Post-Conviction Collateral Relief.

(a) The judge may grant leave to amend or withdraw a **[motion] petition** for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(b) When a **[motion] petition** for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the **[motion] petition**, indicate the nature of the defects, and specify the time within which an amended **[motion] petition** shall be filed. If the order directing amendment is not complied with, the **[motion] petition** may be dismissed without a hearing.

(c) Upon the entry of an order directing an amendment, the clerk of **[court] courts** shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(d) All amended **[motions] petitions** shall be in writing, shall comply substantially with Rule 1502, and shall be filed and served within the time specified by the judge in ordering the amendment.

Official Note: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989; and replaced by Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

[This rule replaces paragraph (a) of former Rule 1505 and paragraph (c) of former Rule 1502.]

"Defective," as used in paragraph (b), is intended to include **[motions] petitions** that are inadequate, insufficient, or irregular for any reason; for example, **[motions] petitions** that lack particularity; **[motions] petitions** that do not comply substantially with Rule 1502; **[motions] petitions** that appear to be patently frivolous; **[motions] petitions** that do not allege facts which would support relief; **[motions] petitions** that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended **[motion] petition** is filed pursuant to paragraph (d), it is intended that the clerk of courts transmit a copy of the amended **[motion] petition** to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. See Rules 1503 and 1506.

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1506. Answer to **[Motion] Petition** for Post-Conviction Collateral Relief.

(a) An answer to a **[motion] petition** for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the **[motion] petition.**

* * * * *

Official Note: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; Comment revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; Comment revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989; and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

As used in the Chapter 1500 Rules, "answer" is intended to include an amended answer filed pursuant to paragraph (d) of this rule, except where the context indicates otherwise.

When determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the **[motion] petition** for post-conviction collateral relief. **[See Section 9543(B) of the PostConviction Relief Act (42 Pa.C.S. § 9543(B)(Supp. 1988)) which, inter alia, authorizes the dismissal of the motion if "because of delay in filing . . . , the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner."]**

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1507. Disposition Without Hearing.

(a) The judge shall promptly review the **[motion] petition**, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the **[motion] petition** and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the **[motion] petition** dismissed, or grant leave to file an amended **[motion] petition**, or direct that the proceedings continue.

(b) A **[motion] petition** for post-conviction collateral relief may be granted without a hearing when the **[motion] petition** and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a **[motion] petition** without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the **[motion] petition** is dismissed without a hearing, the judge**[:] shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.**

[(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.]

Official Note: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989; and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

[Previous Rule 1507 was rescinded in 1989 as unnecessary in view of the enactment of the new PostConviction Relief Act, Act 47 of 1988, 42 Pa.C.S. § 9541 et seq. (Supp. 1988). Present Rule 1507 replaces former Rule 1504.]

The judge is permitted, pursuant to paragraph (a), to summarily dismiss a **[motion] petition** for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the **[motion] petition**, the answer if any, and all other relevant information that is included in the record. If after this review, the judge determines that the **[motion] petition** is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the **[motion] petition** as provided herein.

A summary dismissal would also be authorized under this rule if the judge determines that a previous **[motion] petition** involving the same issue or issues was filed and was finally determined adversely to the defendant. **See § 9545(b) for the timing requirements for filing second and subsequent petitions**. A second or subsequent **[motion] petition** should be summarily dismissed when the judge determines that the defendant has failed to make a strong prima facie showing that a miscarriage of justice may have occurred. See *Commonwealth v. Lawson*, **[_____ Pa. _____,]** 549 A.2d 107 (**Pa.** 1988). See also Rule 1504 with regard to the requirements for appointment of counsel in these cases.

Relief may be granted without a hearing under paragraph (b) only after an answer has been filed either voluntarily or pursuant to court order.

Upon disposition without a hearing under this rule, the judge should also comply with Rule 1508(d), to the extent that it reasonably applies.

By statute, a PCRA petition may not be dismissed due to delay in filing except after a hearing on a motion to dismiss. 42 Pa.C.S. § 9543(d). See Rule 1508.

Under the 1995 amendments to the PCRA, an order under that Act denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court. 42 Pa.C.S. § 9546(b).

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1508. Hearing.

(a) Except as provided in Rule 1507, the judge shall order a hearing **[on all material issues of fact raised by the motion and answer, if any. The]**:

(1) when the petition for post-conviction relief or the Commonwealth's answer, if any, raise material issues of fact. Provided, however, that the judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial**; or**

(2) whenever the Commonwealth files a motion to dismiss due to the defendant's delay in filing the petition.

The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on **[motion] petition** or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended **[motion] petition** or amended answer.

(c) the judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the **defendant's [motion] petition and the Commonwealth's answer, or by the Commonwealth's motion to dismiss**, if any;

(2) issue an order denying relief or granting a specific form of relief **[and stating the grounds on which the case was determined,]** and issue any supplementary orders appropriate to the proper disposition of the case**[; and].**

[(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all materials issues.]

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the **[motion] petition** and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

Official Note: Adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

[This rule replaces former Rule 1506.

With respect to "material issues" as used in this rule, see, e.g., *Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468 (1977); *Commonwealth v. Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth v. Webster*, 466 Pa. 314, 353 A.2d 372 (1975); *Commonwealth v. Hayes*, 462 Pa. 291, 341 A.2d 85 (1975); *Commonwealth v. Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Commonwealth v. Slavik*, 449 Pa. 424 A.2d 920 (1972).]

The judge's power, under paragraph (a), to deny a hearing on a specific factual issue is intended to apply when an issue of fact has already been heard fully, but has never been determined. The judge need not rehear such an issue, but would be required to determine it under paragraph (d).

The 1996 amendment to paragraph (a)(1) requires a hearing on every Commonwealth motion to dismiss due to delay in the filing of a PCRA petition. See 42 Pa.C.S. § 9543(b), as amended in 1995.

Under the 1995 amendments to the PCRA, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. 42 Pa.C.S. § 9545(d)(2).

Under other 1995 amendments to the Act, an order under the Act denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court. 42 Pa.C.S. § 9546(d).

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

Rule 1509. Appeal.

An order granting, denying, dismissing, or otherwise finally disposing of a **[motion] petition** for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Official Note: Adopted February 1, 1989, effective July 1, 1989**; amended _____, effective _____.**

Comment

Disposition without a hearing under Rule 1507(a) and (b) constitutes a final order under this rule. A partial disposition under Rule 1507(c) is not a final order until the judge has fully disposed of all claims.

Under the 1995 amendments to the PCRA, an order under the Act denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court. 42 Pa.C.S. § 9546(d).

***Committee Explanatory Reports*:**

Report explaining the _____, 1996 amendments published at 26 Pa.B. 2302 (May 18, 1996).

REPORT

Amendments to Chapter 1500, Pa.Rs.Crim.P. 1501—1509

Procedures under the Post Conviction Relief Act

Introduction

In 1995, the Governor signed into law Act 1995-32(SS1), effective January 16, 1996. This Act amends the Post Conviction Relief Act, 42 Pa.C.S. §§ 9542—9546, and creates "unitary review" for death penalty cases under the new Capital Unitary Review Act, 42 Pa.C.S. §§ 9570—9579. Early in 1996, the Committee reviewed Act 1995-32(SS1) and agreed that changes to Chapter 1500 were necessary to align Rules 1501—1509 with the amendments to the Post Conviction Relief Act[2].

In general, the proposed changes to Chapter 1500 serve two purposes. First, they align the text of the rules and the Comments with the statutory amendments. Second, additional revisions of the Comments alert the bench and bar to several PCRA amendments relating to pleading, discovery, and appellate review.

Discussion of Proposed Rule Changes

1. Committee Note to Chapter 1500

One of the issues raised in our review of Act 1995-32(SS1) was whether and to what degree this proposal should address procedures under the Capital Unitary Review Act. After a lengthy discussion, we concluded that the Rules of Criminal Procedure should continue to implement only the PCRA, and agreed to add a Committee Note after the Chapter title to make it clear that Chapter 1500 does not apply to proceedings under the new Capital Unitary Review Act, 42 Pa.C.S. §§ 9570—9579, but only to capital cases, see, e.g., 42 Pa.C.S. § 9578, and noncapital cases falling under the provisions of the Post Conviction Relief Act, 42 Pa.C.S. §§ 9542—9546.

2. Substitution of "petition" for "motion" throughout Chapter.

When new Chapter 1500 was drafted in 1988, see 38 Pa.B. 4235 (September 17, 1988), the Committee agreed to use the term "motion" throughout Chapter 1500 in accordance with the Court's express preference for that term. Id., at 4240. After reviewing the rules in Chapter 1500 and the PCRA amendments, the Committee concluded that the use of the term "motion," while contributing to uniformity in one way, was confusing in light of the PCRA's consistent use of the word "petition." For this reason, we are proposing that the term "petition" be used throughout Chapter 1500. In the text of the Rules 1503—1506 and Rule 1509 this is the only change.

3. Rule 1501. Initiation of Post-Conviction Collateral Proceedings.

Present Rule 1501 contains the filing procedures for initiating PCRA proceedings. Because the PCRA, as amended, contains time limits for filing PCRA petitions, 42 Pa.C.S. § 9545(b)(1) and (2), we have added a new paragraph to implement this provision. See Pa.R.Crim.P. 1501(1).

The Comment to Rule 1501 has been expanded to alert the reader to several PCRA amendments related to the initiation of PCRA proceedings.

(a) We have added a cross-reference to 42 Pa.C.S. § 9545(a), which prohibits a court from entertaining a request for any form of relief in anticipation of the filing of a PCRA petition.

(b) In a similar vein, we have added a cross-reference to 42 Pa.C.S. § 9545(d)(2), which prohibits discovery at any stage of the proceedings, except upon leave of court with showing of exceptional circumstances.

(c) Several paragraphs summarize the new PCRA timing requirements.

(1) The Comment refers the reader to the general one-year time limit for petitions filed on or after the effective date of the amendments to the PCRA, 42 Pa.C.S. § 9545(b)(1), and to the exceptions to that requirement, 42 Pa.C.S. § 9545(b)(1)(i)—(iii) and 42 Pa.C.S. § 9545(b)(2).

(2) The Comment also references the timing provision for those petitioners whose judgment became final on or before the effective date of the amendments, i.e., the petition is deemed to have been timely filed if the first petition is filed within one year of the effective date of the Act. See Act 1995-32(SS1), Sections 3 and 4.

(3) Finally, the Comment contains a cross-reference to 42 Pa.C.S. § 9545(b)(3), which provides that, for the purposes of the PCRA, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania.

3. Rule 1502. Content of Petition for Post-Conviction Collateral Relief.

The text of Rule 1502, which sets forth in considerable detail the requisite contents of a PCRA petition, has been amended in two ways. First, we have added a new content requirement to implement 42 Pa.C.S. § 9545(d), which requires, if the petitioner wants an evidentiary hearing, that the petitioner include that request in the petition, accompanied by (1) a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony, and (2) any documents material to the witness's testimony.

Second, we recommend an amendment to paragraph (b), which currently reads:

> Each ground relied upon in support of the relief requested shall be stated in the motion. Failure to state such a ground in the motion shall preclude the defendant from raising that ground *in any subsequent proceeding* for post-conviction collateral relief under these rules. (emphasis added)

We propose to delete the word "subsequent" to make it clearer that if the defendant does not state a ground relied upon in the petition, the defendant may not raise it later in a proceeding on that petition or in a proceeding on any subsequent petition.

The Comment has been revised in several ways.

(a) The present Comment sets forth, verbatim, the pleading requirements contained in 42 Pa.C.S. § 9453(a)(2) prior to the 1995 amendments. We have deleted these paragraphs completely, and have replaced them with the provisions in 42 Pa.C.S. § 9543(a)(2)—(4), as amended in 1995.

(b) The first paragraph, which contains rule history, has been deleted as no longer necessary.

(c) The second paragraph, which discusses the sentencing information required by paragraph (a)(6), has been revised to more completely mirror the statute, 42 Pa.C.S. § 9543(a).

[2] Hereinafter PCRA. A copy of Act 1995-32(SS1) appears in the Appendix to this Report.

(d) Finally, we have included a reference to the new statutory language prohibiting discovery except upon leave of court with a showing of exceptional circumstances. See 42 Pa.C.S. § 9545(d)(2).

4. Rule 1504. Appointment of Counsel; In Forma Pauperis.

Although no substantive changes have been made to the rule itself, we have added a new paragraph to the Comment to clarify the status of PCRA petitions filed after unitary review.

The right to appointment of counsel under Rule 1504 depends on whether the petitioner is filing a first petition or a second or later petition.[3] If an indigent petitioner is filing a first petition, Pa.R.Crim.P. 1504(a) requires the court to appoint counsel. On a second or subsequent petition, however, the judge is only required to appoint counsel if the petitioner is indigent and if an evidentiary hearing is required. Pa.R.Crim.P. 1504(b).

As the Committee reviewed Rule 1504 in the context of Act 1995-32(SS1), a question arose as to the treatment of petitions filed under the PCRA after final disposition under the Capital Unitary Review Act. See 42 Pa.C.S. 9578. Because it can be argued that such petitions are, in a sense, "first" petitions under the PCRA, all other proceedings having been under the Capital Unitary Review Act, the Committee agreed that some clarification was needed. We have therefore added a Comment which states that a PCRA petition filed after final disposition under the Capital Unitary Review Act constitutes a second petition.

5. Rule 1505. Amendment and Withdrawal of Petition for Post-Conviction Collateral Relief.

The first paragraph of the Comment, which contains rule history, has been deleted as no longer necessary. Other changes to the Comment are stylistic only.

6. Rule 1506. Answer to Petition for Post-Conviction Collateral Relief.

In the second paragraph of the Comment, the second sentence has been deleted as more confusing than helpful.

7. Rule 1507. Disposition Without Hearing.

The text of Rule 1507 has been amended to reflect changes in PCRA requirements concerning the content of the court's order dismissing a petition without a hearing.

Present paragraph (d) contains a requirement that when a judge dismisses a petition without a hearing, the judge must state, in the order, the ground "on which the case was determined." Pa.R.Crim.P. 1507(d)(1). This language was originally added to implement a statutory requirement to the same effect. See Committee Report at 18 Pa.B. 4239, 4242 (September 17, 1988). Because the 1995 PCRA amendments deleted this requirement, 42 Pa.C.S. § 9546, the Committee agreed to delete the parallel requirement from the rule.

The Comment to Rule 1507 has been revised in several ways.

(a) The first paragraph containing rule history has been deleted as no longer necessary.

(b) The cross-reference to 42 Pa.C.S. § 9545(b) has been revised to read: "See 42 Pa.C.S. § 9545(b) for the timing requirements for subsequent petitions."

(c) Cross-references to Rule 1508 (Hearing) and to 42 Pa.C.S. § 9543(b) have been added to make it clear that a PCRA petition may be dismissed due to delay in filing only upon a Commonwealth motion to dismiss and after a hearing.

(c) We have added a Comment to alert the bench and bar to the provision of 42 Pa.C.S. § 9546(b), as amended, which states that an order under the PCRA denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court.

8. Rule 1508. Hearing.

Present Rule 1508 requires a hearing only on issues of material fact raised by the petition and answer, if any. We have amended paragraph (a) to implement 42 Pa.C.S. § 9543(b), which requires a hearing whenever the Commonwealth moves to dismiss a petition due to the defendant's delay in filing the petition. Pa.R.Crim.P. 1508(a)(2).

Paragraph (d) sets forth the actions which the court must take at the conclusion of a hearing held under the rule.

(a) Paragraph (d)(1) has been amended to make it clear that the judge must determine all issues raised, not only issues raised by the defendant's petition, but also issues raised by the Commonwealth's answer, and issues raised by the Commonwealth's motion to dismiss.

(b) We have deleted the requirement in paragraph (d)(2) that the judge state in the order the grounds on which the case was determined, because this statutory requirement was deleted when the PCRA was amended in 1995. See 42 Pa.C.S. 9546(b).

(c) We have also deleted paragraph (d)(3) because our review of its history revealed that it was an anomaly inadvertently carried over from original Rule 1506, adopted in 1968.

The Comment to Rule 1508 has been revised in several ways.

The first paragraph contains case law concerning what constitutes "material issues" under the rule, and was intended as an aid to the bench and bar when the rule was new. As such, the Committee agreed that it was no longer necessary.

Several new paragraphs highlight the 1995 amendments to the PCRA.

(a) The Comment underscores the statutory requirement that there must be a hearing on every Commonwealth motion to dismiss due to delay in the filing of a PCRA petition. See 42 Pa.C.S. § 9543(b).

(b) The Comment also cross-references the express statutory limitations on discovery. See 42 Pa.C.S. § 9545(d)(2).

(c) Finally, we have added a Comment to alert the bench and bar to the provision of 42 Pa.C.S. § 9546(b), as amended, which states that an order under the PCRA denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court.

10. Rule 1509. Appeal.

The Comment has been revised to cross-reference 42 Pa.C.S. § 9546(b), as amended, which states that an order under the PCRA denying a petitioner final relief in a case in which the death penalty has been imposed is reviewable only by petition for allowance of appeal to the Supreme Court.

[3] For a discussion of the development of this rule, see the Committee explanatory Report, 18 Pa.B. 4239, 4241 (September 17, 1988).

APPENDIX

Special Session No. 1 of 1995
No. 1995-32

SB 81

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for postconviction relief; and providing for unitary review in death penalty cases.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 9542, 9543, 9544, 9545 and 9546 of Title 42 of the Pennsylvania Consolidated Statutes are amended to read:

§ 9542. Scope of subchapter.

This subchapter provides for an action by which persons convicted of crimes they did not commit [or] and persons serving [unlawful] illegal sentences may obtain collateral relief [and for an action by which persons can raise claims which are properly a basis for Federal habeas corpus relief]. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, nor is this subchapter intended to provide a means for raising issues waived in prior proceedings. Except as specifically provided otherwise, all provisions of this subchapter shall apply to capital and noncapital cases.

§ 9543. Eligibility for relief.

(a) General rule.—To be eligible for relief under this subchapter, [a person] the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the [person] petitioner has been convicted of a crime under the laws of this Commonwealth and is:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution [of Pennsylvania or laws] of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused [an individual] the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by [Commonwealth] government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

[(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.]

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and [that] would have [affected] changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been [previously litigated and one of the following applies:

(i) The allegation of error has not been waived.

(ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.] previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

(b) Exception.—Even if the petitioner [meets] has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have [had knowledge] discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

§ 9544. Previous litigation and waiver.

(a) Previous litigation.—For [the purpose] purposes of this subchapter, an issue has been previously litigated if:

[(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal;]

(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

(b) Issues waived.—For [the] purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to [raise it and if it could have been raised] do so before [the] trial, at [the] trial, during unitary review, on appeal[,] or in a [habeas corpus] prior state postconviction proceeding [or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter].

§ 9545. Jurisdiction and proceedings.

(a) Original jurisdiction.—Original jurisdiction over a proceeding under this subchapter shall be in the court [in which the conviction was obtained.] of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.

[(b) Rules governing proceedings.—The Supreme Court may, by general rule, prescribe procedures to implement the action established under this subchapter but shall not expand, contract or modify the grounds for relief set forth in this subchapter.]

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

(c) Stay of execution.—

(1) No court shall have the authority to issue a stay of execution in any case except as allowed under this subchapter.

(2) Except for first petitions filed under this subchapter by defendants whose sentences have been affirmed on direct appeal by the Supreme Court of Pennsylvania between January 1, 1994, and January 1, 1996, no stay may be issued unless a petition for postconviction relief which meets all the requirements of this subchapter has been filed and is pending and the petitioner makes a strong showing of likelihood of success on the merits.

(3) If a stay of execution is granted, all limitations periods set forth under sections 9574 (relating to answer to petition), 9575 (relating to disposition without evidentiary hearing) and 9576 (relating to evidentiary hearing) shall apply to the litigation of the petition.

(d) Evidentiary hearing.—

(1) Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

(2) No discovery, at any stage of proceedings under this subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.

(3) When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation as to that issue shall be automatically terminated.

§ 9546. Relief and order.

(a) General rule.—If the court [finds] rules in favor of the petitioner, it shall order appropriate relief and issue supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper.

[(b) Grounds to be stated.—The order finally disposing of the petition shall state grounds on which the case was determined.

(c) Status of order.—The order constitutes a final judgment for purposes of review.]

(d) Review of order in death penalty cases.—[A final court] An order under this subchapter granting the petitioner final relief in a case in which the death penalty has been imposed shall be directly appealable [only] by the Commonwealth to the Supreme Court pursuant to its rules. An order under this subchapter denying a petitioner final relief in a case in which the death penalty has been imposed shall be reviewable only by petition for allowance of appeal to the Supreme Court.

Section 2. Chapter 95 of Title 42 is amended by adding a subchapter to read:

SUBCHAPTER D

UNITARY REVIEW IN DEATH PENALTY CASES

Sec.
9570. Short title of subchapter.
9571. Scope of subchapter.
9572. Representation of counsel.
9573. Time for petition; contents of petition.
9574. Answer to petition.
9575. Disposition without evidentiary hearing.
9576. Evidentiary hearing.
9577. Disposition and appeal.
9578. Subsequent petitions.
9579. Certification.

§ 9570. Short title of subchapter.

This subchapter shall be known and may be cited as the Capital Unitary Review Act.

§ 9571. Scope of subchapter.

(a) Capital unitary review.—This subchapter establishes the sole means of challenging proceedings that resulted in a sentence of death. The unitary review proceeding provided by this subchapter shall replace postappeal collateral review of death penalty cases with preappeal collateral review.

(b) Appointment of collateral counsel.—Under the action provided in this subchapter, a person sentenced to death shall be immediately entitled to new counsel for purposes of collateral review. The collateral proceeding shall occur in the trial court after the imposition of sentence and before appeal. The petitioner may raise any claim that could not have been raised previously, including claims of ineffective assistance of counsel.

(c) Capital appeal.—Direct appeal shall occur after the trial court has concluded collateral review. Claims raised

on direct appeal shall be limited to those claims that were preserved at trial and that may be resolved on the basis of the record created up to and including sentencing. Collateral appeal shall occur simultaneously with direct appeal. Claims raised on collateral appeal shall be limited to claims that were preserved in the collateral proceeding in the trial court and to any other claim that could not have been raised previously, including claims of ineffective assistance of counsel on direct appeal.

(d) Limitation on subsequent petitions.—No further review shall be available except as provided in this subchapter.

(e) Capital case in which death penalty not imposed.—This subchapter does not apply to capital cases in which the death penalty was not imposed.

§ 9572. Representation of counsel.

(a) Collateral counsel.—Immediately after the formal imposition of sentence on all charges or within 30 days of the verdict of the death penalty, whichever occurs later, the court shall appoint new counsel for the purposes of collateral review, unless:

(1) the petitioner has elected to proceed pro se and the court finds, after a colloquy on the record, that the petitioner's election is knowing, intelligent and voluntary; or

(2) the petitioner retains counsel for the unitary review proceeding.

(b) Prior attorney.—No petitioner may be represented on collateral review, either in the trial court or on appeal, by an attorney, whether retained or appointed, who has represented the petitioner at any other stage of the proceedings, including direct appeal, unless the court finds, after a colloquy on the record, that the petitioner has knowingly, intelligently and voluntarily waived his right to challenge the effectiveness of that attorney's representation.

(c) Standards for appointment of counsel.—The Supreme Court shall adopt standards for the appointment of counsel in capital cases. These standards shall apply for the appointment of trial counsel, collateral review counsel and appellate counsel. When adopting the standards, the Supreme Court shall consider, where practicable, the following criteria:

(1) Counsel is admitted to practice in Pennsylvania.

(2) Counsel is an experienced and active trial practitioner with at least five years' litigation experience in the field of criminal law.

(3) Counsel has prior experience as counsel in a specified number of trials or other relevant proceedings.

(4) Counsel is familiar with the practice and procedure of the appropriate courts, including Federal courts of the jurisdiction.

(5) Counsel has demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(6) Local practice for the appointment of counsel in capital cases. Absent standards established under this subsection, the court may appoint such counsel as it deems qualified, in accordance with any local rules or practices. The existence or applicability of or failure to comply with such standards shall not provide a basis for relief.

§ 9573. Time for petition; contents of petition.

(a) Filing date.—Any petition under this subchapter shall be filed within 120 days of the date the trial transcript is filed with the court. The court may, for good cause shown, grant extensions of time totaling no more than 90 days.

(b) Subsequent or untimely claims.—Any claim raised after the time specified in subsection (a) shall be dismissed unless it satisfies section 9578 (relating to subsequent petitions).

(c) Evidentiary hearing.—Where the petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this subsection shall render the proposed witness's testimony inadmissible.

(d) Discovery.—Discovery shall be permitted, and no reasonable discovery request of the petitioner shall be denied except upon demonstration of exceptional circumstances justifying denial of the discovery requests.

(e) Claim for relief.—When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation as to that issue shall be automatically terminated.

§ 9574. Answer to petition.

The Commonwealth may file a written answer to the petition within 120 days of the filing and service of the petition. For good cause shown, the court may grant an extension of time of up to 90 days. Failure to file an answer shall not constitute an admission of any facts alleged in the petition.

§ 9575. Disposition without evidentiary hearing.

(a) Evidentiary hearing.—No more than 20 days after the Commonwealth answers the petition or, if no answer is filed, 20 days after the deadline for answering, the court shall determine whether or not an evidentiary hearing is warranted. An evidentiary hearing shall not be warranted unless controverted, previously unresolved factual issues material to petitioner's conviction or sentence exist.

(b) Written order.—Failure of the court to issue a written order within the period prescribed under subsection (a) shall constitute a determination that an evidentiary hearing is warranted on any controverted, previously unresolved factual issues material to petitioner's conviction or sentence.

(c) Disposing of petition.—If the determination is made that no evidentiary hearing is warranted, the court shall, no later than 90 days from the date of that determination, dispose of the petition, after oral argument if requested, and any postsentence motions filed under the Pennsylvania Rules of Criminal Procedure.

§ 9576. Evidentiary hearing.

(a) Order.—If the court determines that an evidentiary hearing is warranted, the court shall enter an order no more than 20 days after the Commonwealth answers the petition or, if no answer is filed, 20 days after the deadline for answering, setting a date for the hearing.

(b) Date.—The hearing shall be scheduled to occur not less than ten days and not more than 45 days from the

date of the order setting the hearing. The court may, for good cause shown, grant leave to continue the hearing.

(c) Disposing of petition.—Not later than 90 days after the evidentiary hearing, the court shall dispose of the petition and any postsentence motions filed under the Pennsylvania Rules of Criminal Procedure.

§ 9577. Disposition and appeal.

(a) Capital unitary review.—Review by the Supreme Court under section 9711(h) (relating to review of death sentence) shall comprise direct appeal and collateral appeal. The common pleas court order disposing of the petition under this subchapter shall constitute the final judgement for purposes of this review.

(b) Briefs for petitioner.—Unless the petitioner has waived the right to new counsel on collateral review, separate briefs shall be filed for direct appeal and collateral appeal. The time for filing the collateral appeal brief shall begin to run from service of the petitioner's brief on direct appeal.

(c) Brief for the Commonwealth.—The Commonwealth shall file a brief in response to the petitioner's direct and collateral appeal briefs. The time for filing the Commonwealth's brief shall begin to run from service of the petitioner's brief on collateral appeal.

§ 9578. Subsequent petitions.

(a) Further review.—No further review shall be available unless a petition is filed under Subchapter B (relating to post conviction relief) alleging that:

(1) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution of the United States or laws of the United States or the Constitution of Pennsylvania or laws of this Commonwealth;

(2) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained in the exercise of due diligence; or

(3) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(b) Exception petition.—Any petition invoking an exception provided in subsection (a) shall be filed within 60 days of the date the claim could have been presented.

§ 9579. Certification.

(a) General rule.—By presenting to the court, whether by signing, filing, submitting or later advocating, a pleading, written motion or other papers regarding a petition for collateral relief, an attorney or unrepresented party is certifying that, to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the following:

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims and other legal contentions in it are warranted by existing law or by a nonfrivolous argument for extension, modifidation or reversal of existing law or the establishment of new law; and

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation.

(b) Sanctions.—If, after notice and a reasonable opportunity to respond, the court determines that this section has been violated, the court may impose an appropriate sanction on the attorneys, law firms or parties that have violated this section.

Section 3. This act shall apply as follows:

(1) The amendment of 42 Pa.C.S. §§ 9542, 9543, 9544, 9545 and 9546 shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of this act.

(2) The addition of 42 Pa.C.S. Ch. 95 Subch. D shall apply in all cases in which the death penalty is imposed on or after January 1, 1996.

Section 4. This act shall take effect in 60 days.

APPROVED—The 17th day of November, A.D. 1995.

THOMAS J. RIDGE

[Pa.B. Doc. No. 96-801. Filed for public inspection May 17, 1996, 9:00 a.m.]

PART I. GENERAL

[234 PA. CODE CHS. 100, 200, 6000 AND 9000]

Proposed Amendments to Pa.Rs.Crim.P. 110 et seq.

Introduction

In March 1995, the Committee published a Report explaining its proposal for the amendment of Pa.R.Crim.P. 141 (Preliminary Hearing) and the revision of the Comments to Pa.Rs.Crim.P. 119 (Requirements for Issuance) and 140 (Preliminary Arraignment) to clarify that, under the present rules, district justices may issue warrants when a defendant fails to appear for a preliminary hearing, and to recognize the various local practices for handling cases in which a defendant fails to appear for a preliminary hearing. See 25 Pa.B. 828 (March 11, 1995) and the Pennsylvania Reporter, 652 A.2d, No. 3 (March 17, 1995). As the result of the Committee's post-publication review of the proposal, and in light of the publication responses, the Committee is modifying its original proposal to establish one Statewide, uniform procedure for handling court cases in which a defendant has failed to appear for the preliminary hearing. This modified proposal includes amendments to Rules of Criminal Procedure 110, 112, 113, 140, 141, 142, 143, 146, 224, 225, 231, 9024, 6000, 6001, and 6003. The following Supplemental Report explains the proposed changes, and highlights the Committee's considerations in formulating these changes.

Please note that the Committee's Reports and Supplemental 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 or Supplemental Reports.

We would appreciate suggestions, comments, or objections concerning this proposal. Correspondence with the Committee should be forwarded to counsel: Anne T. Panfil, Chief Staff Counsel, Supreme Court of Pennsylvania, Criminal Procedural Rules Committee, P. O. Box 1325, Doylestown, PA 18901, no later than Friday, June 21, 1996.

By The Criminal Procedural Rules Committee

FRANCIS BARRY MCCARTHY,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 100. PROCEDURE IN COURT CASES

PART III. SUMMONS AND ARREST WARRANT PROCEDURES IN COURT CASES

PART A. SUMMONS PROCEDURES

Rule 110. Contents of Summons; **[Time] Notice** of Preliminary Hearing.

(A) Every summons in a court case shall command the defendant to appear before the issuing authority for a preliminary hearing at the place **[stated therein]** and **on the date and at** the time **[fixed therein, which] stated on the summons. The date set for the preliminary hearing** shall be not less than 20 days from the date of mailing the summons unless the issuing authority fixes an earlier date upon the request of the defendant or **[his] the defendant's** attorney with the consent of the affiant.

(B) The summons shall give the notice to the defendant:

(1) of the right to secure counsel of the defendant's choice and, for those who are without financial resources, of the right to assigned counsel in accordance with Rule 316;

(2) that bail will be set at the preliminary hearing; and

(3) that if the defendant fails to appear **[at] on** the **date, and at the** time and place specified **[a warrant will be issued for the defendant's arrest.] on the summons, the case will be forwarded to the court of common pleas for further proceedings, unless, within 10 days after the date scheduled for the preliminary hearing, the defendant provides the issuing authority with good cause explaining his or her failure to appear.**

(C) A copy of the complaint shall be attached to the summons.

Official Note: Original Rule 109**[,]** adopted June 30, 1964, effective January 1, 1965, suspended January 31, 1970, effective May 1, 1970. New Rule 109 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 110 and amended September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; amended November 9, 1984, effective January 2, 1985; amended August 9, 1994, effective January 1, 1995; **amended _____, effective _____.**

Comment

[Summonses in the] For the summons procedures in non-summary cases in the Municipal Court of Philadelphia **[are governed generally by the Rules of Chapter 6000], see Rule 6003(C).**

When a defendant appears for a preliminary hearing pursuant to a summons under this rule and is held for court, the issuing authority should require the defendant to submit to administrative processing and identification procedures (such as fingerprinting) as authorized by law. It is suggested that these processing procedures be made a condition of bail or release. See Criminal History Record Information Act, 18 Pa.C.S. § 9112.

See Rule 112 for service of the summons and proof of service.

See Rule 143(D) for the procedures when a defendant fails to appear for the preliminary hearing.

For the consequences of defects in a summons in a court case, see Rule 150.

Committee Explanatory Reports:

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

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 112. Service of Summons**; Proof of Service.**

(A) The summons shall be served upon the defendant by **both first class mail and** certified mail, return receipt requested. A copy of the complaint shall be served with the summons.

(B) Proof of service of the summons by mail shall include:

(1) a return receipt signed by the defendant, or

(2) if the certified mail is returned for whatever reason, the returned summons with the notation that the certified mail was undelivered and evidence that the first class mailing of the summons was not returned to the issuing authority within 15 days after mailing.

Official Note: Original Rule 111**[,]** adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 111 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 112 September 18, 1973, effective January 1, 1974; **amended _____, effective _____.**

Comment

This rule was amended in 1996 to require that the summons be served by both first class mail and certified mail, return receipt requested.

Paragraph (B) sets forth what constitutes proof of service of the summons by mail in a court case for purposes of these rules.

Committee Explanatory Reports:

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 113. Procedure in Court Cases Following Issuance of Summons.

The defendant shall appear before the issuing authority for a preliminary hearing **on the date, and** at the time and place specified in the summons. If the defendant fails

to appear, the issuing authority shall **not** issue a warrant for the arrest of the defendant **and shall proceed as provided in Rule 143(D).**

Official Note: Adopted September 18, 1973, effective January 1, 1974; amended August 9, 1994, effective January 1, 1995; **amended _____, effective _____.**

Comment

For the proper time for the preliminary hearing, see Rule 110.

When a defendant appears for a preliminary hearing pursuant to a summons and is held for court, the issuing authority should require that the defendant submit to administrative processing and identification procedures (fingerprinting, for example,) as authorized by law. It is recommended that this requirement be made a condition of bail or release. See Criminal History Record Information Act, 18 Pa.C.S. § 9112.

This rule was amended in 1996 to reflect the new procedures governing cases in which a defendant fails to appear for the preliminary hearing. The issuing authority must proceed as provided in Rule 143(D) to determine whether the case should be forwarded to the court of common pleas for further proceedings, and in no case does the issuing authority issue a warrant for the arrest of the defendant who has failed to appear.

For the **[procedure] procedures in non-summary cases** in the Municipal Court **[of Philadelphia]**, see Chapter 6000.

Committee Explanatory Reports:

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

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

PART IV. PROCEEDINGS BEFORE ISSUING AUTHORITIES

Rule 140. Preliminary Arraignment.

[(a)] (A) ***

[(b)] (B) ***

[(c)] (C) ***

[(d)] (D) ***

[(e)] (E) Unless the preliminary hearing is waived by a defendant who is represented by counsel, the issuing authority shall:

(1) fix a day and hour for a preliminary hearing which shall not be less than 3 nor more than 10 days after the preliminary arraignment, unless

[(i)] (a) extended for cause shown, or

[(ii)] (b) the issuing authority fixes an earlier date upon request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and

(2) give the defendant notice**, orally and in writing,**

(a) of the **date,** time**,** and place of the preliminary hearing **[thus fixed.], and**

(b) that failure to appear for the preliminary hearing will result in the case being forwarded to the court of common pleas for further proceedings, unless, within 10 days after the date scheduled for the preliminary hearing, the defendant provides the issuing authority with good cause explaining his or her failure to appear.

[(f)] (F) ***

[(g)] (G) ***

Official Note: Original Rule 119 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 119 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 140 September 18, 1973, effective January 1, 1974; amended April 26, 1979, effective July 1, 1979; amended January 28, 1983, effective July 1, 1983; rescinded August 9, 1994, effective January 1, 1995. New Rule 140 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; the April 1, 1996 effective date extended to July 1, 1996**; amended _____, effective _____.**

Comment

[Former Rule 140 was rescinded and replaced by new Rule 140 in 1994. Although the rule has been extensively reorganized, only paragraphs (b) and (c) reflect changes in the procedures contained in the former rule.]

A preliminary arraignment as provided in this rule bears no relationship to arraignment in criminal courts of record. See Rule 303.

Paragraph **[(b)] (B)** requires that the defendant receive copies of the arrest warrant and the supporting affidavit(s) at the time of the preliminary arraignment. See also Rules 119(a), 2008(a), and 6003.

Paragraph **[(b)] (B)** 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*, 530 A.2d 414 (Pa. 1987).

When a defendant has not been promptly released from custody after a warrantless arrest, the defendant must be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. See Rule 102(a).

Under paragraph **[(c)] (C)**, if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before a 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.

Pursuant to the 1996 amendment to paragraph (E)(2), at the time of the preliminary arraignment, the defendant must be given notice, both orally and in writing, of the date, time, and place of the preliminary hearing. The notice must also explain

that, if the defendant fails to appear for the preliminary hearing, the preliminary hearing will not be held and the case will be sent to the court of common pleas for further proceedings, unless, within 10 days after the date scheduled for the preliminary hearing, the defendant shows good cause explaining his or her failure to appear.

See Rule 6003(D) for the procedures governing preliminary arraignments in non-summary cases in the Municipal Court.

Committee Explanatory Reports:

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

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

Supplemental Report explaining the , 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 141. Preliminary Hearing.

[(a)] (A) ***

[(b)] (B) ***

[(c)] (C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may, if he **or she** desires:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against him **or her**;

(3) call witnesses on his **or her** own behalf**,** other than witnesses to **[his] the defendant's** good reputation only**[,]:**

(4) offer evidence on his **or her** own behalf and testify; and

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

[(d)] If a prima facie case of the defendant's guilt is not established at the preliminary hearing, and no application for continuance, supported by reasonable grounds, is made by an interested person, and no reason for a continuance otherwise appears, the issuing authority shall discharge the defendant. **]**

Official Note: Formerly Rule 120**[,]** adopted June 30, 1964, effective January 1, 1965; suspended 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 , effective .**

Comment

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.

[The 1975 modification to paragraph] Paragraph [(c)] (C)(3) is intended to make clear that the defendant **[can] may** call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, 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.

[For suspension of Act of Assembly see Rule 159(g).]

Paragraph (d), concerning the procedures when a prima facie case is found, was deleted in 1996 as unnecessary because the same procedures are set forth in Rule 143 (Disposition of Case at Preliminary Hearing).

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 143(D).

Committee Explanatory Reports

Supplemental Report explaining the , 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 142. Continuance of a Preliminary Hearing.

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

(1) the grounds for granting each continuance,

(2) the identity of the party requesting such continuance, and

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

(B) The issuing authority shall give notice of the new date and time for the preliminary hearing to the defendant or defendant's attorney of record and the attorney for the Commonwealth.

(1) The notice shall be in writing.

(2) Notice shall be served on the defendant either in person or by both first class mail and certified mail, return receipt requested.

(3) 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 attorney(s) at the attorney's office.

Official Note: Formerly 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 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; **amended , effective .**

Comment

For the contents of the transcript, see Rule 26.

Proof of service by mail on the defendant of the notice of the continued preliminary hearing shall include:

(1) a return receipt signed by the defendant, or

(2) if the certified mail is returned for whatever reason, the returned notice with the notation that the certified mail was undelivered and evidence that the first class mailing of the notice was not returned to the issuing authority within 15 days after mailing.

Committee Explanatory Reports:

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 143. Disposition of Case at Preliminary Hearing.

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

[(a)] (B) If the Commonwealth establishes a prima facie case of the defendant's guilt, the issuing authority shall hold the defendant for court. Otherwise, the defendant shall be discharged. **[In either event, the decision of the issuing authority shall be publicly pronounced.]**

[(b)] (C) When the defendant 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 4008(a).

(D) In any case in which the defendant fails to appear for the preliminary hearing, the issuing authority shall not issue a warrant for the arrest of the defendant, and shall proceed as follows:

(1) The issuing authority shall determine whether the defendant received notice of the time, date, and place of the preliminary hearing either:

(a) in person at a preliminary arraignment as provided in Rule 140(E)(2);

(b) in a summons served as provided in Rule 112; or

(c) through defendant's attorney of record.

(2) If the issuing authority finds that the defendant received notice, unless the defendant within 10 days after the date scheduled for the preliminary hearing provides good cause explaining the defendant's failure to appear, the issuing authority shall:

(a) indicate on the transcript that the defendant failed to appear and failed to provide good cause;

(b) make a probable cause determination if no probable cause determination has been previously made in the case; and

(c) forward the case to the court of common pleas for further proceedings.

(3) If the issuing authority finds that the defendant did not receive notice, or finds that there was good 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 and time as provided in Rule 142(B).

(4) If no attorney for the Commonwealth was present for the preliminary hearing, the issuing authority shall notify the attorney for the Commonwealth, and any other designated court official, that the defendant failed to appear for the preliminary hearing. The notice shall indicate whether

(a) the case has been forwarded to the court of common pleas for further proceedings pursuant to paragraph (D)(2), or

(b) the preliminary hearing has been continued pursuant to paragraph (D)(3); the notice shall include the date, time, and place for the rescheduled preliminary hearing.

Official 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; **amended _____, effective _____.**

Comment

For the procedures for preliminary hearings in the Municipal Court of Philadelphia, see Rule 6003F.

Paragraph **[(b) was amended in 1983 to reflect] (C) reflects** the fact that a bail determination will already have been made at the preliminary arraignment, except in those cases where, pursuant to a summons, the defendant's first appearance is at the preliminary hearing. See Rules 109 and 110.

When a defendant fails to appear for the preliminary hearing, the issuing authority must ascertain whether the defendant received notice of the date, time, and place of the preliminary hearing. Paragraph (D)(2).

If the issuing authority determines that the defendant received notice, he or she must forward the case to the court of common pleas for further proceedings, unless the defendant within 10 days after the date scheduled for the preliminary hearing provides the issuing authority with good cause why the defendant failed to appear. Paragraph (D)(2).

If the issuing authority determines that the defendant did not receive notice or that there is good cause explaining why the defendant failed to appear, the preliminary hearing must be continued and rescheduled for a date certain. Paragraph (D)(3). For the procedures when a preliminary hearing is continued, see Rule 142.

If the issuing authority determines that the defendant has not provided good cause explaining why the defendant failed to appear, the issuing authority must forward the case to the court of common pleas for further proceedings.

As provided in paragraph (D)(1), service of the notice of the date, time, and place of the preliminary hearing may have been accomplished in one of three ways; in person and in writing at a preliminary arraignment as provided in Rule 140; in a

summons served pursuant to Rule 112; or through defendant's attorney of record.

As provided in paragraph (D)(2)(b), unless a probable cause determination has been made previously in the case, the issuing authority must make a probable cause determination before forwarding the case to the court of common pleas.

Committee Explanatory Reports:

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

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

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 146. Return of Transcript and Original Papers.

(a) When a defendant is held for court, **or, after a case is forwarded to the court of common pleas when a defendant has failed to appear for the preliminary hearing,** the issuing authority shall prepare a transcript of the proceedings. The transcript shall contain all the information required **by these rules** to be recorded on the transcript **[under Rules 26 and 142]**. It shall be signed by the issuing authority, and have affixed to it the issuing authority's seal of office.

(b) The issuing authority shall transmit the transcript to the clerk of the proper court**:**

(1) within **[five] 5** days after holding the defendant for court**; or**

(2) in cases in which the defendant has failed to appear for the preliminary hearing, at the time the case is forwarded to the court of common pleas for further proceedings.

(c) In addition to **[this] the** transcript**,** the issuing authority shall also transmit the following items:

(1) original complaint;

(2) the summons or the warrant of arrest and its return;

(3) all affidavits filed in the proceeding; and

(4) the appearance or bail bond for the defendant, if any, or a copy of the order committing the defendant to custody.

Official Note: Formerly Rule 126**[,]** adopted June 30, 1964, effective January 1, 1965; suspended effective May 1, 1970, revised January 31, 1970; effective May 1, 1970; renumbered and amended September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; amended July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986**; amended _____, effective _____.**

Comment

See Rule 26 for the general contents of the transcript. There are a number of other rules that require certain things to be recorded on the transcript to make a record of the proceedings before the issuing authority. See, e.g., Rules 142 and 143.

See Rule 143(D) for the procedures when a defendant fails to appear for a preliminary hearing. The issuing authority must forward the case to the court of common pleas for further proceedings unless within 10 days after the date scheduled for the preliminary hearing, the defendant shows good cause to explain why he or she failed to appear. The transcript must be transmitted within 5 days after forwarding the case to the court of common pleas.

Committee Explanatory Reports:

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

CHAPTER 200. INFORMATIONS AND INVESTIGATING GRAND JURIES

PART I. INFORMATIONS

Rule 224. Withdrawal of Charges by Attorney for the Commonwealth.

(a) After a case is held for court, **or, after a case is forwarded to the court of common pleas for further proceedings when a defendant has failed to appear for the preliminary hearing,** at any time before the information is filed, the attorney for the Commonwealth may withdraw one or more charges by filing notice with the clerk of courts.

(b) Upon the filing of the information, any charge not listed on the information shall be deemed withdrawn by the attorney for the Commonwealth.

Official Note: Former Rule 224 adopted November 22, 1971, effective immediately; amended February 15, 1974, effective immediately; amended April 26, 1979, effective July 1, 1979; rescinded August 12, 1993, effective September 1, 1993. New Rule 224 adopted August 14, 1995, effective January 1, 1996**; amended _____, effective _____.**

Comment

Court approval is not required for the withdrawal of charges prior to the filing of an information. Cf. 42 Pa.C.S. § 8932 and Rule 313 (Nolle Prosequi).

See Rule 143(D) for the procedures when a defendant fails to appear for the preliminary hearing.

Committee Explanatory Reports:

Report explaining the August 12, 1993 rescission published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the August 14, 1995 amendments published with the Court's Order at 25 Pa.B. 3468 (August 26, 1995).

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 225. Information: Filing, Contents, Function.

(a) After the defendant has been held for court, **or after a case is forwarded to the court of common pleas for further proceedings when the defendant has failed to appear for the preliminary hearing,** the attorney for the Commonwealth shall proceed by preparing an information and filing it with the court of common pleas.

* * * * *

Official Note: Adopted February 15, 1974, effective immediately; Comment revised January 28, 1993, effec-

tive July 1, 1983; amended August 14, 1995, effective January 1, 1996; **amended _____, effective _____.**

Comment

Before an information is filed, the attorney for the Commonwealth may withdraw one or more of the charges by filing a notice of withdrawal with the clerk of courts. See Rule 224(a). Upon the filing of an information, any charge not listed on the information will be deemed withdrawn by the attorney for the Commonwealth. See Rule 224(b). After the information is filed, court approval is required before a nolle prosequi may be entered on a charge listed therein. See Rule 313.

When there is an omission or error of the type referred to in paragraph (c), the information should be amended pursuant to Rule 229.

See Rule 143(D) for the procedures when a defendant fails to appear for a preliminary hearing.

Committee Explanatory Reports:

Final Report explaining the August 14, 1995 amendments published with the Court's Order at 25 Pa.B. 3468 (August 26, 1995).

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 231. Presentation of Information without Preliminary Hearing.

(a) ***

(b) ***

(c) When a defendant fails to appear for a preliminary hearing and the case is forwarded to the court of common pleas as provided in Rule 143(D), the attorney for the Commonwealth may file an information with the court without a preliminary hearing.

Official Note: Adopted February 15, 1974, effective immediately; amended April 26, 1979, effective July 1, 1979; amended August 12, 1993, effective September 1, 1993; **amended _____, effective _____.**

Comment

The prior language of the rule, authorizing the attorney for the Commonwealth, with the permission of the court, to bypass the preliminary hearing to toll the statute of limitations or to extradite a defendant, was deleted in 1993 in light of changes in the law simplifying the process for obtaining custody of the defendant. It is intended that use of the bypass procedure as set forth in paragraph (a) will be limited to exceptional circumstances only.

Under the Juvenile Act, a juvenile is entitled to substantially the same rights at a transfer hearing as a defendant would be at a preliminary hearing. See Juvenile Act, 42 Pa.C.S. § 6355. Therefore, to avoid duplicative proceedings, this rule permits the attorney for the Commonwealth to bypass the preliminary hearing when a juvenile has been transferred for prosecution as an adult.

When a defendant has failed to appear for a preliminary hearing, Rule 143(D) provides that the issuing authority is to forward the case to the court of common pleas for further proceedings. When a case has been forwarded under these circumstances, paragraph (c) permits the attorney for the Commonwealth to file an information without a preliminary hearing.

Committee Explanatory Reports:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

CHAPTER 6000. RULES OF CRIMINAL PROCEDURE FOR THE MUNICIPAL COURT OF PHILADELPHIA

Rule 6000. Scope of Rules.

[(a) The rules in this chapter govern proceedings in Municipal Court cases in the Municipal Court of Philadelphia and appeals from Municipal Court cases.

(b) Except as provided in this chapter, procedure in Municipal Court cases shall be governed by the Rules of Criminal Procedure adopted and promulgated by the Supreme Court of Pennsylvania.]

(A) The rules in this chapter govern all proceedings in the Philadelphia Municipal Court, including summary cases; Municipal Court cases, as defined in Rule 6001(a); the filing of appeals from Municipal Court cases; the filing of petitions for writs of certiorari; and the preliminary proceedings in criminal cases charging felonies.

(B) Any procedure which is governed by a statewide rule of criminal procedure, but which is not specifically covered in Chapter 6000, shall be governed by the relevant statewide rule.

Official Note: Adopted December 30, 1968, effective January 1, 1969; amended March 28, 1973, effective March 28, 1973; amended July 1, 1980, effective August 1, 1980; **amended _____, 1996, effective _____, 1996.**

Comment

[The 1973 amendment deleted the paragraph which made the rules in this chapter inapplicable to cases which were summary cases prior to the adoption of these rules.]

The 1996 amendments make it clear that, except as otherwise provided in the rules, Chapter 6000 governs all proceedings in the Philadelphia Municipal Court, including the procedures for instituting criminal cases charging felonies, preliminary arraignments, and preliminary hearings. See 42 Pa.C.S. § 1123 (Jurisdiction and Venue).

Committee Explanatory Reports:

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 6001. Disposition of Criminal Cases—Municipal Court, Philadelphia.

[Any misdemeanor] (A) A Municipal Court case is any case in which the only offense or offenses charged are misdemeanors under the Crimes Code**,** or other statutory criminal **[offense] offenses** for which no prison term may be imposed or which is punishable by a term of imprisonment of not more than 5 years,

including any **[indictable]** offense **under the Vehicle Code** other than a summary offense **[under the motor vehicle laws, shall be a Municipal Court case].**

(B) When one or more such offenses are charged in a single complaint or series of complaints against one defendant, all shall be joined in the same Municipal Court case, regardless of the length of the cumulative sentence which could be imposed on all charges.

(C) A **Municipal Court** case may be transferred from the Municipal Court to the Court of Common Pleas by order of the President Judge of the Court of Common Pleas, or **[his] the President Judge's** designee, upon **[his] the President Judge's** approval of:

(1) a certification by defense counsel that trial in the Municipal Court will unduly delay defendant's access to a trial by jury; or

(2) a certification by both defense counsel and the District Attorney that the trial of the case will be so time consuming as to unduly disrupt the business of the Municipal Court.

Official Note: [Adopted] Present Rule 6001 adopted March 28, 1973, effective March 28, 1973, replacing prior Rule **6001**; amended June 28, 1974, effective July 1, 1974; **[last sentence] paragraph (C)** added February 10, 1975, effective immediately; title amended July 1, 1980, effective August 1, 1980; Comment revised January 28, 1983, effective July 1, 1983**; amended _____, 1996, effective _____, 1996.**

Comment

This Rule**, which defines Municipal Court case,** is intended to assure that the Municipal Court will take dispositive action, including trial and verdict when appropriate, in any criminal case which does not involve a felony, excluding summary cases under the **[motor vehicle laws] Vehicle Code**. The latter are under the jurisdiction of the Philadelphia Traffic Court, Judicial Code §§ 1301—1303, 1321; 42 Pa.C.S. §§ 1301—1303, 1321 **[(1981)].**

Committee Explanatory Reports:

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Rule 6003. Procedure in Non-Summary **Cases in** Municipal Court **[Cases].**

A. INITIATION OF CRIMINAL PROCEEDINGS

(1) Criminal proceedings in **court** cases **[which charge any misdemeanor under the Crimes Code or other statutory criminal offenses, other than a summary offense, for which no prison term may be imposed or which is punishable by a term of imprisonment of not more than 5 years]** 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 court of common pleas for review of the decision.

B. CERTIFICATION OF COMPLAINT

Before a Municipal Court judge may issue process or order further proceedings **[in a Municipal Court case]**, the judge shall ascertain and certify on the complaint that:

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

(2) when prior approval from the office of the District Attorney is required, that a district attorney has approved the complaint.

The Municipal Court judge shall then accept the complaint for filing, and the case shall proceed as provided in these rules.

C. SUMMONS AND ARREST WARRANT PROCEDURES

When a Municipal Court judge finds grounds to issue process based on a complaint, the judge 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 subsection 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 Municipal Court judge 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; or

(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 subsection C(1) or (2), the judge 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 a Municipal Court judge without unnecessary delay. If the defendant was arrested without a warrant pursuant to subsection A(1)(a) or (b), unless the Municipal Court judge makes a determination of probable cause, the defendant shall not be detained.

(2) At the preliminary arraignment, the Municipal Court judge:

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

(b) shall give the defendant a copy of the certified complaint;

(c) if the defendant was arrested with a warrant, the issuing authority shall provide 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 shall be given copies no later than the first business day after the preliminary arraignment; and

(d) shall also inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 316;

(ii) **in a Municipal Court case,** of the day, date, hour, and place for trial, which shall not be less than 20 days after the preliminary arraignment unless the **[issuing authority] Municipal Court judge** fixes an earlier date upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth; **[and]**

(iii) in a case charging a felony, of the date, time, and place of the preliminary hearing, which shall not be less than 3 nor more than 10 days after the preliminary arraignment unless extended for cause or the Municipal Court judge 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

[(iii)] (iv) of the type of release on bail, as provided in Chapter 4000 of these rules, and the conditions of the bail bond.

(3) 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) In cases charging a felony, the preliminary hearing in Municipal Court shall be conducted as provided in Rule 141 (Preliminary Hearing).

(2) In any case in which the defendant fails to appear for the preliminary hearing, the Municipal Court judge may issue a warrant for the arrest of the defendant.

[E.] F. ACCEPTANCE OF BAIL PRIOR TO TRIAL

The Clerk of Quarter Sessions shall accept bail at any time **[prior to the Municipal Court trial]**.

Official 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 _____, 1996, effective _____, 1996.**

Comment

[Former rule 6003 was rescinded and replaced by new Rule 6003 in 1994. Although Rule 6003 has been extensively reorganized, only subsections D(1) and D(2)(c) reflect changes in the procedures contained in the former rule.]

The , 1996 amendments make it clear that Rule 6003 covers the preliminary procedures for all non-summary Municipal Court cases, see Rule 6001(A), and cases charging felonies, including the institution of proceedings, the preliminary arraignment, and the preliminary hearing.

See Chapter 100 (Procedure in Court Cases), Parts I (Instituting Proceedings), II (Complaint Procedures), III (Summons and Arrest Warrant Procedures in Court Cases), and IV (Proceedings 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 , 1996 amendments to paragraph A(1) align the procedures for instituting cases in Municipal Court with the Statewide procedures in Rule 101 (Means of Instituting Proceedings in Court Cases).

The **March 22,** 1996 amendments to paragraph A(2) align the procedures for private complaints in non-summary **cases in** Municipal Court **[cases]** with the Statewide procedures for private complaints in Rule 106 (Approval of Private Complaints). In all cases where 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 bail commissioner's authority under 42 Pa.C.S. § 1123(A)(5).

* * * * *

Under subsection D(3), 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.

When a defendant fails to appear for the preliminary hearing, nothing in these rules is intended to preclude a Municipal Court judge from proceeding as provided by present practice or as provided in Rule 143(D).

Committee Explanatory Reports:

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

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

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

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

PART II. LOCAL AND MINOR RULES

CHAPTER 9000. GENERAL PROVISIONS

Rule 9024. Notice of Court Proceeding(s) Requiring Defendant's Presence.

[Notice] Except as otherwise provided in Chapter 100 concerning notice of the preliminary hearing, notice of a court proceeding requiring a defendant's presence shall be either:

(a) in writing and served by

(1) personal delivery to the defendant or defendant's attorney; or

(2) leaving a copy for or mailing a copy to the defendant's attorney at the attorney's office; or

(3) sending a copy to the defendant by certified, registered, or first class mail addressed to the defendant's place of residence, business, or confinement; or

(b) given to the defendant orally in open court on the record.

Official Note: Former Rule 9024 adopted October 21, 1983, effective January 1, 1984; amended March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; renumbered Rule 9025 June 2, 1994, effective September 1, 1994. New Rule 9024 adopted June 2, 1994, effective September 1, 1994**; amended _____, effective _____.**

Comment

Some judicial districts use a document called a "subpoena" to give a defendant notice of required court appearances. Nothing in this rule is intended to change this practice.

See Rules 112, 140, 142, and 143 for the procedures for service of notice of a preliminary hearing, which are different from the procedures in this rule.

See Rule 9023 for the procedures for serving all written motions and any document for which filing is required.

See Rule 80 for the procedures for service in summary cases.

Committee Explanatory Reports:

Report explaining the provisions of new Rule 9024 published at 23 Pa.B. 5008 (October 23, 1993).

Supplemental Report explaining the _____, 1996 amendments published at 26 Pa.B. 2316 (May 18, 1996).

Supplemental Report

Proposed Amendments to Pa.Rs.Crim.P. 110, 112, 113, 140, 141, 142, 143, 146, 224, 225, 231, 9024, 6000, 6001, and 6003

Procedure When Defendant Fails to Appear for Preliminary Hearing

Background

The Committee's original proposal, which was published for comment at 25 Pa.B. 828 (March 11, 1995), was intended to make it clear that (1) under the present rules, district justices may issue warrants for the arrest of a defendant who has failed to appear for the preliminary hearing, and (2) the warrant procedure is not intended to replace the various local procedures for handling cases in which a defendant fails to appear for the preliminary hearing.

In response to our request for comments about the original proposal, the Committee received correspondence from several individuals, including Nancy M. Sobolevitch, Court Administrator of Pennsylvania; Timothy M. McVay, Esq., an attorney with the Administrative Office of Pennsylvania Courts (AOPC) Judicial Computer Project (JCP); and James G. Morgan Jr., solicitor for the Special Courts Judges Association of Pennsylvania. The correspondents urged the Committee to consider modifying the proposal to mandate a uniform procedure for handling cases in which the defendant has failed to appear for the preliminary hearing. They pointed out that currently, without a Statewide uniform procedure, the practices not only vary from judicial district to judicial district, but also from magisterial district to magisterial district, and occasionally from case to case. They noted that this diversity of practice (1) is confusing to the bench, bar, and defendants; (2) makes it difficult to monitor the cases at both the local and Statewide levels; (3) creates administrative problems at the Statewide level, particularly for purposes of the case statistics; and (4) has resulted in some cases being "lost" either at the magisterial district level or in the court of common pleas.

After considering the points raised in the publication correspondence, the Committee reconsidered its original proposal, and was persuaded that the rules should provide one procedure for handling cases in which the defendant fails to appear for the preliminary hearing.

DISCUSSION OF RULE CHANGES

A. *Introduction*

The Committee debated at length the pros and cons of the various procedures that are being used around the State, including procedures in which:

(1) the case is forwarded to the court of common pleas for further proceedings;

(2) the preliminary hearing is deemed waived, and the case then proceeds as though the hearing had been held;

(3) the preliminary hearing is held in the defendant's absence;

(4) the district justice issues a warrant, and the case remains open at the magisterial district level until the defendant is arrested; or

(5) the district justice combines one or more of the above.

Ultimately, the Committee majority agreed that the procedure most likely to address the points raised by the correspondents and to protect the rights of the defendant would be one in which the case is forwarded to the court of common pleas for further proceedings. We also agreed that the rules would have to make it clear that before a case may be forwarded, the issuing authority must consider whether the defendant received notice of the preliminary hearing and whether there was a good reason which would explain the defendant's failure to appear.

In view of these considerations, we settled on the following scheme, which we believe is a fair and reasonable set of procedures for handling cases in which a defendant fails to appear for the preliminary hearing.

(a) When a defendant fails to appear for the preliminary hearing, the issuing authority is required to make a determination that the defendant had notice of the preliminary hearing.

(b) If the issuing authority determines that the defendant had notice, the issuing authority must wait 10 days before taking any action in order to give the defendant an opportunity to explain why he or she failed to appear.

(c) If the issuing authority determines that the defendant did not have notice, or that the defendant provided good cause to explain his or her failure to appear, the issuing authority must continue the hearing to a date certain and send notice of the new date and time of the hearing.

(d) If the issuing authority determines that the defendant had notice, absent a showing of good cause by the defendant within the ten-day period, the district justice must forward the case to the court of common pleas for further proceedings.

B. *Rule 143 (Disposition of Case at Preliminary Hearing)*

Although a number of rules must be amended to accommodate the new procedure outlined above, the Committee agreed to incorporate the requirement that the issuing authority must forward the case to the court of common pleas for further proceedings into Rule 143 (Disposition of Case at Preliminary Hearing).[1]

The new procedure is contained in paragraph (D), which begins by prohibiting the issuing authority from issuing a warrant for the arrest of the defendant.[2] The Committee is recommending this prohibition because, having agreed that when a defendant fails to appear for the preliminary hearing, the case will move forward to the court of common pleas, we did not want to build into the process a warrant procedure which would invariably delay these cases at the magisterial district level. In addition, the prohibition will eliminate the problem of monitoring these warrants, which, under present practice, frequently remain outstanding even after the case is forwarded to the court of common pleas. Rule 113, which currently authorizes an issuing authority to issue a warrant for a defendant who fails to appear for the preliminary hearing when the case is instituted by summons, would also be amended to delete the warrant procedure.

Rule 143(D)(1) requires that the issuing authority determine whether the defendant received notice of the preliminary hearing. See Section C below for the discussion of the related rule changes concerning the new notice provisions. Subparagraphs (1)(a) through (1)(c) set forth the methods of providing notice to the defendant, including "through defendant's attorney of record." The Committee agreed that this method of providing notice should be recognized in the rules since it occurs on a regular basis, particularly when the attorney is privately retained.

If the issuing authority determines that the defendant received notice, paragraph (D)(2) requires that the issuing authority wait ten days after the date scheduled for the preliminary hearing before taking any further action. This ten-day waiting period affords the defendant an opportunity to explain why he or she failed to appear. We recognize that occasionally there are legitimate reasons why a defendant fails to appear, such as being involved in an accident on the way to court or a sudden illness, and we did not want to unfairly penalize these defendants. However, the burden is on the defendant or the defendant's attorney, to contact the district justice and provide the "good cause," and this must be done within the ten-day time limit. Absent the defendant providing good cause, the issuing authority is directed to forward the case to the court of common pleas for further proceedings.

Paragraph D(2)(a)—(c) set forth the procedures the issuing authority must follow after determining that the defendant received notice and did not provide good cause for his or her failure to appear. Subparagraph (2)(a) requires that the issuing authority indicate on the transcript that the defendant failed to appear and that the defendant failed to provide good cause explaining the failure to appear. This will provide a record of the issuing authority's findings concerning the defendant's failure to appear when the case is forwarded.

Subparagraph (2)(b) requires the issuing authority to make a probable cause determination if one has not been previously made. This requirement has been added to address the Committee's concerns about being forwarded to the court of common pleas without a probable cause determination having been made by a judicial officer, which frequently occurs in those cases in which a defendant is to appear for a preliminary hearing pursuant to a summons.

Subparagraph (2)(c) sets forth the requirement that the issuing authority forward the case to the court of common pleas for further proceedings. The Committee considered whether the rules should elaborate on "further proceedings." We concluded that the rules should not directly define "further proceedings," nor should they address specific issues, such as whether a common pleas court judge could remand the case for a preliminary hearing or conduct the preliminary hearing. However, we agreed that Rule 146 (Return of Transcript and Original Papers), Rule 224 (Withdrawal of Charges by Attorney for the Commonwealth), and Rule 225 (Information: Filing, Contents, Function) should be amended to make it clear that a case which has been forwarded pursuant to Rule 143(D) is to proceed under these rules in the same manner as a case that is held for court following a preliminary hearing. See Section D below for the discussion of these amendments.

Paragraph (D)(3) sets forth the procedures that the issuing authority must follow if he or she finds that the defendant did *not* receive notice or finds that there was good cause explaining the defendant's failure to appear. The issuing authority must continue the preliminary hearing to a specific date and time, and give notice as provided in Rule 142 (Continuance of A Preliminary Hearing). *See* Section C.2 below for a discussion of the amendments to Rule 142.

Paragraph (D)(4) addresses the Committee's concern that, in those cases in which no attorney for the Commonwealth is present at the preliminary hearing, the attorney for the Commonwealth would not be aware that a case was forwarded to the court of common pleas or was continued. Paragraph (D)(4) remedies this problem by requiring that the issuing authority notify the attorney for the Commonwealth that the defendant failed to appear and indicate on the notice whether the case was forwarded or continued. This paragraph also provides for

[1] In addition, Rule 141 will be amended to make it clear that Rule 141 only applies to the procedures governing the preliminary hearing itself.

[2] This prohibition does not apply to cases in the Philadelphia Municipal Court. See Section E below.

notice to "any other designated court official" to accommodate local administrative practices concerning the processing of court cases forwarded by the district justice.

C. *Rule Changes Related to Notice Issues*

1. Notice of the Preliminary Hearing: Rules 110, 112, 140, and 9024

In developing the new procedures for handling failures to appear, the Committee was particularly concerned about how to ensure that the defendant receives notice of the preliminary hearing, or notice of the new date and time when a preliminary hearing is continued, and spent a great deal of time working on this issue.

Notice of the date and time of a preliminary hearing, as provided in the present rules, is given to a defendant in one of two ways.[3] When a defendant appears for a preliminary arraignment, notice of the date and time for the preliminary hearing is given to the defendant in person. *See* Rule 140(E)(2). When the case is begun by summons, the summons sets forth the date and time for the preliminary hearing, see Rule 110, and is served by certified mail, return receipt requested, see Rule 112.

(a) Notice In Summons: Rule 112 (Service of Summons: Proof of Service)

The rules do not address how a district justice is to determine whether the defendant actually received a summons that was mailed, and the Committee agreed that the rules should provide guidance in this area. In deciding how to best accomplish this, we looked to the Rules of Civil Procedure to see how this matter was handled in civil cases. Pa.R.Civ.P. 405 (Return of Service) provides, *inter alia*, that proof of service by mail

shall include a return receipt signed by the defendant or, if the defendant has refused to accept mail service and the plaintiff thereafter has served the defendant by ordinary mail,

(1) the returned letter with the notation that the defendant refused to accept delivery, and

(2) an affidavit that the letter was mailed by ordinary mail and was not returned within fifteen days after mailing.

The Committee agreed that a provision comparable to this, but modified for criminal practice, would allay the members' concerns about service by mail, and propose the following amendments to Rule 112 (Service of Summons):

1. The title would be amended to include "proof of service."

2. The present text of the rule would become paragraph (A), and would be amended to require service of the summons by both first class mail and certified mail, return receipt requested.

3. New paragraph (B), modeled on the procedures in Civil Rule 405(c), sets forth what constitutes proof of service of a summons by mail.

(b) Oral and Written Notice at Preliminary Arraignment: Rule 140 (Preliminary Arraignment)

The Committee is proposing amendments to Rule 140 which require that the notice of the preliminary hearing is to be given to the defendant at the preliminary arraignment *both* orally and in writing. We agreed that adding the requirement that the notice of the preliminary hearing be in writing would increase the likelihood that a defendant would remember the information he or she received at the preliminary arraignment.

(c) Rule 9024 (Notice of Court Proceeding(s) Requiring Defendant's Presence)

Recognizing that the requirements for notice in Rule 9024 are different from the proposed requirements in Rules 110, 112, and 140 for notice of the preliminary hearing, the Committee agreed that Rule 9024 should be amended to make it clear that Rule 9024 does not apply to notice of preliminary hearings.

2. Notice of Consequences of Failing to Appear for Preliminary Hearing: Rules 110 and 140

The Committee agreed that, with the implementation of the new procedure under Rule 143(D), it is essential that a defendant receives notice of the consequences of his or her failure to appear for the preliminary hearing. We also agreed that notice of the consequences should be given to the defendant when the defendant receives notice of the preliminary hearing. To accomplish this, we are proposing that Rule 140(E)(2) be amended to require that the issuing authority give notice to the defendant that:

failure to appear for the preliminary hearing will result in the case being forwarded to the court of common pleas for further proceedings, unless, within 10 days after the date scheduled for the preliminary hearing, the defendant provides the issuing authority with good cause explaining his or her failure to appear. Paragraph (E)(2)(b).

Rule 110 would require that the summons include the same language. *See* Rule 110(B)(3).

4. Notice of Continuance: Rule 142 (Continuance of A Preliminary Hearing)

Another notice issue arises when a preliminary hearing is continued. Our review of Rule 142 revealed that the rule does not provide for notice of the new date and time set for the preliminary hearing, a procedural gap the Committee agreed should be filled. Therefore, we are proposing that Rule 142 be amended to require that the issuing authority give written notice of the new date and time to the defendant, or to defendant's attorney of record, and to the attorney for the Commonwealth. *See* Rule 142(B)(1). In addition, the rule requires that service of the notice on the defendant either be given in person or by both first class mail and certified mail, return receipt requested. *See* Paragraph (B)(2). Finally, paragraph (B)(3), modeled on the Rule 9024 provisions for service on counsel, provides for service on the defendant's attorney and on the attorney for the Commonwealth either by personal delivery or by leaving a copy for or mailing a copy to the attorney at the attorney's office.

The Comment, based on the provisions in Rule 112(B), explains that, when the notice of the continuance is mailed to the defendant, proof of service by mail includes (1) a return receipt signed by the defendant, or, (2) if the certified mail is returned for whatever reason, the returned notice with the notation that the certified mail was undelivered and evidence that the first class mailing of the summons was not returned to the issuing authority within 15 days after mailing.

D. *Related Amendments*

1. Rules 146, 224, and 225

The procedures in Rule 146 (Return of Transcript and Original Papers), Rule 224 (Withdrawal of Charges by Attorney for the Commonwealth), and Rule 225 (Information: Filing, Contents, Function) are triggered when a defendant is held for court after a preliminary

[3] Although not specifically provided for in either Rule 112 or 140, notice of a preliminary hearing may also be given to a defendant through the defendant's attorney of record. *See* Rule 143(D)(1)(c).

hearing. With the addition of the requirement that the issuing authority forward a case to the court of common pleas *for further proceedings* when a defendant fails to appear for the preliminary hearing, the Committee agreed that these rules should be amended to include this new provision. Therefore, the phrase "after a case is forwarded to the court of common pleas when a defendant has failed to appear for the preliminary hearing" has been added to Rules 146(a), 224(a), and 225(a) after the "held for court" language.

In addition to the above changes, Rule 146(b) is being amended to require that, in cases in which the defendant has failed to appear for the preliminary hearing, the issuing authority must transmit the transcript at the same time he or she forwards the case to the court of common pleas for further proceedings.

Finally, Rule 146(a) and the Comment have been amended to reflect that there are rules, other than Rules 26 and 142, which require that certain information be included in the transcript to make a record of the proceedings before the district justice.

2. Rule 231 (Presentation of Information without Preliminary Hearing)

Rule 231 sets forth the procedures for filing an information without a preliminary hearing. Paragraph (a) limits this procedure to cases in which the preliminary hearing can not be held for good cause. Aware that a defendant's failure to appear for a preliminary hearing, without more, has been construed in caselaw as not being sufficient "good cause" for filing an information without a preliminary hearing, see *Commonwealth v. Costello*, 448 A.2d 38 (Pa. Super. 1982), the Committee was concerned that, without some clarification, some judges or district attorneys would interpret this caselaw as preventing a case from moving once it was forwarded to the court of common pleas pursuant to Rule 143(D). We agreed that Rule 231 should be amended to specifically provide that in cases forwarded to the court of common pleas pursuant to Rule 143(D), the attorney for the Commonwealth is permitted to file an information without the preliminary hearing. *See* Rule 231(c).

E. *Cases in the Philadelphia Municipal Court*

As the Committee worked on the proposed new procedures for handling cases in which the defendant fails to appear for the preliminary hearing, several members voiced concerns about the impact these changes would have on the Philadelphia Municipal Court. These members pointed out that there are different considerations when the case is in the Philadelphia Municipal Court. Specifically, only cases involving felonies have preliminary hearings in Philadelphia; the Municipal Court is the only court forwarding felony cases to the court of common pleas; and the Municipal Court's administrative and monitoring systems are different and separate from the Statewide district justice computer system. In view of these differences, the Committee was persuaded that, in Philadelphia cases in which a defendant fails to appear for a preliminary hearing, the Philadelphia Municipal Court could continue to proceed under its local practice, including the issuing of bench warrants. We also wanted to give that court the option to proceed under the new procedures in Rule 143(D).

The Committee concluded that the best way to accomplish these changes was to amend Rule 6003 (Procedure in Non-Summary Cases in Municipal Court) to specifically cover both preliminary hearings and cases in which the defendant fails to appear for the preliminary hearing. The new provision would permit Municipal Court judges to continue to issue arrest warrants for a defendant who fails to appear for the preliminary hearing. However, because the scope of Chapter 6000 is limited in present Rule 6000 (Scope of Rules) to Municipal Court cases,[4] we were concerned that merely adding the preliminary hearing/failure to appear procedures to Rule 6003 was technically inaccurate. To correct this problem, the Committee is proposing amendments to Rules 6000, 6001, and 6003 which broaden the scope of Chapter 6000 to encompass not only Municipal Court cases, but also the preliminary procedures in cases charging felonies, including preliminary arraignments and preliminary hearings. These amendments also make it clear that, for cases in the Philadelphia Municipal Court, any procedure which is governed by a Statewide Rule of Criminal Procedure but not specifically covered in Chapter 6000 is governed by the relevant Statewide rule. *See* Rule 6000(b).

The amendments to Rule 6003 provide that the preliminary hearing must be conducted as provided in Rule 141 (Preliminary Hearing), and make it clear that Municipal Court judges may issue warrants for the arrest of a defendant who fails to appear for the preliminary hearing. The Comment explains that, in cases in which the defendant fails to appear for the preliminary hearing, the Municipal Court judge may either continue to follow present Municipal Court practice or follow the new Rule 143(D) procedures. See Rule 6003.E.

[Pa.B. Doc. No. 96-802. Filed for public inspection May 17, 1996, 9:00 a.m.]

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Appointment of New Supervising Judge of the Domestic Relations Branch, Family Court Division; Administrative Order 96-4

And Now, this 30th day of April, 1996, I hereby appoint Honorable Allan L. Tereshko as Supervising Judge of the Domestic Relations Branch, Family Court Division.

By the Court

PAUL P. PANEPINTO,
Administrative Judge
Family Court Division

[Pa.B. Doc. No. 96-803. Filed for public inspection May 17, 1996, 9:00 a.m.]

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[4] Rule 6001 (Disposition of Criminal Cases—Philadelphia Municipal Court) defines a Municipal Court case as "any misdemeanor under the Crimes Code or other statutory criminal offense for which no prison term may be imposed or which is punishable by a term of imprisonment of not more than five (5) years, including any indictable offense other than a summary offense, under the Motor Vehicle laws, shall be a Municipal Court case."

Title 255—LOCAL COURT RULES

CHESTER COUNTY

Amendments to Rules of Criminal Procedure; No. 310M96

Order

And Now, this 17th day of April 1996, the following amendment to the Chester County Rules of Criminal Procedure is hereby adopted effective thirty (30) days after publication in the *Pennsylvania Bulletin*, in accordance with Pa.R.Crim.P. 6(d).

THOMAS G. GAVIN,
President Judge

Approval by the District Attorney of Complaints and Arrest Warrants

[101A.1.] 107 The District Attorney of Chester County having filed a Certification pursuant to Pa.R.Crim.P. **[101A,] 107** criminal complaints and arrest warrant affidavits by police officers, as defined in the Rules of Criminal Procedure, charging the following offenses shall not hereafter be accepted by any judicial officer unless the complaint and affidavit have the approval of an attorney for the Commonwealth prior to filing:

Criminal Homicide in violation of 18 Pa.C.S.A. § 2501

Murder in any Degree in violation of 18 Pa.C.S.A. § 2502

Voluntary Manslaughter in violation of 18 Pa.C.S.A. § 2503

Involuntary Manslaughter in violation of 18 Pa.C.S.A. § 2504

Rape in violation of 18 Pa.C.S.A. § 3121

Statutory Sexual Assault in violation of 18 Pa.C.S.A. § 3122.1

Involuntary Deviate Sexual Intercourse in violation of 18 Pa.C.S.A. § 3123

Sexual Assault in violation of 18 Pa.C.S.A. § 3124.1

Aggravated Indecent Assault in violation of 18 Pa.C.S.A. § 3125

Spousal Sexual Assault in violation of 18 Pa.C.S.A. § 3128(a) or (b)

Arson in violation of 18 Pa.C.S.A. § 3301

Robbery in violation of 18 Pa.C.S.A. § 3701(a)(1)(i) or (ii) or (iii)

Homicide by Vehicle in violation of 75 Pa.C.S.A. § 3732

Homicide by Vehicle while Driving Under Influence in violation of 75 Pa.C.S.A. § 3735

Any criminal complaint filed against a person who is under 18 years of age under circumstances where the law authorizes such person to be charged as if he or she were an adult.

[Pa.B. Doc. No. 96-804. Filed for public inspection May 17, 1996, 9:00 a.m.]