

Proposed Amendments to Pa.R.Crim.P. 802

INTRODUCTION

The Criminal Procedural Rules Committee is considering recommending that the Supreme Court of Pennsylvania amend Rule 802 (Notice of Aggravating Circumstances) to require a defendant to provide notice of mitigating circumstances in a capital case. 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 rule 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, March 15 , 2013.

January 29, 2013

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Nancy L. Butts, Chair

Jeffrey M. Wasileski
Counsel

RULE 802. NOTICE OF AGGRAVATING **AND MITIGATING** CIRCUMSTANCES.

(A) The attorney for the Commonwealth shall file a Notice of Aggravating Circumstances that the Commonwealth intends to submit at the sentencing hearing and contemporaneously provide the defendant with a copy of such Notice of Aggravating Circumstances. Notice shall be filed at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown.

(B) The attorney for the defendant, or the defendant if unrepresented, shall file a Notice of Mitigating Circumstances that the defendant intends to submit at the sentencing hearing and contemporaneously provide the attorney for the Commonwealth with a copy of such Notice of Mitigating Circumstances. Notice shall be filed within 90 days after the arraignment, unless the attorney for the defendant, or the defendant if unrepresented, becomes aware of the existence of a mitigating circumstance after the time for filing or the time for filing is extended by the court.

COMMENT: This rule provides for pretrial disclosure of those aggravating circumstances that the Commonwealth intends to prove at the sentencing hearing. See Sentencing Code, 42 Pa.C.S. § 9711(d). It is intended to give the defendant sufficient time and information to prepare for the sentencing hearing. Although the rule requires that notice generally be given no later than the time of arraignment, it authorizes prompt notice thereafter when a circumstance becomes known to the attorney for the Commonwealth at a later time. The language "for cause shown" contemplates, for example, a situation in which, at the time of arraignment, an ongoing investigation of an aggravating circumstance must be completed before the attorney for the Commonwealth can know whether the evidence is sufficient to warrant submitting the circumstance at the sentencing hearing.

The 1995 amendment requires the Commonwealth to file the Notice of Aggravating Circumstances.

For purposes of this rule, the notice requirement is satisfied if the copy of the notice to the defendant sets forth the existing aggravating circumstances substantially in the language of the statute. See 42 Pa.C.S. § 9711(d). The extent of disclosure of underlying evidence is governed by Rule 573.

See Rule 571 concerning arraignment procedures.

If the trial court orders a new sentencing hearing, or the Supreme Court remands a case for a redetermination of penalty pursuant to 42 Pa.C.S. § 9711(h)(4), the attorney for the Commonwealth may not introduce any new aggravating circumstance except when there has been an intervening conviction for an offense committed prior to the present conviction which would constitute an aggravating circumstance. The trial judge must set the time within which the attorney for the Commonwealth must notify the defendant of such an additional circumstance, and the time set for notice must allow the defendant adequate time to prepare for the new sentencing hearing. No additional notice is required for those aggravating circumstances previously offered and not struck down upon review.

Paragraph (B) of this rule provides for pretrial disclosure of those mitigating circumstances that the defendant intends to prove at the sentencing hearing. See Sentencing Code, 42 Pa.C.S. § 9711(e). Although the rule requires that notice generally be given within 90 days after arraignment, it authorizes prompt notice thereafter when a circumstance becomes known to the defendant's attorney at a later time or when the court otherwise permits. Paragraph (B) was added to the rule in 2013 to encourage early discussion between prosecution and defense regarding the evidence of mitigating circumstance so that those cases in which the death penalty is not appropriate or likely to be awarded, would be amenable to negotiations on the capital aspects of the case. Paragraph (B) is not intended to preclude the introduction of any constitutionally permissible mitigating evidence.

NOTE: Previous Rule 352 adopted July 1, 1985, effective August 1, 1985; renumbered Rule 353 February 1, 1989, effective July 1, 1989. Present Rule 352 adopted February 1, 1989, effective as to cases in which the arraignment is held on or after July 1, 1989; *Comment* revised October 29, 1990, effective January 1, 1991; amended January 10, 1995, effective February 1, 1995; renumbered Rule 801 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; renumbered Rule 802 June 4, 2004, effective November 1, 2004 [.] ; amended _____, 2013, effective _____, 2013.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the October 29, 1990 Comment revision published at 20 Pa.B. 5736 (November 17, 1990).

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 May 10, 2002 amendments published with the Court's Order at 32 Pa. B. (_____).

Report explaining the proposed amendments concerning the requirement of filing a notice of mitigating circumstances published for comment at 42 Pa. B. (_____ , 2012).

REPORT

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NOTICE OF MITIGATING CIRCUMSTANCE

The Committee has been examining a proposal to amend Rule 802 to require a defendant to provide notice of mitigating circumstances similar to the Commonwealth's requirement to provide notice of aggravating circumstances in a capital case.

It was suggested that adding this requirement will facilitate discussions about a possible non-trial disposition. Under current practice, the prosecution is not privy to much information regarding the defendant and the defendant's background at the initiation of a case. There are many cases where an early disclosure of the nature of mitigation would cause the prosecution to review the alleged circumstances and support therefor, leading to a plea agreement for a penalty other than death or, absent an agreement, a decision not to seek the death penalty. The earlier in the process that this information is shared, the earlier such decisions can be made. Furthermore, requiring such notices to be made by the defendant would be consistent with similar notice provisions in the rules, such as is required for alibis in Rule 567 and for mental health defenses in Rule 568.

The Committee examined the procedures in other jurisdictions and concluded that a notice requirement would not be a radical departure from the practice in other states. For example, Florida has a criminal procedural rule, Florida Rule of Criminal Procedure 3.202, that is similar to what was suggested. It should be noted that the Florida rule is limited to requiring the defendant to provide notice of "expert testimony of mental mitigation." Additionally, several states address this issue by means of reciprocal discovery statutes. For example, California Penal Code §1054.3, that requires disclosure of certain forms of defense evidence, is applicable to penalty-phase evidence in capital prosecutions and this disclosure must be made at least 30 days prior to the guilt phase of trial. Similarly, Georgia has a statute, Georgia Code §17-16-4,

that, *inter alia*, requires providing a list of the witnesses that the defense intends to call at the presentencing hearing usually no later than five days before trial commences.

The Committee is cognizant that the defense may not have a fully developed mitigation case at the time the notice is required, within 90 days after the arraignment, and the notice requirement is not intended to replace normal discovery procedures. The Committee does not contemplate that the notice requirement will represent a full disclosure of the details of the mitigation circumstances, but rather, will represent a counter-part to the Commonwealth's notice of aggravating circumstances

The Committee recognizes that there is a constitutional dimension to the presentation of mitigating circumstance. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."). One of the Committee's concerns was whether there should be sanctions for a failure to provide notice such as precluding the defendant from presenting mitigating evidence. It is clear from current law that a waiver must be knowing, intelligent, and voluntary. See, e.g., *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431 (2005), reargument denied 872 A.2d 1125 582 Pa. 437 (2005), *certiorari* denied 546 U.S. 1020 (2005); *Commonwealth v. Wilson*, 861 A.2d 919, 580 Pa. 439 (2004). The Committee concluded that the failure to meet a notice deadline solely would be insufficient to meet this standard. Therefore, the Rule 802 *Comment* would be revised to further explain the intention of this requirement and that it not be used to preclude the defendant from presenting constitutionally-protected evidence of mitigation.