

Proposed Amendments to Pa.R.Crim.P. 645

INTRODUCTION

The Criminal Procedural Rules Committee is considering recommending that the Supreme Court of Pennsylvania amend 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. 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 7, 2013.

April 16, 2013

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Nancy L. Butts, Chair

*Jeffrey M. Wasileski
Counsel*

RULE 645. SEATING AND ~~[DISCHARGE]~~ RETENTION OF ALTERNATE JURORS.

(A) Alternate jurors, in the order in which they are called, shall replace principal jurors who [, prior to the time the jury retires to consider its verdict,] become unable or disqualified to perform their duties.

(B) [An alternate juror who does not replace a principal juror shall be discharged before the jury retires to consider its verdict.] Alternate jurors shall be retained after the jury retires to consider its verdict. The trial judge shall instruct the retained alternate jurors to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. A retained alternate juror shall not be permitted to be present in the jury room during deliberations unless he or she replaces a principal juror as provided in paragraph (C).

(C) After the jury has retired to consider its verdict, a principal juror who becomes unable to perform his or her duties or is disqualified may be replaced with a retained alternate juror only if the trial judge is satisfied that the proper jury function is not harmed by the replacement. To ensure this, the trial judge shall:

(1) colloquy the alternate juror on the record that the alternate juror has not been exposed to any improper outside influences; and

(2) once the jury is reconstituted following the replacement of the principal juror by the alternate juror, colloquy and instruct the reconstituted jury that

(a) the jurors understand that the reason the discharged juror was being replaced has nothing to do with the discharged juror's views on the case or the juror's relationship to fellow jurors; and

(b) the reconstituted jury understands that they must set aside and disregard all past deliberations and begin deliberations anew so as to eliminate the influence of the excused juror and so that the reconstituted jury will consider the evidence in the context of full and complete deliberations with the new juror.

COMMENT: This rule is derived from the last two sentences of former Rule 1108(a). See Rule 633 for the procedures for the examination and challenges of alternate trial jurors.

This rule was amended in 2013 to require that alternate jurors be retained after the jury retires to consider its verdict and to permit the trial judge to seat an alternate juror when a principal juror unable to perform his or her duties or is disqualified, and requires replacement. The amendment recognizes that, in cases in which a

principal juror becomes unable to serve after deliberations have begun, substitution of a retained alternate juror will be an appropriate alternative to the remedy of a mistrial so long as appropriate steps are taken to ensure that the juror function is not compromised. Paragraph (C)(2) provides the required colloquies and instructions that must be placed on the record when a principal juror is replaced by an alternate juror after the jury has retired to consider its verdict. See also Commonwealth v. Saunders, 686 A.2d 25 (Pa. Super. 1996) (Replacement of a principal by an alternate juror is proper if steps have been taken to ensure that the jury function remains protected).

The rule does not require that all retained alternate jurors be sequestered. Rather, it is within the discretion of the trial judge to determine what restrictions are placed upon the retained alternate jurors to ensure that the alternate jurors are available and eligible for substitution should that be necessary.

Retained alternate jurors remain in jury service, subject to all conditions thereof, until all jurors have been discharged.” See, e.g., 42 Pa.C.S. §4561.

When an alternate is seated pursuant to paragraph (C), the trial judge has the discretion in re-instructing the reconstituted jury with the original charge in whole or in part.

Nothing in the rule was intended to preclude an agreement among the parties to be tried by less than 12 jurors as provided in Rule 641.

NOTE: New Rule 645 adopted March 1, 2000, effective April 1, 2001[.] ; amended _____, 2013, effective _____, 2013.

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 645 published with the Court’s Order at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed amendment requiring the retention and permitting the substitution of alternate jurors after deliberations have begun published for comment at 43 Pa.B. (_____, 2013).

REPORT

Proposed amendments to Pa.R.Crim.P. 645

RETENTION AND SEATING OF ALTERNATE JURORS AFTER DELIBERATIONS HAVE BEGUN

As directed by the Supreme Court of Pennsylvania, the Committee has been examining the efficacy of the current requirement 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.

Current Rule 645(B) provides 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 were any constitutional prohibitions against substituting an alternate juror after deliberations have begun. 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 is to balance society’s interest while protecting the defendant’s trial right and this is done by taking steps to ensure that the integrity of the jury process be undiminished by the replacement. See e.g. *Commonwealth v. Haywood*, 377 Mass. 755, 388 NE.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 29.¹

The Committee therefore concluded that Rule 645 should be amended to permit the retention of an alternate juror for replacing a principal juror who becomes incapacitated 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

¹ 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 but, in fact, ordered to the contrary by directing original jurors to disclose to alternate what had transpired during prior deliberations.

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 would be 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 proposed amendments would delete current paragraph (B) that contains the requirement that the alternates be discharged prior to deliberations. New paragraph (B) would contain the requirement that the alternates be retained on jury service while language to be added to the *Comment* would explain that the restrictions to be placed on such retained jurors were within the discretion of the trial judge. Paragraph (B) would also contain the procedures designed to ensure that the alternates would not be tainted once deliberations were undertaken.

New paragraph (C) would provide 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* would also provide that, once the jury is reconstituted, the trial judge would have the discretion to re-instructing the reconstituted jury with the original charge. Finally, language would be 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.