SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Crim.P. 602
Proposed Revision of the *Comment* to Pa.R.Crim.P. 150

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rule 602 (Presence of the Defendant) and the revision of the *Comment* to Rule 150 (Bench Warrants) for the reasons set forth in the accompanying explanatory report. 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 submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

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

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

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All communications in reference to the proposal should be received by **no later than Friday, September 15, 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. The Committee will acknowledge receipt of all submissions.

July 24, 2017 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

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Charles A. Ehrlich
Chair

RULE 150. BENCH WARRANTS.

(A) In a court case when a bench warrant is executed, the case is to proceed in accordance with the following procedures.

(1) When a defendant or witness is arrested pursuant to a bench warrant, he or she shall be taken without unnecessary delay for a hearing on the bench warrant. The hearing shall be conducted by the judicial officer who issued the bench warrant, or, another judicial officer designated by the president judge or by the president judge's designee to conduct bench warrant hearings.

(2) In the discretion of the judicial officer, the bench warrant hearing may be conducted using two-way simultaneous audio-visual communication.

(3) When the individual is arrested in the county of issuance, if the bench warrant hearing cannot be conducted promptly after the arrest, the defendant or witness shall be lodged in the county jail pending the hearing. The authority in charge of the county jail promptly shall notify the court that the individual is being held pursuant to the bench warrant.

(4) When the individual is arrested outside the county of issuance, the authority in charge of the county jail promptly shall notify the proper authorities in the county of issuance that the individual is being held pursuant to the bench warrant.

(5) The bench warrant hearing shall be conducted without unnecessary delay after the individual is lodged in the jail of the county of issuance on that bench warrant.

(a) When the bench warrant is issued by the supervising judge of a “multi-county” investigating grand jury, the individual shall be detained only until the supervising judge is available to conduct the bench warrant hearing.

(b) In all other cases, the individual shall not be detained without a bench warrant hearing on that bench warrant longer than 72 hours, or the close of the next business day if the 72 hours expires on a non-business day.

(6) At the conclusion of the bench warrant hearing following the disposition of the matter, the judicial officer immediately shall vacate the bench warrant.

(7) If a bench warrant hearing is not held within the time limits in paragraph (A)(5)(b), the bench warrant shall expire by operation of law.

(B) As used in this rule, "judicial officer" is limited to the magisterial district judge or common pleas court judge who issued the bench warrant, or the magisterial district

judge or common pleas court judge designated by the president judge or by the president judge's designee to conduct bench warrant hearings, or in Philadelphia, trial commissioners.

COMMENT: This rule addresses only the procedures to be followed after a bench warrant is executed, and does not apply to execution of bench warrants outside the Commonwealth, which are governed by the extradition procedures in 42 Pa.C.S. § 9101 *et seq.*, or to warrants issued in connection with probation or parole proceedings.

Paragraph (A)(2) permits the bench warrant hearing to be conducted using two-way simultaneous audio-visual communication, which is a form of advanced communication technology. *See* Rule 103. Utilizing this technology will aid the court in complying with this rule, and in ensuring individuals arrested on bench warrants are not detained unnecessarily.

Once a bench warrant is executed and the defendant is taken into custody, the bench warrant no longer is valid.

To ensure compliance with the prompt bench warrant hearing requirement, the president judge or the president judge's designee may designate only a magisterial district judge to cover for magisterial district judges or a common pleas court judge to cover for common pleas court judges. *See also* Rule 132 for the temporary assignment of magisterial district judges. In Philadelphia, the current practice of designating trial commissioners to conduct bench warrant hearings is acknowledged in paragraph (B).

It is expected that the practices in some judicial districts of a common pleas court judge (1) indicating on a bench warrant the judge has issued that the bench warrant is a "judge only" bench warrant, or (2) who knows he or she will be unavailable asking another common pleas court judge to handle his or her cases during the common pleas court judge's absence, would continue.

Paragraph (A)(5)(a) recognizes the procedural and substantive differences between "multi-county" investigating grand jury proceedings and all other proceedings in the court of common pleas, including a county investigating grand jury, by eliminating the time limit for conducting the bench warrant hearing when the bench warrant is issued by the

multi-county investigating grand jury supervising judge. *See* Rules 240-244 and 42 Pa.C.S. § 4544. When the supervising judge issues a bench warrant, the bench warrant hearing must be conducted expeditiously when the supervising judge is available.

Paragraph (A)(6) requires the judicial officer to vacate the bench warrant at the conclusion of the bench warrant hearing. The current practice in some judicial districts of having the clerk of courts cancel the bench warrant upon receipt of a return of service is consistent with this paragraph, as long as the clerk of courts promptly provides notice of the return of service to the issuing judge.

It is incumbent upon the president judge or the president judge's designee to establish procedures for the monitoring of the time individuals are detained pending their bench warrant hearing.

For the procedures concerning violation of the conditions of bail, see Chapter 5 Part C.

As used in this rule, "court" includes magisterial district judge courts.

For procedures for a defendant who is apprehended on a bench warrant issued as a result of a proceeding *in absentia*, see Rule 602(C).

For the bench warrant procedures in summary cases, see Rules 430(B) and 431(C).

For the arrest warrants that initiate proceedings in court cases, see Chapter 5, Part B(3)(a), Rules 513, 514, 515, 516, 517, and 518. For the arrest warrants that initiate proceedings in summary cases, see Chapter 4, Part D(1), Rules 430(A) and 431(B).

NOTE: Adopted December 30, 2005, effective August 1, 2006 **[.] ; *Comment* revised , 2017, effective , 2017.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining new Rule 150 providing procedures for bench warrants published with the Court's Order at 36 Pa.B. 184, 2006 (January 14, 2006).

Report explaining the proposed Comment revision cross-referencing the Rule 602 procedures for a defendant to challenge a proceeding being held in absentia published for comment at 47 Pa.B. (, 2017).

RULE 602. PRESENCE OF THE DEFENDANT.

(A) The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence.

(B) A corporation may appear by its attorney for all purposes.

(C) CHALLENGES TO A FINDING OF ABSENCE WITHOUT CAUSE

(i) If a defendant is tried *in absentia* but not sentenced *in absentia*, the defendant, prior to or at time of sentencing, may file a motion seeking a new trial on the grounds that his or her absence at trial was with cause.

(ii) If a defendant is tried and sentenced *in absentia,* or if a defendant is present at trial but sentenced *in absentia,* and the defendant is subsequently taken into custody:

(a) the defendant promptly shall be brought before the sentencing judge, or a judge designated by the president judge, and notified that he or she may file a motion within 30 days seeking a new trial or sentencing hearing on the grounds that his or her absence at trial or at sentencing was with cause.

(b) Counsel for the defendant shall be present at the proceeding at which this notification is given.

(c) The notification shall occur while the defendant is within the jurisdiction of the sentencing court.

(d) The defendant shall remain within the jurisdiction of the sentencing court during the pendency of any motion filed pursuant to this rule or 30 days, whichever is longer.

COMMENT: This rule was amended in 2013 to clarify that, upon a finding that the absence was without cause, the trial judge may conduct the trial in the defendant's absence when the defendant fails to appear without cause at the time set for trial or during trial. The burden of proving that the defendant's absence is without cause is upon the Commonwealth by a preponderance of the evidence. *See Commonwealth v. Scarborough*, 491 Pa. 300, 421 A.2d 147

(1980) (when a constitutional right is waived, the Commonwealth must show by a preponderance of the evidence that the waiver was voluntary, knowing and intelligent); *Commonwealth v. Tizer*, 454 Pa.Super. 1, 684 A.2d 597 (1996). *See also Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.'").

This rule applies to all cases, including capital cases.

A defendant's presence may be deemed waived by the defendant intentionally failing to appear at any stage of the trial after proper notice. *See Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 (1998) (a defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present); *Commonwealth v. Sullens,* 533 Pa. 99, 619 A.2d 1349 (1992) (when a defendant is absent without cause at the time his or her trial is scheduled to begin, the defendant may be tried *in absentia*).

Any defendant who has been convicted or sentenced *in absentia* may challenge the holding of the proceeding in his or her absence by filing a motion for a new trial or sentencing hearing once the defendant is before the court. The defendant has the burden of demonstrating that there was justifiable cause for his or her absence. If the judge determines that the absence was with cause, the defendant must be afforded a new trial or sentencing hearing. Any defendant who is apprehended on a bench warrant as a result of a sentencing *in absentia* must be notified that he or she may file a motion, within 30 days of the notification, challenging the sentencing having been held *in absentia*. This notice must be given while the defendant is still within the jurisdiction of the sentencing court and prior to any transfer to a correctional facility for execution of sentence. Once a motion is filed pursuant to this rule, the defendant must be retained within the jurisdiction of the sentencing court. If no motion has been filed within the 30 days permitted under this rule, the sentence may be executed.

Nothing in this rule is intended to preclude a defendant from

affirmatively waiving the right to be present at any stage of the trial, *see, e.g.*, *Commonwealth v. Vega*, 553 Pa. 255, 719 A.2d 227 (1998) (plurality) (requirements for a knowing and intelligent waiver of a defendant's presence at trial includes a full, on-the-record colloquy concerning consequences of forfeiture of the defendant's right to be present). Once a defendant appears before the court, he or she cannot waive his or her right to appear in capital case. *See Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994) (right of defendant to be present at trial of capital offense is transformed into obligation due to gravity of potential outcome).

Nothing in this rule is intended to preclude a defendant from waiving the right to be present by his or her actions, *see, e.g.*, *Illinois v. Allen,* 397 U.S. 337, 343 (1970) ("[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.") and *Commonwealth v. Wilson, supra.*

The defendant's right to be present in the courtroom is not absolute. *See Commonwealth v. Boyle*, 498 Pa. 486, 491, n.7, 447 A.2d 250, 253, n.7 (1982) (defendant's presence in chambers and at sidebar is not required where he is represented by counsel.) and *Commonwealth v. Hunsberger,* -- Pa. --, 58 A.3d 32, 39-40 (2012) ("[A]lthough a defendant has the clear right to participate in the jury selection process, that right is not compromised where . . . the defendant, who was in the courtroom, was not present at sidebar where his counsel was questioning several venirepersons outside the range of his hearing.")

NOTE: Rule 1117 adopted January 24, 1968, effective August 1, 1968; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; renumbered Rule 602 and amended March 1, 2000, effective April 1, 2001; amended December 8, 2000, effective January 1, 2001, *Comment* revised September 21, 2012, effective November 1, 2012; amended May 2, 2013, effective June 1, 2013 **[.] ; amended , 2017, effective , 2017.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5841 (November 26, 1994).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the December 8, 2000 amendments published with the Court's Order at 30 Pa.B. 6546 (December 23, 2000).

Final Report explaining the September 21, 2012 revision to the second paragraph of the Comment correcting a typographical error published with the Court's Order at 42 Pa.B. 6247 (October 6, 2012).

Final Report explaining the May 2, 2013 amendments concerning trials conducted in the defendant's absence published with the Court's Order at 43 Pa.B. 2704 (May 18, 2013).

Report explaining the proposed amendment concerning motions to challenge in absentia proceedings published for comment at 47 Pa.B. (, 2017).

REPORT

Proposed Amendment to Pa.R.Crim.P. 602
Proposed Revision of the *Comment* to Pa.R.Crim.P. 150

IN ABSENTIA RELIEF

The Committee recently examined the question of relief for those defendants who assert that they have been tried or sentenced *in absentia* under Rule 602. Rule 602(A) provides that "the defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence." However, the rule does not specify a procedure for challenging an incorrect finding of absence without cause. There was a suggestion that the rules should provide a specific procedure for raising such challenges, particularly when the defendant has been sentenced *in absentia*.

During the Committee's discussion it was argued that there was no need to develop separate procedures since existing procedures such as a writ of *habeas corpus* or *nunc pro tunc* post-sentence motions should be sufficient to raise these types of challenges. Other members argued that these suggested remedies are not likely to be available. Any post-sentence motion or appeal that is filed by a fugitive defendant will be quashed due to fugitivity, and that, generally, a trial judge loses authority to enter an order in a case 30 days after the judgment of sentence pursuant to 42 Pa.C.S. §5505. *Habeas corpus* would not be available because the *habeas corpus* statute specifically excludes any claims that might be covered by the PCRA and these challenges might be cognizable under the PCRA. However, a PCRA does not appear to be an adequate vehicle for these types of claims due to the fact that challenges cannot be filed while the defendant is a fugitive since the defendant must be in custody serving a sentence and, while the defendant may be able to raise this in a PCRA once taken into custody, he or she may be precluded from this remedy by the PCRA's severe time limitations.

The Committee concluded that the rules should provide explicit procedures to give a defendant a venue to seek this relief. Where a defendant is tried but not sentenced *in absentia*, the finding of absence without cause may be challenged at the sentencing hearing. This was based on a concept first proposed in a concurrence by Justice Papadakos in the case of *Commonwealth vs. Sullens*, 619 A.2d. 1349 (Pa.

1992). In that case, Justice Papadakos suggested an erroneous order permitting trial *in absentia* could be corrected when the defendant appears for sentencing and establishes good cause for his absence at trial, in which case a new trial will be awarded. However, the case in which a defendant is also sentenced *in absentia* was not addressed in *Sullens*. Ordinarily when such a defendant is arrested, because sentence has already been imposed, they normally would be taken for execution of sentence.

The Committee discussed the fact that when a defendant is tried *in absentia*, a bench warrant would have been issued against him or her. In that case, the defendant would be required to be brought before the judge who issued the bench warrant for a bench warrant hearing when apprehended. Initially it was thought that a challenge to the *in absentia* finding could be raised at the bench warrant hearing or at least the defendant could be advised of the option of seeking relief from the *in absentia* finding. However, the Committee believed that a bench warrant hearing would be an inadequate venue for determining such an issue, particularly since the burden would be on the defendant to prove that his or her absence was with cause. Additionally, there was a concern that by combining the advice regarding *in absentia* relief with the bench warrant proceeding, there may be confusion for the defendant regarding the *in absentia* relief procedures. The Committee concluded that the advice regarding the motion procedure for *in absentia* challenges should be given at a separate proceeding, conducted by the sentencing judge or a judge designated by the president judge. In order for the defendant to understand the significance of this advice, particularly because this might be his or her last opportunity before the execution of his or her sentence, counsel must be present.

The defendant would have 30 days from the time of the advice proceeding to file the motion challenging the *in absentia* sentencing. As a logistical matter, the defendant should be kept within the geographical jurisdiction of the sentencing court during the 30 days in which he or she may file the motion. If no motion is filed, the defendant's sentence would be executed.

The provisions for seeking relief from an *in absentia* proceeding, either guilt determination or sentencing or both, would be included in a new paragraph (C) in Rule

602. Further explanation would be included in the *Comment* to Rule 602. A cross-reference to Rule 602(C) would be added to the *Comment* to Rule 150 to alert the judge conducting the bench warrant hearing that a defendant who had been sentenced *in absentia* will need to be scheduled for a Rule 602(C) proceeding.