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SEP 16 2015
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Alternate Juror Rule
Tim Dille
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09/16/2015 09:02 AM
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1 Attachment

Document1.docx

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To whom it may concern:

I received the e-mail about the change to the alternate juror rule in the rules of Criminal Procedure. I believe this would be a good change to alleviate the issue that Allen Ostegren stated in his request.

One other change that I would suggest is how alternate jurors are picked. The rule currently calls for a separate voir dire to be done of the panel members that are called up after the actual jury has been selected. The way it is done here, unless there is an objection, is we call up enough people with the original panel members to cover the alternate spots. We do the voir dire of all members of those called. The alternate or alternates are then the last one or two called up that are not struck for cause or a peremptory strike. They are not told that they are the alternates, thereby keeping their attention throughout the trial. They are then informed at the time the jurors begin deliberations that they are the alternates, and currently are released. However, with the proposed change, they would not be released at this point.

This seems to be a much more efficient way to select the alternates, and the alternates can be voir dired the same as the regular jurors. It also keeps their attention to the evidence as they do not know they are an alternate. Please consider making this change at the time the change requested by Allen is considered. Thank You.

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OCT 08 2015
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Alternate Juror Rule
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2 Attachments

Comment on proposed new rule of criminal procedure 2.docx

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Comment on proposed new rule of criminal procedure 2.18(15).

I would like to thank the Advisory Committee on the Rules of Criminal Procedure for their thoughtful consideration of my request.

I support the consideration of improvements to the selection process of alternate jurors. I share the view that it is better for alternates to not know their status until the jury retires for deliberation. It stands to reason that a juror who expects to be excused at the end of the trial might not have the same level of attention to the process.

I am concerned at the prospect of the court allowing the parties to conduct voir dire of an alternate juror before that juror replaces a principal juror. I agree that it is reasonable for the court to ensure that the admonition or other measures to protect the integrity of the process have been observed. I see no reason, however, why the court's questioning of the juror would not be sufficient. Perhaps the rule could be amended to specifically provide for allowing the parties to suggest questions to be asked of the juror before replacement. This will avoid any questions of a party which could influence the merits of a juror's decision making.

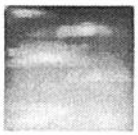
I am also concerned by the evaluation which must be made by the court as to whether the reconstituted jury has deliberated a sufficient period of time. The general rule is that, "shortness of time taken by a jury in arriving at is verdict has no effect on the validity of the verdict either in civil or criminal cases." *State v. Chadwick*, 328 N.W.2d 913, 918 (Iowa 1983), *Sammons v. Smith*, 353 N.W.2d 380, 388 (Iowa 1984).

In my experience as a trial attorney, jurors take their instructions seriously. I find it highly unlikely that a jury instructed to begin deliberations anew would disregard this instruction and immediately return a verdict. If they did, then the better approach would be for the court to evaluate the quick verdict in the context of a motion for a new trial.

A jury which is told to continue deliberating would necessarily believe that the judge thinks that their verdict is wrong and should be changed. If the rule is kept in its present form then I believe the rule should require the court to inform the jury that the instruction to continue deliberating is not based on any assumption as to what their verdict is.

Respectfully,

Alan R. Ostergren
Muscatine County Attorney



Alternate Juror Rule
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1 Attachment

Rule 2-18 comments-oct15.docx

Colleen D. Weiland
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OCT 15 2015
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COMMENTS – proposed rule 2.18(15)(a) and (b)

Colleen Weiland
Judge of the Second Judicial District of Iowa
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Rule 2.18(15)(a). Selecting alternates. (comment to the subsection in whole)

I wholeheartedly recommend adoption of this proposed subsection, which would indeed conform rule to common practice, would promote efficiency, and would reduce two harms that arise from the current rule's necessary result of everyone knowing the identity of the alternate juror: (1) the alternate juror doesn't pay the attention (s)he otherwise would, and (2) the alternate juror gives a verbal opinion about the verdict to the other jurors before the case is submitted for deliberation because (s)he knows she probably won't have the chance later.

Rule 2.18(15)(b). Alternate juror acting as principal juror. (comment to the subsection in whole)

I support adoption of this subsection only if the number of mistrials after commencement of deliberations is so significant in Iowa that a solution is necessary. I don't believe our subdistrict has had any such mistrial in my eight years on the district bench, but I obviously don't have state-wide information. If remediation is necessary, then I certainly cannot suggest a better procedure. But in the absence of such necessity, the subsection is a solution looking for a problem, which at best provides another avenue for error and appeal and at worst invites tampering by a litigant worried about a specific juror in order to get him or her replaced.

Thank you to the committee and the court for your time, effort and energy in addressing this issue. cdw

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Alternate Juror Rule
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1 Attachment

2015.11.09 - Comment to alternate juror rule proposal.docx

Comment attached.

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OFFICE OF THE

STATE PUBLIC DEFENDER

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NOV 09 2015
CLERK SUPREME COURT

TERRY E. BRANSTAD, GOVERNOR

KIM REYNOLDS, LT. GOVERNOR

ADAM C. GREGG, STATE PUBLIC DEFENDER

To: The Iowa Supreme Court
From: The Office of the State Public Defender
Re: Proposed Change to Iowa R. Crim. P. 2.18(15)
Date: November 9, 2015

The Office of the State Public Defender does not support the proposed changes to Iowa R. Crim. P. 2.18(15) that would allow a post-submission substitution of a juror. A rule change allowing for a juror to be replaced after deliberations have begun would significantly and negatively impact a criminal defendant's Sixth Amendment right to a fair trial by an impartial jury. Further, a single incident out of Muscatine County should not trigger a change to a system that is "arguably the least susceptible to constitutional complications…" John A. Maschman, Use of Alternative Jurors in the Event of a Mid-Deliberation Juror Incapacity, Memorandum at 1, (2014).

There is more to the deliberation process than the words spoken in the jury room. Group dynamics and the personalities of jurors play an important role in the deliberative process. The loss of the group dynamics of a jury cannot be repaired by instructions of the court or admonitions. As our Court of Appeals has noted:

> The purpose of rule 2.18(15) is to have the same twelve citizens who elect a foreperson and start deliberating to continue their deliberation until they reach a verdict or a stalemate. The Alaska Court of Appeals described the importance of maintaining the original composition of the jury after deliberations begin:

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> One of the primary benefits of having juries decide lawsuits is that the decision is made by a group of people who bring differing personalities, backgrounds, and attitudes to their deliberations. Because the jurors must deliberate and reach their decision as a group, the jurors' decision necessarily reflects an amalgam of their individual insights and analyses. *We must presume that the deliberations of an unchanging group of twelve are not equivalent to a group of eleven who are later joined, in the middle of their deliberations, by a twelfth person.*

State v. Miller, 825 N.W.2d 327 (Iowa Ct. App. 2012)(*citing Plate v. State*, 925 P.2d 1057, 1061 (Alaska Ct. App. 1996)(emphasis added). If the jury composition is changed after deliberations have begun, admonishing the remaining jurors to disregard the content of prior deliberations and to start over with the new juror cannot undo the group dynamic that has already developed.

The assumption that the admonition would lead the newly constituted jury to start with a clean slate is highly questionable. While it is true admonitions have been found to correct certain errors during the trial process, it is equally true some errors cannot be saved by admonition. Psychological and sociological literature is rife with studies calling into question the effect of admonitions. See Joel Lieberman and Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 Psychol. Pub. Policy & L. 677, 677-711 (2000). Asking a jury to disregard the interaction and deliberative process that has already taken place greatly overestimates the power of the admonition.

Jurors would be subject to coercion if the rules were changed to allow for the replacement of a juror after deliberations have begun. We know this because it has already happened. For example, in a 1986 case a juror was coerced by the other members of the panel and asked to be replaced, after deliberations had begun, and the court allowed an alternate to enter the deliberations. Douglas J. McDermott, Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial, 35 B.C. L.

Rev. 847, 859-860 (1994), citing *Peek v. Kemp*, 784 F.2d 1479, 1485 (11th Cir.), *cert. denied*, 479 U.S. 939 (1986). Later it was revealed that the replaced juror was the lone hold-out at the time of their dismissal. *Id.*

The second way jurors could be coerced is when the new, alternate juror joins the reconstituted jury panel the original jurors will have already formed opinions based on prior deliberations and it would be difficult for the replacement juror to convince them to change their positions. For example, in *United States v. Lamb* the district court judge excused the alternate juror at the start of deliberations with the instruction to "stand by" in case her presence became necessary. Four hours into deliberations, one of the jurors informed the judge that due to the sudden accidental death of a close friend, he was unable emotionally to render a decision. Twenty-nine minutes later, the jury returned a guilty verdict. *Id.* at 857 (citing *United States v. Lamb*, 529 F. 1153 (9th Cir. 1975)). In reversing the district court's verdict, the Ninth Circuit held that alternate substitution after the start of deliberations and without the defendant's consent is fraught with coercive dangers on the new juror and thus constitutes reversible error. *Id.* The Court held that the district court judge placed the alternate in an inherently coercive atmosphere in which the jury may have already determined the final verdict. *Id.* The *Lamb* court determined that such impermissible coercion was clearly present because deliberations, which had been in progress for approximately four hours prior to the alternate substitution, only lasted twenty-nine minutes after the replacement. *Id.*

Lastly, under a system that allows the substitution of a juror after deliberations have begun, there is potential for the judge or the jury to influence its own make-up. In a California case, known as the Reginald Denny case, the court replaced several jurors with alternates both before and after deliberations had begun. Douglas J. McDermott, Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial, 35 B.C. L. Rev. 847, 869-870 (1994),

citing *People v. Williams*, No. BA058116 (L.A. Super. Ct. 1993). The most publicized juror substitution took place on October 11, 1993, after deliberations had been underway for over one week. *Id.* Judge Ouderkirk discharged an elderly black woman, juror 373, for good cause, stating that she was failing to deliberate. *Id.* The court then replaced the juror with an alternate. *Id.* The other eleven jurors on the panel initiated this substitution by submitting a note to the court complaining about the juror and questioning her mental faculties. Assuring the court that the note had nothing to do with juror 373's stance on the issues, the foreperson claimed that juror 373 was not participating in deliberations and, in fact, her behavior thwarted any potential progress. *Id.* at 873. Questioning juror 373's mental capacity, the foreperson recounted that while the jury was discussing important matters, juror 373 would be looking at a variety of papers and notes which appeared to be in total disarray. *Id.* The foreperson concluded that juror 373 was unable to participate meaningfully in deliberations. *Id.* It was revealed shortly after the trial that juror 373 was the lone voice in the room that did not want to convict. In the Reginald Denny case the jury and possibly the judge was able to influence the make-up of the jury.

The Office of the State Public Defender urges the Court to reject the proposed changes to the Iowa Rules of Criminal Procedure which would allow for post-submission substitution of a juror. Defendants enjoy a constitutional right to have a jury that deliberates freely and fully the facts of the case and this proposed rule change interferes with those rights. The Office of the State Public Defender does not object to the changes in the rule that allow for contemporaneous examination of principal and alternate jurors.

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Alternate Juror Rule
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1 Attachment

2.18(15) comments.docx

Here are my comments to the proposed rules regarding substitution of alternate jurors.

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COMMENT ON THE IOWA SUPREME COURT'S PROPOSED RULE CHANGE TO IOWA RULE OF CRIMINAL PROCEDURE 2.18(15)

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NOV 13 2015
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Submitted by

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The Iowa Supreme Court is currently considering amending Rule of Criminal Procedure 2.18(15) to delete the requirement that alternate jurors be discharged once the jury retires to deliberate. Under the proposed rule change, an alternate juror could be called to replace a principal juror who is excused after deliberations begin. While I understand the inconveniences posed by situations in which principal jurors cannot complete their service, I provide my comments today to raise several areas of concern with the proposed solution.

To begin, I wish to clarify that although I am an attorney with the State Appellate Defender Office, I am submitting my comments personally and not on behalf of the State Public Defender. The views and opinions expressed in this document are my own.

I also wish to clarify that I have no objection to proposed Rule 2.18(15)(a) to the extent it aligns the formal procedure for selecting alternate jurors with common practice. (Proposal p. 1 L.6-p. 2 L.2). I have seen many cases on appeal where the district court and parties have agreed on a selection process that keeps the identity of the alternate jurors confidential. I agree that using a

method that does not allow a juror to know whether he or she is a principal or alternate juror may result in more attentive jurors.

My primary area of concern is with proposed Rule 2.18(15)(b), which would allow alternate jurors to replace principal jurors once deliberations have begun. (Proposal p.2 L.2-31). Care must be taken to ensure a defendant's right to a 12-person jury trial is protected.

The right to a jury trial is a long-established one with foundations as far back as the Magna Carta. Duncan v. Louisiana, 391 U.S. 145, 151, 88 S.Ct. 1444, 1448, 20 L.Ed.2d 491, ___ (1968). By the 14th century, the size of the jury became fixed at 12 in common law. Williams v. Florida, 399 U.S. 78, 88-89, 90 S.Ct. 1893, 1899-1900, 26 L.Ed.2d 446, ___ (1970). Nonetheless, the United States Supreme Court has declined to read a 12-person-jury requirement into the Sixth Amendment. Id. at 102-03, 90 S.Ct. at 1907, 26 L.Ed.2d at ___.

The Iowa Constitution is more specific. Article I Section 9 provides:

> The right of trial by jury shall remain inviolate; but the general assembly may authorize a trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty or property, without due process of law.

Iowa Const. art. I § 9.

Article I section 10 further provides:

> In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses, and, to have the assistance of counsel.

Iowa Const. art. I § 10.

The Iowa Code does not contain any statutes increasing or decreasing the size of the jury. The Iowa Rules of Criminal Procedure, however, specify that the clerk at a jury trial is to "select a number of prospective jurors equal to twelve plus the prescribed number of strikes, by drawing ballots from a box without seeing the names." Iowa R. Crim. P. 2.18(1) (2015). Thus, under the Iowa Constitution and the Iowa Rules of Criminal Procedure, all indictable offenses are to be tried to a jury of 12 persons unless a defendant validly waives a jury trial or waives the 12-person requirement. Iowa R. Crim. P. 2.17(1) (2015); State v. Escobedo, 573 N.W.2d 271, 276 n.2 (Iowa Ct. App. 1997).

The Rules of Criminal Procedure provide for the selection of alternate jurors. Currently, alternates may "replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged." Iowa R. Crim. P. 2.18(15) (2015). The rule requires alternates to be discharged prior to deliberations and the trial court commits a procedural error when it fails to do so. State v. Escobedo, 573 N.W.2d at 276.

Most of the cases that have addressed the presence of alternate jurors in deliberations have done so in the context of an alternate sitting in on deliberations along with the 12 principal jurors. These "thirteenth juror" cases have adopted strong language prohibiting alternates – essentially strangers to the jury proceedings – from contaminating the privacy and sanctity inherent in jury deliberations. See, generally, People v. Bruneman, 40 P.2d 891 (Cal. Ct.

App. 1935); Glenn v. State, 123 S.E.2d 896 (1962); Patten v. State, 426 S.W.2d 503 (1968); Berry v. State, 298 So.2d 491 (Fla. Dist. Ct. App. 1974); State v. Bindyke, 220 S.E.2d 521, 530 (N.C. 1975); State v. Cuzick, 530 P.2d 288 (Wash. 1975); People v. Boulies, 690 P.2d 1253 (Colo. 1984); Commonwealth v. Smith, 531 N.E.2d 556 (Mass. 1988); United States v. Beasley, 464 F.2d 468 (10th Cir. 1972).

The proposed rule change avoids the "thirteenth juror" controversy by specifying that alternates would not participate in deliberations until after a principal juror has been excused. If alternates are not to be discharged upon the start of deliberations, their separation from the principal jurors and their participation only upon release of a principal juror are necessary requirements to maintain the integrity of a 12-person jury.

The remainder of the proposal, however, raises two very practical concerns. I address them separately:

Proposed Rule 2.18(15)(b)(2)(2)(ii) The jurors understand that they must set aside and disregard all past deliberations and begin deliberations anew to eliminate the influence of the discharged juror and ensure the reconstituted jury will consider the evidence in the context of full and complete deliberations with the alternate juror. (Proposal p.2 L. 22-25)

The language of this rule specifically directs jurors to "disregard all past deliberations." It is highly impractical to expect principal jurors to disregard what an excused juror previously discussed in deliberations. What if the excused juror made a uniquely salient point that no other juror had contemplated? Are jurors to disregard the point simply because that juror has now been excused from service? A reconstituted jury can be instructed to do

so by a trial court, but such an instruction would completely disregard human nature. If an excused juror made a convincing point, the remaining jurors will remember it after that juror has been released. They will share the point with the alternate. While there may not be 13 jurors in the room, there will be 13 jurors in fact.

Proposed Rule 2.18(15)(b)(3) Once the reconstituted jury has reached a verdict, but before the verdict is announced or revealed to the court, the court must determine whether the amount of time the reconstituted jury deliberated is sufficient for full and complete deliberations with the alternate juror. If necessary, the court may instruct the jury to continue its deliberations to ensure full, conscientious, and careful deliberations by all twelve jurors. (Proposal p.2 L.26-31)

How soon is too soon? Is a 30-minute deliberation enough for a class D felony? What about 15 minutes? Is three hours enough deliberation for a class A felony? One might call this an unworkable standard, except there is no standard. It is entirely subjective.

If this proposed rule change is to be adopted, I would respectfully suggest that – rather than have the judge try to guess whether the jury has had ample time to deliberate with the alternate juror present – the judge simply ask the jurors, or at least the jury foreperson, whether jurors had an appropriate time for full and complete deliberations. This could be done at the same time the judge asks the jury foreperson whether the verdict is the jury's verdict. Alternatively, it could be done as part of the polling of jurors when requested.

To conclude, I respectfully ask this Court not to approve the amendment to Iowa Rule of Criminal Procedure 2.18(15) to the extent it would permit alternate jurors to replace principal jurors after deliberations have begun.