

Appellate Court Procedural Rules Committee

Proposed Amendments to Pa.R.A.P. 313 and 1501

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule of Criminal Procedure 587 and revise the Comments to Rules of Criminal Procedure 580 and 605. The proposed rule changes clarify the procedures when a defendant files a motion to dismiss based on double jeopardy grounds. At the same time, the Appellate Court Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania also amend Rules of Appellate Procedure 313 and 1501 to codify the procedure for seeking appellate review of the trial court's pretrial determination that the motion to dismiss based on double jeopardy grounds is frivolous. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The two Committees worked jointly in developing these proposals, and the following Explanatory Comment highlights the joint considerations in formulating this proposal, as well as the specific appellate considerations. It precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

The text of the proposed changes to the rules follows the Explanatory Comment. Additions are shown in bold and are underlined; deletions are in bold and in brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel. All communications in reference to the proposed amendment should be sent no later than, **Monday, May 1, 2012** to:

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By the Appellate Court Procedural Rules Committee

Honorable Renée Cohn Jubelirer,
Chair

EXPLANATORY COMMENT

I. BACKGROUND

The Committee, in conjunction with the Criminal Procedural Rules Committee,¹ is planning to propose to the Supreme Court amendments to Rules of Appellate Procedure 313 and 1501.

The Supreme Court in *Commonwealth v. Orié*, ___ Pa ___, 22 A.3d 1021 (2011), clarified the appropriate procedures to be followed in the appellate court when a criminal defendant seeks review of a trial court's determination, in the context of dismissing the defendant's pre-trial double jeopardy challenge, that the challenge is frivolous. The Court asked the Appellate Court Procedural Rules Committee and the Criminal Procedural Rules Committee to evaluate the procedural framework that the Court had set forth for possible further refinement and codification.

There are two postures in which a matter can reach an appellate court after a trial court denies a motion to dismiss on double jeopardy grounds. First, if the court denies the motion but does not deem it frivolous, a defendant has a collateral order appeal as of right, clearly governed by Rule 313 and initiated by a Notice of Appeal. Second, if the trial court denies the motion but also deems the challenge to be frivolous, the mechanism for challenging such a determination is by means of a petition for review. The Committees propose to add the procedure for the petition for review to Rule 313 so that both procedures for seeking review of a trial court order denying a motion to dismiss on double jeopardy grounds are in a single location in the Rules of Appellate Procedure.

Because the procedure to be followed to secure review is dictated by whether the trial court finds frivolousness, the Committees concluded that it would be helpful to the bench and bar if the Criminal Rules were amended to provide express procedures for a trial court to follow in resolving a defendant's motion to dismiss on double jeopardy grounds.

¹ The Criminal Procedural Rules Committee is proposing to amend Rule of Criminal Procedure 587 and revise the Comments to Rules of Criminal Procedure 580 and 605.

Accordingly, the Recommendation proposes that the Criminal Procedural Rules:

require that the motion state specifically and with particularity the grounds for the motion and the facts supporting the motion;

require a hearing on the record in open court; and

require the judge to make findings of fact and conclusions of law on the record at the conclusion of the hearing,

Under the proposed Criminal Procedural Rule amendments, the trial judge will be required to advise the defendant on the record of his or her appellate rights. When the judge makes a finding that the motion is frivolous, the judge will advise the defendant that he or she has the right to file a petition for review within 30 days of the order denying the motion. When the judge denies the motion but does not find it frivolous, the judge will advise the defendant the denial is immediately appealable as a collateral order under the Appellate Rules. The proper procedure to follow where the trial court does not make a determination that the claim is frivolous continues to be governed by existing Pa.R.A.P. 313, but the recommendation will ensure that the petition for review will be as well.

Because the term “petition for review” can refer to documents filed for various purposes, some within a court’s appellate jurisdiction and others in a court’s original jurisdiction, the Appellate Rules explain the different petitions for review and the procedures applicable to each in Chapter 15 of the Rules of Appellate Procedure. The Committees believed that, while it was appropriate to include this petition for review in the list of petitions for review in Pa.R.A.P. 1501, it would be confusing for the bar to have to look in two different Chapters for procedures governing a denial of a motion to dismiss on double jeopardy grounds. For that reason, the Note to Rule 1501 cross-references to Rule 313.

Rule 313. Collateral Orders

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(c) Exception for double jeopardy determinations of frivolousness. Where the trial court denies a pretrial motion seeking dismissal of criminal charges on double jeopardy grounds (including grounds raised under 18 Pa.C.S. §§ 109-111) and also determines that the double jeopardy claim is frivolous, the order denying dismissal is not immediately appealable as a collateral order unless the determination of frivolousness is found to be erroneous. Accordingly, immediate review can be secured only if the affected party files a petition for review from the determination of frivolousness under Chapter 15, subject to the following procedures.

(1) Manner of Obtaining Judicial Review of Frivolousness

Determinations.—In order to secure pretrial review, a petition for review must be filed in the appellate court that would have jurisdiction over an appeal from a final order in the case within thirty (30) days of the trial court’s determination of frivolousness. If the petition for review is transmitted to the prothonotary of the appellate court by means of first class, express, or priority United States Postal Service mail, the petition shall be deemed received by the prothonotary for the purposes of Rule 121(a) (filing) on the date deposited in the United States mail, as shown on a United States Postal Service Form 3817 Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified.

(2) Contents.—The petition for review need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall, insofar as practicable, be set forth in the order stated):

(i) A statement of the basis for the jurisdiction of the appellate court.

(ii) The text of the order in question, and the date of its entry in the trial court. If the order is voluminous, it may, if more convenient, be appended to the petition.

(iii) A concise statement of the case containing the facts necessary to an understanding of the frivolousness issue(s) presented.

(iv) The question(s) presented, expressed in the terms and circumstances of the case but without unnecessary detail.

(v) A concise statement of the reasons why the trial court erred in its determination of frivolousness.

(vi) There shall be appended to the petition a copy of any opinions delivered relating to the order sought to be reviewed, including findings of fact and conclusions of law in support of the frivolousness determination, as well as a copy of any transcripts or other record documents necessary to the appellate court's review.

(vii) There shall be appended to the petition the verbatim texts of the pertinent provisions of constitutional provisions, statutes, ordinances, regulations or other similar enactments which the case involves, and the citation to the volume and page where they are published, including the official edition, if any.

(viii) There shall be appended to the petition any briefs filed in the trial court in support of the motion to dismiss.

(3) *Caption and parties.*—The parties in the trial court shall be named as parties in the appellate court. If there are multiple defendants but the order for which review is sought adjudicates the motion of only a single defendant, only that defendant may file a petition for review.

(4) *No supporting brief.*—All contentions in support of a petition shall be set forth in the body of the petition as prescribed by Paragraph (c)(2)(v) of this rule. No separate brief in support of the petition for review will be received, and the prothonotary of the appellate court will refuse to file any petition for review to which is annexed or appended any brief other than the briefs filed in the trial court.

(5) *Essential requisites of petition.*—The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

(6) *Effect of filing petition.*—A petition for review shall not stay the proceedings before the trial court, unless the trial court or the appellate court or a judge thereof shall so order.

(7) *Answer to petition for review.*—Within 14 days after service of a petition for review the Commonwealth or other adverse party may file an answer. The answer shall be deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is utilized. The answer need not be set forth in numbered paragraphs in the manner of a pleading, but it shall set forth any procedural, substantive or other argument or ground why the petition for review should be denied. No separate motion to dismiss a petition for review will be received. A party entitled to file an answer under this rule who does not intend to do so shall, within the time fixed by these rules for filing an answer, file a letter stating that the party does not intend to file an answer to the petition for review.

The failure to file an answer will not be construed as concurrence in the petition for review. The appellate court may, however, direct the respondent to file an answer.

(8) Grant of petition for review and transmission of record.—If the petition for review is granted, the prothonotary of the appellate court shall immediately give written notice of the entry of the order to the clerk of the trial court and to each party who has appeared in the appellate court. The grant of the petition for review shall operate as a stay of all trial court proceedings. The clerk of the trial court shall docket the notice in the same manner as a notice of appeal and shall mail that notice to all parties to the trial court proceeding. The certified record shall be transmitted and filed in accordance with Chapter 19 (preparation and transmission of the record and related matters). The times fixed by those provisions for transmitting the record shall run from the date of the entry of the order granting the petition for review. No party needs to file a separate notice of appeal.

(9) Denial of petition for review. —If the petition for review is denied, the prothonotary of the appellate court shall immediately give written notice of the order to the clerk of the trial court and to each party who has appeared in the appellate court.

Official Note to Rule 313

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If an order falls under Rule 313, an immediate appeal may be taken as of right simply by filing a notice of appeal[.], except where a determination of frivolousness has been made by a trial court in resolving a double jeopardy motion. The procedures set forth in Rule 341(c) and 1311 do not apply under Rule 313.

Subsection (c) prescribes the procedures for securing review of a trial court order denying a pretrial motion seeking dismissal of criminal charges on double jeopardy grounds, where the trial court makes a finding that the double jeopardy claim is frivolous. Commonwealth v. Orié, 22 A.3d 1021 (Pa. 2011); Commonwealth v. Brady, 510 Pa. 336, 508 A.2d 286 (1986). The trial court's determination and the procedure for determining a motion to dismiss on double jeopardy grounds is set forth in Pennsylvania Rule of Criminal Procedure 580. A trial court order denying a pretrial motion seeking dismissal of criminal charges on double jeopardy grounds that does not make a finding that the double jeopardy claim is frivolous is appealable as of right as a collateral order. Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (Pa. 1977); Commonwealth v. Orié, 22 A.3d 1021 (Pa. 2011); Note, supra, listing examples of collateral orders. There is, however, no collateral order if the motion is determined to be frivolous.

and the trial court may proceed, even if a party files an improper notice of appeal. See Rule of Appellate Procedure 1701(b)(6). Accordingly, the only means for securing pretrial review of a double jeopardy determination that has been deemed to be frivolous is to file a petition for review of the frivolousness determination.

This is a petition for review pursuant to Rule 1501(a)(4). The petition for review procedure specified in subsection (c) is modeled after the procedures in Chapter 13 for seeking, responding to, and acting on petitions for review from orders of lower tribunals refusing to amend otherwise unappealable interlocutory orders to permit the filing of a petition for permission to appeal with the appellate court. Where the petition for review of the determination of frivolousness is granted, the grant automatically initiates a separate appeal on the merits from the order denying the pretrial motion seeking dismissal of criminal charges on double jeopardy grounds. A party may seek (or a court may *sua sponte* issue) a stay of the trial court proceedings pending review of the frivolousness determination. Otherwise, the trial court may proceed while the petition for review is pending. See Rule of Appellate Procedure 1701(d). Where the petition for review of the determination of frivolousness is granted, the grant automatically initiates a separate appeal on the merits from the order denying the pretrial motion seeking dismissal of criminal charges on double jeopardy grounds. A grant of the petition for review stays further proceedings in the trial court.

Rule 1501. Scope of Chapter

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

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

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

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

(4) Matters designated by general rule, e.g., review of orders refusing to certify interlocutory orders for immediate appeal, release prior to sentence, appeals under Section 17(d) of Article II of the Constitution of Pennsylvania, **[and]** review of special prosecutions or investigations **and a trial court's finding of frivolousness when a defendant requests dismissal pretrial on double jeopardy grounds.**

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Note:

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Subdivision (a)(4) was added in 2004 to recognize the references to various appellate rules and accompanying notes to petition for review practice. For example, the Notes to Rules 341 and 1311 direct counsel to file a petition for review of a trial court or government agency order refusing to certify an interlocutory order for immediate appeal. Similarly, Rule 1762 directs the filing of a petition for review when a party seeks release on bail before judgment of sentence is rendered. See Rule 1762(b). A petition for review is also the proper method by which to seek judicial review pursuant to Rule 3321 (regarding legislative reapportionment commission) and Rule 3331 (regarding special prosecutions or investigations). The 2004 amendments clarify the use of petitions for review in these special situations. **In 2012, Rule 313 was amended to codify the procedure for filing a petition for review of a determination of frivolousness of a request for dismissal on double jeopardy grounds.**