

Proposed Revisions to the Comments to Pa.Rs.Crim.P. 590, 602, and 803

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania revise the Comments to Rules 590 and 803 to clarify the jury procedures that are available when a degree of guilt hearing is held before a jury. The proposal also recommends a revision to the Comment to Rule 602 to add a cross-reference to the case of Commonwealth v. Ford, 539 Pa. 85, 650 A.2d 433 (1994), that requires the defendant's presence at trial of capital offenses. 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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no later than Friday, Sept 7, 2012.

July 9, 2012

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Philip D. Lauer, Chair

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RULE 590. PLEAS AND PLEA AGREEMENTS.

(A) GENERALLY.

(1) Pleas shall be taken in open court.

(2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.

(3) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

(B) PLEA AGREEMENTS.

(1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record *in camera* and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of *nolo contendere* is based.

(C) MURDER CASES.

In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty or *nolo contendere* to a charge of murder generally, the degree of guilt shall be determined by a jury unless the attorney for the Commonwealth elects to have the judge, before whom the plea was entered, alone determine the degree of guilt.

COMMENT: The purpose of paragraph (A)(2) is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea or plea of *nolo contendere* is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v.*

Ingram, 455 Pa. 198, 316 A.2d 77 (1974); *Commonwealth v. Campbell*, 451 Pa. 198, 304 A.2d 121 (1973); *Commonwealth v. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973).

It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty or a plea of *nolo contendere*. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

- (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he or she has the right to trial by jury?
- (4) Does the defendant understand that he or she is presumed innocent until found guilty?
- (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
- (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?
- (7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?

The Court in *Commonwealth v. Willis*, 471 Pa. 50, 369 A.2d 1189 (1977), and *Commonwealth v. Dilbeck*, 466 Pa. 543, 353 A.2d 824 (1976), mandated that, during a guilty plea colloquy, judges must elicit the information set forth in

paragraphs (1) through (6) above. In 2008, the Court added paragraph (7) to the list of areas of inquiry.

Many, though not all, of the areas to be covered by such questions are set forth in a footnote to the Court's opinion in *Commonwealth v. Martin*, 445 Pa. 49, 54-55, 282 A.2d 241, 244-245 (1971), in which the colloquy conducted by the trial judge is cited with approval. See also *Commonwealth v. Minor*, 467 Pa. 230, 356 A.2d 346 (1976), and *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974). As to the requirement that the judge ascertain that there is a factual basis for the plea, see *Commonwealth v. Maddox*, 450 Pa. 406, 300 A.2d 503 (1973) and *Commonwealth v. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973).

It is advisable that the judge conduct the examination of the defendant. However, paragraph (A) does not prevent defense counsel or the attorney for the Commonwealth from conducting part or all of the examination of the defendant, as permitted by the judge. In addition, nothing in the rule would preclude the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. This written colloquy would have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea or plea of *nolo contendere*.

The "terms" of the plea agreement, referred to in paragraph (B)(1), frequently involve the attorney for the Commonwealth -- in exchange for the defendant's plea of guilty or *nolo contendere*, and perhaps for the defendant's promise to cooperate with law enforcement officials -- promising concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these. In any event, paragraph (B) is intended to insure that all terms of the agreement are openly acknowledged for the judge's assessment. See, e.g., *Commonwealth v. Wilkins*, 442 Pa. 542, 277 A.2d 341 (1971).

The 1995 amendment deleting former paragraph (B)(1) eliminates the absolute prohibition against any judicial involvement in plea discussions in order to align the rule with the realities of current practice. For example, the rule now permits a judge to inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement, or to give counsel, when requested, a reasonable period of time to conduct such a discussion. Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.

Under paragraph (B)(1), upon request and with the consent of the parties, a judge may, as permitted by law, order that the specific conditions of a plea agreement be placed on the record *in camera* and that portion of the record sealed. Such a procedure does not in any way eliminate the obligation of the attorney for the Commonwealth to comply in a timely manner with Rule 573 and the constitutional mandates of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Similarly, the attorney for the Commonwealth is responsible for notifying the cooperating defendant that the specific conditions to which the defendant agreed will be disclosed to third parties within a specified time period, and should afford the cooperating defendant an opportunity to object to the unsealing of the record or to any other form of disclosure.

When a guilty plea, or plea of *nolo contendere*, includes a plea agreement, the 1995 amendment to paragraph (B)(2) requires that the judge conduct a separate inquiry on the record to determine that the defendant understands and accepts the terms of the plea agreement. See *Commonwealth v. Porreca*, 528 Pa. 46, 595 A.2d 23 (1991).

Former paragraph (B)(3) was deleted in 1995 for two reasons. The first sentence merely reiterated an earlier provision in the rule. See paragraph (A)(3). The second sentence concerning the withdrawal of a guilty plea was deleted to eliminate the confusion being generated when that provision was read in conjunction with Rule 591. As provided in Rule 591, it is a matter of judicial discretion and case law whether to permit or direct a guilty plea or plea of

nolo contendere to be withdrawn. See also *Commonwealth v. Porreca*, 528 Pa. 46, 595 A.2d 23 (1991) (the terms of a plea agreement may determine a defendant's right to withdraw a guilty plea).

For the procedures governing the withdrawal of a plea of guilty or *nolo contendere*, see Rule 591.

Paragraph (C) reflects a change in Pennsylvania practice, that formerly required the judge to convene a panel of three judges to determine the degree of guilt in murder cases in which the imposition of a sentence of death was not statutorily authorized. The 2008 amendment to paragraph (C) and the Comment recognizes the Commonwealth's right to have a jury determine the degree of guilt following a plea of guilty to murder generally. See Article I, § 6 of the Pennsylvania Constitution that provides that "the Commonwealth shall have the same right to trial by jury as does the accused." See also *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648 (2006). **Any proceeding, held pursuant to paragraph (C), where the degree of guilt is determined by a jury should follow the procedures for jury trials contained in Chapter 6 Part C of these rules, Rules 631- 649.**

NOTE: Rule 319(a) adopted June 30, 1964, effective January 1, 1965; amended November 18, 1968, effective February 3, 1969; paragraph (b) adopted and title of rule amended October 3, 1972, effective 30 days hence; specific areas of inquiry in *Comment* deleted in 1972 amendment, reinstated in revised form March 28, 1973, effective immediately; amended 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; paragraph (c) added and *Comment* revised May 22, 1978, effective July 1, 1978; *Comment* revised November 9, 1984, effective January 2, 1985; amended December 22, 1995, effective July 1, 1996; amended July 15, 1999, effective January 1, 2000; renumbered Rule 590 and *Comment* revised March 1, 2000, effective April 1, 2001; amended September 18, 2008, effective November 1, 2008 [.] ; **Comment revised**
, 2012, effective , **2012.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the December 22, 1995 amendments published with the Court's Order at 26 Pa.B. 8 (January 6, 1996).

Final Report explaining the July 15, 1999 changes concerning references to nolo contendere pleas and cross-referencing Rule 320 published with the Court's Order at 29 Pa.B. 4057 (July 31, 1999).

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 September 18, 2008 amendments to paragraph (C) concerning juries determining degree of guilt published with the Court's Order at 38 Pa.B. 5431 (October 14, 2008).

Report explaining the proposed Comment revisions concerning jury procedures at degree of guilt published with the Court's Order at 42 Pa.B. (, 2012).

RULE 803. GUILTY PLEA PROCEDURE.

(A) When a defendant charged with murder enters a plea of guilty to a charge of murder generally, the degree of guilt shall be determined by a jury unless the attorney for the Commonwealth elects to have the judge, before whom the plea is entered, alone determine the degree of guilt.

(B) If the crime is determined to be murder of the first degree the sentencing proceeding shall be conducted as provided by law.

COMMENT: For the procedure for the entry of guilty pleas, see Rule 590. For the sentencing procedure if the crime is determined to be murder of the first degree, see Sentencing Code, 42 Pa.C.S. § 9711(b).

The 2008 amendment to paragraph (A) recognizes the Commonwealth's right to have a jury determine the degree of guilt following a plea of guilty to murder generally. See Article I, § 6 of the Pennsylvania Constitution that provides that "the Commonwealth shall have the same right to trial by jury as does the accused." See also *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648 (2006). **Any proceeding, held pursuant to paragraph (A), where the degree of guilt is determined by a jury should follow the procedures for jury trials contained in Chapter 6 Part C of these rules, Rules 631- 649.**

NOTE: Original Rule 352 adopted September 22, 1976, effective November 1, 1976; amended May 26, 1977, effective July 1, 1977; rescinded April 2, 1978, effective immediately. Former Rule 352 adopted July 1, 1985, effective August 1, 1985; renumbered Rule 353 February 1, 1989, effective July 1, 1989; renumbered Rule 802 and amended March 1, 2000, effective April 1, 2001; renumbered Rule 803 June 4, 2004, effective November 1, 2004; amended September 18, 2008, effective November 1, 2008 **[.] ; 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).

Final Report explaining the September 18, 2008 amendments to paragraph (A) concerning juries determining degree of guilt published with the Court's Order at 38 Pa.B. 5431 (October 14, 2008)

Report explaining the proposed Comment revisions concerning jury procedures at degree of guilt published with the Court's Order at 42 Pa.B. (_____, 2012).

RULE 602. PRESENCE OF THE DEFENDANT.

(A) The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict and the imposition of sentence.

(B) A corporation may appear by its attorney for all purposes.

COMMENT: Nothing in this rule is intended to preclude a defendant from affirmatively waiving the right to be present at any stage of the trial, *see e.g.*, *Commonwealth v. Vega*, **553 Pa. 255**, 719 A.2d 227 (Pa. 1998) (plurality) (requirements for a knowing and intelligent waiver of a defendant's presence at trial includes a full, on-the-record colloquy concerning consequences of forfeiture of the defendant's right to be present) or from waiving the right to be present by his or her actions, *see e.g.*, *Commonwealth v. Wilson*, **551 Pa. 593**, 712 A.2d 735 (Pa. 1998) (defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present). **But see Commonwealth v. Ford, 539 Pa. 85, 650 A.2d 433 (1994) ("[R]ight of defendant to be present at trial of capital offense is transformed into obligation due to gravity of potential outcome.")**

Former Rule 1117(c) was moved to Rule 642 (Trial *de novo*) in 2000 as part of the reorganization of the rules.

NOTE: Rule 1117 adopted January 24, 1968, effective August 1, 1968; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; renumbered Rule 602 and amended March 1, 2000, effective April 1, 2001; amended December 8, 2000, effective January 1, 2001 **[.] ; Comment revised , 2012, effective , 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5841 (November 26, 1994).

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 December 8, 2000 amendments published with the Court's Order at 30 Pa.B. 6546 (December 23, 2000).

Report explaining the proposed revision to the Comment cross-referencing Commonwealth v. Ford at 42 Pa.B. (_____, 2012).

REPORT

Proposed Revisions to the Comments to Pa.Rs.Crim.P. 590, 602, and 803

JURY PROCEDURES IN DEGREE OF GUILT HEARINGS; DEFENDANT'S PRESENCE AT CAPITAL TRIALS

The Criminal Procedural Rules Committee recently examined some of the procedures relating to murder trials. As a result of this examination, the Committee is considering *Comment* revisions to address two questions. The first would clarify in the *Comments* to Rules 590 and 803 the jury procedures that are available when a degree of guilt hearing is held before a jury. The second proposal would recommend a revision to the *Comment* to Rule 602 to add a cross-reference to the case of *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994), that requires the defendant's presence at trial of a capital offense.

Jury Procedures in Degree of Guilt Hearings

Several questions were raised with the Committee concerning certain procedures in degree of guilt hearings held pursuant to Rules 590(C) and 803(A). Rule 590(C) provides that, in non-capital murder cases, when a defendant enters a guilty or *nolo contendere* plea to murder generally, the degree of guilt shall be determined by a jury unless the Commonwealth elects otherwise. Rule 803(A) has a similar provision in capital cases.

Among the questions the Committee considered was whether jurors in a degree of guilt hearing should be permitted to take notes as provided in Rule 644 or whether it was permissible to provide written jury instructions as provided in Rule 646. Neither Rule 644 nor 646 specifically addresses degree of guilt hearings. The concern that was articulated was that, because most of the rules regarding procedures during jury proceedings speak in terms of occurring "at trial," degree of guilt hearings might not be considered "trials" under the rules and that a narrow reading might preclude jurors from using these procedures in degree of guilt hearings.

The consensus of the Committee was that these types of procedures should be available to jurors in degree of guilt hearings. During its discussion of these particular

procedures, the members observed that most jury trial procedures would be applicable in degree of guilt hearings. The conclusion of the Committee was that the proposal be broadened to provide that jurors in these types of hearings should be allowed all the procedures available to jurors in regular trials.

The Committee concluded that such an approach would be consistent with the existing law regarding degree of guilt hearings that degree of guilt hearings are comparable to trials generally. In *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648 (2006), which recognized that the Commonwealth has a right to a jury in degree of guilt hearings, the Supreme Court held that:

A plea of guilty to murder generally is a unique plea, unlike anything else provided in statute or decisional law... In a guilty plea, no evidence is presented against the defendant... A Rule 590(C) proceeding, on the other hand still requires the presentation of evidence, the arguments of counsel and the finding of facts in support of a verdict.... This option, created by rule and available only to murder defendants, is not a simple guilty plea. It is instead a variation of a waiver trial...
Id. at 660.

The Supreme Court also held that the 1998 amendment to the Pennsylvania Constitution that granted the Commonwealth a right to jury trial equal to that of the defendant applied to degree of guilt hearings. It was the *White* case that prompted the addition of paragraph (C) to Rule 590 and paragraph (A) to Rule 803 in 2008.

A degree of guilt hearing, therefore, should be conducted in the same manner as a regular jury trial. The Committee examined the jury rules found in Chapter 6 Part C (Jury Procedures) and concluded that they would all be applicable in degree of guilt hearings before a jury.

The *Comment* to Rule 590 would be revised to state that the procedures for jury trial listed in Chapter 6 Part C, Rules 631-649, should be followed in degree of guilt hearings. Similarly, Rule 803(A) also contains a provision for degree of guilt hearings in capital cases. An identical proposed revision to the *Comment* to that rule would be added as well.

Waiver of Defendant's Presence in Capital Cases

The Committee also discussed the issue of whether a defendant in a capital case may waive his or her presence during trial in a capital case. Although unusual, there were a few reported instances recently where the defendant sought to be absent from the trial.

This issue was definitively addressed in *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994). In *Ford*, one of the issues that the defendant in a capital murder case raised was the trial court's refusal to permit him to absent himself from the trial; the defendant claimed that his appearance was so menacing that fair trial could not be obtained with his presence. The Supreme Court held:

The Sixth Amendment to the United States Constitution, Article I Section 9 of the Pennsylvania Constitution, and the Pennsylvania Rules of Criminal Procedure 1117(a) guarantee the right of an accused to be present in court at every stage of a criminal trial. A defendant may waive this right as long as he is not charged with a capital offense. When charged with a capital offense, a defendant's right to be present at his own trial is transformed into an obligation because of the gravity of the potential outcome. See Pa.R.Crim.P. 1117(a); *Commonwealth v. Diehl*, 378 Pa. 214, 107 A.2d 543 (1954); *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912). The trial court correctly required the appellant's presence as he had no right to exclude himself. 539 Pa. at 100, 650 A.2d at 440.

The Committee agreed that a cross-reference to *Ford* in the *Comment* to Rule 602 would be helpful. The cross-reference also includes a parenthetical describing the requirement of the defendant's presence in a capital case.