Proposed Amendments to Pa.Rs.Crim.P. 550 (Pleas of Guilty Before Magisterial District Judge in Court Cases) and 590 (Pleas and Plea Agreements)

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rules 550 and 590 to provide for more detailed standards regarding the areas of inquiry that are required to be part of all guilty plea colloquies in court cases before the courts of common pleas and magisterial district judges. This Supplemental Report resulted from the Committee's review of the correspondence received after publication of our original explanatory Report that explained the Committee's proposal for guilty plea colloquy procedures in the courts of common pleas only. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Supplemental 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 Supplemental 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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no later than Friday, January 22, 2010.

December 8, 2009 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

D. Peter Johnson, Chair

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RULE 550. PLEAS OF GUILTY BEFORE MAGISTERIAL DISTRICT JUDGE IN COURT CASES.

(A) In a court case in which a magisterial district judge is specifically empowered by statute to exercise jurisdiction, a defendant may plead guilty before a magisterial district judge at any time up to the completion of the preliminary hearing or the waiver thereof.

(B) The magisterial district judge may refuse to accept a plea of guilty, and the magisterial district judge shall not accept such plea unless there has been a determination, after inquiry of the defendant, that the plea is **[voluntarily and understandingly] knowingly, intelligently, and voluntarily** tendered.

(C) The plea shall be in writing:

(1) signed by the defendant, with a representation by the defendant that the plea is entered knowingly, **[voluntarily, and intelligently] intelligently, and voluntarily**; and

(2) signed by the magisterial district judge, with a certification that the plea was accepted after a full inquiry of the defendant, and that the plea was made knowingly, voluntarily, and intelligently.

(D) Before accepting a plea, the magisterial district judge shall be satisfied of:

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

(2) jurisdiction to accept the plea; and

(3) the defendant's eligibility under the law to plead guilty before a magisterial district judge.

(E) To ensure that the defendant is entering the plea knowingly, intelligently, and voluntarily the following information shall be elicited by the magisterial district judge as part of an oral examination:

(1) confirmation of the identity of the defendant;

(2) the defendant's understanding of the nature and elements of the charges to which he or she is pleading guilty, the permissible range of sentences, including fines, for those charges, the maximum aggregate sentence, and any applicable mandatory sentence;

(3) the factual basis for the plea;

(4) the defendant's understanding of his or her right to counsel;

(5) the defendant's satisfaction with the representation of his or her attorney, if any;

(6) the defendant's understanding that he or she has certain rights with regard to the charges, including, but not limited to, the trial of the charges in the court of common pleas; the filing and litigation of pretrial motions; the right to counsel; the right to trial by jury, consisting of twelve jurors of his or her peers that 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; and that he or she has the right to testify; to cross-examine the prosecution witnesses, and to call his or her own witnesses;

(7) that the defendant is aware that the magisterial district judge is not bound by the terms of any plea agreement tendered unless the magisterial district judge accepts such agreement;

(8) that the defendant understands that the plea precludes consideration for ARD or other diversionary programs; and

(9) the defendant's understanding that, as provided in paragraph (F), the defendant may within 10 days after sentence, change the plea to not guilty and that in order to change the plea, the defendant, within 10 days after imposition of sentence, must notify the magisterial district judge who accepted the plea of this decision in writing.

(F) A defendant who enters a plea of guilty under this rule may, within 10 days after sentence, change the plea to not guilty by so notifying the magisterial district judge in writing. In such event, the magisterial district judge shall vacate the plea and judgment of sentence, and the case shall proceed in accordance with Rule 547, as though the defendant had been held for court.

[(E)] **(G)** Ten days after the acceptance of the guilty plea and the imposition of sentence, the magisterial district judge shall certify the judgment, and shall forward the case to the clerk of courts of the judicial district for further proceedings.

COMMENT: In certain cases, what would ordinarily be a court case within the jurisdiction of the court of common pleas has been placed within the jurisdiction of magisterial district judges. *See* Judicial Code, 42 Pa.C.S. § 1515(a)(5), (5.1), (6), (6.1), and (7). This rule provides the procedures to implement this expanded jurisdiction of magisterial district judges.

In those cases in which either the defendant declines to enter a plea of guilty before the magisterial district judge or the magisterial district judge refuses to accept a plea of guilty, the case is to proceed in the same manner as any other court case.

This rule applies whenever a magisterial district judge has jurisdiction to accept a plea of guilty in a court case.

Under paragraph (A), it is intended that a defendant may plead guilty at the completion of the preliminary hearing or at any time prior thereto.

Prior to accepting a plea of guilty under this rule, it is suggested that the magisterial district judge consult with the attorney for the Commonwealth concerning the case, concerning the defendant's possible eligibility for ARD or other types of diversion, and concerning possible related offenses that might be charged in the same complaint. *See Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 ([Pa.] 1973), vacated and remanded, 414 U.S. 808 (1973), on remand, 455 Pa. 622, 314 A.2d 854 (1974).

[Before accepting a plea:

(a) The magisterial district judge should be satisfied of jurisdiction to accept the plea, and should determine whether any other related offenses exist that might affect jurisdiction.

(b) The magisterial district judge should be satisfied that the defendant is eligible under the law to plead guilty before a magisterial district judge, and, when relevant, should check the defendant's prior record and inquire into the amount of damages.

(c) The magisterial district judge should advise the defendant of the right to counsel. For purposes of appointment of counsel, these cases should be treated as court cases, and the Rule 122 (Appointment of Counsel) procedures should be followed.

(d) The magisterial district judge should advise the defendant that, if the defendant wants to change the plea to not guilty, the defendant, within 10 days after imposition of sentence, must

notify the magisterial district judge who accepted the plea of this decision in writing.

(e) The magisterial district judge should make a searching inquiry into the voluntariness of the defendant's plea. A colloquy similar to that suggested in Rule 590 should be conducted to determine the voluntariness of the plea. At a minimum, the magisterial district judge should ask questions to elicit the following information:

(1) that the defendant understands the nature of the charges pursuant to which the plea is entered;

(2) that there is a factual basis for the plea;

(3) that the defendant understands that he or she is waiving the right to trial by jury;

(4) that the defendant understands that he or she is presumed innocent until found guilty;

(5) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

(6) that the defendant is aware that the magisterial district judge is not bound by the terms of any plea agreement tendered unless the magisterial district judge accepts such agreement; and

(7) that the defendant understands that the plea precludes consideration for ARD or other diversionary programs.

***See* Rule 590 and the *Comment* thereto for further elaboration of the required colloquy.]**

<u>For purposes of appointment of counsel, cases proceeding under this rule shall be treated as court cases, and the Rule 122 (Appointment of Counsel) procedures will be followed.</u>

<u>New paragraphs (D) and (E) were added in 2010 to provide detail regarding the manner in which the</u>

magisterial district judge must conduct the inquiry into the entry of the plea. *See also Commonwealth v. Minor*, 467 Pa. 230, 356 A.2d 346 (1976), overruled on other grounds in *Commonwealth v. Minarik*, 493 Pa. 573, 427 A.2d 623, 627 (1981); *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974); *Commonwealth v. Martin*, 445 Pa. 49, 282 A.2d 241 (1971).

As provided in paragraph (D)(2) before accepting a plea, the magisterial district judge must be satisfied of jurisdiction to accept the plea. This includes determining whether any other related offenses exist that might affect jurisdiction.

Similarly, the magisterial district judge must be satisfied of the defendant's eligibility under the law to plead guilty before a magisterial district judge. When relevant, the magisterial district judge must check the defendant's prior record and inquire into the amount of damages.

While the rule continues to require a written plea incorporating the contents specified in paragraph (C), the form of plea was deleted in 1985 because it is no longer necessary to control the specific form of written plea by rule.

Paragraph (C) does not preclude verbatim transcription of the colloquy and plea.

The requirements of the content of the colloquy as provided in paragraph (E) are based on the colloquy requirements in Rule 590 and the *Comment* thereto. Rule 590 requires the colloquy to be conducted "on the record." However, the requirement to conduct an oral colloquy in paragraph (E) does not require a verbatim transcription. Because a magisterial district judge is not a court of record, the requirement that an oral colloquy be conducted on the record may be satisfied by a certification in writing by the magisterial district judge that the oral colloquy has been performed in accordance with the requirements of this rule.

While paragraph (E)(6) requires that the defendant be advised of all trial rights, especially those associated with a trial by jury, it should be noted that a defendant does not have the right to a jury trial in certain ungraded misdemeanor charges. In these cases, the oral colloquy

would not include the information concerning the various rights associated with jury trials.

At the time of sentencing, or at any time within the 10-day period before transmitting the case to the clerk of courts pursuant to paragraph **[(E)] (F)**, the magisterial district judge may accept payment of, or may establish a payment schedule for, installment payments of restitution, fines, and costs.

If a plea is not entered pursuant to this rule, the papers must be transmitted to the clerk of courts of the judicial district in accordance with Rule 547. After the time set forth in paragraph (A) for acceptance of the plea of guilty has expired, the magisterial district judge no longer has jurisdiction to accept a plea.

Regardless of whether a plea stands or is timely changed to not guilty by the defendant, the magisterial district judge must transmit the transcript and all supporting documents to the appropriate court, in accordance with Rule 547.

Once the case is forwarded as provided in this rule and in Rule 547, the court of common pleas has exclusive jurisdiction over the case and any plea incident thereto. The case would thereafter proceed in the same manner as any other court case, which would include, for example, the collection of restitution, fines, and costs; the establishment of time payments; and the supervision of probation in those cases in which the magisterial district judge has accepted a guilty plea and imposed sentence.

NOTE: Rule 149 adopted June 30, 1977, effective September 1, 1977; *Comment* revised January 28, 1983, effective July 1, 1983; amended November 9, 1984, effective January 2, 1985; amended August 22, 1997, effective January 1, 1998; renumbered Rule 550 and amended March 1, 2000, effective April 1, 2001; amended December 9, 2005, effective February 1, 2006 **[.] ; amended , 2010, effective , 2010.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the August 22, 1997 amendments, that clarify the procedures following a district justice's acceptance of a guilty plea and imposition of sentence in a court case [,] published with the Court's order at 27 Pa.B. 4549 (September 6, 1997).

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).

Final Report explaining the December 9, 2005 changes to the rule clarifying the magisterial district judges' exercise of jurisdiction published with the Court's Order at 35 Pa.B. 6894 (December 24, 2005).

Supplemental Report explaining the proposed amendments to the rule regarding the requirements of the guilty plea colloquy published with the Court's Order at 39 Pa.B. (, 2009).

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] examination** of the defendant **conducted in accordance with paragraphs (A)(3)(b) through (A)(3)(d)** that the plea is **[voluntarily and understandingly] knowingly, intelligently, and voluntarily** tendered. **[Such inquiry shall appear on the record.] 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)(c). The judge shall be present during this examination.**

(b) To ensure that the defendant is entering the plea knowingly, intelligently, and voluntarily the following information shall be elicited as part of the 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 charges to which he or she is pleading guilty or *nolo contendere,* the maximum aggregate sentence, including fines, for those charges and any applicable mandatory sentence;

(iv) the factual basis for the plea;

(v) the defendant's satisfaction with the representation of his or her attorney; and

(vi) if the defendant is pleading guilty to murder generally, the defendant's understanding that the Commonwealth has the right to have a jury decide the degree of guilt when the defendant enters a plea of guilty to murder generally.

(c) In addition to the information required to be elicited under paragraph (A)(3)(d), 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 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; and that he or she has the right to testify, to cross-examine the prosecution witnesses, and to call his or her own witnesses;

(ii) the defendant's counsel has explained to the defendant the nature and the elements of the charges to which he or she is pleading guilty or *nolo contendere* and that the defendant understands these charges; and

(iii) the defendant's understanding that, if the judge accepts the plea and finds the defendant guilty, the defendant's grounds to appeal are 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.

(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 defendant understands 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 degree of guilt shall be determined by a jury unless the attorney for the Commonwealth elects to have the judge, before whom the plea was entered, 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]** **knowingly, intelligently, and voluntarily** tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974); *Commonwealth v. Campbell*, 451 Pa. 465, 304 A.2d 121 (1973); *Commonwealth v. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973).

Paragraph (A)(3) was added in 2010 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 knowingly, intelligently, and voluntarily. Paragraphs (A)(3)(c) and (d) elaborate on these areas of inquiry. Paragraph (A)(3)(a) provides that the judge may permit counsel to orally examine the defendant as part of the oral portion of the inquiry but the judge must be present during this examination.

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*.

While paragraph (A)(3)(c) requires that the defendant be advised of all trial rights, especially those associated with a trial by jury, it should be noted that a defendant does not have the right to a jury trial in certain ungraded misdemeanor charges. In these cases, the defendant would not be advised of the various rights associated with jury trials.

Some areas of inquiry that require oral inquiry need not necessarily 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 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 knowingly, intelligently, and voluntarily give up his or her rights and plead 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 and acceptance of the terms of the agreement also must be elicited as a separate inquiry on the record. *See Commonwealth v. Porreca*, 528 Pa. 46, 595 A.2d 23 (1991). 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.

A judge either shall accept or reject the plea agreement in whole. The judge shall not accept a portion of the plea agreement while rejecting another portion of the plea agreement. *See Commonwealth v. Parsons*, 969 A.2d 1259 (Pa.Super. 2009).

For the procedures for accepting a guilty plea in a court case before a magisterial district judge, see Rule 550.

[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?]

(7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?]

[The Court in *Commonwealth v. Willis*, 471 Pa. 50, 369 A.2d 1189 (1977), and *Commonwealth v. Dilbeck*, 466 Pa.

543, 353 A.2d 824 (1976), mandated that, during a guilty plea colloquy, judges must elicit the information set forth in paragraphs (1) through (6) above. In 2008, the Court added paragraph (7) to the list of areas of inquiry.]

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 (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 (1976), and *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (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 (1973) and *Commonwealth v. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973).

It is advisable that the judge conduct the examination of the defendant. However, paragraph (A)**(3)(a)** **[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 (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 (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 (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 September 18, 2008, effective November 1, 2008 **[.] ; amended , 2010, effective , 2010.**

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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).

Final Report explaining the September 18, 2008 amendments to paragraph (C) concerning juries determining degree of guilt published with the Court's Order at 38 Pa.B. 5429 (October 4, 2008).

***Report explaining the proposed changes to paragraph (A)(3) concerning plea colloquies published at 39 Pa.B. 991 (February 21, 2009)*[.]; Supplemental Report explaining the proposed amendments concerning plea colloquies published at 39 Pa.B. (, 2009).**

SUPPLEMENTAL REPORT

Proposed Amendments to Pa.Rs.Crim.P. 550 and 590

GUILTY PLEA COLLOQUY

The Committee has examined guilty plea colloquy practice arising from appellate cases[1] and other reports that trial judges were not properly conducting guilty plea colloquies by not eliciting all of the information required to ensure that a provident plea had been entered. The Committee believes that this requirement, embodied in six mandatory areas of inquiry enumerated in *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977) and currently contained in the Rule 590 *Comment*, should be strengthened in the rules.

Proposed Changes to Rule 590

The Committee, recognizing the wide divergence in guilty plea colloquy practice throughout the Commonwealth, developed a proposal in which the six areas of inquiry currently contained in the Rule 590 *Comment* were expanded upon and augmented to provide a more detailed description of the type of inquiry need to ensure that the plea was entered knowingly, intelligently, and voluntarily. The proposal also addressed which elements of inquiry must be performed orally and which could be included in the common practice of written colloquy forms.

In February 2009, the Committee published for comment the proposal to add a list of mandatory elements to the text of Rule 590.[2] The proposal included a new paragraph (3)(b) that 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

[1] *See, e.g.,* Judge Klein's concurring opinion in *Commonwealth v. Fowler*, 893 A.2d 758 (2006),

[2] The original *Report* was published at 39 *Pa.B.* 991 (February 21, 2009).

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 -- was included in paragraph (B) that addresses 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. Additionally, the *Comment* language was 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.

While, the majority of the proposed changes described above were retained and are repeated in this current publication, several changes were made as a result of the publication comments the Committee received.

Several responses expressed concern about the provision in the original proposal that required that an oral examination be conducted into "the nature and elements" of the charges. The comments, which also were echoed by some of the Committee members, questioned whether an extensive oral review of each element of each charge would be required. The Committee concluded that it is defense counsel's duty to advise the defendant on the details of the charges, and what really is needed in the colloquy is an affirmation that the defendant had been properly advised and understood the charges to which he or she was pleading guilty. The elements would not need to be stated in the oral colloquy or written out in a written colloquy but rather the defendant would confirm that he or she had been advised by his or her counsel and

that he or she understood the elements. This process would be further supported by the recitation of the facts done orally on the record at the time of the entry of the plea. Therefore, this language, in paragraph (A)(3)(b)(iii), has been changed to state that the defendant "understands the charges" to which he or she is pleading guilty. Additionally, paragraph (A)(3)(c)(ii) has been modified so that the written colloquy includes a statement that the attorney explained the elements and the defendant understands them.

Another comment suggested that, since sentences may run consecutively, the defendant should be advised of the maximum aggregate sentence. The Committee agreed with this change, and modified paragraph (A)(3)(b)(iii) accordingly.

In addition, concerning the advice to be given the defendant regarding trial rights, the Committee agreed to modify paragraph (A)(3)(c)(i) to provide further clarity. In the phrase "the right to trial by jury, consisting of twelve jurors," we added "of his or her peers." We also added "the right to testify" to the list before the right "to call his or her own witnesses."

In addition to the post publication modifications to the text of Rule 590, the Committee agreed to several revisions to the *Comment.* During the discussions about the defendant's trial rights, the Committee noted that there are cases in which a defendant does not have a right to a jury trial. The members agreed this point should be explained in the *Comment.* Accordingly, a provision has been added to the *Comment* clarifying that "the defendant has a right to jury trial except in certain ungraded misdemeanors when he or she would have bench trial."

During the time the Committee was working on the guilty plea proposal, the Superior Court decided *Commonwealth v. Parsons*, 969 A.2d 1259 (Pa.Super. 2009). In *Parsons,* the Superior Court made it clear that when a judge accepts or rejects a plea agreement, the judge must accept or reject the entire agreement and may not accept or

reject the agreement in part. After reviewing *Parsons,* the Committee agreed that the *Comment* should contain a cross-reference to *Parsons.*

In 2006, the Supreme Court recognized in *Commonwealth v. White,* 589 Pa. 642, 910 A.2d 648(2006), that the Commonwealth has a right to have a jury determine the degree of guilt following a plea of guilty to murder generally. In 2008, the Court approved the revision of the Rule 590 *Comment* that added this point to the list of things about which a judge must inquire during the guilty plea colloquy. As part of the post-publication modification of the text of Rule 590, the Committee moved this provision from the *Comment* and added it as a sixth area of inquiry to the list of mandatory oral inquiry in paragraph (A)(3)(c). This area of inquiry goes to the defendant's understanding that the Commonwealth has the right to have a jury decide the degree of guilt when the defendant enters a plea of guilty to murder generally.

Finally, two paragraphs would be deleted from the Rule 590 *Comment*. The first, referring to conducting a separate inquiry on the record regarding the defendant's understanding and acceptance of a plea agreement, was repetitious of language contained in the proposed new *Comment* language. The second, describing changes made to the rule in 1995 to comport with Rule 591, was no longer necessary since the *Comment* cross-references Rule 591.

Proposed Changes to Rule 550

One comment received during publication raised the question of how the requirements of the Rule 590 oral colloquy can be accomplished by a magisterial district judge (MDJ) when accepting pleas under Rule 550. Specifically, the Rule 550 *Comment* cross-references Rule 590 as the model of how a colloquy should be conducted. However, as proposed, Rule 590 would require a specific oral colloquy to be conducted on the record. How can this be accomplished before an MDJ, when the magisterial district courts are not courts of record?

Initially, the Committee favored removing the Rule 590 requirement that the oral colloquy be conducted "on the record." Instead, the MDJ would still look to Rule 590 as to how the colloquy would be conducted. The oral colloquy would be conducted but, since no record would be produced, the MDJ would be required to certify that he or she had performed the required oral colloquy.

Subsequently, the Committee determined that this would be insufficient because of the differences between a Rule 550 plea and a Rule 590 plea in addition to the fact that MDJ courts are not courts of record, as discussed above. It was noted, for example, that proposed Rule 590(A)(3)(c)(iii) would require a discussion of appellate rights' waiver while Rule 550(D) provides for a ten-day period for the automatic withdrawal that did not seem to be encompassed by the Rule 590 language. In addition, the guilty plea procedures under Rule 550 did not seem as amenable to a division between oral and written colloquy elements as in Rule 590. The Committee ultimately concluded that the best way of making these rules compatible would be to spell out the guilty plea colloquy procedures in Rule 550.

The proposed changes would consist of a list of the elements of inquiry for the colloquy to be added to the text of Rule 550. This list is a combination of the draft Rule 590 language and the suggested list of areas of inquiry in the current version of the Rule 550 *Comment*. In preparing this list, the Committee concluded that some of the items in the list of areas of inquiry in the *Comment* were not really "areas of inquiry" but rather were conclusions to reach after the inquiry. Therefore, a new paragraph (D) would be added to Rule 550 that includes the provision that, before accepting a plea, the MDJ must make certain findings, including whether the defendant has the capacity to comprehend and participate in the proceedings. Additionally, the *Comment* to Rule 550 currently lists several elements, such as jurisdiction, that the magisterial district judge "should be satisfied of…." These elements would also be included in new

paragraph (D), although some of the more explanatory portions of these paragraphs, such as the factors to consider when determining if jurisdiction exists, would be retained in the *Comment* rather than added to the text of the rule.

The proposal retains the concept that, after the oral colloquy was conducted, since no record would be produced, the MDJ would be required to certify that he or she has performed the required oral colloquy.

Finally, the Committee noted that various phrases were used inconsistently in Rules 550 and 590 to describe the defendant's state of mind in order for the plea to be accepted. The Committee favored the phrase "knowingly, intelligently, and voluntarily" as clearer and more comprehensive. This phrase has been used throughout both rules.