

FINAL REPORT¹

Amendment to Pa.R.Crim.P. 645

RETENTION AND SEATING OF ALTERNATE JURORS AFTER DELIBERATIONS HAVE BEGUN

On November 19, 2013, effective January 1, 2014, upon the recommendation of the Criminal Procedural Rules Committee, the Court approved the amendment of Rule 645 (Seating and Discharge of Alternate Jurors) to require that alternate jurors be retained after the jury has retired to consider its verdict, and to provide procedures for a retained alternate juror to replace a principal juror who becomes unable to perform his or her duties or is disqualified.

As directed by the Court, the Committee examined the efficacy of the current requirement, under Rule 645, of discharging alternate jurors before the jury retires for deliberations and whether it might be more effective to provide for the retention of alternate jurors to be available to replace an incapacitated principal juror.

Prior to this amendment, Rule 645(B) provided that “An alternate juror who does not replace a principal juror shall be discharged before the jury retires to consider its verdict.” Rule 645 developed out of two sentences in original Rule 1108(a). Then-Rule 1108 contained the provision regarding discharge of alternates prior to deliberation at least since 1975 and most likely reflected the view of post-submission substitution common at that time. Given the difficulty and expense in re-trying large and complex cases, the provision has come into question, most recently in the case of *Commonwealth v. Jones*, 986 A.2d 1257 (Pa. Super. 2009), *appeal granted* 2 A.3d 467 (Pa. 2010), *appeal dismissed as improvidently granted* 55 A.3d 1044 (Pa. 2012).

As an initial step, the Committee examined whether there are any constitutional prohibitions against substituting an alternate juror after deliberations have begun.

¹ The Committee's *Final 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 Committee's explanatory *Final Reports*.

Claims that such substitutions violate the U.S. Constitution's double jeopardy provision have generally been rejected, as well as claims that the substitution violated the right to jury trial. See *Claudio v. Snyder*, 68 F.3d 1573 (3rd Cir. 1995), *cert denied*, 517 U.S. 1109 (1996); *United States v. Hillard*, 701 F.2d 1052 (2nd Cir. 1983), *cert denied*, 461 U.S. 958 (1983). Rather, in those jurisdictions where the practice has been prohibited, the prohibition is contained in a rule or statute. The main concern expressed in the case is to balance society's interest in efficient judicial proceedings while protecting the defendant's trial right to a proper jury. This is done by taking steps to ensure that the integrity of the jury process is undiminished by the replacement. See *e.g.* *Commonwealth v. Haywood*, 377 Mass. 755, 388 N.E.2d 648 (1979).

Some of the members noted that several jurisdictions allow for the retention of alternate jurors to be available for substitution after deliberations have begun, most notably in the federal system. It was suggested that federal practice might be the best model upon which to base this change. The Committee therefore examined Federal Rule of Criminal Procedure 24 that provides that alternate jurors may be retained after the jury retires to deliberate but the trial court must ensure that the alternate does not discuss the case with anyone. Under the federal rule, if the alternate replaces a principal juror, the court must instruct the jury to begin its deliberations anew.

Furthermore, when Rule 645 was last reviewed, in *Commonwealth v. Saunders*, 686 A.2d 25 (Pa. Super. 1996), the Superior Court declined to interpret Rule 645 as a bright-line restriction. In acknowledging the requirement to release alternates at the start of deliberations, the Superior Court held that a violation of the rule raised a presumption of prejudice toward the defendant that should mandate a new trial. However, the Superior Court held that the presumption could "be rebutted by evidence which establishes that sufficient protective measures were taken to insure the integrity of the jury function." *Id.* at 27. Those procedures were (1) ensuring that the "alternate has not been exposed to any improper outside influences;" (2) directing the recomposed jury to "begin deliberations anew," so to eliminate "the influence of the excused juror" and allow the regular jurors "to consider the evidence in the context of full and complete deliberations with the new juror;" and (3) instructing the recomposed jury that the removal of the original juror had nothing to do with his or her views on the case or

relationship with the fellow jurors to eliminate any impression that the remaining jurors risk removal for having similar beliefs. *Id.* at 29.²

In view of these considerations, the Committee concluded that Rule 645 should be amended to permit the retention of an alternate juror for replacing a principal juror who is unable to perform his or her duties or is disqualified even after deliberations have begun. One member suggested that the “default” for the rule should be that the alternates would be retained and the court would have the discretion to release the alternate. This led to an examination of exactly what it would mean to “retain” the alternate jurors.

The Committee considered the fact that sitting juries are rarely sequestered in current practice and jurors are often permitted to return to their homes at the end of the day during deliberations. Proper instructions given in these situations are sufficient to ensure an untainted jury. The Committee concluded that the same procedure could be applied to alternate jurors and agreed that the rule should provide that alternate jurors be retained in every case. Such a provision is not unprecedented. See Arizona Rule of Criminal Procedure 18.5(h).

It is within the trial judge’s discretion whether the alternates would be sequestered, ordered to remain in the courthouse or could be released to their homes with instructions to remain available for recall if needed. However, it is clear that alternate jurors are not permitted to be present in the jury room during deliberations unless they have replaced an excused principal juror. See *Commonwealth v. Coleman*, 119 A.2d 261 (Pa. 1956). The alternates would be treated the same as any other juror while retained on jury service.

The amendments delete current paragraph (B) of Rule 645 that contains the requirement that the alternates be discharged prior to deliberations. New paragraph (B) contains the requirement that the alternates be retained on jury service while language added to the *Comment* explains that the restrictions to be placed on such retained jurors are within the discretion of the trial judge. Paragraph (B) also contains the

² Ultimately, a new trial was ordered in *Saunders* due to the failure of the trial court to instruct the original jurors to disregard their prior deliberations. In fact, the jurors were directed to disclose to the alternate juror what had transpired during prior deliberations.

procedures designed to ensure that the alternates would not be tainted once deliberations were undertaken.

New paragraph (C) provides the procedures to be followed for replacing a juror post-submission, incorporating the required steps described in *Saunders*. These requirements are subdivided to describe the provisions related to (1) the colloquy of and instructions to the alternate juror before that alternate is placed on the jury and (2) the instructions to be given to the reconstituted jury once that alternate has been seated.

The *Comment* also provides that, once the jury is reconstituted, the trial judge has the discretion to re-instruct the reconstituted jury with the original charge. Finally, language has been added to the *Comment* to ensure that nothing in the rule was construed as intending to preclude an agreement among the parties to be tried by less than 12 jurors as provided in Rule 641. Finally, language has been added to the *Comment* to clarify that the same level of sequestration that the trial judge determines is appropriate for principal jurors should be applied to alternate jurors.