

**STATE OF VERMONT
VERMONT SUPREME COURT
AUGUST TERM, 2022**

**Emergency Order Promulgating Amendments to Rule 24
of the Vermont Rules of Criminal Procedure**

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

1. That Rule 24 of the Vermont Rules of Criminal Procedure be amended as follows (deleted matter stricken; new matter underlined):

RULE 24. TRIAL JURORS

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(c) Peremptory Challenges.

(1) *Manner of Exercise.* After twelve prospective jurors have been seated in the jury box and examined, the parties or their attorneys may exercise their peremptory challenges. Such challenges shall be exercised by removing the name of the juror challenged from a list of the prospective jurors prepared by the clerk.

(2) *Order of Exercise.* Peremptory challenges shall be exercised one by one, alternatively, with the state exercising the first challenge. A challenge not exercised in turn is extinguished. In any action in which there are several defendants the order of challenges shall be as determined by the court.

(3) *Number.* Each party shall be entitled to ~~six~~ peremptory challenges numbering the greater of six, or one half of the total number of jurors and alternates to be selected per subdivisions (d) or (f), rounding up. After a party has exercised ~~six~~ peremptory challenges, any additional peremptory challenges must be used only to remove prospective alternate jurors.

(d) Alternate Jurors.

(1) *In General.* The court may direct ~~not more than four~~ that a reasonable number of 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 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, and to one additional peremptory challenge for each instance in which more than two additional alternate jurors are to be impanelled, consistent with the provisions of paragraph (c)(3). 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.

(e) **Alternative Procedure for Replacement Jurors.** The court may direct that no more than 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 alternate jurors when they have been excused.

(f) **Alternate Procedure for Alternate Jurors.** The court may direct that ~~between thirteen and sixteen~~ a reasonable number of not less than thirteen 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~~ additional peremptory challenges ~~if thirteen or fourteen jurors are selected as permitted by this subdivision (f) and to eight peremptory challenges if fifteen or sixteen jurors are selected in accordance with the provisions of paragraph (c)(3).~~ 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—2022 Amendment

Rule 24 is amended at the request of the Supreme Court to make permanent certain provisions of Administrative Order 49, ¶ 3(b) that have on an interim basis authorized judges to seat more than four, and as many alternate jurors as reasonably required, to accommodate trial disruptions that might occur due to illness during the period of the Judicial Emergency. The proposed amendment serves to provide critical clarity and consistency during the full-scale restoration of jury trials in the Criminal Division post-COVID-19.

The present amendments rescind the existing limitations of subdivisions (d) and (f), which effectively restrict the seating of no more than four alternate jurors, to permit the court to impanel a reasonable number of alternate jurors, without numeric limitation, yet consistent with the anticipated length and complexity of the trial, and such other factors as the existing public-health conditions that may serve to render chosen jurors subject to illness and resulting disability from service. But for the interim

provision of A.O. 49, ¶ 3(b), under the existing rule, the court is not accorded discretion to seat more than four prospective alternates, and the COVID-19 pandemic experience has clearly demonstrated the advisability, under certain case circumstances, of seating a reasonable number of prospective alternate jurors, without fixed limitation on the number of alternates. The amendment, and its authorizations, do not contemplate that all jury panels going forward will be comprised of large numbers of alternate jurors beyond the two to four authorized under the present rule. However, with due regard to case circumstances, the court is accorded the discretion to seat additional prospective alternate jurors without specific numeric limitation, to assure that enough jurors remain at the conclusion of trial to enter into deliberations as to case outcome.

Paragraph (c)(3) is amended to provide that each party shall be entitled to peremptory challenges numbering the greater of six, or one half of the total number of jurors, including alternates to be selected per subdivisions (d) or (f), rounding up. This provision results in the following number of peremptory challenges accorded to each party, in relation to the total number of jurors (including prospective alternates), comprising the panel:

Total Jurors Chosen	Number of Peremptory Challenges to Each Party
12 or less	6
13-14	7
15-16	8
17-18	9
19-20	10
For each additional 1-2	1 additional peremptory

The rule as amended carries forward the statutory right of each party to exercise no less than six peremptory challenges (See, 12 V.S.A. § 1941), as well as the provisions of the existing subdivisions (d)(5) and (f) as to the method of allocating additional peremptory challenges exercised for alternates (i.e., one additional peremptory whenever 1-2 additional alternates is to be chosen). However, rather than limit the parties to a total of seven or eight peremptory challenges where the panel consists of no more than fourteen or sixteen jurors, the formula is applied in the same manner where more than four prospective alternates are chosen, without the maximum limit on number of alternate jurors.

Paragraph (d)(1) is amended to remove the current numeric limitation of no more than four alternate jurors, substituting provision that a reasonable number of jurors in addition to the regular jury may be impanelled by the court to sit as alternate jurors.

Paragraph (d)(5) is amended to comport with the amendment of paragraph (c)(3), to set the method for determining additional peremptory challenges as to alternates, and number when more than two additional

alternate jurors are impanelled—specifically, more than four alternates in number should the court determine it is reasonably necessary.

Subdivision (f) is amended to comport with the method of computing and exercising peremptory challenges authorized by amended (c)(3), where a total of more than sixteen jurors are impanelled, and the alternate procedure is employed, in which the deliberative twelve, and the alternate jurors who are subject to excuse from further service in the case, are determined by random selection at the completion of the trial and before deliberation, rather than prior to commencement of the trial.

2. That this rule, as amended, is prescribed and promulgated to become effective September 6, 2022. The Reporter’s Notes are advisory.

3. That the Court finds that this emergency amendment must be promulgated without resort to the notice and comment procedures set forth in Administrative Order No. 11, to provide continuity of the procedures for choosing and seating of alternate jurors that have been authorized and implemented by Administrative Order No. 49, ¶ 3(b) without disruption or uncertainty as to procedural rules in the anticipated period of transition from court operations during the period of the Judicial Emergency to normative conduct of regular jury selection and trials, necessary for elimination of backlogs in numbers of cases awaiting trial resolution.

4. That the Court Administrator is directed to send this rule as amended out for comment pursuant to Administrative Order No. 11, with comments to be made to the Advisory Committee on Rules of Criminal Procedure. The Advisory Committee is directed to review any comments received and advise the Court whether the amendments should be revised or remain permanent.

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

Done in Chambers at Montpelier, Vermont, this 9th day of August, 2022.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice