

THE COURTS

Title 210—APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

[210 PA. CODE CHS. 17 AND 33]

Proposed Amendments to Pa.R.A.P. 1762 and
3331; Recommendation No. of 2003

Internal Committee Recommendation 52

The Explanatory Comment which appears in connection with the proposed amendments has been inserted by the Committee for the convenience of the bench and bar. It will not constitute part of the rules nor will it be officially adopted or promulgated by the Court.

By the Appellate Court Procedural Rules Committee

HONORABLE JOSEPH A. HUDOCK,
Chair

Annex A

TITLE 210. APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

ARTICLE II. APPELLATE PROCEDURE

CHAPTER 17. EFFECT OF APPEALS; SUPERSEDEAS AND STAYS

STAY IN CRIMINAL MATTERS

Rule 1762. Release in Criminal Matters.

[(a) *Release prior to sentence.*—

(1) Application for release prior to sentence shall be governed by the applicable provisions of the Pennsylvania Rules of Criminal Procedure.

(2) An order granting or denying release or modifying the conditions of release prior to sentence shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations). Service of a petition for review under Rule 1514(c) (service) shall be upon the district attorney in lieu of the Attorney General of Pennsylvania. Any answer to the petition shall conform to Rule 123(b) (answer) in lieu of Rule 1516 (other pleadings allowed). Rule 1517 (applicable rules of pleading) and Rule 1531 (intervention) through Rule 1551 (scope of review) shall not be applicable to a petition for review filed under this paragraph.

(b) *Release pending appeal.*—Application for release pending appeal in criminal matters shall be governed by the applicable provisions of the Pennsylvania Rules of Criminal Procedure and must ordinarily be made in the first instance to the lower court.

(c) *Contents and service of application for release.*—An application in an appellate court for release, or for modification of the conditions of release, shall set forth specifically and clearly the rulings complained of and the amount of bail which the defendant was under in the lower court, and shall be accompanied by a copy of the information or indictment. A copy of the application shall be served on the judge of the court below. All other

parties below shall be served as prescribed by Rule 121(b) (service of all papers required).

(d) *Entry of bail.*—Bail shall be entered in the lower court pursuant to the Pennsylvania Rules of Criminal Procedure.

(e) *Extradition matters.*—Release in extradition matters shall be governed by the procedures prescribed by this rule, except that it shall not be necessary for a copy of an information or indictment to accompany an application under this subdivision.

(f) *Opinion by lower court.*—Upon receipt of a copy of an application to an appellate court under this rule the judge who entered the order in the court below, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or shall specify in writing the place in the record where such reasons may be found.]

(a) Applications relating to bail when an appeal is pending shall ordinarily first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure. If the lower court denies relief, a party may seek relief in the appellate court by filing an application pursuant to Rule 123, ancillary to the pending appeal.

(b) Applications relating to bail when no appeal is pending

(1) Applications relating to bail when no appeal is pending shall first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure.

(2) An order relating to bail shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations). Any answer shall be in accordance with Rule 1516 (other pleadings allowed), and no other pending is authorized. Rule 1517 (applicable rules of pleading) and Rule 1531 (intervention) through 1551 (scope of review) shall not be applicable to a petition for review filed under this paragraph.

(c) *Content.* An Application for relief under Subdivision (a) or a petition for review under Subdivision (b) shall set forth specifically and clearly the matters complained of and a description of any determinations made by the lower court. Any order and opinions relating to the bail determination shall be attached as appendices.

(d) *Service.* A copy of the application for relief or the petition for review and any answer thereto shall be served on the judge of the lower court. All parties in the lower court shall be served in accordance with Rule 121(b) (service of all papers required). The Attorney General of Pennsylvania need not be served in accordance with Rule 1541(c) (service), unless the Attorney General is a party in the lower court.

(e) *Entry of Bail.* Bail shall be entered in the lower court pursuant to the Pennsylvania Rules of Criminal Procedure.

(f) *Extradition matters.* Relief relating to bail in extradition matters shall be governed by the procedures prescribed by this rule.

(g) *Opinion of lower court.* Upon receipt of a copy of an application for relief under Subdivision (a) or a petition for review under Subdivision (b), that does not include an explanation for the bail determination, the judge who made the bail determination below shall forthwith file of record a brief statement of the reasons for the determination or where in the record such reasons may be found.

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[Explanatory Note—1979

At the request of the Criminal Procedural Rules Committee, a copy of the application in the appellate court for release in criminal matters is required to be served upon the lower court judge, and a requirement (similar to Rule 1925) is added that the lower court judge indicates on the record the reasons for the order.]

Explanatory Note—2003

The 2003 amendments establish a simply dichotomy in procedures for seeking appellant review of lower court orders relating to bail: If an appeal is pending, an application for relief ancillary to the appeal is the proper method for invoking appellate court consideration. If no appeal is pending, the party seeking relief must file a petition for review.

ARTICLE III. MISCELLANEOUS PROVISIONS
CHAPTER 33. BUSINESS OF THE SUPREME COURT
REVIEW OF SPECIAL PROSECUTIONS OR INVESTIGATIONS

Rule 3331. Review of Special Prosecutions or Investigations.

(a) *General rule.* [Any] Within the time specified in Rule 1512(b)(3) (special provisions), any of the following orders shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations):

* * * * *

The petition shall [also] conform to Rule 123(a) (contents of application for relief) and any answer to the petition shall conform to [Rule 123(b) (answer) in lieu of] Rule 1516(a) ([other pleadings allowed] general rule). A party entitled to file an answer under this rule who does not intend to do so shall, within the time fixed by these rules for the filing of an answer, file a letter stating that an answer to the petition for review will not be filed. [Rule 1516,] Rule 1517 (applicable rules of pleading) [and Rule 1519 (form of petition for review with notice to plead)] through Rule 1551 (scope of review) shall not be applicable to a petition for review filed under this rule. Seven copies of any papers filed under this rule shall be filed with the original. Rule 3309 (applications for extraordinary relief) shall not be applicable to an order reviewable under this rule.

(b) *Briefs and record.* [The petitioner shall serve and file his brief not later than 14 days after the entry of the order sought to be reviewed. Any other party shall serve and file his brief within seven

days after service of the brief of the petitioner.] The petitioner may file and serve a brief in support of the petition for review with the petition for review. Any other party may file and serve an answer and supporting brief within 14 days of service of the petition. Each party shall append to the petition or answer as much of the record below as the party desires to bring to the attention of the court. The Supreme Court on its own initiative may direct that the lower court comply with Rule 1925 (opinion in support of order) or that the record be otherwise corrected or supplemented.

(c) *Distribution and disposition.* Upon receipt of the last paper [which] that a party is entitled to file under this rule, the papers filed under this rule shall be distributed by the Prothonotary to the Supreme Court for its consideration. The Supreme Court may thereafter dispose of the petition or set it down for argument.

(d) *Interlocutory matters.* The interlocutory or final nature of an order shall not be affected by this rule and, unless independent grounds appear for the review of an interlocutory order, the interlocutory nature of the order will be a sufficient reason for denying the petition. The denial of a petition shall be deemed a disposition on the merits unless otherwise ordered or unless the petition expressly seeks permission to appeal from an interlocutory order and asserts no other basis of jurisdiction on appeal.

(e) *Remand of record.* Unless otherwise ordered:

(1) A certified copy of the judgment of the Supreme Court and the opinion of the court, if one has been filed, shall be transmitted to the lower court forthwith upon entry, notwithstanding the pendency of any application for reargument or other proceeding affecting the judgment[, which]. This transmission shall be in lieu of the remand of the record.

* * * * *

Official Note: This rule is intended to provide a simple and expeditious method for Supreme Court supervision of special prosecutions and investigations, e.g. orders of the supervising judge of an investigating grand jury, findings of contempt (whether civil or criminal) by witnesses called before such a grand jury, etc. Rule 702[(b)] (c) (supervision of special prosecutions or investigations) and 42 Pa.C.S. § 722(5) (direct appeals from courts of common pleas) vest jurisdiction over such matters in the Supreme Court. However, this rule is not applicable to review of investigating grand jury issues [which] that collaterally arise in a plenary criminal prosecution initiated by complaint, information or indictment. Rule 1512(b)(3) (special provisions) requires that review be sought within ten days. Essentially the procedure is analogous to the review of a bail order under Rule 1762 (release in criminal matters). [The last brief is due not later than 21 days after the entry of the order sought to be reviewed.] There is no delay for certification of the record, oral argument is ordinarily not available, and the matter is ready for final disposition by the Supreme Court immediately upon completion of the briefing schedule. The term "investigating grand jury" in Subdivision (a) includes a "multicounty investigating grand jury" convened under 42 Pa.C.S. § 4544 (convening multicounty investigating grand jury).

* * * * *

Under Rule 1702(a) (stay ancillary to appeal), the Supreme Court or a justice thereof will not entertain an

application for relief under Rule 1781 (stay pending action on petition for review) in connection with a special prosecution or investigation order until a petition for review has been filed under this rule.

**EXPLANATORY COMMENT
RECOMMENDATION 52**

Proposed Amendments to Rules 1762 and 3331

Introduction

As part of the effort to clarify the use of petitions for review in certain criminal proceedings, the Committee submits for consideration proposed amendments to Rule 1762 (Release in Criminal Matters) and Rule 3331 (Review of Special Prosecutions or Investigations). The proposed amendments are in addition to proposed amendments to Chapter 15 of the Appellate Rules (published as Recommendation 50 simultaneous to publication of this Recommendation).

Rule 1762 (Release in Criminal Matters)

Currently, Rule 1762 addresses bail issues under two circumstances: subdivision (a) addresses "release prior to sentence"; subdivision (b) addresses "release pending appeal." The proposed amendments to Rule 1762 replace these categories with a dichotomy based on whether the case is pending on appeal or not. Thus, new subdivision (a) (applications related to bail when an appeal is pending) replaces old subdivision (b) and new subdivision (b) (applications when no appeal is pending) replaces old subdivision (a).

Proposed subdivision (a) continues the requirement that while an appeal is pending, applications for bail be made first in the trial court, whereupon, if such relief is denied, the aggrieved party may seek relief ancillary to the appeal by proceeding pursuant to Rule 123 (applications for relief). Under the current subdivision (b), the procedure for seeking ancillary relief in the appellate court was undefined and there was some confusion among the bench and bar as to whether a petition for review under such circumstances is required. Under proposed subdivision (b), it is clear that a petition for review is not required where the bail application is ancillary to a pending appeal.

Proposed subdivision (b) replaces current subdivision (a) and addresses releases prior to sentencing. Currently, subdivision (a) does not expressly require that such applications go to the trial court first, although such requirement is implicit in paragraph (1) of subdivision (a). Proposed subdivision (b) expressly requires that a party seeking a release prior to sentencing must initially seek relief in the trial court pursuant to the Rules of Criminal Procedure.

Where no appeal is pending, and a party seeks review of a trial court order pertaining to bail, the proper procedure under proposed subdivision (b) is a petition for review pursuant to Chapter 15 (judicial review of governmental determinations). This is consistent with prior practice. However, proposed subdivision (b) does change

current practice insofar as answers to such petitions for review would be governed by Rule 1516, while under the current rules, they are governed by Rule 123(b). Thus, proposed subdivision (b) would eliminate this hybrid practice of requiring the petition conform to Chapter 15 and the answer to Rule 123.

It is important to note, however, that proposed subdivision (b) continues the existing practice of allowing only the petition and answer, and continues to provide that Rules 1531 through 1551 do not apply to such petitions for review. Additionally, the service requirement currently contained in paragraph (1) of subdivision (a) has been deleted, and the new service requirements for all applications for review of bail determinations are set forth under new subdivision (d) (service).

Proposed subdivision (d) (service) requires service of the application or petition for review on all parties in the lower court and makes it clear that Rule 121(b) governs such service. Proposed subdivision (d) also provides that service on the attorney general is not required, unless the attorney general is a party to the proceeding in the court below.

Rule 3331 (Review of Special Prosecutions or Investigations)

The proposed amendments to Rule 3331 are primarily a restructuring of the Rule. However, there are a few substantive changes. First, the proposed amendment to subdivision (a) specifies that the time for filing such a petition for review shall conform to Rule 1512(b)(3)(special provisions).

Rule 1512(b)(3) currently provides that:

"A determination governed by Rule 3331 (review of special prosecutions or investigations) shall be filed within ten days after the entry of the order sought to be reviewed."

Although the Note to current Rule 3331 does cross reference Rule 1512(b)(3), the Committee believes an express reference to this requirement in the text of Rule 3331 is helpful to the bench and bar.

There are no changes to paragraphs (1)-(5) of subdivision (a) in the proposed amendments.

The proposed amendment to subdivision (a) continues the practice of requiring that the petition conform to Rule 123(a)(contents of application for relief). However, answers would be governed by Rule 1516(a)(other pleadings allowed; general rule).

The proposed amendment to subdivision (a) also provides expressly, for the first time, that: "A party entitled to file an answer under this rule who does not intend to do so shall, within the time fixed by these rules for filing an answer, file a letter stating that an answer to the petition for review will not be filed."

[Pa.B. Doc. No. 03-1439. Filed for public inspection July 25, 2003, 9:00 a.m.]

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the herein Motion for Protracted/Semi-Protracted Hearing was served upon the following:

Attorney for

(Check one) _____ Defendant

_____ Commonwealth of Pennsylvania

Date:

[Pa.B. Doc. No. 03-1440. Filed for public inspection July 25, 2003, 9:00 a.m.]
