Proposed Amendments to Pa.Rs.Crim.P. 120, 122, and 904

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rules of Criminal Procedure 120, 122, and 904. The proposed amendments would replace Pennsylvania's Anders/Finley procedures with a procedure that would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. These amendments have been developed in conjunction with the Appellate Court Procedural Rules Committee, which is proposing correlative amendments to Pennsylvania Rules of Appellate Procedure 120, 907, 1925, and 2744 by publication of the same date.

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, June 3, 2011.

April 21, 2011 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

_____
Risa Vetri Ferman, Chair

_____
Anne T. Panfil
Chief Staff Counsel

_____
Jeffrey M. Wasileski
Staff Counsel

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. **Counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.**

(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: **The 2011 amendments to this rule, to Pa.Rs.Crim.P. 122 and 904, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California,* 386 U.S. 738 (1967), and *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981), and *Pennsylvania v. Finley,* 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.**

ENTRY OF APPEARANCE

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.

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).

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.

***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

WITHDRAWAL OF APPEARANCE

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).

The court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon, supra*, and *Turner/Finley, supra*, and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins*, 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

Counsel has the ultimate authority to decide which arguments to make on appeal. *See Jones v. Barnes*, 463 U.S. 745 (1983). *See also Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. Ct. 2001).

[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 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.]

NOTE: Adopted June 30, 1964, effective January 1, 1965; formerly Rule 303, renumbered Rule 302 and 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; amended March 22, 1993, effective January 1, 1994; renumbered Rule 120 and amended March 1, 2000, effective April 1, 2001; *Comment* revised February 26, 2002, effective July 1, 2002; *Comment* revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005 **[.] ; amended , 2011, effective , 2011.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the March 22, 1993 amendments published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

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 February 26, 2002 Comment revision adding the cross-reference to Rule 904 published with the Court's Order at 32 Pa.B. 1393 (March 16, 2002).

Final Report explaining the April 28, 2005 amendments concerning the filing of an appointment order as entry of appearance for appointed counsel and withdrawal of counsel published with the Court's Order at 35 Pa.B. 2859 (May 14, 2005).

Report explaining the proposed amendments to paragraph (B)(1) and the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing Anders/McClendon briefs and Finley/Turner no merit letters published for comment at 41 Pa.B. (, 2011).

RULE 122. APPOINTMENT OF COUNSEL.

(A) Counsel shall be appointed:

(1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed;

(2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel;

(3) in all cases, by the court, on its own motion, when the interests of justice require it.

(B) 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 shall be effective until final judgment, including any proceedings upon direct appeal.

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

(D) Appointed counsel shall not be permitted to withdraw without leave of court pursuant to Rule 120(B). Appointed counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.

COMMENT: This rule is designed to implement the decisions of *Argersinger v. Hamlin,* 407 U.S. 25 (1972), and *Coleman v. Alabama,* 399 U.S. 1 (1970), that no defendant in a summary case be sentenced to imprisonment unless the defendant was represented at trial by counsel, and that every defendant in a court case has counsel starting no later than the preliminary hearing stage.

No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. *See Alabama v. Shelton*, 535 U.S. 654 (2002) and *Scott v.*

Illinois, 440 U.S. 367 (1979). *See* Rule 454 (Trial in Summary Cases) concerning the right to counsel at a summary trial.

Appointment of counsel can be waived, if such waiver is knowing, intelligent, and voluntary. *See Faretta v. California*, 422 U.S. 806 (1975). Concerning the appointment of standby counsel for the defendant who elects to proceed *pro se*, see Rule 121.

In both summary and court cases, the appointment of counsel to represent indigent defendants remains in effect until all appeals on direct review have been completed.

Ideally, counsel should be appointed to represent indigent defendants immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases. This rule strives to accommodate the requirements of the Supreme Court of the United States to the practical problems of implementation. Thus, in summary cases, paragraph (A)(1) requires a pretrial determination by the issuing authority as to whether a jail sentence would be likely in the event of a finding of guilt in order to determine whether trial counsel should be appointed to represent indigent defendants. It is expected that the issuing authorities in most instances will be guided by their experience with the particular offense with which defendants are charged. This is the procedure recommended by the ABA Standards Relating to Providing Defense Services § 4.1 (Approved Draft 1968) and cited in the United States Supreme Court's opinion in *Argersinger, supra*. If there is any doubt, the issuing authority can seek the advice of the attorney for the Commonwealth, if one is prosecuting the case, as to whether the Commonwealth intends to recommend a jail sentence in case of conviction.

In court cases, paragraph (A)(2) requires counsel to be appointed at least in time to represent the defendant at the preliminary hearing. Although difficulty may be experienced in some judicial districts in meeting the *Coleman* requirement, it is believed that this is somewhat offset by the prevention of many post-conviction proceedings that would otherwise be brought based on the denial of the right to

counsel. However, there may be cases in which counsel has not been appointed prior to the preliminary hearing stage of the proceedings, *e.g.*, counsel for the preliminary hearing has been waived, or a then-ineligible defendant subsequently becomes eligible for appointed counsel. In such cases it is expected that the defendant's right to appointed counsel will be effectuated at the earliest appropriate time.

An attorney may not be appointed to 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)(3) retains in the issuing authority or judge the power to appoint counsel regardless of indigency or other factors when, in the issuing authority's or the judge's opinion, the interests of justice require it.

Pursuant to paragraph (B)(2), counsel retains his or her appointment 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 (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).

The 2011 amendments to this rule, to Pa.Rs.Crim.P. 120 and 904, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California,* 386 U.S. 738 (1967), and *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981),. and *Pennsylvania v. Finley,* 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.

Pursuant to paragraph (D), if an appointed attorney seeks to withdraw, the attorney must proceed pursuant to the procedures in Rule 120(B). Pursuant to Rule 120, the court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon, supra,* and *Turner/Finley, supra*, and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins,* 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

[*See Commonwealth v. Alberta,* 601 Pa. 473, 974 A.2d 1158 (2009), in which the Court stated that "appointed counsel who has complied with *Anders* [*v. California,* 386 U.S. 738 (1967),] and is permitted to withdraw discharges the direct appeal obligations of counsel. Once counsel is granted leave to withdraw per *Anders*, a

necessary consequence of that decision is that the right to appointed counsel is at an end.")]

For suspension of Acts of Assembly, see Rule 1101.

NOTE: Rule 318 adopted November 29, 1972, effective 10 days hence, replacing prior rule; amended September 18, 1973, effective immediately; renumbered Rule 316 and amended June 29, 1977, and October 21, 1977, effective January 1, 1978; renumbered Rule 122 and amended March 1, 2000, effective April 1, 2001; amended March 12, 2004, effective July 1, 2004; *Comment* revised March 26, 2004, effective July 1, 2004; *Comment* revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; *Comment* revised February 26, 2010, effective April 1, 2010 **[.] ; amended , 2011, effective , 2011.**

* * * * * *

COMMITTEE EXPLANATORY REPORTS:

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 March 12, 2004 editorial amendment to paragraph (C)(3), and the Comment revision concerning duration of counsel's obligation, published with the Court's Order at 34 Pa.B. 1672 (March 27, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning Alabama v. Shelton published with the Court's Order at 34 Pa.B. 1931 (April 10, 2004).

Final Report explaining the April 28, 2005 changes concerning the contents of the appointment order published with the Court's Order at 35 Pa.B. 2859 (May 14, 2005).

Final Report explaining the February 26, 2010 revision of the Comment adding a citation to Commonwealth v, Alberta published at 40 Pa.B. 1396 (March 13, 2010).

Report explaining the proposed amendments adding paragraph (D) and revising the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing Anders/McClendon briefs and Finley/Turner no merit letters published for comment at 41 Pa.B. (_____, 2011).

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) Counsel, whether retained or appointed, shall not be permitted to withdraw without leave of court pursuant to Rule 120(B). Counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.

[(G)] (H) 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)] (I) 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)]** **(I)**(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)]** **(I)**(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 (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. 2001).

The 2011 amendments to this rule, to Pa.Rs.Crim.P. 120 and 122, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California,* 386 U.S. 738 (1967), and *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981),. and *Pennsylvania v. Finley,* 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.

Pursuant to paragraph (G), if an attorney seeks to withdraw, the attorney must proceed pursuant to the procedures in Rule 120(B). Pursuant to Rule 120, the court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon, supra,* and *Turner/Finley, supra*, and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins,* 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such

advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

Paragraph **[(H)] (I)** 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)] (I)** (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,* 128 S.Ct. 2379, 2388 (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.

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).

NOTE: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; amended January 21, 2000, effective July 1, 2000; renumbered Rule 904 and amended March 1, 2000, effective April 1, 2001; amended February 26, 2002, effective July 1, 2002; *Comment* revised March 12, 2004, effective July 1, 2004; *Comment* revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; *Comment* revised March 29, 2011, effective May 1, 2011 **[.] ; amended , 2011, effective , 2011.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 11, 1997 amendments published with the Court's Order at 27 Pa.B. 4305 (August 23, 1997).

Final Report explaining the January 21, 2000 amendments adding paragraph (F) concerning appointment of counsel published with the Court's Order at 30 Pa.B. 624 (February 5, 2000).

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 February 26, 2002 amendments concerning entry of appearance by counsel published with the Court's Order at 32 Pa.B 1393 (March 16, 2002).

Final Report explaining the March 12, 2004 Comment revision concerning duration of counsel's obligation published with the Court's Order at 34 Pa.B. 1672 (March 27, 2004).

Final Report explaining the April 28, 2005 amendments concerning entry of appearance and content of appointment order published with the Court's Order at 35 Pa.B. 2859 (May 14, 2005).

Final Report explaining the March 29, 2011 revision of the Comment concerning right to counsel published with the Court's Order at 41 Pa.B. (, 2011).

Report explaining the proposed amendments adding paragraph (G) and revising the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing Anders/McClendon briefs and Finley/Turner no merit letters published for comment at 41 Pa.B. (, 2011).

REPORT

Proposed Amendments to Pa.Rs.Crim.P. 120, 122, and 904

MODIFICATION OF THE *ANDERS/FINLEY* PROCEDURES

I. INTRODUCTION

The Committee, in conjunction with the Appellate Court Procedural Rules Committee,[1] is planning to propose to the Supreme Court amendments to Rules of Criminal Procedure 120, 122, and 904. The proposed rules of the two Committees, and their respective explanatory *Report* and *Explanatory Comment,* should be read in tandem.

The proposed amendments would replace Pennsylvania's *Anders-McClendon/Turner-Finley* procedures[2] with a procedure that would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. The Committee reasoned that requiring counsel to stay in the case through the direct appeal would better protect the defendant's constitutional rights, would promote judicial economy, and would satisfy the goals of *Anders* without its cumbersome mechanism.

II. BACKGROUND

The United States Supreme Court in 1967 in *Anders* addressed the extent of the duty of appointed appellate counsel in a criminal case to proceed with a first appeal after that attorney has conscientiously determined that there is no merit to the indigent's appeal. The Court noted that indigent defendants taking an appeal have a Sixth Amendment right to counsel. In cases involving frivolous appeals, however, counsel may request and receive permission to withdraw without depriving the indigent

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[1] The Appellate Court Procedural Rules Committee proposal is for conforming amendments to Pa.Rs.A.P. 120, 907, 1925, and 2744.

[2] *Anders v. California,* 386 U.S. 738 (1967), *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981) (direct appeal), *Pennsylvania v. Finley,* 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988) (PCRA).

defendant of his or her right to representation if certain safeguards are met. The Court elaborated on the procedure counsel and the courts should follow:

> [The attorney's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. ...This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. *Supra.* at 744-745

Subsequently in *Finley*, the Court concluded that federal constitutional law does not require that *Anders* be made applicable to collateral proceedings under the Post Conviction Hearing Act (PCHA, now PCRA). The Pennsylvania Supreme Court, in *Commonwealth v. Turner, supra*, after making a finding that defendants have a rule-made right to counsel for collateral proceedings under Pennsylvania law, reaffirmed the procedures for withdrawal of counsel in collateral attacks on criminal convictions after trial or on appeal that the Superior Court had applied in *Finley*. Pursuant to *Finley,* counsel must present the court with a "no-merit" letter that detail the nature and extent of the attorney's review, listing each issue the petitioner wishes to have raised, with the attorney's explanation of why those issues were meritless. The PCHA court must conduct its own independent review. If the court agrees with counsel that the petition was meritless, the attorney may be permitted to withdraw.

Since these cases were decided, there have continued to be appeals in cases in which counsel has not properly followed the procedures enumerated in the case law. *See, e.g., Commonwealth v. Pitts*, 603 Pa. 1; 981 A.2d 875 (2009); *Commonwealth v.*

Santiago, 602 Pa. 159; 978 A.2d 349 (2009); *Commonwealth v. Ferguson*, 761 A.2d 613, 616 (Pa. Super. 2000); *Commonwealth v. Peterson*, 756 A.2d 687 (Pa. Super. 2000); *Commonwealth v. Smith*, 700 A.2d 1301, 1304 (Pa. Super. 1997). The number of cases raising these issues was the impetus for the Appellate Court Rules Committee to undertake the development of proposed procedures for the Appellate Rules to govern withdrawal of counsel (*Anders* brief and *Finley* letter).

The Appellate Court Rules Committee's initial proposal was for amendments to Pa.R.A.P. 120 (Entry of Appearance) to provide the procedural steps when counsel is requesting permission to withdraw on appeal or on collateral review. This proposal was published for comment in December 2009[3] and met with a number of objections that sent the Appellate Rules Court Committee back to the drawing board. In view of these objections, the Committee considered a new approach that included a post sentence determination concerning defendant's and defendant's counsel's appeal intentions. This new idea was based on research evidencing that this is done in other jurisdictions. Because this new approach would require amendments to the Criminal Rules, a Joint Appellate-Criminal Subcommittee was formed to address this matter.[4]

The Joint Subcommittee considered the Appellate Court Rules Committee's suggestions, and looked at the case law, as well as the procedures in other jurisdictions. The members noted that some jurisdictions have developed different approaches to *Anders.*[5] For example, in *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213, 1214 (1977), the Idaho Supreme Court declined to follow *Anders* altogether, deciding that "once counsel is appointed to represent an indigent client during appeal on

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[3] 39 *Pa.B.* 6866 (December 5, 2009).

[4] The Joint Subcommittee membership included a retired appellate court judge, a common pleas court judge, prosecutors, and a private defense attorney.

[5] Several treatises provide a summary of the different states' *Anders* procedures and alternative procedures. *See, e.g.,* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal Than Others',* 23 Florida State University Law Review 625 (Winter, 1996); James E. Duggan and Andrew W. Moeller, *Make Way for the ABA: Smith V. Robbins Clears A Path For Anders Alternatives,* 3 Journal of Appellate Practice and Process 65 (Spring 2001).

a criminal case, no withdrawal will thereafter be permitted on the basis that the appeal is frivolous or lacks merit." *Id.* at 1214. The Court observed that the mere filing of a motion to withdraw based on the frivolousness of issues will result in prejudice and that there is less conflict and less judicial energy focusing on reviewing motions rather than the merits of the case if counsel is not allowed to motion for withdrawal.

In *Commonwealth v. Moffett*, 383 Mass. 201, 418 N.E.2d 585 (1981), the Massachusetts Supreme Judicial Court held that appointed counsel would not be permitted to withdraw based solely on the ground that the appeal is frivolous or other wise lacking in merit. The Court based its holding on the following analysis:

> Although meant to resolve the tension between an indigent defendant's right to a counseled appeal and counsel's desire to withdraw because he finds the appeal frivolous, the *Anders* procedure has been criticized not only as cumbersome and impractical, but also as insufficiently responsive both to the position of the indigent and to the ethical concerns of appointed counsel. The major difficulty with the *Anders* procedure is its requirement that an attorney assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit. ... Some courts have recognized that the mere submission by appointed counsel of a request to withdraw on grounds of frivolousness may result in prejudice to the indigent defendant, and have adopted the position of disallowing such motions to withdraw. ... Aside from the possibility of prejudice, practical administrative reasons exist for prohibiting withdrawal. If appointed counsel may move to withdraw on grounds of frivolousness, the court must determine whether the appeal is frivolous in order to rule on counsel's motion, and the determination necessarily entails consideration of the merits of the appeal. As long as counsel must research and prepare an advocate's brief, he or she may as well submit it for the purposes of an ordinary appeal. Even if the appeal is frivolous, less time and energy will be spent directly reviewing the case on the merits. *Id. at* 205-206, 418 N.E.2d at 590-591.

In *New Hampshire v. Cigic*, 138 N.H. 313, 314, 639 A.2d 251 (1994), the New Hampshire Supreme Court held that "the efficiency and integrity of the appellate process are better ensured by the adoption of a modified Idaho rule" instead of continuing to adhere to the withdrawal requirements set forth in *Anders, supra.* The Court also addressed the implications of filing a frivolous appeal that could arise under the new procedures, observing that:

> [s]uch instances, however, would be extremely rare, especially in light of the fact that it is not considered frivolous to make "a good faith argument for an

> extension, modification or reversal of existing law." *N.H.R.Prof.Conduct* 3.1. In addition, the ABA Model Code Comments to Rule 3.1 state that '[an] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.' An action cannot be considered frivolous, therefore, if the lawyer is able 'either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.' 138 N.H at 317, 639 A.2d at 253.

Recognizing that by adopting the new procedure, there may be rare occasions when appellate counsel would be required to assert a frivolous issue, the Court created an exception to New Hampshire Rule of Professional Conduct 3.1 for such conduct.

In 2000*,* the U. S. Supreme Court considered the alternative procedures developed by California following *Anders*.[6] *Smith v. Robbins*, 528 U.S. 259 (2000). In *Smith,* the Court observed "[t]he procedure we sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." *Id.* 265. The Court held:

> Accordingly, we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may-and, we are confident, will-craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders.* The Constitution erects no barrier to their doing so. *Id* at 276.

The Joint Subcommittee considered the procedures developed to replace *Anders* in these other jurisdictions, and agreed that proposing a comparable change in Pennsylvania would be beneficial to the bench and bar. The new approach being proposed would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. The members reasoned that requiring counsel to stay in the case through the direct appeal would protect the defendant's constitutional rights and promote judicial economy, and would satisfy the goals of *Anders* without its cumbersome mechanism.

To implement this new approach, the new procedures would be incorporated into the Criminal Rules' counsel rules, Rules 120, 122, and 904, as well as Appellate Rule

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[6] California's new procedure was established in *People v. Wende,* 25 Cal.3d 436, 441-442, 158 Cal.Rptr. 839, 600 P.2d 1071, 1074-1075 (1979).

120 (Entry of Appearance), and that any withdrawal of counsel, whether the case is before the trial court or the appellate court, would be pursuant to Criminal Rule 120. In addition, the text of the rules would make it clear that counsel no longer would be permitted to withdraw solely because the attorney believes there are no non-frivolous issues to raise. Because the new procedures are changing years of practice, the *Comments* to the rules will emphasize that, with this change, there no longer will be *Anders* briefs or *Finley* no-merit letters in Pennsylvania. In addition, the *Comments* would elaborate what counsel's obligations are under the new procedures.

DISCUSSION OF PROPOSED CRIMINAL RULE CHANGES

Rule 120 (Attorneys – Appearances and Withdrawals)

Rule 120 would be amended by adding a second sentence to paragraph (B)(1) that says "counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit." The Committee considered incorporating several other procedures that provided more detail, such as requiring the attorney to file the appeal, found in other jurisdictions' rules, but ultimately concluded because this proposal does not change the appeal process, the rule should contain only the new prohibition on withdrawal. Correlatively, the Rule 120 *Comment* would be revised by adding a new first paragraph that explains that the 2011 changes to the Criminal and Appellate Rules supersede the procedures set forth in the *Anders/McClendon* and *Turner/Finley* line of cases. The *Comment* explains further that with this change, there no longer will be *Anders* briefs or *Finley* no-merit letters in Pennsylvania.

The proposed revisions to the Rule 120 *Comment* also address counsel's obligations when proceeding with an appeal or collateral review under the new procedures.[7] These obligations include advising the client of any right to appeal, the possible grounds for appeal, and counsel's opinion of the probable outcome of an

[7] The source of the obligations included in the proposed *Comment* revision, in addition to Pennsylvania law, include the ABA *Standards for Appeals*, Standard 21-3.2, and ABA *Defense Function Standard*, Standard 4-8.3, and the procedures set forth in *New Hampshire v. CIGIC, supra..*

appeal. If, in the attorney's estimation, the appeal lacks merit or is frivolous, the attorney must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

One issue that presented a bit of a hurdle with regard to requiring the attorney to stay in the case even when the attorney believes there are no non-frivolous issues concerns the provisions of Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions). Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The Note to Rule 3.1 states:

> [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

The members believe that the new procedures fall within the "exception" set forth in Note 3 since the new procedures protect a defendant's constitutional right to counsel.[8] However, there was some concern that, because this "exception" in the Note is broader than the language of Rule 3.1, without some clarification, there would be confusion for the bench and bar. Accordingly, the Rule 120 *Comment* would include a statement to the effect that Pa.R.P.C. 3.1 should be construed with reference to Rule 120.

Another issue concerns whether counsel must raise all the issues a defendant asks to be raised. This issue was discussed at length by the Committee during the development of the 2004 amendments to Rule 122. The Committee at that time agreed

[8] *See, also,* the discussion in *New Hampshire v. CIGIC, supra.,* concerning this issue.

to add a reference to *Jones v. Barnes*, 463 U.S. 745 (1983), noting Chief Justice Burger's remarks that:

> Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. This Court, in holding that a State must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf.' ... Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. *Id.* at 751.

The Committee agreed a similar cross-reference should be added to the Rule 120 *Comment* to emphasize that appellate counsel has the ultimate authority to decide which arguments to make on appeal. The members also included a cross-reference to *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001) for the same principle.

Finally, the Committee thought the Rule 120 *Comment* would be clearer if the *Comment* provisions are separated into provisions concerning entry of appearance and provisions concerning withdrawal of appearance with section titles in the same manner as in the text of the rule. Correlative to this organization of the *Comment*, the provisions related to entry of appearance that currently are in the fifth to the last paragraph and the last paragraph of *Comment* would be moved to be the fourth and fifth paragraphs under the new section titled "Entry of Appearance."

Rule 122 (Appointment of Counsel) and Rule 904 (Entry of Appearance and Appointment of Counsel; *In Forma Pauperis*)

The provisions proposed for Rule 120 explained above also would be added to Rules 122 and 904 with modifications to conform to the procedures in these rules. Because neither Rule 122 nor Rule 904 provide for the withdrawal of counsel, both rules would be amended to provide that counsel will not be permitted to withdraw without leave of court pursuant to Rule 120(B), thereby making it clear that the procedures for withdrawal of counsel in all cases are governed by Rule 120(B). In addition to the new

withdrawal of counsel provisions, Rules 122 and 904 would include the same prohibition on permitting withdrawals solely on the ground that the appeal is frivolous or otherwise lacking in merit that is being added to Rule 120(B)(1).

The *Comments* to Rules 122 and 904 would be revised in the same manner as the Rule 120 *Comment.* The language of some of the provisions that are in the Rule 120 *Comment* has been modified to conform to the procedures in Rules 122 and 904.

Finally, cross-references to all the other Criminal and Appellate Rules would be included in the *Comments* to all the rules. This is important given the significant changes in procedure that are being proposed so the bench and bar will know which rules to consult with regard to the new procedures.