FINAL REPORT[1]

Amendments to Pa.Rs.Crim.P. 203, 209, and 212, and Comment Revisions to Pa.Rs.Crim.P. 113, 205, and 210

RETURN OF SEARCH WARRANTS

On October 22, 2013, effective January 1, 2014, upon the recommendation of the Criminal Procedural Rules Committee, the Court adopted amendments to Rules 203, 209, and 212 and revisions to the *Comments* to Rules 113, 205, and 210 to: (1) clarify the requirement to return search warrants to the issuing authority promptly; (2) provide that unexecuted warrants do not constitute public records; and (3) clarify who retains the original search warrant.

Return of Executed Warrants

The Committee began examining the need to specify procedures for the return of executed search warrants because of a reported problem with a municipal police force that was refusing to return search warrants to the magisterial district judge (MDJ) after the warrants had been executed, resulting in the MDJ being unable to forward the case to the clerk of courts because the MDJ did not have all of the case documents required by Rule 210.

Although Rules 205(6) and 209 mention the concept of a return of the warrant, there are no rules that specifically direct the police officer to return the search warrant to the designated judicial officer after it is executed[2]. The Committee concluded that an explicit mention in the rules of the requirement to return the warrants after execution would emphasize the need for the return.

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[1] The Committee's *Final 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 Committee's explanatory *Final Reports*.

[2] Rule 209 requires the officer who executed the warrant to return the inventory of items seized.

The Committee examined procedures from other jurisdictions that provide provisions for the return of search warrants. Some, such as Alabama, contain general provisions while others, like Maryland, are more specific including time limits for the return. The Committee favored the more general model. The Committee rejected setting a time limit for the return, concluding that any time period selected would be arbitrary and there would be no practical sanctions that could be imposed on the police for failing to abide by the limit. Therefore, a new paragraph (A) has been added to Rule 209 that requires the search warrant and inventory to be returned promptly after execution to the issuing authority. Additionally, a cross-reference to Rule 205(6) and its *Comment* has been added to the Rule 209 *Comment* to indicate that there may be circumstances under which the issuing authority that issued the warrant may differ from the issuing authority to whom the warrant is returned, *e.g.,* when the warrant was issued by a "duty" issuing authority.

Return of Unexecuted Warrants

The Committee also examined the more complex issue of whether to include a provision for the return of unexecuted warrants. There was a good deal of debate over the need for such a provision given that an unexecuted warrant will ultimately expire. The Committee concluded that, since the warrant is a court document, the court has an interest in its ultimate resolution. The members reasoned having unexecuted warrants returned upon expiration provides notice to the issuing authority that the search warrant was not executed and no longer is effective. Accordingly, unexecuted warrants have been included in the requirement that the warrants be returned. The requirement to return the unexecuted search warrant upon expiration has been added as a new paragraph (B) to Rule 209 along with explanatory revisions to the *Comment*.

The requirement to return unexecuted warrants raised a concern that once these documents have been returned to the issuing authority, they would be considered public records. The Committee recognized that public disclosure of these unexecuted documents could cause problems such as the destruction of evidence or the endangerment of officers serving subsequent warrants. More importantly, there are

occasions when the information supporting a search warrant is discovered to be inaccurate or even fraudulent prior to the execution of the warrant so the search warrant will remain unexecuted. However, public disclosure of the information contained in the affidavits supporting these warrants could prove embarrassing or dangerous to the subject of the warrant and therefore constitute a severe harm to that individual's privacy interests.

To resolve this problem, the Committee at first considered a provision that a returned unexecuted warrant should be considered sealed. However, it was clear that such a statement raised a great many more questions, such as the duration of such a sealing order, than could be addressed with a simple statement.

This led to a discussion regarding whether unexecuted warrants are in fact public documents. Pennsylvania strongly favors public access to search warrant information, based on both an Eight Amendment and common law rationale. The clearest pronouncement of this view is found in *PG Publishing Co. v. Commonwealth*, 532 Pa. 1, 614 A.2d 1106 (1992). However, while noting with approval the process of sealing executed search warrants by court order, the Court specifically distinguished the pre-execution situation, stating, "The *ex parte* application for issuance of a search warrant and the issuing authority's consideration of the application are not subject to public scrutiny. The need for secrecy will ordinarily expire once the search warrant has been executed." 532 Pa. at 6, 614 A.2d at 1108.

The most recent decision on the question of search warrant records as public records is found in *Commonwealth v. Upshur*, 592 Pa. 273, 924 A.2d 642 (2007), where the Court stated that:

> Certainly, however, any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document. *See, e.g.*, *Fenstermaker*, 515 Pa. at 510, 530 A.2d at 419 (arrest warrant affidavits filed with a magistrate); *PG Publishing Co. v. Commonwealth*, 532 Pa. 1, 6, 614 A.2d 1106, 1108 (1992) (search warrants and supporting affidavits).

However, *Upshur* cites *PG Publishing* for the general proposition that the search warrant and affidavits are to be considered public records but does not note the specific exclusion of unexecuted warrants from this analysis. Additionally, while the language used in citing *PG Publishing* talks of a document relied on in the course of "judicial decision-making," it is unlikely that the probable cause determination is of a type of judicial decision-making contemplated by the Court. Such determinations are *ex-parte* proceedings and there is no public right to be present during a probable cause determination. If the search warrant is not utilized in any further proceedings, especially if it is never executed, the probable cause determination would not be reviewable in the public arena.

The Committee concluded that unexecuted search warrants and the associated affidavits of probable cause do not constitute public records until execution, and unexecuted search warrants and their supporting documentation should remain confidential even after return. A statement to that effect has been added as new paragraph (B) to Rule 212. Additionally, because an unexecuted warrant now would never be publically disseminated, the original language in paragraph (A) stating that the warrant would remain undisclosed for no "longer than 48 hours after the warrant has been issued" would contradict the provisions of new paragraph (B) and therefore has been deleted. Cross-references to the Rule 212 concept of an unexecuted warrant not being a public record have been added to the *Comments* to Rules 113, 209, and 210 along with the notation that the returned unexecuted search warrants would not be included in the criminal case file nor docketed.

Once this concept was introduced into the rules, the question then became how best to handle the documents themselves. The returned unexecuted search warrant will be expired and therefore will never be executed. In most cases, the returned warrant would not be a filing in a case and would therefore require separate treatment. Rather than burden the issuing authority with the need to create separate storage arrangements for these documents, the unexecuted search warrant documentation would be destroyed upon return. This procedure also will eliminate the possibility that

information harmful to the privacy interests of an individual is made public when it has not resulted in any criminal charges.

This concept was borrowed from Maryland Criminal Procedure Rule 4-601 that states that the "judge to whom an unexecuted search warrant is returned may destroy the search warrant and related papers or make any other disposition the judge deems proper."

Brady Implications

The Committee also considered the potential implications of *Brady v. Maryland*, 373 U.S. 83 (1963) on the proposed new language in Rule 212 that would require the destruction of returned unexecuted warrants. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The provisions in Rule 212 that provide for the destruction of unexecuted search warrants deal with documents from unexecuted search warrants that had been returned to the issuing authority. Since *Brady* and its progeny were concerned with information in the possession of the prosecution, the initial question in the Committee's consideration of this issue was whether the same obligation to preserve and disclose exculpatory information extended to the courts.

In Pennsylvania, there is a limited obligation for such disclosure by the courts when the information is exclusively in the possession of the court. In *Commonwealth v. Santiago*, 405 Pa. Super. 56, 591 A.2d 1095 (1991), a highly publicized case involving the murder of a police officer, the trial judge conducted pre-trial interviews with potential trial witnesses *in camera* without either counsel being present. The defendant argued that because neither he nor the prosecution was aware of the contents of such testimony, the trial court owed him a duty of disclosing favorable testimony offered during these interviews. A plurality of the Superior Court held:

> In sum, therefore, we conclude that where a trial court is in the sole possession of materially exculpatory evidence, it must disclose that evidence to the defense. We note that the duty here is quite limited in practical effect. Ordinarily, prosecution or defense counsel will be privy to any information available to the judge; hence, the need for judicial disclosure will be obviated. When a judge has exclusive knowledge of such evidence, as here or as in *Pennsylvania v. Ritchie, supra,* [480 U.S. 39 (1987)] then the duty will arise. Moreover, materiality is another significant limitation. It is only when a miscarriage of justice is threatened that due process requires judicial intervention through *sua sponte* disclosure. 405 Pa. Super at 91, 591 A.2d at 1113.

The fact pattern in *Santiago* was fairly unique and the potentially exculpatory evidence was entirely within the possession of the court, the prosecution being excluded from the witness interviews. Similarly, in *Pennsylvania v. Ritchie*, the U.S. Supreme Court case cited in *Santiago* above, the trial court conducted an *in camera* examination of the defendant's child and youth file to determine which portions of the record could be released.

The question raised by the Committee was whether a search warrant is similarly in the exclusive possession of the court. The Committee considered the circumstances under which exculpatory evidence might be found through an unexecuted search warrant. The most likely, albeit rare, scenario is the situation in which the defendant asserts that another individual had committed the offense. In that situation, the fact that the police had at one point sought a search warrant for that individual might bolster such a claim.

Arguably, the requirement to return the unexecuted warrant to the issuing authority places the search warrant within the possession of the court. On the other hand, the law enforcement agency that had requested the search warrant also would be in possession of information related to another individual being targeted as a suspect in the crime with which the defendant is charged as well as copies of the search warrant information.

Furthermore, the Committee questioned how materially exculpatory a search warrant that police never executed, especially in comparison to investigative materials

in the possession of the police or prosecution, would be. In other words, any exculpatory materials that might be within the possession of the court would be duplicative of much fuller exculpatory information that was in the possession of the Commonwealth which has an unquestionable duty to provide it to the defendant.

The Committee concluded that the destruction of the search warrant information would not encompass the destruction of any exculpatory evidence since the original form of it would be in the possession of the police or prosecution. However, the Committee did not underestimate the importance of preserving potentially exculpatory evidence. To facilitate the maintenance of unexecuted search warrants that might have *Brady* implications, a sentence has been included in new paragraph (B) of Rule 209 that requires a copy of the returned unexecuted search warrant to be retained by the affiant. Additionally, a cross-reference reading "for the obligation of the Commonwealth to disclose exculpatory evidence, see Rule 573 and its *Comment*" has been added to the Rule 209 *Comment.*

Possession of Original Search warrant

The Committee also received reports of an ongoing dispute in some counties regarding whether the original search warrant document should be given to the requesting police officers or retained by the issuing authority. Some issuing authorities had concluded that the issuing authority should retain the original search warrant and provide the police with copies. Other than the Rule 208 requirement that the police leave a copy of the warrant and affidavits at the premises that was searched, the rules did not address who retains the original search warrant. The Committee concluded that some clarification of this question would be helpful.

The Committee concluded that the more proper method would be to have the serving officer be able to display the actual warrant to the owner of the premises to be searched and so should be given the original of the warrant. However, the Committee recognizes that the rules authorize providing a search warrant to the officer via advanced communications technology (ACT) and did not want to undo that capability.

Therefore, a new paragraph (G) has been added to Rule 203 that would provide

that the original of a search warrant be given to the executing police officer. Additionally, language has been added to the *Comment* that, when the search warrant is obtained using ACT, the version delivered to the police officer should be considered the original.