

Proposed Amendments to Rule 24(c), (d), and (e):

(c) Peremptory Challenge and Procedure for Exercising. - After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve who have been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge the name of any juror in the group of twelve that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. Peremptory challenges may be directed to any member of the jury, and counsel shall not be limited to replacement jurors. Alternate jurors will be selected in the same manner. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

(d) Number of Peremptory Challenges. - If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges, and the state is entitled to fifteen peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight peremptory challenges, and the state is entitled to eight peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three peremptory challenges for each defendant.

(e) Alternate Jurors. - The trial court in its discretion may use either of the following methods to select alternate jurors:

(1) The court may direct that jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are selected, 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. 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. An alternate who does not replace a regular juror shall be discharged when the jury retires to consider its verdict. For each alternate juror to be selected, each side is entitled to one peremptory challenge for each defendant. The additional peremptory challenges may be used only as each alternate juror is selected; and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

FILED
January 28, 1997
Cecile W. Crowson
Appellate Court Clerk

(2) The court may direct prior to the start of jury selection that jurors in addition to the regular jury be called and impanelled as alternate jurors. For each alternate juror to be selected, each side is entitled to one peremptory challenge for each defendant. There shall be no distinction made by the court as to which jurors shall ultimately be designated alternate jurors at any time during the jury selection or the trial of the case. Before the jury retires to consider its verdict, the court shall select at random or by lot the names of the requisite number of jurors to reduce the jury to a body of twelve.

Proposed Amendment to Comment to Rule 37:

Subsection (b) of the rule provides for two (2) circumstances in which a defendant may appeal a certified question of law that is dispositive of the case. See Tenn. R. Crim. P. 37(b) (i) and (iv). In order for an attorney to perfect an appeal under either of these two (2) sections, the attorney must be certain that the application fully comports with the requirements for this type of an appeal as set forth by the Tennessee Supreme Court in its decision of *State v. Preston*, 759 S.W.2d 647 (Tenn. 1988). Failure to follow the dictates of the *Preston* decision could result in the dismissal of the appeal.

Proposed Rule 38. APPEAL OF DENIAL OF PRE-TRIAL DIVERSION.

A defendant who seeks and is denied pre-trial diversion pursuant to T.C.A. § 40-15-105 shall have the right to petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion. If the trial court finds that the prosecuting attorney has not committed an abuse of discretion in failing to grant pre-trial diversion, the defendant may pursue an interlocutory appeal pursuant to either Rule 9 or Rule 10 of the Tennessee Rules of Appellate Procedure. In the event that the defendant does not pursue an interlocutory appeal, the defendant shall have the right to appeal the decision of the trial court denying the petition for writ of certiorari pursuant to Tennessee Rule of Appellate Procedure 3(b) following the entry of the final judgment in the trial court.

Proposed Comment:

This rule changes prior case law and practice regarding appeal of the denial of pre-trial diversion from the trial court. The new rule provides the methods by which denials of pre-trial diversion can be appealed. A failure to pursue an interlocutory appeal would not result in a waiver of the issue on direct appeal.

Proposed Amendment to Rule 49(c).

(c) Filing. Papers required to be served shall be filed with the court. The use of recycled paper with the highest feasible percentage of postconsumer waste content is recommended and encouraged for all papers filed with the court. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. The clerk shall endorse upon every pleading and other papers filed with the clerk in a proceeding the date and hour of the filing. If petitions for post conviction relief or other papers are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility, filing shall be timely if the papers are delivered to the appropriate individual at the correctional facility within the time fixed for filing.

Proposed Comment:

Should timeliness of filing become an issue, the burden is on the incarcerated person to establish compliance with the amended language. The provision relative to filing with the appropriate correctional personnel is consistent with the United States Supreme Court's ruling in *Houston v. Lack*, 487 U.S. 266 (1988).