

Proposed New Pa.Rs.Crim.P. 870-875
Proposed Amendments to Pa.Rs.Crim.P. 568, 807, and 809
Proposed Revision of the *Comment* to Pa.R.Crim.P.808

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 870-875,¹ amend Rules 568, 807, and 809, and revise the Comment to Rule 808 to provide procedures for the determination of a defendant's mental retardation that would preclude the imposition of a sentence of death. 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 changes 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, November 23, 2012.

September 25, 2012 BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Philip D. Lauer, Chair

Jeffrey M. Wasileski, Counsel

¹ The proposed new rules are in a new Part C to Chapter 8 because there is pending a proposal for a new Part B addressing competency to be executed. See *Report*, 40 Pa.B. 2397 (May 8, 2010)

RULE 568. NOTICE OF DEFENSE OF INSANITY OR MENTAL INFIRMITY;
NOTICE OF EXPERT EVIDENCE OF A MENTAL CONDITION.

(A) NOTICE BY DEFENDANT

(1) Notice of Defense of Insanity or Mental Infirmary

A defendant who intends to offer at trial the defense of insanity or mental infirmity shall file with the clerk of courts not later than the time required for filing an omnibus pretrial motion provided in Rule 579 a notice of the intention to offer the defense of insanity or mental infirmity, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

(a) The notice and certificate shall be signed by the attorney for the defendant, or the defendant if unrepresented.

(b) The notice shall contain specific available information as to the nature and extent of the alleged insanity or mental infirmity, the period of time that the defendant allegedly suffered from such insanity or mental infirmity, and the names and addresses of witnesses, expert or otherwise, whom the defendant intends to call to establish such defense.

(2) Notice of Expert Evidence of Mental Condition

Except as provided in Rule 871, [A] a defendant who intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing (1) on the issue of guilt, or (2) in a capital case, on the issue of punishment, shall file with the clerk of courts not later than the time required for filing an omnibus pretrial motion provided in Rule 579 a notice of the intention to offer this expert evidence, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

(a) The notice and certificate shall be signed by the attorney for the defendant, or the defendant if unrepresented.

(b) The notice shall contain specific available information as to the nature and extent of the alleged mental disease or defect or any other mental condition, the period of time that the defendant allegedly suffered from such mental disease or defect or any other mental condition, and the names and addresses of the expert witness(es) whose evidence the defendant intends to introduce.

(B) FAILURE TO FILE NOTICE

(1) If the defendant fails to file and serve a notice of insanity or mental infirmity defense, or a notice of expert evidence of a mental condition as required by this rule, the court may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, may grant a continuance to enable the Commonwealth to investigate such evidence, or may make any other order as the interests of justice require.

(2) If the defendant omits a witness from the notice of insanity or mental infirmity defense or a notice of expert evidence of a mental condition, the court at trial may exclude the testimony of the omitted witness, may grant a continuance to enable the Commonwealth to investigate such evidence, may grant a continuance to enable the Commonwealth to investigate the witness, or may make any other order as the interests of justice require.

(C) RECIPROCAL NOTICE OF WITNESSES

Within 10 days after receipt of the defendant's notice of the insanity or mental infirmity defense, or notice of expert evidence of a mental condition, or within such other time as allowed by the court upon cause shown, the attorney for the Commonwealth shall file and serve upon defendant's attorney, or the defendant if unrepresented, written notice of the names and addresses of all witnesses the attorney for the Commonwealth intends to call to disprove or discredit the defendant's claim of insanity or mental infirmity, or mental disease, defect, or other mental condition.

(D) FAILURE TO SUPPLY RECIPROCAL NOTICE

(1) If the attorney for the Commonwealth fails to file and serve a list of its witnesses as required by this rule, the court may exclude any evidence offered by the Commonwealth for the purpose of disproving the insanity or mental infirmity defense, may grant a continuance to enable the defense to investigate such evidence, or may make such other order as the interests of justice require.

(2) If the attorney for the Commonwealth omits a witness from the list of its witnesses required by this rule, the court at trial may exclude the testimony of the omitted witness, may grant a continuance to enable the defense to investigate the witness, or may make such other order as the interests of justice require.

(E) CONTINUING DUTY TO DISCLOSE

If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the notice furnished under paragraphs (A) or (C), the party shall promptly notify the other party's attorney, or if unrepresented, the other party, of the existence and identity of such additional witness.

(F) FAILURE TO CALL WITNESSES

No adverse inference may be drawn against the defendant, nor may any comment be made concerning the defendant's failure to call available witnesses with regard to the insanity or mental infirmity defense, when such witnesses have been prevented from testifying by reason of this rule, unless the defendant or the defendant's attorney shall attempt to explain such failure to the jury.

COMMENT: This rule, which is derived from paragraphs (C)(1)(b), (c) - (f), and (D) of Rule 573 (Pretrial Discovery and Inspection) and was made a separate rule in 2006, sets forth the notice procedures when a defendant intends to raise a defense of insanity or mental infirmity, or introduce evidence relating to a mental disease or defect or any other mental condition at trial.

For the procedures related to the determination of mental retardation precluding imposition of a sentence of death, see Chapter 8 Part (C).

The reference in paragraph (A) to Rule 579 (Time for Omnibus Pretrial Motion and Service) contemplates consideration of the exceptions to the time for filing set forth in Rule 579(A).

See Rule 569 (Examination of Defendant by Mental Health Expert) for the procedures for the examination of the defendant by the Commonwealth's expert when the defendant provides notice of an intention to raise a defense of insanity or mental infirmity or an intention to introduce expert evidence concerning his or her mental condition.

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 Rule 576(B)(4) and *Comment* for the contents and form of the certificate of service.

NOTE: Adopted January 27, 2006, effective August 1, 2006 [.] ; renumbered Rule 802 June 4, 2004, effective November 1, 2004 [.] ; amended _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of new Rule 568 governing notice of insanity or mental infirmity defense and notice of expert evidence of a mental condition published at 36 Pa.B. (_____ , 2006).

Report explaining the proposed amendment to paragraph (A)(2) and Comment revisions regarding notice of mental retardation published for comment at 42 Pa.B. (_____ , 2012).

CHAPTER 8. SPECIAL RULES FOR CASES IN WHICH
DEATH SENTENCE IS AUTHORIZED

RULE 807. SENTENCING VERDICT SLIP.

(A) JURY

(1) **Except as provided in paragraph (2), [I]** in all cases in which the sentencing proceeding is conducted before a jury, the judge shall furnish the jury with a jury sentencing verdict slip in the form provided by Rule 808.

(2) In cases in which the jury is to determine if imposition of a sentence of death is precluded due to the defendant's mental retardation, the judge shall furnish the jury with the sentencing verdict slip in the form required by Rule 875. If the jury subsequently does not find unanimously that the defendant is mentally retarded, the judge then shall furnish the jury with a jury sentencing verdict slip in the form provided by Rule 808.

[(2)] (3) Before the jury retires to deliberate, the judge shall meet with counsel and determine those aggravating and mitigating circumstances of which there is some evidence. The judge shall then set forth those circumstances on the sentencing verdict slip using the language provided by law.

[(3)] (4) The trial judge shall make the completed sentencing verdict slip part of the record.

(B) TRIAL JUDGE

(1) In all cases, **including those in which the defendant seeks to have the imposition of a sentence of death precluded by reason of mental retardation,** in which the defendant has waived a sentencing proceeding before a jury and the trial judge determines the penalty, the trial judge shall complete a sentencing verdict slip in the form provided by Rule 809.

(2) The trial judge shall make the completed sentencing verdict slip part of the record.

COMMENT: The purpose of this rule is to provide statewide, uniform jury and trial judge sentencing verdict slips in death penalty cases. The jury sentencing verdict slip is not intended to replace those jury instructions required by law. See Sentencing Code, 42 Pa.C.S. § 9711(c). For the

sentencing procedure under paragraph (B), see Sentencing Code, 42 Pa.C.S. § 9711(b).

NOTE: Rule 357 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 806 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 807 June 4, 2004, effective November 1, 2004[.] ; **amended** , **2012**, **effective** , **2012**.

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COMMITTEE EXPLANATORY REPORTS:

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).

Report explaining the proposed amendments regarding cases in which the defendant has introduced evidence of mental retardation published for comment at 42 Pa.B. (, 2012).

RULE 808. FORM FOR JURY SENTENCING VERDICT SLIP.

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :

vs. : NO. _____

:

FIRST DEGREE MURDER
SENTENCING VERDICT SLIP

I. GENERAL INSTRUCTIONS

A. READ THROUGH THE ENTIRE VERDICT SLIP BEFORE BEGINNING DELIBERATIONS.

B. AGGRAVATING AND MITIGATING CIRCUMSTANCES PRESENTED TO THE JURY.

1. The following aggravating circumstance(s) (is) (are) submitted to the jury and must be proved by the Commonwealth beyond a reasonable doubt:

[List and number separately]

(1)

(2)

(3)

(4)

2. The following mitigating circumstance(s) (is) (are) submitted to the jury and must be proved by the defendant by a preponderance of the evidence:

[List and number separately]

(1)

(2)

(3)

(4) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the defendant's offense.

C. DO NOT COMPLETE THIS SENTENCING VERDICT SLIP UNTIL YOUR DELIBERATIONS ARE CONCLUDED. THIS SENTENCING VERDICT SLIP IS ONLY TO BE USED TO RECORD YOUR SENTENCING VERDICT AND THE FINDINGS UPON WHICH IT IS BASED.

D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

II. SENTENCING VERDICT AND FINDINGS

If you have reached a unanimous verdict, complete this part of the form.

In Section A, indicate whether the sentencing verdict is death or life imprisonment. If the sentence is death, indicate the basis for that verdict by completing Section B. If the sentence is life imprisonment, indicate the basis for that verdict by completing Section C.

A. We, the jury, unanimously sentence the defendant to (check one):

_____ Death

_____ Life Imprisonment

B. The findings on which the sentence of death is based are (check one):

_____ 1. At least one aggravating circumstance and no mitigating circumstance.

The aggravating circumstance(s) unanimously found (is) (are):

_____ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) unanimously found (is) (are):

The mitigating circumstance(s) found by one or more of us (is) (are):

C. The findings on which the sentence of life imprisonment is based are (check one):

_____ 1. No aggravating circumstance exists.

_____ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

The mitigating circumstance(s) found by one or more of us (is) (are):

The aggravating circumstance(s) unanimously found (is) (are):

_____ DATE _____ JURY FOREPERSON

COMMENT: The general instructions contained in Part I of the verdict slip are not intended to replace the jury instructions required by law. See Sentencing Code, 42 Pa.C.S. § 9711(c)(1) and (2).

The judge should caution the jury that the verdict slip is to be used to record the sentencing verdict and findings, and that the slip should be completed only after their deliberations are concluded.

In Part I, General Instructions, the judge should set forth those aggravating and mitigating circumstances of which there is some evidence. The list should include the mitigating circumstance "concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S.

§ 9711(e)(8). See *Commonwealth v. Moody*, 382 A.2d 442 (Pa. 1977), cert. den. 438 U.S. 914 (1978), and *Lockett v. Ohio*, 438 U.S. 586 (1978).

The list of aggravating and mitigating circumstances completed by the judge in Part I, and by the jury foreperson in Part II, should use the language provided by law for each circumstance. See Sentencing Code, 42 Pa.C.S. § 9711(d) and (e). The judge's instructions on the weighing of aggravating and mitigating circumstances must comply with *Mills v. Maryland*, 108 S.Ct. 1860 (1988).

See Rule 875 for the jury verdict slip form to be used when the jury is to determine if imposition of the death penalty is precluded due to the defendant's mental retardation.

Note: Rule 358A adopted February 1, 1989, effective July 1, 1989; renumbered Rule 807 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 808 June 4, 2004, effective November 1, 2004 [.] ; **Comment revised _____, 2012, effective _____, 2012.**

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COMMITTEE EXPLANATORY REPORTS:

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).

Report explaining the proposed Comment revision cross-referencing Rule 875 published for comment at 42 Pa.B. _____ (_____, 2012).

RULE 809. FORM FOR TRIAL JUDGE SENTENCING VERDICT SLIP.

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :

vs. : NO. _____

:

FIRST DEGREE MURDER
SENTENCING VERDICT SLIP

A. I, _____ J., sentence the defendant to:

_____ Death

_____ Life Imprisonment

B. The findings on which the sentence of death is based are:

_____ 1. At least one aggravating circumstance and no mitigating circumstance.

The aggravating circumstance(s) (is) (are):

_____.

_____ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) (is) (are):

_____.

The mitigating circumstance(s) (is) (are):

C. The findings on which the sentence of life imprisonment is based are:

A sentence of death is precluded because the defendant is mentally retarded.

OR

_____ 1. No aggravating circumstance exists.

_____ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

The mitigating circumstance(s) (is) (are):

The aggravating circumstance(s) (is) (are):

_____ DATE _____, J.

COMMENT: In listing aggravating and/or mitigating circumstances in Sections B or C, the trial judge should use the language provided by law for each circumstance. See Sentencing Code, 42 Pa.C.S. § 9711(d) and (e)

NOTE: Rule 358B adopted February 1, 1989, effective July 1, 1989; renumbered Rule 808 and *Comment revised* March 1, 2000, effective April 1, 2001; renumbered Rule 809 June 4, 2004, effective November 1, 2004 **[.] amended**, **2012, effective**, **2012.**

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COMMITTEE EXPLANATORY REPORTS:

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).

Report explaining the proposed amendment regarding findings of mental retardation published for comment at 42 Pa.B. (, 2012).

**PART C. PROCEDURES FOR SEEKING TO PRECLUDE IMPOSITION OF A
SENTENCE OF DEATH BY REASON OF THE DEFENDANT’S MENTAL
RETARDATION**

[This is an entirely new rule.]

RULE 870. SCOPE.

The rules in Part C provide the procedure for determining if imposition of the death penalty is precluded due to the defendant’s mental retardation.

COMMENT: These rules are intended to apply only to cases arising within the context of the United States Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), that held “executions of mentally retarded criminals are ‘cruel and unusual punishments’ prohibited by the Eighth Amendment” as applied in Pennsylvania by *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011).

NOTE: New Rule 870 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed adoption of the new rule published for comment at 42 Pa.B. (, 2012).

[This is an entirely new rule.]

RULE 871. NOTICE OF MENTAL RETARDATION PRECLUDING IMPOSITION OF SENTENCE OF DEATH

(A) Notice of Mental Retardation Precluding Imposition of a Sentence of Death

A defendant who intends to offer evidence of mental retardation that would preclude the imposition of a sentence of death shall file with the clerk of courts not later than 90 days after arraignment, or within such other time as allowed by the court upon cause shown, a notice and certification of service on the attorney for the Commonwealth.

(1) The notice and certification shall be signed by the attorney for the defendant or the defendant if unrepresented.

(2) The notice shall contain specific available information as to the nature and extent of the alleged mental retardation and the names and addresses of witnesses, experts or otherwise, whom the defendant intends to call to establish mental retardation.

(B) Notice of Expert Evidence of Mental Retardation

A defendant who intends to introduce expert evidence relating to mental retardation that would preclude imposition of a sentence of death shall file with the clerk of courts not later than 90 days after arraignment, or within such other time as allowed by the court upon cause shown, a notice of the intention to offer this expert evidence and a certificate of service on the attorney for the Commonwealth.

(1) The notice and certificate shall be signed by the attorney for the defendant or the defendant if unrepresented.

(2) The notice shall contain specific available information as to the nature and extent of the alleged mental retardation or any other mental condition, and the names and addresses of the expert witness(es) whose evidence the defendant intends to introduce.

(C) Reciprocal Notice of Witnesses

Within 30 days after receipt of the defendant's notice of mental retardation that would preclude the imposition of a sentence of death, or notice of expert evidence of mental retardation or within such other time as allowed by the court upon cause shown, the attorney for the Commonwealth shall file and serve upon defendant's attorney, or the defendant if unrepresented, written notice of the names and addresses of all witnesses

the attorney for the Commonwealth intends to call to disprove or discredit the defendant's claim of mental retardation.

(D) If prior to or during trial a party learns of an additional witness or additional information which, if known, should have been included in the notice furnished under paragraphs (A), (B), or (C), the party shall promptly notify the other party's attorney, or if unrepresented, the other party, of the existence and identity of such additional witness.

(E) After docketing the notice, the clerk of courts immediately shall transmit the notice to the trial judge.

COMMENT: This rule sets forth the notice procedures when a defendant intends to assert his or her mental retardation to preclude imposition of the death penalty pursuant to *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011). Notices filed in accordance with this rule fall within the definition of "motion" in Rule 575 and must comply with the provisions of Rules 575 and 576.

The requirement in Paragraph (B) for a separate notice of intention to introduce expert evidence is intended to alert all the parties that there will be expert evidence and that the parties are prepared for this evidence. See Rule 872 regarding the requirement that any expert who has examined the defendant must prepare a written report stating the subject matter, the substance of the facts relied upon, and a summary of the expert's opinions and the grounds for each opinion.

Paragraph (E) emphasizes the requirement that the trial judge be informed of the filing of the notice at the earliest occasion to ensure the prompt collection of all materials relevant to the issue of the defendant's mental retardation.

Nothing in this rule precludes the trial judge from raising the issue of the defendant's mental retardation *sua sponte*.

NOTE: New Rule 871 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

**Report explaining the proposed adoption of the new rule published
for comment at 42 Pa.B. (, 2012).**

[This is an entirely new rule.]

RULE 872. EXAMINATION OF DEFENDANT BY MENTAL HEALTH EXPERT.

(A) EXAMINATION OF DEFENDANT

(1) BY AGREEMENT

(a) The defendant, defendant's counsel, and the attorney for the Commonwealth may agree to an examination of the defendant by the mental health expert(s) designated in the agreement for the purpose of determining mental retardation that would preclude imposition of A sentence of death.

(b) The agreement shall be in writing and signed by the defendant, defendant's counsel, and the attorney for the Commonwealth, or made orally on the record.

(c) Unless otherwise agreed, the mental health expert(s) promptly shall prepare a written report stating the subject matter, the substance of the facts relied upon, and a summary of the expert's opinions and the grounds for each opinion.

(2) BY COURT ORDER

(a) Upon motion of the attorney for the Commonwealth, if the court determines the defendant has provided notice of mental retardation that would preclude the imposition of a sentence of death or notice of intention to introduce expert evidence relating to mental retardation that would preclude imposition of a sentence of death, the court shall order that the defendant submit to an examination by one or more mental health experts specified in the motion by the Commonwealth for the purpose of determining the condition of mental retardation put in issue by the defendant.

(b) When the court orders an examination pursuant to this paragraph, the court on the record shall advise the defendant in person and in the presence of defendant's counsel:

- (i) of the purpose of the examination and the contents of the court's order;

- (ii) that the information obtained from the examination may be used at trial; and
- (iii) the potential consequences of the defendant's refusal to cooperate with the Commonwealth's mental health expert(s).

(c) The court's order shall:

- (i) specify who may be present at the examination; and
- (ii) specify the time within which the mental health expert(s) must submit the written report of the examination.

(d) Upon completion of the examination of the defendant, the mental health expert(s), within the time specified by the court as provided in paragraph (A)(2)(c)(ii), shall prepare a written report stating the subject matter, the substance of the facts relied upon, and a summary of the expert's opinions and the grounds for each opinion.

(B) DISCLOSURE OF REPORTS BETWEEN PARTIES

(1) The mental health experts' reports shall be confidential, and not of public record.

(2) Any mental health expert whom either party intends to call to testify concerning the defendant's condition of mental retardation must prepare a written report. No mental health expert may be called to testify concerning the defendant's condition of mental retardation until the expert's report has been disclosed as provided herein.

(3) The court shall set a reasonable time after the Commonwealth's expert's examination for the disclosure of the reports of the parties' mental health experts.

(C) PROTECTIVE ORDERS

Upon a sufficient showing, the court may at any time order that the disclosure of a report or reports be restricted or deferred for a specified time, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made *in camera*.

(D) SANCTIONS FOR NON-COMPLIANCE

At any time during the course of the proceedings, upon motion or *sua sponte*, if the court determines there has been a failure to comply with this rule, the court may order compliance, may grant a continuance, or may grant other appropriate relief. Upon motion, any hearing to determine if there has been a failure to comply may be held *in camera* and the record sealed until after disposition of the case.

COMMENT: This rule establishes the procedures for the examination of the defendant by a mental health expert(s) retained by the prosecution pursuant to an agreement by the parties, see paragraph (A)(1), or a court order, see paragraph (A)(2) in cases in which the defendant's mental retardation has been raised to preclude the imposition of a sentence of death.

"Mental Health Expert," as used in this rule, includes a psychiatrist, a licensed psychologist, a physician, or any other expert in the field of mental health who will be of substantial value in the determination of the issues raised by the defendant concerning his or her mental retardation.

Examination of Defendant

Paragraph (A)(1) is intended to encourage the defendant, defendant's counsel, and the attorney for the Commonwealth to agree to an examination of the defendant by the Commonwealth's mental health expert(s).

When the defendant, defendant's attorney, and the attorney for the Commonwealth agree that the defendant will be examined under this rule, at a minimum, the agreement should specify the time, place, and conditions of the examination, who may be present during the examination, and the time within which the parties will disclose the reports of their experts.

It is intended that the examining mental health expert(s), whether appointed pursuant to the agreement of the parties or a Commonwealth's motion, have substantial discretion in how to conduct an examination. The conduct of the examination, however, must conform to generally recognized

and accepted practices in that profession. Therefore, the examination of the defendant may consist of such interviewing, clinical evaluation, and psychological testing as the examining mental health expert(s) considers appropriate, within the limits of non-experimental, generally accepted medical, psychiatric, or psychological practices.

Nothing in this rule is intended to limit the number of examining experts the defense may use, nor is it to be construed as a limitation on any party with regard to the number of other expert or lay witnesses they may call to testify concerning the defendant's mental retardation.

The court is required in paragraph (A)(2)(b) to inform the defendant, in person on the record, about the request for a compelled examination. See Rule 118 (Use of Two-Way Simultaneous Audio-Video Communication in Criminal Proceedings). The court is to explain that the examination is being conducted at the request of the attorney for the Commonwealth and that the purpose of the examination is to obtain information about defendant's mental condition specifically with regard to mental retardation. In addition, the court should explain the procedures for the examination that are included in the court's order as set forth in paragraph (A)(2)(b), and explain the potential consequences of the defendant's failure to cooperate with the examination.

Paragraph (A)(2)(d) requires that the examining mental health expert(s) promptly prepare a written report and sets forth the minimum contents of that report. It is intended that the scope of the mental health expert's report be limited in the court's order to matters related to the defendant's mental condition at the time put into issue by the defendant.

Disclosure of Reports

After the examination of the defendant by the Commonwealth's mental health expert(s) is completed and the mental health expert's report has been prepared, the defendant and the Commonwealth are required in paragraph (B) to disclose the reports that are made by any experts either party intends to call to testify concerning the

defendant's mental retardation. The reports must be in writing, and should comply with the content requirements in paragraph (A)(2)(d). An expert witness, whether or not the expert witness has examined the defendant, cannot testify until the report is disclosed as provided in paragraph (B)(2) and (3). There may be situations in which the court would have to call a short recess to permit the expert to complete a written report and to give the parties an opportunity to review the report, such as when a mental health expert(s) is observing the defendant during the trial and will be called to testify on these observations.

When the parties agree to the examination, the time for the disclosure of the reports should be set by the agreement of the parties. The agreement should permit adequate time to review the reports and prepare for the proceeding. If the parties cannot agree, in cases proceeding pursuant to court order under paragraph (A)(2), the court should set the time for the disclosure of reports, which should afford the parties adequate time to review the reports and prepare for the proceeding.

Establishing a reasonable time frame and providing for the reciprocal disclosure are intended to further promote the fair handling of these cases. In no case should the disclosure occur until after the defendant has been examined by the Commonwealth's mental health expert(s) and the mental health expert(s) has prepared and submitted a written report. There may be cases in which, although proceeding pursuant to a court order, the parties, with the court's approval, agree to an earlier time for disclosure consistent with the purposes of this rule. This rule would not preclude such an agreement.

The procedures in paragraph (C) are similar to the existing procedures for protective orders in Rule 573(F).

Because the question of whether the imposition of a sentence of death is precluded due to the defendant's mental retardation ordinarily is a question reserved for sentencing, use of information obtained from the examination of a defendant by a Commonwealth's expert is

not to be disclosed or used until after the defendant has been found guilty. This may require that the Commonwealth's examination should be sealed until the penalty phase of defendant's trial takes place. See *Commonwealth v. Sartin*, 561 Pa. 522, 751 A.2d 1140 (2000). However, where the parties have agreed to a pretrial determination of the issue pursuant to Rule 873, earlier disclosure may be required.

See the Pennsylvania Rules of Evidence concerning the admissibility of the experts' reports and information from any examinations of the defendant by an expert.

Sanctions

The sanctions authorized by paragraph (D) may be imposed on any person who has failed to comply with any of the provisions of this rule, including the attorney for the Commonwealth, the defendant, defendant's counsel, or an expert.

When the defendant has refused to cooperate in the examination by the Commonwealth's mental health expert(s), before imposing a sanction, the court should consider whether the defendant's failure to cooperate (1) was intentional, (2) was the result of the defendant's mental condition, and (3) will have an adverse and unfair impact on the Commonwealth's ability to respond to the defendant's claim. The court also should consider whether ordering the defendant to resubmit to the examination would result in the defendant's cooperation.

NOTE: New Rule 872 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

**Report explaining the proposed adoption of the new rule published
for comment at 42 Pa.B. (, 2012).**

[This is an entirely new rule.]

RULE 873. OPTIONAL PRE-TRIAL HEARING.

- (A) If the parties agree, the issue of defendant's mental retardation precluding imposition of a sentence of death may be determined by the judge after a pre-trial evidentiary hearing.
- (B) The defendant shall appear in person with counsel at the hearing.
- (C) The defendant shall have the burden of going forward with the evidence.
- (D) No later than the beginning of the evidentiary hearing, the judge shall advise defendant that, by agreeing to have the issue of his or her mental retardation decided pre-trial, the defendant, if convicted, will not be permitted to seek a preclusion of the imposition of a sentence of death due to mental retardation with a jury. In these cases, the defendant may introduce evidence of the defendant's mental retardation for purposes of mitigation only.
- (E) The attorney for the Commonwealth and the defendant's attorney may introduce evidence and cross-examine any witness, including the examining mental health experts. The judge may call and interrogate witnesses as provided by law.
- (F) Within 30 days of the completion of the evidentiary hearing, the judge shall enter an order finding either that the defendant is mentally retarded and therefore is precluded from receiving a sentence of death or that the defendant is not mentally retarded.

COMMENT: In *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011), the Pennsylvania Supreme Court held that, pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), a determination that a defendant is precluded from receiving a sentence of death by reason of mental retardation generally is to be made by the jury.

As provided in *Sanchez*, the parties may agree to a pre-trial determination of the defendant's ineligibility for the death penalty to be made by the trial judge. The defendant has the burden of proof by a preponderance of the evidence to prove mental retardation. See *Commonwealth v. Sanchez*, ___ Pa. ___, 36 A.3d at 62-63. If the trial judge finds defendant is eligible for the death penalty, the defendant may introduce

evidence of mental retardation only during the penalty portion of trial and only for purposes of mitigation.

NOTE: New Rule 873 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed adoption of the new rule published for comment at 42 Pa.B. (_____, 2012).

(This is an entirely new rule.)

RULE 874. SENTENCING PROCEDURES IN CASES IN WHICH THE DEFENDANT'S MENTAL RETARDATION IS ASSERTED.

(A) Unless the issue is decided pretrial pursuant to rule 873, in a case in which the defendant has asserted that imposition of a sentence of death is precluded by reason of his or her mental retardation, after a return of a verdict of guilty of murder in the first degree, a sentencing hearing shall be held in which all sentencing evidence shall be presented, including, but not limited to, evidence of the defendant's mental retardation and evidence of aggravating and mitigating circumstances.

(B) After presentation of the evidence, the judge shall determine if sufficient evidence exists for the jury to decide whether the imposition of a sentence of death should be precluded by reason of mental retardation.

(C) Each party shall be entitled to present one closing argument addressing all sentencing issues, including the defendant's incompetence to be executed due to mental retardation and arguments for or against the sentence of death penalty. The defendant's argument shall be made last.

(D) Upon completion of argument, the judge shall instruct the jury solely upon the issue of the defendant's mental retardation and shall submit a special issue to the jury as to whether the defendant is mentally retarded.

(E) The question of the defendant's mental retardation shall be considered and answered by the jury prior to the consideration of any other sentencing issue and the determination of sentence.

(F) If the jury determines the defendant to be mentally retarded, the judge shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

(G) If the jury finds the defendant is not mentally retarded, the judge will instruct the jury on the mitigating and aggravating circumstances and the jury shall deliberate on whether or not to impose the death penalty.

COMMENT: In *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011), the Pennsylvania Supreme Court held that, pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), a determination that a defendant is precluded from receiving the death penalty by reason of mental retardation is to be made by the

jury as the first issue in sentencing. This rule provides the procedures for that jury determination.

This rule contemplates that a single capital sentencing hearing will be held in such cases but the jury's deliberations will be conducted sequentially with the defendant's mental retardation decided first. If the jury finds the defendant not mentally retarded, the judge will instruct the jury on the issues related to the imposition of a sentence of death, including the mitigating and aggravating circumstances, after which the jury will deliberate on the sentence.

Except as otherwise provided in Part C of this Chapter, sentencing shall proceed as provided in Chapter 7.

NOTE: New Rule 874 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed adoption of the new rule published for comment at 42 Pa.B. (, 2012).

(This is an entirely new rule.)

RULE 875. FORM FOR SENTENCING VERDICT SLIP IN CASES IN WHICH THE DEFENDANT'S MENTAL RETARDATION IS ASSERTED.

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :

vs. : NO. _____

:

FIRST DEGREE MURDER
SENTENCING VERDICT SLIP
FINDINGS REGARDING MENTAL RETARDATION

INSTRUCTIONS:

Indicate whether you unanimously agree that the defendant was proven to be mentally retarded at the time of the murder.

Upon completion of deliberations on the question of the defendant's mental retardation, return to the courtroom for further instructions from the judge.

FINDINGS:

_____ We, the jury, unanimously find that the defendant has proven by a preponderance of the evidence that the defendant was mentally retarded at the time of the murder.

_____ We, the jury, unanimously find that the defendant has not proven by a preponderance of the evidence that the defendant was mentally retarded at the time of the murder.

_____ We, the jury, cannot agree unanimously that the defendant was mentally retarded at the time of the murder.

_____ DATE _____ JURY FOREPERSON

COMMENT: The verdict slip form was created in 2012 to provide for those cases in which the question of a defendant's mental retardation that would preclude imposition of the death penalty is determined by the jury. See *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011). See also Rule 874. For optional procedures for a pretrial determination of the defendant's mental retardation, see Rule 873.

The judge should caution the jury that the verdict slip is to be used to record the sentencing verdict and findings, and that the slip should be completed only after their deliberations are concluded.

Note: Rule 874 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed adoption of the new Rule 874 providing the jury verdict slip form in cases involving a determination of mental retardation precluding imposition of the death penalty published for comment at 42 Pa.B. (_____, 2012).

REPORT

Proposed New Pa.Rs.Crim.P. 870-875
Proposed Amendments to Pa.Rs.Crim.P. 568, 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

The Supreme Court of Pennsylvania recently directed the Criminal Procedural Rules Committee to develop notice procedures for asserting claims arising under *Atkins v. Virginia*, 536 U.S. 304 (2002), a U.S. Supreme Court case that held that the execution of the mentally retarded violates the constitutional prohibition against cruel and unusual punishment, as applied in Pennsylvania in the case of *Commonwealth v. Sanchez*, 36 A.3d 24 (Pa. 2011).

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 Supreme Court found that the execution of the mentally retarded is “cruel and unusual punishment” within the meaning of the Eighth Amendment’s prohibition. In this decision, however, the 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 317.² The concept of individual state action on *Atkins* issues was reaffirmed in the case of *Schiro v. Smith*, 546 U.S. 6 (2005), that held that the states must develop their own legal

² The Committee had previously discussed *Atkins* in 2010, prior to the decision in *Sanchez*, ultimately concluding that, while some aspects of this issue would necessitate procedural rule changes, most of the questions were of a substantive nature and more appropriately decided by legislation or caselaw. The Committee therefore took no action at that time.

definition of mental retardation. There is currently no statute that provides for an *Atkins* determination in Pennsylvania.³

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). In *Sanchez*, the Court expressed frustration over the fact that ten years had gone by since the *Atkins* decision without the Legislature being able to develop *Atkins* standards in the Commonwealth. Although acknowledging that setting such standards should be a legislative matter, the delay caused the Court to act, using the *Sanchez* case to establish the parameters for making *Atkins* determinations.

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 Court placed the burden of proof on the proponent of the *Atkins* claim, usually the defendant, to prove mental retardation by a preponderance of the evidence.

Discussion

The Committee's examination initially focused on the question of the timing for raising this issue. The Committee believes that the rules should provide specific timing requirements for the raising of an *Atkins/Sanchez* claim. The Committee considered a time limit similar to that used for the Rule 568 (Notice of Insanity Defense) -- the motion is to be filed not later than the time required for filing an omnibus pretrial motion, 30 days after arraignment.

Ultimately, 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. This would be consistent with the requirements for the notice of aggravating circumstances

³ "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)

in Rule 802. A time period of ninety days after arraignment was 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 consider other procedures that should be addressed in the new rule including that the procedures should provide for an extension of this time limitation for cause shown, and that early involvement of the trial judge, soon after the notice was filed, would be helpful in providing appropriate supervision of the discovery and examination process. The Committee also noted 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 of these notice procedures.

In further discussions, the Committee considered whether procedures comparable to the procedures in Rule 568 be added to address 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 much of the procedures for making an Atkins/Sanchez determination as possible, would be helpful to the bench and bar and so agreed to exam procedures for how this determination is to be made, either by the jury or, upon agreement of the parties and a pretrial determination.

Proposed Rule Changes

Originally, the Committee considered placing these procedures in Rule 802. But given the increased scope of the proposal, placement here would make that rule very unwieldy. Therefore, the Committee concluded that the best structure for this proposal would be a series of separate rules grouped in a new subchapter (C) in Chapter 8 that would include new Rules 870 (Scope), 871 (Notice of Mental Retardation Precluding Imposition of the Death Penalty), and 872 (Examination of Defendant by Mental Health

Expert), 873 (Optional Pre-trial Hearing), 874 (Sentencing Procedures in Cases in which the Defendant's Mental Retardation is Asserted), and 875 (Form for Sentencing Verdict Slip in Cases in which the Defendant's Mental Retardation is Asserted).

Proposed new Rule 870 would establish that the rules in Part C provide the procedure for determining the defendant's ineligibility to be executed by reason of mental retardation. The *Comment* to Rule 870 would include citations to *Atkins* and *Sanchez*.

New Rule 871 would provide for the timing of the filing of the notices. The rule would also contain the reciprocal notice provision as well as the continuing duty to disclose. The disclosure requirements in Rule 871 are based on those for the competency to stand trial determination procedures found in Rule 568.

Additionally, Rule 871 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 871 would require the clerk of courts to immediately 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 would be considered "motions" and so the *Comment* would contain 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 872 would provide 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.

Proposed new Rule 873 would provide the procedures for an optional pre-trial hearing for the determination of the issue but, as provided in *Sanchez*, only if all the parties and the judge agree. Rule 873 also includes a time limit for when the decision of the pre-trial determination must be made. The judge would be required to enter an order within 30 days of the completion of the evidentiary hearing finding the defendant

either is or is not competent to be executed due to mental retardation. Paragraph (D) would require 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 the sentencing hearing would proceed when a jury makes this determination. The proposal provides that, after the guilt determination, there will be a single capital sentencing hearing in which all sentencing evidence will be presented, followed by a single argument on 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. New Rule 874 would detail this procedure.

A new separate jury verdict slip to record the jury's determinations regarding mental retardation has been developed and appears in Rule 875. Since it will be a distinct determination, the slip in Rule 875 is fairly short, with the only question that of 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.

While it is unlikely that a defendant to opt for a judge-alone trial and not seek the pre-trial determination, there might be a case in which that occurs. Therefore, the judge sentencing verdict slip in Rule 809 would be modified to incorporate this possibility and correlative changes also have been made to Rule 807 (B).

Finally, the proposal would make correlative changes to Rule 568 to indicate that procedures for Atkins/Sanchez determinations are in Chapter 8 Part (C).