Proposed Amendments to Pa.R.Crim.P. 631

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule 631 to provide for the Commonwealth's participation in the waiver of the individual method of voir dire and to revise the Comment to Rule 631 to cross reference recent cases addressing waiver of the judge's presence during voir dire and challenges to accepted jurors. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

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Criminal Procedural Rules Committee
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no later than Friday, June 3, 2011.

April 25, 2011 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Risa Vetri Ferman, Chair

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RULE 631. EXAMINATION AND CHALLENGES OF TRIAL JURORS.

(A) *Voir dire* of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

(B) This oath shall be administered individually or collectively to the prospective jurors:

> "You do solemnly swear by Almighty God (or do declare and affirm) that you will answer truthfully all questions that may be put to you concerning your qualifications for service as a juror."

(C) *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full unless the recording is waived. The record will be transcribed only upon written request of either party or order of the judge.

(D) Prior to *voir dire*, each prospective juror shall complete the standard, confidential juror information questionnaire as provided in Rule 632. The judge may require the parties to submit in writing a list of proposed questions to be asked of the jurors regarding their qualifications. The judge may permit the defense and the prosecution to conduct the examination of prospective jurors or the judge may conduct the examination. In the latter event, the judge shall permit the defense and the prosecution to supplement the examination by such further inquiry as the judge deems proper.

(E) In capital cases, the individual *voir dire* method must be used, unless the defendant **and the attorney for the Commonwealth with the approval of the judge, after a colloquy on the record demonstrating that this is a knowing and intelligent waiver,** waive**[s]** that alternative. In non-capital cases, the trial judge shall select one of the following alternative methods of *voir dire*, which shall apply to the selection of both jurors and alternates:

(1) INDIVIDUAL *VOIR DIRE* AND CHALLENGE SYSTEM.

(a) *Voir dire* of prospective jurors shall be conducted individually and may be conducted beyond the hearing and presence of other jurors.

(b) Challenges, both peremptory and for cause, shall be exercised alternately, beginning with the attorney for the Commonwealth, until all jurors are chosen. Challenges shall be exercised immediately after the prospective juror is examined. Once accepted by all parties, a prospective juror shall not be removed by peremptory challenge. Without declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected, or the defendant consents to be tried by a jury of fewer than 12, pursuant to Rule 641.

(2) LIST SYSTEM OF CHALLENGES.

(a) A list of prospective jurors shall be prepared. The list shall contain a sufficient number of prospective jurors to total at least 12, plus the number of alternates to be selected, plus the total number of peremptory challenges (including alternates).

(b) Prospective jurors may be examined collectively or individually regarding their qualifications. If the jurors are examined individually, the examination may be conducted beyond the hearing and presence of other jurors.

(c) Challenges for cause shall be exercised orally as soon as the cause is determined.

(d) When a challenge for cause has been sustained, which brings the total number on the list below the number of 12 plus alternates, plus peremptory challenges (including alternates), additional prospective jurors shall be added to the list.

(e) Each prospective juror subsequently added to the list may be examined as set forth in paragraph (E)(2)(b).

(f) When the examination has been completed and all challenges for cause have been exercised, peremptory challenges shall then be exercised by passing the list between prosecution and defense, with the prosecution first striking the name of a prospective juror, followed by the defense, and alternating thereafter until all peremptory challenges have been exhausted. If either party fails to exhaust all peremptory challenges, the jurors last listed shall be stricken. The remaining jurors and alternates shall be seated. No one shall disclose which party peremptorily struck any juror.

COMMENT: This rule applies to all cases, regardless of potential sentence. Formerly there were separate rules for capital and non-capital cases.

Paragraph (A) provides for the waiver of the judge's presence during *voir dire* if the parties agree and the judge permits it. This waiver may be performed in writing and no on-the-record colloquy is required. *See Commonwealth v. Fitzgerald*, 979 A.2d 908 (Pa. Super 2009).

If Alternative (E)(1) is used, examination continues until all peremptory challenges are exhausted or until 12 jurors and 2

alternates are accepted. Challenges must be exercised immediately after the prospective juror is questioned. In capital cases, only Alternative (E)(1) may be used unless affirmatively waived by all defendants and the Commonwealth, with the approval of the trial judge.

Regarding challenges raised due to after discovered information against jurors who had been previously accepted pursuant to paragraph (E)(1)(b), see *Commonwealth v. Reed,* 605 Pa. 431, 990 A.2d 1158 (2010).

If Alternative (E)(2) is used, sufficient jurors are assembled to total 12, plus the number of alternates, plus at least the permitted number of peremptory challenges (including alternates). It may be advisable to assemble additional jurors to encompass challenges for cause. Prospective jurors may be questioned individually, out of the presence of other prospective jurors, as in Alternative (E)(1); or prospective jurors may be questioned in the presence of each other. Jurors may be challenged only for cause, as the cause arises. If the challenges for cause reduce the number of prospective jurors below 12, plus alternates, plus peremptory challenges (including alternates), new prospective jurors are called and they are similarly examined. When the examination is completed, the list is reduced, leaving only 12 jurors to be selected, plus the number of peremptories to be exercised; and sufficient additional names to total the number of alternates, plus the peremptories to be exercised in selecting alternates. The parties then exercise the peremptory challenges by passing the list back and forth and by striking names from the list alternately, beginning with counsel for the prosecution. Under this system, all peremptory challenges must be utilized. Alternates are selected from the remaining names in the same manner. Jurors are not advised by whom each peremptory challenge was exercised. Also, under Alternative (E)(2), prospective jurors will not know whether they have been chosen until the challenging process is complete and the roll is called.

This rule requires that prospective jurors be sworn before questioning under either Alternative.

The words in parentheses in the oath shall be inserted when any of the prospective jurors chooses to affirm rather than swear to the oath.

Unless the judge's presence during *voir dire* and the jury selection process is waived pursuant to paragraph (A), the judge must be present in the jury selection room during *voir dire* and the jury selection process.

Pursuant to paragraph (D), which was amended in 1998, and Rule 632, prospective jurors are required to complete the standard, confidential juror information questionnaire prior to *voir dire*. This questionnaire, which facilitates and expedites *voir dire*, provides the judge and attorneys with basic background information about the jurors, and is intended to be used as an aid in the oral examination of the jurors.

The point in time prior to *voir dire* that the questionnaires are to be completed is left to the discretion of the local officials. Nothing in this rule is intended to require that the information questionnaires be mailed to jurors before they appear in court pursuant to a jury summons.

See Rule 103 for definitions of "capital case" and "*voir dire*."

NOTE: Adopted January 24, 1968, effective August 1, 1968; amended May 1, 1970, effective May 4, 1970; amended June 30, 1975, effective September 28, 1975. The 1975 amendment combined former Rules 1106 and 1107. *Comment* revised January 28, 1983, effective July 1, 1983; amended September 15, 1993, effective January 1, 1994. The September 15, 1993 amendments suspended December 17, 1993 until further Order of the Court; amended February 27, 1995, effective July 1, 1995; the September 15, 1993 Order amending Rule 1106 is superseded by the September 18, 1998 Order, and Rule 1106 is amended September 18, 1998, effective July 1, 1999; renumbered Rule 631 and amended March 1, 2000, effective April 1, 2001**[.] ; amended , 2011, effective , 2011.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 15, 1993 amendments published at 21 Pa.B. 150 (January 12, 1991). Order suspending, until further Order of the Court, the September 15, 1993 amendments concerning juror information questionnaires published at 24 Pa.B. 333 (January 15, 1994).

Final Report explaining the February 27, 1995 amendments published with the Court's Order at 25 Pa.B. 948 (March 18, 1995).

Final Report explaining the September 18, 1998 amendments concerning juror information questionnaires published with the Court's Order at 28 Pa.B. 4887 (October 3, 1998).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed amendments regarding waiver of the judge's presence during voir dire, challenges to jurors, and the Commonwealth's role in the waiver of individual voir dire published at 41 Pa.B. (, 2011).

REPORT

Proposed Amendments to Pa.R.Crim.P.631

VOIR DIRE ISSUES

As part of its duties of monitoring developments in the law that effect criminal practice, the Committee examined two recent cases, *Commonwealth v. Fitzgerald*, 979 A.2d 908 (Pa. Super. 2009), *appeal denied,* __ Pa. __, 990 A.2d 727 (2010) and *Commonwealth v. Reed*, 605 Pa. 431, 990 A.2d 1158 (2010), that addressed aspects of Rule 631 (Examination and Challenges of Trial Jurors) and determined that cross-references to these cases in the *Comment* to Rule 631 would be beneficial. Additionally, the Committee examined the provisions in Rule 631(E) regarding the waiver of the individual *voir dire* method in capital cases in light of the Commonwealth's right to trial by jury under the Pennsylvania Constitution.

Waiver of Judge's Presence during *Voir Dire*

The first issue considered by the Committee concerned clarifying that a written waiver of the presence of the judge and court reporter during *voir dire* is sufficient and that no on-the-record waiver colloquy is required. Rule 631(A) specifically permits the parties to waive the judge's presence during *voir dire*. Questions have arisen from time to time as to whether, when the parties waive the presence of the judge and the court reporter during *voir dire*, it is necessary that an on-the-record colloquy be conducted as opposed to having a written waiver executed. Unlike waivers that involve fundamental constitutional rights, such as the waiver of a jury trial or the entry of a guilty or *nolo contendere* plea, the waiver of the presence of the judge and the court reporter during *voir dire* is a waiver that does not require a searching on-the-record colloquy.

This issue has been addressed by the Superior Court in *Commonwealth v. Fitzgerald*, 979 A.2d 908 (Pa. Super. 2009), *appeal denied,* __ Pa. __, 990 A.2d 727 (2010). In this case, the Superior Court held that defense counsel was not ineffective for failing to demand an on-the-record colloquy as to the defendant's waiver of the judge's presence during *voir dire*. The Superior Court rejected the defendant's argument that waiver of the judge's presence rose to the same level, that of a "fundamental personal right, as a waiver of jury trial or counsel." The Court noted that

Rule 631 permitted such a waiver but did not specify whether the waiver must be in writing, on the record, or "knowing, voluntary, and intelligent" as is the case for the Rule 620 waiver of jury trial. The defendant provided no authority to indicate that the waiver of the judge's presence rose to a level requiring constitutional protection.

The proposed revisions to the *Comment* to Rule 631 make it clear that a written waiver of the presence of the judge and the court reporter during *voir dire* will suffice, in accordance with the holding in the *Fitzgerald* case.

Challenges to Accepted Jurors

The second part of the proposal adds a cross-reference to the Rule 631 *Comment* to the Pennsylvania Supreme Court's decision in *Commonwealth v. Reed*, 605 Pa. 431, 990 A.2d 1158 (2010). In this case, the defendant challenged on appeal the removal of a potential juror by peremptory challenge after he had been accepted. The claim was based on the language of Rule 631(E)(1)(b) that states, "Once accepted by all parties, a prospective juror shall not be removed by peremptory challenge. Without declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected, or the defendant consents to be tried by a jury of fewer than 12, pursuant to Rule 641."

The prospective juror, after having been accepted by both parties, informed the trial judge that, although he stayed occasionally in Pennsylvania, he was really a resident of Ohio. The trial judge permitted the Commonwealth to use a peremptory challenge to remove the prospective juror. Defendant argued that the Commonwealth should have been required to challenge the juror for cause.

In rejecting the defendant's argument, the Court referred to *Commonwealth v. Chmiel,* 585 Pa. 547, 889 A.2d 501 (2005), in which the Court held that the Rule 631(E)(1)(b) provision regarding no challenges "must be read in context of other requirements in the rule that peremptory challenges are to be used only after the prospective juror is examined" and that the allowance of peremptory challenges remained within the trial court's discretionary prerogative, even after the parties' initial acceptance of a juror, where additional information subsequently came to light.

The Court also rejected the defendant's challenge, including a request for the remedy of additional peremptory challenges, to the trial court's entertainment of a

challenge for cause of an accepted juror who later informed the judge that he would not be able to ever render a death verdict. The Court noted that the defendant admitted that challenges for cause may be exercised before the jury begins to deliberate, as provided for in Rule 631(E)(1)(b) and that, under Rule 634(A)(3) and *Commonwealth v. Edwards*, 493 Pa. 281, 426 A.2d 550 (1981), the trial judge in a capital murder case lacks the discretion to expand the number of peremptory challenges.

The Committee believes that a cross-reference to the holding in *Reed* would be beneficial to the bench and bar, and is proposing the *Comment* to Rule 631 be revised accordingly.

Commonwealth's Participation in the Waiver of the Individual *Voir Dire* Method.

Rule 631(E) states that "[i]n capital cases, the individual *voir dire* method must be used, unless the defendant waives that alternative." The question was raised as to whether the Commonwealth should have an equal say in whether the individual *voir dire* method is used in capital cases in light of the 1998 amendment of the Pennsylvania Constitution that afforded the Commonwealth "the same right to trial by jury as does the accused." Pa. Const. Art I, § 6 (amended 1998).

The Committee examined the history of Rule 631 (formerly Rule 1106) and determined that the language regarding the waiver of method had been included in the rule prior to the 1998 Constitutional amendments and concluded that failure to modify the waiver provision had been an oversight.

The Committee is therefore proposing an amendment to Rule 631(E) to give the Commonwealth the right to participate in the process of a waiver of the individual *voir dire* method in a manner similar to that used in Rule 620 for the waiver of jury trials. This includes the requirement that the waiver colloquy be conducted on the record and that the waiver is subject to the judge's approval.