

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to recommend amendment to the notes of Pa.R.A.P. 341, 902, 1112, 1115, 2116, and 2119. This proposal is being submitted for public comments, suggestions and concerns prior to submission to the Supreme Court.

Proposed new material is underlined and in bold face type and deleted material is bracketed and in bold face type.

All communications in reference to the proposed amendment should be sent no later than **July 22, 2013** to:

Appellate Court Procedural Rules Committee

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601 Commonwealth Ave., Suite 6200
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Harrisburg, Pennsylvania 17106-2635
or Fax to
(717) 231-9551
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An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Renée Cohn Jubelirer
Chair

EXPLANATORY COMMENT

Discretionary Aspects of Sentence

Although a challenge to the legality of a sentence cannot be waived, a challenge to the discretionary aspects of a sentence can. Moreover, review of the discretionary aspects of a sentence are limited by statute in two ways.

First, even when objections have been preserved, the appellate court (generally Superior Court)¹ undertakes a threshold analysis (referred to in the statute as a petition for allowance of appeal). The appellant – whether the defendant or the Commonwealth – does not file a separate petition, however; instead, the challenge is raised in a separate section of the merits brief. See 42 Pa.C.S. § 9781(b); *Commonwealth v. Childs*, 664 A.2d 994, 996 (Pa. Super. 1995). Failure to comply with the requirements to set forth the basis for the court’s review in a separate section of the brief necessarily waives the challenge to the discretionary aspects of the sentence, if the opposing party raises the procedural defect, and may waive it even if the opposing party fails to raise the procedural defect. Because challenges to the legality of a sentence are not foreclosed, regardless of the extent of preservation, there are several cases in which persons have sought to characterize an issue as relating to “legality” rather than discretion, but the Supreme Court has cautioned that persons should file post-sentence motions and Rule 2119(f) statements for all sentencing claims. See *Commonwealth v. Foster*, 17 A.3d 332, 345 n.20 (Pa. 2011). Indeed, the only categories of challenges that the Court has recognized as challenges to the legality of a sentence are those in which a court’s authority to use discretion has been constrained or those in which the sentence imposed is patently inconsistent with the parameters set forth by the General Assembly. *Id.* at 342. These include challenges under *Apprendi*, merger, double jeopardy, and sentencing outside a minimum or maximum. *Id.* at 338, 342.

Second, the statute permits only one level of review. Nonetheless, the Supreme Court has recognized that the statutory limitation does not preclude it from reviewing “the application of legal principles, including the issue of whether a lower court exceeded its standard of review in supplanting the sentencing court’s discretion.” *Commonwealth v. Perry*, 32 A.3d 232, 236 n.10 (Pa. 2011), although there have been multiple cases in which the dissent raised a concern that such review was contrary to 42 Pa.C.S. § 9781.

The appellate rules had not been updated in this area in quite some time, and there is concern that leaving only the old citations in the notes could be confusing to practitioners and may be outdated. As a result, the Appellate Court Procedural Rules

¹ In *Commonwealth v. Mouzon*, 912 A.2d 617 (Pa. 2002), the Supreme Court explained that when a capital defendant appeals to the Supreme Court, the Supreme Court considers all questions relating to lesser sentences as well, including challenges to the discretionary aspects of a sentence. *Id.* at 622.

Committee appointed a subcommittee to study the issue, and now proposes the following Recommendation.

Rule 341. Final Order; Generally.

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Official Note:

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[Criminal Law Proceedings—Discretionary Aspects of Sentencing—Section 9781 of the Sentencing Code (42 Pa.C.S. § 9781) states that the defendant or the Commonwealth may “petition for allowance of appeal” of the discretionary aspects of a sentence for a felony or a misdemeanor. The practice under these rules is to file a notice of appeal. See note to Rule 902 (manner of taking appeal). If the defendant has a right to an appeal with respect to the discretionary aspects of a sentence, the appellate court must, of course, entertain the appeal. Otherwise, such an appeal may be entertained by an appellate court if, but only if, it appears to the court that there is a substantial question that the sentence imposed is not appropriate under the applicable guidelines.]

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Rule 902. Manner of Taking Appeal.

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Official Note:

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Section 9781 of the Sentencing Code (42 Pa.C.S. § 9781) provides that the defendant or the Commonwealth may file a “petition for allowance of appeal” of the discretionary aspects of a sentence for a felony or a misdemeanor. The notice of appeal under this chapter (see **[Rule]Pa.R.A.P. 904 [(content of the notice of appeal)]**), **in conjunction with the requirements set forth in Pa.R.A.P. 2116(b) and 2119(f)**, operates as the “petition for allowance of appeal” under the Sentencing Code. **[It automatically raises all possible questions under 42 Pa.C.S. § 9781 and is available and appropriate even where no issue relating to guilt or the legality of the sentence (in the sense that the sentence falls outside of the range of discretion vested by law in the sentencing court) is presented.]** No additional wording is required or appropriate in the notice of appeal. **See Pa.R.A.P. 2116(b) and the note thereto; Pa.R.A.P. 2119(f) and the note thereto. Although 42 Pa.C.S. § 9781(f) limits appeals to “the appellate court that has initial jurisdiction for such**

appeals” the Supreme Court may review “the application of legal principles, including the issue of whether a lower court exceeded its standard of review in supplanting the sentencing court’s discretion.” *Commonwealth v. Perry*, 32 A.3d 232, 236 n.10 (Pa. 2011).

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Rule 1112. Appeals by Allowance.

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Official Note:

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[With regard to Subdivision (f) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Entry of Appearance and Appointment of Counsel; *In Forma Pauperis*).]

With respect to appearances by new counsel following the initial docketing of appearances pursuant to **[Subdivision]paragraph** (f) of this rule, please note the requirements of Rule 120[0].

Where an appellant desires to challenge the discretionary aspects of a sentence of a trial court the “petition for allowance of appeal” is deferred until the briefing stage, and the appeal is commenced by filing a notice of appeal pursuant to Chapter 9 rather than a petition for allowance of appeal pursuant to Chapter 11. See note to Pa.R.A.P. 902; note to Pa.R.A.P. 1115; Pa.R.A.P. 2116(b) and the note thereto; Pa.R.A.P. 2119(f) and the note thereto.

Rule 1115. Content of the Petition for Allowance of Appeal.

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Official Note:

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Where an appellant desires to challenge the discretionary aspects of a sentence of a trial court [no “petition for allowance of appeal”, as that term is used in these rules, may be filed and the practice is governed by Chapter 9 (appeals from lower courts).] the “petition for allowance of appeal” is deferred until the briefing stage, and the appeal is commenced by filing a notice of appeal pursuant to Chapter 9 rather than a petition for allowance of appeal pursuant to Chapter 11. *Commonwealth v. Tuladeziecki*, 522 A.2d 17, 18 (Pa. 1987). See note to [Rule] Pa.R.A.P. 902 [(manner of taking appeal)]; note to Pa.R.A.P. 1112; Pa.R.A.P. 2116(b) and the note thereto; Pa.R.A.P. 2119(f) and the note thereto.

Rule 2116. Statement of Questions Involved

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(b) *Discretionary aspects of sentence.* An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall include any questions relating to the discretionary aspects of the sentence imposed (but not the issue whether the appellate court should exercise its discretion to reach such question) in the statement required by **[Subdivision]paragraph** (a). Failure to comply with this **[subdivision]paragraph** shall constitute a waiver of all issues relating to the discretionary aspects of sentence.

Official Note:

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The requirement set forth in Pa.R.A.P. 2116(b) is part of the procedure set forth by the Supreme Court to implement the standard set forth in 42 Pa.C.S. § 9781(b). *Commonwealth v. Tuladeziecki*, 522 A.2d 17, 18 (Pa. 1987). See note to Pa.R.A.P. 902; note to Pa.R.A.P. 1112; note to Pa.R.A.P. 1115; and Pa.R.A.P. 2119(f) and the note thereto.

Rule 2119. Argument

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(f) *Discretionary aspects of sentence.* An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of the sentence.

Official Note:

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[In some circumstances an appellant may have a right to appellate review of the discretionary aspects of a sentence. See note to Rule 341 (final orders generally). In such cases a citation to the controlling authority will suffice for purposes of Subdivision (f).] Where a challenge is raised to the discretionary aspects of sentencing, the “petition for allowance of appeal” specified in 42 Pa.C.S. § 9781 is deferred until the briefing stage, and the appeal is commenced by filing a notice of appeal pursuant to Chapter 9 rather than a petition for allowance of appeal pursuant to Chapter 11. In order to assert a challenge to the discretionary aspects of a sentence, the issue must first be raised at the sentencing hearing or in a motion to modify the sentence imposed at the hearing and, in accordance with the provisions of this rule, the appellant (whether the Commonwealth or the defendant) must set forth clear reasons why the sentence was not consistent with the Sentencing Code and must do so in compliance with the requirements of this rule and Pa.R.A.P. 2116(b). *Commonwealth v. Anderson*, 830 A.2d 1013, 1016 (Pa. Super. 2003). If the appellant complies with these rules, the court will determine whether there is a substantial question as to the sentence imposed. *Commonwealth v. Tuladeziecki*, 522 A.2d 17, 18 (Pa. 1987). If these rules are not complied with and the opposing party fails to object to the procedural defect, the court may likewise determine for itself whether a substantial question has been presented. *Commonwealth v. Bailey*, 534 A.2d 829 (Pa. Super. 1987); *Commonwealth v. Gambal*, 561 A.2d 710 (Pa. 1989). If these rules are not complied with and the opposing party raises the procedural defect, the court will not reach the merits of the challenge to the discretionary aspects of sentence on appeal. *Tuladeziecki*, 522 A.2d at 18.