Proposed New Pa.Rs.Crim.P. 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, and 862; and Amendments to Pa.Rs.Crim.P. 113, 119, and 800

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules of Criminal Procedure 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, and 862, and amend Rules of Criminal Procedure 113, 119, and 800. The proposed new rules and amendments establish the procedures for determining a defendant's competency to be executed and make correlative changes. 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 Report 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 Wednesday, June 23, 2010.

April 28, 2010 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Risa Vetri Ferman, Chair

Anne T. Panfil
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RULE 113. CRIMINAL CASE FILE AND DOCKET ENTRIES.

(A) The clerk of courts shall maintain the criminal case file for the court of common pleas. The criminal case file shall contain all original records, papers, and orders filed in the case, and copies of all court notices. These records, papers, orders, and copies shall not be taken from the custody of the clerk or court without order of the court. Upon request, the clerk shall provide copies at reasonable cost.

(B) The clerk of courts shall maintain a list of docket entries: a chronological list, in electronic or written form, of documents and entries in the criminal case file and of all proceedings in the case.

(C) The docket entries shall include at a minimum the following information:

(1) the defendant's name;

(2) the names and addresses of all attorneys who have appeared or entered an appearance, the date of the entry of appearance, **[and]** the date of any withdrawal of appearance**, and a notation when an attorney is appointed pursuant to Rule 852;**

(3) notations concerning all papers filed with the clerk, including all court notices, appearances, pleas, motions, orders, verdicts, findings and judgments, and sentencings, briefly showing the nature and title, if any, of each paper filed, writ issued, plea entered, and motion made, and the substance of each order or judgment of the court and of the returns showing execution of process;

(4) notations concerning motions made orally or orders issued orally in the courtroom when directed by the court;

(5) a notation of every judicial proceeding, continuance, and disposition;

(6) the location of exhibits made part of the record during the proceedings; and

(7) all other information required by Rules 114 and 576.

COMMENT: This rule sets forth the mandatory contents of the list of docket entries and the criminal case files. This is not intended to be an exhaustive list of what is required to be recorded in the docket entries. The judicial districts may require additional information be recorded in a case or in all cases.

The list of docket entries is a running record of all information related to any action in a criminal case in the court of common pleas of the clerk's county, such as dates of filings, of orders, and of court proceedings. The clerk of courts is required to make docket entries at the time the information is made known to the clerk, and the practice in some counties of creating the list of docket entries only if an appeal is taken is inconsistent with this rule.

Nothing in this rule is intended to preclude the use of automated or other electronic means for time stamping or making docket entries.

This rule applies to all proceedings in the court of common pleas at any stage of a criminal case.

The requirement in paragraph (C)(2) that all attorneys and their addresses be recorded makes certain there is a record of all attorneys who have appeared for any litigant in the case. The requirement also ensures that attorneys are served as required in Rules 114 and 576. *See also* Rule 576(B)(4) concerning certificates of service. **When an attorney is appointed pursuant to Rule 852, the docket entry must include a notation that the appointment is for the limited purpose of raising the defendant's competency to be executed.**

In those cases in which the attorney has authorized receiving service by facsimile transmission or electronic means, the docket entry required in paragraph (C)(2) must include the facsimile number or electronic address.

Paragraph (C)(4) recognizes that occasionally disposition of oral motions presented in open court should be reflected in the docket, such as motions and orders related to omnibus pretrial motions (Rule 578), motions for a mistrial (Rule 605), motions for changes in bail (Rule 529), and oral motions for extraordinary relief (Rule 704(B)).

NOTE: Former Rule 9024 adopted October 21, 1983, effective January 1, 1984; amended March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; renumbered Rule 9025 June 2, 1994, effective September 1, 1994. New Rule 9024

adopted June 2, 1994, effective September 1, 1994; renumbered Rule 113 and amended March 1, 2000, effective April 1, 2001; rescinded March 2, 2004 and replaced by Rule 114(C), effective July 1, 2004. New Rule 113 adopted March 2, 2004, effective July 1, 2004 **[.] ; amended , 2010, effective , 2010.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with the Court's Order at 34 Pa.B. (, 2004).

Report explaining the proposed amendments to paragraph (C)(1) concerning docket entries published at 40 Pa.B. (, 2010).

RULE 119. USE OF TWO-WAY SIMULTANEOUS AUDIO-VISUAL COMMUNICATION IN CRIMINAL PROCEEDINGS.

(A) The court or issuing authority may use two-way simultaneous audio-visual communication at any criminal proceeding except:

(1) preliminary hearings;

(2) proceedings pursuant to Rule 569(A)(2)(b);

(3) trials;

(4) sentencing hearings;

(5) parole, probation, and intermediate punishment revocation hearings; **[and]**

(6) proceedings pursuant to Chapter 8 Part B (Procedures For Determining Defendant's Competency To Be Executed); and

[6] (7) any proceeding in which the defendant has a constitutional or statutory right to be physically present.

(B) The defendant may consent to any proceeding being conducted using two-way simultaneous audio-visual communication.

(C) When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.

COMMENT: This rule was adopted in 2003 to make it clear that unless the case comes within one of the exceptions in paragraph (A), the court or issuing authority may use two-way simultaneous audio-visual communication in any criminal proceeding. Two-way simultaneous audio-visual communication is a type of advanced communication technology as defined in Rule 103.

Except in cases in which the defendant's competency to be executed is being challenged, [N] nothing in this rule is intended to limit any right of a defendant to waive his or her presence at a criminal proceeding in the same manner as

the defendant may waive other rights. *See*, *e.g.*, Rule 602 *Comment*.

Pursuant to Rule 861, a defendant who is challenging his or her competency to be executed is required to appear in person for the hearing on the motion. The defendant may not waive presence and appear by means of two-way simultaneous audio-visual communication.

Negotiated guilty pleas when the defendant has agreed to the sentence, probation revocation hearings, and hearings held pursuant to Rule 908(C) and the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq*., are examples of hearings in which the defendant's consent to proceed using two-way simultaneous audio-visual communication would be required. Hearings on post-sentence motions, bail hearings, bench warrant hearings, extradition hearings, and *Gagnon* I hearings are examples of proceedings that may be conducted using two-way simultaneous audio-visual communication without the defendant's consent. It is expected the court or issuing authority would conduct a colloquy for the defendant's consent when the defendant's constitutional right to be physically present is implicated.

Within the meaning of this rule, counsel is present when physically with the defendant or with the judicial officer conducting the criminal proceeding.

This rule does not apply to preliminary arraignments (Rule 540), arraignments (Rule 571), or to search warrant (Rule 203) and arrest warrant (Chapter 5 Part B(3)) procedures.

This rule is not intended to preclude the use of advanced communication technology for the preservation of testimony as permitted by Rules 500 and 501.

See Rule 542 for the procedures governing preliminary hearings.

See Chapter 6 for the procedures governing trials.

See Chapter 7 for the procedures governing sentencing hearings.

See Rule 708 for the procedures governing revocation of probation, intermediate punishment, and parole.

The paragraph (A)(5) reference to revocation hearings addresses *Gagnon* II-type probation (*Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) and parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)) revocation hearings, and is not intended to prohibit the use of two-way simultaneous audio-visual communication in hearings to determine probable cause (*Gagnon* I).

NOTE: New Rule 118 adopted August 7, 2003, effective September 1, 2003; renumbered Rule 119 and *Comment* revised June 30, 2005, effective August 1, 2006; amended January 27, 2006, effective August 1, 2006; *Comment* revised May 4, 2009, effective August 1, 2009**[.] ; amended , 2010, effective , 2010.**

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COMMITTEE EXPLANATORY REPORTS:

***Final Report explaining new Rule 118 published with the Court's Order at 33 Pa.B.* 830 (August 30, 2003).**

Final Report explaining the June 30, 2005 renumbering of Rule 118 as Rule 119 and the revision of the second paragraph of the Comment published at 35 Pa.B 3901 (July 16, 2005).

***Final Report explaining the January 27, 2006 amendments adding Rule 569 proceedings as a proceeding for which ACT may not be used published with the Court's Order at 36 Pa.B.* 694 (February 11, 2006).**

***Final Report explaining the May 4, 2009 revision to the Comment adding PCRA hearings as a proceeding to which the defendant may consent to be held using ACT published with the Court's Order at 39 Pa.B.* (, 2009).**

Report explaining the proposed changes to the rule concerning proceedings to determine the defendant's competency to be executed published at 40 Pa.B. (_____, 2010).

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

PART A. GUILT AND PENALTY DETERMINATION PROCEDURES

RULE 800. APPLICABILITY OF **[SUBCHAPTER] PART A**.

The rules **[of this chapter] in Part A** shall apply to the guilt and penalty determination phases of all cases in which the imposition of a sentence of death is authorized by law.

COMMENT: The 1990 amendment to this rule **[makes] made** it clear that **Part A of** Chapter 8 applies to both the guilt determination and sentencing phases of cases in which the death penalty is authorized. **The chapter was amended in 2010 by the addition of Part B providing special procedures for the determination of competency to be executed.**

Except as provided in **[this chapter] Part A**, trial and retrial procedures in death penalty cases are governed by the Rules of Criminal Procedure generally.

For sentencing generally in death penalty cases, see the Sentencing Code, 42 Pa.C.S. § 9711.

The sentencing procedures in **[this chapter] Part A** and in the Sentencing Code also apply when the trial court orders a new sentencing proceeding, or when the Supreme Court vacates a sentence of death and remands a case for redetermination of sentence pursuant to 42 Pa.C.S. § 9711 (h)(4).

When a jury is empaneled for the first time for sentencing, or for resentencing, the jury trial rules (Chapter **[600] 6**) apply. *See*, for example, Rule 631 (Examination and Challenges of Trial Jurors).

Part A [This chapter] does not provide procedures for those cases in which the Supreme Court vacates a sentence of death and remands the case to the trial court for the

imposition of a life imprisonment sentence. *See* 42 Pa.C.S. § 9711(h)(4).

For post-verdict procedures in cases in which a sentence of death is authorized by law, see Rule **[809] 811**.

NOTE: Previous Rule 351 adopted September 22, 1976, effective November 1, 1976; rescinded April 2, 1978, effective immediately. Present Rule 351 adopted July 1, 1985, effective August 1, 1985; *Comment* revised February 1, 1989, effective July 1, 1989; amended October 29, 1990, effective January 1, 1991; renumbered Rule 800 and amended March 1, 2000, effective April 1, 2001 **[.] ; amended , 2010, effective , 2010.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the October 29, 1990 amendments 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 Pa.B. (, 2000).

Report explaining the proposed new rules establishing the procedures for determining the defendant's competency to be executed published at 40 Pa.B. (, 2010).

PART B. PROCEDURES FOR CHALLENGING DEFENDANT'S COMPETENCY TO BE EXECUTED

[This is an entirely new rule.]

RULE 850. SCOPE.

The rules in Part B provide the exclusive procedure for challenging the defendant's competency to be executed.

COMMENT: These rules are intended to apply only to cases arising within the context of the United States Supreme Court decision in *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986), that held "the Eighth Amendment of the U.S. Constitution prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *See also Panetti v. Quarterman*, 551 U.S. 930 (2007).

NOTE: New Rule 850 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 851. DEFINITIONS.

The following words and phrases, when used in Part B of Chapter 8 of the Rules of Criminal Procedure, shall have the following meanings:

(1) "Mental Health Expert" 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 the defendant's competency to be executed.

(2) "Judge" includes the judge who imposed sentence or the judge of the court of common pleas presiding over the PCRA proceedings if different from the sentencing judge.

NOTE: New Rule 851 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 852. APPOINTMENT OF COUNSEL.

(A) In those death penalty cases in which direct review has not been completed prior to the effective date of this rule, upon remand of the record at the conclusion of direct review, which includes discretionary review in the Supreme Court of the United States, or at the expiration of time for seeking the review, the judge shall appoint counsel to represent defendant in proceedings under Part B of Chapter 8.

(B) In those death penalty cases in which direct review, including discretionary review in the Supreme Court of the United States, has been completed, or the time for seeking the review has expired prior to the effective date of this rule, the judge promptly, but in no case later than 7 days from the date the Governor signs the warrant of execution, shall appoint counsel to represent defendant in proceedings under Part B of Chapter 8.

(C) Before an attorney may be appointed under this rule, the attorney must meet the educational and experiential criteria set forth in Rule 801 (Qualifications For Defense Counsel in Capital Cases).

(D) When counsel is appointed, the judge shall enter an order indicating the name, address, and phone number of the appointed counsel. The order shall be docketed and served on the defendant, the appointed counsel, the most recent attorney of record, if any, and the attorney for the Commonwealth, pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

(E) Withdrawal of Counsel

(1) A motion to withdraw shall be filed with the clerk of courts and a copy of the motion shall be served on the attorney for the Commonwealth.

(2) The judge shall not permit counsel to withdraw his or her appearance until the judge appoints new counsel or new counsel enters an appearance.

(3) The judge's order granting the attorney leave to withdraw and appointing new counsel, or new counsel's entry of appearance, shall be entered on the docket.

(F) When the defendant satisfies the judge that the defendant is unable to pay the costs of the competency proceedings, the judge shall order that the defendant be permitted to proceed *in forma pauperis.*

COMMENT: The defendant may not waive counsel under these rules. *See Indiana v. Edwards,* 554 U.S. 208 (2008).

To the extent the procedures in this rule are different from the procedures in Rules 120, 122, and 123, the procedures in this rule take precedence.

Nothing in this rule is intended to preclude the entry of appearance by retained counsel.

Counsel must file a motion to withdraw in all cases, and counsel's obligation to represent the defendant, whether as retained or appointed counsel, remains until leave to withdraw is granted by the court. *See, e.g., Commonwealth v. Librizzi,* 810 A.2d 692 (Pa. Super. 2002).

The obligations of an attorney appointed pursuant to this rule are limited, where appropriate, to challenging the defendant's competency to be executed. The appointment of the attorney for purposes of determining the defendant's competency to be executed does not affect the appointment of the same attorney for other purposes under the rules or for the appointment of different attorneys for different purposes under the rules. *See, e.g.,* Rule 904(H) for the procedures for appointment of counsel in death penalty cases for purposes of pursuing post-conviction collateral relief. However, the attorney's obligations under this rule are separate and distinct from all other obligations of counsel.

When making the docket entry of the appointment of counsel under this rule, the clerk of courts must include a notation that this appointment only is for purposes of determining defendant's competency to be executed.

NOTE: New Rule 852 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 853. MOTION CHALLENGING DEFENDANT'S COMPETENCY TO BE EXECUTED AND REQUESTING STAY OF EXECUTION.

(A) After a warrant of execution has been issued, any motion challenging the defendant's competency to be executed and requesting a stay of execution shall be filed only by appointed counsel. Appointed counsel's motion shall be filed with the clerk of courts of the judicial district in which the sentence was imposed.

(B) A copy of the motion shall be served on the attorney for the Commonwealth, and on all other attorneys of record.

(C) The motion shall be signed by the appointed attorney. The signature of the attorney shall constitute a certification that the attorney has read the motion, that to the best of the attorney's knowledge, information, and belief there is good ground to support the motion, and that it is not interposed for delay.

(D) The motion shall bear the caption, number, and court term of the case or cases in which relief is requested, and shall request an order staying execution and an order declaring defendant incompetent to be executed. The motion also shall contain substantially the following information:

(1) the name of the defendant;

(2) the place where the defendant is confined;

(3) the date on which the defendant was sentenced;

(4) the name of the judge(s) who presided at trial or plea and imposed sentence;

(5) the date on which the record was transmitted to the Governor, the date the warrant of execution was issued, and the scheduled date for execution;

(6) a statement that clearly sets forth the alleged facts in support of the assertion that the defendant is incompetent;

(7) any affidavits, records, and other evidence supporting the above statement or a statement why such is not available;

(8) the names and addresses of any witnesses the defendant intends to call in support of the motion;

(9) the name and address of one mental health expert who will examine the defendant for the purpose of determining the defendant's competency to be executed;

(10) information concerning any previous proceedings in which the defendant challenged his or her competency; and

(11) a certificate of service.

(E) If the defendant's attorney learns of an additional witness whose identity, if known, should have been included in the motion, the defendant shall promptly notify the attorney for the Commonwealth and the judge of the existence and identity of such additional witness.

(F) If the motion sets forth facts that do not already appear of record in the case, the motion shall be verified by the sworn affidavit of some person having knowledge of the facts or by the unsworn written statement of such a person that the facts are verified subject to the penalties for unsworn falsification to authorities under the Crimes Code § 4904, 18 Pa.C.S. § 4904.

(G) If the motion is a second or subsequent motion, the motion also shall allege with specificity a change of circumstances subsequent to the previous determination of competency that is sufficient to challenge the defendant's competency to be executed.

COMMENT: Although paragraph (D)(9) requires the defendant to name one expert to examine the defendant, nothing in this rule is intended to preclude the defendant from requesting the judge to order one or more additional experts to conduct an examination of the defendant.

See Rule 575(C) for the format requirements for motions.

Consistent with the intent of these rules that there be open and full disclosure of information, paragraph (E) imposes a continuous duty to disclose witness information. *See, also,* Rule 856 (Evidentiary Material).

Pursuant to Rule 576, all filings by the parties must include a certificate of service setting forth the date and manner of service, and the names, addresses, and phone numbers of the persons served.

NOTE: New Rule 853 adopted , 2009, effective , 2009.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 854. DOCKETING AND ASSIGNMENT.

(A) Upon receipt of the motion challenging the defendant's competency to be executed, the clerk of courts promptly shall time stamp the motion with the date of receipt and make a docket entry at the same term and number as the underlying conviction and sentence reflecting the date of receipt, and promptly shall place the motion in the criminal case file.

(B) The clerk shall transmit the motion and the criminal case file to the judge who imposed sentence, if available, or to the president judge, or the president judge's designee, if the judge who imposed sentence is not available. When the judge who imposed sentence is unavailable, the president judge, or the president judge's designee, promptly shall assign and transmit the motion and the record to another judge.

COMMENT: *See* Rule 113 (Criminal Case File and Docket Entries) for the procedures concerning the retention of documents and making docket entries.

NOTE: New Rule 854 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 855. REVIEW OF MOTION; STAY OF EXECUTION.

(A) Within five days of receipt of the motion, the judge shall review the motion.

(B) When the motion complies with the requirements of Rule 853, the judge shall issue an order staying the execution and proceed pursuant to these rules.

(C) When the motion does not comply with the requirements of Rule 853, the judge shall deny the motion.

(D) When the warrant of execution is stayed by any judge in a collateral proceeding, the stay also shall stay these proceedings.

COMMENT: *See* Pa.R.A.P. 1572 for the procedures to petition for review if the judge denies the motion pursuant to paragraph (C).

Pursuant to paragraph (D), after the motion challenging the defendant's competency to be executed has been filed, if any judge stays the warrant of execution for reasons unrelated to the defendant's motion, the stay will act as a stay of these proceedings. "Collateral proceedings" as used in paragraph (D) include proceedings under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, and Chapter 9 of the Rules of Criminal Procedure, and Federal *Habeas Corpus.*

NOTE: New Rule 855 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 856. EVIDENTIARY MATERIAL.

(A) As used in Part B of Chapter 8, “evidentiary material” is all information relative to the issue of defendant's competency to be executed. The term includes:

(1) any and all medical, correctional, educational, and military records;

(2) raw data, tests, and test scores;

(3) notes, behavioral observations, reports, evaluations, results of scientific tests or experiments; and

(4) any other information of any kind

that form the basis for the defendant’s motion, would form the basis for the attorney for the Commonwealth’s response, and would be pertinent to the party’s or the judge’s expert for any examination under these rules.

(B) By filing the motion challenging the defendant’s competency to be executed, defendant is deemed to have waived all claims of confidentiality and evidentiary privilege to, and is deemed to have consented to the release of, any and all evidentiary materials relative to the issue of defendant's competency to proceed to execution only.

(C) Upon receipt of the motion to determine the defendant’s competency to be executed, the judge shall issue an order directing the parties, the Department of Corrections, and any public or private organization, entity, or agency having evidentiary materials relevant to the defendant’s motion to provide the judge with copies of the evidentiary materials in their possession. The order shall state the time within which the evidentiary materials are to be provided to the judge.

(D) The judge shall establish procedures for the collection, indexing, maintenance, and distribution of the evidentiary materials received under this rule. The evidentiary materials shall be made available for inspection and copying to the defendant’s attorney, the attorney for the Commonwealth, and the experts who will examine the defendant pursuant to these rules.

(E) All evidentiary materials provided to the judge, the defendant’s attorney, the attorney for the Commonwealth, and the experts who will examine the defendant pursuant to these rules shall be confidential, and not of public record unless and until

admitted by the judge at the hearing. The evidentiary materials shall not be disseminated further unless ordered by the judge.

(F) If the parties, Department of Corrections, and public or private organizations, entities, or agencies providing evidentiary materials pursuant to this rule, prior to or during the hearing, discover additional evidentiary materials relevant to the defendant's motion that were not previously available, such party, department, or agency promptly shall provide the evidentiary materials to the judge.

> COMMENT: The purpose of this rule is to ensure the prompt collection in one location of all materials relevant to the issue of the defendant's competency to be executed, and to provide access to these materials to the judge, the attorneys, and the experts who will be examining the defendant under these rules at an early stage in the proceedings.
>
> Pursuant to this rule, there is a continuing obligation to provide evidentiary materials to the judge when additional materials become available or are identified.
>
> The evidentiary materials collected under this rule are not part of the record of the proceedings until the materials are introduced at the hearing on the defendant's competency to be executed and made part of the record.
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> NOTE: New Rule 856 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 857. RESPONSE TO MOTION.

(A) Within 120 days of the filing and docketing of the motion, the attorney for the Commonwealth shall file a response to the motion.

(B) The response shall include:

(1) the name and address of one mental health experts who will examine the defendant for the purpose of determining the defendant's competency to be executed; and

(2) the names and addresses of all witnesses the attorney for the Commonwealth intends to call to disprove or discredit the defendant's claim of incompetency to be executed.

(C) If the attorney for the Commonwealth learns of an additional witness whose identity, if known, should have been included in the motion, the attorney for the Commonwealth shall promptly notify the defendant's attorney and the judge of the existence and identity of such additional witness.

(D) The attorney for the Commonwealth shall serve a copy of the response on all other attorneys of record.

COMMENT: The term "response" is used in this rule because the rule requires more information than ordinarily would appear in an "answer." In all other respects, "response" is the same as "answer" for purposes of determining the contents requirements, see Rule 575(B), for the format requirements, see Rule 575(C), and for the procedures for filing and service, see Rule 576.

Although paragraph (B)(1) requires the attorney for the Commonwealth to name one expert to examine the defendant, nothing in this rule is intended to preclude the attorney for the Commonwealth from requesting the judge to order one or more additional experts to conduct an examination of the defendant.

Consistent with the intent of these rules that there be open and full disclosure of information, paragraph (C) imposes a continuing duty to disclose witness information. *See, also,* Rule 856 (Evidentiary Material).

NOTE: New Rule 857 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 858. DISPOSITION WITHOUT A HEARING.

(A) No more than 20 days after the attorney for the Commonwealth files a response, the judge shall review the motion, the attorney for the Commonwealth's response, and other matters of record relating to the defendant's competency to be executed, and shall determine whether an evidentiary hearing is required.

(B) If the judge is satisfied from the review that the motion is patently frivolous, or, when the motion is filed after the defendant previously has been found competent to be executed, that the successive motion does not meet the requirements of Rule 853(F):

(1) the judge promptly shall give notice to the parties of the intention to deny the motion and shall state in the notice the reasons for the denial.

(2) The defendant may respond to the proposed denial of the motion within 20 days of the date of the notice.

(3) No later than 30 days from the date of the notice, or from the date of the defendant's response, the judge either shall:

(a) deny the motion and issue an order to that effect; or

(b) order an examination pursuant to Rule 859.

(4) For purposes of this proceeding, the order denying the motion shall be a final order that may be reviewed. The order shall

(a) advise the defendant of the right to file a petition for review from the final order denying the motion, and of the time within which the petition for review must be filed; and

(b) vacate any previous order staying execution.

(5) The clerk of courts immediately shall furnish a copy of the order denying the motion by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, the defendant’s attorney, and any other attorneys of record.

(6) Upon receipt of the order denying the motion, the Prothonotary of the Supreme Court promptly shall forward a copy of the order to the Governor.

COMMENT: The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any orders entered pursuant to this rule.

Pursuant to paragraph (B), the judge is permitted to deny a motion raising the defendant's competency to be executed without a hearing. To determine whether a denial of the motion without a hearing is appropriate, the judge should thoroughly review the motion, the response, and all other relevant information that is included in the record.

For the procedures for filing a petition for review with the Supreme Court in competency to be executed cases, see Rule of Appellate Procedure 1572.

NOTE: New Rule 858 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 859. EXAMINATION OF DEFENDANT.

(A**)** If the judge does not deny the motion under Rule 858, the judge promptly shall order the defendant to submit to an examination by the mental health expert specified in the defendant's motion and the mental health expert specified in the attorney for the Commonwealth's response.

(B) The judge may order the defendant to submit to an examination by one or more mental health experts designated by the judge, on the judge's own motion or motion of the defendant or the attorney for the Commonwealth, for the purpose of determining whether the defendant is competent to be executed.

(C) When the judge orders the examination of the defendant, the following procedures shall be followed.

(1) By filing a motion, the defendant is deemed to consent to submit to and fully cooperate in any competency examination by any expert, including but not limited to any experts retained on behalf of the defendant or by the Commonwealth, and any expert retained or appointed by the judge.

(2) The judge's order for an examination pursuant to this rule shall:

(a) inform the defendant of the purpose of the examination and of the potential consequences, including but not limited to, the denial of the motion, of the defendant's refusal to cooperate with any of the mental health expert(s);

(b) specify who may be present at the examination; and

(c) specify the time within which the examination must be conducted and the time within which the mental health expert(s) must submit the written report of the examination.

(3) All mental health experts who have examined the defendant pursuant to the judge's order shall write reports in which the experts shall consider and address the nature of the defendant's mental disorder, if any, and its relationship to the factors relevant to the defendant's competency to be executed.

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

(5) The reports of all the mental health experts who have examined the defendant pursuant to this rule shall be disclosed to the parties. The judge shall set a reasonable time after the last examination of the defendant before the hearing for the disclosure of the reports of the parties' and judge's mental health experts.

COMMENT: Although paragraph (A) limits the mandatory examination of the defendant to an examination by one expert designated by the defense and one expert designated by the attorney for the Commonwealth, nothing in this rule is intended to preclude either party from requesting the judge to order one or more additional experts to conduct an examination of the defendant. When considering the indigent defendant's request for experts, the judge should consider the reasonable fees and costs to be incurred by the court for such experts.

It is intended that the examining mental health expert(s) 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.

When the defendant has refused to cooperate in the examination, before imposing a sanction, the court should consider whether the defendant's failure to cooperate (1) was intentional and (2) was the result of the defendant's mental illness. The court also should consider whether ordering the defendant to resubmit to the examination would result in the defendant's cooperation.

Factors relevant to the defendant's competency to be executed include (a) the defendant's awareness of the fact of the defendant's impending execution, and (b) the defendant's understanding that the defendant is to be executed for the crime of murder. *See Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986).

NOTE: New Rule 859 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 860. STATUS REPORTS; PRE-HEARING CONFERENCE.

(A) The defendant's attorney and the attorney for the Commonwealth shall file a status report with the judge 60 days after the judge's order for the examination of the defendant, and no later than every 30 days thereafter. The status report shall advise the judge of the status of the examinations of the defendant, the status of the experts' reports of the examinations, and of any other matters pertinent to the case.

(B) The judge shall schedule a pre-hearing conference to review the status of the case. The pre-hearing conference shall be held no later than 6 months from the date of the judge's order for the examination of the defendant. For good cause shown, the judge may extend the date of the pre-hearing conference for one 30-day period.

(C) At the pre-hearing conference, the judge, the defendant's attorney, and the attorney for the Commonwealth shall consider:

(1) the time for the hearing;

(2) the simplification or stipulation of factual issues, including admissibility of evidence;

(3) the qualification of exhibits as evidence to avoid unnecessary delay;

(4) the number of witnesses who are to give testimony of a cumulative nature;

(5) such other matters as may aid in the determination of the defendant's competency to be executed.

(D) The defendant's attorney and the attorney for the Commonwealth shall have the right to record an objection to rulings of the judge during the conference.

(E) The judge shall place on the record the agreements or objections made by the defendant's attorney and the attorney for the Commonwealth and rulings made by the judge as to any of the matters considered in the pre-hearing conference. Such order shall control the subsequent proceedings unless modified at the hearing to prevent injustice.

COMMENT: The pre-hearing conference serves the same purpose as a pre-trial hearing in criminal cases. *See* Rule 570.

Nothing in this rule is intended to preclude the judge from conducting the pre-hearing conference before the end of the 6-month time period established by this rule if the examinations of the defendant have been concluded in less time. The judge also may conduct periodic status conferences before the pre-hearing conference.

NOTE: New Rule 860 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 861. HEARING; DISPOSITION.

(A) The issue of defendant's competency to be executed shall be determined by the judge after an 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) 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.

(E) Upon the conclusion of the hearing, if the judge finds that the defendant is not competent to be executed,

(1) the judge shall enter an order staying the defendant's execution or continuing the stay of execution until the defendant is mentally competent to be executed.

(2) The order shall be in writing and on the record and shall include specific findings of fact concerning each of the following factors:

(a) the defendant's awareness of the fact of the defendant's impending execution;

(b) the defendant's understanding that the defendant is to be executed for the crime of murder;

(c) the nature of the defendant's mental disorder, if any, and its relationship to the factors relevant to the defendant's competency.

(3) The judge shall order that the defendant receive appropriate mental health treatment, and may issue any supplementary orders appropriate to the proper disposition of the case.

(4) The clerk of courts immediately shall furnish a copy of the order by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(F) Upon the conclusion of the hearing, if the judge finds the defendant is competent to be executed, the judge shall enter an order denying the motion. Any previous order staying execution entered under the rules in Chapter 8 Part B shall be vacated.

(1) The clerk of courts immediately shall furnish a copy of the order by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(2) The order shall advise the defendant of the right to file a petition for review from the final order disposing of the motion, and of the time within which the petition for review must be filed.

(G) Upon receipt of the order granting or denying the motion, the Prothonotary of the Supreme Court promptly shall forward a copy of the order to the Governor.

(H) TIME FOR COURT ACTION

(1) No more than 30 days after the conclusion of the hearing, the judge shall dispose of the motion. When the 30-day time period must be delayed, the judge, for good cause shown, may enter an order extending the period for not longer than 15 days.

(2) If the judge does not act within the 30 days mandated by paragraph (G)(1), or within the 15-day extension, the clerk of courts shall send a notice to the judge that the time period for disposing of the motion has expired. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(3) If the judge does not dispose of the defendant's motion within 30 days of the clerk of courts' notice, the clerk immediately shall send a notice of the judge's non-compliance to the Supreme Court. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for the Commonwealth, the defendant, and defense counsel.

COMMENT: Pursuant to paragraph (B), the defendant must be present in person at the hearing. Advanced communication technology may not be utilized. *See* Rule 119. However, this paragraph is not intended to prevent the judge from excluding a disruptive defendant from the hearing. *See Illinois v. Allen,* 397 U.S. 337 (1970), in which the United States Supreme Court held "that a defendant can lose his right to be present at trial if, after he

has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *See also Commonwealth v. Basemore,* 525 Pa. 512, 582 A.2d 861 (1990).

Any evidence to be considered by the judge in making the determination about the defendant's competency to be executed, including the reports of the examining mental health experts and the evidentiary materials gathered pursuant to Rule 856, must be introduced by the parties at the hearing, and made a part of the record.

Concerning the judge's authority to call and interrogate witnesses, see Pa.R.E. 614 (Calling and Interrogating of Witnesses by Court) and Pa.R.E. 706 (Court Appointed Experts).

The law concerning burden in proving a defendant's competency has evolved from discussions concerning burden when the issue is the defendant's competency to be tried, see *Cooper v. Oklahoma*, 517 U.S. 348 (1996), *Commonwealth v. DuPont*, 545 Pa. 564, 681 A.2d 1328 (1996), to burden when the issue is the defendant's competency to assist with collateral proceedings, see *Commonwealth v. Zook,* 585 Pa. 11, 887 A.2d 1218 (2007), and to burden when the issue is the defendant's competency to be executed, see *Commonwealth v. Jermyn,* 539 Pa. 371, 652 A.2d 821 (1995). The Court has uniformly held that the burden is on the defendant to prove his or her incompetency by a preponderance of the evidence.

The requirement in paragraph (E)(1) that the clerk of courts immediately notify the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, and all defense counsel of record that the motion has been denied is intended to protect the defendant's right to review.

The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any orders entered pursuant to this rule.

NOTE: New Rule 861 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

[This is an entirely new rule.]

RULE 862. MONITORING OF DEFENDANT'S INCOMPETENCY.

(A) Following a determination that the defendant is incompetent to be executed, the Department of Corrections' treating psychiatrist and any other treating mental health expert shall monitor the defendant's competency to be executed.

(B) Every 6 months following the determination, without further orders from the judge, the treating mental health experts shall provide a written report on the defendant's current mental status and progress toward competency restoration to the judge, the attorney for the Commonwealth, and the defendant's attorney. A copy of the report also shall be provided to the Supreme Court if a petition for review filed pursuant to Pa.R.A.P. 1572 is pending.

(C) Unless a petition for review filed pursuant to Pa.R.A.P. 1572 is pending, following receipt of the treating mental health experts' reports, upon motion of the attorney for the Commonwealth or the defendant's attorney, or on his or her own motion, the judge shall conduct a hearing to determine the defendant's current mental status and progress toward competency restoration.

(D) At any time following a determination that the defendant is incompetent to be executed, the attorney for the Commonwealth may request a hearing to determine the defendant's competency to be executed by filing a motion with the judge alleging a material change in circumstances. A copy of the motion shall be served on the defendant and defendant's attorney.

(E) At the hearing conducted pursuant to paragraphs (C) or (D),

(1) the attorney for the Commonwealth shall have the burden of going forward with the evidence.

(2) The attorney for the Commonwealth, and the defendant's attorney may introduce evidence and cross-examine any witness, including the examining mental health experts.

(3) The judge may call and interrogate witnesses as provided by law.

(F) Upon the conclusion of the hearing, if the judge determines the defendant remains incompetent to be executed,

(1) the judge shall enter an order continuing the stay of execution until the defendant is mentally competent to be executed.

(2) The order shall be in writing and on the record and shall include specific findings of fact concerning each of the following factors:

(a) the defendant's awareness of the fact of the defendant's impending execution;

(b) the defendant's understanding that the defendant is to be executed for the crime of murder;

(c) the nature of the defendant's mental disorder, if any, and its relationship to the factors relevant to the defendant's competency.

(3) The judge shall order that the defendant shall continue to receive appropriate mental health treatment, and may issue any supplementary orders appropriate to the proper disposition of the case.

(4) The clerk of courts immediately shall furnish a copy of the order by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(G) If the judge determines the defendant is competent to be executed, the judge shall issue an order to that effect. Any previous order staying execution shall be vacated.

(1) The clerk of courts immediately shall furnish a copy of the order by mail or personal delivery to the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(2) The order shall advise the defendant of the right to file a petition for review of the order, and of the time within which the petition for review must be filed.

(H) Upon receipt of the order granting or denying the motion, the Prothonotary of the Supreme Court promptly shall forward a copy of the order to the Governor.

(I) TIME FOR COURT ACTION

(1) No more than 30 days after the conclusion of the hearing, the judge shall dispose of the motion. When the 30-day time period must be delayed, the judge, for good cause shown, may enter an order extending the period for not longer than 15 days.

(2) If the judge does not act within the 30 days mandated by paragraph (G)(1), or within the 15-day extension, the clerk of courts shall send a notice to the judge that the time period for disposing of the motion has expired. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for the Commonwealth, the defendant, the defendant's attorney, and all other attorneys of record.

(3) If the judge does not dispose of the defendant's motion within 30 days of the clerk of courts' notice, the clerk immediately shall send a notice of the judge's non-compliance to the Supreme Court. The clerk shall enter the date and time of the notice on the docket, and shall send a copy of the notice to the attorney for the Commonwealth, the defendant, and defense counsel.

> COMMENT: Nothing in this rule is intended to prevent the judge, on his or her own motion or upon motion of either party, from ordering examinations of the defendant by additional mental health experts for purposes of determining the defendant's current mental status and progress toward competency restoration.
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> Any evidence to be considered by the judge in making the determination about the defendant's competency to be executed, including the reports of the examining mental health experts and the evidentiary materials gathered pursuant to Rule 856, must be introduced by the parties at the hearing, and made a part of the record.
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> Concerning the judge's authority to call and interrogate witnesses, see Pa.Rs.E. 614 (Calling and Interrogating of Witnesses by Court) and 706 (Court Appointed Experts).
>
> The requirement in paragraph (G)(1) that the clerk of courts immediately notify the Prothonotary of the Supreme Court, the attorney for the Commonwealth, the defendant, and all defense counsel of record that the motion has been denied is intended to protect the defendant's right to review.
>
> The clerk of courts must comply with the notice and docketing requirements of Rule 114 with regard to any orders entered pursuant to this rule.

If a Pa.R.A.P. 1572 Petition for Review is filed, the hearing provisions of this rule would not be conducted during the time the petition is pending with the Supreme Court.

NOTE: New Rule 862 adopted , 2010, effective , 2010.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the proposed new rule published at 40 Pa.B. (, 2010).

REPORT

Proposed New Pa.Rs.Crim.P. 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, and 862; and Amendments to Pa.Rs.Crim.P. 113, 119, and 800

DETERMINATION OF COMPETENCY TO BE EXECUTED

I. INTRODUCTION

The Committee, in conjunction with the Appellate Court Procedural Rules Committee,[1] is planning to propose to the Supreme Court new Rules of Criminal Procedure 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, and 862 that would establish the procedures for determining a defendant's competency to be executed. The Committee also is proposing correlative amendments to Rules of Criminal Procedure 113, 119, and 800. These changes are being recommended at the request of the Supreme Court. In correspondence from Chief Justice Castille, and in footnote 7 in *Commonwealth v. Banks*, 596 Pa. 297, 943 A.2d 230 (2007), the Appellate Court Procedural Rules Committee and the Criminal Procedural Rules Committee were instructed to work together "to consider a framework for: (1) the timely filing and disposition of motions for stay of execution premised upon a claim that the defendant is incompetent to be executed; and (2) the timely litigation of the issue of whether such a defendant is indeed incompetent to be executed." The Chief Justice noted that the current Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 and the Criminal Rules do not provide an adequate process for instituting and disposing of cases in which the defendant's competency to be executed has to be determined, and suggested the Committees look at other jurisdictions' case law, rules, and statutes.

To accomplish this directive, a Joint Subcommittee of the Appellate Court Procedural Rules Committee and Criminal Rules Committee was formed to assist the two Committees in addressing the issue of competency to be executed. The Joint Subcommittee's recommendations have been fully reviewed and approved for publication by both Committees.

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[1] The Appellate Court Procedural Rules Committee proposal is for new Pa.R.A.P. 1572 and correlative amendments to Pa.Rs.A.P. 1512(b) and 1516 to provide for review by the Supreme Court of a trial court's determination as to whether a person under a warrant of execution is competent to be executed.

II. BACKGROUND

The United States Supreme Court in *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986) held, *inter alia,* that "the Eighth Amendment of the U.S. Constitution prohibits a State from carrying out a sentence of death upon a prisoner who is insane." The *Ford* Court, however, did not provide a clear set of procedures to be followed in cases challenging a defendant's competency to be executed, leaving the task of developing the means to enforce the constitutional prohibition to the states.[2] Those jurisdictions that have addressed *Ford* in case law, statutes, and rules have developed procedures that run the gamut from merely acknowledging that a defendant may not be executed if he or she is incompetent and providing for a stay of execution if the defendant is determined to be incompetent, to very detailed procedures encompassing the filing of a motion, the examination of the defendant, the evidentiary hearing, the judge's conclusions and the order, subsequent re-examination and re-hearing to determine the defendant's current status, and appeals.[3] In developing the new procedures for Pennsylvania, the Joint Subcommittee drew upon the procedures already in place in other jurisdictions. In addition, when relevant, procedures from Pennsylvania's current Criminal Rules have been incorporated into the new rules.

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[2] The minimum procedures suggested by Justice Powell in his concurring opinion in *Ford, supra,* and reiterated in *Panetti v. Quarterman*, 551 U.S. 930 (2007), include the requirements that the defendant make a substantial threshold showing of insanity, that the court appoint mental health experts, and that the defendant have a fair hearing, an opportunity to be heard, and an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.

[3] *See, e.g., Van Tran v. Tennessee,* 6 S.W.3d 257 (1999); *Washington v. Harris, III,* 114 Wash.2d 419, 789 P.2d 60 (1990); Code of Alabama § 15-16-23; Arizona Statutes § 13-4021 through § 13-4026; Arkansas Code § 16-90-506; Connecticut General Statutes § 54-101; Florida Rules of Criminal Procedure, Rule 3.811 and Rule 3.812; Code of Georgia § 17-10-60 through § 17-10-71; Kansas Code of Criminal Procedure § 22-4006; Louisiana Revised Statutes, Title 15 § 567.1; Mississippi Code § 99-19-57; Nevada Revised Statutes Title 14 § 176.425, §176.435, § 176.445, and § 176.455; New Mexico Statutes § 31-14-1 through § 31-14-7; Consolidated Laws of New York, Chapter 23 § 656; and Utah Code § 77-19-201 through § 77-19-206.

III. PLACEMENT OF NEW PROCEDURES

The first issue addressed by the Joint Subcommittee concerned the placement of the proposed new procedures. Recognizing that the issue of a defendant's competency to be executed is not ripe for consideration until after the Governor has issued a death warrant,[4] the Joint Subcommittee concluded that these claims do not "fit" within the procedural framework of the Criminal Rules governing post-conviction collateral proceedings, Rules 900-910, or the Post Conviction Relief Act (PCRA).[5] Because the new procedures would be invoked within the scope of a death penalty case, the Joint Subcommittee agreed Chapter 8 (Special Rules for Cases in Which Death Sentence is Authorized) would be the most appropriate chapter in which to incorporate the new procedures governing challenges to the defendant's competency to be executed. Furthermore, because the current rules in Chapter 8 apply only to the guilt and penalty determination phases of cases in which the imposition of a sentence of death is authorized, the new procedures should be set forth in a separate part of Chapter 8. Finally, given the seriousness of the process and the need for clarity, the Joint Subcommittee reasoned that each step in the process should be set forth in a separate rule rather than setting out all the procedures in one rule as is done in several other jurisdictions.

In view of these considerations, the new rules for determining a defendant's competency to be executed would be set forth in new Part B of Chapter 8. To accomplish this proposal, the current rules in Chapter 8 would become new Part A,

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[4] A death warrant is issued after the conclusion of all appeals or the expiration of the time for taking the appeals or upon the completion of post conviction collateral review. Pursuant to 61 P.S. § 3002(a), the Governor is required to issue a death warrant within 90 days of the Governor's receipt of the record from the Pennsylvania Supreme Court's Prothonotary "where a sentence of death has been upheld by the Supreme Court." See 42 Pa.C.S. § 9711(i). When a stay of execution has been lifted in a collateral proceeding, the Governor has 30 days from receiving notice that the stay has been lifted to reissue the warrant.

[5] The Joint Subcommittee noted that in *Van Tran v. State*, 6 S.W.3d 257 (1999), the Court held that Tennessee's PCRA is not an appropriate means for raising the issue of competency to execute.

titled “Guilt and Penalty Determination Procedures,” and new Part B would be titled “Procedures For Challenging Defendant’s Competency To Be Executed.”

IV. DISCUSSION

A. Procedural Framework of Proposed New Criminal Rules

This section provides a brief overview of the procedural scheme of the proposed new rules. The specific procedures are explained more fully in the description of the individual rules.

After extensive discussions and review of the case law, rules, and statutes in other jurisdictions, as well as of Pennsylvania case law, the Joint Subcommittee agreed to follow in the proposed new rules, to the extent possible, the procedural framework of the current PCRA rules. The procedures for challenging a defendant’s competency to be executed would be initiated by a motion (proposed new Rule 853). The defendant would be entitled to appointment of counsel (proposed new Rule 852). The motion would be docketed with the clerk of courts and assigned to a judge (proposed new Rule 854). The Commonwealth would be required to file a response to the motion (proposed new Rule 857). The judge is authorized to dispose of the motion without a hearing if, after review, the judge determines the motion is patently frivolous (proposed new Rule 858). If the motion is not disposed of without a hearing, there will be a hearing (proposed new Rule 861).

In addition, in view of the special nature of a challenge to the defendant’s competency to be executed, the Joint Subcommittee, drawing upon other jurisdictions’ rules and statutes and case law, included procedures specific to this proceeding. After the motion is filed, docketed, and assigned, the judge must review the motion and must determine whether to stay execution (proposed new Rule 855). If a stay of execution has been issued in a collateral proceedings, such as in a PCRA proceeding or in a federal *habeas* proceeding, then the proceedings challenging the defendant’s competency to be executed are premature and the stay in the collateral proceedings acts as a stay in the competency to be executed proceedings (proposed new Rule 855(D)). The judge, upon receipt of the motion, is required to issue an order directing copies of all relevant evidentiary materials be provided to the judge (proposed new Rule 856). If the motion is not disposed of without a hearing, the judge must order the

examination of the defendant by mental health experts (proposed new Rule 859). During the time after the order for the examination of the defendant is issued, the parties must file status reports and the judge must schedule a pre-hearing conference to review the status of the case (proposed new Rule 860). If the defendant is found incompetent to be executed, the defendant's incompetency will be monitored (proposed new Rule 862).

B. Explanation of the Proposed New Rules

RULE 850. SCOPE

Proposed new Rule 850 establishes that the rules in Part B provide the exclusive procedure for determining the defendant's competency to be executed.

The *Comment* to new Rule 850 includes citations to *Ford v. Wainwright,* 477 U.S. 399, 409-410 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007), the two federal cases directly addressing the issue that a defendant may not be executed if the defendant is found to be incompetent, clarifying that these new rules apply only in the context of *Ford* and *Panetti,* and are not addressing the issues raised in *Atkins v. Virginia,* 536 U.S. 304 (2002) ("executions of mentally retarded criminals are 'cruel and unusual punishments' prohibited by the Eighth Amendment").

RULE 851. DEFINITIONS.

Proposed new Rule 851 sets forth the definition of "mental health experts" and "judge" as used in the rules in Part B.

The Joint Subcommittee spent a great deal of time reaching an agreement about the definition of "mental health experts," debating at length how to ensure flexibility in the individuals who will examine the defendant and who will testify without compromising reliability in determining a defendant's competency to be executed. Ultimately, the Joint Subcommittee agreed to incorporate the same definition of "mental health expert" that is used in Rule 569 (Examination of Defendant by Mental Health Expert).

The definition of "judge" clarifies that the judge required to preside over the proceedings under these rules is the judge who imposed sentence or the judge presiding over the PCRA proceedings if different from the sentencing judge.

RULE 852. APPOINTMENT OF COUNSEL

Proposed new Rule 852 mandates the appointment of counsel, and is modeled on Criminal Rule 120 (Attorneys – Appearances and Withdrawals) and paragraph (H) (Appointment of Counsel in Death Penalty Cases) of Criminal Rule 904 (Entry of Appearance and Appointment of Counsel; *In Forma Pauperis*).

Before reaching the decision that counsel must be appointed in every case in which a defendant has received a sentence of death, the Joint Subcommittee spent a great deal of time researching and discussing who may initiate a challenge to the defendant's competency. This question is a major issue that arises both in Pennsylvania and in other jurisdictions in many of the cases in which there is a challenge to the defendant's competency to be executed.

This issue is addressed in many different ways in other jurisdictions. Several states, including California, Connecticut, Missouri, Nebraska, and Nevada, provide that the warden or sheriff having custody of the defendant may raise the defendant's competency to be executed.[6] Other states, including Louisiana and Mississippi, in addition to defendant's counsel, permit a next friend to file a petition challenging the defendant's competency to be executed.[7] Arizona and New Mexico include the prosecutor among the individuals who may file the petition. Arizona authorizes the director of the state department of corrections, the prisoner's attorney, or an attorney for the state to file a petition raising the defendant's competency to be executed. New Mexico requires the district attorney in the county in which the defendant is incarcerated to file a petition raising the issue of the defendant's competency to be executed after the

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[6] *See* California Penal Code § 3700.5, Connecticut General Statutes § 54-101, Missouri Statutes, Title XXXVII § 552.060, Nebraska Revised Statutes of 1943 § 29-2537, and Nevada Revised Statutes, Title 14 § 176.425.

[7] *See* Louisiana Revised Statutes § 567.1 and Mississippi Code § 99-19-57

warden notifies him or her that there is reason to believe the defendant is incompetent.[8]

In Pennsylvania, this issue arises frequently in case law. For example, in *In re Gary M. Heidnik, Petition of Maxine Davidson White, Next Friend*, 554 Pa. 177, 182, 184-185, 720 A.2d 1016, 1019, 1020 (1998), the Court observed that

> in many cases, however, because counsel, whether court-appointed or privately retained, is not engaged to provide open-ended service, a condemned prisoner will not be represented at the time an execution warrant is signed after completion of direct and collateral review. Moreover, as previously indicated, the Mental Health Procedures Act is inapplicable to such proceedings. Finally, there would appear to be no way in which the prisoner himself can initiate review of the issue. If he cannot comprehend the reasons for the penalty or its implications, he cannot conceive of the need to take any measures to postpone it. Conversely, if he can conceive of such a need, by definition he must comprehend the implications of the penalty, and the very filing of the application would refute its substance, *i.e*., the allegation of incompetency. In such cases, then, where all other litigation has been completed, it would seem that the issue of the condemned prisoner's competency to be executed can *only* be raised by a person acting on the prisoner's behalf. ... The latter situation [challenging competency to be executed], however, presents a conundrum. Since the ultimate proposition sought to be established is that the condemned prisoner is incompetent to be executed, it makes no sense to inquire preliminarily whether the prisoner is competent to forego raising that issue himself. As noted above at p. 1019, one who is able to raise the inquiry by definition cannot be incompetent, and one who is incompetent cannot raise the inquiry. And if one cannot raise the inquiry due to incompetence, one cannot knowingly forego raising it. As to this limited issue, then, next friend standing cannot be conditioned on a showing by the putative next friend that the real party in interest is unable to litigate his own cause due to mental incapacity. Accordingly, we must examine the applicability of the other conditions for next friend standing--whether the next friend is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," and whether there is a "significant relationship with the real party in interest."

See, also, Commonwealth v. Bronshtein, 556 Pa. 545, 729 A.2d 1102 (1999).

The Joint Subcommittee extensively evaluated the procedures in the different jurisdictions and reviewed Pennsylvania case law in trying to craft a fair and expeditious procedure addressing who would be authorized to initiate a challenge to the defendant's competency. Ultimately, the members agreed that the most reasonable process would

[8] *See* Arizona Revised Statutes § 13-4022 and New Mexico Statutes § 31-14-4.

be to limit the filing of the motion challenging a defendant's competency in the first instance to an attorney appointed by the judge for this purpose.

Pursuant to proposed new Rule 852, the appointment of counsel is the first step in the process. The Joint Subcommittee reasoned that, by having an attorney involved in the case from the point a defendant is sentenced to death, and the appeal process is completed or the time for appeal has expired, other individuals, who may have an interest in having a court determine the defendant's competency to be executed, including, for example, the individuals who are authorized to initiate these proceedings in other jurisdictions, would be able to communicate their thoughts and concerns to the appointed attorney at the beginning of the process.

The Joint Subcommittee also spent a great deal of time discussing the issue of whether the defendant should be permitted to proceed *pro se* in these cases. Some members posited that for the limited circumstance of a competency to be executed proceeding, the defendant never should be allowed to proceed *pro se.* Other members thought the decision should be left to the trial judge, noting that there may be cases in which the defendant is competent enough to knowingly and intelligently waive counsel and should be allowed to proceed without counsel, especially to challenge a motion that has been filed by someone else on the defendant's behalf. Taking note of *Indiana v. Edwards*, 128 S.Ct. 2379, 2388 (U.S. 2008), and the unique nature of these proceedings, the Joint Subcommittee agreed that the new rule should not permit the defendant to waive counsel in these cases.[9] A citation to *Indiana v. Edwards*, *supra,* would be included in the *Comment*.

The attorney's appointment pursuant to proposed new Rule 852 is limited to representing the defendant in proceedings under Part B of Chapter 8. However, as explained in the *Comment,* nothing in the rule is intended to prohibit the appointed attorney from representing the defendant in other proceedings or for the appointment of

[9] In *Indiana v. Edwards,* the U.S. Supreme Court held that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the constitution permits states to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

other attorneys to represent the defendant in other proceedings. The *Comment* emphasizes that the appointed attorney's obligations under this rule are separate and distinct from all other obligations of counsel.

The Joint Subcommittee also recognized that there may be cases in which the defendant wants to retain counsel. The members felt strongly that in the first instance, the judge must appoint counsel so the process can begin as soon as possible. However, as explained in the *Comment,* subsequent to the appointment of counsel, retained counsel may enter an appearance.

Paragraphs (A) and (B) set forth the time within which the judge must appoint counsel. Paragraph (A) addresses the time for appointment in cases in which direct review has not been completed prior to the effective date of the new rule. Similar to the requirements in Rule 904(H), the judge is required to appoint counsel upon the remand of the record at the conclusion of direct review or the expiration of the time for seeking the review. Paragraph (B) addresses the time for appointment in cases in which the direct review has been completed or the time to take the appeal has expired prior to the effective date of the new rule. In these cases, the judge is required to appoint counsel promptly, but in no case later than 7 days from the date the Governor signs the warrant of execution. The prompt appointment of counsel in these cases is beneficial for the defendant and the criminal justice system. The prompt appointment of counsel to file the motion challenging the defendant's competency to be executed ensures that the motion is properly and timely prepared and timely filed, ensures the defendant's interests are protected, and promotes judicial economy.

Paragraph (C) requires that the attorney appointed by the judge satisfy the educational and experiential requirements of Criminal Rule 801 (Qualifications for Defense Counsel in Capital Cases). There was discussion by the Joint Subcommittee and the full Committee about what experience the appointed attorney should have. Some members questioned whether requiring the appointed attorney to meet all the requirements of Rule 801 was the proper way to ensure that the most qualified attorneys for the proceeding would be appointed for these special types of cases. Rule 801 qualified attorneys may not have enough substantive knowledge concerning competency and mental health issues. Some members noted that, at the stage of the proceedings when a challenge to competency to be executed is raised, the experiential

and educational requirements that qualify counsel under Rule 801 are no longer necessary to provide quality representation on this narrow issue. Rather, in these members' opinion, it is more protective of the defendant's rights if the appointed attorney has experience raising challenges to a defendant's competency or with other issues in the mental health field, whether criminal or civil. The Joint Subcommittee and the full Committee questioned whether the requirements for an attorney appointed under this rule should be modified to include experience in these areas of law.

The members concluded that this is an issue about which they need more information from individuals with experience in the field before making a final determination. **Accordingly, the Committee invites the members of the bench and bar and other interested individuals to provide in writing to the Committee your ideas about the educational and experiential qualifications attorneys should satisfy to be appointed pursuant to proposed new Rule 852.**

Paragraph (D) sets forth the contents of the appointment order and the docketing and service requirements.

Paragraph (E) addresses the withdrawal of counsel. These provisions are taken from Criminal Rule 120(B). However, under the proposed new procedures, the judge may not permit counsel to withdraw until the judge appoints new counsel or new counsel enters an appearance. In these cases, it is critical that an attorney is monitoring the defendant's competency without any gaps in representation through the time for execution.

Paragraph (F) incorporates the provision from Rule 904(G) concerning proceeding *in forma pauperis.*

The final issue relates to *Commonwealth v Lucarelli*, 601 Pa. 185, 971 A.2d 1173 (2009). In *Lucarelli,* the Court held that a defendant may abrogate his or her right to counsel by dilatory conduct, stating:

> where a defendant's course of conduct demonstrates his or her intention not to seek representation by private counsel, despite having the opportunity and financial wherewithal to do so, a determination that the defendant be required to proceed *pro se* is mandated because that defendant has forfeited the right to counsel.

Id. at 1179. Several members opined that this case should apply to the appointment of

counsel in the context of determining competency to be executed and should be cited in the rules. The other members disagreed with this assessment, maintaining that, in the context of competency to execute, the defendant never should be permitted to waive counsel, even when being uncooperative, since the behavior could be a feature of the defendant's mental illness. Ultimately, the members agreed merely to reference *Lucarelli* in the Committee's explanatory *Report.*

RULE 853. MOTION TO DETERMINE DEFENDANT'S COMPETENCY TO BE EXECUTED.

Proposed new Rule 853 sets forth the procedures for the appointed attorney to file a motion challenging the defendant's competency to be executed, and enumerates the required contents of the motion. These motion procedures incorporate procedures from the general motions rules, Rules 575 and 576.

Paragraph (A) establishes the time for filing the motion. Consistent with the case law, the motion may not be filed until after a warrant of execution has been issued. Furthermore, the paragraph reiterates that the motion may only be filed by the appointed counsel. The motion must be filed with the clerk of courts in the judicial district in which the defendant was sentenced.

Paragraph (B), consistent with paragraph (B) (Service) of Rule 576 (Filing and Service of Motions), requires service of the motion on the attorney for the Commonwealth. In addition, the rule requires that a copy of the motion be served on "all other attorneys of record." The members noted that there may be other attorneys representing the defendant in, for example, a PCRA proceeding or in other matters, and reasoned that these attorneys need to be aware of this additional, collateral proceeding.

Paragraph (C) incorporates the provisions of paragraph (A)(2)(a) of Rule 575 (Motions and Answers) requiring the attorney to sign the motion, and making it clear that the signature is a certification that the attorney has read the motion, that there are grounds to support the motion, and that the motion is not interposed for delay.

Paragraph (D) incorporates the contents of the motion provisions from Rule 575 modified to address the special nature of the challenge of a defendant's competency to be executed. The motion is required to request both an order staying execution and an order declaring that the defendant is incompetent to be executed. In addition, the

defendant must include the name and address of one expert who will examine the defendant for the purpose of determining the defendant's competency to be executed, and information concerning any previous proceedings in which the defendant challenged his or her competency. The *Comment* explains that although the defendant is limited to naming one mental health expert to examine the defendant, nothing in the rules is intended to preclude the defendant from requesting that the judge order one or more additional experts to examine the defendant.

Paragraph (E) incorporates the requirement of a continuing duty to disclose from Rule 573 (Pretrial Discovery and Inspection). If the defendant's attorney learns of additional witnesses whose identity, if known, should have been in the motion, the defendant's attorney promptly must notify the attorney for the Commonwealth and the judge. This idea is explained further in the *Comment.*

Paragraph (F) incorporates the provisions from Rule 575(A)(2)(g) requiring a verification by sworn affidavit or unsworn written statement of any facts that do not appear of record.

Finally, paragraph (G) addresses the additional contents of the motion that are required when the motion is a second or subsequent motion challenging the defendant's competency to be executed. The motion must allege a change in circumstances subsequent to the previous determination of competency.

The *Comment* includes cross-references to Rule 575 for the format of motions requirements and to Rule 576 concerning certificates of service.

RULE 854. DOCKETING AND ASSIGNMENT.

This rule incorporates provisions from Rule 903 concerning the docketing and assignment of the matter. The members agreed following the procedures in Rule 903 makes sense because practitioners and court personnel are familiar with these procedures and understand the need for docketing and assigning these cases promptly.

Paragraph (B) requires the clerk of courts to transmit the motion and the criminal case file to the judge who imposed sentence, if available, or to the president judge, or the president judge's designee. We added the "president judge's designee" to accommodate systems in which, for example, the criminal court administrative judge would handle these types of assignment.

RULE 855. REVIEW OF MOTION; STAY OF EXECUTION

The Joint Subcommittee spent a great deal of time discussing what happens after the motion is filed. The members decided that, at this stage of the proceedings, before any further proceedings may occur, the judge must review the motion to determine if the motion fully complies with the requirements of Rule 853, that is, whether the motion is facially adequate.[10]

As set forth in paragraph (A), the judge is required to make this review within five days of receipt of the motion. If the judge finds that the motion does comply with the requirements of Rule 853 and is facially adequate, paragraph (B) requires the judge to issue a stay of execution and the case proceeds pursuant to the rules. The judge is not permitted to make a substantive determination at this point.

Paragraph (C) requires the judge to deny the motion if the judge finds that the motion does not comply with the requirements of Rule 853.

The members considered whether the rules should address the defendant's right to appeal the judge's denial of the motion at this stage. Agreeing that the defendant could petition for review of the denial of the motion, the Joint Subcommittee added a cross-reference to Rule of Appellate Procedure 1572 (Review of Determinations of Competency to be Executed) to the *Comment*.

Proposed new Rule 855 also addresses the situation in which the competency to be executed proceedings have been initiated and other collateral proceedings also are initiated. The members expressed concern about having these two proceedings moving forward at the same time if the judge in the collateral proceeding issues a stay of execution. They noted that a great deal of time and resources may be wasted because the defendant's mental status could change markedly during the period of the collateral review and because a determination of incompetency to be executed must be

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[10] The members agreed, if the motion is facially adequate, that is, if the defendant's attorney has included all the information required by proposed new Rule 853(D), the defendant will have made a substantial showing of incompetency. This threshold showing is consistent with the requirements in the case law. *See, e.g. Ford v. Wainwright*, 477 U.S., at 426, and *In re Gary M. Heidnik,* 554 Pa., at 187, 720 A.2d, at 1021.

made when execution is imminent. The members concluded that this issue should be addressed in proposed new Rules 855(D) with a requirement that, if a stay has been issued for reasons other than competency to be executed, that stay acts as a stay of competency proceedings under this Part. The *Comment* elaborates on this concept and provides examples of related "collateral proceedings" as used in paragraph (D).

RULE 856. EVIDENTIARY MATERIAL.

In developing the proposed new procedures, the Joint Subcommittee considered the application of the discovery procedures in the Criminal Rules to a proceeding challenging the defendant's competency to be executed. Agreeing that in this special case there is a need for full reciprocal disclosure of all relevant information, the members created an entirely new concept for the Criminal Rules that provides a different mechanism in competency to be executed cases for gathering all necessary and relevant information in a pool maintained by the judge. This new procedure, as explained in the *Comment,* is intended to ensure the gathered information is available to the parties and the experts at the earliest possible time.

The first issue addressed was what to call this new rule. The Joint Subcommittee looked at other Pennsylvania rules and statutes, and the rules and statutes in other jurisdictions for ideas, but did not find much help from these sources. The members settled on "evidentiary material" as the title of the new rule, with a definition of what "evidentiary material" means in paragraph (A). The information covered by the definition is intentionally broad in scope with the limitation being the need for the information. To be subject to this new rule, the information being sought must relate to facts that form the basis of the defendant's motion, or would form the basis of the Commonwealth's response, or would be pertinent to the experts for purposes of examinations under the rules.

Paragraph (B) addresses the issue of obtaining information that otherwise may be confidential or privileged material. The members agreed that, because the defendant is challenging his or her competency to be executed, and because the information being gathered is vital to a fair and just resolution of the challenge, the rule should require that, by filing of the motion, the defendant is deemed to have waived confidentiality and privilege claims and to have consented to the release of the

evidentiary materials, but only to the extent these materials are relevant to the issue of competency to be executed.

Paragraph (C) establishes the procedures for gathering the information. When the judge receives the motion, the judge is required to issue an order directing the individuals and organizations that most likely will have information relevant to the defendant's motion – the parties, the Department of Corrections, and any public or private organization, entity, or agency – to provide the judge with copies of the evidentiary materials in their possession, and to specify in the order the time within which the evidentiary materials must be provided. The judge is the best person to gather the information because the materials in this pool are to be available to the judge, both sides, and the experts. In addition, because there are not that many cases challenging the defendant's competency to be executed, the members do not believe this requirement will be an onerous burden on the judge.

Paragraph (D) places with the judge the responsibility for establishing procedures for collecting, indexing, maintaining, and distributing the materials. In addition, the paragraph requires the materials to be made available for inspection and copying to the parties and the experts who will examine the defendant.

During the discussions about this new procedure, the members recognized the potential problems concerning public access to evidentiary materials and the defendant's privacy rights. After reviewing the confidentiality provisions in paragraph (B)(1) of Rule 569 (Examination of Defendant by Mental Health Expert), the members agreed that paragraph (E) should make it clear that the evidentiary materials gathered pursuant to this rule are confidential and not of public record unless and until admitted by the judge at the hearing. This protection is emphasized in the *Comment.* Furthermore, dissemination of the evidentiary materials is controlled by the judge.

Paragraph (F) provides for the continuous duty to provide information when it becomes available. This requirement is further explained in the *Comment.*

RULE 857. RESPONSE TO MOTION.

Rule 857 is modeled on Rule 906(E)(1) and requires the attorney for the Commonwealth to file an answer to the motion. The members agreed the timing in this rule should be consistent with the timing for answers in death penalty cases provided in

the PCRA rules; that is, within 120 days of the filing and service of the motion. *See* Rule 906(E). Although cognizant of the Court's interest in timely disposition of these cases, the members agreed the attorney for the Commonwealth needs sufficient time to review all the records in the case as well as all the relevant information being gathered pursuant to proposed new Rule 856 to prepare a response.

The members also thought this "answer" should be called a "response" because the attorney for the Commonwealth not only is answering the motion, but also is supplying the name of one mental health expert to examine the defendant and the names and addresses of other witnesses the attorney for the Commonwealth intends to call. To make it clear that the "response" is subject to the contents of answers provisions in Rule 575(b), the format requirements in Rule 575(c), and the filing and service provisions in Rule 576, the members agreed to include a clarification in the *Comment*.

Paragraph (B) requires the attorney for the Commonwealth to name the expert he or she wants to examine the defendant. The *Comment* explains that the attorney for the Commonwealth also may request the court to order additional examinations of the defendant.

Paragraph (B) also requires the attorney for the Commonwealth to disclose the names and addresses of any witnesses the Commonwealth intends to call to disprove or discredit the defendant's claim of incompetency to be executed. The Committee believes the requirement for disclosure of witnesses is important to be consistent with the intent of the proposed new rules to have full, open, and continuous disclosure. Correlative with this requirement, paragraph (C) requires the continuing disclosure of witness information. This requirement is emphasized in the *Comment.*

Finally, paragraph (D) requires service on "all other attorneys of record."

RULE 858. DISPOSITION WITHOUT A HEARING.

Proposed new Rule 858 is taken from Rule 907 (Disposition Without Hearing). Before settling on incorporating the Rule 907 procedures, the Joint Subcommittee debated whether the judge should be able to dismiss the motion challenging the defendant's competency to be executed without a hearing at all or before the defendant has been examined by the mental health experts. The members noted the procedural

flow of cases at this point varies among the jurisdictions, with some jurisdictions requiring the judge to make a preliminary finding whether the matter should proceed, with others proceeding to examination before determining whether to proceed, and with others conducting the hearing without the requirement of a preliminary finding.[11]

Ultimately, the members concluded that if the standard for the dismissal is strict enough to limit the application of this rule, the judge should be permitted to dismiss without a hearing. Thus, the rule requires that before dismissing a case without a hearing, the judge must make a preliminary finding whether the motion is patently frivolous. The patently frivolous standard is a stricter standard than what is required in Rule 907.

Paragraph (A) imposes a 20-day time limit after the Commonwealth files a response within which the judge must review the motion, the Commonwealth's response, and other matters of record relating to the defendant's competency to be executed to determine whether a hearing is required. The 20-day time limit is consistent with the time limit on dismissals of PCRA petitions in death penalty cases set forth in Rule 909(B)(1). The members agreed to use the same timing because, at this point in the proceedings when there is a challenge to the defendant's competency to be executed, it is just as important to have the case keep moving as it is in the PCRA context.

Paragraph (B) sets forth the requirement that a motion must be patently frivolous to dismiss without a hearing. In addition, the paragraph provides as a separate standard for dismissal of a successive motion that does not comply with the

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[11] *See, e.g.,* Florida Rules of Criminal Procedure, Rule 3.811(e) (if the judge, "upon review of motion and submissions has reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant the stay of execution and may order further proceedings which may include a hearing"); Consolidated Laws of New York, Chapter 43 § 656 ("promptly upon filing the petition, the court shall appoint a commission of three psychiatric examiners ... to inquire into the inmate's competence"); and Ohio Revised Code, Title XXIX, § 2949.28 ("if the judge finds that probable cause exists to believe that the convict is insane, the judge shall hold a hearing to determine whether the convict is insane. If the judge does not find that probable cause of that nature exists, the judge may dismiss the matter without a hearing").

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requirements of Rule 853(F). In any case in which the judge determines the motion is patently frivolous or the successive motion does not comply with Rule 853(F), the case will proceed as provided in the remainder of paragraph (B). As in Rule 909(B)(2), the judge is required to give notice of the intention to deny the motion, paragraph (B)(1), and the defendant has a 20-day time period within which to respond, paragraph (B)(2).

Paragraph (B)(3) sets forth the judge's options after providing the notice of the intention to deny the motion. The proposed new rule requires that, within the 30-day period after the notice to the defendant, or in cases in which the defendant responds to the notice, 30-days from the date of the defendant's response, the judge is required to either deny the motion, or, if the judge decides not to deny the motion, the judge is required to order an examination of the defendant, the next step in the proceeding. *See* proposed new Rule 859.

Paragraph (B)(4) addresses what occurs after the judge denies the motion. The paragraph makes it clear that this order is a final order that may be reviewed, and requires the judge in the order to advise the defendant of the right to file a petition for review. In addition, when the motion is denied, the judge must vacate any previous order staying execution.

Paragraph (B)(5) incorporates the provision from Rule 909(B)(7)(b) that the clerk of courts must send a copy of the order to the Supreme Court as well as to the defendant, defendant's attorney, and all other attorneys of record. When the Supreme Court receives the order, the Prothontary is required to forward a copy of the order to the Governor.

RULE 859. EXAMINATION OF DEFENDANT.

The provisions in proposed new Rule 859 providing for the examination of the defendant by mental health experts are an amalgamation of the examination procedures Rule 569 and the procedures in some of the other jurisdictions.

Paragraph (A) requires the judge to order that the defendant submit to an examination by the one mental health expert named in the defendant's motion and by the one mental health expert named in the attorney for the Commonwealth's response. In reaching the conclusion that each side should be permitted as of right to have the defendant be examined by one mental health expert, the Committee considered that in

most of these cases, the defendant is proceeding *in forma pauperis* so the cost for the defendant's mental health expert will be borne by the court. In balancing the defendant's rights, the fair disposition of the case, and the fiscal implications, the members opined that providing for one examination as of right is reasonable. Recognizing, however, that there may be legitimate reasons why a defendant or the Commonwealth would require additional examinations by different specialists, the Committee agreed to provide that both sides may request that the judge order additional examinations, but this decision is discretionary with the judge. This provision is set forth in paragraph (B). The *Comment* includes an explanation that the judge has an obligation when deciding whether to order additional examinations under paragraph (B) to take into consideration the reasonable fees and costs of the examinations that would be incurred by the court when the defendant is indigent. Paragraph (B) also permits the judge to order the defendant to submit to examinations by mental health experts designated by the judge.

Paragraph (C) sets forth the procedures following the judge's order for the examinations. Paragraph (C)(1) requires that, by filing the motion, the defendant is deemed to consent to and cooperate in any competency examinations.

Paragraph (C)(2) explains the contents of the judge's order, and requires the judge's order to (1) inform the defendant of the purpose of the examination and the potential consequences; (2) specify who may be present; and (3) specify the time within which the examination must be conducted and the time within which the mental health expert's report must be submitted. These procedures are comparable to the procedures in Rule 569(A)(2)(b) and (c).

Paragraphs (C)(3) and (C)(4) address the mental health experts' reports. The experts who examine the defendant pursuant to the Court's order must prepare written reports. Similar to the provision in Rule 573 that expert's reports are confidential, Rule 859(C)(4) provides that the reports are confidential and not of public record. The experts in their reports must address the nature of the defendant's mental disorder and its relationship to the factors relevant to defendant's competency to be executed. These factors are derived from *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007), and are set forth in the *Comment.*

One procedure used by other jurisdictions that was considered but rejected concerns requiring that the examinations be videotaped. The members discussed at length the issues related to videotaping including public access, custody of the videotape, access by parties and the judge, implications of the Wiretap Act, *etc.* Ultimately, in view of all these issues, they agreed videotaping should not be required in these cases, but noted that, in any given case, the judge has the discretion to permit the videotaping.

Another issue that was debated concerns the exchange of the mental health experts' reports. The members considered an approach modeled on the disclosure provisions in Rule 573 (Pretrial Discovery and Inspection) that would provide for a reciprocal exchange prior to the hearing on defendant's motion of the reports of the experts whom the parties intend to call at the hearing. However, after considering the unique nature of the proceedings in competency to be executed cases, and reaffirming the importance of the full and free exchange of information incorporated into the new procedures, the members concluded that all of the reports of all the mental health experts who examine the defendant pursuant to Rule 859 must be disclosed to the parties. The judge is required to set a reasonable time after the last examination before the hearing for the disclosure of the reports.

The final issue discussed with regard to the examination of a defendant challenging his or her competency to be executed concerns *Commonwealth v Sam,* 597 Pa. 523, 952 A.2d 565 (2008). In *Sam,* the Court addressed whether "an inmate who is presently incompetent may be compelled to take psychiatric medication in order to render him competent to determine whether to pursue relief under the Post Conviction Relief Act (PCRA)," holding that the defendant could be forced to take the medications. The Court concluded by stating "the PCRA court erred in determining that Appellee may refuse the administration of antipsychotic medication under the circumstances of this case," *Id,* 597 Pa. at 562, and 952 A.2d at 598. The members discussed whether *Sam* affects a *Ford/Banks* analysis and whether the case would play any role in determining a defendant's competency to be executed. The members ultimately agreed that *Sam* is limited to the facts of that case, and, therefore, the issue of compelled medication would not be addressed in these new rules.

The *Comment* fleshes out the conduct of the examinations, the considerations when a defendant refuses to cooperate, and the factors relevant to the defendant's competency to be executed.

RULE 860. STATUS REPORTS; PRE-HEARING CONFERENCE.

During the discussions in proposed new Rule 859 about the exchange of reports, the Joint Subcommittee noted that, because there may be more than one expert examining the defendant by court order, and the examinations of the defendant could be conducted on multiple occasions, there should be a mechanism in the rules to keep the judge apprised of the status of the examinations. To accomplish this, the members thought periodic status reports from the parties to the judge followed by a pre-hearing conference similar to the pretrial conference in Rule 570 was a reasonable requirement.

Proposed new Rule 860 sets forth the procedures for the status reports and the pre-hearing conference. Paragraph (A) requires that the first status reports be filed 60 days after the judge orders the examinations. Subsequent status reports must be filed no later than every 30 days after the first reports. The status reports advise the judge of the status of the examinations, the status of the experts' reports, and any other matters pertinent to the case.

Paragraph (B) requires the judge to schedule a pre-hearing conference. The conference must be held no later than 6 months from the date of the judge's order for the examination of the defendant. The rule permits the judge to extend the date of the conference for one 30-day period for good cause.

Paragraphs (C), (D), and (E) are taken from Rule 570 and explain what occurs at the pre-hearing conference.

The *Comment* explains that the judge may conduct the pre-hearing conference before the end of the 6-month period if the examinations of the defendant are concluded in less time. The *Comment* also makes it clear that the judge may conduct periodic status conferences before the pre-hearing conference. The Joint Subcommittee thought it important to make it clear that the judge has the discretion to shorten the times as well as keep closer tabs on what is happening to ensure the case proceeds in a timely and efficient manner.

RULE 861. HEARING; DISPOSITION.

Proposed new Rule 861 is modeled on Rules 908 and 909 and establishes the procedures for the hearing on the defendant's challenge of his or her competency to be executed and disposition of the motion following the hearing. Paragraph (B) requires that the defendant appear in person for the hearing, not by two-way simultaneous audio-visual communication. In the *Comment,* the parameters of the "in person" requirement are addressed. The U.S. Supreme Court noted in *Illinois v. Allen*, 397 U.S. 337 (1970), that:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. 343. The Pennsylvania courts in numerous cases have relied on the *Allen* holding in deciding that unruly, disruptive defendants may be excluded from proceedings. *See, e.g., Commonwealth v. Basemore,* 525 Pa. 512, 582 A.2d 861 (1990). These cases are cited in the *Comment.*

In discussing the procedures for the hearing, the issue arose whether to address in the proposed new rule the burden of going forward and the burden of proof. After a thorough review of the relevant case law and other jurisdictions' rules and statutes, the members settled upon providing in the rule that the defendant as the movant has the burden of going forward with the evidence at the hearing. Concerning the issue of the burden of proof, the members concluded the burden of proof is substantive and would not be appropriate to address in the text of the rule. However, the members agreed from their reading of the relevant cases that the burden of proving competency is on the defendant by a preponderance of the evidence, and that citation to some of the relevant case law in the *Comment* would be helpful to the bench and bar.

Paragraph (E) sets forth the procedures the judge is to follow if the judge finds the defendant is not competent to be executed. These procedures are taken from

Rules 908 and 909 as well as from other jurisdictions and include the requirements that the judge order the defendant to receive appropriate mental health treatment and include on the record specific findings of fact concerning

> (a) the defendant's awareness of the fact of the defendant's impending execution;
>
> (b) the defendant's understanding that the defendant is to be executed for the crime of murder; and
>
> (c) the nature of the defendant's mental disorder, if any, and its relationship to the factors relevant to the defendant's competency.

These specific findings are taken from *Ford* and *Panetti.*

Paragraph (F) sets forth the procedures when the judge finds the defendant is competent to be executed. The judge must vacate any previous order staying execution that was entered under the rules in Chapter 8 Part B.

Paragraph (F)(1) incorporates the provision from Rule 909(B)(7)(b) that the clerk of courts must send a copy of the order to the Supreme Court as well as to the defendant, defendant's attorney, and all other attorneys of record. When the Supreme Court receives the order, the Prothontary is required to forward a copy of the order to the Governor.

Paragraph (H) is modeled on the provisions of Rule 909(B)(3), (4), (5), and (6) but has shorter time periods. Under paragraph (H), the judge is required to dispose of the motion within 30 days of the conclusion of the hearing, with a 15-day extension for good cause. If the motion is not disposed within the time periods, the clerk of courts is required to send the judge a reminder, and if the judge does not act, then the clerk must send notice of the judge's non-compliance to the Supreme Court.

In addition to addressing the burden of proof, the *Comment* explains several other points that merit additional elaboration. The first point concerns the evidentiary material gathered pursuant to Rule 856 and the experts' reports. The members thought a paragraph should be added to the *Comment* to caution the parties that this information must be introduced at the hearing and made part of the record. In addition, a reference to Rules of Evidence 614 and 706 is included to explain the authority of the judge to call and interrogate witnesses.

RULE 862. MONITORING OF DEFENDANT'S INCOMPETENCY

Proposed new Rule 862 provides the procedures for the review of the defendant's status following a determination that the defendant is not competent to be executed. Recognizing that the defendant's status may change over time and with treatment, most of the other jurisdictions have established procedures for the periodic review of the defendant's status. Agreeing that this subsequent review makes sense, the members incorporated procedures from some of the other jurisdictions into proposed new Rule 862.

Paragraph (A) requires the Department of Correction's (DOC) treating psychiatrist and any other expert who is treating the defendant at this time to monitor the defendant's competency.

Paragraph (B) requires the treating mental health experts every six months to provide a written report on the defendant's current mental status and progress toward competency restoration to the judge, the attorney for the Commonwealth, and the defendant's attorney. The 6-month period runs from the date the defendant is found to be incompetent to be executed and will occur whether or not a petition for review has been filed. The treating mental health experts are required to provide these reports automatically without requiring the judge to issue an order. In addition, if there is a petition for review pending in the case, a copy of the report must be provided to the Supreme Court.[12]

Paragraph (C) sets forth the procedures for requesting a hearing. Because the defendant is being monitored by mental health experts after a determination that the defendant is not competent to be executed, the members reasoned it was not necessary to require that a hearing on the defendant's current status be conducted in every case following receipt of the treating mental health experts' reports. Rather, a hearing only should be held if the parties request a hearing on a motion, or the judge determines a hearing is necessary. No hearings will be conducted during the time a petition for review is pending.

[12] Pursuant to the proposed changes to the Appellate Rules, the appeal in these cases will be by means of a petition for review filed directly with the Supreme Court.

Paragraph (D) permits the attorney for the Commonwealth at any time after the defendant has been found to be incompetent to be executed to request a hearing if the attorney for the Commonwealth alleges there is a material change in circumstances. This is an exception to the proscription on conducting a hearing while a petition for review is pending. A copy of the motion must be served on the defendant and the defendant's attorney.

Paragraph (E) sets forth the procedures for the review hearing. The members agreed that this review hearing would be conducted in the same manner as the initial hearing in Rule 861, the parties would be able to introduce evidence and cross-examine witnesses, and the judge may call and interrogate witnesses as provided by law. As with the discussion about the hearing procedures in Rule 861, the members spent a great deal of time determining who has the burden to go forward and the burden of proof in these review hearings. Because the attorney for the Commonwealth is the movant in these cases, he or she has the burden of going forward.

Paragraphs (F), (G), (H), and (I) and the correlative provisions in the *Comment* for the most part are the same as the provisions in proposed new Rule 861(E), (F), (G), and (H) and *Comment* concerning the procedures (1) when the judge finds that the defendant remains incompetent to be executed; (2) when the judge determines the defendant is competent to be executed; and (3) the time for court action. The Rule 862 *Comment* also makes it clear that the rule is not intended to preclude the judge, on his or her own motion or on motion of the parties, to order examinations of the defendant for the purposes of determining the defendant's current mental status and progress toward competency restoration.

II. CORRELATIVE RULE CHANGES

Correlative to the new procedures in these rules, Rules 113, 119, and 800 would be amended as explained below.

RULE 113. CRIMINAL CASE FILE AND DOCKET ENTRIES.

Rule 113 would be amended by adding to paragraph (C)(2) the requirement that the clerk of courts make a notation in the docket when the attorney is appointed pursuant to proposed new Rule 852. In addition, the *Comment* would be revised to

include a cross-reference to proposed new Rule 852 further emphasizing that the notation in the docket when counsel is appointed under these rules should specify that the appointment is for the limited purpose of raising the defendant's competency to be executed. Rule 113 also is cross-referenced in the proposed new Rule 852 *Comment*.

RULE 119. USE OF TWO-WAY SIMULTANEOUS AUDIO-VIDEO COMMUNICATION IN CRIMINAL PROCEEDINGS.

The changes to Rule 119 add the proceedings to determine the defendant's competency to be executed to the exceptions to using two-way simultaneous audio-visual communication in paragraph (A). A correlative provision would be added to the Rule 119 *Comment*. As discussed above in the summary of the proposed new Rule 861 procedures, the defendant must be present in person at the hearing on the defendant's motion challenging competency to be executed.

RULE 800. APPLICABILITY OF PART A.

Rule 800 would be amended to conform with the addition of new Part B to accommodate the new competency to be executed procedures.