Proposed Amendments to Pa.Rs.Crim.P. 905, 906, 907, and 909

INTRODUCTION

The Criminal Procedural Rules Committee is considering recommending that the Supreme Court of Pennsylvania amend Rules 905 (Amendment and Withdrawal of Petition for Post-Conviction Collateral Relief), 906 (Answer to Petition for Post-Conviction Collateral Relief), 907 (Disposition Without Hearing), and 909 (Procedures for Petitions in Death Penalty Cases: Stays of Execution of Sentence; Hearing; Disposition) to formalize the procedures for pre-dismissal amendment of petitions in PCRA cases. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's 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 explanatory Reports.

The text of the proposed amendments to the rules precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

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no later than Friday, September 12, 2014.

June 23, 2014 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Thomas P. Rogers, Chair

Jeffrey M. Wasileski
Counsel

RULE 905. AMENDMENT AND WITHDRAWAL OF PETITION FOR POST-CONVICTION COLLATERAL RELIEF.

(A) The judge**, at any time:**

(1) shall grant leave for one amended petition for post-conviction collateral relief as of right; and

(2) for any second or subsequent amended petition, may grant leave to amend **a petition for post-conviction collateral relief upon a determination of cause shown; or**

(3) may grant leave to withdraw a petition for post-conviction collateral relief **[at any time. Amendment shall be allowed to achieve substantial justice].**

(B) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

(C) Upon the entry of an order directing an amendment, the clerk of courts shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(D) All amended petitions shall be in writing, shall comply substantially with Rule 902, and shall be filed and served within the time specified by the judge in ordering the amendment.

COMMENT: **The purpose of the amendment procedure under this rule is to provide the defendant with the opportunity to correct any material defect in the petition in order to provide the fullest review of the case. The rule recognizes that often the initial petition is filed *pro se* or the case may involve complex issues needing further development. Therefore each petition may be amended once as of right as a further means of ensuring that the collateral review is as full as possible. However, the amendment process should not be used as a vehicle for raising new matter that should have been included in the original petition. Second or subsequent amendments will not be permitted absent a showing of cause as to why the matter was not raised**

initially or in the first amendment. Paragraph (A) originally contained the sentence, "Amendment shall be allowed to achieve substantial justice." This sentence was removed because it had come to be interpreted that amendments of the petition should be automatically granted.

"Defective," as used in paragraph (B), is intended to include petitions that are inadequate, insufficient, or irregular for any reason; for example, petitions that lack particularity; petitions that do not comply substantially with Rule 902; petitions that appear to be patently frivolous; petitions that do not allege facts that would support relief; petitions that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended petition is filed pursuant to paragraph (D), it is intended that the clerk of courts transmit a copy of the amended petition to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. *See* Rules 903 and 906.

NOTE: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; renumbered Rule 905 and amended March 1, 2000, effective April 1, 2001; *Comment* revised September 21, 2012, effective November 1, 2012 [.] ; **amended , 2014, effective , 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 11, 1997 amendments published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1477 (March 18, 2000).

Final Report explaining the September 21, 2012 revision of the Comment correcting a typographical error in the first paragraph published with the Court's Order at 42 Pa.B. (, 2012).

Report explaining the proposed amendment clarifying the purpose of the amendment procedures published for comment at 44 Pa.B. (, 2014).

RULE 906. ANSWER TO PETITION FOR POST-CONVICTION COLLATERAL RELIEF.

(A) Except as provided in paragraph (E), an answer to a petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the petition.

(B) Upon the entry of an order directing an answer, the clerk of courts shall serve a copy of the order on the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented.

(C) If the judge orders an answer, the answer shall be in writing and shall be filed and served within the time fixed by the judge in ordering the answer. The time for filing the answer may be extended by the judge for cause shown.

(D) **Amendment and Withdrawal of the Answer**

The judge**, at any time:**

(1) if the petition has been amended, shall grant the Commonwealth leave to amend the answer; or

(2) if the petition has not been amended, may grant leave**, upon a determination of cause shown,** to amend **an answer ;** or

(3) may grant leave to withdraw an answer **[at any time]**.

[Amendment shall be freely allowed to achieve substantial justice.] Amended answers shall be in writing and shall be filed and served within the time specified by the judge in granting leave to amend.

(E) Answers in Death Penalty Cases

(1) First Counseled Petitions

(a) The Commonwealth shall file an answer to the first counseled petition for collateral review in a death penalty case.

(b) The answer shall be filed within 120 days of the filing and service of the petition. For good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(2) Second and Subsequent Petitions

(a) An answer to a second or subsequent petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to file an answer.

(b) The answer shall be filed within 120 days of the filing and service of the petition. For good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(3) Amendments to Answer

The judge**, at any time:**

(a) if the petition has been amended, shall grant the Commonwealth leave to amend the answer; or

(b) if the petition has not been amended, may grant the Commonwealth leave**, upon a determination of cause shown,** to amend the answer **[at any time, and amendment shall be freely allowed to achieve substantial justice.]**

Amended answers shall be in writing, and shall be filed and served within the time specified by the judge in granting leave to amend.

COMMENT: As used in the Chapter 9 rules, "answer" is intended to include an amended answer filed pursuant to paragraphs (D) and (E)(3) of this rule, except where the context indicates otherwise.

The purpose of the amendment procedure under this rule is to provide the Commonwealth with the opportunity to correct any material defect in the answer to the petition in order to provide the fullest review of the case. If the Commonwealth seeks to amend the answer due to an amendment to the petition, the judge shall grant the petition. If the Commonwealth seeks to amend the petition independent of any change to the petition, the Commonwealth must show good cause in doing so.

Paragraphs (D) and (E)(3) originally contained the statement that amendment "shall be feely allowed to achieve substantial justice." This sentence was removed because it had come to be interpreted that amendments of the answer should be automatically granted.

Except as provided in paragraph (E), when determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the petition for post-conviction collateral relief.

Paragraph (E)(1) was added in 1997 to require that the Commonwealth file an answer to the first counseled petition in a death penalty case. For second and subsequent petitions, paragraph (E)(2) would apply.

"First counseled petition," as used in paragraph (E)(1), includes petitions on which defendants have elected to proceed *pro se* pursuant to Rule 904(F)(1)(a). *See also* the *Comment* to Rule 903.

NOTE: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; *Comment* revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; *Comment* revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; *Comment* revised January 21, 2000, effective July 1, 2000; renumbered Rule 906 and *Comment* revised March 1, 2000, effective April 1, 2001; amended March 2, 2004, effective July 1, 2004 **[.] ; amended , 2014, effective , 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 11, 1997 amendments published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

Final Report explaining the January 21, 2000 Comment revisions cross-referencing Rule 1504(F)(1)(a) published with the Court's Order at 30 Pa.B. 264 (February 5, 2000).

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 March 2, 2004 changes to paragraph (B) published with the Court's Order at 34 Pa.B. (, 2004).

Report explaining the proposed amendment clarifying the purpose of the amendment procedures published for comment at 44 Pa.B. (, 2014).

RULE 907. DISPOSITION WITHOUT HEARING.

Except as provided in Rule 909 for death penalty cases,

(1) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

(2) A petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(3) The judge may dispose of only part of a petition without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(4) When the petition is dismissed without a hearing, the judge promptly shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time limits within which the appeal must be filed. The order shall be filed and served as provided in Rule 114.

(5) When the petition is granted without a hearing, the judge promptly shall issue an order granting a specific form of relief, and issue any supplementary orders appropriate to the proper disposition of the case. The order shall be filed and served as provided in Rule 114.

> COMMENT: The judge is permitted, pursuant to paragraph (1), to summarily dismiss a petition for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record. If, after this review, the judge determines that the petition is patently frivolous and

without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the petition as provided herein.

When the judge has determined that dismissal without an evidentiary hearing is the appropriate course but discerns the potential for amendment of the petition, the judge has the obligation of providing the defendant with the opportunity to amend the petition. To that end, the judge must provide sufficiently specific reasons for the disposition such that the potential for amendment may be reasonably evaluated by counsel. *See Commonwealth v. Williams*, 566 Pa. 553, 569, 782 A.2d 517, 527 (2001); *Commonwealth v. Rush,* 576 Pa. 3, 14-15, 838 A.2d 651, 657-658 (2003).

A summary dismissal would also be authorized under this rule if the judge determines that a previous petition involving the same issue or issues was filed and was finally determined adversely to the defendant. *See* 42 Pa.C.S. § 9545(b) for the timing requirements for filing second and subsequent petitions.

Second or subsequent petitions will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred. *See Commonwealth v. Szuchon*, 534 Pa. 483, 486, 633 A.2d 1098, 1099 (1993) (citing *Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988)). This standard is met if the petitioner can demonstrate either: (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged. *See Commonwealth v. Szuchon*, 534 Pa. 483, 487, 633 A.2d 1098, 1100 (1993).

When the disposition granting a petition reinstates a defendant's direct appeal rights *nunc pro tunc*, the judge must advise the defendant by certified mail, return receipt requested that a new notice of appeal must be filed within 30 days of the order.

The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any orders entered pursuant to this rule.

For the requirements for appointment of counsel on second and subsequent petitions, see Rule 904(B).

Relief may be granted without a hearing under paragraph (2) only after an answer has been filed either voluntarily or pursuant to court order.

A PCRA petition may not be dismissed due to delay in filing except after a hearing on a motion to dismiss. *See* 42 Pa.C.S. § 9543(b) and Rule 908.

Nothing in this rule is intended to preclude a judicial district from utilizing the United States Postal Service's return receipt electronic option, or any similar service that electronically provides a return receipt, when using certified mail, return receipt requested.

NOTE: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989, and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; renumbered Rule 907 and amended March 1, 2000, effective April 1, 2001; *Comment* revised September 18, 2008, effective February 1, 2009; amended July 27, 2012, effective September 1, 2012 **[.] ; *Comment* revised , 2014, effective , 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 11, 1997 amendments published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

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 September 18, 2008 revision of the Comment concerning the United States Postal Service's return receipt electronic option published with the Court's Order at 38 Pa.B. 5428 (October 4, 2008).

Final Report explaining the July 27, 2012 amendments to paragraph (4) and the addition of paragraph (5) concerning orders and the proposed revision of the Comment concerning appeals nunc pro tunc published with the Court's Order at 42 Pa.B. (,2012).

Report explaining the proposed revision of the Comment concerning allowance for amendment of the petition published for comment at 44 Pa.B. (, 2014).

RULE 909. PROCEDURES FOR PETITIONS IN DEATH PENALTY CASES: STAYS OF EXECUTION OF SENTENCE; HEARING; DISPOSITION.

(A) Stays of Execution

(1) In a case in which the defendant has received a sentence of death, any request for a stay of execution of sentence should be made in the petition for post-conviction collateral relief.

(2) In all cases in which a stay of execution has been properly granted, the stay shall remain in effect through the conclusion of all PCRA proceedings, including review in the Supreme Court of Pennsylvania, or the expiration of time for seeking such review.

(B) Hearing; Disposition

(1) No more than 20 days after the Commonwealth files an answer pursuant to Rule 906(E)(1) or (E)(2), or if no answer is filed as permitted in Rule 906(E)(2), within 20 days after the expiration of the time for answering, the judge shall review the petition, the Commonwealth's answer, if any, and other matters of record relating to the defendant's claim(s), and shall determine whether an evidentiary hearing is required[.] **, as provided in paragraphs (B)(2) and (B)(3).**

(2) For all first petitions for collateral review in a death penalty case,

(a) the judge shall order an evidentiary hearing.

(b) The judge shall order the attorney for the Commonwealth and the defense attorney, or, if unrepresented, the defendant to appear before the judge within 90 days after the ordering of the evidentiary hearing for a conference before the judge in open court, unless agreed by the defendant to be in chambers, to consider:

(i) setting a date certain for the hearing, which shall not be held later than 180 days from the date of the conference;

(ii) deadlines for amendment of pleadings;

(iii) the simplification or stipulation of factual issues, including the admissibility of evidence; and

(iv) such other matters as may aid in the disposition of the petition.

[(2)] **(3) For second and subsequent petitions, [I]** **i**f the judge is satisfied from this review that there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by any further proceedings,

(a) the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal.

(b) The defendant may respond to the proposed dismissal within 20 days of the date of the notice.

(c) No later than 90 days from the date of the notice, or from the date of the defendant's response, the judge shall issue an order:

(i) dismissing the petition;

(ii) granting the defendant leave to file an amended petition; or

(iii) ordering that an evidentiary hearing be held on a date certain.

The order shall be filed and served as provided in Rule 114.

[(3)] **(d)** If the judge determines that an evidentiary hearing is required, the judge shall enter an order setting a date certain for the hearing, which shall not be scheduled for fewer than 10 days or more than 45 days from the date of the order. The judge may, for good cause shown, grant leave to continue the hearing.

(4) No more than **[90]** **180** days after the conclusion of the evidentiary hearing, the judge shall dispose of the petition.

[(4) When the 90-day time periods in paragraphs (B)(2)(c) and (B)(3) must be delayed, the judge, for good cause shown, may enter an order extending the period for not longer than 30 days.]

(5) If the judge does not act within the **[90 days]** **time periods** mandated by paragraphs **[(B)(2)(c)]** **(B)(3)(c)** or **[(B)(3)]** **(B)(4)**, **[or within the 30 day-extension permitted by paragraph (B)(4),]** the clerk of courts shall send a notice to the judge that the time period for disposing of the petition has expired. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for the Commonwealth, the defendant, and defense counsel, if any.

(6) If the judge does not dispose of the defendant's petition within 30 days of the clerk of courts' notice, the clerk immediately shall send a notice of the judge's non-compliance to the Supreme Court. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for

the Commonwealth, the defendant, and defense counsel, if any.

(7) When the petition for post-conviction collateral relief is dismissed by order of the court,

(a) the clerk immediately shall furnish a copy of the order by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, and defense counsel, if any.

(b) The order shall advise the defendant of the right to appeal from the final order disposing of the petition, and of the time within which the appeal must be taken.

COMMENT: Paragraph (A)(1) was added in 1999 to provide the avenue by which a defendant in a death penalty case may request a stay of execution. Failure to include a request for a stay in the petition for post-conviction collateral relief may not be construed as a waiver, and the defendant may file a separate request for the stay. In cases involving second or subsequent petitions when an application for a stay is filed separately from the PCRA petition, *Commonwealth v. Morris*, 565 Pa. 1, 33-34, 771 A.2d 721, 740-741 (2001) provides that the separate stay application "must set forth: a statement of jurisdiction; if necessary, a statement that a petition is currently pending before the court; and a statement showing the likelihood of prevailing on the merits."

Paragraph (A)(2) provides, if a stay of execution is properly granted, that the stay will remain in effect throughout the PCRA proceedings in the trial court and during the appeal to the Pennsylvania Supreme Court. Nothing in this rule is intended to preclude a party from seeking review of an order granting or denying a stay of execution. *See* Pa.R.A.P. 1702(d) (Stay of Execution) and Pa.R.A.P. 3316 (Review of Stay of Execution Orders in Capital Cases).

The rule was amended in 2014 to require that an evidentiary hearing be held in all first counseled petitions in capital cases. The reason for the requirement is to ensure that a complete and comprehensive collateral review of the case be accomplished by the first petition.

The conference required under paragraph (B)(2)(b) is designed to establish the judge's supervision over the

preparation for the evidentiary hearing, including any amendment to the pleadings, while allowing flexibility for setting the parameters of this process.

When the judge has determined that dismissal without an evidentiary hearing is the appropriate course but discerns the potential for amendment of the petition, the judge has the obligation of providing the defendant with the opportunity to amend the petition. To that end, the judge must provide sufficiently specific reasons for the disposition such that the potential for amendment may be reasonably evaluated by counsel. *See Commonwealth v. Williams*, 556 Pa. 553, 569, 782 A.2d 517, 527 (2001); *Commonwealth v. Rush,* 576 Pa. 3, 14-15, 838 A.2d 651, 657-65 (2003).

Paragraph (B)(3)**(d)** permits the judge to continue the hearing when there is good cause, such as when the judge determines that briefing and argument are necessary on any of the issues, or when there is a problem with securing the defendant's appearance.

It is intended that **in the evidentiary hearing held pursuant to paragraph (B)(2) and,** once a determination is made under paragraph (B)(3)**(d)** of this rule that an evidentiary hearing is required, the provisions of Rule 908(C), (D), and (E) apply.

[Paragraph (B)(4) was added in 2002 to permit the judge to enter an order for one 30-day extension of the 90-day time limit within which the judge must act pursuant to paragraphs (B)(2)(c) and (B)(3) of this rule. When the judge extends the time, the judge promptly must notify the clerk of courts of the extension order.]

The time limit in paragraph (B)(4) within which a judge must dispose of the petition following the evidentiary hearing was extended in 2014 from 90 days to 180 days in recognition of the often complex issues raised in petitions in capital cases. With the extended time, the former provision for a 30-day extension was deleted as no longer necessary.

Paragraph (B)(5) addresses the situation in which the judge does not comply with the rule's time limits. The clerk of courts is required to give the judge notice that the 90-day

time period **[, or the 30-day extension,]** has expired. Further non-compliance requires the clerk to bring the case to the attention of the Supreme Court, which is responsible for the administration of the unified judicial system.

It is expected, if there are extenuating circumstances why the judge cannot act within the time limits of the rule, the judge will provide a written explanation to the Supreme Court.

Paragraph (B)(7) requires the clerk to immediately notify the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, and defense counsel, if any, that the petition has been denied. This notice is intended to protect the defendant's right to appeal.

When the disposition reinstates a defendant's direct appeal rights *nunc pro tunc*, the judge must advise the defendant either in person or by certified mail, return receipt requested that a new notice of appeal must be filed within 30 days of the order.

The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any orders entered pursuant to this rule.

NOTE: Previous Rule 1509 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 1510 August 11, 1997, effective immediately. Present Rule 1509 adopted August 11, 1997, effective immediately; amended July 23, 1999, effective September 1, 1999; renumbered Rule 909 and amended March 1, 2000, effective April 1, 2001; amended February 12, 2002, effective July 1, 2002; amended October 7, 2005, effective February 1, 2006; amended July 27, 2012, effective September 1, 2012 **[.] ; amended , 2014, effective , 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 11, 1997 adoption of new Rule

1509 published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

Final Report explaining the July 23, 1999 amendments concerning stays published with the Court's Order at 29 Pa.B. 4167 (August 7, 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 February 12, 2002 amendments concerning extensions of time and sanctions published with the Court's Order at 32 Pa.B. 1174 (March 2, 2002).

Final Report explaining the October 7, 2005 amendments to paragraph (A)(2) and revision of the Comment concerning Commonwealth v. Morris published with the Court's Order at 35 Pa.B. 5772 (October 22, 2005).

Final Report explaining the July 27, 2012 amendments to paragraph (2)(c) concerning orders and the revision of the Comment concerning appeals nunc pro tunc published with the Court's Order at 42 Pa.B. (, 2012).

Report explaining the proposed amendments to require an evidentiary hearing and scheduling conference in first PCRA petitions published for comment at 44 Pa.B. (, 2014).

REPORT

Proposed Amendments to Pa.Rs.Crim.P. 905, 906, 907, and 909

PRE-DISMISSAL PROCEDURES FOR POST-CONVICTION REVIEW ACT PETITIONS

At the direction of the Court, the Committee undertook an examination of the issues related to pre-dismissal notice in matters arising under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§9541-9546. It had been suggested that problems have arisen due to the practice of frequent and repeated amendments to the petition.

The Committee established a subcommittee to examine in depth what procedural rule changes might be recommended to address these issues. The subcommittee examined the varied practice across Pennsylvania related to the amendment of PCRA petitions as well as suggestions to improve the process. These suggestions included methods of formalizing the pre-decisional amendment process, such as time limitations or limitations on the number of issues that may be raised, as well as more uniform definition of the PCRA court's duty in providing notice of an intention to dismiss and in addressing the issues raised in the petition.

As described more fully below, the subcommittee recommended several proposed rule changes which the Committee subsequently modified. These modified proposals are being published for comment.

Proposed Rule Changes

The Committee, concurring with the recommendations of the subcommittee, concluded that there was a genuine problem, particularly in Philadelphia, with the practice of frequent and repeated amendment of PCRA petitions. There was considerable discussion of the best way to structure the process for amending petitions to make it more efficient. The Committee discussed setting a time limit after which amendment would be permitted only upon cause. However, the Committee concluded that no practical time limitation could be set given the wide divergence of practice across the state, including the often lengthy process for providing counsel in some jurisdictions. Ultimately, it was concluded that the best manner to address the

excessive amendment problem was by having the PCRA court exercise more control over that process.

The subcommittee favored a change designed to impress on judges that amendment should not be automatic but rather the request to amend should be reviewed and permitted only if there was a good reason for not including the claim in the initial petition. This also would help to break the current practice by some counsel who do not review their initial filings, knowing that they will always be able to amend it.The subcommittee suggested that the phrase "upon cause shown" be added to Rule 905(A) to modify the allowance of amendments. The subcommittee also felt that part of the problem of the practice of automatically permitted amendments lay with the sentence in Rule 905(A), "Amendment shall be allowed to achieve substantial justice," and so recommended that that language be deleted. Additionally, it was recommended that language be added to the *Comment* to describe the reason for the change and to indicate that requests to amend the petition must show a reason why the information was not included in the original petition.

In reviewing the subcommittee's recommendations, the Committee supported placing limitations on excessive amendments. However, the Committee as a whole was reluctant to place an absolute requirement that good cause must be shown for any amendment to be made. It was noted that often the initial petition will be filed *pro se* or that some review is necessary before a full listing of the issues can be made. The Committee therefore agreed that a procedure should be added to Rule 905 to provide the defendant, either *pro se* or counseled, one "free" amendment of the petition as of right with any subsequent amendment permitted only upon a determination of cause shown. In the draft above, Rule 905(A) would contain this procedure. The *Comment* would also be changed to reflect this new procedure.

Since the language in Rule 906 regarding amendment of the answer to the petition paralleled that in Rule 905, the Committee considered whether similar amendments regarding the requirement to show cause should be added for any amendment to the answer. However, there was discussion whether it was necessary to amend Rule 906 since an answer serves a different role in the collateral review process. Additionally, the Committee concluded that, in most cases, the only time when an answer would be amended would be when the petition had been amended. In the draft

above, therefore, language has been added to paragraphs (D) and (E)(3) of Rule 906 that would provide for an automatic allowance of amendment when the petition had been amended but a need for showing cause if the answer was sought to be amended independently.

The subcommittee recommended that Rule 907(1) be amended by adding a phrase "for cause shown" as a requirement for amendment and that the phrase in Rule 907(1), "shall state in the notice the reasons for the dismissal" should be changed to "shall identify any procedural defects that can be cured to avoid dismissal" to indicate the amendment process is meant to be a means of correcting errors rather than for introducing new issues that should have been raised initially. However, the Committee concluded that the standard for amendment should be broader than merely correcting procedural defects and those changes have not been included.

The Committee considered the suggestion that there should be restrictions placed on the number of issues that may be raised in the petitions. However, the Committee believed that any such limitation would be arbitrary and likely to be challenged. For these reasons, this suggestion was not included in the final proposal.

The Committee agreed that the PCRA court should be obliged to address every claim and sub-claim in its notice of intent to dismiss cases. The Committee concluded that the PCRA court is in the best position to transmit to the appellate courts what happened in the case and ultimately would provide for a more efficient review. Further, failure of the PCRA court to address some of the claims would only lead to increased litigation.

However, the Committee agreed that some guidance about how extensively each issue should be addressed would be helpful. The Committee believed that language from case law could be used to further define how the issues should be discussed. In particular, they examined *Commonwealth v. Williams,* 566 Pa. 553, 782 A.2d 517 (2001). This capital case describes the standard that the PCRA court should meet regarding pre-dismissal notice:

> Pursuant to Rule of Criminal Procedure 1509(C)(1), a PCRA court is obliged to provide a capital defendant with pre-dismissal notice of its reasons for dismissal, *see* Pa.R.Crim.P. 1509(C)(1), and the opportunity is

> thus provided for a defendant to seek leave to amend to cure any material defect in the petition, *see* Pa.R.Crim.P. 1509(C)(3)(b). *See generally* Pa.R.Crim.P. 1505(b) (prescribing that, when a petition is defective as originally filed, a PCRA court "shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed"); Pa.R.Crim.P. 1505(a) (providing that amendment of post-conviction petitions may be granted by a PCRA court "at any time," and "shall be freely allowed to achieve substantial justice"). Particularly in light of the legislative scheme channeling all forms of claims through the PCRA and limiting the opportunity for seeking post-conviction review to the one-year period after the judgment of sentence becomes final, *see* 42 Pa.C.S. § 9545, both PCRA courts and counsel must pay careful attention to their respective obligations under the rules. Where PCRA courts discern the potential for amendment, it is their obligation under Rule 1505(b) to specifically allow the opportunity; where dismissal is deemed the appropriate course, the court must obviously provide sufficiently specific reasons for the disposition such that the potential for amendment may be reasonably evaluated by counsel. Upon receipt of either form of notice, counsel must undertake a careful review of the pleadings and other materials submitted to ensure that a sufficient offer has been made to warrant merits review. These procedures are afforded not only to protect the integrity of the process and the rights of a capital petitioner in the common pleas setting, but also to provide the essential predicate for appellate review of the post-conviction proceedings by this Court. 566 Pa. at 568-569, 782 A.2d at 526-527.

Language taken from the foregoing would be added to the *Comments* to Rules 907 and 909 to guide the PCRA courts to describe the reasons for their dismissal. A cross-reference to the *Williams* case and to the similar holding in *Commonwealth v. Rush*, 576 Pa. 3, 838 A.2d 651 (2003) would be added to the *Comment* as well.

The Committee also considered a proposed word limitation to the size of the petition to be added to Rule 902. This would have been based on Appellate Rule 2135 that limits the size of appellate briefs to 14,000 words. However, the Committee ultimately rejected this as unnecessary.

Amendment of Capital Case PCRA Petitions

The Committee concluded that issues associated with capital cases are the most complex and undergo the most extensive review. The Committee determined that the

case in which an initial PCRA petition should be dismissed without a hearing would be rare. Therefore, the most effective way to address problems arising from the dismissal of PCRA petitions in a capital case without a hearing was to require that a hearing be held for the initial PCRA petition in every capital case. Second and subsequent petitions could still be dismissed without a hearing.

This led the Committee to consider the best method of ensuring that the initial PCRA review would be the most effective and adequately address the issues presented while providing an appropriate structure to the amendment process that would be fair to all the parties. This would be accomplished by requiring the parties to participate in a "scheduling conference" to review the issues that have been raised by the petition and determine how much time and resources would be needed to develop these issues thus ensuring court oversight at an early stage in the process.

Therefore, a new paragraph (B)(2) has been added to Rule 909 to require a hearing in all initial PCRA petitions in capital cases. The language of this amendment is modeled on Rule 570 (Pretrial Conferences). It includes a list of some of the topics that should be considered at this conference.

The original procedure that permitted dismissal without a hearing would be retained for second or subsequent petitions as paragraph (B)(3). Language regarding the pre-dismissal advice similar to that proposed for the Rule 907 *Comment* would also be added to the Rule 909 *Comment* as well as the cross-references to *Williams* and *Rush*.

The Committee believed that, given the complexity of issues usually raised in capital case PCRAs, the period in which the court should make its determination should be increased to 180 days but that the provision permitting a 30-day extension should be removed.