JUDGES CHAMBERS
FIFTY-FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
GETTYSBURG, PENNSYLVANIA
17325

OSCAR F. SPICER
PRESIDENT JUDGE

ROOM 401

August 20, 1996

The Honorable Stephen R. Maitland
Member, 91st District-House of Representatives
146 Chambersburg Street
Gettysburg, PA 17325

Dear Steve:

Thank you for giving me the opportunity to comment about sentencing procedures and law. Generally speaking, procedures are described in Pa. Rule of Criminal Procedure 1406, which has been recently amended. I do not believe the amendments affect the issue presented for consideration and therefore enclose a copy of the rule that has been in effect since 1975. Authority for sentencing is generally described in the Sentencing Code, 42 Pa.C.S.A.§9721, a copy of which is also appended. You will note that the legislature has granted trial courts the power to impose sentences either concurrently or consecutively, and the Rule would seem to allow the sentencing judge wide discretion as to the commencement date of a sentence. However, this is not true. Superior Court has ruled that sentences may not be imposed to run partially concurrent and partially consecutive. I enclose copies of an opinion when explains why, and you will see that it involves the suspension of some former rules and statutes.

Policy reasons dictating limitations of a sentencing judge's power seem to involve parole powers. It has become rather clear that our appellate courts have taken the position that sentences imposed by a single judge must be aggregated, that is minimums are added together and then maximums are added. For example, if two consecutive sentences of six to twelve months are imposed, the effect of such sentences will be a twelve month to twenty four month sentence. Supreme Court has recently ruled

that a judge cannot impose a series of twenty three month maximums without invoking aggregation.

When maximum sentences total 2 years, the court of common pleas loses parole powers, which are then vested exclusively in the state Board of Parole. Thus, when one judge sentences a prisoner to several sentences, which do not run concurrently, the law is firmly established that the local court loses parole powers when the aggregated maximum exceeds 1 year and 364 days. Yet to be addressed are cases involving different judges and sentences originating in different counties.

It has never been thought that the rule applies to different judges/counties, but if policy dictates that parole powers should be shifted in one instance, the same policy should apply wherever and whenever sentences are imposed. Either that, or the policy reasons are invalid.

There are certainly situations when a county probation office should retain control over a defendant. Two such times are those involving intermediate punishment and parole violations.

I am frequently presented with plea arrangements which call for partially consecutive/concurrent sentences and many involve new charges coupled with parole violations. It is common for the district attorney's office to propose that parole violations run from the expiration of a minimum sentence imposed in another case. Another situation of recent origin involve intermediate punishment. At present, it is my understanding that intermediate punishment is similar to probation, even though it may involve partial confinement ( sentences served in a local jail, with the opportunity for work release). We recently considered a plea arrangement where restrictive intermediate punishment, in the form of partial confinement, began at the expiration of the minimum sentence imposed in another case.

If intermediate punishment is subject to the rules of aggregation, the arrangement was illegal. That would mean that the sentences could be attacked at some distant time in the future.

There are two fairly significant policy reasons I would propose support a change in the law. Sentencing judges and local district attorneys, who are in the best position to judge the factors which influence choices of sentencing, retain flexibility to fashion punishment that will both protect society and rehabilitate a defendant. Secondly, appellate courts have made it quite clear that a deviation from what has been determined to be acceptable practices makes a sentence illegal. An illegal sentence can be attacked and set aside at anytime. Thus, although a defendant may be admonished to appeal within thirty days or lose his right to complain, the passage of years make no difference when a sentence is deemed illegal.

This is important because it affects the finality of judgments. Rights are reinstated by re-sentencing and a person may appeal trial issues years after it might be thought those issues had become extinct.

Very truly yours,

OSCAR F. SPICER
President Judge

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**(b) Satisfactory completion of community service program.**—Satisfactory completion of the community service program under subsection (a) shall result in a dismissal of charges and expungement of the record of the person sentenced under subsection (a). The court shall follow procedures similar to those established for the Accelerated Rehabilitative Disposition Program.

1994, April 21, P.L. 131, No. 17, § 2, effective in 60 days.

## SUBCHAPTER C. SENTENCING ALTERNATIVES



### Library References

Sentencing and incarceration, see West's Pa. Prac. Vol. 2, Criminal Procedure, Rudovsky and Sosnov, § 14.0 et seq.

### WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

### United States Supreme Court

Delegation of legislative power, federal sentencing guidelines, see Mistretta v. U.S., U.S.Mo. 1989, 109 S.Ct. 647, 488 U.S. 361, 102 L.Ed.2d 714.

Presumption of vindictiveness, resentencing, vacation of guilty plea, see Alabama v. Smith, 1989, 109 S.Ct. 2201, 490 U.S. 794, 104 L.Ed.2d 865, on remand 557 So.2d 20.

Separation of powers, federal sentencing guidelines, see Mistretta v. U.S., U.S.Mo.1989, 109 S.Ct. 647, 488 U.S. 361, 102 L.Ed.2d 714.

## § 9721. Sentencing generally

**(a) General rule.**—In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

(1) An order of probation.

(2) A determination of guilt without further penalty.

(3) Partial confinement.

(4) Total confinement.

(5) A fine.

(6) Intermediate punishment.

As amended 1990, Dec. 19, P.L. 1196, No. 201, § 3, effective July 1, 1991; 1991, July 11, P.L. 76, No. 13, § 2, imd. effective.

**(a.1) Exception.**—Unless specifically authorized under section 9763 (relating to sentence of intermediate punishment), subsection (a) shall not apply where a mandatory minimum sentence is otherwise provided by law.

Added 1991, July 11, P.L. 76, No. 13, § 2.

*[See main volume for (b)]*

**(c) Mandatory restitution.**—In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained. For purposes of this





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subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.[1]

Amended 1995, May 3, P.L. 999, No. 12 (Spec. Sess No. 1), § 3, effective in 60 days.

*[See main volume for (d) and (e)]*

1 71 P.S. § 180–9.1.

## Historical and Statutory Notes

**1990 Legislation**

The 1990 amendment, in subsec. (a), added the provision relating to intermediate punishment.

**1991 Legislation**

The 1991 amendment added subsec. (a.1), and inserted the reference to that subsection in subsec. (a).

Section 4 of Act 1991, July 11, P.L. 76, No. 13, provides that the amendment or addition of subsecs. (a) and (a.1) of this section shall apply to sentences imposed on or after the effective date of this act.

**1995 Legislation**

The 1995 amendment rewrote subsec. (c).

## SENTENCING GUIDELINES

[204 Pa.Code Ch. 303]

*These sentencing guidelines were adopted by the Commission on Sentencing February 22, 1988, effective April 25, 1988. They are not enacted as part of 42 Pa.C.S.A. § 9721, but, rather, constitute Chapter 303 of Title 204 of the Pennsylvania Code and are reproduced here for the convenience of the user.*

*Courts are required to consider these guidelines when sentencing offenses which occurred on or after April 25, 1988. These guidelines replace in their entirety all previous sentencing guidelines.*

*The provisions of 42 Pa.C.S. § 9781 relating to appellate review of the discretionary aspects of sentences will become effective once again on the effective date of these guidelines.*

*These guidelines include all amendments through August 27, 1994.*



§ 303.1. Sentencing guidelines standards

(a) The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of felonies and misdemeanors.

(b) The sentencing guidelines do not apply to sentences imposed as a result of probation or parole revocations, accelerated rehabilitative disposition, disposition in lieu of trial, direct or indirect contempt of court, nor violations of protection from abuse orders.

(c) The sentencing guidelines became effective on April 25, 1988 and shall apply to all misdemeanor and felony offenses committed on or after that date. Amendments to the guidelines went into effect August 9, 1991, December 20, 1991, and August 12, 1994. Amendments to the sentencing guidelines shall apply to all offenses committed on or after the date the amendment becomes part of the guidelines.

(d) A Pennsylvania Commission on Sentencing Guideline Sentence Form shall be completed at the court's direction and shall be made a part of the record no later than 20 days

extend the time limit for sentencing under extraordinary circumstances only. Because such extensions are intended to be the exception rather than the rule, the extension must be for a specific time period, and the judge must include in the record the length of the extension. A hearing need not be held before an extension can be granted. Once a specific extension has been granted, however, some provision should be made to monitor the extended time period to insure prompt sentencing when the extension period expires.

**Oral Motion for Extraordinary Relief**

Under Section B, when there has been an error in the proceedings that would clearly result in the judge's granting relief post-sentence, the judge should grant a motion for extraordinary relief before sentencing occurs. Although trial errors may be serious and the issues addressing those errors meritorious, this rule is intended to allow the trial judge the opportunity to address only those errors so manifest that immediate relief is essential. It would be appropriate for counsel to move for extraordinary relief, for example, when there has been a change in case law, or, in a multiple count case, when the judge would probably grant a motion in arrest of judgment on some of the counts post-sentence. Although these examples are not all-inclusive, they illustrate the basic purpose of the rule: when there has been an egregious error in the proceedings, the interests of justice are best served by deciding that issue before sentence is imposed. Because the relief provided by this section is extraordinary, boilerplate motions for extraordinary relief should be summarily denied.

Under paragraph B(2), the motion must be decided before sentence is imposed, and sentencing may not be postponed in order to dispose of the motion. The judge may summarily deny the motion or decide it on the merits.

Paragraph B(3) is intended to make it clear that a motion for extraordinary relief is neither necessary nor sufficient to preserve an issue for appeal. The failure to make a motion for extraordinary relief, or the failure to raise a particular issue in such a motion, does not constitute a waiver of any issue. Conversely, the making of a motion for extraordinary relief does not, of itself, preserve any issue raised in the motion, nor does the judge's denial of the motion preserve any issue.

**Sentencing Procedures**

Paragraph C(1) retains the former Rule 1405 requirement that the judge afford the defendant an opportunity to make a statement and counsel the opportunity to present information and argument relative to sentencing. The defendant's right to allocution at sentencing is well established, and the trial judge must inform the defendant of that right. *Commonwealth v. Thomas*, 520 Pa. 206, 553 A.2d 918 (1989).

The duty of the judge to explain to the defendant the rights set forth in paragraph C(3) is discussed in *Commonwealth v. Wilson*, 430 Pa. 1, 241 A.2d 760, 763 (1968), and *Commonwealth v. Stewart*, 430 Pa. 7, 241 A.2d 764, 765 (1968).

The judge should explain to the defendant, as clearly as possible, the timing requirements for making and deciding a post-sentence motion under present Rule 1410. The judge should also explain that the defendant may choose whether to file a post-sentence motion and appeal after the decision on the motion, or to pursue an appeal without first filing a post-sentence motion.

The rule permits the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the sentencing proceeding. This written colloquy must be supplemented by an on-the-record oral examination to determine that the defendant has been advised of the applicable rights enumerated in paragraph C(3) and that the defendant has signed the form.

After sentencing, the judge should inquire whether the defendant intends to file a post-sentence motion or to appeal, and if so, should determine the defendant's bail status pursuant to subparagraph C(3)(e) and Rule 4009. It is recommended, when a state sentence has been imposed, that the judge permit a defendant who cannot make bail to remain incarcerated locally, at least for the 10-day period during which counsel may file the post-sentence motion. When new counsel has been appointed or entered an appearance for the purpose of pursuing a post-sentence motion or appeal, the judge should consider permitting the defendant to remain incarcerated locally for a longer period to allow new counsel time to confer with the defendant and become familiar with the case. *See also* Rule 302 (Attorneys—Appearances and Withdrawals).

It is difficult to set forth all the standards which a judge must utilize and consider in imposing sentence. It is recommended that, at a minimum, the judge look to the standards and guidelines as specified by statutory law. *See* the Judicial Code, 42 Pa.C.S. § 9701 et seq. *See also Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977) and *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988).

In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution if determined at the time of sentencing, or the basis for determining an amount of restitution. *See* 18 Pa.C.S. § 1106 and 42 Pa.C.S. §§ 9721, 9728.

For the right of a victim to have information included in the pre-sentence investigation report concerning the impact of the crime upon him or her, see 71 P.S. § 180-9.3(1) and Rule 1403.A(4).

For the duty of the sentencing judge to state on the record the reasons for the sentence imposed, see *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977) and *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988). If the sentence initially imposed is modified pursuant to Rule 1410.B(1)(a)(v), the sentencing judge should ensure that the reasons for the ultimate sentence appear on the record. *See also* Sentencing Guidelines, 204 Pa.Code §§ 303.1(b), 303.1(h), and 303.3(2) (1982).

In cases in which a mandatory sentence is provided by law, when the judge decides not to impose a sentence greater than the mandatory sentence, regardless of the number of charges on which the defendant could be sentenced consecutively, and when no psychiatric or psychological examination is required under Rule 1403.B, the judge may immediately impose that sentence. *But see* Rule 1403.A(2), which requires that the court state on the record the reasons for dispensing with a pre-sentence report under the circumstances enumerated therein. *See also* 42 Pa.C.S. § 9721 et seq.

With respect to the recording and transcribing of court proceedings, including sentencing, see Rule 9030.

## RULE 1406. IMPOSITION OF SENTENCE: COMPUTATION AND SERVICE

(a) Whenever more than one sentence is imposed at the same time on a defendant, or whenever a sentence is imposed on a defendant who is incarcerat-

ed for another offense, such sentences shall be deemed to run concurrently unless the judge states otherwise.

(b) A sentence to imprisonment shall be deemed to commence and shall be computed from the date of commitment for the offense or offenses for which such sentence is imposed, which date shall be specified by the judge. Credit, to be calculated by the clerk of court, shall be given as provided by law for any days spent in custody by the defendant for such offense or offenses prior to the imposition of sentence.

(c) When, at the time sentence is imposed, the defendant is imprisoned under a sentence imposed for any other offense or offenses, the instant sentence which the judge is imposing shall be deemed to commence from the date of imposition thereof unless the judge states that it shall commence from the date of expiration of such other sentence or sentences.

**Note:** Adopted July 23, 1973, effective 90 days hence; amended March 21, 1975, effective March 31, 1975.

**Comment**

Statutory authority for credit pursuant to paragraph (c) is found in Act of August 14, 1963, P.L. 841 § 1, 19 P.S. § 898.

The 1975 amendment deleted the original second paragraph of this Rule, dealing with the simultaneous imposition of two or more sentences. This matter is now the subject of § 1357 of the Act of Dec. 30, 1974, P.L. 1052, 18 Pa.C.S. § 1357.

For suspension of Acts of Assembly, see Rule 1415(c).

## RULE 1407. FINES OR COSTS

(a) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.

(b) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden its payments will impose, as set forth in paragraph (d) below.

(c) The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of his financial means, including his ability to make restitution or reparations.

(d) In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on his payment schedule when he is in default of a payment or when he advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his financial condition has deteriorated to the extent that he is without the means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, it may impose imprisonment as provided by law for nonpayment.

**Note:** Approved July 23, 1973, effective in 90 days.

**Comment**

See generally *Commonwealth ex rel. Benedict v. Cliff*, 451 Pa. 427, 304 A.2d 158 (1973).

Nothing in this Rule is intended to abridge any rights the Commonwealth may have in a civil proceeding to collect a fine or costs.

For suspension of Acts of Assembly, see Rule 1415(d), (e), and (f).

## RULE 1408. DOCUMENTS TRANSMITTED TO PRISON

When a defendant is sentenced to a term of imprisonment of two years or more, a copy of each of the following shall be delivered to the person in charge of the correctional facility to which the defendant is committed at the time the defendant is delivered thereto:

(a) any available pre-sentence investigation report;

(b) any report by a state correctional diagnostic and classification center; and

(c) any medical, psychiatric or social agency report used by the sentencing judge in imposing sentence or by a probation department or state correctional diagnostic and classification center in compiling a report to the sentencing judge.

**Note:** Adopted July 23, 1973, effective 90 days hence.

**Comment**

It is intended that the confidentiality of such reports remain as secure after they have been delivered pursuant to this Rule as at any previous stage. *Cf.* Rule 1404.

## RULE 1409. VIOLATION OF PROBATION OR PAROLE: HEARING AND DISPOSITION

Whenever a defendant has been placed on probation or parole, the judge shall not revoke such probation or parole as allowed by law unless there has been a hearing held as speedily as possible at which the defendant is present and represented by counsel and there has been a finding of record that the defendant violated a condition of probation or parole. In the event that probation is revoked and sentence is reim-

of Corrections, 89 Pa. Cmwlth. 222, 492 A.2d 70 (1985). Additionally, this court has cited Blackwell with approval in concluding that consecutive sentences are aggregated as a matter of law, even if the sentencing judge does not explicitly state such to be his intent. Commonwealth v. Bell, 328 Pa. Superior Ct. 35, 476 A.2d 439 (1984).(Petition for Allowance of Appeal denied August 6, 1984).

The sentencing judge in the instant case imposed a sentence of two and one-half to twelve and one-half years for burglary. The robbery sentence was for two and one-half to ten years to commence at the expiration of the minimum sentence imposed for burglary. By that sentence, the trial judge was attempting to impose non-aggregating consecutive sentences. Had this sentence been imposed between July 23, 1973 and March 31, 1975 when the Act of 1937 was suspended and when Pa. R. Crim Pro. 1406(b) gave the judge discretion whether or not to aggregate consecutive sentences, this would have been a lawful sentence. However, for the reasons previously stated, after March 31, 1985, all consecutive sentences are aggregated as a matter of law. The sentence imposed by the trial judge in the instant case is not a legal sentence, it being neither a consecutive sentence nor a concurrent sentence.

Order affirmed in part, reversed in part; sentence vacated; case remanded to the sentencing court for the imposition of consecutive maximum sentences in accordance with this opinion.

KELLY, J. files a Concurring and Dissenting Statement.

POPOVICH, J. concurs in the result.

DATED: DECEMBER 11, 1987
JUDGMENT ENTERED

Gilbert E. Hellman
DEPUTY PROTHONOTARY

guidelines. He also considered the fact that the appellant was on probation at the time of the offenses when he imposed sentence. Appellant attempts to argue that the court should have considered the fact that the perpetrators did not molest the female victim. Of course, this is reflected by the fact that they were not charged or convicted with any such offenses. The fact that the appellant did not participate in other crimes does not mitigate the above facts. Under these circumstances, we cannot find that the sentencing court abused its discretion in imposing the sentence that it did.

Appellant's third contention has merit. We agree with appellant's contention that a sentence which is partially consecutive and partially concurrent is not a valid sentence. While at first glance it might appear that a consecutive minimum sentence and a concurrent maximum sentence has no practical effect, we must point out that the minimum and maximum sentences may determine a convict's place of incarceration, his parole eligibility and the jurisdiction to grant parole. Further, Pa. R. Crim Pro. 1406(b) adopted July 23, 1973, and effective ninety (90) days thereafter, provided as follows:

> (b) Whenever two or more sentences are imposed on a defendant to run consecutively, there shall be deemed to be imposed on such defendant, unless otherwise stated by the judge, a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentence.

This provisions would appear to grant the sentencing court the discretion to impose partially concurrent-partially consecutive sentences. Simultaneous to the adoption of this rule came the enactment of Pa. C.S.A. 1416(c), which suspended the Act of 1937, 19 Pa. C.S.A. 897, as inconsistent with Pa. R. Crim. Pro. 1406(b). However, 18 Pa. C.S.A. 1357, now found at 42 Pa. C.S.A. 9757, was enacted on December 30,

1974, and became effective on March 31, 1985. Said statute provided that:

> §1357. Consecutive sentence of total confinement for multiple offenses.
>
> Whenever the court determines that a sentence should be served consecutively to one being then imposed by the court, or to one previously imposed, the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed. Such minimum sentence shall not excees one-half of the maximum sentence imposed.

Pa. R. Crim. Pro. 1406(b), which provided for discretion in the aggregation of consecutive sentences, was repealed on March 21, 1975, effective with the enactment of 18 Pa. C.S.A. §1357 on March 31, 1975.

The current Comment to Pa. R.Crim. Pro. 1406 states:

> The 1974 (sic) amendment deleted the original second paragraph of this Rule, dealing with the simultaneous imposition of two or more sentences. This matter is now the subject of §1357 of the Act of Dec. 30, 1974, P.L. _____, 18 Pa. C.S. §1356.

The Commonwealth Court of Pennsylvania has reached the following conclusion from its examination of this history of enactments and repeals:

> The Act of 1937 (providing for automatic aggregation of consecutive sentences) was merely suspended by Pa. R. Crim. P. 1415 (c). When Pa. R. Crim. P. 1406(b), as originally promulgated, was deleted in 1974 (sic) and 18 Pa. C.S. §1356 was enacted, there resulted a gap with regard to maximum sentences as no mention thereof is made in 18 Pa. C.S. §1357. We conclude, therefore, that in 1974, the Act of 1937, insofar as it results in an aggregation of maximum sentences was revived.

Blackwell v. Commonwealth of Pennsylvania, 36 Pa. Comwlth. 31, 38, 387 A.2d 506, 509 (1978).

Blackwell remains the law as it is understood by Commonwealth Court. Hamlin v. Commonwealth of Pennsylvania Board of Probation and Parole, 92 Pa. Cmwlth. 349, 500 A.2d 499 (1985); Wilson v. Commonwealth of Pennsylvania Bureau