

STATE OF VERMONT
 SUPREME COURT
 _____ TERM, 2018

Order Promulgating Amendments of Rule 42 of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter 11, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 42 of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 42. CRIMINAL CONTEMPT

(a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt ~~shall~~ must recite the facts and ~~shall~~ be signed by the judge and entered of record.

(b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. ~~The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt, and describe it as such. The notice shall be given orally by the judge in open court in the presence of the person charged, or, on application of an attorney for the state, or of an attorney appointed by the court for that purpose by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury. He is entitled to pretrial release as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.~~

(1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

- (A) state the time and place of the trial;
- (B) allow the defendant a reasonable time to prepare a defense;
- (C) state the essential facts constituting the criminal contempt charged and describe it as such;
- (D) state whether any term of imprisonment, a term of imprisonment of more than two years, or a fine of more than \$1,000.00 may be imposed upon conviction; and
- (E) inform the defendant of his or her right to be represented by counsel, and to request the assignment of counsel at state expense if he or she is financially unable to retain counsel.

(2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by the Attorney General or a state's attorney, unless the interest of justice requires the appointment of another attorney. If the Attorney General or a state's attorney declines the request, the court may appoint another attorney to prosecute the contempt.

(3) Trial and Disposition. The defendant is entitled to a trial by jury and to pretrial release as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court must enter an order fixing the punishment.

Reporter's Notes—2018 Amendment

Rule 42, governing contempt process, is reorganized and substantively amended in three instances. Provision is added for notice to the defendant of the maximum penalty that may be imposed upon conviction. To facilitate appearance of counsel and assignment of counsel to represent the indigent defendant, a requirement is added to provide notice of the right to be represented by counsel and to make application for assignment of counsel. Specific provision is also made for the mode of appointment of a prosecuting attorney.

The reorganization of the Rule generally follows the organization of the equivalent federal rule, F.R.Cr.P. 42, with specific paragraphs addressed to notice; appointment of a prosecutor of the contempt; and trial and disposition.

The words “or she” are added to subdivision (a), consistent with the Court's general restyling of rules with respect to gender references.

Paragraph (b)(1) serves to restate in specific subsections the requisites of notice to the contempt defendant, without substantive change from the existing rule, except the added requirements that the court provide notice to the defendant in subparagraph (b)(1)(D) as to whether, in event of conviction, a sanction would be imposed that would invoke the defendant's right to seek appointment of counsel at state expense for representation in the proceeding, and in subdivision (b)(1)(E) of the defendant's right to be represented by counsel in the contempt proceeding, and to make application for assignment of counsel at state expense for representation if he or she is financially unable to retain counsel.

Paragraph (b)(2) adds specific provision for the mode of appointment of a prosecuting attorney. Under this provision of the rule, the court must first request that the Attorney General or a state's attorney prosecute the contempt, unless the interests of justice requires appointment of another attorney. If the Attorney General or a state's attorney declines the request, the court may appoint another attorney to prosecute the contempt. The requirement of request on the part of the court for prosecution by the Attorney General or a state's attorney prior to appointment of other counsel is intended to avoid any appearance of influence on the part of the judge as to the conduct of the contempt and assure that counsel without interest in the proceeding serve as prosecuting attorney. See, e.g., Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987).

Paragraph (b)(3) specifies the procedures for conduct of the contempt proceeding with no substantive changes from the existing rule.

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