

**SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.A.P. 1925

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.A.P. 1925(c)(3) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. 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 report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be 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 **December 31, 2024**. 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.

By the Appellate Court Procedural Rules Committee,

Peter J. Gardner
Chair

Rule 1925. Opinion in Support of Order.

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(c) **Remand.**

- (1) An appellate court may remand in either a civil or criminal case for a determination as to whether a Statement had been filed **[and/]**or served, or timely filed **[and/]**or served.
- (2) Upon application of the appellant and for good cause shown, an appellate court may remand in a civil case for the filing or service *nunc pro tunc* of a Statement or for amendment or supplementation of a timely filed and served Statement and for a concurrent supplemental opinion. If an appellant has a statutory or rule-based right to counsel, good cause shown includes a failure by counsel to file or serve a Statement timely or at all.
- (3) If **[an] a criminal defendant**-appellant represented by counsel **[in a criminal case]** was ordered to file and serve a Statement and either failed to do so, or untimely filed or served a Statement, such that the appellate court is convinced that counsel has been *per se* ineffective, and the trial court did not file an opinion, the appellate court may remand for appointment of new counsel, the filing or service of a Statement *nunc pro tunc*, and the preparation and filing of an opinion by the judge.
- (4) If counsel intends to seek to withdraw in a criminal case pursuant to *Anders/Santiago* or if counsel intends to seek to withdraw in a post-conviction relief appeal pursuant to *Turner/Finley*, counsel shall file of record and serve on the judge a statement of intent to withdraw in lieu of filing a Statement. If the appellate court believes there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court shall remand for the filing and service of a Statement pursuant to Pa.R.A.P. 1925(b), a supplemental opinion pursuant to Pa.R.A.P. 1925(a), or both. Upon remand, the trial court may, but is not required to, replace an appellant's counsel.

* * *

[Note:] Comment:

* * *

[Paragraph] Subdivision (c): The appellate courts have the right under the Judicial Code to “affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances.” 42 Pa.C.S. § 706.

[Subparagraph] Subdivision (c)(1): This **[subparagraph] subdivision** applies to both civil and criminal cases and allows an appellate court to seek additional information~~[-]~~, whether by supplementation of the record or additional briefing~~[-]~~, if it is not apparent whether an initial or supplemental Statement was filed **[and/]**or served, or timely filed **[and/]**or served. **The 2024 amendment was technical in nature and did not alter practice or procedure.**

[Subparagraph] Subdivision (c)(2): This **[subparagraph] subdivision** allows an appellate court to remand a civil case to allow an initial, amended, or supplemental Statement and/or a supplemental opinion. See also 42 Pa.C.S. § 706. In 2019, the rule was amended to clarify that for those civil appellants who have a statutory or rule-based right to counsel, **[([such as appellants in post-conviction relief, juvenile, parental termination, or civil commitment proceedings])]**, good cause includes a failure of counsel to file a Statement or a timely Statement.

[Subparagraph] Subdivision (c)(3): This **[subparagraph] subdivision** allows an appellate court to remand in criminal cases only when **[an] a criminal defendant-**appellant, who is represented by counsel, has completely failed to respond to an order to file and serve a Statement or has failed to do so timely. It is thus narrower than **[subparagraph] subdivision** (c)(2). See, e.g., *Commonwealth v. Burton*, 973 A.2d 428, 431 (Pa. Super. 2009); *Commonwealth v. Halley*, 870 A.2d 795, 801 (Pa. 2005); *Commonwealth v. West*, 883 A.2d 654, 657 (Pa. Super. 2005). *Per se* ineffectiveness applies in all circumstances in which an appeal is completely foreclosed by counsel's actions, but not in circumstances in which the actions narrow or serve to foreclose the appeal in part. *Commonwealth v. Rosado*, 150 A.3d 425, 433-35 (Pa. 2016). **[Pro se] Self-represented appellants and the Commonwealth** are excluded from this exception to the waiver doctrine as set forth in *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998). **The rule supersedes the holdings in *Commonwealth v. Grohowski*, 980 A.2d 113 (Pa. Super. 2009), and *Commonwealth v. Baker*, 311 A.3d 12 (Pa. Super. 2024).**

Direct appeal rights have typically been restored through a post-conviction relief process, but when the ineffectiveness is apparent and *per se*, the court

in *West* recognized that the more effective way to resolve such *per se* ineffectiveness is to remand for the filing of a Statement and opinion. See *West*, 883 A.2d at 657; see also *Burton* (late filing of Statement is *per se* ineffective assistance of counsel). The procedure set forth in *West* is codified in **[subparagraph] subdivision** (c)(3). As the *West* court recognized, this rationale does not apply when waiver occurs due to the improper filing of a Statement. In such circumstances, relief may occur only through the post-conviction relief process and only upon demonstration by the appellant that, but for the deficiency of counsel, it was reasonably probable that the appeal would have been successful. An appellant must be able to identify *per se* ineffectiveness to secure a remand under this **[section] subdivision**, and any appellant who is able to demonstrate *per se* ineffectiveness is entitled to a remand. Accordingly, this **[subparagraph] subdivision** does not raise the concerns addressed in *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) (observing that where a rule has not been consistently or regularly applied, it is not[--], under federal law[--], an adequate and independent state ground for affirming petitioner's conviction.)

[Subparagraph] Subdivision (c)(4): See *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009); *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). These procedures do not relieve counsel of the obligation to comply with all other rules.

**SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE**

PUBLICATION REPORT

Proposed Amendment of Pa.R.A.P. 1925

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court the amendment of Pennsylvania Rule of Appellate Procedure 1925 to clarify that it is the criminal defendant-appellant, and not the Commonwealth, who is afforded the exception to the bright-line waiver standard in *Commonwealth v. Lord*, 710 A.2d 306 (Pa. 1988), set forth in subdivision (c)(3) when there is a failure to file a timely Pa.R.A.P. 1925(b) Statement.

Current Pa.R.A.P. 1925(c)(3) provides:

- (3) If an **appellant** represented by counsel in a criminal case was ordered to file and serve a Statement and either failed to do so, or untimely filed or served a Statement, such that the appellate court is convinced that counsel has been *per se* ineffective, and the trial court did not file an opinion, the appellate court may remand for appointment of new counsel, the filing or service of a Statement *nunc pro tunc*, and the preparation and filing of an opinion by the judge.

(Emphasis added.)

In the recent decision of *Commonwealth v. Baker*, 311 A.3d 12 (Pa. Super. 2024), the Superior Court examined the question of whether the Commonwealth, an appellant, had waived all issues for failure to file a timely Pa.R.A.P. 1925(b) statement. The majority interpreted Pa.R.A.P. 1925(c)(3) to apply to the Commonwealth in this circumstance. It ultimately held the Commonwealth did not waive its issues because the trial court had an adequate opportunity to prepare an opinion addressing the issues raised on appeal, and cited to *Commonwealth v. Burton*, 973 A.2d 428 (Pa. Super. 2009) as support for this conclusion.

The concurring opinion questioned whether the waiver exception for appellants in criminal cases as set forth in Pa.R.A.P. 1925(c)(3) applied to the Commonwealth, and would have found that the Commonwealth waived all issues for failure to file a timely 1925(b) statement under the Supreme Court's the bright-line waiver standard set forth in *Commonwealth v. Lord*. The concurring opinion also noted that there was some question about the reach of the waiver exception in light of the Superior Court's holding in *Commonwealth v. Grohowski*, 980 A.2d 113 (Pa. Super. 2009), which reached the same conclusion as the majority in *Baker* that the exception to waiver in Pa.R.A.P. 1925(c)(3)

applies to the Commonwealth when there is a failure to file a statement or is done so untimely. Citing to the dissenting opinion in *Grohowski*, the concurrence noted, among other points, that the concept of *per se* ineffectiveness is a term of art particular to criminal defense lawyers, not prosecutors, and the reason for the exception was to forestall claims under the Post Conviction Relief Act. 311 A.3d at 22 (Olson, J., concurring), citing *Grohowski*, 980 A.2d at 117 (Klein, J., dissenting).

The Committee is proposing to clarify this subdivision and its accompanying commentary. First, the Committee proposes that Pa.R.A.P. 1925(c)(3) be modified to explicitly state that this subdivision applies only to appellants who are criminal defendants, thereby excluding the Commonwealth from its scope. The Committee notes that the dissenting opinion in *Grohowski*, which also questioned whether subdivision (c)(3) applied to the Commonwealth, suggested that if the subdivision was intended to apply to only criminal defendants, “appellant” should be clarified as the “criminal defendant-appellant.” 980 A.2d at 117. The proposed amendment incorporates this language; a similar change is proposed for the commentary discussing subdivision (c)(3).

The Committee also proposes amending the commentary to explicitly state that the exception in subdivision (c)(3) is not available to the Commonwealth, and to add a statement indicating that the rule supersedes both *Grohowski* and *Baker*.

Accordingly, the Committee invites all comments, objections, concerns, and suggestions regarding this proposed rulemaking.