***New Pa.Rs.Crim.P. 490 and 790 and Rescission of Pa.R.Crim.P. 722***

FINAL REPORT[1]

PROCEDURES FOR REQUESTING AND ORDERING EXPUNGEMENT

On September 22, 2010, effective in 90 days, upon the recommendation of the Criminal Procedural Rules Committee, the Court adopted new Rules of Criminal Procedure 490 (Procedure for Obtaining Expungement in Summary Cases; Expungement Order) and 790 (Procedure for Obtaining Expungement in Court Cases; Expungement Order), and rescinded Pa.R.Crim.P. 722 (Contents of Order for Expungement). These new rules establish uniform procedures for petitioning and ordering expungement in summary and court cases.

## I. BACKGROUND

The Committee undertook an examination of the issue of providing in the rules the procedures for requesting expungement after the enactment of Act 134 of 2008. Act 134 amends Section 9122 of the Criminal History Record Information Act (18 Pa.C.S. § 9122) ("CHRIA") by providing that a defendant's summary offenses may be expunged when the defendant "has been free of arrest or prosecution for five years following the conviction for that offense."

When Act 134 became effective, the Committee received several communications asking us to consider rule changes that would provide the procedures for requesting expungement under the statute.[2] The Committee was cognizant that the current Rules of Criminal Procedure only establish procedures for expungement following the successful completion of an Accelerated Rehabilitation Disposition (ARD)

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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] The Committee received communications about summary case expungements from John Heaton, Secretary to the Board of Pardons, Representative Thomas R. Caltagirone, and private citizens.

program (Rule 320) and provide the contents of an expungement order (Rule 722). The members also opined that many defendants in summary cases likely will proceed *pro se* in seeking expungement. In view of these considerations, and recognizing that without a uniform statewide rule, the procedures may vary significantly among the judicial districts, the members agreed to explore statewide uniform procedures for requesting expungement.

## II. DISCUSSION

Initially, the Committee considered several options for how to proceed. The members considered merely retaining Rule 722 (Contents of Order for Expungement) and adding a reference to the summary expungement provisions in CHRIA in the Rule 722 *Comment.* The Committee also discussed adding to Rule 722 a section for procedures for summary case expungements; establishing a separate summary case expungement rule; or developing procedures for both summary and court case expungements. Ultimately, the Committee agreed (1) that the provisions for expungement following completion of ARD should continue to be handled separately under Rule 320; (2) offenses entitled to expungement under 35 P.S. § 780-119 ("Section 19") would continue to proceed under the statute; and (3) there should be separate rules establishing the procedures for summary case expungements and for court case expungements. By retaining the separate procedures for ARD cases and for cases under Section 19 and having separate new rules for all other summary and court cases, it will be easier for the members of the bench, bar, and the public to utilize the correct procedures.

The next question the Committee considered was the placement of the new rules. Because an expungement request ordinarily will not occur until after sentencing, the new summary case expungement rule has been placed at the end of Chapter 4 as new Rule 490 and the new court case expungement rule has been placed at the end of Chapter 7 as new Rule 790. To distinguish both new rules from the rules immediately preceding these new rules, new subchapters have been added to Chapter 4 and Chapter 7 governing expungement.

In determining what the procedures for summary and court case expungements should be, the Committee looked at the provisions for ARD expungements in Rule 320, the contents of the order set forth in Rule 722, the expungement procedures set forth in local rules, and the expungement procedures in other jurisdictions. Drawing from these resources, the members recommended and the Court agreed that the new rules should provide the following:

- the petition should be filed with the clerk of courts in the court of common pleas in which the offense was disposed, and a copy must be served on the attorney for the Commonwealth;
- the contents of the petition should include the information that must be included in the order required by Rule 722 and the verification language from Rule 575(2)(g);
- the attorney for the Commonwealth should have the right to file objections to the petition;
- the court should conduct a hearing when there are objections and the parties should have an opportunity to respond;
- there should be a separate section in the rules for the order that would require the judge to enter an order and the order must include all the contents from Rule 722;
- the clerk of courts must serve copies of the expungement order on the criminal justice agencies specified in the court's order.

**A. NEW RULE 490**

New Rule 490 sets out the procedures for requesting and ordering expungement in all summary cases.

Paragraph (A)(1) and the second paragraph of the *Comment* make it clear that summary case ARD expungements are to proceed pursuant to Rule 320. Paragraph (A)(1) also requires the expungement petition to be filed with the clerk of courts in the

judicial district in which the offenses were disposed.[3] Although the requested expungement is of summary offenses that are within the jurisdiction of the magisterial district judges, the Committee believes the CHRIA contemplates that the judges of the courts of common pleas should order expungements, even though this is not spelled out specifically in the CHRIA. Furthermore, the expungement proceedings should be in the court of common pleas because (1) there is not a rule-governed motion practice in the summary case rules; and (2) the magisterial district courts are not courts of record.[4]

As a matter of uniform procedure, the term "motion" is used in the Criminal Rules whenever feasible.[5] However, for these new expungement procedures, the term "petition" is used to avoid confusion because this is the term used in the statute and in many of the local rules providing expungement procedures. To clarify this variation further, a provision has been added to the *Comment* explaining that "petition" as used in this rule is a "motion" for purposes of Rules 575, 576, and 577.

Paragraph (A)(2) sets forth the contents of the petition. All the information required to be in the petition is necessary to aid the attorney for the Commonwealth and the court to identify accurately the defendant and the offense(s) the defendant is asking to have expunged. The contents are the mandatory contents and may not be supplemented or modified by local rule or practice. This prohibition against modification was added to the new rules in response to points raised in the publication responses concerning the importance of having uniformity in the expungement procedures. The correspondents noted that, if the counties are able to add to the information required on the petition, defendants will be hindered in their efforts to obtain expungement, and

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[3] Pursuant to Rules 575 and 576, the petition must be filed with the clerk of courts first rather than taking the petition to a judge or the court administrator before filing.

[4] It should be noted, however, that under local procedures implementing Rules 300 and 301, some magisterial district judges may have the authority to expunge summary ARD records after successful completion in the same manner as common pleas judges under Rule 320.

[5] *See* the Rule 103 definition of "motion."

preclude the use of a statewide uniform form of petition that will be developed in conjunction with the adoption of these new rules. This prohibition is made clear in the last sentence of paragraph (A)(2).

Most of the required information is the same as the information that was required under Rule 722 for the expungement order. In paragaraph (A)(2)(a), the requirement of including "any aliases that the petitioner has used" has been added as an additional identifier. Paragraph (A)(2)(j) includes the requirement that the petitioner verify the facts set forth in the petition, which is consistent with all other motions. *See* Rule 575(2)(g).

Rule 722(1) required the defendant's social security number be included on the order for expungement. The Committee debated at length whether the social security number should be required on the petition and order in the new expungement rules. The members are aware that section 213.7 of the Court's new Public Access Policy governing the official case records of the magisterial district courts direct parties and their attorneys to refrain from including social security numbers on documents filed with the court. We also noted many other governmental agencies are taking the position that social security numbers should not appear on public documents, although as a compromise, some governmental agencies will require only the last four digits of the social security number. Furthermore, in their publication comments, the AOPC's automation staff reiterated the concerns about including social security numbers on the expungement petitions and orders.

Although the concerns about protecting a defendant's privacy and protecting the defendant from identity theft and other misuse of the social security number are legitimate concerns and worthy of consideration, in the context of the criminal justice system, the social security number continues to be a necessary identifier of defendants. In fact, communications from the AOPC and the Pennsylvania State Police indicate that the State Police and the FBI require the full social security number for purposes of ensuring accurate identification before these criminal justice agencies are able to expunge a defendant's criminal record. After carefully weighing the need to protect a defendant's privacy and to protect the defendant from misuse of the social security number against the stated need of various criminal justice agencies to continue to use the full social security number as an identifier, it was determined that the full social

security number should be retained as an identifier in expungement cases, at least in the immediate future until such time as the social security number no longer is used as an identifier.

Paragraph (A)(3) requires the defendant to attach to the petition a copy of his or her Pennsylvania State Police criminal record. Two of the publication respondents suggested this addition because they believe providing the court with a copy of the criminal record maintained by the State Police will ensure the court has accurate information concerning the offenses the defendant is requesting be expunged. In addition, to ensure the information on the criminal record is accurate, the rule requires that the copy of the criminal record be obtained by the defendant within 60 days before filing the petition.

Paragraph (A)(4) requires that the defendant serve a copy of the petition on the attorney for the Commonwealth concurrently with filing. This requirement is consistent with Rule 576(B)(1). The requirement for concurrent service ensures the attorney for the Commonwealth receives timely notice of the petition.

Paragraph (B) sets forth the procedures for the attorney for the Commonwealth and the judge to follow after the petition is filed and served. Paragraph (B)(1) provides that after the attorney for the Commonwealth receives the petition, he or she has 30 days within which to exercise one of three options for how to proceed. Recognizing that most summary cases are not complicated and do not have extensive court records to be reviewed, the Committee reasoned a 30-day time period was an adequate amount of time for the attorney for the Commonwealth to determine if he or she is going to consent to or object to a petition for summary case expungement. The attorney for the Commonwealth, of course, may take action in less than 30 days in a given case.

The attorney for the Commonwealth may file a consent to the petition, file an objection to the petition, or take no action. During its discussions, the Committee noted that there will be cases in which the attorney for the Commonwealth will agree with the defendant that the case should be expunged. In these cases, the Committee reasoned the attorney for the Commonwealth would want to move the case along. Therefore, the "Commonwealth consents" language in the rules makes it clear that the attorney for the Commonwealth may affirmatively consent at any time after he or she receives the

petition rather than allowing the full 30-day period to expire before proceeding. The "take no action" language also was added to the rule to address those cases in which the attorney for the Commonwealth determines that he or she is taking no position on the petition.

When the attorney for the Commonwealth takes action, he or she is required to file the consent or the objections with the clerk of courts. The attorney for the Commonwealth also must serve copies of the consent or objections on the petitioner's attorney, or the petitioner if unrepresented.

Paragraph (B)(2) sets forth the procedures the judge is to follow in these cases. The judge is required to take action upon receipt of the attorney for the Commonwealth's consent or objections, but in no case may the judge act later than fourteen days after the expiration of the 30-day time period in paragraph (B)(1). The issue of a time limit on the judge's action was raised in the publication responses. The Committee debated at length adding a time limit on the judge's action. Some members expressed concern that a time limit places too much of a burden on the judge. Other members expressed concern that without a time limit, these cases could languish. They also noted that the judge will have received a copy of the petition when the defendant files it, so the judge will be aware of the petition for at least 30 days before any time limit is applied. Ultimately, a 14-day time limit was included in the rule.

The judge has the discretion to enter an order granting the petition for expungement, to enter an order denying the petition, or to schedule a hearing. Although, in most cases, the judge will take action based on the petition and any response from the attorney for the Commonwealth without holding a hearing, the judge may identify issues with the petition or the attorney for the Commonwealth's response that warrant holding a hearing to resolve.

Paragraph (B)(3) requires that, when a judge schedules a hearing, the parties must be given an opportunity to be heard. At the conclusion of the hearing, the judge is required to enter an order granting or denying the petition.

Paragraph (B)(4) addresses the procedures when the judge grants the petition. The judge must enter an order and the order must contain the contents required in paragraph (C). Paragraph (B)(4)(b) provides for the stay of the expungement order

during the 30-day time period within which the attorney for the Commonwealth may file an appeal. If the attorney for the Commonwealth does file an appeal, then the order will be stayed pending the disposition of the appeal and further order of the court. Although providing for the stay during the time for taking an appeal will delay the defendant's record being expunged, the stay is necessary, because, once the defendant's records are expunged, the records cannot be retrieved.

Paragraph (B)(5) addresses the procedures when the judge denies the petition. The judge is required to enter an order denying the petition. The order must state the judge's reasons for denying the petition. The judge's reasons for the denial are necessary to make a record for appeal.

Paragraph (C) sets forth the contents of the expungement order. As previously explained, the information required in paragraph (C) is the same as the information required in Rule 722. It should be noted that the judge is required to name in the order the criminal justice agencies upon which the certified copies of the order are to be served. In addition, paragraph (C)(2) requires the clerk of courts to serve the order on the criminal justice agencies listed in the order. Although the practice in some judicial districts is to require the defendant to provide the criminal justice agencies' information for the order and to do the service of the order, this practice has been rejected because these functions are court functions, and the responsibility should not be placed on the defendant.[6]

The *Comment* provides further elaboration on the provisions of the new rule, including emphasizing the requirement in the rule that the list of information required in the petition and the order may not be modified by local rule or practice.

One of the concerns expressed to the Committee about the new summary case expungements under the CHRIA is that many defendants in summary cases will seek to have their records expunged without the assistance of counsel. Because of this, it was suggested that the new rule include the form of the expungement petition. The Committee, when considering this suggestion, noted that, except in a few cases in

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[6] *See also* Rule 114(D) prohibiting local rules requiring a party to file or serve orders and Rule 575(D) prohibiting any local rules requiring a party to attach a proposed order to a motion.

which the Committee agreed the identical form must be used in all judicial districts (*e.g.* Rule 632 - juror information questionnaire), the Committee has not included the actual forms in the rules since the forms were deleted from the rules in 1985.[7] The members agreed petitions to expunge a record do not fit into the category of forms that must be identical in all judicial districts, and declined to devise a form and include it in the rules. However, we did agree that having a form available for the use of petitioners is a sound idea. Accordingly, as explained in the *Comment,* the Administrative Office of Pennsylvania Courts will design a form, in consultation with the Committee as provided in Rule 104, that incorporates the required contents that are set forth in paragraph (A)(2). It is anticipated that this form will be easily accessible for petitioners.

Addressing one of the issues raised in the publication responses, the *Comment* includes a clarification about the procedures for expungement when a summary offense is joined with a misdemeanor or felony. Under the rules, when a summary offense is joined with misdemeanor or felony offenses, the case is a court case. Thus, in cases in which the summary offense has been joined with misdemeanor or felony charges, petitions to expunge these summary offenses must proceed under new Rule 790.

The Committee also discussed whether the rule should address standing to challenge expungement. The members agreed this was not something that should be addressed in the Criminal Rules, but thought it would be helpful if the *Comment* included a cross-reference to the cases on standing in the expungement context.

**B. NEW RULE 790**

Except when modification of language is necessary to conform with procedures for court cases,[8] the provisions in paragraphs (A)(2), (A)(3), (A)(4), and (C) in new Rule

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[7] The Committee's *Report* explaining the deletion of the forms was published at 13 *Pa.B.* 3813 (December 10, 1983).

[8] For example, in paragraph (A)(2)(b), the defendant is required to provide in the petition the name of the judge of the court of common pleas rather than the magisterial district judge, and paragraph (A)(2)(e) requires the OTN, a number not assigned to summary cases.

790 are the same as paragraphs (A)(2), (A)(3), (A)(4), and (C) in new Rule 490 discussed above.

Paragraph (A)(1) of new Rule 790 and the second paragraph of the *Comment* make it clear that court case ARD expungements are to proceed pursuant to Rule 320,[9] and expungements arising under 35 P.S. § 780-119 are to proceed pursuant to that statute. Paragraph (A)(1) also requires the expungement petition to be filed with the clerk of courts in the judicial district in which the offenses were disposed.[10]

Paragraph (B) sets forth the procedures in court cases for the attorney for the Commonwealth to file a consent to the petition to expunge, any objections to the petition to expunge, and for the judge to take action. In court cases, the attorney for the Commonwealth is given 60 days to decide whether to file a consent, file objections, or to take no action on the petition. The attorney for the Commonwealth is afforded additional time in court cases because there may be more extensive records to review and more complicated issues to address. Paragraphs (B)(1) and (B)(2) incorporate the 60-day time period. In all other respects, paragraph (B) is the same as paragraph (B) in Rule 490 discussed above.

The Rule 790 *Comment* includes the same provisions that are in the Rule 490 *Comment* discussed above. One point the Committee discussed in the context of new Rule 790 is whether the order expunging a record under 35 P.S. § 780-119 must include the same contents as orders issued pursuant to new Rule 790. The AOPC representative to the Committee pointed out that currently, under Rule 722, these expungement orders do comply with Rule 722. Although cases under 35 P.S. § 780-119 are excluded from the application of the new rules, the Section 19 orders will continue to be required to include the same information as all other court case expungements, that is, the contents set forth in Rule 790(C) must be included in the

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[9] This point also is addressed in the second paragraph of the proposed new Rule 490 *Comment*.

[10] Pursuant to Rules 575 and 576, the petition must be filed with the clerk of courts first rather than taking the petition to a judge or the court administrator before filing.

Section 19 expungement order. To make this clear, a provision to that effect has been added to the fifth paragraph of the Rule 790 *Comment.*