

Proposed Amendment to Pa.R.Crim.P. 648

INTRODUCTION

The Criminal Procedural Rules Committee is considering recommending that the Supreme Court of Pennsylvania amend Rule 648 (Verdicts) to standardize the practice of requiring juries to make specific verdicts as to essential facts as required under United States v. Alleyne, ___ U.S. ___, 133 S.Ct. 2151 (2013). 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 Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The 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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Criminal Procedural Rules Committee
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no later than Friday, December 6, 2013.

October 22, 2013

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Nancy L. Butts, Chair

Jeffrey M. Wasileski
Counsel

RULE 648. VERDICTS.

(A) Upon retiring to deliberate, the jury shall select one of its members as foreman.

(B) The verdict shall be unanimous, and shall be announced by the foreman in open court in the presence of a judge, the attorney for the Commonwealth, the defendant and defendant's attorney, except as provided in Rule 602.

(C) If there are two or more defendants, the jury may report a verdict or verdicts with respect to those defendants, upon which it has agreed, and the judge shall receive all such verdicts. If the jury cannot agree upon a verdict with respect to all of the defendants, the verdicts which have been received shall be recorded.

(D) If there are two or more counts in the information or indictment, the jury may report a verdict or verdicts with respect to those counts upon which it has agreed, and the judge shall receive and record all such verdicts. If the jury cannot agree with respect to all the counts in the information or indictment if those counts to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter counts shall be dismissed. When the counts in the information or indictment upon which the jury cannot agree are not included offenses of the counts in the information or indictment upon which it has agreed, the defendant or defendants may be retried on those counts in the information or indictment.

(E) If there are two or more informations or indictments, the jury may report a verdict or verdicts with respect to those informations or indictments upon which it has agreed, and the judge shall receive and record all such verdicts. If the jury cannot agree with respect to all the informations or indictments, if those informations or indictments to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter informations or indictments shall be dismissed. When the informations or indictments upon which the jury cannot agree are not included in the offenses of the information or indictment upon which it has agreed, the defendant or defendants may be retried on those informations or indictments.

(F) If there is a sentencing fact that must be found by the jury, the jury shall be instructed to render a specific verdict as to that fact, separate from its verdict or verdicts on the charged criminal offenses. If the jury cannot agree with respect to the specific verdict, its failure to agree shall have no effect on the other verdict or verdicts it has reached.

[(F)] (G) If there is a summary offense joined with the misdemeanor, felony, or murder charge that was tried before the jury, the trial judge shall not remand the summary offense to the issuing authority. The summary offense shall be disposed of in the court of common pleas, and the verdict with respect to the summary offense shall be recorded in the same manner as the verdict with respect to the other charges.

[(G)] (H) Before a verdict, whether oral or sealed, is recorded, the jury shall be polled at

the request of any party. Except where the verdict is sealed, if upon such poll there is no concurrence, the jury shall be directed to retire for further deliberations.

COMMENT: Paragraph (A) of the rule replaces the practice of automatically appointing the first juror chosen as foreman of the jury. Paragraphs (C), (D), and (E) serve only to codify the procedure where conviction or acquittal of one offense operates as a bar to a later trial on a necessarily included offense. Similarly, the rule applies to situations of merger and *autrefois* convict or acquit. No attempt is made to change the substantive law that would operate to determine when merger or any of the other situations arise. See, e.g., *Commonwealth v. Comber*, 374 Pa. 570, 97 A.2d 343 (1953).

New paragraph (F) was added in 2013 to conform procedure with the requirement enunciated by the U.S. Supreme Court in *Alleyne v. U.S.*, U.S. 133 S.Ct. 2151 (2013), that any fact, other than a prior conviction, that increases a mandatory minimum sentence, must be submitted to the jury. The separate verdict should be required on the verdict slip with the charged offense(s), and the jury should deliberate on the separate fact at the same time it deliberates on the charged offense(s).

Paragraph **[(F)] (G)** provides for the disposition in the court of common pleas of any summary offense that is joined with the misdemeanor, felony, or murder charges that were tried before the jury. Under no circumstances may the trial judge remand the summary offense to the issuing authority, even in cases in which the defendant is found not guilty by the jury. See *also* Rule 543 (Disposition of Case at Preliminary Hearing).

Paragraph **[(G)] (H)** provides for the polling of the jury and requires the judge to send the jury back for deliberations in accordance with *Commonwealth v. Martin*, 379 Pa. 587, 109 A.2d 325 (1954). With respect to the procedure upon non-concurrence with a sealed verdict, see Rule 649(C).

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 paragraphs (D) and

(E) of this rule because there may be some cases still pending that were instituted under the former indicting grand jury rules prior to the abolition of the indicting grand jury in 1993. These references to “indictment” do not apply in the context of an indicting grand jury convened pursuant to the new indicting grand jury procedures adopted in 2012 in which an information would be filed after a grand jury indicts a defendant. See Rules 103 and 556.11.

NOTE: Rule 1120 adopted January 24, 1968, effective August 1, 1968; amended February 13, 1974, effective immediately; paragraph (E) amended to correct printing error June 28, 1976, effective immediately; paragraph (F) amended April 26, 1979, effective July 1, 1979; amended August 12, 1993, effective September 1, 1993; renumbered Rule 648 and amended March 1, 2000, effective April 1, 2001; amended March 9, 2006, effective September 1, 2006; *Comment* revised June 21, 2012, effective in 180 days [.] ; **amended _____, 2013, effective _____, 2013.**

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COMMITTEE EXPLANATORY REPORTS:

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

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 9, 2006 amendments concerning joinder of summary offenses with misdemeanor, felony, or murder charges published with the Court’s Order at 36 Pa.B. 1325 (March 25, 2006).

Final Report explaining the June 21, 2012 revision of the Comment concerning the former abolition of the indicting grand jury published with the Court’s Order at 42 Pa.B. (_____, 2012).

Report explaining the proposed amendment concerning specific verdicts published for comment at 43 Pa.B. (_____, 2013).

REPORT

Proposed amendment to Pa.R.Crim.P. 648

SPECIFIC VERDICTS

On June 17 , 2013, the United States Supreme Court issued its opinion in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151 (2013). In *Alleyne*, the defendant was convicted of using a firearm in the commission of a violent crime. The offense carried a mandatory minimum sentence of five years' incarceration but the mandatory minimum would be increased to seven years if it was found that the firearm was brandished or to ten years if the firearm was discharged during the commission of the crime. The jury found that the defendant had "used or carried a firearm" but the verdict slip did not contain a specific finding that the defendant had brandished it. During sentencing, the trial judge determined that the defendant had likely brandished the firearm during the offense and imposed the seven year mandatory minimum sentence.

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court concluded that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are not merely sentencing factors that the trial judge could decide, but are elements of the crime and the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. The Court overruled the earlier case of *Harris v. United States*, 536 U.S. 545 (2002) which had held that judicial fact-finding that increased the mandatory minimum sentence for a crime is permissible under the Sixth Amendment.

Recently, the Committee has been receiving reports that there is some confusion about the requirements imposed by *Alleyne* and the method by which facts that increase mandatory minimum sentences must be submitted to the jury. The Committee concluded that it would helpful to the bench and bar if the rules provided guidance in this area.

The Committee examined current practice and concluded that, especially since *Apprendi, supra.*, it has become commonplace to add specific findings to a verdict slip

when the case is given to the jury in cases in which a particular fact will affect the sentence. Since such a finding is considered one element of the offense, it is logical for that specific fact to be determined as part of the general deliberations of the jury.

The Committee considered the holding in *Commonwealth v. Samuel*, 599 Pa. 166, 961 A.2d 57 (2008), a case that stated that, in contrast to civil cases, where there is specific authority for special verdicts, there is no such provision in criminal trials. However, the Committee concluded that *Samuels* arose in a situation different from that in *Alleyne* and was of limited application.

The proposed amendments would add a new paragraph (F) to Rule 648 (Verdicts) that would state the requirement for a specific verdict when there is a sentencing fact that is required to be found by the jury. A proposed revision to the Rule 648 *Comment* would cite to *Alleyne* and elaborate that the specific verdict be included in the verdict slip to be deliberated as part of the general deliberation of the offense. Current paragraphs (F) and (G) would be re-lettered accordingly.