

To: The Iowa Supreme Court
From: The Iowa Supreme Court Advisory Committee on
Rules of Criminal Procedure
Re: Proposed change to Iowa R. Crim. P. 2.18(15)
Date: April 13, 2015

Assigned Task:

By letter dated April 17, 2014, Muscatine County Attorney Alan R. Ostergren proposed to the Court that Iowa R. Crim. P. 2.18(15) be reviewed and possibly modified to eliminate the requirement that alternate jurors be discharged once jury deliberations begin. This issue was raised after a juror in a Muscatine County class “A” felony trial was incapable of completing his/her jury duty after deliberations began. Since, pursuant to the rule, the alternate jurors in that case had been discharged when deliberations began, a mistrial was declared after seven days of trial. Mr. Ostergren requested the Court consider replacing Iowa R. Crim. P. 2.18(15) with Federal Rule of Criminal Procedure 24(c)(3) since the federal rule does not require alternate jurors to be discharged when deliberations begin. (See attached Ostergren letter, denoted Exhibit A.) On October 7, 2014, the Court directed the Advisory Committee to review this requested rule change and make appropriate recommendations.

Advisory Committee’s Work:

The Advisory Committee members have discussed the requested rule change by email exchanges and teleconferences. (See attached listing of committee members, denoted Exhibit B.) District 5A law clerk John Maschman provided the committee with a helpful research memo, which assisted the committee in its discussions and recommendations. (A copy of the memo is attached, denoted Exhibit C.) Additionally, a drafting subcommittee

drafted a proposed replacement rule for the full committee's consideration for submission to the Court. The drafting subcommittee made subsequent revisions after input from the full advisory committee.

Consideration of a rule change:

As a backdrop to the Advisory Committee's considerations, the rules at issue are set forth below:

Iowa R. Crim. Proc. 2.18(15) (as it currently exists):

2.18(15) *Alternate jurors.* The court may require one or more alternate jurors to be selected whose qualifications, powers, functions, facilities, and privileges shall be the same as regular jurors. After the regular jury is selected, the clerk shall draw the names of three more persons if one alternate juror is desired, or four more persons if two alternate jurors are desired, and so on in like proportion, who are to serve under this rule, who shall be sworn and subject to examination and challenge for cause as provided in this rule. Each side must then strike off one such name, and the one or two or appropriate number remaining shall be sworn to try the case with the regular jury, and sit at the trial. Alternate jurors shall, in the order they were drawn, replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged. If a jury is being selected for trial of an action outside of the county pursuant to rule 2.11(10)(d), the court shall require two alternate jurors to be selected, who shall be sworn with the regular jury to try the case, and who shall sit at the trial. These alternates shall be used or discharged in accordance with this rule. The court may require more than two alternates to be selected.

Federal R. Crim. Proc. 24(c)(3):

(3) *Retaining Alternate Jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

The Advisory Committee thoroughly discussed the propriety of allowing an alternate juror to be called as a replacement juror after deliberations begin. The committee considered the experiences of the committee members as well as the research provided by Law Clerk John Maschman's memo. The committee focused on whether a criminal

defendant could receive a fair trial by allowing an alternate juror to replace a principal juror. A few committee members felt a defendant could not receive a fair trial under any circumstances when an alternate juror replaces a principal juror after deliberations begin. The majority of the committee, however, concluded a defendant can receive a fair trial when an alternate juror replaces a principal juror after deliberations begin, if appropriate safeguards are built into the rule.

As part of the Advisory Committee's review of the rule, and admittedly beyond the scope of the assigned task, there was also discussion concerning the current rule's requirement of a separate jury examination process for selection of alternate jurors. The Advisory Committee unanimously agreed that this part of the rule should also be changed. The experience of the committee members reveals it is very common that parties circumvent this requirement by agreeing to contemporaneously examine and select principal and alternate jurors. In the experience of the committee members, it is rare that alternate jurors are selected by separate examination. One of the benefits of a contemporaneous examination and selection process is the parties may also agree in advance to a confidential method for determining the identity of the alternates (e.g., if two alternates, the parties agree the last two prospective jurors drawn for examination who are not struck will serve as the alternates). In doing so, jurors who hear the case, not knowing whether they are a primary or alternate juror, have more motivation to concentrate on the trial process.

The drafting subcommittee was tasked with drafting a replacement rule that, with proper safeguards, allows an alternate juror to replace a principal juror after deliberations begin and also allows for contemporaneous examination and selection of primary and alternate jurors. The drafting subcommittee combined language from the current Iowa rule,

the Federal rule, and Pennsylvania's rule (as discussed in the research memo) to arrive at a proposed replacement rule for Iowa Rule of Criminal Procedure 2.18(15).

The full Advisory Committee considered the proposed draft rule by teleconference on February 13, 2015. Concerning the issue of allowing an alternate juror to replace a principal juror after deliberations begin, a preliminary vote of 8-2 approved subpart *b. Alternate juror acting as principal juror*. Those voting against believe there are no circumstances under which an alternate can replace a principal juror after deliberations have begun and afford the defendant a fair trial. Concerning the issue of allowing for contemporaneous examination and selection of primary and alternate jurors, the committee unanimously approved the language of subpart *a. Selecting alternates*. A question was raised, however, concerning whether the additional peremptory strike afforded to each party as part of the separate alternate juror selection process was maintained in the draft language of the proposed new rule. The draft was referred back to the drafting subcommittee for further work.

The drafting subcommittee sought further input from the full Advisory Committee on this issue prior to its meeting. As part of that input, two suggested changes were proposed. First, the proposed rule should be revised to clearly allow for an additional peremptory strike for each party when alternates are being selected. Second, it was suggested the rule mandate the method by which the alternates are to be identified, namely, the last two prospective jurors seated for examination, who are not struck.

The drafting subcommittee discussed these suggested changes. The subcommittee agreed that if alternate jurors are to be selected, an additional peremptory strike for each party should be maintained in the new rule. The subcommittee, however, decided against

mandating the method by which alternate jurors are to be identified for the following reasons. Different districts have employed different local practices as to the method of identifying alternates. The subcommittee believed it unnecessary to change those practices with a mandated method. Further, if the rule mandates the method, any prospective juror reading the rule, or becoming aware of the method through general public knowledge, could determine the identity of the alternates. Thus, the effort at maximizing juror attention by not divulging the identity of alternates until commencement of deliberations would be jeopardized.

The drafting subcommittee therefore added language to the proposed rule to mandate preservation of an additional peremptory strike for each party when alternate jurors are being selected but did not add language that would mandate the method of identifying the alternates. The revised proposed replacement rule was then circulated for the full Advisory Committee's review.

At an Advisory Committee teleconference on April 10, 2015, after review and discussion of the revised proposed replacement rule, a quorum of the full Advisory Committee decided to vote separately on subparts *a.* and *b.* Subpart *a.* was approved by roll call vote of 7-0. Subpart *b.* was approved by roll call vote of 7-0. (The proposed replacement rule is attached, denoted Exhibit D.)

Based on these votes, the Advisory Committee recommends adoption of this proposed replacement rule for Iowa Rule of Criminal Procedure 2.18(15) and stands ready to provide such further assistance and information as the Court may request.

Respectfully submitted,

Iowa Supreme Court Advisory
Committee on Rules of
Criminal Procedure

/s/

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