

FINAL REPORT¹

Proposed New Pa.Rs.Crim.P. 840-845
Proposed Amendments to Pa.Rs.Crim.P. 568, 800, 807, and 809
Proposed Revision of the Comment to Pa.R.Crim.P.808

PROCEDURES FOR SEEKING TO PRECLUDE IMPOSITION OF A SENTENCE OF DEATH BY REASON OF DEFENDANT'S MENTAL RETARDATION

On July 31, 2013, effective October 1, 2013, upon the recommendation of the Criminal Procedural Rules Committee, the Court adopted new Rules 840-845, amendments to Rules 568, 800, 807, and 809, and revision to the *Comment* to Rule 808 to provide procedures for asserting a claim of mental retardation that would preclude imposition of the death penalty.

Pursuant to directions from the Court, the Committee undertook the development of notice procedures for seeking to preclude the imposition of a sentence of death by reason of the defendant's mental retardation. As described more fully below, the Committee concluded that the bench and bar would benefit from having a more detailed procedural framework for asserting these claims. Therefore, the amendments address, in addition to the notice requirements, procedures for examination of the defendant, for disclosure of information, for conducting the optional pre-trial determination, for conducting the sentencing hearing in cases in which the issue is determined by the jury as well as a model jury slip.

Background

The question of the availability of the death penalty for mentally retarded individuals convicted of a capital offense was definitively decided by the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the United States Supreme Court found that the execution of the mentally retarded is "cruel and unusual

¹ The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

punishment” within the meaning of the Eighth Amendment’s prohibition. In this decision, however, the U.S. Supreme Court did not adopt a definition of mental retardation or a prescribed method of how the issue should be determined. Instead, the Court left those tasks to the individual states to develop, specifically noting that states are “left the task of developing appropriate ways to enforce the constitutional restriction upon execution of sentences.” *Id.* at 317. The concept of individual state action on *Atkins* issues was reaffirmed in the case of *Schriro v. Smith*, 546 U.S. 6 (2005), that held that the states must develop their own legal definition of mental retardation. There is currently no statute that provides for an *Atkins* determination in Pennsylvania.²

In the absence of action by the Legislature, the Pennsylvania Supreme Court addressed most of the substantive questions regarding adjudication of *Atkins* claims in *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011). *Sanchez* provides that the decision regarding this issue will be made by the jury as the first issue to be determined at sentencing, with the requirement that the finding of mental retardation for death penalty preclusion must be unanimous. However, the parties may agree to have the issue decided by the judge pre-trial. The burden of proof is on the proponent of the *Atkins* claim, usually the defendant, to prove mental retardation by a preponderance of the evidence.

Development of the Rule Changes

As directed by the Court, the Committee’s examination initially focused on the question of the timing for raising this issue. The Committee considered a time limit similar to that used for the Rule 568 (Notice of Defense of Insanity or Mental Infirmity; Notice of Expert Evidence of a Mental Condition) -- the motion to be filed no later than the time required for filing an omnibus pretrial motion, that is 30 days after arraignment. After further discussion, the Committee concluded that the time limit should not be tied to the omnibus pretrial motions rules but should be based on the arraignment date.

² “Mental retardation” was defined in Pennsylvania in *Commonwealth v. Miller*, 585 Pa. 144, 888 A.2d 624 (2005) which held that a defendant may establish mental retardation as defined by either the American Association of Mental Retardation or Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. (DSM-IV)

This would be consistent with the requirements for the notice of aggravating circumstances in Rule 802. The members settled on the time to be a period of ninety days after arraignment, concluding that this is reasonable given the amount of information that must be gathered in order to present a good faith notice of mental retardation.

In addition to determining the timing for providing the notice, the Committee considered other procedures related to notice that should be addressed. These procedures include the provision for an extension of this time limitation for cause shown, and the provision for encouragement of the early involvement of the trial judge, soon after the notice was filed, in order to provide appropriate supervision of the discovery and examination process. The Committee agreed that the new notice procedures should provide for a response time of 30 days. This would be comparable to the procedures for the notice of insanity defense that served as a model for these notice procedures.

In further discussions, the Committee agreed that procedures comparable to the procedures in Rule 568 (Notice of Defense of Insanity or Mental Infirmity; Notice of Expert Evidence of a Mental Condition) should be added to provide a continuing duty to disclose and reciprocal notice. Lastly, the Committee also considered whether the new procedures should provide for the Commonwealth to obtain an examination of the defendant by a mental health expert similar to the procedures in Rule 569.

Because of the additional elements, particularly the disclosure and examination provisions, the Committee realized that the proposal was extending beyond notice procedures. The Committee determined that an expanded proposal, setting forth as many of the procedures for making an *Atkins/Sanchez* determination as possible, would be helpful to the bench and bar and agreed to examine procedures for how this determination is to be made, either by the jury or, upon agreement of the parties, as a pretrial determination by the trial judge.

Rule Changes

Originally, the Committee considered placing these procedures in Rule 802. Given the increased scope of the proposal, placement in a single rule would make that

rule very unwieldy. The Committee concluded that the best structure for these procedures would be as a series of separate rules grouped in a new subchapter B in Chapter 8.

Therefore, new subchapter B includes new Rules 840 (Scope), 841 (Notice of Mental Retardation Precluding Imposition of the Death Penalty), 842 (Examination of Defendant by Mental Health Expert), 843 (Optional Pre-trial Hearing), 844 (Sentencing Procedures in Cases in which the Defendant's Mental Retardation is Asserted), and 845 (Form for Sentencing Verdict Slip in Cases in which the Defendant's Mental Retardation is Asserted).

New Rule 840 establishes that the rules in Part B provide the procedure for determining the defendant's ineligibility to be executed by reason of mental retardation. The *Comment* to Rule 840 includes citations to *Atkins* and *Sanchez*.

New Rule 841 provides for the timing of the filing of the notices. The rule also contains a reciprocal notice provision as well as a continuing duty to disclose. The disclosure requirements in Rule 841 are based on those for the competency to stand trial determination procedures found in Rule 568.

Additionally, Rule 841 contains in paragraph (B) provisions for the filing of the separate notice of expert evidence provision. As this proposal is modeled on the notice of insanity defense procedures, the Committee decided to retain this separate notice of expert evidence to keep the examination procedures for mental retardation similar to those for insanity.

Paragraph (E) of Rule 841 requires the clerk of courts immediately to send a copy of the notice to the trial judge to ensure the judge's supervision of the discovery and examination process at an early stage.

The notices filed under this rule are considered "motions." To make this clear, the *Comment* contains a cross-reference to Rules 575 and 576 for motion procedures and explains that the term "notices" as used in the rule fall within the definition of "motion" in Rule 575.

Rule 842 provides the procedures by which the Commonwealth may obtain an examination of the defendant by a mental health expert. These procedures are almost

identical to those found in Rule 569 with the only differences being changes necessary to conform to the mental retardation procedures.

New Rule 843 provides the procedures for the optional pre-trial hearing for the determination of the issue but only if all the parties agree, as provided in *Sanchez*. If the parties agree, the judge shall hear the issue as provided in this rule. Rule 843 also requires that, within 30 days of the completion of the evidentiary hearing, the judge enter an order finding the defendant either is or is not competent to be executed due to mental retardation. Paragraph (D) requires that the judge advise the defendant that, by agreeing to have this issue decided pretrial, the defendant would not be able to argue for capital punishment preclusion with a jury but only may introduce mental retardation evidence for purposes of mitigation.

The Committee conducted a lengthy examination of the manner in which a sentencing hearing would proceed when the issue of the defendant's mental retardation has not been decided pretrial pursuant to Rule 843. This procedure is detailed in Rule 844. First, after the guilt determination, a single capital sentencing hearing is held in which all sentencing evidence is to be presented, including evidence of the defendant's mental retardation. Under Rule 844(B), the trial judge makes an initial determination that the evidence of the defendant's mental retardation that has been presented is sufficient to raise a question for the jury to determine. If the trial judge determines that sufficient evidence of the defendant's mental retardation had not been presented, the case proceeds as in any other capital case. If the trial judge determines that sufficient evidence has been presented, each party would be permitted to make a single argument encompassing all sentencing issues. At the conclusion of the arguments, the judge will instruct the jury on the mental retardation issue only. The jury then will deliberate on that single issue. If the jury finds the defendant not mentally retarded, the trial judge will instruct them on the mitigating and aggravating circumstances and the jury will deliberate on that phase of sentencing.

Paragraph (C) provides the procedures to be followed when the defendant has waived sentencing before a jury and is sentenced before the trial judge. As with a jury sentencing proceeding, one hearing would be held and each party would be permitted one argument addressing all sentencing issues. The judge would then consider the

question of the defendant's mental retardation prior to the consideration of any other sentencing issue.

In cases in which the jury is asked to make a determination as to the defendant's mental retardation, a new separate jury verdict slip, contained in new Rule 845, would be used to record the jury's determinations regarding mental retardation. Since this is a distinct determination, the slip in Rule 845 poses only one question, whether the jury unanimously finds the defendant was mentally retarded at the time of the murder. If the jury finds the defendant mentally retarded, the jury would not need to consider aggravating or mitigating factors. If the jury does not find the defendant mentally retarded or if the jury cannot unanimously agree that the defendant was mentally retarded, the jury would proceed, after further instruction by the trial judge, to the capital determination guided by the jury slip in Rule 807.

In cases in which the defendant has waived sentencing before a jury and has not sought a pretrial determination of mental retardation as contemplated in Rule 844(C), the judge sentencing verdict slip in Rule 809 has been modified to incorporate this possibility and correlative changes also have been made to Rule 807 (B).

Finally, correlative changes to Rule 800 indicating the addition of new Part B to Chapter 8 as well as to Rule 568 to indicate that procedures for *Atkins/Sanchez* determinations are in Chapter 8 Part B have been added.