

PROPOSED

**STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2007**

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 12(d)(2) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; STATUS CONFERENCE

(d) Motion to dismiss for Lack of Prima facie Case.

(2) Hearing and Determination. ~~At the hearing on the motion, which shall be heard and decided prior to trial, if~~ the prosecution does not establish by affidavits, depositions, sworn oral testimony, or other admissible evidence that it has substantial, admissible evidence as to the elements of the offense challenged by the defendant's motion, or a lesser included offense, sufficient to prevent the grant of a motion for judgment of acquittal at the trial, the court shall dismiss the indictment or information without prejudice and discharge the defendant. If the prosecution has sufficient evidence of a lesser included offense, the court shall enter an order dismissing the offense charged and specifying the lesser included offense remaining for trial. The prosecution or the defendant may request a hearing. The court may determine the motion without hearing as long as both the state and defense have been provided an opportunity to submit affidavits, depositions, or other sworn admissible evidence in written or recorded form. Any question of law determinative of the issues raised by the defendant's motion that could be raised by motion under subdivision (b) of this rule shall be determined ~~at the hearing held~~ under this subdivision.

Reporter's Notes—2007 Amendment

Rule 12(d)(2) is amended to eliminate the necessity of having to schedule a formal hearing on defendant's motion to dismiss, when the motion can be disposed of on the pleadings and written submissions. *State v. Fanger*, 164 Vt.

48, 52 (1995), reiterates that the current language of the rule requires the court to observe the formality of defendant's cross examination of witnesses, even though the court cannot properly consider such "modifying" evidence in deciding the motion. *Id.* at 51. The proposed amendment would clarify the state's and the defendant's equal opportunity to submit admissible evidence by tape or writing. The court will consider a request by either party for a hearing but retains discretion to proceed without hearing provided the opportunity provided by the rule has been accorded.

2. That Rule 23(d) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 23. TRIAL BY JURY OR BY THE COURT

(d) **Jury Separation; Conduct of Trial.** The court may allow the jury to separate during the trial. After the composition of the jury is determined, the court shall proceed without unreasonable delay to the impaneling of the jury, the opening statements and the reception of evidence. Unless the parties consent to a longer delay, the trial must commence not more than 48 hours after jury selection in the case of a felony for which the penalty may be life imprisonment ~~or death, not more than 14 days after jury selection in the case of a any other felony,~~ and not more than 30 days after jury selection in ~~the case of a misdemeanor~~ any other case. If the commencement of trial is delayed more than 24 hours, the parties shall be entitled to conduct a supplemental examination of the jurors as provided in Rule 24(a) related solely to issues arising from the period of separation and may exercise challenges for cause as provided in Rule 24(b) before the jury is sworn.

Reporter's Notes—2007 Amendment

Rule 23(d) is amended to permit up to thirty days to pass between jury selection and trial of felonies not punishable by life imprisonment, as the rule currently allows for misdemeanors, while preserving the right of further *voir dire* on the issue of jury contamination only. The amendment would also delete a reference to the death penalty, which does not now exist under current law. Presumably, in the case of an incarcerated defendant in a felony case, the court would seek to expedite trial.

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

RULE 24. TRIAL JURORS

(e) **Alternative Procedure for Replacement Jurors.** The court may direct that no more than ~~six~~ twelve replacement jurors also be drawn when the original twelve prospective jurors or any alternates are drawn. The replacement jurors shall be examined along with the prospective jurors or alternates. Replacement jurors shall, in the order they were seated, replace prospective or alternative jurors when they have been excused.

(f) **Alternate Procedure for Alternate Jurors.** The court may direct that between thirteen and sixteen jurors be selected in the manner provided in subdivisions (a)(3), (b), and (c) of this rule. Each party shall then be entitled to seven or eight peremptory challenges, depending on the number of alternates to be selected as provided in subdivision (d). Those who are to be alternate jurors will be determined by random selection at the completion of the trial but before submission of the case to the jury for deliberations.

Reporter's Notes—2007 Amendment

Rule 24(e) is amended to allow for a total panel of twenty-four potential jurors during *voir dire*, by seating twelve, rather than six, replacements, along with the first twelve prospective jurors. The purpose is to minimize interruption and to “streamline” the ongoing impaneling process as the parties progress through challenges for cause and peremptory challenges.

New Rule 24(f) would permit the court to select a sufficient number of jurors to make up both a jury of twelve and between one and four alternates without predetermining the identity of the alternates. Those who are to be designated as alternates would be determined by random selection once the trial is complete but prior to deliberations. The parties would be entitled to six peremptory challenges each pursuant to Rule 24(c)(3) and additional challenges as provided in Rule 24(d): One additional peremptory for every two alternates to be selected. Thus, each side would have a total of seven or eight peremptory challenges. The present rule does not permit such an alternative procedure. Experience has shown, however, that juror satisfaction and attention increase if alternates are not predetermined and all sitting jurors understand that they are as likely as any juror to participate in deliberations. Although currently some judges will not directly advise pre-determined alternates of their status at the beginning of the trial, experience indicates that the alternates become aware of this pre-determination in any event.

4. That these rules, as amended, are prescribed and promulgated to become effective on _____, 2007. The Reporter's Notes are advisory.

5. 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 _____ day of _____, 2007.

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