

**Proposed Amendments to Pa.Rs.Crim.P. 209 (Return with Inventory) and
212 (Dissemination of Search Warrant Information)**

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rules 209 and 212 to clarify the requirement to return search warrants to the issuing authority promptly and to provide that unexecuted warrants do not constitute public records. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

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

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

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Criminal Procedural Rules Committee
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no later than Tuesday, June 22, 2010.

April 26, 2010

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Risa Vetri Ferman, Chair

*Anne T. Panfil
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*Jeffrey M. Wasileski
Staff Counsel*

RULE 209. RETURN WITH INVENTORY.

(A) The law enforcement officer executing the search warrant shall return the search warrant promptly after the search is completed, along with any inventory required under paragraph (C), to the issuing authority.

(B) Unexecuted warrants shall be returned promptly to the issuing authority once the period of time authorized for execution of the warrant has expired.

(C) An inventory of items seized shall be made by the law enforcement officer serving a search warrant. The inventory shall be made in the presence of the person from whose possession or premises the property was taken, when feasible, or otherwise in the presence of at least one witness. The officer shall sign a statement on the inventory that it is a true and correct listing of all items seized, and that the signer is subject to the penalties and provisions of 18 Pa.C.S. § 4904(b) -- Unsworn Falsification To Authorities. The inventory shall be returned to and filed with the issuing authority.

~~[(B)]~~ (D) The judicial officer to whom the return was made shall, upon request, cause a copy of the inventory to be delivered to the applicant for the warrant and to the person from whom, or from whose premises, the property was taken.

~~[(C)]~~ (E) When the search warrant affidavit(s) is sealed pursuant to Rule 211, the return shall be made to the justice or judge who issued the warrant.

COMMENT: The inventory is required to ensure that all items seized are accounted for in the return to the issuing authority. It thus differs from the receipt required by Rule 208, which is for the personal records of those from whose possession or from whose premises property was taken. In some cases, however, the list in the receipt may be sufficiently detailed so as to also be sufficient for use in the inventory. The inventory need not be sworn to before the issuing authority; however, the officer is subject to statutory penalties for unsworn falsification.

The rule was amended in 2010 specifically to require that the executed warrant be returned to the issuing authority. This amendment reflects a procedure with a long-standing practice but one that had not been codified in the rules.

As provided in Rule 205(D), search warrants generally authorize execution within a period not to exceed two days. Paragraph (B) requires that an unexecuted warrant be returned to the issuing authority upon expiration of this period. See Rule 212 regarding the exclusion of unexecuted search warrants from public disclosure.

NOTE: Rule 209 adopted October 17, 1973, effective 60 days hence; amended April 26, 1979, effective July 1, 1979; amended September 3, 1993, effective January 1, 1994 [.]; renumbered Rule 209 and amended March 1, 2000, effective April 1, 2001[.]; **amended _____, 2010, effective _____, 2010.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 3, 1993 amendments published at 21 Pa.B. 3681 (August 17, 1991).

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).

Report explaining the proposed amendments related to the return of the search warrant published at 40 Pa.B. (_____, 2010).

RULE 212. DISSEMINATION OF SEARCH WARRANT INFORMATION.

(A) The issuing authority shall not make any search warrant(s) and any affidavit(s) of probable cause available for public inspection or dissemination until the warrant has been executed [, **but in no case shall the delay be longer than 48 hours after the warrant has been issued**].

(B) Any unexecuted warrant(s) and any associated affidavits(s) of probable cause are not public records and upon return to the issuing authority shall be destroyed by the issuing authority.

COMMENT: Execution of search warrants carries the potential risk of hazard and premature dissemination of the intention to execute a warrant may greatly increase that risk. For this reason, this rule was adopted in 2008 to delay the dissemination of search warrant information to the general public until after execution [**or no longer than 48 hours after issuance, whichever is sooner**]. This rule does not deny disclosure of **any** search warrant information [**to the public**] **to which the public is entitled**, but rather, temporarily delays the dissemination of that information in order to protect public safety.

Once the warrant is executed, the information may be disseminated unless sealed pursuant to Rule 211.

The rule was amended in 2010 to clarify that unexecuted search warrants are not public records. This change recognizes that often search warrants may be issued that are never executed. This non-execution may arise from many factors, including a discovery that the information that formed the basis of the original issuance of the search warrant was inaccurate. Given the potential harm to the privacy rights of the subject of a search warrant as well as potential disruption to public safety and investigations, information related to such expired warrants must remain confidential. See PG Publishing Co. v. Commonwealth, 532 Pa. 1, 614 A.2d 1106 (1992) (“The ex parte application for the issuance of a search warrant and the issuing authority’s consideration of the application are not subject to public scrutiny. The need for secrecy will ordinarily expire once the search warrant has been executed.”)

NOTE: Rule 212 adopted June 23, 2008, effective August 1, 2008[.] ; amended , 2010, effective , 2010

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining new Rule 212 providing for the limitations in dissemination of search warrant information published with the Court's Order at 38 Pa.B. (, 2008).

Report explaining the proposed amendment providing that expired unexecuted warrants are not public records published at 40 Pa.B. (, 2010).

REPORT

Proposed Amendments to Pa.Rs.Crim.P. 209 and 212

RETURN OF SEARCH WARRANTS

Return of Executed Warrants

The Committee began examining the need to specify procedures for the return of executed search warrants because of a problem reported by the then-solicitor for the Special Courts Judges Association. A municipal police force was refusing to return search warrants to the magisterial district judge (MDJ) after they had been executed, resulting in the MDJ being unable to forward the case to the Clerk of Courts because the MDJ did not have all of the case documents required by Rule 210.

Presently, while Rules 205(6) and 209 mention the concept of a return of the warrant, there are no rules that specifically direct the police officer to return the search warrant to the designated judicial officer after it is executed. The Committee concluded that an explicit mention in the rules of the requirement to return the warrants after execution would emphasize the need for the return.

The Committee examined procedures from other jurisdictions that provide provisions for the return of search warrants. Some, such as Alabama, contained general provisions while others, like Maryland, were more specific including time limits for the return. The Committee favored the more general model. The Committee rejected setting a time limit for the return, concluding that any time period selected would be arbitrary and there would be no practical sanctions that could be imposed on the police for failing to abide by the limit.

The Committee therefore proposes adding a new paragraph (A) to Rule 209 that states the requirement that the search warrant and inventory be returned promptly to the issuing authority after execution.

Return of Unexecuted Warrants

The Committee then turned to the more complex issue of whether to include a provision for the return of unexecuted warrants. While there was debate over the need for such a provision, given that an unexecuted warrant will ultimately expire, the Committee concluded that, since the warrant is a court document, the court has an interest in its ultimate resolution and, therefore, unexecuted warrants should be included in the requirement to be returned. The requirement to return the unexecuted search warrant upon expiration would be added as a new paragraph (B) to Rule 209 along with explanatory revisions to the *Comment*.

The requirement to return unexecuted warrants raised a concern that once these documents have been returned to the issuing authority, they would be considered public records. The Committee recognized that public disclosure of these documents could cause problems such as the destruction of evidence or the endangerment of officers serving subsequent warrants.

More importantly, there are occasions when the information supporting a search warrant is discovered to be inaccurate or even fraudulent prior to the execution of the warrant so the search warrant will remain unexecuted. However, public disclosure of the information contained in the affidavits supporting these warrants could prove embarrassing or dangerous to the subject of the warrant and therefore constitute a severe harm to that individual's privacy interests.

To resolve this problem, the Committee at first considered a provision that a returned unexecuted warrant should be considered sealed. However, it was clear that such a statement raised a great many more questions, such as the duration of such a sealing order, than could be addressed with a simple statement.

This led to a discussion regarding the whether unexecuted warrants are in fact public documents. Pennsylvania strongly favors public access to search warrant

information, based on both an Eight Amendment and common law rationale. The clearest pronouncement of this view is found in *PG Publishing Co. v. Commonwealth*, 532 Pa. 1, 614 A.2d 1106 (1992). However, while noting with approval the process of sealing executed search warrants by court order, the Court specifically distinguished the pre-execution situation, stating, “The ex parte application for issuance of a search warrant and the issuing authority’s consideration of the application are not subject to public scrutiny. The need for secrecy will ordinarily expire once the search warrant has been executed.” 532 Pa. at 6, 614 A.2d at 1108.

The most recent decision on the question of search warrant records as public records is found in *Commonwealth v Upshur*, 592 Pa. 273, 924 A.2d 642 (2007), where the Court stated that:

Certainly, however, any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document. See, e.g., *Fenstermaker*, 515 Pa. at 510, 530 A.2d at 419 (arrest warrant affidavits filed with a magistrate); *PG Publishing Co. v. Commonwealth*, 532 Pa. 1, 6, 614 A.2d 1106, 1108 (1992) (search warrants and supporting affidavits).

However, *Upshur* cites *PG Publishing* for the general proposition that the search warrant and affidavits are to be considered public records but does not note the specific exclusion of unexecuted warrants. Additionally, while the language used in citing *PG Publishing* talks of a document relied on in the course of “judicial decision-making,” it is unlikely that the probable cause determination is of a type of judicial decision-making contemplated by the Court. Such determinations are *ex-parte* proceedings and there is no public right to be present during a probable cause determination. If the search warrant is not utilized in any further proceedings, the probable cause determination would not be reviewable in the public arena.

The Committee concluded that unexecuted search warrants and the associated affidavits of probable cause do not constitute public records until execution, and unexecuted search warrants and their supporting documentation should remain confidential even after return. A statement to that effect would be added as new paragraph (B) to Rule 212.

The question then became how best to handle the documents themselves. The returned unexecuted search warrant almost certainly will be expired and therefore will never be executed. In most cases, the returned warrant would not be a filing in a case and would therefore require separate treatment. Rather than burden the MDJ with the need to create separate storage arrangements for these documents, the Committee proposes adding a provision that, upon return, the unexecuted search warrant documentation would be destroyed. This procedure also would eliminate the possibility that information harmful to the privacy interests of an individual are not made public when they have not resulted in any criminal charges.

This concept was borrowed from Maryland Criminal Procedure Rule 4-601 that states that the “judge to whom an unexecuted search warrant is returned may destroy the search warrant and related papers or make any other disposition the judge deems proper.”

The Committee recognizes that the provision for the destruction of the returned unexecuted search warrant may appear in conflict with the Records Retention and Disposition Schedule established by the Supreme Court pursuant to Rule of Judicial Administration 507. That policy requires that all search warrant documentation be retained for three years. However, the policy does not distinguish between warrants that have been executed and those warrants that have expired unexecuted. In the latter situation, there is little compelling reason for their retention since as noted about they are not public records and would not be reviewed in any form of action. The Committee

would also recommend that the Court modify its policy specifically to permit the destruction of this limited type of search warrant documentation.