SUPREME COURT OF PENNSYLVANIA
NOTICE OF PROPOSED RULEMAKING

Proposed Adoption of new Pa.Rs. Crim.P. 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, Amendment of Pa.Rs.Crim.P. 113, 119, 909 and Revision of the *Comments* to Pa.Rs.Crim.P. 120, 800, and 904

Proposed Adoption of Pa.R.A.P. 3311, 3312, 3314, 3315, 3316, 3319, Rescission of Pa.R.A.P. 1704, 1941, 3315, 3316, Amendment of Pa.Rs.A.P. 702, 901, 909, 1501, 1702, 1761, 2189, 2521, 2572, 3313 and Revision of the *Official Notes* to Pa.Rs.A.P. 2151, 2152, 2154, 2155, and 2187

The Supreme Court of Pennsylvania is considering the adoption of new Pa.Rs. Crim.P. 850-862, amendment of Pa.Rs.Crim.P. 113, 119, 909, and revision of the *Comments* to Pa.Rs.Crim.P. 120, 800, and 904, and the adoption of Pa.R.A.P. 3311-3316, and 3319, the rescission of Pa.R.A.P. 1704, 1941, 3315, 3316, the amendment of Pa.R.A.P. 702, 901, 909, 1501, 1702, 1761, 2189, 2521, 2572, 3313, and the revision of the *Official Notes* to Pa.R.A.P. 2151, 2152, 2154, 2155, and 2187 for the reasons set forth in the accompanying explanatory report. This would result in the replacement of Pa.R.A.P. 3315 and 3316 with entirely new rules, and it would have the effect of consolidating all of the rules for capital appeals into the chapter dedicated to Supreme Court procedure. These amendments do not reflect proposed revisions to the Rules of Appellate Procedure that have been published for consideration to address other matters that the Appellate Court Procedural Rules Committee is currently considering. 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 adoption by the Supreme Court.

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

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

Daniel Durst, Chief Rules Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
fax: (717) 231-9521
e-mail: rulescommittees@pacourts.us

All communications in reference to the proposal should be received by **no later than Thursday, October 12, 2017.** E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail.

August 1, 2017

RULES OF CRIMINAL PROCEDURE

RULE 113. CRIMINAL CASE FILE AND DOCKET ENTRIES.

(A) The clerk of courts shall maintain the criminal case file for the court of common pleas. The criminal case file shall contain all original records, papers, and orders filed in the case, and copies of all court notices. These records, papers, orders, and copies shall not be taken from the custody of the clerk of court without order of the court. Upon request, the clerk shall provide copies at reasonable cost.

(B) The clerk of courts shall maintain a list of docket entries: a chronological list, in electronic or written form, of documents and entries in the criminal case file and of all proceedings in the case.

(C) The docket entries shall include at a minimum the following information:

(1) the defendant's name;

(2) the names and addresses of all attorneys who have appeared or entered an appearance, the date of the entry of appearance, **[and]** the date of any withdrawal of appearance**, and a notation when an attorney is appointed or enters an appearance pursuant to Rule 854;**

(3) notations concerning all papers filed with the clerk, including all court notices, appearances, pleas, motions, orders, verdicts, findings and judgments, and sentencings, briefly showing the nature and title, if any, of each paper filed, writ issued, plea entered, and motion made, and the substance of each order or judgment of the court and of the returns showing execution of process;

(4) notations concerning motions made orally or orders issued orally in the courtroom when directed by the court;

(5) a notation of every judicial proceeding, continuance, and disposition;

(6) a notation if the defendant was under the age of 18 at the time of the commission of the alleged offense and charged with one of the offenses excluded from the definition of ''delinquent act'' in paragraphs (2)(i), (2)(ii), and (2)(iii) of 42 Pa.C.S. § 6302;

(7) the location of exhibits made part of the record during the proceedings; and

(8) all other information required by Rules 114 and 576.

COMMENT: This rule sets forth the mandatory contents of the list of docket entries and the criminal case files. This is not intended to be an exhaustive list of what is required to be recorded in the docket entries. The judicial districts may require additional information be recorded in a case or in all cases.

The list of docket entries is a running record of all information related to any action in a criminal case in the court of common pleas of the clerk's county, such as dates of filings, of orders, and of court proceedings. The clerk of courts is required to make docket entries at the time the information is made known to the clerk, and the practice in some counties of creating the list of docket entries only if an appeal is taken is inconsistent with this rule.

Nothing in this rule is intended to preclude the use of automated or other electronic means for time stamping or making docket entries.

This rule applies to all proceedings in the court of common pleas at any stage of a criminal case.

The requirement in paragraph (C)(2) that all attorneys and their addresses be recorded makes certain there is a record of all attorneys who have appeared for any litigant in the case. The requirement also ensures that attorneys are served as required in Rules 114 and 576. *See also* Rule 576(B)(4) concerning certificates of service.

In those cases in which the attorney has authorized receiving service by facsimile transmission or electronic means, the docket entry required in paragraph (C)(2) must include the facsimile number or electronic address.

Paragraph (C)(4) recognizes that occasionally disposition of oral motions presented in open court should be reflected in the docket, such as motions and orders related to omnibus pretrial motions (Rule 578), motions for a mistrial (Rule 605), motions for changes in bail (Rule 529), and oral motions for extraordinary relief (Rule 704(B)).

Unexecuted search warrants are not public records, see Rule 212(B), and therefore are not to be included in the criminal case file nor are they to be docketed.

RULE 119. USE OF TWO-WAY SIMULTANEOUS AUDIO-VISUAL COMMUNICATION IN CRIMINAL PROCEEDINGS.

(A) The court or issuing authority may use two-way simultaneous audio-visual communication at any criminal proceeding except:

(1) preliminary hearings;

(2) proceedings pursuant to Rule 569(A)(2)(b);

(3) proceedings pursuant to Rules 595 and 597;

(4) trials;

(5) sentencing hearings;

(6) parole, probation, and intermediate punishment revocation hearings; **[and]**

(7) proceedings pursuant to Part C of Chapter 8 (Procedures for Determining and Challenging the Defendant's Competency to be Executed) when the defendant's presence is mandated by rule; and

[7] (8) any proceeding in which the defendant has a constitutional or statutory right to be physically present.

(B) The defendant may consent to any proceeding being conducted using two-way simultaneous audio-visual communication.

(C) When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.

COMMENT: This rule was adopted in 2003 to make it clear that unless the case comes within one of the exceptions in paragraph (A), the court or issuing authority may use two-way simultaneous audio-visual communication in any criminal proceeding. Two-way simultaneous audio-visual communication is a type of advanced communication technology as defined in Rule 103.

Except in cases in which the defendant's presence is mandated pursuant to Part C of Chapter 8, [N]nothing in this rule is intended to limit any right of a defendant to waive

his or her presence at a criminal proceeding in the same manner as the defendant may waive other rights. *See*, *e.g.*, Rule 602 *Comment*.

In proceedings under Part C of Chapter 8, the defendant is required to appear in person for examinations and hearings conducted under Rules 861 and 862. The defendant is not required to appear for pre-hearing conferences.

Negotiated guilty pleas when the defendant has agreed to the sentence, probation revocation hearings, and hearings held pursuant to Rule 908(C) and the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq*., are examples of hearings in which the defendant's consent to proceed using two-way simultaneous audio-visual communication would be required. Hearings on post-sentence motions, bail hearings, bench warrant hearings, extradition hearings, and *Gagnon* I hearings are examples of proceedings that may be conducted using two-way simultaneous audio-visual communication without the defendant's consent. It is expected the court or issuing authority would conduct a colloquy for the defendant's consent when the defendant's constitutional right to be physically present is implicated.

Within the meaning of this rule, counsel is present when physically with the defendant or with the judicial officer conducting the criminal proceeding.

This rule does not apply to preliminary arraignments (Rule 540), arraignments (Rule 571), or to search warrant (Rule 203) and arrest warrant (Chapter 5 Part B(3)) procedures.

This rule is not intended to preclude the use of advanced communication technology for the preservation of testimony as permitted by Rules 500 and 501.

See Rule 542 for the procedures governing preliminary hearings.

See Chapter 6 for the procedures governing trials.

See Chapter 7 for the procedures governing sentencing hearings.

See Rule 708 for the procedures governing revocation of probation, intermediate punishment, and parole.

The paragraph (A)**[(5)] (6)** reference to revocation hearings addresses *Gagnon* II-type probation (*Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) and parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)) revocation hearings, and is not intended to prohibit the use of two-way simultaneous audio-visual communication in hearings to determine probable cause (*Gagnon* I).

RULE 120. ATTORNEYS -- APPEARANCES AND WITHDRAWALS.

(A) ENTRY OF APPEARANCE

(1) Counsel for defendant shall file an entry of appearance with the clerk of courts promptly after being retained, and serve a copy of the entry of appearance on the attorney for the Commonwealth.

(a) If a firm name is entered, the name of an individual lawyer shall be designated as being responsible for the conduct of the case.

(b) The entry of appearance shall include the attorney's address, phone number, and attorney ID number.

(2) When counsel is appointed pursuant to Rule 122 (Appointment of Counsel), the filing of the appointment order shall enter the appearance of appointed counsel.

(3) Counsel shall not be permitted to represent a defendant following a preliminary hearing unless an entry of appearance is filed with the clerk of courts.

(4) An attorney who has been retained or appointed by the court shall continue such representation through direct appeal or until granted leave to withdraw by the court pursuant to paragraph (B).

(B) WITHDRAWAL OF APPEARANCE

(1) Counsel for a defendant may not withdraw his or her appearance except by leave of court.

(2) A motion to withdraw shall be:

(a) filed with the clerk of courts, and a copy concurrently served on the attorney for the Commonwealth and the defendant; or

(b) made orally on the record in open court in the presence of the defendant.

(3) Upon granting leave to withdraw, the court shall determine whether new counsel is entering an appearance, new counsel is being appointed to represent the defendant, or the defendant is proceeding without counsel.

COMMENT: Representation as used in this rule is intended to cover court appearances or the filing of formal motions. Investigation, interviews, or other similar pretrial matters are not prohibited by this rule.

For admission *pro hac vice*, see Pa.B.A.R. 301.

An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Paragraph (A)(2) was added in 2005 to make it clear that the filing of an order appointing counsel to represent a defendant enters the appearance of appointed counsel. Appointed counsel does not have to file a separate entry of appearance. Rule 122 (Appointment of Counsel) requires that (1) the judge include in the appointment order the name, address, and phone number of appointed counsel, and (2) the order be served on the defendant, appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

Under paragraph (B)(2), counsel must file a motion to withdraw in all cases, and counsel's obligation to represent the defendant, whether as retained or appointed counsel, remains until leave to withdraw is granted by the court. *See, e.g., Commonwealth v. Librizzi,* 810 A.2d 692 (Pa. Super. **[Ct.]** 2002). The court must make a determination of the status of a case before permitting counsel to withdraw. Although there are many factors considered by the court in determining whether there is good cause to permit the withdrawal of counsel, when granting leave, the court should determine whether new counsel will be stepping in or the defendant is proceeding without counsel, and that the change in attorneys will not delay the proceedings or prejudice the defendant, particularly concerning time limits. In addition, case law suggests other factors the court should consider, such as whether (1) the defendant has failed to meet his or her financial obligations to pay for the attorney's services and (2) there is a written contractual agreement between counsel and the defendant terminating

representation at a specified stage in the proceedings such as sentencing. *See, e.g., Commonwealth v. Roman**[. Appeal of Zaiser***]**, 549 A.2d 1320 (Pa. Super. **[Ct.]**1988).

If a post-sentence motion is filed, trial counsel would normally be expected to stay in the case until disposition of the motion under the post-sentence procedures adopted in 1993. *See* Rules 704 and 720. Traditionally, trial counsel stayed in a case through post-verdict motions and sentencing.

For the filing and service procedures, see Rules 575-576.

For waiver of counsel, see Rule 121.

For the procedures for appointment of counsel, see Rule 122.

***See* Rule 854(B) that requires an attorney who has been retained to represent a defendant in proceedings under Part C of Chapter 8 to file a written entry of appearance.**

See Rule 904(A) that requires an attorney who has been retained to represent a defendant during post-conviction collateral proceedings to file a written entry of appearance.

CHAPTER 8. SPECIAL RULES FOR CASES IN WHICH DEATH SENTENCE IS AUTHORIZED

PART A. GUILT AND PENALTY DETERMINATION PROCEDURES

RULE 800. APPLICABILITY OF PART A.

Except as provided in Rule 801, the rules in Part A shall apply to the guilt and penalty determination phases of all cases in which the imposition of a sentence of death is authorized by law.

> COMMENT: The 1990 amendment to this rule made it clear that Part A of Chapter 8 applies to both the guilt determination and sentencing phases of cases in which the death penalty is authorized. The chapter was amended in 2013 by the addition of Part B providing special procedures for seeking to preclude imposition of a sentence of death by reason of the defendant's mental retardation. **The chapter was amended in [DATE] by the addition of Part C providing procedures for determining and challenging the defendant's competency to be executed.**
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> Except as provided in Part A, trial and retrial procedures in death penalty cases are governed by the Rules of Criminal Procedure generally.
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> For sentencing generally in death penalty cases, see the Sentencing Code, 42 Pa.C.S. § 9711.
>
> The sentencing procedures in Part A and in the Sentencing Code also apply when the trial court orders a new sentencing proceeding, or when the Supreme Court vacates a sentence of death and remands a case for redetermination of sentence pursuant to 42 Pa.C.S. § 9711 (h)(4).
>
> When a jury is empaneled for the first time for sentencing, or for resentencing, the jury trial rules (Chapter 6) apply. *See*, for example, Rule 631 (Examination and Challenges of Trial Jurors).
>
> Part A does not provide procedures for those cases in which the Supreme Court vacates a sentence of death and

remands the case to the trial court for the imposition of a life imprisonment sentence. *See* 42 Pa.C.S. § 9711(h)(4).

For post-verdict procedures in cases in which a sentence of death is authorized by law, see Rule 811.

[This is an entirely new Part.]

PART C. PROCEDURES FOR DETERMINING AND CHALLENGING THE DEFENDANT'S COMPETENCY TO BE EXECUTED

Explanatory Comment to Part C-[DATE]

The rules in Part C provide the procedures for resolving issues of competency to be executed.

After a death sentence is affirmed, the Supreme Court transmits a copy of the record to the Governor. 42 Pa.C.S. § 9711(i). Within 90 days of receipt, unless a pardon or commutation has issued, the Governor issues a warrant of execution directed to the Secretary of Corrections, fixing a date of execution within 60 days. 61 Pa.C.S. § 4302(a)(1), (b). If a reprieve or judicial stay causes the warrant period to lapse, the Governor reissues a warrant within 30 days after termination of the reprieve or stay, again fixing a date for execution within 60 days. *Id*. § 4302(a)(2). Execution warrants typically issue after a defendant is denied relief on direct appeal, on a collateral attack arising under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, on federal habeas corpus review, and after the expiration of any ensuing stay or reprieve.

Pursuant to the Eighth Amendment to the United States Constitution, the Commonwealth cannot execute a defendant who does not meet minimal competency standards. *See Ford v. Wainwrig*ht, 477 U.S. 399, 409-10 (1986). A defendant is incompetent to be executed if he or she suffers from a mental illness preventing a factual awareness and a rational understanding of the punishment to be imposed and the reasons for its imposition. *See Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007); *Commonwealth v. Banks,* 29 A.3d 1129, 1144 (Pa. 2011) ("*Banks II*"). If the defendant makes a substantial threshold showing of incompetency, due process requires a judicial procedure to resolve the issue. *See Panetti*, 551 U.S. at 934-35, 949-50. *Panetti* did not set forth "precise limits" of the process required; at a minimum, due process requires a fair hearing, an opportunity to be heard in a procedure that may be far less formal than a trial, and an opportunity to present argument and submit evidence, including expert mental health evidence. *See id*. at 949-51 (discussing *Ford*, 477 U.S. at 424, 426 -27 (Powell, J., concurring and concurring in judgment)).

There is no point in entertaining *Ford* execution competency claims whenever an execution warrant issues; absent a valid waiver of further review, for example, a warrant issued after direct appeal will be stayed to allow for PCRA review. Moreover, a defendant's mental condition can improve or deteriorate over time. Thus, it is better to defer *Ford* claims until there is a reasonable likelihood that execution is imminent; in the ordinary case, this means deferral at least until state and federal avenues of collateral

review as of right have been exhausted or waived. *See Panetti*, 551 U.S. at 946 (noting the "empty formality in requiring prisoners to file unripe *Ford* claims").

In 2007, the Supreme Court, presented with a ripe *Ford* claim, noted the absence of existing procedures for the timely consideration of the claim. *Commonwealth v. Banks*, 943 A.2d 230, 234-35 n.7 (Pa. 2007) (*Banks I*). The Court directed its criminal and appellate procedural rules committees to consider a protocol. The rules in Part C establish those procedures applicable in the lower court, and a related revision of the Rules of Appellate Procedure establishes the procedures on appeal. *See* Pa.R.A.P. 3315 (Review of Orders Determining Competency to be Executed).

The committees' proposal deemed a *Ford* claim ripe whenever an execution warrant issued: counsel would be appointed if the defendant was unrepresented and counsel's motion challenging competency would initiate the *Ford* claim. The committees also believed it was unrealistic to attempt to resolve a *Ford* claim within the 60-day term of an execution warrant. The proposal further envisioned that, if the defendant made a substantial threshold showing of incompetency, requiring a hearing, a 210-day stay of execution would follow.

The Court had reservations with the lengthy stay of execution, which could be secured by untested expert opinions and supporting documents, as well as the absence of a mechanism to resolve a meritless *Ford* claim before an execution warrant expired. The Court was also concerned with the prospect of serial challenges and stays, and the resulting effect upon executive administration of the scheme of capital punishment designed by the General Assembly.

Accordingly, in May 2014, the Court transmitted to the Governor and legislative leaders a status report on these potential procedural developments. The Court outlined its concerns and advised that, before implementing procedures affecting administration of capital punishment, it was inviting the input of the executive and legislative branches. The Court received no response.

The Court then revised the committees' proposals to allow for (1) a more timely identification of ripe *Ford* claims, and (2) the prospect of resolving cases posing no colorable *Ford* issue before expiration of an execution warrant. The rules in Part C recognize that if there is a reasonable likelihood that execution is imminent, there is no reason to await the execution warrant before beginning the process of identifying a colorable *Ford* claim. The Commonwealth knows or should know the status of the case, including when each stage of review becomes final and a reprieve or stay expires, and may project when a warrant will issue and the likelihood execution will proceed. The Department of Corrections likewise can track the case and can monitor the defendant's mental condition in anticipation of an execution warrant.

The rules thus establish a procedure tied to the expectation that the prosecutor will monitor the case and the Department will monitor the defendant. To secure the accelerated consideration necessary to timely resolve the preliminary issue of entitlement to a hearing, the rules require the prosecutor to determine, in advance of the issuance of a warrant, when there is a reasonable likelihood both that a warrant will issue and execution will occur. In such cases, the prosecutor must then seek a competency certification from the Secretary of Corrections. If the Secretary certifies that the defendant is competent, the rules establish an accelerated procedure to timely resolve any challenge to the certification. If the Secretary does not certify that the defendant is competent, a stay will issue and the rules provide the procedures for an expeditious determination of any ensuing challenge, but do not contemplate a final decision before the warrant expires.

In further recognition of the time constraints when execution is imminent, the rules require that *Ford* claims be litigated in the judicial district where the defendant is confined. Centralization also facilitates the defendant's presence if a hearing is required, and should create greater expertise in those judicial districts passing upon *Ford* claims.

The new criminal and appellate rules addressing competency require coordination and cooperation among counsel, the lower court, the lower court clerk, the Department of Corrections, and the Prothonotary of the Supreme Court to facilitate the timely litigation of *Ford* claims, including expedited review.

PART C(1). PRELIMINARY PROVISIONS

RULE 850. SCOPE.

The rules in Part C provide the procedures for determining a defendant's competency to be executed.

RULE 851. DEFINITIONS.

The following words and phrases, as used in Part C, shall have the following meanings:

(1) "Competency" means competency to be executed.

(2) "Department" means the Department of Corrections.

(3) "Judge" includes the judge of the court of common pleas in the county in which the defendant was convicted and sentenced, or the judge in the judicial district in which a competency challenge is being litigated.

(4) "Mental Health Expert" includes a psychiatrist, a licensed psychologist, a physician, or any other expert in the field of mental health who will be of substantial value in the determination of the defendant's competency to be executed.

(5) "Prosecutor" means the Attorney General or the county district attorney responsible for the prosecution of the defendant.

(6) "Prothonotary" means the Prothonotary of the Supreme Court of Pennsylvania.

(7) "Secretary" means the Secretary of Corrections.

RULE 852. GENERAL PROVISIONS.

(A) Place of Filing

Unless otherwise directed by the judge, all motions, certifications, responses, answers and other filings shall be filed with the clerk of courts in the judicial district in which the defendant is presently confined.

(B) Service; Time of Essence

(1) Copies of motions, responses, answers and other pleadings shall be promptly served on the opposing party's counsel, the Department, the Governor, and the Prothonotary. Because competency certification motions under Rule 855 precede the appointment of counsel, the prosecutor shall promptly serve a copy of any Rule 855 motion upon the defendant, the defendant's most recent attorney of record, the Department, the Governor, and the Prothonotary, and shall promptly serve any attorney subsequently retained or appointed to represent the defendant once the identity of counsel is known.

(2) The Secretary shall provide copies of any competency certification and supporting mental health expert report to the attorney for the Commonwealth, the defendant's attorney, the Governor, and the Prothonotary.

(3) All motions, certifications, responses, answers and other pleadings shall include a certificate of service.

(4) The judge, the clerk, the parties' counsel, and the Department shall maintain lines of communication to ensure the prompt filing and contemporaneous service of all motions, certifications, responses, answers and other pleadings.

(C) Verification

If an initial motion filed under Rules 857, 858, 859 or 862 sets forth facts not already of record, the motion shall be verified by the sworn affidavit of some person having knowledge of the facts or by the unsworn written statement of such a person that the facts are verified subject to the penalties for unsworn falsification to authorities. *See* 18 Pa.C.S. § 4904.

(D) Second or Subsequent Competency Determination

If a prior competency determination has been made under Part C, any motion seeking a contrary determination shall allege with specificity a material change of circumstances

sufficient to support the assertion that the defendant's mental condition has substantially deteriorated or improved.

(E) Effect of Stay Issued by Another Court

If a warrant of execution is stayed by the order of a judge presiding over a collateral proceeding in state or federal court, that order shall stay proceedings under Part C, and the obligations of the defendant's attorney will be terminated once the warrant of execution expires.

(F) Clerk of Courts; Docketing, Notice, and Transmittal

(1) The clerk of courts immediately shall time stamp, docket and transmit to the assigned judge all motions, certifications, responses, answers, other pleadings, and entries of appearance. If the judge is unavailable, the clerk shall transmit the material to the president judge, or the president judge's designee, who promptly shall assign and transmit the material to another judge.

(2) The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any order entered.

(3) The clerk of courts immediately shall serve a copy of any order entered by the judge upon the attorney for the Commonwealth, the defendant's attorney, the Department, the Governor, and the Prothonotary. A copy of any order appointing counsel under Rule 854(A) shall also be served upon the defendant and the defendant's most recent counsel of record.

> COMMENT: Given the time constraints when execution is imminent, the time periods in Part C generally are measured from the point of filing, rather than service. Rule 852(B)(4) is intended to ensure that service of motions, certifications, pleadings, and orders will be contemporaneous with filings. It is imperative that the judge, the clerk, the parties, and the Department take measures, including electronic transmission, to ensure prompt filing and contemporaneous service.
>
> Service upon the Prothonotary assists in discharging the Prothonotary's duty to monitor capital cases. *See* Rule 853.

"Collateral proceeding" as used in paragraph (E) includes proceedings under the PCRA and federal habeas corpus review.

RULE 853. SUPREME COURT PROTHONOTARY.

(A) The Prothonotary shall monitor all Pennsylvania capital cases pending on collateral review in state and federal court, and provide the Supreme Court with status reports as necessary or directed.

(B) Whenever the Commonwealth files a competency certification motion under Rule 855, or a warrant of execution is issued in the absence of a certification motion, the Prothonotary shall establish communications with the parties and relevant state and federal courts to facilitate the Supreme Court's timely resolution of issues relating to the execution process.

> COMMENT: This rule formalizes the role of the Prothonotary in monitoring capital cases and is in aid of the Supreme Court's jurisdiction over capital appeals, including applications to review competency determinations. *See* Pa.R.A.P. 3315. The Prothonotary's monitoring role also protects the right to a timely review of a competency determination.

RULE 854. COUNSEL; *IN FORMA PAUPERIS*.

(A) Appointment of Counsel

Within five days of the Commonwealth's filing of a competency certification motion under Rule 855, or within five days of the issuance of a warrant of execution if no such motion has been filed, the judge shall appoint an attorney to represent the defendant for purposes of proceedings under Part C, unless an attorney has already entered an appearance to represent the defendant. The appointment order shall indicate the attorney's name, address, and phone number, and shall include as an attachment any filings in the matter. In instances where a warrant has been issued but no certification motion has been filed, the prosecutor shall apprise the clerk of courts of the issuance of the warrant.

(B) Retained Counsel

When an attorney is retained, the attorney shall promptly file a written entry of appearance with the clerk of courts, and shall serve a copy on the defendant, the attorney for the Commonwealth, the Department, and the Prothonotary. The entry of appearance shall include the attorney's address, phone number, attorney identification number, and a statement that the attorney meets the criteria set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

(C) Qualifications

No attorney may be appointed or enter an appearance without meeting the criteria set forth in Rule 801.

(D) Duration of Obligation

The attorney's representation under Part C shall continue until:

(1) a stay of execution or reprieve is granted for reasons other than to determine competency and causes the execution warrant to expire;

(2) the judge permits the attorney to withdraw; or

(3) the defendant is deceased.

(E) Withdrawal of Counsel

(1) Counsel seeking to withdraw must file a written withdrawal motion. A copy shall also be promptly served upon the defendant.

(2) The judge shall not grant permission to withdraw until the judge appoints new counsel or new counsel enters an appearance.

(F) *In Forma Pauperis*

If the defendant proves an inability to pay the costs of the competency proceedings, the judge shall permit the defendant to proceed *in forma pauperis.*

> COMMENT: This rule ensures that the defendant is represented by counsel for purposes of Part C. In cases initiated by a certification motion under Rule 855, representation before a warrant of execution issues provides counsel with additional time to assess a potential claim under *Ford v. Wainwrig*ht, 477 U.S. 399 (1986). In other cases, ensuring representation when an execution warrant issues is a failsafe if execution proves to be imminent. Counsel can assess the availability of collateral review from the underlying conviction and the likelihood of a stay being granted on grounds other than incompetency. If the defendant files a *Ford* motion in a case where execution appears imminent and the Commonwealth has not sought a competency certification, a stay of execution shall issue. *See* Rule 858(A)(3).
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> Because the issue is competency, the rule does not permit waiver of counsel. *See Indiana v. Edwards,* 554 U.S. 164, 177-78 (2008).
>
> To the extent this rule differs from the procedures in Rules 120, 122, and 123, this rule take precedence.
>
> Before appointing counsel, the judge must consider whether the attorney is able to handle the case within the time limitations of Part C.
>
> The filing of an order appointing counsel enters counsel's appearance. Counsel does not have to file a separate entry of appearance.
>
> Counsel's appointment or entry of appearance does not affect the appointment or entry of appearance of the same attorney for other purposes or for the appointment or entry

of appearance of different attorneys for different purposes. However, counsel's obligations under this rule are separate and distinct.

The docket entry by the clerk of courts must include a notation that the appointment or entry of appearance is only for purposes of proceedings under Part C.

PART C(2). COMPETENCY CERTIFICATION BY SECRETARY OF CORRECTIONS

RULE 855. COMMONWEALTH'S MOTION FOR CERTIFICATION.

(A) Motion; Timing; Party Respondent

(1) If the prosecutor determines that there is a reasonable likelihood that execution is imminent, the prosecutor shall file a motion requesting that the Secretary be ordered to produce a verified certification whether the defendant is presently competent to be executed.

(2) If the basis for the prosecutor's determination that execution is imminent is an order or event giving rise to the requirement to issue an execution warrant under 61 Pa.C.S. § 4302, the motion shall be filed no later than five days after that order or event.

(3) The defendant shall be named the party respondent, but is not required to file an answer, nor must the judge await an answer before disposing of the motion.

(B) Contents

The motion shall set forth the following information:

(1) the name of the defendant;

(2) the caption, county of conviction, number, and court term of the case or cases at issue;

(3) the date on which the defendant was sentenced;

(4) the place where the defendant is presently confined;

(5) the review status of the case, including whether any direct or collateral challenges to the underlying conviction are pending, and, if so, in what courts, and whether any applications for a stay of execution have been filed, and, if so, in what court and the status of the application;

(6) the basis for the prosecutor's determination that there is a reasonable likelihood that execution is imminent;

(7) the outcome of any previous proceeding in which competency was determined; and

(8) the name of the defendant's most recent attorney of record.

(C) Disposition

Within five days of the filing of the motion, the judge shall issue an order directing the Secretary to produce, within 10 days of the order, a verified certification of whether the defendant is presently competent to be executed.

> COMMENT: This rule does not require an answer from the defendant or appointment of counsel in advance of an order directing a competency certification. Certification merely requires the Secretary to timely state the executive branch's position on competency. Other provisions in Part C establish a procedure for the defendant to raise a timely claim under *Ford v. Wainwrig*ht, 477 U.S. 399 (1986), when the Secretary issues a competency certification, and Rule 854 assures counsel will be available for the investigation and litigation of a colorable *Ford* claim.
>
> This rule does not require the prosecutor to await an order or event triggering the requirement for reissuance of an execution warrant before seeking a competency certification. There may be instances where, for example, a court entertaining a serial PCRA petition identifies in advance a time frame for decision. The main concern is that the competency determination be made reasonably close in time to any date for execution ultimately specified.
>
> If the prosecutor's motion is untimely under paragraph (A)(2), there is no requirement that the matter be accelerated so that any *Ford* issue may be finally resolved before the warrant of execution expires.

RULE 856. CERTIFICATION BY THE SECRETARY OF CORRECTIONS.

(A) Certification; Timing

Within 10 days of the issuance of an order under Rule 855(C), the Secretary shall provide a certification, under oath or affirmation, accompanied by a written mental health expert's report and opinion supporting the certification. The certification shall consist of a representation that:

(1) the defendant is competent to be executed; or

(2) the defendant is incompetent to be executed; or

(3) there are substantial grounds to believe the defendant's competency cannot be determined without further examination and a hearing.

(B) Effect of Certification; Action by Judge

(1) If the Secretary certifies that the defendant is competent, no immediate action is required of the judge. Any motion by counsel for the defendant challenging the certification shall proceed under Rule 857.

(2) If the Secretary certifies that the defendant is incompetent, the judge shall promptly issue an order staying the execution.

(a) Any motion by the Commonwealth challenging the certification shall proceed under Rule 859.

(b) If the Commonwealth does not challenge the certification, the judge shall issue an order directing the Department to:

(i) monitor the defendant's mental health;

(ii) provide appropriate mental health treatment; and

(iii) provide periodic certifications respecting the defendant's continuing competency status in accordance with Rule 862.

(c) The judge may issue any supplemental orders necessary or appropriate to the disposition.

(3) If the Secretary certifies that there are substantial grounds to believe the defendant's competency cannot be determined without further examination and a

hearing, the judge shall promptly issue an order staying the execution and providing for a competency examination of the defendant.

(4) If the Secretary fails to provide a certification within the requisite time frame, the judge shall issue an order staying the execution and providing for a competency examination of the defendant.

> COMMENT: *See* Rule 860 for the contents of an order directing a competency examination.
>
> Paragraph (B)(2)(b)(ii) does not address any question about the defendant's right to object to or refuse treatment. Any such question is a substantive matter for the court. *See* Rule 862 for further monitoring and review procedures if a certification of incompetency is not challenged by the Commonwealth.
>
> Under paragraph (B)(3), the Secretary's certification that further examination and a hearing are necessary is sufficient to satisfy the *Ford v. Wainwrig*ht, 477 U.S. 399 (1986) threshold burden and require a hearing under Rules 860 and 861. Under paragraph (B)(4), the Secretary's failure to provide a certification likewise is sufficient to satisfy that threshold burden.
>
> An order entered under paragraph (B)(2), (B)(3), or (B)(4) is not a final order subject to immediate review.

PART C(3) DEFENDANT'S CHALLENGE TO CERTIFICATION OF COMPETENCY

RULE 857. MOTION; RESPONSE; DISPOSITION.

(A) Motion; Timing; Request for Stay of Execution

(1) Any motion challenging the Secretary's certification of competency shall be filed within seven days of the date of certification. The motion shall request an order staying the execution and scheduling a competency examination and a hearing. Prior notice of the intent to challenge the certification of competency shall be provided to the clerk of courts with service upon all parties no later than two days before the filing. Notice may be given by electronic or facsimile transmission.

(2) The motion shall be signed by the defendant's attorney. The signature of the attorney shall constitute a certification that the attorney has read the motion, to the best of the attorney's knowledge, information, and belief there are good grounds to support the motion, and the motion is not interposed for delay.

(B) Contents

The motion shall set forth substantially the following information:

(1) whether any challenges to the underlying conviction are pending; if so, in what court and the status of the challenge;

(2) whether any other applications for a stay of execution have been filed; if so, in what court and the status of the application;

(3) a statement of the facts alleged in support of the assertion that the defendant is presently incompetent;

(4) any affidavits, records, and other evidence supporting the assertion of incompetency or a statement why such information is not available; and

(5) the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency.

(C) Commonwealth's Response

Within seven days of the filing of the motion, the Commonwealth shall file a response indicating whether it opposes the motion, the request for a stay, and the request for a

competency examination and hearing. If the Commonwealth opposes the motion, the response shall also include the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency.

(D) Defendant's Answer

Within three days of the filing of the Commonwealth's response, the defendant's attorney may file an answer.

(E) Disposition

Within seven days of the filing of the defendant's answer or the expiration of the time for the answer, the judge shall issue an order determining whether the defendant has made a substantial threshold showing of incompetency to be executed. The order shall state the reasons supporting the determination.

(1) If the judge finds that the defendant has not made a substantial threshold showing of incompetency, the order shall deny the motion and the request for a stay of execution without a hearing.

> (a) The order denying the motion shall be a final order for purposes of appeal. The order shall advise the defendant of the right to seek expedited review in the Pennsylvania Supreme Court and of the time within which such review must be sought. *See* Pa.R.A.P. 3315(b)(1) (application for review of an order determining competency where execution warrant is not stayed must be filed within 10 days of entry of the order).
>
> (b) Upon entry of the order, the clerk of courts immediately shall transmit the record of the proceeding to the Prothonotary.

(2) If the judge finds that the defendant has made a substantial threshold showing of incompetency, the order shall stay the execution and provide for a competency examination of the defendant pursuant to Rule 860, and the case shall proceed under Rules 860 and 861.

> COMMENT: The time limitations in this rule must be strictly followed, given the exigencies. The limitations recognize that the certification process affords additional time for the parties to prepare. Moreover, the question is narrow: has the defendant made a substantial threshold showing of incompetency.
>
> The rule requires the Commonwealth to affirmatively take a position. The term "response" is used because the rule

requires more information than ordinarily appears in an "answer." In all other respects, "response" is the same as "answer" for purposes of determining the contents requirements, *see* Rule 575(B), format requirements, *see* Rule 575(C), and procedures for filing and service, *see* Rule 576.

See Rule 860 for the contents of an order directing a competency examination. *See* Rule 861 for the procedures governing a competency hearing.

See Pa.R.A.P. 3315 for the expedited procedures governing an application for review of an order entered under paragraph (E)(1), denying the motion and request for a stay of execution.

An order entered under paragraph (E)(2) is not a final order subject to immediate review.

PART C(4) DEFENDANT'S CHALLENGE TO COMPETENCY IN THE ABSENCE OF CERTIFICATION

RULE 858. MOTION; RESPONSE; DISPOSITION.

(A) Motion; Timing; Stay of Execution

(1) If a warrant of execution is issued, but no competency certification motion under Rule 855 has been filed, any motion challenging the defendant's competency shall be filed within 30 days of the issuance of the warrant. The motion shall request an order staying the execution and scheduling a competency examination and a hearing.

(2) The motion shall be signed by the defendant's attorney. The signature of the attorney shall constitute a certification that the attorney has read the motion and, to the best of the attorney's knowledge, information, and belief there are good grounds to support the motion.

(3) The Commonwealth's failure to seek a competency certification shall be deemed sufficient to require a stay of execution, which shall remain in place until the decision of the motion becomes final, including proceedings on appeal.

(B) Contents

The motion shall set forth the following information:

(1) the name of the defendant;

(2) the caption, county of conviction, number, and court term of the case or cases at issue;

(3) the date on which the defendant was sentenced;

(4) the place where the defendant is presently confined;

(5) the date the warrant of execution was issued and the scheduled date for execution;

(6) the review status of the case, including whether any challenges to the underlying conviction are pending; if so, in what court and the status of the challenge;

(7) whether any other applications for a stay of execution have been filed; if so, in what court and the status of the application;

(8) a statement of the facts alleged in support of the assertion that the defendant is presently incompetent;

(9) any affidavits, records, and other evidence supporting the assertion of incompetency or a statement why such information is not available;

(10) the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency; and

(11) information concerning the outcome of any previous proceeding in which competency was determined.

(C) Commonwealth's Response

Within 20 days of the filing of the motion, the Commonwealth shall file a response indicating whether it opposes the motion and the request for a competency examination and a hearing. If the Commonwealth opposes the motion, the response shall also include the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency.

(D) Defendant's Answer

Within 10 days of the Commonwealth's response, the defendant may file an answer.

(E) Disposition

Within 20 days of the filing of the defendant's answer or the expiration of the time for the answer, the judge shall issue an order determining whether the defendant has made a substantial threshold showing of incompetency to be executed. The order shall state the reasons supporting the determination.

(1) If the judge finds that the defendant has not made a substantial threshold showing of incompetency, the order shall deny the motion without a hearing.

(a) The order denying the motion shall be a final order for purposes of appeal. The order shall advise the defendant of the right to seek expedited review in the Pennsylvania Supreme Court and of the time within which such review must be sought. *See* Pa.R.A.P. 3315(b)(2) (application for review of an order determining competency where no execution warrant is pending, or warrant is stayed, must be filed within 21 days of the entry of the order).

(b) Upon entry of the order, the clerk of courts immediately shall transmit the record of the proceeding to the Prothonotary.

(2) If the judge finds that the defendant has made a substantial threshold showing of incompetency, the order shall provide for a competency examination of the defendant pursuant to Rule 860, and the case shall proceed under Rules 860 and 861.

COMMENT: This rule addresses the circumstance where an execution warrant is issued and execution appears imminent, but the Commonwealth did not invoke the accelerated competency certification procedure contemplated under Rule 855. Upon the filing of a motion challenging the defendant's competency, a stay must issue, and the competency question, including the threshold question of entitlement to a hearing, should be resolved expeditiously, with the case proceeding as otherwise provided in Part C.

See Pa.R.A.P. 3315 for the procedures governing an application for review of an order entered under paragraph (E)(1), denying the motion.

An order entered under paragraph (E)(2) is not a final order subject to immediate review.

PART C(5) COMMONWEALTH'S CHALLENGE TO CERTIFICATION OF INCOMPETENCY

RULE 859. MOTION; RESPONSE; DISPOSITION.

(A) Motion; Timing

(1) Any motion challenging the Secretary's certification of incompetency shall be filed by the Commonwealth within 30 days of the certification. The motion shall request an order scheduling a competency examination and a hearing.

(B) Contents

The motion shall set forth substantially the following information:

(1) a statement of the facts alleged in support of the assertion that the defendant is presently competent;

(2) any affidavits, records, and other evidence supporting the assertion of competency or a statement why such information is not available; and

(3) the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency.

(C) Defendant's Response

Within 20 days of the filing of the motion, the attorney for the defendant shall file a response. If the defendant opposes the motion, the response shall include the name and address of one mental health expert who has examined, or will examine, the defendant to determine competency.

(D) Commonwealth's Answer

Within 10 days of the filing of the defendant's response, the Commonwealth may file an answer.

(E) Disposition

Within 20 days of the filing of the Commonwealth's answer or the expiration of the time for the answer, the judge shall issue an order determining whether the Commonwealth has shown reasonable grounds to question the certification of incompetency. The order shall state the reasons supporting the determination.

(1) If the judge finds that the Commonwealth has not demonstrated reasonable grounds to question the certification of incompetency, the order shall deny the motion without a hearing and continue the stay of execution.

(a) The order denying the motion shall be a final order for purposes of appeal, and is subject to expedited review in the Supreme Court. *See* Pa.R.A.P. 3315(b)(2) (application for review of an order determining competency where no execution warrant is pending, or warrant is stayed, must be filed within 21 days of the entry of the order).

(b) If the Commonwealth does not seek further review, the judge shall enter an order directing the Department to:

(i) monitor the defendant's mental health;

(ii) provide appropriate mental health treatment; and

(iii) provide periodic certifications respecting the defendant's continuing competency status in accordance with Rule 862.

(2) If the judge finds that the Commonwealth has demonstrated reasonable grounds to question the certification of incompetency, the order shall provide for a competency examination of the defendant pursuant to Rule 860, and the case shall proceed under Rules 860 and 861.

COMMENT: Under Rule 856(B)(2), the Secretary's certification of incompetency requires the trial court to issue a stay of execution. The rules do not require resolving a Commonwealth challenge to the certification before the execution warrant expires. The claim still should be resolved expeditiously, however, proceeding as otherwise provided in Part C.

See Pa.R.A.P. 3315 for the procedures governing an application for review of an order entered under paragraph (E)(1), denying the motion and continuing the stay of execution.

Paragraph (E)(1)(b)(ii) does not address any question about the defendant's right to object to or refuse treatment. Any such question is a substantive matter for the court. *See* Rule 862 for further monitoring and review procedures.

An order entered under paragraph (E)(2) is not a final order subject to immediate review.

PART C(6) COMPETENCY HEARINGS

RULE 860. PRELIMINARY MATTERS.

(A) Order Directing Competency Examinations of the Defendant

(1) Whenever the judge orders a competency examination, the order shall:

(a) direct the defendant to submit to examinations by the mental health experts specified by the defendant and the Commonwealth;

(b) inform the defendant of the purpose of the examinations and that the results of the examinations may be used at a competency hearing;

(c) inform the defendant of the potential consequences of failing to cooperate with the examinations;

(d) specify who may be present at the examinations; and

(e) specify the time within which the examinations must be conducted and the mental health experts must submit their written reports.

(2) The judge may also order the defendant to submit to a competency examination by one or more mental health experts designated by the judge.

(B) Evidentiary Material; Reciprocal Disclosure

(1) Upon request of the defendant or the Commonwealth, the judge shall order the Department and other entities identified as having possession of evidentiary material relevant to the defendant's present competency status to promptly provide the parties with copies of the material.

(2) The parties shall promptly exchange copies of relevant evidentiary material in their possession, including written expert reports. Issues concerning disclosure, including claims of privilege, shall be presented to and resolved by the judge.

(3) Evidentiary material secured under this rule shall not be of public record and shall not be disclosed beyond the parties and their experts without leave of the judge.

(C) Mental Health Expert Reports

(1) The examinations shall be completed, and the mental health experts' written reports shall be submitted to the court and provided to the parties, within 60 days of the order

directing the examinations. In cases proceeding under Rule 862 (monitoring and review after incompetency finding), the judge may grant an extension of no more than 30 days for submission of the expert reports.

(2) The expert reports shall address the nature of the defendant's mental disorder, if any; the disorder's relationship to competency; the expert's opinion of the defendant's competency expressed within a reasonable degree of medical, psychiatric, or psychological certainty; and the grounds supporting that opinion.

(3) The expert reports shall not be of public record, and shall not be disclosed beyond the parties and the parties' experts without leave of the judge.

(D) Status Report

Within 30 days of the order directing examinations, the parties shall report to the judge the status of the examinations and expert reports, and any other pertinent matters. In cases proceeding under Rule 862 (monitoring and review after incompetency finding), status reports are not required, but may be ordered by the judge.

(E) Pre-hearing Conference; Scheduling Hearing

Within 60 days of the order directing examinations, the judge shall hold a pre-hearing conference to review the status of the case and determine if a hearing is necessary. Any hearing shall commence no later than 60 days after completion of the examinations unless, upon good cause shown, the judge orders a continuance, which shall not exceed 30 days. In cases proceeding under Rule 862 (monitoring and review after incompetency finding), a pre-hearing conference is not required, but may be ordered by the judge. Competency hearings conducted under Rule 862 shall be concluded as soon as reasonably practicable.

> COMMENT: Before ordering additional examinations, the judge must consider, among other factors, the need for additional experts and the costs.
>
> As used in paragraph (B), "evidentiary material" is information directly relevant to the question of competency to be executed. Paragraph (B) is intended to ensure the prompt collection of materials relevant to competency at an early stage of the proceedings.
>
> If the defendant fails to cooperate in an examination, before imposing a sanction, the judge shall consider whether: (1) the failure was intentional; (2) the failure resulted from

mental illness; and (3) ordering the defendant to resubmit to the examination would result in cooperation. Sanctions for failure to cooperate include, but are not limited to, the judge declining to consider expert mental health evidence proffered by the defendant.

The pre-hearing conference serves the same purpose as a pretrial conference in criminal cases. *See* Rule 570. The judge and counsel should consider: (1) simplification or stipulation of factual issues; (2) adopting measures to avoid cumulative testimony; (3) qualification of exhibits as evidence; and (4) such other matters as may aid in the timely determination of competency.

The judge may schedule an earlier date for the hearing when appropriate. A hearing may be unnecessary where, for example, the experts and the parties are in agreement on the competency question.

In cases proceeding under Rule 862, the question of whether there has been a material change in circumstances is narrow, but the time constraints are not the same as when an execution warrant is pending. Thus, the rule offers greater flexibility. Matters arising under Rule 862 should still be decided expeditiously.

RULE 861. HEARING; DISPOSITION.

(A) Hearing

(1) The hearing shall be limited to the issue of the defendant's present competency to be executed.

(2) The defendant shall appear in person with counsel.

(3) The parties may introduce evidence, including expert reports and testimony, cross-examine witnesses, and present argument or, by stipulation, may submit the matter for the judge's determination on the basis of expert reports and other evidence. The judge may call and question witnesses as provided by law.

(B) Disposition

Within 30 days of the conclusion of the hearing, the judge shall issue an order determining whether the defendant is competent. The order shall include specific findings of fact concerning the relevant factors for determining competency. In cases proceeding under Rule 862 (monitoring and review after incompetency finding), the judge's order shall be issued as soon as reasonably practicable.

(1) If the judge finds that the defendant is competent, the order shall vacate any existing order staying execution. The order shall advise the defendant of the right to seek expedited review in the Pennsylvania Supreme Court and of the time within which such review must be sought. *See* Pa.R.A.P. 3315(b)(2) (application for review of an order determining competency where no execution warrant is pending, or warrant is stayed, must be filed within 21 days of the entry of the order).

(2) If the judge finds that the defendant is incompetent, the order shall stay the execution until such time as the defendant is determined to be competent.

(a) The order shall direct the Department to:

(i) monitor the defendant's mental health;

(ii) provide appropriate mental health treatment; and

(iii) provide periodic certifications respecting the defendant's continuing competency status in accordance with Rule 862.

(b) The judge may issue any supplemental orders necessary or appropriate to the disposition.

(3) The order determining competency issued under paragraph (B)(1) or (2) shall be a final order subject to expedited review in the Supreme Court. *See* Pa.R.A.P. 3315(b)(2) (application for review of an order determining competency where no execution warrant is pending, or warrant is stayed, must be filed within 21 days of the entry of the order).

COMMENT: This rule provides the due process hearing required by *Panetti v. Quarterman*, 551 U.S. 930, 934-35, 949-50 (2007), once a substantial threshold showing of incompetency has been made. The rule also addresses subsequent competency hearings held pursuant to Rule 862.

Paragraph (A)(2) requires the defendant's presence. Advanced communication technology may not be utilized. *See* Rule 119. However, the judge may exclude a disruptive defendant. *See, e.g., Illinois v. Allen,* 397 U.S. 337, 342-43 (1970). *See also Commonwealth v. Basemore,* 582 A.2d 861, 867-68 (Pa. 1990).

The defendant ordinarily has the burden of going forward and proving incompetency by a preponderance of evidence. *See Commonwealth v. Banks,* 29 A.3d 1129, 1135 (Pa. 2011). Under the certification procedure in Part C, however, there may be instances where the Commonwealth is the moving party. *See* Rule 859 (Commonwealth motion challenging certification of incompetency); Rule 862 (Commonwealth motion alleging a change in circumstances following a finding of incompetency). Assignment of the burden depends upon the identity of the moving party and the prior decisional status of the competency question.

Evidence to be considered by the judge, including mental health expert reports, must be introduced by the parties at the hearing and made part of the record.

Paragraph (B)(2)(a)(ii) does not address any question about the defendant's right to object to or refuse treatment. Any such question is a substantive matter for the court. *See* Rule 862 for further monitoring and review procedures.

In requiring the vacatur of an existing stay of execution if the defendant is found competent under paragraph (B)(1), the rule recognizes that any warrant of execution will have

expired by the time a hearing has been conducted and a final order is entered.

See Pa.R.A.P. 3315 for the procedures governing an application for review of an order determining competency under paragraph (B)(1) or (B)(2).

PART C(7) MONITORING AND REVIEW OF INCOMPETENCY

RULE 862. MONITORING; REVIEW; HEARING; DISPOSITION.

(A) Monitoring; Periodic Certifications

(1) The Department shall monitor the defendant's competency whenever so ordered by the judge.

(2) Unless otherwise ordered by the judge, the Secretary shall provide the judge with a competency certification every six months. The certification shall be under oath or affirmation and accompanied by a written mental health expert's report in support of the certification.

(B) Certification of Continued Incompetency; Commonwealth Challenge

(1) If the Secretary certifies that the defendant remains incompetent, the judge shall take no further action unless the Commonwealth challenges the certification.

(2) Any motion challenging a certification of continued incompetency shall be filed by the Commonwealth within 21 days of the certification.

(a) The motion shall state with specificity the facts alleged to support the assertion that the Secretary's certification is erroneous. The motion shall include a supporting mental health expert's affidavit and any other relevant evidence.

(b) Counsel for the defendant shall file a response to the motion within 21 days.

(c) Within 10 days of the filing of the defendant's response, the Commonwealth may file an answer.

(d) Within 30 days of the filing of the Commonwealth's answer or the expiration of the time for the answer, the judge shall order a competency examination and a hearing only if the Commonwealth establishes substantial grounds to question the certification of continued incompetency, and the matter shall proceed under Rules 860 and 861.

(C) Certification of Competency; Defendant's Challenge

(1) If the Secretary certifies that the defendant has become competent, any motion challenging the certification shall be filed by the defendant's counsel within 21 days of the certification.

(a) The motion shall state with specificity the facts alleged to support the assertion that the Secretary's certification is erroneous. The motion shall include a supporting mental health expert's affidavit and any other relevant evidence.

(b) Counsel for the Commonwealth shall respond to the motion within 21 days.

(c) Within 10 days of the filing of the Commonwealth's response, the defendant may file an answer.

(d) Within 30 days of the filing of the defendant's answer or the expiration of the time for the answer, the judge shall order a competency examination and a hearing only if the defendant establishes substantial grounds to question the certification of competency, and the matter shall proceed under Rules 860 and 861.

(2) If the defendant fails to file a timely challenge to the certification of competency, the judge shall vacate any existing order staying execution.

(D) Commonwealth Challenge in the Absence of Certification

At any time following a determination that the defendant is incompetent, the Commonwealth may move for a further competency examination by alleging a material change in the defendant's mental health status. The motion shall state with specificity the facts alleged in support of the assertion that the defendant is presently competent, and shall include a supporting mental health expert's affidavit and any other relevant evidence. Counsel for the defendant shall respond as directed by the judge. Within 10 days of the filing of the defendant's response, the Commonwealth may file an answer. Within 30 days of the filing of the Commonwealth's answer or the expiration of the time for the answer, the judge shall order a competency examination only if the Commonwealth establishes substantial grounds to conclude that, due to a material change in circumstances, the defendant is presently competent.

(E) Examination; Hearing; Determination

Unless otherwise ordered by the judge, examinations and hearings ordered under this Rule shall proceed under Rules 860 and 861.

> COMMENT: In instances where the determination of incompetency followed upon a full-blown hearing under Rule 861, paragraph (E) authorizes the judge to resolve a further competency challenge in a less formal manner than that contemplated under Rules 860 and 861.

If an application for review of a prior competency determination pursuant to Pa. R.A.P. 3315 has been filed and remains pending, the judge shall not take any action under this rule until the application has been decided.

RULE 904. ENTRY OF APPEARANCE AND APPOINTMENT OF COUNSEL; *IN FORMA PAUPERIS*.

(A) Counsel for defendant shall file a written entry of appearance with the clerk of courts promptly after being retained, and serve a copy on the attorney for the Commonwealth.

(1) If a firm name is entered, the name of an individual lawyer shall be designated as being responsible for the conduct of the case.

(2) The entry of appearance shall include the attorney's address, phone number, and attorney ID number.

(B) When counsel is appointed, the filing of the appointment order shall enter the appearance of appointed counsel.

(C) Except as provided in paragraph (H), when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.

(D) On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 908, the judge shall appoint counsel to represent the defendant.

(E) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(F) When counsel is appointed,

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

(2) the appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.

(G) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed *in forma pauperis*.

(H) Appointment of Counsel in Death Penalty Cases.

(1) At the conclusion of direct review in a death penalty case, which includes discretionary review in the Supreme Court of the United States, or at the expiration of time for seeking the review, upon remand of the record, the trial judge shall appoint new counsel for the purpose of post-conviction collateral review, unless:

(a) the defendant has elected to proceed *pro se* or waive post-conviction collateral proceedings, and the judge finds, after a colloquy on the record, that the defendant is competent and the defendant's election is knowing, intelligent, and voluntary;

(b) the defendant requests continued representation by original trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the petitioner's election constitutes a knowing, intelligent, and voluntary waiver of a claim that counsel was ineffective; or

(c) the judge finds, after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings.

(2) When counsel is appointed,

(a) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

(b) the appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.

(3) When the defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed *in forma pauperis.*

COMMENT: If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. *See* Rule 121.

Consistent with Pennsylvania post-conviction practice, it is intended that counsel be appointed in every case in which a defendant has filed a petition for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent petitions so that counsel should be appointed *only* if the judge determines that an evidentiary hearing is required. Of course, the judge has the discretion to appoint counsel in any case when the interests of justice require it.

Paragraph (B) was added in 2005 to make it clear that the filing of an order appointing counsel to represent a defendant enters the appearance of appointed counsel. Appointed counsel does not have to file a separate entry of appearance.

Paragraphs (F)(1) and (H)(2)(a) require that (1) the judge include in the appointment order the name, address, and phone number of appointed counsel, and (2) the order be served on the defendant, appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

Pursuant to paragraphs (F)(2) and (H)(2)(b), appointed counsel retains his or her assignment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. *See Commonwealth v. Liebel*, **[573 Pa. 375,]** 825 A.2d 630 (**Pa.** 2003). Concerning counsel's obligations as appointed counsel, see *Jones v.*

Barnes, 463 U.S. 745 (1983). *See also Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. **[Ct.]** 2001).

Paragraph (H) was added in 2000 to provide for the appointment of counsel for the first petition for post-conviction collateral relief in a death penalty case at the conclusion of direct review.

Paragraph (H)(1)(a) recognizes that a defendant may proceed *pro se* if the judge finds the defendant competent, and that the defendant's election is knowing, intelligent, and voluntary. In *Indiana v. Edwards,* **554 U.S. 164, 178 (2008)**, the Supreme Court recognized that, when a defendant is not mentally competent to conduct his or her own defense, the U. S. Constitution permits the judge to require the defendant to be represented by counsel.

***See* Rule 854(B) that requires an attorney who has been retained to represent a defendant in proceedings under Part C of Chapter 8 to file a written entry of appearance.**

An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

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) The judge shall grant a stay of execution if the petition is a timely first petition under the PCRA. In cases involving a second or subsequent PCRA petition, the judge shall grant a stay of execution only if the petition meets the requirements of the PCRA and there has been a strong showing of a likelihood of success on the merits.

[(2)] (3) 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.

(2) If 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) 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. No more than 90 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 mandated by paragraphs (B)(2)(c) and (B)(3), 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 (**Pa.** 2001) **(“*Morris I*”)**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) was added in [DATE] to make clear that the defendant may pursue a timely first PCRA petition as of right, and therefore is entitled to a stay of execution during the pendency of the petition. *Accord* Pa.R.A.P. 3314 & *Note.* Stay requests associated with second or subsequent PCRA petitions are subject to 42 Pa.C.S. § 9545(c) (the petition must be pending, must meet all requirements of the PCRA, and the petitioner must make a strong showing of a likelihood of success on the merits). *See Commonwealth v. Morris*, 822 A.2d 684, 693 (Pa. 2003) (“*Morris II*”). The PCRA court lacks jurisdiction to grant a stay ancillary to an untimely petition. *See Commonwealth v. Morris*, 771 A.2d 721, 734-35 & n.14, 742 (Pa. 2001) (“*Morris I*”); 42 Pa.C.S. § 9545(c).

Paragraph (A)**[(2)]** **(3)** 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 **in an appropriate case**. *See* Pa.R.A.P. **[1702(d)] 3314 (Stays of Execution) [and Pa.R.A.P. 3316 (Review of Stay of Execution Orders in Capital Cases)]**.

Paragraph (B)(3) 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 once a determination is made under paragraph (B)(3) 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.

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.

RULES OF APPELLATE PROCEDURE

Rule 702. Final Orders.

(a) *General rule*.—An appeal authorized by law from a final order shall be taken to, and petitions for allowance of appeal from a final order shall be filed in, the appellate court vested by law with jurisdiction over appeals from such order.

(b) *Matters tried with capital offenses*.—If an appeal is taken to the Supreme Court **from a sentence of death** under **[Rule 1941 (review of death sentence)] Pa.R.A.P. 3311(a)**, any other appeals relating to sentences for lesser offenses imposed on **[a] the** defendant as a result of the same criminal episode or transaction and tried with the capital offense shall be taken to the Supreme Court.

(c) *Supervision of special prosecutions or investigations*..—All petitions for review under **[Rule] Pa.R.A.P.** 3331 (review of special prosecutions or investigations) shall be filed in the Supreme Court.

Official Note**:** : Because of frequent legislative modifications it is not desirable to attempt at this time to restate appellate court jurisdiction in these rules. However, the Administrative Office of Pennsylvania Courts publishes from time to time at 204 Pa. Code § 201.2 an unofficial chart of the Unified Judicial System showing the appellate jurisdiction of the several courts of this Commonwealth, and it is expected that the several publishers of these rules will include a copy of the current version of such chart in their respective publications.

[Subdivisions] [Paragraphs] (b) and (c) are based upon 42 Pa.C.S. § 722(1) (direct appeals from courts of common pleas). Under **[Rule] Pa.R.A.P.** 751 (transfer of erroneously filed cases) an appeal from a lesser offense improvidently taken to the Superior Court or the Commonwealth Court will be transferred to the Supreme Court for consideration and decision with the capital offense.

The Supreme Court conducts a limited direct review of death sentences even if no appeal is taken. *See* Pa.R.A.P. 3312. Under paragraph (b), if an appeal is taken from a sentence of death, review of sentences imposed for lesser offenses is also available. *See Commonwealth v. Parrish*, 77 A.3d 557, 561 (Pa. 2013) (if the defendant fails to file an appeal from a death sentence, claims unassociated with automatic review are not preserved).

Under **[Rule] Pa.R.A.P.** 701 **[(interlocutory orders)]** the jurisdiction described in **[Subdivision] [paragraph]** (c) extends also to interlocutory orders. **[See]** ***See*** **[Rule] Pa.R.A.P.** 102 **[(definitions)]** where the term “appeal” includes proceedings on petition for review. Ordinarily **[Rule] Pa.R.A.P.** 701 will have no application to matters within the

scope of **[Subdivision] [paragraph]** (b), since that **[subdivision] [paragraph]** is contingent upon entry of a final order in the form of a sentence of death; the mere possibility of such a sentence is not intended to give the Supreme Court direct appellate jurisdiction over interlocutory orders in homicide and related cases since generally a death sentence is not imposed.

Rule 901. Scope of Chapter.

This chapter applies to all appeals from a trial court to an appellate court except:

(1) An appeal by allowance taken under 42 Pa.C.S. § 724 (allowance of appeals from Superior and Commonwealth Courts). **[See]** ***See*** **[Rule]** **Pa.R.A.P.** 1112 (appeals by allowance).

(2) An appeal by permission taken under 42 Pa.C.S. § 702(b) (interlocutory appeals by permission). **[See]** ***See*** **[Rule]** **Pa.R.A.P.** 1311 (interlocutory appeals by permission).

(3) An appeal which may be taken by petition for review pursuant to **[Rule]** **Pa.R.A.P.** 1762(b)(2), which governs applications relating to bail when no appeal is pending.

(4) An appeal which may be taken by petition for review pursuant to **[Rule]** **Pa.R.A.P.** 1770, which governs out of home placement in juvenile delinquency matters.

(5) Automatic review of sentences pursuant to 42 Pa.C.S. § 9711(h) (review of death sentence). **[See]** ***See*** **[Rule 1941 (review of death sentence)]** **Pa.R.A.P. 3312**.

(6) An appeal which may be taken by petition for review pursuant to **[Rule]** **Pa.R.A.P.** 3331 (review of special prosecutions or investigations).

(7) An appeal which may be taken only by a petition for review pursuant to **[Rule]** **Pa.R.A.P.** 1573, which governs review when a trial court has denied a motion to dismiss on the basis of double jeopardy as frivolous.

Official Note: Paragraph 5 addresses cases involving automatic review of a death sentence and does not affect direct appeals and post-conviction appeals in death penalty cases, which are generally subject to this chapter. ***See*** **Pa.R.A.P. 3311 and 3313.**

Rule 909. Appeals to the Supreme Court. Jurisdictional Statement. Sanctions.

(a) *General rule*—Upon filing a notice of appeal to the Supreme Court, the appellant shall file with the prothonotary or clerk of the trial court an original and **[8] eight** copies of a jurisdictional statement. The statement shall be in the form prescribed by **[Rule] Pa.R.A.P.** 910(a) and (b). No statement need be filed in cases **[arising] involving review of a sentence of death** under Pa.R.A.P. **[1941] 3311 (direct review) or 3312 (automatic review) [(Review of Death Sentences)]**.

(b) *Answer*. –Within 14 days after service of a jurisdictional statement, an adverse party may file with the Prothonotary of the Supreme Court an original and eight copies of an answer thereto in the form prescribed by **[Rule] Pa.R.A.P.** 911. The answer shall be deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is utilized. No separate motion to dismiss a jurisdictional statement will be received. A party entitled to file an answer who does not intend to do so shall, within the time fixed by these rules for filing an answer, file a letter stating that an answer to the jurisdictional statement will not be filed. The failure to file an answer will not be construed as concurrence in the jurisdictional statement.

(c) *Action by the Supreme Court*.—After consideration of the jurisdictional statement and the brief in opposition thereto, if any, the Court will enter an appropriate order which may include summary dismissal for lack of subject matter jurisdiction. If the Supreme Court in its order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Prothonotary of the Supreme Court forthwith shall notify the court below and the attorneys of record of the noting or postponement, and the case will then stand for briefing and oral argument. In such case, the parties shall address the question of jurisdiction at the outset of their briefs and oral arguments.

(d) *Sanctions*.—If the court finds that the parties have not complied with **[Rule] Pa.R.A.P.** 909 through 911, it may impose appropriate sanctions including but not limited to dismissal of the action, imposition of costs or disciplinary sanction upon the attorneys.

Rule 1501. Scope of Chapter.

(a) *General rule*.—Except as otherwise prescribed by **[Subdivisions]** **paragraphs** (b) and (c) of this rule, this chapter applies to:

(1) Appeals from an administrative agency (within the meaning of Section 9 of Article V of the Constitution of Pennsylvania) to an appellate court.

(2) Appeals to an appellate court pursuant to 2 Pa.C.S. § 702 **[(appeals)]**, 42 Pa.C.S. § 5105 **[(right to appellate review)],** or any other statute providing for judicial review of a determination of a government unit.

(3) Original jurisdiction actions heretofore cognizable in an appellate court by actions in the nature of equity, replevin, mandamus or quo warranto or for declaratory judgment, or upon writs of **[certiorari]** ***certiorari*** or prohibition.

(4) Matters designated by general rule, **[**e.g.,**]**for example, review of orders refusing to certify interlocutory orders for immediate appeal, release prior to sentence, appeals under Section 17(d) of Article II of the Constitution of Pennsylvania**,** and review of special prosecutions or investigations.

(b) *Appeals governed by other provisions of rules*.—This chapter does not apply to any appeal within the scope of:

(1) Chapter 9 **[(appeals from lower courts)].**

(2) Chapter 11 **[(appeals from Commonwealth Court and Superior Court)].**

(3) Chapter 13 **[interlocutory appeals by permission)]**, except that the provisions of this chapter and ancillary provisions of these rules applicable to practice and procedure on petition for review, so far as they may be applied, shall be applicable: (a) where required by the **[N]n**ote to **[Rule]** **Pa.R.A.P.** 341 and the **[N]n**ote to **[Rule]** **Pa.R.A.P.** 1311; and (b) after permission to appeal has been granted from a determination which, if final, would be subject to judicial review pursuant to this chapter.

(4) **[Rule 1941]** **Pa.R.A.P. 3312** (**automatic** review of death sentence**[s]**).

(c) *Unsuspended statutory procedures*.—This chapter does not apply to any appeal pursuant to the following statutory provisions, which are not suspended by these rules:

(1) Section 137 of Title 15 of the Pennsylvania Consolidated Statutes (Court to pass upon rejection of documents by Department of State).

(2) The Pennsylvania Election Code.

(d) *Jurisdiction of courts unaffected*.—This chapter does not enlarge or otherwise modify the jurisdiction and powers of the Commonwealth Court or any other court.

Official Note**:** This chapter applies to review of any "determination" of a "government unit" as defined in **[Rule] Pa.R.A.P.** 102**,** assuming, of course, that the subject matter of the case is within the jurisdiction of a court subject to these rules (see **[Subdivision] [paragraph]** (d) of this rule). A "determination" means "action or inaction by a government unit which action or inaction is subject to judicial review by a court under Section 9 of Article V of the Constitution of Pennsylvania or otherwise. The term includes an order entered by a government unit." The term "government unit" is all inclusive and means "the Governor and the departments, boards, commissions, officers, authorities and other agencies of the Commonwealth, including the General Assembly and its officers and agencies and any court or other officer or agency of the unified judicial system, and any political subdivision or municipal or other local authority or any officer or agency of any such political subdivision or local authority. The term includes a board of arbitrators whose determination is subject to review under 42 Pa.C.S. § 763(b) (awards of arbitrators)." The term "administrative agency" is not defined in these rules, although the term is used in these rules as a result of its appearance in Section 9 of Article V of the Constitution of Pennsylvania.

[Subdivision] Subparagraph](a)(4) was added in 2004 to recognize the references in various appellate rules and accompanying notes to petition for review practice. For example, the **[N] n**otes to **[Rule] Pa.R.A.P.** 341 and 1311 direct counsel to file a petition for review of a trial court or government agency order refusing to certify an interlocutory order for immediate appeal. Similarly, **[Rule] Pa.R.A.P.** 1762 directs the filing of a petition for review when a party seeks release on bail before judgment of sentence is rendered, **[see]** ***see*** **[Rule] Pa.R.A.P.** 1762(b), and **[Rule] Pa.R.A.P.** 1770 directs the filing of a petition for review when a juvenile seeks review of placement in a juvenile delinquency matter. A petition for review is also the proper method by which to seek judicial review pursuant to **[Rule] Pa.R.A.P.** 3321 (regarding legislative reapportionment commission) and **[Rule] Pa.R.A.P.** 3331 (regarding special prosecutions or investigations). The 2004 and 2012 amendments clarify the use of petitions for review in these special situations.

[Subdivision] [Paragraph] (b) of this rule is necessary because otherwise conventional appeals from a court (which is included in the scope of the term "government unit") to an appellate court would fall within the scope of this chapter under the provisions of **[P]subp**aragraph (a)(2) of this rule.

[Subdivision] [Paragraph] (c) expressly recognizes that some statutory procedures are not replaced by petition for review practice. Thus, matters brought pursuant to Section 137 of the Associations Code governing judicial review of documents rejected by the Department of State or pursuant to the Election Code are controlled by the applicable statutory provisions and not by the rules in Chapter 15. **[See]** ***See*** 15 Pa.C.S. § 137; Act of June 3, 1937, P.L. 1333, as amended**,** 25 P.S. §§ 2600-3591.

In light of **[Subdivision] [paragraph]** (d), where the court in which a petition for review is filed lacks subject matter jurisdiction **([e.g.]for example**, a petition for review of a local government question filed in the Commonwealth Court), **[Rule] Pa.R.A.P.** 741 (waiver of objections to jurisdiction), 751 (transfer of erroneously filed cases)**,** and 1504 (improvident petitions for review) will be applicable. **[See also]*See also*** 42 Pa.C.S. § 5103.

The 2004 amendments are made to petition for review practice to address the evolution of judicial responses to governmental actions. As indicated in the **[N]n**ote to **[Rule] Pa.R.A.P.** 1502, when the Rules of Appellate Procedure were initially adopted, there was a "long history in the Commonwealth ... of relatively complete exercise of the judicial review function under the traditional labels of equity, mandamus, **[certiorari] *certiorari,*** and prohibition." While such original jurisdiction forms of action are still available, their proper usage is now the exception rather than the rule because appellate proceedings have become the norm. Thus, the need to rely on **[Rule] Pa.R.A.P.** 1503 to convert an appellate proceeding to an original jurisdiction action and **[vice versa] *vice versa*** arises less often. Moreover, the emphasis on a petition for review as a generic pleading that permits the court to simultaneously consider all aspects of the controversy is diminished. The primary concern became making the practice for appellate proceedings more apparent to the occasional appellate practitioner. Accordingly, the rules have been amended to more clearly separate procedures for appellate proceedings from those applicable to original jurisdiction proceedings.

The responsibility of identifying the correct type of proceeding to be used to challenge a governmental action is initially that of counsel. Where precedent makes the choice clear, counsel can proceed with confidence. Where the choice is more problematic, then counsel should draft the petition for review so as to satisfy the directives for both appellate and original jurisdiction proceedings. Then the court can designate the proper course of action regardless of counsel's earlier assessment.

Rule 1702. Stay Ancillary to Appeal.

(a) *General rule.*—Applications for relief under this chapter will not be entertained by an appellate court or a judge thereof until after a notice of appeal has been filed in the **[lower]**__**trial**__ court and docketed in the appellate court or a petition for review has been filed.

(b) *Proceedings on petition for allowance of or permission to appeal.*—Applications for relief under this chapter may be made without the prior filing of a petition for allowance of appeal or petition for permission to appeal, but the failure to effect timely filing of such a petition, or the denial of such a petition, shall automatically vacate any ancillary order entered under this chapter. In such a case__,__ the clerk of the court in which the ancillary order was entered shall, on **[praecipe]** ***praecipe*** of any party to the matter, enter a formal order under this rule vacating such ancillary order.

(c) *Supreme Court review of appellate court supersedeas and stay determinations.*—No appeal, petition for allowance of appeal**,** or petition for review need be filed in the Supreme Court in connection with a reapplication under **[Rule 3315]** __**Pa.R.A.P. 3319**__ (review of stay orders of appellate courts).

__**Official**__ Note__**:**__ **[Based on former Superior Court Rule 53 and Commonwealth Court Rule 112A, which required the taking of an appeal prior to an application for supersedeas or other interlocutory order.] [Subdivision]** __**[Paragraph]**__ (b) **[is new and is]** __**was**__ added in recognition of the fact that the drafting of a petition for allowance of appeal or a petition for permission to appeal in the form required by these rules may not be possible prior to the time when an application for *supersedeas* may have to be made in the appellate court in order to avoid substantial harm.

Rule 1704. Rescinded by Order of [DATE]--- [Application in a Capital Case for a Stay of Execution or for Review of an Order Granting or Denying a Stay of Execution.

Prior notice of the intent to file an application in a capital case for a stay or review of an order granting or denying a stay of execution shall be provided to the Prothonotary of the Pennsylvania Supreme Court, if prior notice is practicable.

The application for stay or review shall set forth the following:

1. The date the warrant issued; the date and nature of the order that prompted the issuance of the warrant; and the date the execution is scheduled, if a date has been set;

2. Whether any direct or collateral challenges to the underlying conviction are pending, and, if so, in what court(s) or tribunal(s);

3. Whether any other applications for a stay of the pending execution have been filed, and, if so, in what court(s) or tribunal(s), when, and the status of the application(s);

4. The grounds for relief and the showing made to the trial court of entitlement to a stay under 42 Pa.C.S. § 9545(c), if applicable;

5. A statement certifying that emergency action is required and setting forth a description of the emergency.

All dockets, pleadings, and orders that are referred to in 1—5 above must be attached to the application. If any of the information provided in the application changes while the motion is pending, the party seeking the stay or review must file with the Pennsylvania Supreme Court written notice of the change within 24 hours.

No notice of appeal or petition for review needs to be filed in order to file an application under this rule.]

Official Note: The Supreme Court rescinded this rule on [DATE], as part of its consolidation of the rules relating to capital appeals. Pa.R.A.P. 3314 now provides the procedures governing applications for a stay of execution or for review of an order granting or denying a stay of execution.

Rule 1761. Capital Cases.

Stays of execution in death penalty cases are governed by Pa.R.A.P. 3314. [The pendency of proceedings under Rule 1941 (review of sentence of death) shall stay execution of sentence of death.]

Note: **Based on 42 Pa.C.S. § 9711(h) (review of death sentence).]**

[REVIEW OF DEATH SENTENCES]

Rule 1941. Rescinded by Order of [DATE]--- [Review of Sufficiency of the Evidence and the Propriety of the Penalty in Death Penalty Appeals.

(a) Procedure in trial court. Upon the entry of a sentence subject to 42 Pa.C.S. § 9711(h) (review of death sentence) the court shall direct the official court reporter and the clerk to proceed under this chapter as if a notice of appeal had been filed 20 days after the date of entry of the sentence of death, and the clerk shall immediately give written notice of the entry of the sentence to the Administrative Office and to the Supreme Court Prothonotary's Office. The clerk shall insert at the head of the list of documents required by Pa.R.A.P. 1931(c) a statement to the effect that the papers are transmitted under this rule from a sentence of death.

(b) Filing and docketing in the Supreme Court. Upon receipt by the Prothonotary of the Supreme Court of the record of a matter subject to this rule, the Prothonotary shall immediately:

(1) Enter the matter upon the docket as an appeal, with the defendant indicated as the appellant and the Commonwealth indicated as the appellee.

(2) File the record in the Supreme Court.

(3) Give written notice of the docket number assignment in person or by first class mail to the clerk of the trial court.

(4) Give notice to all parties and the Administrative Office of the docket number assignment and the date on which the record was filed in the Supreme Court, and give notice to all parties of the date, if any, specially fixed by the Prothonotary pursuant to Pa.R.A.P. 2185(b) for the filing of the brief of the appellant.

(c) Further proceedings. Except as required by Pa.R.A.P. 2189 or by statute, a matter subject to this rule shall proceed after docketing in the same manner as other appeals in the Supreme Court.

***Note*: Formerly the Act of February 15, 1870 (P. L. 15, No. 6) required the appellate court to review the sufficiency of the evidence in certain homicide cases regardless of the failure of the appellant to challenge the matter. See, e.g., Commonwealth v. Santiago, 382 A.2d 1200 (Pa. 1978). Pa.R.A.P. 302 now provides otherwise with respect to homicide cases generally. However, under paragraph**

(c) of this rule the procedure for automatic review of capital cases provided by 42 Pa.C.S. § 9711(h) (review of death sentence) will permit an independent review of the sufficiency of the evidence in such cases. In capital cases, the Supreme Court has jurisdiction to hear a direct appeal and will automatically review (1) the sufficiency of the evidence ''to sustain a conviction for first-degree murder in every case in which the death penalty has been imposed;'' (2) the sufficiency of the evidence to support the finding of at least one aggravating circumstance set forth in 42 Pa.C.S. § 9711(d); and (3) the imposition of the sentence of death to ensure that it was not the product of passion, prejudice, or any other arbitrary factor. Commonwealth v. Mitchell, 902 A.2d 430, 444, 468 (Pa. 2006); 42 Pa.C.S. § 722; 42 Pa.C.S. § 9711(h)(1), (3). Any other issues from the proceedings that resulted in the sentence of death may be reviewed only if they have been preserved and if the defendant files a timely notice of appeal.

Likewise, although Pa.R.A.P. 702(b) vests jurisdiction in the Supreme Court over appeals from sentences imposed on a defendant for lesser offenses as a result of the same criminal episode or transaction where the offense is tried with the capital offense, the appeal from the lesser offenses is not automatic. Thus the right to appeal the judgment of sentence on a lesser offense will be lost unless all requisite steps are taken, including preservation of issues (such as by filing post-trial motions) and filing a timely notice of appeal.

See Pa.R.A.P. 2189 for provisions specific to the production of a reproduced record in cases involving the death penalty.

Explanatory Comment--1979

The clerk is required to "flag" capital cases by appropriate notation on the face of the record certification. The rule is revised to reflect the fact that the requirement of Rule 302 that an issue be raised below in order to be available on appeal may not be applicable in cases of automatic statutory review of death sentences.]

Official Note: The Supreme Court rescinded this rule on [DATE] as part of its consolidation of the rules relating to capital appeals. The revised content of former Pa.R.A.P. 1941 is now found in Pa.R.A.P. 3311 and 3312.

Rule 2151. Consideration of Matters on the Original Record without the Necessity of Reproduction.

(a) *General rule*.—An appellate court may by rule of court applicable to all cases, or to classes of cases, or by order in specific cases under **[Subdivision]** **paragraph** (d) of this rule, dispense with the requirement of a reproduced record and permit appeals and other matters to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

(b) *In forma pauperis*.—If leave to proceed **[in forma pauperis]** ***in forma pauperis*** has been granted to a party, such party shall not be required to reproduce the record.

(c) *Original hearing cases*.—When, under the applicable law, the questions presented may be determined in whole or in part upon the record made before the appellate court, a party shall not be required to reproduce the record.

(d) *On application to the court*.—Any appellant may within 14 days after taking an appeal file an application to be excused from reproducing the record for the reason that the cost thereof is out of proportion to the amount involved, or for any other sufficient reason. Ordinarily leave to omit reproduction of the record will not be granted in any case where the amount collaterally involved in the appeal is not out of proportion to the reproduction costs.

Official Note**: [Based on former Supreme Court Rules 35D, 35E and 61(f), former Superior Court Rules 51 (last sentence) and 52 and former Commonwealth Court Rules 81, 110B and 111A.] [Subdivision]** **Paragraph** (a) **[is new and]** is included in recognition of the developing trend toward sole reliance on the original record.

See **[Rule 2189]** **Pa.R.A.P. 3311(d) and 3313(b)** for **[procedure]** **provisions specific to the production of a reproduced record** in cases involving the death penalty.

Rule 2152. Content and Effect of Reproduced Record.

(a) *General rule*.—The reproduced record shall contain:

(1) The relevant docket entries and any relevant related matter (**[see]** ***see*** Rule 2153 (docket entries and related matter)).

(2) Any relevant portions of the pleadings, charge**,** or findings ((**[see]** ***see*** Rule 2175(b) (order and opinions)**,** which provides for a cross**-**reference note only to orders and opinions reproduced as part of the brief of appellant).

(3) Any other parts of the record to which the parties wish to direct the particular attention of the appellate court.

(b*) Immaterial formal matters*.—Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted.

(c) *Effect of reproduction of record*.—The fact that parts of the record are not included in the reproduced record shall not prevent the parties or the appellate court from relying on such parts

Official Note**:** The general rule has long been that evidence which has no relation to or connection with the questions involved must not be reproduced. **[See former Supreme Court Rule 44, former Superior Court Rule 36 and former Commonwealth Court Rule 88.]** [**See also, e.g.,**] ***See Shapiro v. Malarkey***, **[278 Pa. 78, 84,]** 122 A. 341, 342**[, 29 A.L.R. 1358]** (**Pa.** 1923); ***Sims v. Pennsylvania R.R. Co.***, **[279 Pa. 111, 117,]** 123 A. 676, 679 (**Pa.** 1924).

See **[Rule 2189]** **Pa.R.A.P. 3311(d) and 3313(b)** for **[procedure]** **provisions specific to the production of a reproduced record** in cases involving the death penalty.

Rule 2154. Designation of Contents of Reproduced Record.

(a) *General rule*.—Except when the appellant has elected to proceed under **[Subdivision]** **paragraph** (b) of this rule, or as otherwise provided in **[Subdivision]** **paragraph** (c) of this rule, the appellant shall**,** not later than 30 days before the date fixed by or pursuant to **[Rule]** **Pa.R.A.P.** 2185 **[(service and filing of briefs)]** for the filing of his or her brief, serve and file a designation of the parts of the record which he or she intends to reproduce and a brief statement of issues which he or she intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within ten days after receipt of the designations of the appellant, serve and file a designation of those parts. The appellant shall include in the reproduced record the parts thus designated. In designating parts of the record for reproduction, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

(b) *Large records*.—If the appellant shall so elect, or if the appellate court has prescribed by rule of court for classes of matters or by order in specific matters, preparation of the reproduced record may be deferred until after the briefs have been served. Where the appellant desires thus to defer preparation of the reproduced record, the appellant shall, not later than the date on which his or her designations would otherwise be due under **[Subdivision]** **paragraph**(a), serve and file notice that he or she intends to proceed under this **[subdivision]** **paragraph**. The provisions of **[Subdivision]** **paragraph** (a) shall then apply, except that the designations referred to therein shall be made by each party at the time his or her brief is served, and a statement of the issues presented shall be unnecessary.

(c) *Children's fast track appeals*.

(1) In a children's fast track appeal, the appellant shall not later than 23 days before the date fixed by or pursuant to **[Rule]** **Pa.R.A.P**. 2185 **[(service and filing of briefs)]** for the filing of his or her brief, serve and file a designation of the parts of the record which he or she intends to reproduce and a brief statement of issues which he or she intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 7 days after receipt of the designations of the appellant, serve and file a designation of those parts. The appellant shall include in the reproduced record the parts thus designated. In designating parts of the record for reproduction, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

(2) In a children's fast track appeal, the provisions of **[Subdivision] paragraph** (b) shall not apply.

Official Note**:** **[Based in part upon former Supreme Court Rule 44, former Superior Court Rule 36 and former Commonwealth Court Rule 88. The prior statutory practice required the lower court or the appellate court to resolve disputes concerning the contents of the reproduced record prior to reproduction. The statutory practice was generally recognized as wholly unsatisfactory and has been abandoned in favor of deferral of the issue to the taxation of costs phase. The uncertainty of the ultimate result on the merits provides each party with a significant incentive to be reasonable, thus creating a self-policing procedure.**

Of course, parties] **Parties** proceeding under either procedure may by agreement omit the formal designations and accelerate the preparation of a reproduced record containing the material which the parties have agreed should be reproduced.

See **[Rule 2189]** **Pa.R.A.P. 3311(d) and 3313(b)** for **[procedure]** **provisions specific to the production of a reproduced record** in cases involving the death penalty.

Rule 2155. Allocation of Cost of Reproduced Record.

(a) *General rule*.—Unless the parties otherwise agree**,** the cost of reproducing the record shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for a determination of the issues presented**,** the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. If the appellee fails to advance such costs within ten days after written demand therefor, the appellant may proceed without reproduction of the parts of the record designated by appellee which the appellant considered to be unnecessary.

(b) *Allocation by court*.—The cost of reproducing the record shall be taxed as costs in the case pursuant to Chapter 27 **[(fees and costs in appellate courts and on appeal)]**, but if either party shall cause material to be included in the reproduced record unnecessarily, the appellate court may on application filed within ten days after the last brief is filed, in its order disposing of the appeal**,** impose the cost of reproducing such parts on the designating party.

Official Note**:** This rule reflects the fact that the appellate judge to whom a case is assigned for preparation of an opinion will ordinarily be in the best position to determine whether an excessive amount of the record has been included in the reproduced record by a party.

See **[Rule 2189]** **Pa.R.A.P. 3311(d) and 3313(b)** for **[procedure]** **provisions specific to the production of a reproduced record** in cases involving the death penalty.

Rule 2187. Number of Copies to be Served and Filed.

(a) *General rule*.—Unless the appellate court directs otherwise, each party shall file:

(1) 25 copies of each definitive brief and reproduced record in the Supreme Court;

(2) 15 copies of each definitive brief and five copies of each reproduced record in the Commonwealth Court;

(3) 7 copies of each definitive brief and reproduced record in the Superior Court.

Each party shall serve 2 copies of its definitive brief and reproduced record on every other party separately represented.

(b) *Advance text of briefs*.—If the record is being reproduced pursuant to **[Rule] Pa.R.A.P.** 2154(b) (large records)**,** two copies of each brief without definitive reproduced record pagination shall be served on each party separately represented. Proof of service showing compliance with this rule (but not including the advance text of the brief) shall be filed with the prothonotary of the appellate court.

(c) *In forma pauperis*.—Unless the appellate court directs otherwise, a party who has been permitted to proceed **[in forma pauperis]** ***in forma pauperis*** shall file:

(i) 15 copies of each definitive brief with the Supreme Court;

(ii) 15 copies of each definitive brief with the Commonwealth Court;

(iii) 7 copies of each definitive brief with the Superior Court.

Each party who has been permitted to proceed **[in forma pauperis]** ***in forma pauperis*** shall serve one copy of each definitive brief on every other party separately represented.

Official Note: ***See*** **[Rule 2189] Pa.R.A.P. 3311(d) and 3313(b)** for **[procedure] provisions specific to the production of a reproduced record** in cases involving the death penalty.

Rule 2189. Rescinded by Order of [DATE] [Reproduced Record in Cases Involving the Death Penalty.

(a) *Number of Copies*.—Any provisions of these rules to the contrary notwithstanding, in all cases involving the death penalty, eight copies of the entire record shall be reproduced and filed with the prothonotary of the Supreme Court, unless the Supreme Court shall by order in a particular case direct filing of a lesser number.

(b) *Costs of Reproduction*.—Appellant, or, in cases where appellant has been permitted to proceed in *forma pauperis*, the county where the prosecution was commenced, shall bear the cost of reproduction.

(c) *Prior Rules Superseded*.—To the extent that this rule conflicts with provisions of Rule 2151(a), (b) (relating to necessity of reproduction of records); Rule 2152 (relating to content of reproduced records); Rule 2154(a) (relating to designation of contents of reproduced records); Rule 2155 (allocating costs of reproduction of records); and Rule 2187(a), (prescribing numbers of copies of reproduced record to be filed), the same are superseded.

***Note*: The death penalty statute, 42 Pa.C.S. § 9711, provides that the Supreme Court Prothonotary must send a copy of the lower court record to the Governor after the Supreme Court affirms a sentence of death. The statute does not state who is responsible for preparing the copy. This amendment provides for preparation of the Governor's copy of the record before the record is sent to the Supreme Court.]**

Official Note: The Supreme Court rescinded Pa.R.A.P. 2189 on [DATE] as part of its consolidation of the rules relating to capital appeals. The revised content of former Pa.R.A.P. 2189 is now found in Pa.R.A.P. 3311(d) and 3313(b).

Rule 2521. Entry of Judgment or Other Orders.

(a) *General Rule***--** Subject to the provisions of **[Rule]** **Pa.R.A.P.** 108 (date of entry of orders), the notation of a judgment or other order of an appellate court **[in]on** the docket constitutes entry of the judgment or other order. The prothonotary of the appellate court shall prepare, sign**,** and enter the judgment following receipt of the opinion of the court unless the opinion is accompanied by an order signed by the court, or unless the opinion directs settlement of the form of the judgment, in which event the prothonotary shall prepare, sign**,** and enter the judgment following settlement by the court. If a judgment is rendered without an opinion or an order signed by the court, the prothonotary shall prepare, sign and enter the judgment following instruction from the court. The prothonotary shall, on the date a judgment or other order is entered, send by first class mail to all parties a copy of the opinion, if any, or of the judgment or other order if no opinion was written, and notice of the date of entry of the judgment or other order.

[(b) *Notice in death penalty cases.* Pursuant to Pa.R.Crim.P. 900(B), in all death penalty cases upon the Supreme Court's affirmance of the judgment of a death sentence, the prothonotary shall include in the mailing required by subdivision (a) of this Rule the following information concerning the Post Conviction Relief Act and the procedures under Chapter 9 of the Rules of Criminal Procedure. For the purposes of this notice, the term ''parties'' in subdivision (a) shall include the defendant, the defendant's counsel, and the attorney for the Commonwealth.

(1) A petition for post-conviction collateral relief must be filed within one year of the date the judgment becomes final, except as otherwise provided by statute.

(2) As provided in 42 Pa.C.S. § 9545(b)(3), a judgment becomes final at the conclusion of direct review, which includes discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(3) (A) If the defendant fails to file a petition within the one-year limit, the action may be barred. *See* 42 Pa.C.S. § 9545(b).

(B) Any issues that could have been raised in the post-conviction proceeding, but were not, may be waived. *See* 42 Pa.C.S. § 9544(b).

(4) Pursuant to Rule 904 (Appointment of Counsel; In Forma Pauperis), the trial judge will appoint new counsel for the purpose of post-conviction collateral review, unless:

(A) the defendant has elected to proceed pro se or waive post-conviction collateral proceedings, and the judge finds, after a colloquy on the record, that the defendant is competent and the defendant's election is knowing, intelligent and voluntary;

(B) the defendant requests continued representation by original trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the petitioner's election constitutes a knowing, intelligent and voluntary waiver of a claim that counsel was ineffective; or

(C) the judge finds, after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings.

Official Note See Pa.R.Crim.P. 900(B), which also includes the identical requirement in death penalty cases that notice of the information concerning the statutory time limitations for filing petitions for post-conviction collateral relief and the right to counsel enumerated in subdivision (b) of this rule be sent by the prothonotary with the order or opinion sent pursuant to subdivision (a) of this rule. Because of the importance of this notice requirement to judges, attorneys and defendants, the requirement that the Supreme Court Prothonotary mail the aforesaid notice has been included in both the Rules of Criminal Procedure and the Rules of Appellate Procedure.]

Official Note: The Supreme Court rescinded former paragraph (b) on [DATE] as part of its consolidation of the rules relating to capital appeals. The revised content of former Pa.R.A.P. 2521 (b) is now found in Pa.R.A.P. 3311(e).

Rule 2572. Time for Remand of Record.

(a) *General rule.*—Except as provided in paragraphs (b) or (c), the record shall be remanded after the entry of the judgment or other final order of the appellate court possessed of the record.

(1) *Supreme Court orders.* **In Supreme Court appeals, the record shall be remanded at the expiration of 14 days after the entry of the judgment or other final order. [The time for the remand of the record pursuant to subdivision (a) following orders of the Supreme Court shall be**

(1) 7 days after expiration of the time for appeal or petition for writ of certiorari to the United States Supreme Court in cases in which the death penalty has been imposed, and

(2) 14 days in all other cases.

***Note*: The amendment provides for remand seven days after expiration of the time for appeal or petition for writ of certiorari to the United States Supreme Court in cases in which the death penalty has been imposed. This keeps the movement of the record to a minimum and decreases any risks associated with the physical movement of the record.**]

(b) *Effect of pending post-decision applications on remand.*—Remand is stayed until disposition of: (1) an application for reargument; (2) any other application affecting the order; or (3) a petition for allowance of appeal from the order. The court possessed of the record shall remand 30 days after either the entry of a final order or the disposition of all post-decision applications, whichever is later.

(c) *Stay of remand pending United States Supreme Court Review*.—Upon application, the Supreme Court of Pennsylvania may stay remand of the record pending review in the Supreme Court of the United States. The Supreme Court Prothonotary shall notify the court having possession of the record of the application and of disposition of the application. The stay shall not exceed 90 days unless the period is extended for cause shown. If a stay is granted and the Clerk of the Supreme Court of the United States notifies the Supreme Court of Pennsylvania that the party that obtained the stay has filed a jurisdictional statement or a petition for a writ of *certiorari*, the stay shall continue until final disposition by the Supreme Court of the United States. Upon the filing in the Supreme Court of Pennsylvania of a copy of an order of the Supreme Court of the United States dismissing the appeal or denying the petition for a writ of *certiorari*, the record shall be remanded immediately.

(d) *Security.*—Appropriate security in an adequate amount may be required as a condition to the grant or continuance of a stay of remand of the record.

(e) *Docket entry of remand.*—The prothonotary of the appellate court shall note on the docket the date on which the record is remanded and give written notice to all parties of the date of remand.

Official Note: This rule keeps the movement of the record to a minimum and decreases the risks associated with the physical movement of the record. The 2017 amendment clarifies that an application for stay of the remand of the record pending United States Supreme Court review should be filed in the Pennsylvania Supreme Court.

SPECIAL RULES APPLICABLE IN DEATH PENALTY CASES

(Rules 3311-3316 are entirely new)

Rule 3311. Review of Death Sentence; Reproduced Record; PCRA Notice; Remand of Record; Copy of Record to Governor.

(a) *Direct Review.*--Except as otherwise provided in this rule, an appeal from a sentence of death shall proceed in the same manner as other appeals in the Supreme Court.

(1) Lesser offenses tried with capital offenses: appeals from sentences imposed on the defendant for lesser offenses tried with the offense(s) resulting in a sentence of death shall be briefed along with the related capital appeal. *See* Pa.R.A.P. 702(b).

(b) *Automatic Review of Sufficiency of the Evidence and Propriety of the Penalty.* If the defendant fails to file a timely appeal from a sentence of death, limited automatic review shall proceed in the Supreme Court pursuant to Pa.R.A.P. 3312.

(c) *Jurisdictional statement..*--A jurisdictional statement is not required in appeals involving direct or automatic review of a death sentence.

(d) *Reproduced Records in Cases Involving Direct or Automatic Review of a Death Sentence.*

(1) Number of Copies: Four copies of the entire record shall be reproduced and filed with the Supreme Court Prothonotary, unless the Court shall by order direct the filing of a different number.

(2) Cost of Reproduction: The appellant, or, in cases where the appellant has been permitted to proceed *in forma pauperis*, the county where the prosecution was commenced, shall bear the cost of reproduction.

(3) Other Rules Superseded: To the extent paragraph (d) conflicts with provisions of Pa.R.A.P. 2151, 2152, 2154(a), 2155, and 2187(a), paragraph (d) controls.

(e) *PCRA Notice if Death Sentence is Affirmed.* When the Supreme Court affirms a sentence of death, the Prothonotary shall include in the mailing required by Pa.R.A.P. 2521(a) the following information concerning post-conviction rights:

1. The appellant has the right to seek further review by way of a petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

2. A PCRA petition must be filed within one year of the date the judgment becomes final, except as otherwise provided in the statute. *See* 42 Pa.C.S. § 9545(b).

3. A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States, or at the expiration of the time for seeking that review, if review is not sought. *See* 42 Pa.C.S. § 9545(b)(3).

4. If the appellant fails to file the PCRA petition within the one-year time limit, the action may be barred. *See* 42 Pa.C.S. § 9545(b).

5. Issues that could have been raised prior to the PCRA proceeding, but were not, may be deemed waived. *See* 42 Pa.C.S. § 9544(b).

6. Pursuant to Pa.R.Crim.P. 904(H), the trial judge will appoint new counsel for the purpose of PCRA review, unless:

(i) the appellant elects to proceed without counsel or to waive PCRA review, and the judge finds, after a colloquy on the record, that the appellant is competent and the appellant's election is knowing, intelligent, and voluntary;

(ii) the appellant requests continued representation by trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the appellant's election constitutes a knowing, intelligent, and voluntary waiver of claims sounding in that attorney's ineffectiveness; or

(iii) the judge finds, after a colloquy on the record, that the appellant has engaged counsel who has entered, or will promptly enter, an appearance for the PCRA proceedings.

For purposes of this notice, the term ''parties'' in Pa.R.A.P. 2521(a) includes the appellant, the appellant's counsel, and the attorney for the Commonwealth.

(f) *Remand of Record.* Following entry of the judgment on direct or automatic review, the Supreme Court Prothonotary shall remand the record to the court of common pleas at the expiration of seven days from the later of the date of:

1. the expiration of the time for filing a petition for a writ of *certiorari* to the Supreme Court of the United States;

2. the denial of a petition for a writ of *certiorari*; or

3. remand from the Supreme Court of the United States, if that Court grants the petition for a writ of *certiorari*.

(g) *Copy of Record to Governor if Death Sentence is Affirmed.* When the Supreme Court affirms a judgment of sentence of death the Supreme Court Prothonotary shall transmit to the Governor a complete copy of the record, and provide notice of that transmission to the Secretary of Corrections, within 30 days after the date the record is ready for remand. *See* 42 Pa.C.S. § 9711(i).

Official Note: Pa.R.A.P. 3311 includes provisions found in former Pa.R.A.P. 1941, 2189, 2521(b), and 2572(b).

Death sentences are subject to automatic review by the Supreme Court. *See* 42 Pa.C.S. §§ 722(4); 9711(h); Pa.R.A.P. 3312. Automatic review is generally limited to: (1) the sufficiency of the evidence to sustain the first-degree murder conviction; (2) the sufficiency of the evidence to support at least one of the aggravating circumstances set forth in 42 Pa.C.S. § 9711(d) and found by the fact finder; and (3) review to determine if the death sentence was the product of passion, prejudice, or any other arbitrary factor. *See, e.g., Commonwealth v. Mitchell*, 902 A.2d 430, 444, 468 (Pa. 2006); 42 Pa.C.S. § 9711(h) (3). These issues are examined, on direct or automatic appeal, whether the appellant raises them or not.

It is imperative that the defendant and counsel recognize that other issues are generally reviewable only if preserved and if a timely notice of appeal is filed. *See* Pa.R.A.P. 302(a) (issues not raised in the lower court are waived); *Commonwealth v. Freeman*, 827 A.2d 385, 402-03 (Pa. 2003) (reflecting curtailment of the relaxed waiver doctrine in capital direct appeals); *Commonwealth v. Parrish*, 77 A.3d 557, 561 (Pa. 2013) (claims unassociated with automatic review are not preserved if the defendant fails to file an appeal from a death sentence).

Although Pa.R.A.P. 702(b) vests jurisdiction in the Supreme Court over appeals from sentences imposed for lesser offenses tried together with capital offenses, the appeal is not automatic. To secure review, the defendant must take all requisite steps, including the preservation of issues below and filing a timely notice of appeal encompassing the lesser offenses.

The Supreme Court Prothonotary must transmit a copy of the record to the Governor after a sentence of death is affirmed, but the death penalty statute does not assign responsibility for preparing the copy. *See* 42 Pa.C.S. § 9711(i). Paragraph (d) reduces the number of copies of the record ordinarily required and addresses responsibility for reproduction.

Paragraph (e) is intended to ensure that the appellant's PCRA rights are not inadvertently defaulted.

Rule 3312. Automatic Review of Death Sentence.

(a) *Procedure in trial court.*—Upon the entry of a judgment of sentence of death, the trial court shall direct the official court reporter and the clerk to proceed as if a timely notice of appeal will be filed by the defendant. The clerk shall promptly give written notice of the entry of the death sentence to the Administrative Office and to the Supreme Court Prothonotary. If a timely appeal is not filed from the death sentence, the clerk shall insert at the head of the list of documents required by Pa.R.A.P. 1931(c) a statement that the papers are transmitted under this rule for automatic review of a death sentence.

(b) *Filing and docketing in the Supreme Court.*—Upon receipt of the record in a case where a death sentence has been entered but no appeal has been filed, the Supreme Court Prothonotary shall:

1. Enter the matter upon the docket as an appeal, with the defendant indicated as the appellant and the Commonwealth indicated as the appellee.

2. File the record in the Supreme Court.

3. Provide written notice of the docket number assignment to the clerk of the trial court.

4. Provide notice to the parties and the Administrative Office of the docket number assignment and the date on which the record was filed in the Supreme Court, and provide notice to the parties of the date, if any, fixed by the Prothonotary for the filing of the brief of the appellant.

5. Except as required by Pa.R.A.P. 3311(d) (reproduced record), (f) (remand of record), and (g) (copy of record to Governor), a matter subject to automatic review under this rule shall proceed after docketing in the same manner as other appeals in the Supreme Court.

Official Note: The rule incorporates and revises provisions in former Pa.R.A.P. 1941, 2189, and 2521(b) and implements the automatic review of death sentences required by statute. *See* 42 Pa.C.S. §§ 722(4), 9711(h).

A notice of appeal triggers (1) the duty of the court reporter to transcribe the notes of testimony, (2) the duty of the clerk of the trial court to prepare and transmit the record, and (3) various duties of the appellate court prothonotary. The rule governs cases where no appeal is filed and automatic review is implicated.

Rule 3313. PCRA Appeals; Reproduced Record; Remand of Record; Copy of Record to Governor.

(a) *General Rule.*—Except as otherwise provided in this rule, an appeal from a final order disposing of a PCRA petition in a death penalty case shall proceed in the same manner as other appeals in the Supreme Court.

(b) *Reproduced Record.*

1. Number of Copies: Four copies of the entire record shall be reproduced and filed with the Supreme Court Prothonotary, unless the Court shall by order direct the filing of a different number.

2. Cost of Reproduction: The appellant shall bear the cost of reproduction unless the defendant is the appellant and has been permitted to proceed in *forma pauperis*, in which case the county where the prosecution was commenced shall bear the cost of reproduction.

3. Other Rules Superseded: To the extent paragraph (b) conflicts with provisions of Pa.R.A.P. 2151, 2152, 2154(a), 2155, and 2187(a), this paragraph (b) controls.

(c) *Remand of Record.*—Following entry of the judgment, the Supreme Court Prothonotary shall remand the record to the court of common pleas at the expiration of seven days from the later of the date of:

1. the expiration of the time for filing a petition for a writ of *certiorari* to the Supreme Court of the United States;

2. the denial of a petition for a writ of *certiorari*; or

3. remand from the Supreme Court of the United States, if that Court grants the petition for a writ of *certiorari*.

(d) *Copy of Record to Governor.*—Whenever a PCRA appeal results in the denial of relief to the defendant, the Supreme Court Prothonotary shall transmit to the Governor a complete copy of the record, and provide notice of that transmission to the Secretary of Corrections, within 30 days after the date the record is ready for remand. *See* 42 Pa.C.S. § 9711(i).

Official Note: Under 42 Pa.C.S. § 9546(d), as amended in 1988, the Supreme Court has exclusive jurisdiction over appeals from final orders in death penalty cases litigated under the PCRA. Later amendments to Section 9546(d) were

suspended by the Supreme Court's order dated August 11, 1997, thus reviving the 1988 provision. *See Commonwealth v. Morris*, 771 A.2d 721, 743 n.1 (Pa. 2001) (Castille, J., concurring) (explaining effect of suspension).

Rule 3314. Stays of Execution.

(a) *Automatic Stays.*

(1) Direct Review: Execution of a sentence of death shall be stayed by the pendency of an appeal from that sentence, or by the pendency of automatic review under Pa.R.A.P. 3312.

(2) PCRA Review: Execution of a sentence of death shall be stayed by the pendency of an appeal from the disposition of a timely first petition for PCRA relief.

(b) *Other Cases; Application for Stay or Review.* Except in matters arising under Pa.R.A.P. 3315, an application for a stay of execution or for review of an order granting or denying a stay of execution shall be reviewable by the Supreme Court in the manner prescribed by this paragraph (b).

(1) Advance Notice to Court: Prior notice of the intention to seek a stay of execution or review of an order granting or denying a stay shall be promptly provided to the Supreme Court Prothonotary.

(2) Form of Pleading: No notice of appeal or petition for review needs to be filed in order to file the application for stay or review.

(3) Content: The application shall set forth the following:

(i) The name of the defendant.

(ii) The place where the defendant is presently confined.

(iii) The date the warrant of execution issued; the date and nature of the order that prompted the warrant; and the date execution is scheduled.

(iv) Whether any challenge to the underlying conviction is pending, and if so, in what court.

(v) Whether any other application for stay of the execution has been filed; if so, in what court; and the status of that application.

(vi) A statement briefly setting forth the procedural history.

(vii) The text of the trial court order ruling upon the stay, if any, and an account of the trial court's reasoning in granting or denying the stay.

(viii) A statement setting forth the facts alleged in support of the application.

(ix) The grounds for relief and the showing made to the trial court of entitlement to a stay under 42 Pa.C.S. § 9545(c), if applicable.

(x) A statement certifying that emergency action is required and setting forth a description of the emergency.

All relevant materials shall be attached to the application. If any of the information provided in the application changes while the application is pending, the applicant must file written notice of the change with the Supreme Court within 24 hours.

(4) Answer: The respondent shall file an answer, or a no-answer letter, according to a timeframe established by the Supreme Court Prothonotary, bearing in mind the imminence of execution.

(5) Filing and Copies: The original application and seven copies, along with a certificate of service, shall be filed with the Supreme Court Prothonotary in person or by first class, express, or priority United States Postal Service mail. If execution appears imminent, the application shall be filed in coordination with the Prothonotary in a manner, electronic or otherwise, ensuring receipt by the Court on the date of transmission. Any answer shall be filed in similar number and fashion.

(6) Service: A copy of the application shall be served in person or by first class, express, or priority United States Postal Service mail upon the respondent, the Governor, and the Secretary of Corrections. A copy of the answer or no-answer letter shall be served upon the petitioner, the Governor, and the Secretary of Corrections in a similar fashion. If execution appears imminent, the application and answer shall also be served in a manner, electronic or otherwise, ensuring receipt on the date of transmission.

(7) Entry and Notice of Judgment: The Supreme Court Prothonotary shall prepare and enter the judgment of the Supreme Court immediately following receipt of the decision. The Prothonotary shall immediately

inform the parties of the decision and shall send by first class mail to the parties, the Governor, and the Secretary of Corrections a copy of the opinion, if any, or of the judgment or other order if no opinion was written, and notice of the date of the entry of the judgment. If execution appears imminent, the Prothonotary shall provide the above notice in a manner, electronic or otherwise, ensuring receipt on the date of transmission.

(8) Remand of record: Following entry of the judgment, the Supreme Court Prothonotary shall remand the record, if any, to the court of common pleas at the expiration of seven days from the later of the date of:

(i) the expiration of the time for filing a petition for a writ of *certiorari* to the Supreme Court of the United States;

(ii) the denial of a petition for a writ of *certiorari*; or

(iii) remand from the Supreme Court of the United States, if that Court grants the petition for a writ of *certiorari*.

Official Note: The rule revises provisions found in former Pa.R.A.P. 1704 and 3316.

Subparagraph (a)(1) recognizes that an execution warrant cannot be issued unless review of a death sentence results in affirmance. *See* 42 Pa.C.S. § 9711(i) (record to Governor where death sentence is upheld)); 61 Pa.C.S. § 4302 (issuance of warrant of execution). The effect of the statutory scheme is that the death sentence is stayed pending completion of direct review.

Subparagraph (a)(2) recognizes that the defendant has a right to pursue a timely first petition for PCRA relief and a right to appeal if denied relief. A stay of execution allows for the vindication of those rights when timely asserted.

Paragraph (b) addresses stays in other contexts, and derives from former Pa.R.A.P. 3316. Stay issues often arise ancillary to a second or subsequent PCRA petition; those issues are subject to 42 Pa.C.S. § 9545(c) (the petition must be pending and meet all requirements of the PCRA, and the petitioner must make a strong showing of a likelihood of success on the merits). *See Commonwealth v. Morris*, 822 A.2d 684, 693 (Pa. 2003) ("*Morris II*"). The PCRA trial court lacks jurisdiction to grant a stay ancillary to an untimely petition. *See Commonwealth v. Morris*, 771 A.2d 721, 734-35 & n.14, 742 (Pa. 2001) ("*Morris I*"); 42 Pa.C.S. § 9545(c).

Pa.R.Crim.P. 909(A)(3) provides that a stay of execution properly granted by the PCRA court remains in effect through the conclusion of the proceedings, including appeal. The Commonwealth may seek immediate review under Pa.R.A.P. 3314 to challenge whether a stay was properly granted in the serial petition context, while the defendant may seek immediate review of the denial of a stay request forwarded ancillary to a serial petition. In permitting immediate review, the rule recognizes the exigencies and that the stay issue may require resolution in advance of an appeal from the decision on the PCRA petition, or even in advance of the decision itself. In addition, there may be instances where the PCRA court denies the underlying petition, but grants a stay; the Commonwealth is potentially aggrieved only by the stay.

The *Morris* cases left open a question of whether scenarios outside the context of the PCRA might exist in which courts would maintain authority to grant a stay of execution, and whether the standard in Section 9545(c) of the PCRA should apply. *See Morris II*, 822 A.2d at 693-94. The Supreme Court has not issued a "wholesale resolution of this residual question," *Commonwealth v. Michael*, 56 A.3d 899, 903 (Pa. 2012) (*per curiam*), but it has addressed discrete circumstances. *See id.*, 56 A.3d at 903-04 (denying deemed applications for relief seeking review of denial of stay of execution requested in connection with clemency process; lower courts lacked authority to issue a stay under Section 9545(c)); *Commonwealth v. Banks*, 943 A.2d 230, 234-35 n.7 (Pa. 2007) (*per curiam*) (noting the absence of a rules-based process for determining a motion to stay execution based upon a claim of incompetency to be executed).

In the wake of *Banks*, the Supreme Court has adopted specific rules addressing stay of execution issues arising in conjunction with execution competency claims. *See* Pa.R.Crim.P. 850-862; Pa.R.A.P. 3315.

The rule does not expand or diminish any inherent powers of the Supreme Court to grant a stay of execution. *See Morris II*, 822 A.2d at 691.

Subparagraph (b)(2) recognizes that stay of execution issues require streamlined treatment falling outside the appeal or petition for review process.

[SUPERSEDEAS AND STAYS

Rule 3315. Review of Stay Orders of Appellate Courts.

Where the Superior Court or the Commonwealth Court in the exercise of its appellate jurisdiction has entered an order under Chapter 17 (effect of appeals; supersedeas and stays), such order may be further reviewed by any justice of the Supreme Court in the manner prescribed by Chapter 17 with respect to appellate review of supersedeas and stay determinations of lower courts.

Note: **After a party has applied for a stay, etc., in the trial court, and a further application has been acted on by the Superior Court or the Commonwealth Court, or by a judge thereof, a further application may be made under this rule to the Supreme Court or to a justice thereof. Under the prior practice a petition for allowance of appeal was required in the Supreme Court under Rule 1702(b) in order to maintain the validity of the Supreme Court action on the stay, etc. Rule 1702(c) (Supreme Court review of appellate court supersedeas and stay determinations) now provides that no appeal or petition need be filed to support jurisdiction under this rule. However, this rule does not invite routine reapplications in the Supreme Court, but only clarifies the procedure when the Court exercises its inherent supervisory powers in cases of egregious error below. See 42 Pa.C.S. § 726 (extraordinary jurisdiction).**

Explanatory Comment--1979

The stay and supersedeas procedure in the Supreme Court is clarified in King's Bench matters and in cases where the Superior Court or the Commonwealth Court (in its appellate capacity) has acted on a stay or supersedeas application.]

Former Pa.R.A.P. 3315 (Review of Stay Orders of Appellate Courts) has been renumbered Pa.R.A.P. 3319 to accommodate the consolidation of the special rules relating to capital cases.

Rule 3315. Review of Orders Determining Competency to be Executed.

(a) *General Rule.*—A trial court's determination of competency to be executed, issued under Part C of Chapter 8 of the Rules of Criminal Procedure, is subject to review by application filed in the Supreme Court in the manner prescribed by this rule.

(1) Advance Notice to Court: Prior notice of the intention to file the application for review shall be provided to the Supreme Court Prothonotary no later than two days before a filing under subparagraph (b)(1) (execution warrant pending) and no later than five days before a filing under subparagraph (b)(2) (no execution warrant pending).

(b) *Timing; Answer.*

(1) Execution Warrant Active (Expedited Review): An application for review of an order entered under Pa.R.Crim.P. 857(E)(1), denying a challenge to a certification of competency to be executed and denying a stay of execution, shall be filed in the Supreme Court within 10 days of the entry of the order.

(i) The Commonwealth shall file an answer within seven days of the filing of the application, unless the Supreme Court Prothonotary directs that the answer be filed sooner.

(2) No Active Execution Warrant: An application for review of an order entered under Pa.R.Crim.P. 858(E)(1), 859(E)(1), or 861(B), resolving the issue of competency to be executed where no execution warrant is pending or a pending warrant has been stayed, shall be filed within 21 days of the entry of the order.

(i) The respondent shall file an answer within 14 days of the filing of the application.

(c) *Form of Pleading.*—No notice of appeal or separate petition for review needs to be filed in order to file an application under this rule.

(d) *Content.*—The application shall set forth the following:

1. The name of the defendant.

2. The place where the defendant is presently confined.

3. If a warrant of execution is pending, the date the warrant issued and the date execution is scheduled.

4. Whether any challenge to the underlying conviction is pending, and if so, in what court.

5. If a warrant of execution is pending, whether any other application for a stay of the execution has been filed; if so, in what court; and the status of that application.

6. A statement briefly setting forth the procedural history.

7. The text of the order below, and an account of the lower court's reasoning in support of the order.

8. A statement setting forth the facts alleged in support of the application, including citations to the record.

9. A concise legal argument on the question of competency to be executed.

All relevant materials shall be attached to the application. If any of the information provided in the application changes while the application is pending, the applicant must file written notice of the change with the Supreme Court within 24 hours.

(e) *Filing; Copies*.—The original application and seven copies, along with a certificate of service, shall be filed with the Supreme Court Prothonotary in person or by first class, express, or priority United States Postal Service mail. The answer to the petition shall be filed in similar number and fashion. If an execution warrant is pending, the application and answer shall also be filed in coordination with the Supreme Court Prothonotary in a manner, electronic or otherwise, ensuring receipt by the Court on the date of transmission.

(f) *Service.*—A copy of the application for review shall be served in person or by first class, express, or priority United States Postal Service mail upon the respondent, the Governor, and the Secretary of Corrections. The answer to the petition shall be served upon the petitioner, the Governor, and the Secretary of Corrections in similar fashion. If an execution warrant is pending, the application and answer shall also be served in a manner, electronic or otherwise, ensuring receipt on the date of transmission.

(g) *Entry and Notice of Judgment.*—The Supreme Court Prothonotary shall prepare and enter the judgment of the Court immediately following receipt of the decision. The Prothonotary shall immediately inform the parties of the decision and shall send by first class mail to the parties, the Governor, and the Secretary of Corrections a copy of the opinion, or order if no opinion was issued, and notice of the date of the entry of the judgment. In addition, if an execution warrant is pending, the Prothonotary shall provide the parties, the Governor, and the Secretary of Corrections with a copy of the opinion or order of judgment in a manner, electronic or otherwise, ensuring receipt on the date of transmission.

(h) *Remand of record.*—The Supreme Court Prothonotary shall remand the record to the court of common pleas at the expiration of seven days from the later of the date of:

1. the expiration of the time for filing a petition for a writ of *certiorari* to the Supreme Court of the United States;

2. the denial of a petition for a writ of *certiorari*; or

3. remand from the Supreme Court of the United States, if that Court grants the petition for a writ of *certiorari*.

The Prothonotary shall contemporaneously provide a copy of the final order and notice of the remand and transmittal to the parties, the Governor and the Secretary of Corrections.

Official Note*:* The rule was adopted in conjunction with the rules of criminal procedure addressing execution competency. *See* Pa.R.Crim.P. 850-862.

Subparagraph (b)(1) governs review where the defendant is found competent below and execution appears imminent. Expedition on appeal is required.

Subparagraph (b)(2) governs review of other competency orders, where a stay of execution is in place or an execution warrant has expired. Some expedition is still required to ensure that the competency determination is not stale and the stay of execution is not excessive.

When competency is litigated in the trial court, the judge, the trial court clerk, the parties' counsel, and the Department of Corrections are to "maintain lines of communication to ensure the prompt filing and contemporaneous service of all motions, certifications, responses, answers and other pleadings." *See* Pa.R.Crim.P. 852(B)(4). The Supreme Court Prothonotary is also required to

monitor capital cases and, when competency proceedings are initiated, to "establish communications with the parties and relevant state and federal courts to facilitate the Supreme Court's timely resolution of issues relating to the execution process." *See* Pa.R.Crim.P. 853(C). Pa.R.A.P. 3315 likewise recognizes the exigencies and requires prompt filing and service and, in cases where execution is imminent, requires measures to ensure contemporaneous service.

Paragraph (c) recognizes that execution competency issues require streamlined treatment outside the normal appeal or petition for review process.

[Rule 3316. Review of Stay of Execution Orders in Capital Cases.

When a trial court has entered an order granting or denying a stay of execution in a capital case, such order may be reviewed by the Supreme Court in the manner prescribed in Pa.R.A.P. 1704.

Explanatory Comment—2005

The promulgation of new Rule 3316 addresses a gap in the Rules of Appellate Procedure such that there was no immediate vehicle for review of stays of execution orders granted or denied ancillary to Post Conviction Relief Act ("PCRA") petitions in capital cases. See *Commonwealth v. Morris*, 565 Pa. 1, 771 A.2d 721 (2001) ("*Morris I*"). The new Rule permits an immediate appeal from an order granting or denying a stay pending a determination of the underlying PCRA petition. The new Rule also permits immediate review of a grant of a stay of execution without the filing of an appeal in situations in which the trial court grants a stay of execution but denies the PCRA petition.

There may be cases in which the PCRA court denies a stay of execution at the same time that it denies a timely PCRA petition. In such cases, the petitioner may take an immediate appeal from the denial of the stay of execution, even before the petitioner files an appeal from the denial of the PCRA petition. The PCRA court lacks jurisdiction to grant a stay of execution in connection with an untimely PCRA petition. See *Morris I*. However, the improper grant of a stay in connection with an untimely PCRA petition is also immediately reviewable under this Rule. See Pa.R.Crim.P. 909(A)(2).

Pa.R.Crim.P. 909(A)(2) only applies to properly granted stays of execution. Once a stay is properly granted, it is not reviewable until the conclusion of the PCRA proceedings, including appellate review. However, the Commonwealth may seek review under Rule 3316 to determine whether the PCRA court properly granted the stay.

The standard of review for stay applications under 42 Pa.C.S. § 9545(c) is a heightened standard, since there is a greater potential that second and subsequent PCRA applications have been filed merely for purposes of delaying the execution of sentence. See *Morris I* and *Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684 (2003) ("*Morris II*"). Stays of execution in capital cases, however, are routinely granted in timely-filed, first PCRA petitions.

Nothing in this Rule or subdivision (d) of Rule 1702 is intended to abrogate the requirement in *Morris II* that any grant of a stay by the trial court while a PCRA petition is pending must comply with the PCRA, 42 Pa.C.S. § 9545(c)(1), nor do

these rules expand or diminish any inherent powers of the Supreme Court to grant a stay of execution. See *Morris II*.]

(Former Pa.R.A.P. 3316 (Review of Execution Orders in Capital Cases) was rescinded by Order of [DATE]. The subject matter of former Pa.R.A.P. 3316 is now part of Pa.R.A.P. 3314.)

Rule 3316. Miscellaneous.

(a) *Other Cases.*—Death penalty cases involving other issues, such as appeals from collateral orders or other interlocutory appeals, shall proceed in the same manner as other matters in the Supreme Court.

SUPERSEDEAS AND STAYS

Rule 3319. Review of Stay Orders of Appellate Courts.

Where the Superior Court or the Commonwealth Court in the exercise of its appellate jurisdiction has entered an order under Chapter 17 (effect of appeals; *supersedeas*, and stays), such order may be further reviewed by any justice of the Supreme Court in the manner prescribed by Chapter 17 with respect to appellate review of *supersedeas* and stay determinations of lower courts.

Official Note*:* After a party has applied for a stay, etc., in the trial court, and a further application has been acted on by the Superior Court or the Commonwealth Court, or by a judge thereof, a further application may be made under this rule to the Supreme Court or to a justice thereof. Under the prior practice, a petition for allowance of appeal was required in the Supreme Court under Pa.R.A.P. 1702(b) in order to maintain the validity of the Supreme Court action on the stay, etc. Pa.R.A.P. 1702(c) now provides that no appeal or petition need be filed to support jurisdiction under this rule. However, this rule does not invite routine reapplications in the Supreme Court, but only clarifies the procedure when the Court exercises its inherent supervisory powers in cases of egregious error below. *See* 42 Pa.C.S. § 726 (extraordinary jurisdiction).

The rule was formerly Pa.R.A.P. 3315, but has been renumbered to accommodate the consolidation of the rules relating to capital cases. *See* Pa.R.A.P. 3311-3316.

Proposed Adoption of new Pa.Rs. Crim.P. 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, Amendment of Pa.Rs.Crim.P. 113, 119, 909 and Revision of the Comments to Pa.Rs.Crim.P. 120, 800, and 904

Proposed Adoption of Pa.Rs.A.P. 3311, 3312, 3314, 3315, 3316, 3319, Rescission of Pa.R.A.P. 1704, 1941, 3315, 3316, Amendment of Pa.R.A.P. 702, 901, 909, 1501, 1702, 1761, 2189, 2521, 2572, 3313 and Revision of the Official Notes to Pa.R.A.P. 2151, 2152, 2154, 2155, and 2187

DETERMINATION OF COMPETENCY TO BE EXECUTED

The Supreme Court of Pennsylvania is considering the adoption of new Pa.Rs. Crim.P. 850-862 that would establish the procedures for determining a defendant's competency to be executed. The Court is also considering the adoption of new Pa.R.A.P. 3311-3316, and 3319 and the rescission of Pa.R.A.P. 1704, 1941, 3315, 3316, that would establish the procedures for seeking review of a competency determination made under the proposed new Criminal Rules as well as a consolidation of the procedures for the review of capital matters generally. The Court also is considering correlative changes to Pa.Rs.Crim.P. 113, 119, 120, 800, 904 and 909 and to Rules of Appellate Court Procedure 702, 901, 909, 1501, 1702, 1761, 2151, 2152, 2154, 2155, 2187, 2189, 2521, and 2572.

I. BACKGROUND

Ford v. Wainwright, 477 U.S. 399 (1986) held that, pursuant to the Eighth Amendment to the United States Constitution, a defendant is incompetent to be executed when he or she suffers from a mental illness preventing a factual awareness and a rational understanding of the punishment to be imposed and the reasons for its imposition. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the United States Supreme Court held that, if the defendant makes a substantial threshold showing of incompetency, due process requires a judicial procedure to resolve the issue. *Panetti* did not set forth "precise limits" of the process required, but left to the states the procedures for challenging competency to be executed. *See also Commonwealth v. Banks,* 29 A.3d 1129, 1144 (Pa. 2011).

Pennsylvania does not have specific procedures in either statute or rule for the determination of competency to be executed. The current proposal originated in this Court's opinion in *Commonwealth v. Banks*, 943 A.2d 230 (2007). One of the issues raised in *Banks* regarded the procedures for an examination by a Commonwealth expert of the defendant's mental condition. As the Court observed in a footnote:

> There is not currently in place a specific procedure for the timely handling of *Ford v. Wainwright* claims—either under the PCRA or other legislation,

> or under this Court's rules. We had hoped that this case might be the proper vehicle for developing such a procedure, but the warrant for appellee's execution has expired and the parties do not address the propriety of the procedure employed here. Therefore, we will refer the matter to the Appellate Court Procedural Rules Committee and the Criminal Procedural Rules Committee to recommend a framework for the filing and disposition of motions for stay of execution based on a defendant's purported incompetence to be executed.

As directed by the Court, the Committees jointly developed a proposal that was published for comment on May 8, 2010.[1]

II. CRIMINAL RULES

The 2010 proposal deemed a *Ford* claim ripe whenever an execution warrant issued: counsel would be appointed if the defendant was unrepresented and counsel's motion challenging competency would initiate the *Ford* claim. The proposal envisioned that, if the defendant made a substantial threshold showing of incompetency, requiring a hearing, a 210-day stay of execution would follow.

Following submission of the proposal, the Court has concluded that there is no point in entertaining *Ford* execution competency claims whenever an execution warrant issues; absent a valid waiver of further review, for example, a warrant issued after direct appeal will be stayed to allow for PCRA review. Moreover, a defendant's mental condition can improve or deteriorate over time. The Court believes it is better to defer *Ford* claims until there is a reasonable likelihood that execution is imminent.

The Court also has reservations with the lengthy stay of execution, which could be secured by untested expert opinions and supporting documents, as well as the absence of a mechanism to resolve a meritless *Ford* claim before an execution warrant expires.

The Court therefore has revised the proposal to allow for (1) a more timely identification of ripe *Ford* claims, and (2) the prospect of resolving cases posing no colorable *Ford* issue before expiration of an execution warrant. A new Part C to Chapter 8 of the Rules of Criminal Procedure, containing proposed new Rules 850-862, would be added to provide these procedures. The revised proposal envisions a

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[1] S*ee* 40 *Pa.B.* 2397 (May 8, 2010). The *Reports* also were posted on the Court's web page and published in the *Pennsylvania Reporter,* the *Legal Intelligencer,* and the *Pittsburgh Legal Journal.*

competency certification by the Secretary of Corrections ("the Secretary"), triggered by the Commonwealth filing a certification motion.

The rules in Part C would recognize that if there is a reasonable likelihood that execution is imminent, the Commonwealth need not wait until the issuance of the execution warrant before beginning the process of identifying a colorable *Ford* claim. To avail itself of an accelerated determination of the preliminary issue of entitlement to a hearing, the Commonwealth would be required under new Rule 855 to track and identify cases posing a reasonable likelihood that execution is imminent (*e.g.*, due to exhaustion or waiver of direct and collateral avenues of challenge), and act in advance of an execution warrant. To facilitate the Department of Corrections' role, the rules require serving the Secretary with copies of all motions, pleadings, and orders. *See* proposed Rule 852(8). Proposed Rule 856 recognizes that the Secretary has access to qualified staff to monitor mental health issues and is positioned to produce an expert-supported certification in short order.

If the Secretary certifies that the prisoner is competent, the proposed rules make a trial court and appellate court level fast-track available to the prisoner, governed initially by Rule 857. If the prisoner makes the required substantial threshold showing of incompetency, a stay of execution issues and a hearing governed by Rules 860 and 861 will be held. The certification protocol should ensure that colorable competency issues are timely identified in all capital cases (and attendant stays of execution and hearings afforded), while meritless claims are identified and determined without unnecessary delay.

III. APPELLATE RULES

Complementary to the procedures applicable in the trial court, a related revision of the Rules of Appellate Procedure would establish the procedures on appeal. The 2010 proposal had recommended that the Petition for Review ("PFR") process govern execution competency appeals. Following submissions, the Court has determined it would be better to devise a procedure using an application as the initiating document . It would thus operate outside the current PFR process, as well as the Notice of Appeal process. This process is set forth in proposed new Pa.R.A.P. 3315.

In considering the appropriate placement of this rule, the Court noted that, over the years, the rules relating to capital matters have become scattered across the various chapters of appellate procedure and were in need of clarification and updating. Rather than address the competency review procedures in isolation, the Court is proposing to update, align, and consolidate all appellate rules governing capital review, and it would enact a new, self-contained rule governing execution competency review.

The placement of the new rules is in Chapter 33 (Business of the Supreme

Court). The new rules related to capital review, proposed Rules 3311-3316,[2] would be placed after Rule 3309 (Applications for Extraordinary Relief) and would appear under a heading, "SPECIAL RULES APPLICABLE IN DEATH PENALTY CASES."

In addition, the new rules would address the interplay between automatic review of a death sentence and the more robust review available upon a direct appeal. Pa.R.A.P. 3311 would explain the two avenues of review, and it would provide that special procedures attending automatic review under Pa.R.A.P. 3312 are triggered only if no appeal is taken, and consolidate all other procedural rules relevant to both direct and automatic review. Pa.R.A.P. 3313 would explicitly address, for the first time, capital PCRA appeals, collecting those of the existing special rules that apply to such appeals. Pa.R.A.P. 3314 would consolidate and update the various rules and commentary addressing stays of execution, most importantly to state that execution is stayed not only during automatic review, as Pa.R.A.P. 1761 now states, but also during a direct appeal and an appeal involving a timely, first PCRA petition. The Court intends this approach to narrow contested issues to stays ancillary to serial PCRA petitions or extra-PCRA matters. The approach also aligns better with 42 Pa.C.S. § 9545(c)(2), the statutory stay of execution standard specifically governing serial petition cases.

IV. ADDITIONAL QUESTIONS

While considerable study and analysis has already gone into the development of these proposed procedures, at least one Justice is interested in the experienced opinions of the bench and bar with regard to the practicalities of the proposal. Particularly, at least one Justice is interested in responses to the questions listed below.

(1) Are the timelines set forth in the proposals workable in actual practice in their current form?

(2) What should be the consequences of failure to adhere strictly to the timelines? For example, what should happen when the Secretary fails to certify within ten days that the defendant is competent or files a competency report late? What should be consequences if the defendant fails to file a Rule 857 motion within seven days - would he or she be procedurally barred from challenging the Secretary's competency determination?

(3) What mechanism, if any, should the rules provide for the appointment of an expert, including funding, to evaluate the defendant for his or her own purposes?

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[2] Current Pa.R.A.P. 3315 (Review of Stay Orders of Appellate Courts) would be renumbered as Pa.R.A.P. 3319.

(4) Should the rules mandate specific requirements that counsel must take immediately upon being appointed to ensure a timely evaluation and preparation of the case. If so, what should those steps be and in what priority?

(5) Should the rules provide for discovery after the Secretary certifies that the defendant is competent or incompetent? If so, what would be appropriate the time frames for such discovery?

(6) Should the rules provide a definition of what constitutes a substantial threshold showing of incompetency or delineate factors or considerations are relevant to that determination? If so, what should they be?