

**STATE OF VERMONT
VERMONT SUPREME COURT
FEBRUARY TERM, 2010**

Order Promulgating Amendments to the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 16.1(c) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 16.1. DISCLOSURE TO THE PROSECUTION

* * * * *

(c) **Witnesses.** On request of the prosecuting attorney, the defendant's attorney shall disclose the names and address of persons whom ~~he~~ the defendant's attorney intends to call as witnesses at the trial, provided that the prosecuting attorney and ~~his~~ agents of the prosecuting attorney may thereafter interview any such witnesses not on the list supplied by ~~him~~ the prosecuting attorney under Rule 16(a)(1), other than law enforcement officers who have participated in the investigation, only in the presence of defendant's attorney or by deposition under Rule 15. The fact that a witness' name is on a list furnished under this subdivision and that ~~he~~ the witness is not called shall not be commented upon at the trial.

Reporter's Notes—2010 Amendment

Rule 16.1(c) is amended to create an exception to the general rule that the prosecution may interview witnesses disclosed under this subdivision only in the presence of the defense attorney or by deposition. The exception would allow the prosecutor to speak privately to law enforcement officers who have participated in the investigation. The purpose of the exception is to ensure that prosecutors are able to discuss and prepare their cases with the investigating officers without limitation. The amendment also eliminates several masculine pronouns in the interest of gender neutrality.

2. That Rule 18(b) of the Vermont Rules of Criminal Procedure be added to read as follows (new matter underlined):

RULE 18. PLACE OF PROSECUTION AND TRIAL

(a) In General. Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the county or territorial unit in which the offense was

committed. The trial of a proceeding in the district court shall be held either in the circuit in which the proceeding was filed or in any contiguous circuit within the territorial unit.

(b) Violations of Conditions of Pretrial Release. After arraignment the prosecution and trial for the offense of violation of conditions of pretrial release shall be had in the county or circuit of the court which issued the pretrial release order. The prosecution may be had in the county or circuit where the offense occurred if the defendant has also been charged with a new offense other than violation of conditions of pretrial release.

Reporter's Notes—2010 Amendment

Rule 18 is divided into two subdivisions and subdivision (b) is added to address the concern that prosecutions for violation of conditions of release are currently pursued in many cases in counties where the violations have occurred, but not in the county where the conditions had been originally imposed. The rule reflects the view that, absent a new criminal charge, the interests of both the State and defendant to be addressed by such prosecution are best served in the court that imposed the conditions being enforced. The amendment would require the court to transfer the case to the issuing court on its own once the arraignment was complete in the county where the violation occurred, but would permit the filing and arraignment to take place in either location. The potential logistical problems of requiring initial filing and arraignment to take place in a county removed from the location of the violation in all cases may be of sufficient concern to warrant the initial proceeding to be commenced locally and then be transferred by the court.

3. That Rule 24(d) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 24. TRIAL JURORS

* * * * *

(d) Alternate Jurors.

(1) In General. The court may direct not more than four jurors in addition to the regular jury to be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

(2) Procedure. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and

challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors.

(3) *Discharging or Retaining Alternate Jurors.* An alternate juror who does not replace a regular juror shall may be discharged after the jury retires to consider its verdict, or the court may retain alternate jurors after the jury retires to deliberate. The court shall ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged.

(4) *Replacement of Jurors after Jury Retires.* If, after the jury retires to deliberate, a juror becomes or is found to be unable or disqualified to perform his or her duties and is discharged, the court shall have discretion to replace that juror with a retained alternate. The court may decline to replace a juror even if the failure to do so will cause a mistrial. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

(5) *Peremptory Challenges.* Each side is entitled to one peremptory challenge in addition to those otherwise allowed, whenever one or two alternate jurors are to be impanelled, and to two peremptory challenges in addition to those otherwise allowed whenever more than two alternate jurors are to be impanelled. Such additional peremptory challenges may be used against alternate jurors only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

Reporter's Notes—2010 Amendment

Rule 24(d) is amended to adapt for Vermont practice Federal Rule of Criminal Procedure 24(c)(3) as adopted in 1999, which permits the court to retain previously selected alternate jurors after the jury has retired to deliberate. The amendment also follows the pattern of the federal rule by dividing subdivision (d) into numbered paragraphs for clarity.

Presently, Rule 24(d) requires that alternate jurors be discharged after the jury retires to deliberate. In a number of recent Vermont cases, including a murder trial, a juror was unable for various reasons to complete deliberations after the alternates had been discharged. Since unlike Federal Rule 23(b)(3) as amended in 1983, the Vermont Rules do not expressly give the court discretion to order trial by a jury of 11 in such a case, the only option was to obtain the consent of the parties to a lesser number pursuant to V.R.Cr.P. 23(b). Given the increasing number in Vermont of longer and more complex jury trials that provide more possibilities of juror disability or taint, as well as the availability of electronic devices that can lead to misconduct during deliberations,

the amendment provides a valuable means for avoiding the waste of judicial resources that are occasioned by a mistrial in such circumstances.

Other states have similar rules allowing for such a practice or allow the practice by case law. See, e.g., Ariz. R. Cr. P. 18.5(h); Conn. Gen. Stat. Ann. § 54-82h(c); Mass. R. Cr. P. 20(d)(3); *Carillo v. People*, 974 P.2d 478 (Colo. 1999)(presumption of prejudice caused by replacement rebutted); *Johnson v. State*, 369 N.E.2d 623 (Ind. 1977)(alternate may sit with jury during deliberations so long as instructed that may not participate unless replacing another juror).

A few cases have found that allowing the alternate to participate without a court rule is permissible or is harmless non-constitutional error, but others have rejected the practice. See, e.g., *Claudio v. State*, 585 A.2d 1278 (Del. 1991) (rule required replacement prior to the time the jury retires to consider the verdict and that the alternates then be discharged; harmless error can be applied but the practice is not to be condoned as a matter of convenience); *United States v. Hillard*, 701 F.2d 1052 (2d Cir.), cert. denied, 461 U.S. 958 (1983) (alternate could be used after deliberations begun as long as they were chosen by same process, heard all the same evidence and instructions, alternate re-affirmed ability to consider the evidence and deliberate fairly and fully, and alternates were instructed not to deliberate and discuss case while they waited); *United States v. Olano*, 507 U.S. 725 (1993) (presence of alternate juror in jury room during deliberations did not violate defendant's rights--no substantial rights violated by such a situation). But see *State v. Murray*, 757 A.2d 578 (Conn. 2000) (rule requires dismissal of alternates and it cannot be harmless error to replace a juror during deliberations); *State v. Dushame*, 616 A.2d 469 (N.H. 1992)(alternates cannot be kept for use after deliberations begin, but this is statutory and not constitutional right); *Hayes v. State*, 735 A.2d 1109 (Md. Ct. App. 1998) (no harmless error analysis in such a situation).

Former 12 V.S.A. § 1942 allowed for replacement even after deliberations had begun, but it was thought to be constitutionally dubious because the alternates would either have to enter the deliberations late or sit with jury during deliberations and was repealed after the Vermont Criminal Rules were adopted. See Reporter's Notes to Rule 24(d). The present amendment addresses those concerns by requiring the court to segregate the alternate and by requiring the jury to recommence deliberations if an alternate is seated.

In using the rule, the court should follow these practical guidelines: The retained jurors should be kept under the control of the court in an appropriate location. If the jury is reconvened in the courtroom during deliberations, the retained alternate jurors must be present for such proceedings. If more than one alternate juror has been retained, the replacement will be by order of their initial selection as alternate jurors. If, pursuant to new Rule 24(f), alternates were not designated, they should be selected as provided in that subdivision before deliberations begin.

Rule 24(d)(4) provides that a retained juror may replace a juror in the same circumstances where replacement would be appropriate during the trial under Rule 24(d)(1). Paragraph (4), however, makes clear that replacement of a juror during deliberations is within the court's discretion and may be denied even if the result will be a mistrial. The court's exercise of discretion will be guided by the circumstances of the case and the length of jury deliberations to that point.

4. That Rules 32(a) and (b) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence.

(1) *Imposition of Sentence.* Sentence shall be imposed or deferred without unreasonable delay. Pending imposition or deferment of sentence the court may commit the defendant or continue or alter the conditions of ~~his~~ release. Before imposing sentence the court shall:

(A) determine that the defendant and ~~his~~ defense counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3);

(B) afford counsel an opportunity to speak on behalf of the defendant;
and

(C) address the defendant personally ~~and ask him to determine if he~~ the defendant wishes to make a statement in his or her own behalf and to present any information relevant to sentencing.

The attorney for the state shall have an equivalent opportunity to speak to the court and to present any information relevant to sentencing.

(2) *Notification of Right To Appeal.* After imposing or deferring sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of ~~his~~ the right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed or deferred following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence or conditions of deferment thereof. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge, ~~and~~ except that if the judge makes a ruling from the bench on the record, the clerk may sign a judgment that reflects the judge's ruling. The judgment shall then be entered by the clerk forthwith. Such entry by the clerk shall be the entry of judgment for all purposes under these rules and the Rules of Appellate Procedure.

Reporter's Notes—2010 Amendment

Rules 32(a) and (b) are amended to eliminate gender-specific references and to allow the clerk to sign a judgment when one is announced by the judge from the bench. In order to enforce and collect fines imposed by the District Court, including those for which deferred payment arrangements are made, it is currently necessary for there to be a judgment order signed by the judge. In practice, such judgment orders are seldom signed by the judge, but pronounced in court and subsequently issued by the clerk. In addition, quite often, deferred payment orders are arranged with the clerk's office to allow time for a defendant to pay off the fine. Given the large numbers of such orders and the desire to effectively collect fines agreed to and imposed as well as to permit time payments for these fines, the amendment regularizes the existing practice. The practice of taking pleas with fines by a waiver form would remain unchanged, since the judge currently signs those forms.

5. That Rule 32(c)(1) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 32. SENTENCE AND JUDGMENT

* * * * *

(c) Sentencing Information.

(1) *Presentence Investigatio, When Made.* A presentence investigation shall not be initiated until there has been an adjudication of guilt, unless the defendant consents to such action. The commissioner of corrections shall make the presentence investigation ~~and~~. The probation officer who interviews a defendant as part of a presentence investigation shall, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview. The commissioner of corrections shall report to the court before the imposition or deferment of sentence or the granting of probation, except that the court, in its discretion, may dispense with the report, in the following situations:

- (A) if the offense is a misdemeanor;
- (B) if the defendant has two or more felony convictions;
- (C) if the defendant refuses to be interviewed by a probation officer or requests that disposition be made without a presentence report;
- (D) if it is impractical to verify the background of the defendant.

A report made prior to an adjudication of guilt shall not be submitted to the court or its contents disclosed to anyone until after such adjudication, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time and may, if the defendant's consent expressly so states, permit the defendant's attorney, or a defendant appearing pro se, and the attorney for the state to inspect the report.

Reporter's Notes—2010 Amendment

Rule 32(c)(1) is amended to adapt the language of Federal Rule of Criminal Procedure 32(c)(2) requiring a probation officer to give defendant's attorney notice and a reasonable opportunity to attend an interview of a defendant conducted as part of a presentence investigation. The presence of counsel at a presentence investigation is of great importance in view of developments such as mandatory minimum or indeterminate sentences for certain sex offenses. See, e.g., 13 V.S.A. §§ 2602(c), 3253(c), 3271. The courts of other states have recognized that presentence investigation interviews may implicate the Sixth Amendment right to counsel. See *State v. Everybodytalksabout*, 166 P.3d 693 (Wash. 2007) (PSI interview a "critical stage"; use in retrial of defendant's statements made without counsel violated Sixth Amendment); *Commonwealth v. Talbot*, 830 N.E.2d 177 (Mass. 2005) (right to counsel in PSI interviews).

6. That these rules, as amended, are prescribed and promulgated to become effective on April 26, 2010. The Reporter's Notes are advisory.

7. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 24th day of February 2010.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice