

**Proposed Amendments to Pa.Rs.Crim.P. 646 (Materials Permitted in Possession of the Jury) and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions)**

*INTRODUCTION*

*The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania reconsider the current Rule 646 prohibition of providing the jury with written jury instructions, and amend Rules 646 and 647 to permit the trial judge to provide written copies of the portion of the charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been charged. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.*

*The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.*

*The text of the proposed amendments to the rules precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.*

*We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,*

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***no later than Friday, June 19, 2009.***

*April 29, 2009*

*BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

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*D. Peter Johnson, Chair*

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*Anne T. Panfil  
Chief Staff Counsel*

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Staff Counsel*

RULE 646. MATERIAL PERMITTED IN POSSESSION OF THE JURY.

(A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph ~~[(B)] (C)~~.

**(B) The trial judge may permit the members of the jury to have for use during deliberations written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed.**

**(1) If the judge permits the jury to have written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed, the judge shall provide that portion of the charge in its entirety.**

**(2) The judge shall instruct the jury about the use of the written charge. At a minimum, the judge shall instruct the jurors that**

**(a) the entire charge, written and oral, shall be given equal weight; and**

**(b) the jury may submit questions regarding any portion of the charge.**

~~[(B)] (C)~~ During deliberations, the jury shall not be permitted to have:

- (1) a transcript of any trial testimony;
- (2) a copy of any written or otherwise recorded confession by the defendant;
- (3) a copy of the information; **and**
- (4) **except as provided in paragraph (B)**, written jury instructions.

~~[(C)] (D)~~ The jurors shall be permitted to have their notes for use during deliberations.

COMMENT: This rule prohibits the jury from receiving a copy of the indictment or information during its deliberations. The rule also prohibits the jury from taking into the jury room any written or otherwise recorded confession of the defendant. In *Commonwealth v. Pitts*, 450 Pa. 359, 301 A.2d 646, 650 n. 1 (1973), the Court noted that "it would be a

better procedure not to allow exhibits into the jury room which would require expert interpretation."

**[The 1999 amendment to paragraph (B) makes it clear that the trial court is prohibited from sending written jury instructions with a jury for use during deliberations.] The 2009 amendment to paragraph (B) changes the procedures in Pennsylvania concerning the jury's access during deliberations to written copies of the judge's charge by permitting the judge to provide each member of the jury with written copies of the portion of the judge's charge on the elements of offenses, the lesser included offenses, and the elements of any potential defenses upon which the jury was charged for the jurors to use during their deliberations. [See] This amendment supersedes the line of cases from *Commonwealth v. Baker*, 466 Pa. 382, 353 A.2d 406 (1976) (plurality opinion) and *Commonwealth v. Oleynik*, 524 Pa. 41, 568 A.2d 1238 (1990), through *Commonwealth v. Karaffa*, 551 Pa. 173, 709 A.2d 887 (1998), in which the Court held it was reversible error to submit written jury instructions to the jury to the extent these cases would preclude that portion of the charge containing the elements of the offense charged, lesser included offenses, and defenses raised at trial from going to the jury.**

**It is within the discretion of the trial judge to permit the use of the written copies of the portions of the charge on the elements by the jury during deliberations. However, once the judge permits the use of the written elements, the elements of all of the offenses, lesser included offenses, and defenses upon which the jury was charged must be provided to the jury in writing.**

**The method of preparing the written instructions to be provided to the jury is within the discretion of the trial judge. For example, the instructions do not have to be contemporaneously transcribed but can be a copies of previously prepared instructions that the judge has read as part of the charge that are then provided to the jury for use during deliberations.**

The judge must instruct the jurors concerning the use of written instructions during deliberations. Paragraph (B)(3) sets forth the minimum information the judge must explain to the jurors.

It is strongly recommended the judge instruct the jurors along the lines of the following:

Members of the jury, I will now instruct you on the law that applies to this case including the elements of each offense as well as the elements of the lesser included offenses and defenses upon which evidence has been provided during this trial. To assist you in your deliberations I will give you a written list of the elements of these offenses, lesser included offenses, and defenses to use in the jury room.

If any matter is repeated or stated in different ways in my instructions, no emphasis is intended. Do not draw any inference because of a repetition. Do not single out any individual rule or instruction and ignore the others. Do not place greater emphasis on the elements of the offenses, lesser included offense and defenses simply because I have provide them to you in writing and other instructions are not provided in writing. Consider all the instructions as a whole and each in the light of the others.

If, during your deliberations, you have a question or feel that you need further assistance or instructions from me, write your question on a sheet of paper and give it to the court officer who will be standing at the jury room door, and who, in turn, will give it to me. You may ask questions about any of the instructions that I have given to you whether they were given to you orally or in writing.

See Rule 647(A) (Request For Instructions, Charge To The Jury, And Preliminary Instructions) concerning the content of the charge and written requests for instructions to the jury.

The 1996 amendment adding "or otherwise recorded" in paragraph (B)(2) is not intended to enlarge or modify what constitutes a confession under this rule. Rather, the

amendment is only intended to recognize that a confession can be recorded in a variety of ways. See *Commonwealth v. Foster*, 425 Pa.Super. 61, 624 A.2d 144 (1993).

Nothing in this rule is intended to preclude jurors from taking notes during testimony related to a defendant's confession and such notes may be in the jurors' possession during deliberations.

Paragraph (C) was added in 2005 to make it clear that the notes the jurors take pursuant to Rule 644 may be used during deliberations.

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 because the indicting grand jury was abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in this rule because there may be some cases still pending that were instituted prior to the abolition of the indicting grand jury.

NOTE: Rule 1114 adopted January 24, 1968, effective August 1, 1968; amended June 28, 1974, effective September 1, 1974; *Comment* revised August 12, 1993, effective September 1, 1993; amended January 16, 1996, effective July 1, 1996; amended November 18, 1999, effective January 1, 2000; renumbered Rule 646 March 1, 2000, effective April 1, 2001; amended June 30, 2005, effective August 1, 2005; amended August 7, 2008, effective immediately [.] ; **amended \_\_\_\_\_, 2009, effective \_\_\_\_\_ 2009.**

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**COMMITTEE EXPLANATORY REPORTS:**

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

**Final Report explaining the January 16, 1996 amendments published with the Court's Order at 26 Pa.B. 439 (February 3, 1996).**

**Final Report explaining the changes to paragraph (B) and the Comment prohibiting written jury instructions going to the jury published with the Court's Order at 29 Pa.B. 6102 (December 4, 1999).**

**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 June 30, 2005 amendment concerning jurors' notes published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).**

**Final Report explaining the August 7, 2008 revision to the Comment concerning jurors' notes related to a defendant's confession published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).**

**Report explaining the proposed amendments concerning providing jurors with the elements of the charged offenses in writing published at 39 Pa.B. ( \_\_\_\_\_, 2009).**

RULE 647. REQUEST FOR INSTRUCTIONS, CHARGE TO THE JURY, AND PRELIMINARY INSTRUCTIONS.

(A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.

(B) No portions of the charge nor omissions **[therefrom] from the charge** may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

(C) After the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties, except that the defendant's absence without cause shall not preclude proceeding, as provided in Rule 602.

(D) The trial judge may give instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case.

COMMENT: Paragraph (A), amended in 1985, parallels the procedures in many other jurisdictions which require that the trial judge rule on the parties' written requests for instructions before closing arguments, that the rulings are on the record, and that the judge charge the jury after the closing arguments. See, e.g., Fed.R.Crim.P. 30; ABA Standards on Trial by Jury, Standard 15-3.6(a); Uniform Rule of Criminal Procedure 523(b).

**Pursuant to Rule 646 (Materials Permitted in Possession of the Jury), the judge must determine whether to provide the members of the jury with written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed for use during deliberations.**

Paragraph (D), added in 1985, recognizes the value of jury instructions to juror comprehension of the trial process. It is

intended that the trial judge determine on a case by case basis whether instructions before the taking of evidence or at anytime during trial are appropriate or necessary to assist the jury in hearing the case. The judge should determine what instructions to give based on the particular case, but at a minimum the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. In addition, it is suggested that the instructions may include such points as note taking, the elements of the crime charged, presumption of innocence, burden of proof, and credibility. Furthermore, if a specific defense is raised by evidence presented during trial, the judge may want to instruct on the elements of the defense immediately after it is presented to enable the jury to properly evaluate the specific defense. See *also* Pennsylvania Suggested Standard Criminal Jury Instructions, Chapter II (1979).

NOTE: Rule 1119 adopted January 24, 1968, effective August 1, 1968; amended April 23, 1985, effective July 1, 1985; renumbered Rule 647 and amended March 1, 2000, effective April 1, 2001; *Comment* revised June 30, 2005, effective August 1, 2005 [.] ; **amended \_\_\_\_\_, 2009, effective \_\_\_\_\_, 2009.**

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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).**

**Final Report explaining the June 30, 2005 Comment revision concerning the note taking instruction published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).**

**Report explaining the proposed changes adding to the Comment a cross-reference to Rule 646 published at 39 Pa.B. ( \_\_\_\_\_, 2009).**

## REPORT

### *Proposed Amendments to Pa.Rs.Crim.P. 646 and 647*

#### WRITTEN JURY INSTRUCTIONS

As part of its ongoing research and examination of the manner in which jury trials are conducted, the Committee has been studying the question of whether juries should be permitted written copies of the jury instructions for use during deliberations. The Committee began its most recent review of this issue at the direction of the Court. The Committee was instructed to “consider the issue of sending written instructions out with the jury during deliberations.”

Currently, Pennsylvania law prohibits jurors from having any form of written instructions during deliberations. See *Commonwealth v. Baker*, 353 A.2d 406 (Pa. 1976) (plurality opinion); *Commonwealth v. Oleynik*, 568 A.2d 1238 (Pa. 1990); and *Commonwealth v. Karaffa*, 709 A.2d 887 (Pa. 1998). This was consistent with what had been the traditional practice.

In recent years, however, most states and the federal courts have relaxed the prohibition of providing written instructions during deliberations.<sup>1</sup> The Committee conducted an extensive review of the experiences of these courts and concluded that the fears that most associate with this practice, such as misinterpretation of the law or undue weight being placed on the written instructions, have not been demonstrated in these jurisdictions.<sup>2</sup>

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<sup>1</sup> Among the majority of states that permit written jury instructions are Alabama, Arizona, California, Colorado, Illinois, Massachusetts, Texas, and Virginia.

<sup>2</sup> See, e.g., *The State-Of-The-States Survey of Jury Improvement Efforts: A Compendium Report* by Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & (continued...)

At the same time, interest in permitting the practice in Pennsylvania has increased. For example, at several meetings in 2005-2007, the Committee invited a number of judges of the courts of common pleas to address the Committee on procedural issues in which they were interested. A number of these judges requested that the Committee consider permitting the elements of the offense to be provided in writing to the jury during deliberations. They reported that the majority of questions received from jurors during deliberations would be eliminated by providing this limited information. Popular interest in this practice has remained high as well; several pieces of legislation have been introduced that urged the Court to reconsider the prohibition.<sup>3</sup>

Based upon the foregoing, the Committee concluded that permitting the use of written jury instructions in some form would be a beneficial practice. The question then becomes how extensive the scope of allowance should be.

The Committee considered a proposal that the entire instructions should be provided in writing. The Committee believes that the logistical difficulties in preparing what would need to be verbatim transcripts of the charge would be prohibitive, at least under current technology. Further, the Committee does not want to squelch the individual initiative that many judges employ to provide “off-the-cuff” elaboration and example. If anything less than the entire charge is permitted, however, it should be clearly defined and should not favor one party over another.

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(...continued)

Nicole L. Waters, Ph.D. published by the National Center for State Courts; *Recent Evaluative Research on Jury Trial Innovations* by Judge B. Michael Dann and Professor Valerie P. Hans in *Court Review*, Spring 2004, volume 41, pages 12-19.

<sup>3</sup> See HR 559 of 2008 and House Resolution 128 of 2009, both requesting the Pennsylvania Supreme Court to modify the rules in this area. See *also* HB 190 of 2007, HB 612 of 2007 and HB 1085 of 2009, all of which propose amendments to Title 42 to allow the submission of written jury instructions to the jury.

The proposed amendments therefore limit what may be provided to the jury in writing to written copies of the elements of the offense, lesser included offenses, and defenses upon which the jury had been orally charged. This limited practice has the benefit of clear definition and even-handed application as well as being more practically manageable. It also is consistent with the input the Committee received from the common pleas judges and the Legislature. Therefore, a new paragraph (B) would be added to Rule 646 that would permit the judge to provide this portion of the charge to the jury in writing.

Recognizing that a jury's need for written instructions will vary from case to case, the Committee believes that the decision whether to provide written instructions should be discretionary. However, in order to ensure fairness in the process of providing these instructions, once a judge decides to provide written instructions, he or she must send out the elements of the offenses and defenses in their entirety. This requirement is contained in paragraph (B)(1).

During the discussion of this proposal, some members of the Committee expressed the concern that the jury would emphasize the importance of the written portion of the instructions if only partial written instructions were provided. To address this concern, paragraph (B)(2) requires mandatory instructions that must include language that the entire instructions, written and oral, should be given equal weight and that the jury should feel free to ask questions regarding any portion of the instructions. These points are elaborated upon in the *Comment* and a sample instruction is provided.

Additionally, the Committee does not intend for this practice to create greater burdens on the courts that utilize this procedure and the *Comment* to Rule 646 also would include some practical recommendations suggestions on how the written instructions may be produced. For example, in order that there be no mistaken belief

that a transcript of the instructions is required, the *Comment* suggests that the instructions do not have to be contemporaneously transcribed but can be a version of previously prepared instructions that the judge reads and is then provided to the jury.

Finally, a cross reference to the new procedures in Rule 646 would be added to the *Comment* to Rule 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions).