THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 5 AND 11]

Proposed Amendments of Pa.R.Crim.P. 573 and 1101

[54 Pa.B. 5221]
[Saturday, August 17, 2024]

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the proposed amendment of Pa.R.Crim.P. 573 (Pretrial Discovery and Inspection) and 1101 (Suspension of Acts of Assembly) for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by Tuesday, October 1, 2024. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Criminal Procedural Rules Committee

STEFANIE J. SALAVANTIS,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

PART G. Procedures Following Filing of Information

Rule 573. Pretrial Discovery and Inspection.

(**[A]** **a**) **[INFORMAL]** ***Initiation of Discovery.*** **[Before any disclosure or discovery can be sought under these rules by either party, counsel]** **Counsel for the parties shall provide all information as required under law. Counsel** for the parties shall make a good faith effort to resolve all questions of discovery**[,]** and to provide information required or requested under these rules **or required by law** as to which there is no dispute.

(1) Initiation of the discovery process shall be documented by a request in writing from the party seeking discovery. The request shall include the name, address, telephone number, and e-mail address of the counsel, or of the self-represented defendant, to whom the discovery is to be provided. Failure of a party to make such a request shall not be grounds for a failure to provide information required by law to be disclosed.

(2) [When there are items requested by one party which the other party has refused to disclose] If a party has failed to disclose information within a reasonable time, the **[demanding] other** party may make appropriate motion. Such motion shall **not** be made **[within] until at least** 14 days after arraignment**[, unless the time for filing is extended by the court]**. In such motion the party must set forth the fact that a good faith effort to discuss the **[requested material] information** has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any **[items] information** agreed upon by the parties pending resolution of any motion for discovery.

(**[B]** **b**) **[DISCLOSURE BY THE COMMONWEALTH]** ***Disclosure by the Commonwealth.***

(1) **[MANDATORY:]** ***Mandatory.*** In all court cases, **[on request by the defendant, and]** subject to any protective order **[which]** the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney**, or to the self-represented defendant,** all of the following **[requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.] information:**

(**[a]** **i**) **[Any evidence] information** favorable to the accused **[that is material either to guilt or to punishment]**, **including information that tends to exculpate the defendant, to mitigate the level of the defendant's culpability, to mitigate punishment, or to impeach a prosecution witness's credibility** and **that** is within the possession or control of the attorney for the Commonwealth**, regardless of the form that information takes and whether the attorney for the Commonwealth credits the information**;

(**[b]** **ii**) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

(**[c]** **iii**) the defendant's prior criminal record;

(**[d]** **iv**) the circumstances**, [and]** results**, and any related documentation or notes** of any identification **or attempted identification** of the defendant by voice, photograph, or in-person identification**, and the circumstances, results, and any related documentation ornotes of any**

identification or attempted identification of any other person conducted during the investigation of the instant case;

(**[e]** **v**) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;

[(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and]

(**[g]** **vi**) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained**[.]**; **and**

(vii) except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury) and Rule 556.10 (Secrecy; Disclosure), and subdivision (g) (Work Product), and subject to redaction of privileged, protected, or other sensitive information from otherwise mandated discovery prior to disclosure, the Commonwealth shall disclose to the defendant's attorney, or to the self-represented defendant, any tangible objects, including:

(A) documents, including law enforcement notes or reports made in response to and in investigation of the instant case;

(B) photographs, audio, video, or other electronic recordings, including the recordings from body or dashboard cameras and other recordings in the possession of law enforcement;

(C) fingerprints, or other tangible information;

(D) the names and all written or recorded statements, and substantially verbatim oral statements, of fact witnesses the Commonwealth intends to call at trial; and

(E) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not.

(2) **[DISCRETIONARY WITH THE COURT:]** ***Discretionary with the Court.***

(**[a]** **i**) In all court cases, except as otherwise provided in **[Rules]** **Rule** 230 (Disclosure of Testimony Before Investigating Grand Jury) and **Rule** 556.10 (Secrecy; Disclosure), if the defendant files a motion for pretrial **discretionary** discovery, the court may order the Commonwealth to **[allow]** **disclose to** the defendant's attorney**, or the self-represented defendant, [to inspect and copy or photograph]** any of the following requested **[items]** **information**, upon a showing **[that they are material to the preparation of the defense, and]** that the request is reasonable:

(**[i]** **A**) the **[names and addresses of eyewitnesses]** **name of any fact witness who the Commonwealth does not intend to call at trial and the address and criminal record of any fact witness**;

[(ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and]

(B) the underlying data upon which scientific tests or opinions are based; and

(**[iv] C**) any other **[evidence] information** specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

(**[b] ii**) If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

(iii) Nothing in this rule is intended to limit disclosure of the foregoing information by agreement with the opposing party.

(**[C] c**) **[DISCLOSURE BY THE DEFENDANT]** ***Disclosure by the Defendant.***

(1) In all court cases, if the Commonwealth files a motion for pretrial discovery, upon a showing **[of materiality to the preparation of the Commonwealth's case and]** that the request is reasonable, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to **[allow] disclose to** the attorney for the Commonwealth **[to inspect and copy or photograph]** any of the following requested **[items] information**:

(**[a] i**) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, that the defendant intends to introduce as evidence in chief, or were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under **[paragraph (B)(1)(e)] subdivision (b)(1)(v)**; and

(**[b] ii**) the names and addresses of **[eyewitnesses] fact witnesses** whom the defendant intends to call in its case-in-chief, provided that the defendant has previously requested and received discovery under **[paragraph (B)(2)(a)(i)] subdivision (b)(2)(i)(A)**.

(2) If an expert whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the defendant disclose a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

(**[D] d**) **[CONTINUING DUTY TO DISCLOSE]** ***Continuing Duty to Disclose.***

(1) The obligations of the parties under this rule extend to information in the possession or control of members of the parties' staff and of any others who either regularly report to or, with reference to the instant case, have reported to the parties.

(2) The attorney for the Commonwealth shall make reasonable efforts to ensure that information favorable to the defendant is provided to the attorney for the Commonwealth's office by the police or other investigative personnel. The attorney for the Commonwealth shall report to the court, with notice to the defense, if the police or other investigative personnel fails to provide to the attorney for the Commonwealth information within its possession that would be discoverable if in the possession of the attorney for the Commonwealth.

(3) If the attorney for the Commonwealth is aware that information that would be discoverable if in the possession of the attorney for the Commonwealth is in the possession

or control of a governmental agency not reporting directly to the prosecution, the prosecution shall disclose the fact of the existence of such information to the defense.

(4) If a police department, a governmental agency not reporting directly to the attorney for the Commonwealth, or other investigative personnel fails to provide information within its possession that would be discoverable if in the possession of the attorney for the Commonwealth, a motion to compel the disclosure of this information may be filed at any time by either the attorney for the Commonwealth or the defense.

(5) If, prior to or during trial, either party discovers additional **[evidence or material] information** previously **required to be disclosed,** requested**,** or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party **[or] and** the court of the additional **[evidence, material,] information** or witness.

(6) If, following trial but before judgment of conviction and sentence is final, the attorney for the Commonwealth discovers additional information previously required to be disclosed, requested, or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, the disclosure of which would undermine an aspect of the Commonwealth's case, the Commonwealth shall promptly notify the defendant and the court of the additional information or witness.

(**[E] e**) **[REMEDY]** ***Remedy.***

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing **into** evidence **information** not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

(2) As it deems just under the circumstances and as permitted under the law of this Commonwealth, the court may issue:

(i) an order of dismissal if the attorney for the Commonwealth fails to comply with the obligations under this rule; or

(ii) a finding of contempt against the attorney for the Commonwealth or the attorney for the defendant if he or she fails to comply with the obligations under this rule.

(**[F] f**) **[PROTECTIVE ORDERS]** ***Protective Orders.*** Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

(**[G] g**) **[WORK PRODUCT]** ***Work Product.*** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

Comment**:**

This rule is intended to apply only to court cases. However, the constitutional guarantees mandated in *Brady v. Maryland*, 373 U.S. 83 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions, apply to all cases, including court cases and summary

cases, and nothing to the contrary is intended. For definitions of "court case" and "summary case," see Rule 103. **_See also Commonwealth v. Green_, 640 A.2d 1242 (Pa. 1994); _Commonwealth v. Johnson_, 815 A.2d 563 (Pa. 2002); _Commonwealth v. Paddy_, 800 A.2d 294 (Pa. 2002); _Commonwealth v. Smith_, 985 A.2d 886 (Pa. 2009).**

This rule does not apply to rebuttal evidence. _See, e.g., Commonwealth v. Clary_, 226 A.3d 571 (Pa. Super. 2020).

See Rule 556.10(B)(5) for discovery in cases indicted by a grand jury.

The attorney for the Commonwealth should not charge the defendant for the costs of copying pretrial discovery materials. However, nothing in this rule is intended to preclude the attorney for the Commonwealth, on a case-by-case basis, from requesting an order for the defendant to pay the copying costs. In these cases, the trial judge has discretion to determine the amount of costs, if any, to be paid by the defendant.

Subdivision (a) recognizes the more common practice of the parties to provide mandatory discovery information to the opposing party as a matter of course. This had previously been called "informal discovery." However, this terminology was changed to recognize that the first step in discovery should be the voluntary disclosure of mandatory discovery information without the need for there to be a solicitation by the opposing party.

In the event that there is a disagreement between the parties, the process for seeking an order to compel discovery is available as provided in this rule. In order for the process of voluntary discovery to proceed in the first instance, the rule prohibits the filing of a motion to compel discovery earlier than 14 days after arraignment. Previous versions of this rule required the motion to be filed within 14 days of arraignment. This requirement had proved to be impracticable and did not reflect actual practice. The rule was amended to reflect this actual practice wherein the parties attempt to resolve discovery issues among themselves and seek intervention by the court when one party fails to provide discovery deemed necessary by another party. Although the rule does not provide a deadline for when such motions must be filed, the rule contemplates that such motions will be filed promptly as soon as the dispute over discovery is determined to be irresolvable by the parties without the court's intervention. The parties should bring such disputes to the court's attention as soon as practicable.

Any motion under this rule must comply with the provisions of Rule 575 (Motions and Answers) and Rule 576 (Filing and Service by Parties).

[_See_] **See** Rule 576(b)(4) and **[_Comment_]** **Comment** for the contents and form of the certificate of service.

For purposes of this rule, "information" means any evidence, document, item, or other material or data concerning the case.

For purposes of this rule, "to disclose" includes, but is not limited to, when applicable, permitting the party seeking disclosure to inspect and copy, photograph, or otherwise reproduce such items.

Subdivision (b)(1)(i) was amended in 2024 to remove the provision of "materiality" from the requirement of mandatory disclosure by the prosecution of information favorable to the defense. While originally intended to convey the idea that the information was relevant to the case at issue, the term had become more narrowly defined in practice and used as an obstacle to disclosure. The removal of this requirement, however, is not intended to alter the meaning or application of materiality in the post-conviction _Brady_ context. Additionally, subdivision (b)(1)(i) requires disclosure of favorable information regardless of the form in which that information might be or whether the attorney for the Commonwealth believes the information is credible.

[*See*] **See** Rule 569 (Examination of Defendant by Mental Health Expert) for the procedures for the examination of the defendant by the mental health expert when the defendant has given notice of an intention to assert a defense of insanity or mental infirmity or notice of the intention to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant.

Subdivision (b)(1)(vii)(D) requires the Commonwealth to provide the names and statements of any fact witnesses who are to be called at trial. Because a witness's address and other contact information could be misused, including for the purpose of witness intimidation, disclosure of that information is discretionary under subdivision (b)(2)(i)(A). If it is determined that a witness's address will not be disclosed, the Commonwealth must provide the defense with other means of access to the witness for investigative purposes.

Included within the scope of **[paragraph (B)(2)(a)(iv)]** **subdivision (b)(2)(i)(C)** is any information concerning any prosecutor, investigator, or police officer involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the prosecutor or investigator in connection with his or her involvement in the case.

Pursuant to **[paragraphs (B)(2)(b) and (C)(2)]** **subdivisions (b)(2)(ii) and (c)(2)**, the trial judge has discretion, upon motion, to order an expert who is expected to testify at trial to prepare a report. However, these provisions are not intended to require a prepared report in every case. The judge should determine, on a case-by-case basis, whether a report should be prepared. For example, a prepared report ordinarily would not be necessary **[when]** **if** the expert is known to the parties and testifies about the same subject on a regular basis. On the other hand, a report might be necessary if the expert is not known to the parties or is going to testify about a new or controversial technique.

Whenever the rule makes reference to the term "identification," or "in-person identification," it is understood that such terms are intended to refer to all forms of identifying a defendant by means of the defendant's person being in some way exhibited to a witness for the purpose of an identification: *e.g.*, a line-up, stand-up, show-up, one-on-one confrontation, one-way mirror, *etc.* The purpose of this provision is to make possible the assertion of a rational basis for a claim of improper identification based upon *Stovall v. Denno*, 388 U.S. 293 (1967), and *United States v. Wade*, 388 U.S. 218 (1967).

This rule is not intended to affect the admissibility of evidence that is discoverable under this rule or evidence that is the fruits of discovery, nor the standing of the defendant to seek suppression of such evidence. **[*See*]** **See** Rule 211 for the procedures for disclosure of a search warrant affidavit(s) that has been sealed.

[Paragraph] **Subdivision** (C)(1), which provided the requirements for notice of the defenses of alibi, insanity, and mental infirmity, was deleted in 2006 and moved to Rules 567 (Notice of Alibi Defense) and 568 (Notice of Defense of Insanity or Mental Infirmity).

[It is intended that the remedies provided in paragraph (E) apply equally to the Commonwealth and the defendant as the interests of justice require.]

The provision for a protective order, **[paragraph (F)]** **subdivision (f)**, does not confer upon the Commonwealth any right of appeal not presently afforded by law.

It should also be noted that as to **[material]** **information** which is discretionary with the court, or which is not enumerated in the rule, if such information **[contains]** **is** exculpatory **[evidence]** as would come under the *Brady* rule, it *must* be disclosed. Nothing in this rule is intended to **[limit in any way disclosure of evidence constitutionally required to be**

disclosed] **supersede or abrogate in any way the Commonwealth's constitutional obligations to disclose information to the defense**.

Nothing in this rule is intended to limit the defense in performing its own independent investigation at any time outside of the discovery process provided in this rule, including seeking the issuance of subpoenas by the court.

Subdivision (d) is intended to clarify that the obligation of the parties to provide required discovery extends to the offices of the attorneys for the Commonwealth and defense counsel, including those who regularly report to the respective attorneys. Additionally, the attorney for the Commonwealth has the obligation to obtain favorable information relevant to the case from the police or other investigating entities that report to the prosecution. The attorney for the Commonwealth does not have an obligation to seek out favorable information affirmatively from governmental agencies that do not report to the prosecution but must inform the defense if they learn that favorable information is in the possession of those governmental agencies. For purposes of this rule, such governmental agencies may include, but are not limited to, child and youth agencies, child protective agencies, and the Department of Corrections. If discoverable information in the possession of the police or a governmental agency is being withheld, either the prosecution or defense may seek an order from the court to compel the information's disclosure.

Dismissal is an extraordinary remedy and "a trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed." *Commonwealth v. Burke*, 781 A.2d 1136, 1144 (Pa. 2001), quoting from *Commonwealth v. Shaffer*, 712 A.2d 749, 752 (Pa. 1998). Contempt may be entertained when the misconduct satisfies 42 Pa.C.S. § 4132.

The limited suspension of **[Section 5720 of the Wiretapping and Electronic Surveillance Control Act,]** 18 Pa.C.S. § 5720, see Rule 1101(**[E]** **5**), is intended to **[insure]** **ensure** that the statutory provision and Rule **[573(B)(1)(g)]** **573(b)(1)(vi)** are read in harmony. A defendant may seek discovery under **[paragraph (B)(1)(g)]** **subdivision (b)(1)(vi)** pursuant to the time frame of the rule, while the disclosure provisions of Section 5720 would operate within the time frame set forth in Section 5720 as to materials specified in Section 5720 and not previously discovered.

[*Official Note*: Present Rule 305 replaces former Rules 310 and 312 in their entirety. Former Rules 310 and 312 adopted June 30, 1964, effective January 1, 1965. Former Rule 312 suspended June 29, 1973, effective immediately. Present Rule 305 adopted 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 April 24, 1981, effective June 1, 1981; amended October 22, 1981, effective January 1, 1982; amended September 3, 1993, effective January 1, 1994; amended May 13, 1996, effective July 1, 1996; *Comment* revised July 28, 1997, effective immediately; *Comment* revised August 28, 1998, effective January 1, 1999; renumbered Rule 573 and amended March 1, 2000, effective April 1, 2001; amended March 3, 2004, effective July 1, 2004; *Comment* revised March 26, 2004, effective July 1, 2004; amended January 27, 2006, effective August 1, 2006; amended June 21, 2012, effective in 180 days.

***Committee Explanatory Reports*:**

Report explaining the September 3, 1993 amendments published at 21 Pa.B. 3681 (August 17, 1991).

Final Report explaining the May 13, 1996 amendments published with the Court's Order at 26 Pa.B. 2488 (June 1, 1996).

Final Report explaining the July 28, 1997 Comment revision deleting the references to the ABA Standards published with the Court's Order at 27 Pa.B. 3997 (August 9, 1997).

Final Report explaining the August 28, 1998 Comment revision concerning disclosure of remuneration published with the Court's Order at 28 Pa.B. 4883 (October 3, 1998).

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 amendments to paragraphs (A), (C)(1)(a), and (C)(1)(b), and the revision to the Comment adding the reference to Rules 575 and 576 published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning costs of copying discovery materials published with the Court's Order at 34 Pa.B. 1933 (April 10, 2004).

Final Report explaining the January 27, 2006 changes to paragraph (C) deleting the notice of defenses of alibi, insanity, and mental infirmity published with the Court's Order at 36 Pa.B. 694 (February 11, 2006).

Final Report explaining the June 21, 2012 amendments concerning discovery when case is indicted by grand jury published with the Court's Order at 42 Pa.B. 4140 (July 7, 2012).]

CHAPTER 11. ABOLITIONS AND SUSPENSIONS

Rule 1101. Suspension of Acts of Assembly.

This rule provides for the suspension of the following Acts of Assembly:

(**[1]** **a**) The Act of June 15, 1994, P.L. 273, No. 45, § 1, 42 Pa.C.S. §§ 4137, 4138, and 4139, which provides, *inter alia*, that any punishment imposed for contempt will be "automatically stayed for a period of 10 days from the date of the imposition of the punishment during which time an appeal of the action" of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge "may be filed with the court of common pleas of the judicial district," and which is implemented by Rules 140, 141, and 142, is suspended only insofar as the Act is inconsistent with the 30-day appeal period and 30-day automatic stay period set forth in Rule 141.

(**[2]** **b**) The Act of April 29, 1959, P.L. 58, § 1209, 75 P.S. § 1209, repealed by Act of June 17, 1976, P.L. 162, No. 81, § 7 and replaced by Sections 6322, 6323, 6324, and 6325 of the Vehicle Code (75 Pa.C.S. §§ 6322—6325), are suspended insofar as these sections are inconsistent with Rule 470.

(**[3]** **c**) The Act of July 1, 1987, P.L. 180, No. 21, § 2, 42 Pa.C.S. § 1520, is suspended insofar as the Act is inconsistent with Rules 300, 301, 302, and Rules 310 through 320.

(**[4]** **d**) The Public Defender Act, Act of December 2, 1968, P.L. 1144, No. 358, § 1 et seq. as amended through Act of December 10, 1974, P.L. 830, No. 277, § 1, 16 P.S. § 9960.1 et seq., is suspended only insofar as the Act is inconsistent with Rule 122.

(**[5]** **e**) Section 5720 of the Wiretapping and Electronic Surveillance Control Act, Act of October 4, 1978, P.L. 831, No. 164, 18 Pa.C.S. § 5720, is suspended as inconsistent with Rule 573 only insofar as the section may delay disclosure to a defendant seeking discovery under **[Rule 573(B)(1)(g)]** **Rule 573(b)(1)(vi)**; and Section 5721(b) of the Act, 18 Pa.C.S. § 5721(b), is suspended only insofar as the time frame for making a motion to suppress is concerned, as inconsistent with Rules 579 and 581.

(**[6]** **f**) Sections 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 of the Sentencing Code, 42 Pa.C.S. §§ 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 are suspended

as being inconsistent with the rules of Chapter 7.

(**[7] g**) The Act of November 21, 1990, P.L. 588, No. 138, § 1, 42 Pa.C.S. § 8934, which authorizes the sealing of search warrant affidavits, and which is implemented by Rule 211, is suspended only insofar as the Act is inconsistent with Rules 205, 206, and 211.

Comment:

This rule is derived from former Rules 39, 159, 340, 1415, and 2020, the rules previously providing for the suspension of legislation.

[*Official Note*: Former Rule 39 adopted October 1, 1997, effective October 1, 1998; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 159 adopted September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; amended April 10, 1989, effective July 1, 1989; amended January 31, 1991, effective July 1, 1991; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 340 combined previous Rules 321 and 322, which were the prior suspension rules, and was adopted June 29, 1977, effective September 1, 1977; amended April 24, 1981, effective June 1, 1981; amended January 28, 1983, effective July 1, 1983; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 1415 adopted July 23, 1973, effective 90 days hence; paragraph (g) added March 21, 1975, effective March 31, 1975; amended August 14, 1995, effective January 1, 1996; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 2020 adopted September 3, 1993, effective January 1, 1994; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. New Rule 1101 adopted March 1, 2000, effective April 1, 2001.

***Committee Explanatory Reports*:**

FORMER RULE 39: Final Report explaining the provisions of new Rule 39 published with the Court's Order at 27 Pa.B. 5401 (October 18, 1997).

FORMER RULE 159: Report explaining the January 31, 1991 amendments to former Rule 159 published at 20 Pa.B. 4788 (September 15, 1990); Supplemental Report published at 21 Pa.B. 621 (February 16, 1991).

FORMER RULE 1415: Final Report explaining the August 14, 1995 amendments to former Rule 1415 published with the Court's Order at 25 Pa.B. 3472 (August 26, 1995).

FORMER RULE 2020: Report explaining the provisions of former Rule 2020 published at 21 Pa.B. 3681 (August 17, 1991).

NEW RULE 1101: Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 1101 published at 30 Pa.B. 1477 (March 18, 2000).]

SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

PUBLICATION REPORT

Proposed Amendments of Pa.R.Crim.P. 573 and 1101

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court the amendment of Pa.R.Crim.P. 573 to improve the mandatory disclosure of *Brady* materials, *i.e.*, information favorable to the defendant. The proposed amendment of the rule would also better define both the duties of the parties to provide information in a timely fashion and the corresponding remedies if such disclosure is not made.[1]

First, the proposed amendment of the rule would include a change of terminology, replacing "evidence" with "information." This change would reflect the broader scope of materials that are to be provided to the opposing party. To avoid confusion and the potentially inconsistent use of terminology, "material" and "item" would also be replaced by "information" throughout the rule. Second, the types of information to be disclosed to the defense would be described in more detail. Third, the requirement that discoverable information be "material," a term of art throughout *Brady* related jurisprudence, would be removed. Fourth, the amended rule would more clearly define the duty of prosecutors to discover and disclose information favorable to the defendant. This obligation would include reasonable efforts to obtain information relating to the defendant and the offenses charged that is in the possession of investigative entities. Lastly, the Comment to the rule would be revised to cite relevant post-*Brady* jurisprudence.

Turning to specifics, subdivision (a) would be retitled "Initiation of Discovery." While subdivision (a) currently directs the parties to make a good faith effort to provide information required or requested, the most commonpractice in the Commonwealth is for prosecutors to provide discovery at a fairly early stage in the proceeding, regardless of whether a request has been made. To better reflect this practice, subdivision (a) would be amended to mandate the disclosure of "all information as required by law." This subdivision would, nevertheless, retain the requirement that the parties make a good faith effort to resolve discovery disputes.

Although the Committee previously proposed eliminating a request requirement, *see* 49 Pa.B. 7173 (Dec. 7, 2019), a commenter objected. According to the commenter, requiring a request for discovery from the defense encourages communication and aids in documenting the discovery process. To address this concern, new subdivision (a)(1) would require the discovery process to be initiated by a request in writing from the party seeking discovery. The request would be required to include the name, address, telephone number, and email address of the requester. However, failure to make a request would not be "grounds for a failure to provide information required by law to be disclosed." Thus, even though the amended rule would require a request, information required to be disclosed must be disclosed even in the absence of a request.

To accommodate the vicissitudes of the discovery process, the Committee has chosen not to include a deadline for providing discoverable information but, instead, to allow for a "reasonable" time. If a party fails to disclose information within a reasonable time, subdivision (a)(2) would provide for the filing of a motion to compel disclosure. In the prior publication, the Committee had also proposed extending the time for filing such a motion from the current 14 days to 30 days. However, the Committee is now proposing the elimination of a deadline so as not to artificially hamper discovery. Instead, subdivision (a)(2) would be amended to prohibit the filing of a motion to compel "until at least 14 days after arraignment." The Comment would explain,

> [a]lthough the rule does not provide a deadline for when such motions must be filed, the rule contemplates that such motions will be filed promptly as soon as the dispute over discovery is determined to be irresolvable by the parties without the court's intervention. The parties should bring such disputes to the court's attention as soon as practicable.

The Comment would also observe that requiring a motion to compel discovery to be filed within 14 days of arraignment, as the rule currently does, was impracticable and not a reflection of actual practice. Moreover, prohibiting the filing of a motion to compel discovery prior to the 14th day after arraignment, as the proposed amendment would do, allows for informal discovery to proceed more fully before the court's assistance is sought.

Subdivision (b)(1), which governs mandatory disclosure by the Commonwealth, would be amended to remove both the requirement that the defense must first request items of mandatory discovery and the requirement that information must be "material." The term "material" was originally intended to restrict discoverable items to those containing information that was relevant to the case at issue. However, the term has become more narrowly defined in practice and, in some cases, used as an impediment to disclosure. The Comment would clarify that the

"removal of [the materiality] requirement. . .is not intended to alter the meaning or application of materiality in the post-conviction *Brady* context."

Subdivision (b)(1)(i) would be amended to require disclosure of "information favorable to the accused" rather than "evidence favorable to the accused." Among information favorable to the accused that must be disclosed would be information that "tends to exculpate the defendant, to mitigate the level of the defendant's culpability, to mitigate punishment, or to impeach a prosecution witness's credibility." This subdivision would also clarify that the disclosure of favorable information is required regardless of the form of the information or whether the attorney for the Commonwealth credits the information.

Subdivision (b)(1)(iv) would be amended to require the prosecution to disclose not only the circumstances and results of any identification of the defendant but also the circumstances and results of any attempted identification of the defendant. Similar disclosure requirements would attach to the identification or attempted identification of any other person conducted during the investigation. The disclosure of notes and reports by investigative personnel concerning identifications would also be required.

Subdivision (B)(1)(f) of the current rule, which requires the disclosure of tangible objects, would be expanded and relocated to new subdivision (b)(1)(vii). The new subdivision would require disclosure of tangible objects, including: law enforcement notes or reports; photographs, audio, video, or other recordings; recordings from body and dashboard cameras; fingerprints; the names and statements of fact witnesses the Commonwealth intends to call at trial; and statements of co-defendants and co-conspirators. Subdivision (b)(1)(vii) would also take into consideration grand jury secrecy, the exclusion of work product as provided for in subdivision (g), and the redaction of privileged, protected, or other sensitive information.

The items identified in subdivisions (B)(2)(a)(ii) and (B)(2)(a)(iii) of the current rule would be relocated to subdivisions (b)(1)(vii)(D) and (b)(1)(vii)(E) of the amended rule, rendering their disclosure mandatory rather than discretionary. Additionally, with that relocation, "eyewitnesses" in subdivision (B)(2)(a)(ii) would be replaced by "fact witnesses" in subdivision (b)(1)(vii)(D). The Committee chose the broader category to, in part, limit disputes over the ambit of the term "eyewitness."

Subdivision (b)(2), which governs discretionary disclosure by the Commonwealth, would be amended to require only a showing that a request for discretionary discovery is reasonable. The current requirement that the information requested be "material to the preparation of the defense" would be deleted. Subdivision (b)(2)(i) would be amended to include the address and criminal record of any fact witness, the name of any fact witness the Commonwealth does not intend to call at trial, and the underlying data supporting scientific tests or opinions. With respect to the address of a fact witness, the Comment would explain, "[b]ecause a witness's address and other contact information could be misused, including for purposes of witness intimidation, disclosure of that information is discretionary under subdivision (b)(2)(i)(A)." Subdivision (b)(2)(i)(C) would be amended to provide for disclosure of "any other information specifically identified by the defendant" rather than "any other evidence specifically identified by the defendant." A new subdivision (b)(2)(iii) would recognize the practice of disclosure by agreement between opposing counsel.

Subdivision (c) (Disclosure by the Defendant) would remain effectively unchanged except for the deletion of the requirement of materiality in subdivision (c)(1) and the replacement of "eyewitnesses" with "fact witnesses" in subdivision (c)(1)(ii). The materiality provision in subdivision (c)(1) would be removed to create consistency within the rule.

To better define the continuing duty of the parties to disclose information, with particular emphasis on the Commonwealth's obligations, the Committee is proposing a number of amendments to subdivision (d), including the creation of five new subdivisions. New subdivision (d)(1) would explain that the duty to disclose extends to the parties' staff and others who report to the parties. New subdivision (d)(2) would obligate the attorney for the Commonwealth to make reasonable efforts to obtain information relating to the defendant and the offenses charged

that is in the possession of the police and other investigative personnel. The Committee is not, however, proposing that an affirmative obligation be placed on the attorney for the Commonwealth to seek out favorable information in the possession of governmental agencies other than the police and investigative personnel. "Other governmental agencies" would include entities outside of the control of the attorney for the Commonwealth, such as the Department of Corrections and children and youth services agencies. Instead, as provided in new subdivision (d)(3), the attorney for the Commonwealth must advise the defense of the existence of discoverable information in the possession of other governmental agencies when the Commonwealth becomes aware of it. These duties would be further elaborated in the Comment.

To address the issue of trial delays resulting from police departments either failing to provide discoverable information or providing such information in an untimely manner, new subdivision (d)(2) would require the attorney for the Commonwealth to alert the trial judge when "the police or other investigative personnel fails to provide [ ] information within its possession that would be discoverable if in the possession of the attorney for the Commonwealth." New subdivision (d)(4) would permit the attorney for the Commonwealth or the defense to file a motion to compel disclosure when "a police department, a governmental agency not reporting directly to the attorney for the Commonwealth, or other investigative personnel fails to provide information within its possession that would be discoverable if in the possession of the attorney for the Commonwealth."

The current language of subdivision (d) would be relocated to new subdivision (d)(5). Within subdivision (d)(5), "evidence" would, as in previous subdivisions, be replaced with "information."

New subdivision (d)(6) would require the Commonwealth to "promptly notify the defendant and the court" if,

> following trial but before judgment of conviction and sentence is final, the attorney for the Commonwealth discovers additional information previously required to be disclosed, requested, or ordered to be disclosed by it, which is subject to discovery or inspection under this rule[.]

The Commonwealth would also be required to disclose the "identity of an additional witness or witnesses [that] would undermine an aspect of the Commonwealth's case[.]"

New subdivision (e)(2) would provide for dismissal of the charges if "the attorney for the Commonwealth fails to comply with the obligations under this rule" and for a finding of contempt if the attorney for the Commonwealth or the attorney for the defendant "fails to comply with the obligations under this rule." The Comment would explain that dismissal is an extraordinary remedy and would cite *Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001) ("[A] trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed."). The Comment would also note that contempt "may be entertained when the misconduct satisfies 42 Pa.C.S. § 4132."

"Information" would be defined in the Comment as "any evidence, document, item, or other material or data concerning the case." The Comment would also explain that "'to disclose' includes, but is not limited to. . .permitting the party seeking disclosure to inspect and copy, photograph, or otherwise reproduce such items." Requiring a party to "disclose" information would replace the current requirement that a party "allow" the opposing party "to inspect and copy or photograph" requested items. *See* Pa.R.Crim.P. 573(b)(2)(i) (proposed); Pa.R.Crim.P. 573(c)(1) (proposed). The change in terminology is intended to accommodate e-discovery.

Finally, the Comment would be amended to clarify that the rule "does not apply to rebuttal evidence. *See, e.g., Commonwealth v. Clary*, 226 A.3d 571 (Pa. Super. 2020)." Whether rebuttal evidence is necessary is, in most instances, contingent upon the opposing party's presentation of its case. Because the need for rebuttal evidence cannot be anticipated, rebuttal evidence cannot be subject to pretrial discovery.

A corollary amendment would be made to Rule 1101(5) to reflect the renumbering of subdivision (B)(1)(g) of Rule 573 as (b)(1)(vi).

The Committee invites all comments, concerns, and suggestions.

[Pa.B. Doc. No. 24-1143. Filed for public inspection August 16, 2024, 9:00 a.m.]

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[1] Stylistic amendments have also been made to conform to the Supreme Court of Pennsylvania Style and Rulemaking Guide for Procedural and Evidentiary Rules.

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