

**Proposed Amendments to Pa.R.Crim.P. 587 and  
Proposed Revisions to the Comments To Pa.Rs.Crim.P. 580 and 605**

*INTRODUCTION*

*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 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 changes 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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***no later than Monday, May 1, 2012.***

*March 7, 2012 BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

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*Philip D. Lauer, Chair*

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*Anne T. Panfil, Counsel*

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*Jeffrey M. Wasileski, Counsel*

RULE 580. DISPOSITION OF PRETRIAL MOTIONS.

Unless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.

**COMMENT: See Rule 587(B) for the procedures for motions to dismiss on double jeopardy grounds.**

NOTE: Rule 309 adopted June 30, 1964, effective January 1, 1965; renumbered Rule 310 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; renumbered Rule 580 March 1, 2000, effective April 1, 2001 **[.] ; Comment revised \_\_\_\_\_, 2012, effective \_\_\_\_\_, 2012.**

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**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)**

**Report explaining the proposed revision of the Comment adding a citation to Rule 587 concerning motions to dismiss on double jeopardy grounds published for comment at 42 Pa.B. ( \_\_\_\_\_, 2012).**

RULE 587. MOTION FOR DISMISSAL.

**(A) Untimely Filing of Information**

**[(A)] (1)** Upon motion and a showing that an information has not been filed within a reasonable time, the court may order dismissal of the prosecution, or in lieu thereof, make such other order as shall be appropriate in the interests of justice.

**[(B)] (2)** The attorney for the Commonwealth shall be afforded an opportunity to respond.

**(B) Double Jeopardy**

**(1) A motion to dismiss on double jeopardy grounds shall state specifically and with particularity the basis for the claim of double jeopardy and the facts that support the claim.**

**(2) A hearing on the motion shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). The hearing shall be conducted on the record in open court.**

**(3) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law and shall issue an order granting or denying the motion.**

**(4) In a case in which the judge denies the motion, the findings of fact shall include a specific finding as to frivolousness.**

**(5) If the judge makes a finding that the motion is frivolous, the judge shall advise the defendant on the record that a defendant has a right to file a petition for review of that determination pursuant to Rule of Appellate Procedure 313(c) within 30 days of the order denying the motion.**

**(6) If the judge denies the motion but does not find it frivolous, the judge shall advise the defendant on the record that the denial is immediately appealable as a collateral order.**

COMMENT: Cf. Pa.R.J.A. 1901 concerning termination of inactive cases.

**A motion filed pursuant to this rule must comply with the provisions of Rule 575 (Motions and Answers) and Rule 576 (Filing and Service by Parties).**

**[See Rule 575 for the procedures governing motions and answers.]**

In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, and therefore is part of the court case, a dismissal of the prosecution pursuant to paragraph (A)(1) would include the dismissal of the summary offense. See the *Comment* to Rule 502 (Instituting Proceedings in Court Cases).

**“Hearing,” as used in paragraph (B)(2) includes the taking of testimony, or the hearing of argument, or both. See Rule 115 for the procedures for the recording and transcribing of the hearing.**

**Paragraph (B)(4) requires the judge to make a specific finding whether the motion is being dismissed as frivolous. The judge should expressly cite on-point controlling case law that would make the claim frivolous. See, e.g., *Commonwealth v. Gains*, 383 Pa.Super. 208, 217, 556 A.2d 870, 874 (1989). (“A frivolous claim is a claim clearly and palpably without merit; it is a claim which presents no debatable question.”). A mere adverse decision of the case does not mean the matter is frivolous.**

**Although the judge is required to advise the defendant of his or her appellate rights in paragraphs (B)(5) and (B)(6) upon dismissing the motion, nothing in this rule is intended to preclude the defendant from proceeding to trial without first appealing the double jeopardy question. See, e.g., *Commonwealth v. Lee*, 490 Pa. 346, 350, 416 A.2d 503, 504 (1980). (“Unquestionably, appellant could have sought immediate appellate review of the question involved. For whatever reason, however, appellant proceeded to trial without first appealing the double jeopardy question. We believe that a defendant may choose to proceed to trial and if**

**convicted, still challenge the propriety of the pretrial motion to dismiss on double jeopardy grounds on appeal.” citations omitted)**

**For the procedures for challenging the denial of the motion to dismiss on double jeopardy grounds when the judge makes a finding that the motion is frivolous, see Rule of Appellate Procedure 313(c).**

**Pursuant to Rule of Appellate Procedure 1701(d), the filing of a petition for review does not affect the judge’s power to proceed further in the case while the petition for review is pending.**

NOTE: Rule 316 adopted June 30, 1964, effective January 1, 1965; amended June 8, 1973, effective July 1, 1973; amended February 15, 1974, effective immediately; renumbered Rule 315 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; *Comment* revised January 28, 1983, effective July 1, 1983; amended August 12, 1993, effective September 1, 1993; renumbered Rule 587 and amended March 1, 2000, effective April 1, 2001; amended March 3, 2004, effective July 1, 2004; *Comment* revised March 9, 2006, effective September 1, 2006 [.] ; amended \_\_\_\_\_, 2012, effective \_\_\_\_\_, 2012.

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**COMMITTEE EXPLANATORY REPORTS:**

**Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).**

**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 3, 2004 amendment of paragraph (B) published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).**

**Final Report explaining the March 9, 2006 Comment revision concerning joinder of summary offenses with misdemeanor, felony, or murder charges published with the Court's Order at 36 Pa.B. 1385 (March 25, 2006).**

**Report explaining the proposed provisions of the new paragraph (B) concerning motions to dismiss on double jeopardy grounds published for comment at 42 Pa.B. ( , 2012).**

RULE 605. MISTRIAL.

(A) Motions to withdraw a juror are abolished.

(B) When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

COMMENT: This rule replaces the practice of moving for the withdrawal of a juror.

Examples of "manifest necessity" can be found in *Commonwealth v. Stewart*, **456 Pa. 447**, 317 A.2d 616 ([Pa.] 1974); *Commonwealth v. Brown*, **451 Pa. 395**, 301 A.2d 876 ([Pa.] 1973); *United States ex rel. Russo v. Superior Court of New Jersey*, Law Division, Passaic County, 483 F.2d 7 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1023 (1973); *United States v. Tinney*, 473 F.2d 1085 (3rd Cir. 1973), *cert. denied*, 412 U.S. 928 (1973); *United States v. Jorn*, 440 U.S. 470 (1971); and *United States v. Perez*, 9 Wheat. 579 (1824); see also *Illinois v. Somerville*, 410 U.S. 458 (1973).

**See Rule 587(B) for the procedures when a motion to dismiss on double jeopardy grounds is filed.**

NOTE: Rule 1118 adopted January 24, 1968, effective August 1, 1968; amended June 28, 1974, effective September 1, 1974; renumbered Rule 605 and amended March 1, 2000, effective April 1, 2001 [.] ; **Comment revised \_\_\_\_\_, 2012, effective \_\_\_\_\_, 2012.**

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**Report explaining the proposed revision of the Comment adding a citation to Rule 587 concerning motions to dismiss on double jeopardy grounds published for comment at 42 Pa.B. ( \_\_\_\_\_, 2012).**



## REPORT

### *Proposed Amendments to Pa.R.Crim.P. 587, and Proposed Revisions to the Comments To Pa.Rs.Crim.P. 580 and 605*

#### MOTION TO DISMISS BASED ON DOUBLE JEOPARDY GROUNDS

### **I. BACKGROUND**

The Committee, in conjunction with the Appellate Court Procedural Rules Committee,<sup>1</sup> is planning to propose to the Supreme Court amendments to Rule of Criminal Procedure 587 that would clarify the procedures when a defendant files a motion to dismiss based on double jeopardy grounds. The Committee also is proposing correlative revisions to the *Comments* to Rules of Criminal Procedure 580 and 605.

The Supreme Court in *Commonwealth v. Orié*, -- Pa --, 22 A.3d 1021 (2011), clarified the appropriate procedure for an appellate court to follow when a trial court dismisses a defendant's pre-trial double jeopardy challenge as frivolous. The Court asked the Appellate Court Procedural Rules Committee and the Criminal Procedural Rules Committee to evaluate the Court's proposed procedural framework for possible further refinement.

During the Committees' discussions of the *Orié* case and the Court's directive, in addition to considering the appellate procedures that should apply when a judge determines that a pretrial motion to dismiss on double jeopardy grounds is frivolous,<sup>2</sup>

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<sup>1</sup> The Appellate Court Procedural Rules Committee proposal is for amendments to Pa.Rs.A.P. 313 (Collateral Orders) and 1501 (Scope of Chapter).

<sup>2</sup> As explained more fully in the Appellate Court Procedural Rules Committee's published proposal, when a defendant moves for a dismissal on double jeopardy grounds and the judge determines the motion is frivolous, the mechanism for challenging such a determination would be a petition for review. If the pretrial motion seeking dismissal on double jeopardy grounds is dismissed but not because of a finding of frivolousness, then the claim is immediately appealable as of right as a collateral order and the appropriate avenue for a challenge is to file a notice of appeal.

the members also noted that there is no uniformity in how motions to dismiss on double jeopardy grounds currently are handled at the trial level. They reasoned this lack of uniformity contributes to the confusion with regard to challenging the dismissal of these motions in the appellate courts. The Committees therefore agreed that it would be helpful to the bench and bar if the Criminal Rules would be amended to provide the procedures in the court of common pleas when the defendant files a motion to dismiss based on double jeopardy grounds.

## **DISCUSSION OF PROPOSED RULE CHANGES**

The Committees determined the procedures governing motions to dismiss on double jeopardy grounds, in terms of the importance of protecting a defendant's rights, of creating a record at the trial level for purposes of appeal and preserving all parties' positions, and of ensuring the defendant understands his or her appeal rights, most closely compare to the procedures for a motion to suppress in Rule 581. Specifically, the procedures that, *inter alia*:

- 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,

also should govern the procedures when a motion to dismiss on double jeopardy grounds is filed.

The proposed new procedures would be added to Rule 587 (Motion for Dismissal) as new paragraph (B). Paragraph (B)(1) requires that the motion state specifically and with particularity the basis for the claim of double jeopardy and the facts supporting the claim. This requirement also is comparable to Rule 575(A)(2)(c).

Paragraph (B)(2) requires that there be a hearing conducted in open court. The Committees reasoned that a hearing on the record is vital to preserve the parties' positions. As elaborated in the *Comment*, the "hearing" in this context may include taking testimony, taking testimony and presenting arguments, or merely presenting

arguments as the judge determines necessary in a given cases.

Paragraph (D)(3) requires that the judge enter on the record findings of fact and conclusions of law at the conclusion of the hearing and issue an order granting or denying the motion. Paragraph (D)(4) adds the requirement that if the judge denies the motion, the judge also must make specific findings as to frivolousness. The members noted, anecdotally, that frequently judges will deny the motion to dismiss on double jeopardy grounds and not make a finding with regard to frivolousness until a defendant challenges the denial of the motion, and that some judges do not explain the basis for finding the motion frivolous. Recognizing that these practices are another source of the confusion and of the problems with challenging the denial of these motions, and because the correct avenue of appeal in cases involving motions to dismiss based on double jeopardy grounds depends on whether there has been a finding of frivolousness, the proposal requires the trial judge to make a specific finding as to frivolousness at the time the judge decides the double jeopardy motion, and that there must be a record made of the judge's reasons for his or her findings. Furthermore, the *Rule 587 Comment* would be revised to include a cross-reference to *Commonwealth v. Gains*, 383 Pa.Super. 208, 217, 556 A.2d 870, 874 (1989), to provide guidance about what constitutes a frivolous claim. The *Comment* explains that "a 'frivolous claim is a claim clearly and palpably without merit; it is a claim which presents no debatable question'" and a "mere adverse decision of the case does not mean the matter is frivolous."

Paragraphs (D)(5) and (D)(6) require that the judge advise the defendant on the record of his or her appellate rights. When the judge makes a finding that the motion is frivolous, paragraph (D)(5) requires the judge to 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, paragraph (D)(6) requires the judge to advise the defendant the denial is immediately appealable as a collateral order under the Appellate Rules.

One issue related to the defendant's appellate rights concerned the consequences of a defendant failing to challenge a denial of a motion to dismiss on double jeopardy grounds. Although in the ordinary situation a failure to timely appeal

may result in a waiver, because of the constitutional ramifications of a double jeopardy claim, case law has held that a defendant may defer a challenge to a denial of such a motion until the conclusion of the trial. As an aid to the bench and bar, the Committees agreed to include a cross-reference to *Commonwealth v. Lee*, 490 Pa. 346, 350, 416 A.2d 503, 504 (1980), that explains that a defendant may, but does not have to, challenge a denial of the double jeopardy motion immediately after the denial and may wait until the conclusion of the trial to appeal.

The *Comment* also would include a cross-reference to the new Appellate Rule provisions concerning petitions for review set forth in Rule of Appellate Procedure 313(c). As a further aid to the bench and bar, the *Comment* includes a cross-reference to Rule of Appellate Procedure 1701(d) to make it clear that the filing of a petition for review does not affect the judge's power to proceed further in the case while the petition for review is pending.

Finally, cross-references to the new Criminal Rule provisions in Rule 587 would be added to the *Comments* to Rules 580 (Disposition of Pretrial Motions) and 605 (Mistrial).