Proposed Amendments to Pa.R.Crim.P. 590 (Pleas and Plea Agreements)

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule 590 to provide for more detailed standards regarding the areas of inquiry that are required to be part of all guilty plea colloquies. 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 Report 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 Friday, April 10, 2009.

February 10, 2009 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

D. Peter Johnson, Chair

Anne T. Panfil
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Staff Counsel

RULE 590. PLEAS AND PLEA AGREEMENTS.

(A) GENERALLY.

(1) Pleas shall be taken in open court.

(2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.

(3) **Guilty Pleas.**

(a) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. **[Such inquiry shall appear on the record.]**

(b) To ensure that the defendant understands the full impact and consequences of the plea, and is willing to enter that plea, the following information shall be elicited as part of an oral examination on the record:

(i) confirmation of the identity of the defendant;

(ii) the defendant's capacity to comprehend and communicate in the proceedings;

(iii) the defendant's understanding of the nature and elements of the charges to which he or she is pleading guilty or *nolo contendere,* as well as the maximum sentences, including fines, for the offenses charged and any applicable mandatory sentence;

(iv) the factual basis for the plea; and

(v) the defendant's satisfaction with the representation afforded by his or her attorney.

(c) In addition to the information required to be elicited under paragraph (b), the following information shall be elicited, either orally or in writing, on the record:

(i) the defendant's understanding that he or she has certain rights with regard to the charges, including but not limited to the filing and litigation of pretrial motions; the right to counsel;

the right to trial by jury before twelve jurors the defendant would assist in selecting; the right to challenge potential jurors; the requirement of a unanimous verdict; that he or she is presumed innocent and can only be found guilty if the prosecution proves guilt beyond a reasonable doubt; that he or she has the right to cross-examine the prosecution witnesses; and the right to call his or her own witnesses; and

(ii) the defendant's understanding that, if the judge accepts the plea and finds the defendant guilty, the defendant's right to appeal is limited to the legality of the sentence, the voluntariness of the plea, and the jurisdiction of the court.

(d) Counsel for the defendant shall certify on the record, either orally or in writing, that he or she has had the opportunity to discuss the case with the defendant, and that the defendant has been advised of his or her rights and the effects of entry of a plea of guilty or *nolo contendere.*

(e) The judge may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(3)(b). The judge shall be present during this examination.

(B) PLEA AGREEMENTS.

(1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record *in camera* and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of *nolo contendere* is based**, and that the judge is not bound by the terms of the tendered plea agreement unless the judge accepts the plea agreement**.

(C) MURDER CASES.

In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty or *nolo contendere* to a charge of murder generally, the judge before whom the plea was entered shall alone determine the degree of guilt.

COMMENT: The purpose of paragraph (A)(2) is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea or plea of *nolo contendere* is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, **455 Pa. 198,** 316 A.2d 77 (**[Pa.]** 1974); *Commonwealth v. Campbell*, **451 Pa. 465,** 304 A.2d 121 (**[Pa.]** 1973); *Commonwealth v. Jackson*, **450 Pa. 417,** 299 A.2d 209 (**[Pa.]** 1973).

Paragraph (A)(3) was added in 2009 to provide further instructions to judges accepting pleas of guilty or *nolo contendere*. Under *Commonwealth v. Willis*, 471 Pa. 50, 369 A.2d 1189 (1977), and *Commonwealth v. Dilbeck*, 466 Pa. 543, 353 A.2d 824 (1976), judges are required to make inquiry on the record into six areas, at a minimum, to ensure that a defendant is entering the plea voluntarily and understandingly. Paragraphs (A)(3)(b) and (c) elaborate on these areas of inquiry.

Paragraph (A)(3)(b) recognizes that certain elements of the colloquy are so critical to assuring the judge that the defendant understands the plea and that the colloquy is in compliance with this rule that the inquiry must be performed orally on the record.

Paragraph (A)(3)(c) requires two additional areas of inquiry. Nothing in the rule would preclude the use of a written colloquy for inquiry into these areas that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. Similarly, areas of inquiry not listed in the rule but that the court deems necessary for the acceptance of the plea may be addressed in a written colloquy. The written colloquy may have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea or plea of *nolo contendere*.

Some areas of inquiry that require oral inquiry do not necessarily need to be performed as a direct examination of the defendant. For example, the factual basis of the plea and the nature of the charges are case-specific and therefore an oral inquiry must be conducted into the specific facts of the case. This may

be accomplished by the defendant confirming on the record a recitation of the facts by the attorney for the Commonwealth or defense counsel. In such a situation, however, the judge must be assured that the defendant fully understands and agrees with such a recitation.

Paragraph (A)(3)(d) requires that, in addition to the colloquy conducted of the defendant, counsel for the defendant also must certify on the record that the defendant has been fully advised of the nature and effects of his or her plea.

The court may inquire of counsel for the defendant if he or she knows of any reason why the defendant cannot voluntarily and understandingly giving up his or her rights and pleading guilty or *nolo contendere*.

Similarly, paragraph (B)(1) requires that counsel for the defendant and for the Commonwealth state on the record the terms of any plea agreement. Under paragraph (B)(2), the defendant's understanding of the terms of the agreement also must be elicited. This inquiry should include discussion of whether the court is bound by the agreement, the ability to withdraw the plea if it is not accepted, and that no coercion or other promises outside of the plea agreement have led to the defendant's willingness to enter a plea.

[It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty or a plea of *nolo contendere*. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:]

[(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?

(2) Is there a factual basis for the plea?

(3) Does the defendant understand that he or she has the right to trial by jury?

(4) Does the defendant understand that he or she is presumed innocent until found guilty?

(5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?]

[Inquiry into the above six areas is mandatory during a guilty plea colloquy under *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977), and *Commonwealth v. Dilbeck*, 353 A.2d 824 (Pa. 1976).]

Many, though not all, of the areas to be covered by such questions are set forth in a footnote to the Court's opinion in *Commonwealth v. Martin*, **445 Pa. 49, 54-56,** 282 A.2d 241, 244-245 (**[Pa.]** 1971), in which the colloquy conducted by the trial judge is cited with approval. *See also Commonwealth v. Minor*, **467 Pa. 230,** 356 A.2d 346 (**[Pa.]** 1976), and *Commonwealth v. Ingram*, **455 Pa. 198,** 316 A.2d 77 (**[Pa.]** 1974). As to the requirement that the judge ascertain that there is a factual basis for the plea, see *Commonwealth v. Maddox*, **450 Pa. 406,** 300 A.2d 503 (**[Pa.]** 1973) and *Commonwealth v. Jackson*, **450 Pa. 417,** 299 A.2d 209 (**[Pa.]** 1973).

It is advisable that the judge conduct the examination of the defendant. However, paragraph (A)**(3)(e) [does not prevent] authorizes the judge to permit** defense counsel or the attorney for the Commonwealth **[from] to** conduct**[ing]** part or all of the examination of the defendant **[, as permitted by the judge**. **In addition, nothing in the rule would preclude the use of a written colloquy, that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. This written colloquy would have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea or plea of *nolo contendere*]**.

The "terms" of the plea agreement, referred to in paragraph (B)(1), frequently involve the attorney for the Commonwealth

-- in exchange for the defendant's plea of guilty or *nolo contendere*, and perhaps for the defendant's promise to cooperate with law enforcement officials -- promising concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these. In any event, paragraph (B) is intended to insure that all terms of the agreement are openly acknowledged for the judge's assessment. *See, e.g., Commonwealth v. Wilkins*, **442 Pa. 524,** 277 A.2d 341 (**[Pa.]** 1971).

The 1995 amendment deleting former paragraph (B)(1) eliminates the absolute prohibition against any judicial involvement in plea discussions in order to align the rule with the realities of current practice. For example, the rule now permits a judge to inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement, or to give counsel, when requested, a reasonable period of time to conduct such a discussion. Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.

Under paragraph (B)(1), upon request and with the consent of the parties, a judge may, as permitted by law, order that the specific conditions of a plea agreement be placed on the record *in camera* and that portion of the record sealed. Such a procedure does not in any way eliminate the obligation of the attorney for the Commonwealth to comply in a timely manner with Rule 573 and the constitutional mandates of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Similarly, the attorney for the Commonwealth is responsible for notifying the cooperating defendant that the specific conditions to which the defendant agreed will be disclosed to third parties within a specified time period, and should afford the cooperating defendant an opportunity to object to the unsealing of the record or to any other form of disclosure.

When a guilty plea, or plea of *nolo contendere*, includes a plea agreement, the 1995 amendment to paragraph (B)(2) requires that the judge conduct a separate inquiry on the record to determine that the defendant understands and accepts the terms of the plea agreement. *See*

Commonwealth v. Porreca, **528 Pa. 46,** 595 A.2d 23 (**[Pa.**] 1991).

Former paragraph (B)(3) was deleted in 1995 for two reasons. The first sentence merely reiterated an earlier provision in the rule. *See* paragraph (A)(3). The second sentence concerning the withdrawal of a guilty plea was deleted to eliminate the confusion being generated when that provision was read in conjunction with Rule 591. As provided in Rule 591, it is a matter of judicial discretion and case law whether to permit or direct a guilty plea or plea of *nolo contendere* to be withdrawn. *See also Commonwealth v. Porreca*, **528 Pa. 46,** 595 A.2d 23 (**[Pa.**] 1991) (the terms of a plea agreement may determine a defendant's right to withdraw a guilty plea).

For the procedures governing the withdrawal of a plea of guilty or nolo contendere, see Rule 591.

Paragraph (C) reflects a change in Pennsylvania practice, which formerly required the judge to convene a panel of three judges to determine the degree of guilt in murder cases in which the imposition of a sentence of death was not statutorily authorized.

NOTE: Rule 319(a) adopted June 30, 1964, effective January 1, 1965; amended November 18, 1968, effective February 3, 1969; paragraph (b) adopted and title of rule amended October 3, 1972, effective 30 days hence; specific areas of inquiry in *Comment* deleted in 1972 amendment, reinstated in revised form March 28, 1973, effective immediately; amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; paragraph (c) added and *Comment* revised May 22, 1978, effective July 1, 1978; *Comment* revised November 9, 1984, effective January 2, 1985; amended December 22, 1995, effective July 1, 1996; amended July 15, 1999, effective January 1, 2000 ; renumbered Rule 590 and *Comment* revised March 1, 2000, effective April 1, 2001**[.] ; amended , 2009, effective , 2009.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the December 22, 1995 amendments published with the Court's Order at 26 Pa.B. 8 (January 6, 1996).

Final Report explaining the July 15, 1999 changes concerning references to nolo contendere pleas and cross-referencing Rule 320 published with the Court's Order at 29 Pa.B. 4057 (July 31, 1999).

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

Report explaining the proposed changes to subparagraph (A)(3) concerning plea colloquies published at 39 Pa.B. (, 2009).

REPORT

Proposed Amendments to Pa.Rs.Crim.P. 590

GUILTY PLEA COLLOQUY

The Committee began examining guilty plea colloquy practice as a result of the opinion in *Commonwealth v. Fowler*, 893 A.2d 758 (2006), that discussed the contents of a guilty plea colloquy that are necessary for the plea to be accepted as voluntary. In a concurring opinion, Judge Klein criticizes the majority for not enforcing the requirement, derived from *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977), that the colloquy include six areas of inquiry. The list of these six items is included in the Rule 590 *Comment,* as well as a cross-reference to the *Willis* case. The Committee also received anecdotal reports that some courts were not eliciting all of this required information, thereby calling into question the providency of the pleas taken.

Initially, the Committee considered recommending moving these six areas of inquiry from the *Comment* into the text of Rule 590 to emphasize their mandatory nature. However, the Committee recognized that this relatively simple proposal raised more complex questions regarding the standardization of colloquy procedures, especially with regard to the use of written colloquy forms and the extent to which the colloquy must be performed orally.

The Committee, after conducting a statewide survey of colloquy practice, noted the wide divergence in guilty plea colloquy practice throughout the Commonwealth. At first, the Committee considered attempting to create a uniform statewide guilty plea colloquy form that would ensure that the minimum requirements for a provident plea are met. Ultimately, the Committee concluded that practice with regard to written guilty plea colloquies was too diverse to capture in a single form that was still efficient to use. Rather than trying to create a single form that would be applicable to all counties, the

Committee concluded that the better option would be to provide fuller guidance as to the elements that should be included in every colloquy.

To that end, the Committee developed a list of the mandatory colloquy components that would be included in the text of Rule 590. The current list of six mandatory colloquy items would be expanded upon and augmented to include a more detailed description of the areas of inquiry that the six areas of inquiry in the Rule 590 Comment are intended to encompass, and that are needed to ensure that the defendant is pleading voluntarily and understandingly.

In developing this proposal, some Committee members expressed the concern that the proposal could be interpreted to require an extensive oral colloquy of each element of the list. Such an interpretation would tie judges' hands and require a far more extensive colloquy than is necessary to ensure that a valid plea has been entered. Therefore, the Committee concluded that the rule should explicitly provide which mandatory items of the colloquy have to be done orally and which could be handled either orally or by a written colloquy form. .

To accomplish this, a new paragraph (3)(b) would be added to Rule 590 setting forth the five areas of inquiry that must be conducted orally on the record. The items that are required to be elicited orally relate to confirming the defendant's identity, his or her capacity to understand the nature of the proceedings; the nature, elements, and factual basis of the charges; and his or her satisfaction with his or her representation. New paragraph (3)(c) would set forth two broad areas of inquiry that, while mandatory, may be addressed either orally or through a written colloquy form, and on the record These two areas concern the defendant's understanding of the full panoply of rights that he or she will be giving up if the plea is accepted. One of the elements of the original list of six areas of inquiry, the advice to the defendant that the judge is not bound by the

terms of any plea agreement unless the judge accepts the agreement, has been included in paragraph (B) that relates to plea agreements. Taken together, this new expanded list contains all of the original six areas of inquiry, augmented to provide more detailed instructions as to the composition of the colloquy.

The *Comment* language has been revised to reflect these changes and emphasize that the main purpose of the colloquy is to assure that the plea is entered providently and provide some detail as to how the colloquy requirements might be applied. For example, one area of oral inquiry in which more detailed instructions are provided is that of the factual basis for the plea. Rather than requiring the defendant to provide an oral description of the facts of the case, the rule would permit an oral recitation by the district attorney or defense counsel confirmed by the defendant.