

STATE OF VERMONT
SUPREME COURT
_____ TERM, 2018

Order Promulgating Amendments to Rule 23(d) of 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 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.

(1) 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 in a signed writing filed with the court or on the record in open court to a longer delay, 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~~, and not more than 30 days after jury selection in any other case.

(2) If the commencement of trial is delayed more than 24 hours, the court must provide appropriate instruction to the jurors of their obligation to avoid outside influences that might adversely affect their ability to serve fairly and impartially, and result in their discharge from service at the trial.

(3) If the commencement of trial is delayed more than 24 hours, the parties shall be entitled the court shall afford the parties an opportunity upon request 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—2018 Amendment

These amendments respond to the Supreme Court's decision in State v. Breed, 2015 VT 43, 198 Vt. 574, 117 A.3d 829, where the Court outlined the better practice when there may be delay after the jury has been chosen but before trial. The Court wrote:

the better practice is for the trial court to: (1) confirm that the parties are in fact consenting to a longer delay;

(2) emphasize that the jurors are to avoid any news and not research the case during any separation period between jury selection and trial; (3) question the jurors about anything they may have heard or learned about the case following a separation period; (4) ensure that the parties are offered an opportunity to examine the jurors following a separation period; and (5) inquire whether either party has any challenges for cause based on any such examination.

Id. ¶ 14. The Court also has suggested in State v. Abdi, 2012 VT 4, ¶ 25, 191 Vt. 162, 45 A.3d 29, that although Vermont courts “routinely admonish jurors not to consult outside sources, it may well be time to consider a stronger and more technology-specific admonition” than the standard instructions now used.

Rule 23(d) is amended to provide for three paragraphs.

Paragraph (d)(1) adds a requirement to the existing test of the rule to provide that consent to a delay of commencement of trial beyond those times prescribed in the rule must be given in a signed writing filed with the court or on the record in open court. Reference to the penalty of death in this subdivision is deleted, as such has been abolished in Vermont.

Paragraph (d)(2) adds a requirement that, in the event that commencement of trial is delayed for more than 24 hours, the court must provide an appropriate instruction, as suggested in Breed, as to avoidance of external influences that might serve to adversely affect the jurors ability to serve fairly and impartially, and result in their discharge from service at trial. While the referenced text from Breed provides guidance, the exact language of the admonition to be given to the chosen jurors is left to the discretion of the trial judge, in consideration of the particular circumstances of the case and length of separation.

The judicial admonition to jurors prescribed in the amended language of paragraph (d)(2) is specific to the period of separation from voir dire to commencement of trial and supplements those instructions to be provided as to juror prohibitions at trial itself.

Paragraph (d)(3) is amended to clarify that while parties are entitled to conduct supplemental voir dire of jurors as to issues arising from the period of separation, and to exercise challenges for cause that may then be revealed, a party must initiate a request for supplemental voir dire. The existing language of the rule is also amended to delete reference to limiting supplemental voir dire solely

to such issues, to enable the trial court in its discretion to permit supplemental voir dire that may be warranted for specific cause, including circumstances that may have arisen during the period of separation, while preventing any reopening or repetition of voir dire that is not warranted at the time of the scheduled commencement of the trial.

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

3. 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 _____, 2018.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice