

INTRODUCTION

The Juvenile Court Procedural Rules Committee is planning to recommend to the Supreme Court of Pennsylvania that the renumbering of Rule 520 to 620 and new Rules 622, 625, and 628 be adopted and prescribed. These proposed modifications and additions address *nunc pro tunc* relief.

The following *Explanatory Report* highlights the intent of these Rules. 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 Committee requests that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel, Christine Riscili at juvenilerules@pacourts.us. Email is the preferred method for receiving comments in an effort to conserve paper and expedite the distribution of comments to the Committee. Emailed comments need not be reproduced and sent via hard copy. The Committee will acknowledge receipt of your comment.

For those who do not have access to email, comments may be faxed to the Committee at 717-231-9541 or written comments may be mailed to:

Christine Riscili, Esq., Counsel
Supreme Court of Pennsylvania
Juvenile Court Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave, Suite 6200
P.O. Box 62635
Harrisburg, PA 17106-2635.

All comments shall be received no later than August 12, 2011.

6/20/2011

BY THE JUVENILE COURT PROCEDURAL RULES
COMMITTEE:

George D. Mosee, Jr., Esq., Chair

Christine Riscili, Esq.
Counsel

EXPLANATORY REPORT

Background

Testimony from hearings conducted by the Interbranch Commission on Juvenile Justice (ICJJ) revealed a number of constitutional and procedural rule violations occurred, more than just the violation of the right to counsel. One such violation involved the notice of the right to file a post-dispositional motion and appeal.

Pa.R.J.C.P. 512(C) requires that the court determine on the record that the juvenile has been advised of the following: 1) the right to file a post-dispositional motion; 2) the right to file an appeal; 3) the time limits for a post-dispositional motion and appeal; 4) the right to counsel to prepare the motion and appeal; 5) the time limits within which the post-dispositional motion shall be decided; and 6) that issues raised before and during adjudication shall be deemed preserved for appeal whether or not the juvenile elects to file a post-dispositional motion.

The ICJJ recommended that a form be developed to give to juveniles that would refer them to the statewide appellate office. Currently, there is no statewide appellate office that handles all juvenile appeals. Whether an office is ultimately established by the General Assembly as recommended by the ICJJ for this purpose is outside the scope of this Committee and its recommendations.

As stated *supra*, the court should determine if the juvenile has been advised of his or her rights regardless of whether there is a statewide appellate office. The Supreme Court of Pennsylvania requires under Pa.R.J.C.P. 150(B) that counsel shall represent the juvenile until final judgment, including any proceeding upon direct appeal. Therefore, counsel for the juvenile is required to file any post-dispositional motions and to perfect an appeal for the juvenile. The attorney for the juvenile should also explain the post-dispositional and appellate process.

The ICJJ also recommended that consideration be given to creating a mechanism which would afford a juvenile an avenue to petition for relief from a wrongful adjudication even though the period for direct appeal has expired. In the adult system, the use of the Post Conviction Relief Act (PCRA) permits those who have been convicted of a crime and have exhausted their direct appeal rights, to bring their case to the attention of the court under certain limited circumstances.

These proposed rule additions address *nunc pro tunc* relief for juveniles. Currently, issues similar to PCRA claims, such as ineffective assistance of counsel, are raised on direct appeal for juveniles. However, claims that are raised must be filed through the normal appellate process which can take several months only to be remanded to the juvenile court for an evidentiary hearing.

Additionally, if the appeal is not filed within thirty days as required, the case will be dismissed as untimely.

These rule additions specifically address allowance of untimely appeals when good cause has been shown. The additions also provide for an expedited review by the juvenile court to avoid the delays inherent in the direct appeal process. For example, a juvenile claims that counsel was ineffective. The juvenile court could order an evidentiary hearing and ultimately find the counsel was ineffective. A new adjudicatory hearing would be ordered and the case would progress through the normal juvenile court process, eliminating the need for an appeal to Superior Court.

In other instances, the juvenile court could allow an appeal to the Superior Court even though the appeal is untimely. For example, the juvenile may claim he or she advised counsel to file an appeal and counsel did not file an appeal. If the juvenile court finds that the appeal should have been perfected, the appeal would be allowed even though the time for filing an appeal has passed.

Rule Discussion

Rule 520 to 620 - Post-Dispositional Motions

The Committee is recommending that the Rule on Post-Dispositional Motions be placed in Chapter Six under new Part C, Motions. This new Part will include post-dispositional motions and motions for *nunc pro tunc* relief.

Rule 622 - Motion for Nunc Pro Tunc Relief

This new proposed rule sets forth the requirements for filing a motion for *nunc pro tunc* relief. The allegations must contain that: 1) there is a need for correction of an error to accurately reflect the court's findings; or 2) the juvenile has been adjudicated delinquent for a delinquent act and is currently under the court's supervision; there is a legitimate basis for the appeal; and there are sufficient facts upon which to conclude the delay for the motion was justified and should be overlooked in the interest of justice. See paragraph (C)(6)(a) and (b).

Rule 625 - Hearing and Findings on Motion for Nunc Pro Tunc Relief

This new proposed rule allows the judge to grant an evidentiary hearing if it is clear there is no evidence or insufficient evidence on the record upon which the Superior Court could base its decision. This is important because if an appeal was taken and there was no evidence in the record for the Superior Court to review, the case would be remanded for an evidentiary hearing. This is common for ineffective assistance of counsel claims because there would be no evidence in the record. Also, there may be new evidence that was just made available and it did not appear in the record.

This bypass procedure streamlines the process and will prevent an overload of cases to the Superior Court. It also saves time and money to have the juvenile court judge or another Common Pleas judge hear cases that would

otherwise be remanded.

The judge may also grant or deny a motion without a hearing. Before the judge denies the motion under paragraph (C), the judge is to give notice of the intention to dismiss the motion and state the reasons for the dismissal in the notice. The juvenile may respond to the notice within twenty days, whereupon the judge will make his or her final ruling.

Rule 628 - Order of Court on Motion for *Nunc Pro Tunc* Relief

This new proposed rule governs the contents of the court order. The order must include the judge's findings and conclusions of law; any appropriate relief and supplementary orders or modifications of the dispositional order; and advise the parties of the right to appeal and time within which the appeal must be taken.

CHAPTER 5

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**PART C. (RESERVED)
[POST- DISPOSITIONAL MOTIONS]**

[520. Post-Dispositional Motions]

**CHAPTER 6
POST-DISPOSITIONAL PROCEDURES**

**PART A
SUMMONS AND NOTICE**

600. Summons and Notice of the Commitment Review, Dispositional Review, and Probation Revocation Hearing

**PART B
MODIFICATIONS[,] AND REVIEWS[, AND APPEALS]**

605. Detaining Juvenile for Modification of the Dispositional Order or Violation of Probation

610. Dispositional and Commitment Review

612. Modification or Revocation of Probation

[616. Post-Dispositional Procedures; Appeals (RESERVED)

617. Release of Juvenile Pending Appeal (RESERVED)]

**PART C
MOTIONS AND NUNC PRO TUNC RELIEF**

620. Post-Dispositional Motions

622. Motion for *Nunc Pro Tunc* Relief

625. Hearing and Findings on Motion for *Nunc Pro Tunc* Relief

628. Order of Court on Motion for *Nunc Pro Tunc* Relief

**PART D
CESSATION OF COURT JURISDICTION OR SUPERVISION**

630. Loss of Court Jurisdiction

631. Termination of Court Supervision

632. Early Termination of Court Supervision by Motion

RULE [520]620. POST-DISPOSITIONAL MOTIONS

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RULE 622. MOTION FOR *NUNC PRO TUNC* RELIEF

A. Timing. A motion for *nunc pro tunc* relief shall be filed with the clerk of courts in the court in which the alleged error occurred as soon as possible but no later than sixty days after the date that the error was known or reasonably should have been known through the exercise of due diligence.

B. Counsel.

- 1) The juvenile is to retain the same counsel as assigned pursuant to Rule 151 unless ineffective assistance of counsel is alleged.**
- 2) If alleged ineffective assistance of counsel is the basis for the appeal, counsel is to withdraw pursuant to Rule 150(C) and the judge shall assign new counsel.**

C. Contents of Motion. A motion for relief under this rule shall include:

- 1) the name of the juvenile and case docket number;**
- 2) the location of the juvenile;**
- 3) the delinquent acts for which the juvenile was adjudicated delinquent;**
- 4) if ineffective assistance of counsel is alleged, the name of counsel who allegedly rendered ineffective assistance;**
- 5) the relief requested;**
- 6) a statement that one of the following requirements for the relief has been met:**
 - a) there is a need for correction of an error to accurately reflect the court's findings; or**
 - b) allegations that:**
 - 1) the juvenile has been adjudicated delinquent and is under the court's supervision;**
 - 2) there is a legitimate basis for the relief requested; and**

3) there are sufficient facts upon which to conclude the delay for the motion was justified and should be overlooked in the interest of justice.

7) the facts supporting the grounds for relief and sufficient facts to support the delay of the motion for relief that:

a) appear in the record, and the place in the record where they appear; and

b) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;

8) whether the grounds for the relief requested were raised before, and if so, at what stage of the proceedings;

9) a verification that the facts set forth in the motion are true and correct to the best of the movant's personal knowledge or information and belief and that any false statements are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities;

10) if applicable, any request for an evidentiary hearing, including:

a) a signed certification by counsel as to each intended witness, stating the:

i) witness's name;

ii) witness's address;

iii) witness's date of birth; and

iv) the substance of the witness's testimony; and

b) any documents material to the witness's testimony, attached to the motion; and

11) if applicable, any request for discovery.

D. Answer.

1) The Commonwealth may answer the motion. If the Commonwealth chooses to respond to the motion, such response shall:

- a) be submitted within ten days of receipt of the motion; and
- b) include a verification that the facts set forth in the answer are true and correct to the best of the attorney's personal knowledge or information and belief and that any false statements are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities;
- 2) The court may order the Commonwealth to file an answer within a timeframe established by the court.

COMMENT

Relief under this rule is to be filed with the clerk of courts in the court in which the alleged error occurred. Rule 120 defines "court" as the Court of Common Pleas. See Rule 120. Because the court has continual supervision over a juvenile until court supervision is terminated pursuant to Rules 631 or 632, the juvenile court is the appropriate forum for such relief.

This process allows the juvenile court to accept late motions when there is a sufficient basis for the delay. See paragraph (C)(6) for requirement of the grounds for the motion. Because the court is providing relief *nunc pro tunc*, the requirements of 42 Pa.C.S. § 5505 do not apply. See *City of Philadelphia Police Dept. v. Civil Service Comm'n of City of Philadelphia*, 702 A.2d 878 (Pa. Commw. Ct. 1997)(absent specific rule, only technical errors may be corrected after 30-day period). See also *Justice v. Justice*, 612 A.2d 1354, 417 Pa.Super. 581 (1992)(after a 30-day period the order can be opened or vacated if there is fraud or some other circumstance so grave or compelling as to constitute extraordinary cause which justifies intervention by the court); *Com., Dept. of Transp., Bureau of Driver Licensing v. Duncan*, 601 A.2d 456, 144 Pa.Comm. 261 (1991)(after a 30-day period order can be opened or vacated upon extraordinary cause).

Pursuant to paragraph (A), the motion is to be filed as soon as possible but no later than sixty days of the date the error was made known or discovered. It is best practice to file the motion within thirty days. The juvenile is to allege facts to support the delay for the relief pursuant to paragraph (C)(7).

Pursuant to paragraph (B), counsel is to remain in the case until court supervision of the juvenile is terminated, including any proceedings upon appeal. See Rule 150(B).

If ineffectiveness of counsel is alleged, counsel is to file a motion to withdraw pursuant to Rule 150(C) and the judge is to assign new counsel.

Second or subsequent motions will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. See *Commonwealth v. Szuchon*, 633 A.2d 1098, 534 Pa. 483 (1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107, 519 Pa. 504 (1988)). This standard is met if the juvenile can demonstrate either: 1) the proceedings resulting in the juvenile's disposition were so unfair that a miscarriage of justice occurred in which no civilized society can tolerate; or 2) the juvenile is innocent of the delinquent acts petitioned. See *Szuchon, supra*.

RULE 625. HEARING AND FINDINGS ON MOTION FOR *NUNC PRO TUNC* RELIEF

A. Hearing.

- 1) The judge may grant an evidentiary hearing to resolve material questions of fact.**
- 2) The hearing shall be conducted as soon as possible but no later than thirty days of the filing of the motion for *nunc pro tunc* relief unless, upon good cause shown, the judge determines more time is necessary for investigation and preparation.**

B. Grant with No Hearing. If sufficient facts exist in the record to warrant relief, the judge may grant the motion without a hearing. If the judge grants the motion, it shall be granted within thirty days unless an extension is granted.

C. Dismiss with No Hearing.

- 1) The judge shall give notice to the parties of the intention to dismiss the motion, stating the reasons for the dismissal in the notice upon conclusion that:**
 - a) there are no genuine issues concerning any material fact;**
 - b) the juvenile is not entitled to relief; or**
 - c) no purpose would be served by any further proceedings.**
- 2) The juvenile may respond to the proposed dismissal within twenty days of the date of the notice.**
- 3) The judge shall order the motion dismissed, grant leave to file an amended motion, or direct that the proceedings continue.**
- 4) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.**

D. Findings. The judge shall:

- 1) state its findings and conclusions of law for all material issues raised:
 - a) on the record when there is a hearing; or
 - b) in the order when there is no hearing; and
- 2) issue an order denying relief or granting a specific form of relief, and issue any supplementary orders or modification of dispositional orders appropriate to the proper disposition of the case.

E. Dismissed by Operation of Law. If the judge fails to decide the motion within thirty days, or to grant an extension:

- 1) the motion shall be deemed denied by operation of law and not subject to reconsideration; and
- 2) the clerk of courts shall forthwith:
 - a) enter an order on behalf of the court; and
 - b) as provided pursuant to Rule 167, shall serve a copy of the order on each attorney and the juvenile, if the juvenile has waived counsel, that the motion is deemed denied.

F. Appellate Rights.

- 1) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the juvenile on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.
- 2) If the case is taken under advisement or the judge denies the motion without a hearing, the judge shall notify the juvenile of the right to appeal.

COMMENT

The judge is permitted, pursuant to paragraph (C), to summarily dismiss a motion in certain cases. To determine whether a summary dismissal is appropriate, the judge should review the motion, the answer, if any, and all other relevant information included in the record. If, after this review, the judge determines that the motion is patently frivolous and without support in the record, or that the facts alleged would not, if proven, entitle the juvenile to relief, or that there are no genuine issues of fact, the judge may dismiss the motion.

A summary dismissal would also be authorized under this rule if the judge determines that a previous motion involving the same issue or issues was filed and

determined adversely to the juvenile. See *Comment* to Rule 622 for second or subsequent motions.

Additionally, relief may be granted without a hearing pursuant to paragraph (D)(2) after an answer has been filed.

RULE 628. ORDER OF COURT ON MOTION FOR *NUNC PRO TUNC* RELIEF

A. Order by court. The court order shall:

- 1) state the judge's findings and conclusions of law;**
- 2) provide for appropriate relief and supplementary orders or modifications of the dispositional order as to:**
 - a) the detention of the juvenile;**
 - b) whether a new adjudicatory hearing is granted;**
 - c) correction of the adjudication of delinquency;**
 - d) correction of the disposition;**
 - e) termination of court supervision; and/or**
 - f) other matters that are appropriate.**
- 3) include a statement explaining the right to appeal from the final order disposing of the motion, and of the time within which the appeal must be taken.**

B. Order by clerk of courts for deemed denied by operation of law. When the clerk of courts has entered an order providing that the motion for *nunc pro tunc* relief is deemed denied by operation of law pursuant to Rule 625(E), the court order shall:

- 1) state that the motion is denied by operation of law pursuant to Rule 625(A)(2); and**
- 2) include a statement explaining the right to appeal from the final order disposing of the motion, and of the time within which the appeal must be taken.**