

**SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING**

Proposed Amendment of Pa.R.Crim.P. 720

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania a revision to the *Comment* to Rule 720 (Post-Sentence Procedures; Appeal) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **no later than Friday, December 28, 2018**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

October 23, 2018

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Brian W. Perry
Chair*

RULE 720. POST-SENTENCE PROCEDURES; APPEAL.

(A) TIMING.

(1) Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.

(2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed:

(a) within 30 days of the entry of the order deciding the motion;

(b) within 30 days of the entry of the order denying the motion by operation of law in cases in which the judge fails to decide the motion; or

(c) within 30 days of the entry of the order memorializing the withdrawal in cases in which the defendant withdraws the motion.

(3) If the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, except as provided in paragraph (A)(4).

(4) If the Commonwealth files a timely motion to modify sentence pursuant to Rule 721, the defendant's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion.

(B) OPTIONAL POST-SENTENCE MOTION.

(1) Generally.

(a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:

- (i) a motion challenging the validity of a plea of guilty or *nolo contendere*, or the denial of a motion to withdraw a plea of guilty or *nolo contendere*;
- (ii) a motion for judgment of acquittal;
- (iii) a motion in arrest of judgment;

- (iv) a motion for a new trial; and/or
- (v) a motion to modify sentence.

(b) The defendant may file a supplemental post-sentence motion in the judge's discretion as long as the decision on the supplemental motion can be made in compliance with the time limits of paragraph (B)(3).

(c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.

(2) Trial Court Action.

(a) Briefing Schedule

Within 10 days after a post-sentence motion is filed, if the judge determines that briefs or memoranda of law are required for a resolution of the motion, the judge shall schedule a date certain for the submission of briefs or memoranda of law by the defendant and the Commonwealth.

(b) Hearing; Argument

The judge shall also determine whether a hearing or argument on the motion is required, and if so, shall schedule a date or dates certain for one or both.

(c) Transcript

If the grounds asserted in the post-sentence motion do not require a transcript, neither the briefs nor hearing nor argument on the post-sentence motion shall be delayed for transcript preparation.

(3) Time Limits for Decision on Motion.

The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.

(a) Except as provided in paragraph (B)(3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law.

(b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

(c) When a post-sentence motion is denied by operation of law, the clerk of courts shall forthwith enter an order on behalf of the court, and, as provided in Rule 114, forthwith shall serve a copy of the order on the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented, that the post-sentence motion is deemed denied. This order is not subject to reconsideration.

(d) If the judge denies the post-sentence motion, the judge promptly shall issue an order and the order shall be filed and served as provided in Rule 114.

(e) If the defendant withdraws a post-sentence motion, the judge promptly shall issue an order memorializing the withdrawal, and the order shall be filed and served as provided in Rule 114.

(4) Contents of Order.

An order denying a post-sentence motion, whether issued by the judge pursuant to paragraph (B)(3)(d) or entered by the clerk of courts pursuant to paragraph (B)(3)(c), or an order issued following a defendant's withdrawal of the post-sentence motion, shall include notice to the defendant of the following:

(a) the right to appeal and the time limits within which the appeal must be filed;

(b) the right to assistance of counsel in the preparation of the appeal;

(c) the rights, if the defendant is indigent, to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Rule 122; and

(d) the qualified right to bail under Rule 521(B).

(C) AFTER-DISCOVERED EVIDENCE.

A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.

(D) SUMMARY CASE APPEALS.

There shall be no post-sentence motion in summary case appeals following a trial *de novo* in the court of common pleas. The imposition of sentence immediately following a determination of guilt at the conclusion of the trial *de novo* shall constitute a final order for purposes of appeal.

COMMENT: See Rules 606, 608, and 622.

For post-sentence procedures after a sentence of death has been imposed, see Rule 811.

The purpose of this rule is to promote the fair and prompt disposition of all issues relating to guilty pleas, trial, and sentence by consolidating all possible motions to be submitted for trial court review, and by setting reasonable but firm time limits within which the motion must be decided. Because the post-sentence motion is optional, the defendant may choose to raise any or all properly preserved issues in the trial court, in the appellate court, or both.

TIMING

Paragraph (A) contains the timing requirements for filing the optional post-sentence motion and taking an appeal. Under paragraph (A)(1), the post-sentence motion must be filed within 10 days of imposition of sentence.

When a defendant files a timely post-sentence motion, the 30-day period for the defendant's direct appeal on all matters in that case -- including all issues related to any informations and any charges consolidated against the defendant for trial -- is triggered by the trial judge's decision on the post-sentence motion, the denial of the motion by operation of law, or the withdrawal of the post-sentence motion. The appeal period runs from the entry of the order. As to the date of entry of orders, see Pa.R.A.P. 108. See also *Commonwealth v. Miller*, 715 A.2d 1203 (Pa. Super. 1998), concerning the time for appeal following the withdrawal of a post-sentence motion. No direct appeal may be taken by a

defendant while his or her post-sentence motion is pending. See paragraph (A)(2).

If no timely post-sentence motion is filed, the defendant's appeal period runs from the date sentence is imposed. See paragraph (A)(3). Under paragraph (A)(4), however, when the defendant has not filed a post-sentence motion but the Commonwealth files a timely motion to modify sentence under Rule 721, it is the entry of the order disposing of the Commonwealth's motion that commences the 30-day period during which the defendant's notice of appeal must be filed. See Rule 721(B)(2)(b).

All references to appeals in this rule relate to the defendant's right to appeal. The rule does not address or alter the Commonwealth's right to appeal. For Commonwealth challenges to sentences, see Rule 721.

OPTIONAL POST-SENTENCE MOTION

Paragraph (B) represents a departure from traditional Pennsylvania practice. It is intended to give the defendant the option of resubmitting for the trial judge's consideration issues that were raised before or during trial. Although the defendant may choose to raise only some issues in the post-sentence motion, the decision on the motion triggers the appeal period on all properly preserved issues. See paragraph (A)(2).

Under paragraph (B)(1)(c), any issue raised before or during trial is deemed preserved for appeal whether or not the defendant chooses to raise the issue in a post-sentence motion. It follows that the failure to brief or argue an issue in the post-sentence motion would not waive that issue on appeal as long as the issue was properly preserved, in the first instance, before or during trial. Nothing in this rule, however, is intended to address Pa.R.A.P. 1925(b) or the preservation of appellate issues once an appeal is filed. See *Commonwealth v. Lord*, [553 Pa. 415,] 719 A.2d 306 (Pa. 1998) (any issues not raised in a 1925(b) statement will be deemed waived).

Nothing in this rule precludes the judge from granting a motion for extraordinary relief before sentencing under the special provisions of Rule 704(B). *But see* Rule 704(B)(3).

Under paragraph (A)(1), if a defendant chooses to file a post-sentence motion, the motion must be filed within 10 days of imposition of sentence. The filing of the written post-sentence motion triggers the time limits for decision on the motion, including any supplement to it filed pursuant to paragraph (B)(1)(b). See paragraph (B)(3)(a).

For procedures governing post-sentence challenges to the sufficiency of the evidence, see Rule 606(A)(6) and (A)(7). For challenges to the weight of the evidence, see Rule 607(A).

In those cases in which a petitioner under the Post Conviction Relief Act has been granted leave to file a post-sentence motion or to appeal *nunc pro tunc*, the filing of the post-sentence motion or the notice of appeal must comply with the timing requirements contained in paragraph (A) of this rule. See the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*

BRIEFS; TRANSCRIPTS; ARGUMENT

Under paragraph (B)(2)(a), the judge should determine, on a case-by-case basis, whether briefs or memoranda of law are required for a fair resolution of the post-sentence motion. If they are not needed, or if a concise summary of the relevant law and facts is sufficient, the judge should so order. Any local rules requiring briefs or oral argument are inconsistent with this rule. See Rule 105(B)(1).

Under paragraph (B)(2)(c), the judge, in consultation with defense counsel and the attorney for the Commonwealth, should determine what, if any, portions of the notes of testimony must be transcribed so that the post-sentence motion can be resolved. The judge should then set clear deadlines for the court reporter to insure timely disposition of the motion. Nothing in this rule precludes the judge from ordering the transcript or portions of it immediately after the conclusion of the trial or the entry of a plea.

Paragraph (B)(1)(b) permits the trial judge to entertain a supplemental post-sentence motion at his or her discretion, as long as the decision on the supplemental issue(s) is made within the time limits of paragraph (B)(3).

For the recording and transcribing of court proceedings generally, see Rule 115. The requirements for the record and the writing of an opinion on appeal are set forth in the Pennsylvania Rules of Appellate Procedure.

There is no requirement that oral argument be heard on every post-sentence motion. When argument is to be heard, however, the judge should determine whether the post-sentence motion argument must be argued before the judge alone, or before a panel sitting *en banc*. It is recommended that, except in extraordinary circumstances, the post-sentence motion be heard by the judge alone. The judge may make any rulings that could be made by a court *en banc*. See *Commonwealth v. Norris*, [256 Pa. Super. 196,] 389 A.2d 668 (Pa. Super. 1978). On the powers of courts *en banc*, see *Commonwealth v. Bonser*, [215 Pa. Super. 452,] 258 A.2d 675 (Pa. Super. 1969). For cases in which there has been a change of venue, see Rule 584.

When oral argument is heard on the post-sentence motion, the defendant need not be present.

DISPOSITION

Under paragraph (B)(3), once the defendant makes a timely written post-sentence motion, the judge retains jurisdiction for the duration of the disposition period. The judge may not vacate the order imposing sentence pending decision on the post-sentence motion. This is so whether or not the Commonwealth files a motion to modify sentence. See Rule 721.

Paragraph (B)(3)(b) permits one 30-day extension of the 120-day time limit, for good cause shown, upon motion of the defendant. In most cases, an extension would be requested and granted when new counsel has entered the case. Only the defendant or counsel may request such an

extension. The judge may not, *sua sponte*, extend the time for decision: a congested court calendar or other judicial delay does not constitute "good cause" under this rule.

The possibility of an extension is not intended to suggest that 120 days are required for decision in most cases. The time limits for disposition of the post-sentence motion are the outer limits. Easily resolvable issues, such as a modification of sentence or a guilty plea challenge, should ordinarily be decided in a much shorter period of time.

If the trial judge decides the motion within the time limits of this rule, the judge may grant reconsideration on the post-sentence motion pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701.1, but the judge may not vacate the sentence pending reconsideration. Rule 720(B)(3). The reconsideration period may not be used to extend the timing requirements set forth in paragraph (B)(3) for decision on the post-sentence motion: the time limits imposed by paragraphs (B)(3)(a) and (B)(3)(b) continue to run from the date the post-sentence motion was originally filed. The trial judge's reconsideration must therefore be resolved within the 120-day decision period of paragraph (B)(3)(a) or the 30-day extension period of paragraph (B)(3)(b), whichever applies. If a decision on the reconsideration is not reached within the appropriate period, the post-sentence motion, including any issues raised for reconsideration, will be denied pursuant to paragraph (B)(3)(c).

Under paragraph (B)(3)(a), on the date when the court disposes of the motion, or the date when the motion is denied by operation of law, the judgment becomes final for the purposes of appeal. See Judicial Code, 42 Pa.C.S. §§ 102, 722, 742, 5105(a) and *Commonwealth v. Bolden*, [472 Pa. 602,] 373 A.2d 90 (Pa. 1977).

An order entered by the clerk of courts under paragraph (B)(3)(c) constitutes a ministerial order and, as such, is not subject to reconsideration or modification pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701.

If the motion is denied by operation of law, paragraph (B)(3)(c) requires that the clerk of courts enter an order

denying the motion on behalf of the court and immediately notify the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented, that the motion has been denied. This notice is intended to protect the defendant's right to appeal. The clerk of courts also must comply with the filing, service, and docket entry requirements of Rule 114.

The disposition of a motion to modify a sentence imposed after a revocation hearing is governed by Rule 708 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition).

CONTENTS OF ORDER

Paragraph (B)(4) protects the defendant's right to appeal by requiring that the judge's order denying the motion, the clerk of courts' order denying the motion by operation of law, or the order entered memorializing a defendant's withdrawal of a post-sentence motion, contain written notice of the defendant's appeal rights. This requirement ensures adequate notice to the defendant, which is important given the potential time lapse between the notice provided at sentencing and the resolution of the post-sentence motion. See Rule 704(C)(3). See also *Commonwealth v. Miller*, 715 A.2d 1203 (Pa. Super. 1998), concerning the contents of the order memorializing the withdrawal of a post-sentence motion.

When a defendant withdraws a post-sentence motion in open court and on the record, the judge should orally enter an order memorializing the withdrawal for the record, and give the defendant notice of the information required by paragraph (B)(4). See *Commonwealth v. Miller, supra*.

MISCELLANEOUS

Commonwealth v. Grant, [572 Pa. 48,] 813 A.2d 726 (Pa. 2002), which overrules *Commonwealth v. Hubbard*, [472 Pa. 259,] 372 A.2d 687 (Pa. 1977), provides that a defendant should wait until collateral review to raise ineffective counsel claims. **For exceptions to the general rule in *Grant*, see,**

e.g., Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013) and Commonwealth v. Delgros, -- A.3d -- (Pa. 2018),

Under paragraph (B)(1)(a), the grounds for the post-sentence motion should be stated with particularity. Motions alleging insufficient evidence, for example, must specify in what way the evidence was insufficient, and motions alleging that the verdict was against the weight of the evidence must specify why the verdict was against the weight of the evidence.

Because the post-sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial. See paragraph (B)(1)(c).

Under paragraph (B)(1)(a)(ii), a challenge to the sufficiency of the evidence would be made in a motion for judgment of acquittal. See Rule 606.

A post-sentence challenge to a guilty plea under this rule is distinct from a motion to withdraw a guilty plea prior to sentence. See Rule 591. Cf. Standards Relating to Pleas of Guilty § 2.1(a)(ii), ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (Approved Draft, 1968). Properly preserved issues related to guilty pleas need not be raised again in the post-sentence motion, but the defendant may choose to do so. A key consideration for the defendant is whether the record will be adequate for appellate review. If counsel is uncertain about the record, it is recommended that the guilty plea be challenged in the post-sentence motion.

Issues properly preserved at the sentencing proceeding need not, but may be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived. See *Commonwealth v. Jarvis*, [444 Pa. Super. 296,] 663 A.2d 790 (Pa. Super. 1995). See also Rule 704(C)(4). As a general rule, the motion to modify

sentence under paragraph (B)(1)(a)(v) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, [520 Pa. 385,] 554 A.2d 50 (Pa. 1989) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, [437 Pa. 288,] 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under paragraph (B)(1)(a)(v) or Rule 721, a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or reimposed.

Commonwealth challenges to sentences are governed by Rule 721. If the defendant files a post-sentence motion, the time limits for decision on the defendant's motion govern the time limits for disposition of the Commonwealth motion to modify sentence, regardless of which motion is filed first. See Rule 721(C)(1). If the defendant elects to file an appeal and the Commonwealth files a motion to modify sentence, decision on the Commonwealth's motion triggers the defendant's 30-day appeal period. See Rule 720(A)(4).

Given that the Commonwealth has 10 days to file a motion to modify sentence under Rule 721(B)(1), it is possible that the defendant might elect to file a notice of appeal under Rule 720(A)(3) followed by the Commonwealth's filing a timely motion to modify sentence. When this occurs, the defendant's notice of appeal is rendered premature, because the entry of the order disposing of the Commonwealth's motion to modify sentence then becomes the triggering device for the defendant's notice of appeal. In this situation, counsel for the defendant should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals that were quashed because of the

premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction that treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.

For bail proceedings pending the outcome of the post-sentence motion, see Rules 521 and 523.

[Unlike ineffective counsel claims, which are the subject of *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), p] Paragraph (C) requires that any claim of after-discovered evidence must be raised promptly after its discovery. Accordingly, after-discovered evidence discovered during the post-sentence stage must be raised promptly with the trial judge at the post-sentence stage; after-discovered evidence discovered during the direct appeal process must be raised promptly during the direct appeal process, and should include a request for a remand to the trial judge; and after-discovered evidence discovered after completion of the direct appeal process should be raised in the context of the PCRA. See 42 Pa.C.S. § 9545(b)(1)(ii) and (b)(2) (PCRA petition raising after-discovered evidence must be filed within 60 days of date claim could have been presented). *Commonwealth v. Kohan*, 825 A.2d 702 (Pa. Super. 2003), is superseded by the 2005 amendments to paragraphs (A) and (C) of the rule.

Although there are no post-sentence motions in summary appeals following the trial *de novo* pursuant to paragraph (D), nothing in this rule is intended to preclude the trial judge from acting on a defendant's petition for reconsideration. See the Judicial Code, 42 Pa.C.S. § 5505. See also *Commonwealth v. Dougherty*, [451 Pa. Super. 248,] 679 A.2d 779, 784 (Pa. Super. 1996). The time for appeal in summary cases following a trial *de novo* runs from the imposition of sentence.

NOTE: Previous Rule 1410, adopted May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; rescinded March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994, and replaced by present Rule 1410.

Present Rule 1410 adopted March 22, 1993 and amended December 17, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; 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. *Comment* revised September 26, 1996, effective January 1, 1997; amended August 22, 1997, effective January 1, 1998; *Comment* revised October 15, 1997, effective January 1, 1998; amended July 9, 1999, effective January 1, 2000; renumbered Rule 720 and amended March 1, 2000, effective April 1, 2001; amended August 21, 2003, effective January 1, 2004; amended March 2, 2004, effective July 1, 2004; *Comment* revised June 4, 2004, effective November 1, 2004; amended June 8, 2005, effective August 1, 2005; *Comment* revised January 18, 2007, effective August 1, 2007 [.] ; **Comment revised _____, 2018, effective _____, 2018).**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Report explaining the December 17, 1993 amendments published with the Court's Order at 24 Pa.B. 334 (January 15, 1994).

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

Final Report explaining the September 26, 1996 Comment revision on Rule 1409 procedures published at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the August 22, 1997 amendments to paragraphs (A)(4) and (B)(3) published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

Final Report explaining the Comment references to Rule 1124A (Challenges to the Weight of the Evidence) and to Commonwealth v. Dougherty published with the Court's Order at 27 Pa.B. 5594 (November 1, 1997).

Final Report explaining the July 9, 1999 amendments to paragraphs (A)(2) and (B)(4) concerning time for appeal and contents of the order entered following withdrawal of post-sentence motion, and revision of the Comment adding the citation to Commonwealth v. Lord, published with the Court's Order at 29 Pa.B. 3836 (July 24, 1999).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the August 21, 2003 changes to Rule 720 concerning the timeliness of filings and the order published with the Court's Order at 33 Pa.B. 4438 (September 6, 2003).

Final Report explaining the March 2, 2004 amendments updating the cross-references correlative to the March 2, 2004 changes to the motions rules published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the June 8, 2005 changes concerning ineffective counsel claims and concerning after-discovered evidence published with the Court's Order at 35 Pa.B. 3545 (June 25, 2005).

Final Report explaining the January 18, 2007 revision of the last paragraph of the Comment clarifying the time for appeal following a trial de novo published with the Court's Order at 37 Pa.B. (, 2007).

Report explaining the proposed revision of the Comment cross-referencing cases that provide exceptions to principle that ineffectiveness of counsel claims may only be raised on collateral appeal published for comment at 48 Pa.B. (_____, 2018).

REPORT

Proposed Amendment of Pa.R.Crim.P. 720

INEFFECTIVENESS OF COUNSEL CLAIMS RAISED IN POST-SENTENCE MOTIONS

On April 28, 2018, the Supreme Court of Pennsylvania issued an opinion in the case of *Commonwealth v. Delgros*, 183 A.3d 352 (Pa. 2018). In *Delgros*, the defendant was convicted of receiving stolen property. He was sentenced to pay restitution and a fine only, there was no confinement. Defendant filed post-sentence motions seeking a new trial asserting, *inter alia*, ineffective assistance of trial counsel. The trial court denied the motion and was affirmed by the Superior Court. On appeal, the Supreme Court vacated and remanded the case, finding that trial courts are required to address ineffectiveness claims when the defendant is statutorily precluded from obtaining subsequent review under the Post-Conviction Relief Act.

The case of *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), established the general principle that claims of ineffectiveness of counsel will not be entertained on direct appeal and a defendant should wait to raise ineffectiveness claims until collateral review. Subsequent case law refined this principle and provided exceptions to it, most notably in *Commonwealth v. Holmes*, 79 A.3d 561 (Pa. 2013). In *Holmes*, the Court established two limited exceptions: (1) where the ineffectiveness is “apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice”; and (2) where the defendant shows good cause and expressly waives the entitlement to seek subsequent PCRA review. *Holmes* also softened the position adopted in *Commonwealth v. O’Berg*, 880 A.2d 597 (Pa. 2005) where the Court refused to create a categorical exception to *Grant* for defendants with short sentences. Recognizing “the constitutional primacy of claims involving the ineffectiveness of trial counsel,” the Court directed trial courts to “err on the side of favoring the vindication of constitutional rights otherwise susceptible to forfeiture,” and conveyed confidence that trial courts in short sentence cases will recognize these concerns and liberally permit unitary review. *Holmes*, 79 A.3d at 578.

This rationale was applied in *Delgros*. Because the defendant in *Delgros* was sentenced only to a monetary punishment, he fell outside of the parameters of the

PCRA which, under 42 Pa.C.S. §9543(a)(1), limits relief to those currently serving a sentence of imprisonment, probation or parole for the crime. The Court found that the defendant's "ineligibility for PCRA review is more than potential; it is definitive, as he can never satisfy Subsection 9543(a)(1) because he was sentenced only to pay a fine...." and concluded this situation required a remedy:

Accordingly, to ensure that defendants are afforded an opportunity to challenge trial counsel's stewardship, we adopt an additional exception to Grant's general deferral rule, requiring trial courts to address claims challenging trial counsel's performance where the defendant is statutorily precluded from obtaining subsequent PCRA review. *Delgros*, ___ A.3d at ___, 2018 WL 1959478 at *7.

Rule 720 provides the procedures for optional post-sentence motions. The *Comment* contains a cross-reference only to *Grant*:

Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), which overrules *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977), provides that a defendant should wait until collateral review to raise ineffective counsel claims.

The Committee concluded that the cross-reference only to *Grant* is incomplete and that it would be helpful to the bench and bar to include cross-references to the two cases providing important statements regarding exceptions to the rule in *Grant*. Therefore, cross-references to both *Holmes* and *Delgros* would be added to the *Comment* to Rule 720.