Substitution of Alternate Jurors during Deliberations: Constitutional and Procedural Considerations

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The increasing prevalence of lengthy and complex trials, and the resulting rise in the opportunities for juror incapacitation or disqualification, has created a greater need for alternate jurors. Federal Rule of Criminal Procedure (FRCrimP) 24(c) and Federal Rule of Civil Procedure (FRCP) 47(b) allow courts to substitute alternate jurors until deliberations begin. A mistrial is likely to occur without an available alternate juror to replace incapacitated or disqualified juror.


The rule provides in part:

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

FRCrimP 24(c) (emphasis added).

FRCP 47(b) is identical to FRCrimP 24(c), supra note 3.

The federal system introduced the practice in criminal cases in 1932 and in civil cases in 1938. The use of alternate jurors, the substitution of an alternate juror for a juror, the time of the substitution, and the procedure used to determine if a substitution should be made are all at the court's discretion. See L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 24:101, :103-04, :202-04 (1966 & Supp. 1980) [hereinafter cited as L. ORFIELD]; 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 388, at 49, 50-51 (1969 & Supp. 1980) (criminal) [hereinafter cited as WRIGHT]; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2484, at 475-76 (1969) (civil) [hereinafter cited as MILLER]. See also Robinson v. United States, 144 F.2d 392, 397 (6th Cir. 1944), aff'd, 324 U.S. 282 (1945) (called a needed procedural reform).
Concern for incapacitation and disqualification, however, does not cease with the closing of the jury room door. A major shortcoming of FRCrimP 24(c) and FRCP 47(b) is that neither rule provides for substitution when a juror becomes incapacitated or disqualified during deliberations. Although proposals for substitution during federal trial deliberations have been unsuccessful, some states allow substitution during deliberations. Two procedures are used: (1) the alternate jurors remain separate from the deliberating jurors; or (2) the alternate jurors remain in the jury room during deliberations, but are instructed not to participate. This note analyzes these two procedures. Part I examines whether the two procedures would violate the federal rules of criminal and civil procedure; part II considers the constitutional validity of the two procedures; and part III reviews the current case law concerning the two procedures.

I. Federal Rules of Procedure

FRCrimP 24(c) and FRCP 47(b) require the discharge of alternate jurors "after the jury retires to consider its verdict." States

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6 See Parker v. Gladden, 385 U.S. 363 (1966); Remmer v. United States, 350 U.S. 377 (1956); L. Orfield, supra note 5, §24:101; Wright, supra note 5, § 388, at 49 n.92; Miller, supra note 5, § 2484, at 475. The court does not always call a mistrial, because the defendant may stipulate to a verdict by the remaining jurors or to the substitution of an alternate juror. Mistrials have been characterized as the "poorest of all possible solutions." Report of Supreme Court Committee on Criminal Procedure, 95 N.J.L.J. 1, 16 (Apr. 13, 1972) (hereinafter cited as N.J. Supreme Court Committee Report).


10 See notes 3 & 4 supra. See also Truscott v. Chaplin, 403 F.2d 644, 645 (3rd Cir. 1968) (presence of alternate juror at jury's noon meal, but before the commencement of deliberations, not reversible error and not violative of FRCP 47(b)).

The discharge of alternate jurors once deliberations begin is a mandatory requirement. See, e.g., United States v. Lamb, 529 F.2d 1153, 1155 (9th Cir. 1975); United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973); United States v. Hayutin, 398 F.2d 944, 950 (2d Cir.), cert. denied, 393 U.S. 961 (1968), subsequent appeal sub nom. United States v. Nash, 414 F.2d 234 (2d
that allow the substitution of alternate jurors during deliberations, whether they have been present or absent during deliberations, do not discharge alternate jurors until a verdict is reached. Thus, the use of either procedure would be a violation of both FRCrimP 24(c) and FRCP 47(b).  

Of equal concern is whether juror substitution during deliberations, or the presence of alternate jurors in the jury room during deliberations, results in more than twelve jurors. FRCP 48 allows stipulations for juries of less than twelve, and does not state, as does FRCrimP 23(b), that juries shall consist of twelve members. FRCP 48 implies that twelve jurors are the maximum, but such an implication is subject to debate.

In Colgrove v. Battin, the Supreme Court of the United States upheld a local district court rule that, without requiring stipulation by the parties, provided for six-member civil juries. The Court determined that, because FRCP 48 rested on the drafters' mistaken belief that the seventh amendment required a jury of twelve, the rule's twelve-person jury implication was without support. As a result, the district court rule providing for six jurors in all civil cases

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11 See note 10 infra. For similar rulings on nearly identical state statutes, see note 200 and accompanying text infra. Further, FRCrimP 24(c) can be waived. See, e.g., United States v. Allison, 461 F.2d at 472; United States v. Barone, 83 F.R.D. at 567, 573-74. The Fourth Circuit has also found FRCrimP 24(c) inapplicable where a court reinstates a discharged alternate juror. United States v. Evans, 635 F.2d 1124, 1127 (4th Cir. 1980).

12 Courts have held that substitution during deliberations results in more than twelve jurors. See notes 29 & 131 infra.

13 The rule provides: "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." FRCP 48.

14 The rule provides: "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing that with the approval of the court that the jury shall consist of any number less than 12." FRCrimP 23(b).


16 The rule was adopted pursuant to FRCP 83, which is derived from 28 U.S.C. § 2071 (1976), allowing local rules consistent with the federal rules and Supreme Court decisions.

17 The amendment states:

In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.
was consistent with FRCP 48.18

Because twelve is not a magic number,19 providing for more than twelve would seem as constitutionally consistent20 and procedurally acceptable as providing for less than twelve. Therefore, even if a court determines that the substitution of alternate jurors during deliberations produces a jury of greater than twelve members, no violation of FRCP 48 occurs.

FRCrimP 23(b), unlike FRCP 48, states that a jury shall consist of twelve members, which number can be reduced only by stipulation of the parties.21 Although courts have interpreted the rule to mean twelve is the maximum number of jurors allowable,22 such an interpretation, like that of FRCP 48, is based on the mistaken belief that in a criminal case the Constitution mandates a jury of twelve.23 In Williams v. Florida,24 the Supreme Court declared that a twelve-person jury is not constitutionally required in a criminal case. The Court said Congress, by passing FRCrimP 23(b), determined the jury size required in federal criminal cases.25 Thus, the substitution of alternate jurors during deliberations, whether they are present or absent during the prior deliberations, violates FRCrimP 23(b), if substitution constitutes a jury of more than twelve members.26

20 See State v. Cuzick, 85 Wash. 2d 146, 530 P.2d 288, 289 (1975) (Williams makes it difficult to see how a jury of 13 would prejudice the respondent).
21 See note 14 supra.
22 See United States v. Allison, 481 F.2d 468, 470 (5th Cir. 1973); United States v. Hayutin, 398 F.2d 944, 950 (2d Cir. 1968); United States v. Virginia Erection Corp., 335 F.2d 868, 870 (4th Cir. 1964).
23 See Williams v. Florida, 399 U.S. at 102-03. For a proper waiver of constitutional rights in a criminal case, not only does the defendant have to knowingly and intelligently consent, but government counsel must consent and the court must sanction the procedure. Patton v. United States, 281 U.S. 276, 312 (1930). Accord, Note, Rule 24(c), supra note 10, at 1610.
25 Id. at 102-03 n.50.
26 Note, Rule 24(c), supra note 10, at 1610. The House Judiciary Committee proposed an amendment allowing verdicts by less than the original jury of twelve, where one or more jurors were excused. House Comm. on the Judiciary, Proposed Amendments to the Federal Rules of Criminal Procedure, 95th Cong., 1st Sess. 298 (1977).
II. Constitutional Considerations

A. Substitution During Deliberations of Alternate Jurors Absent from the Prior Deliberations

1. Right to Jury Trial—Sixth and Seventh Amendments

The first of four constitutional considerations is whether substitution during deliberations of an alternate absent from the prior deliberations results in more jurors than is constitutionally allowed. The Supreme Court, by refusing to establish a maximum number of jurors that can constitutionally compose a jury, has rendered this consideration obsolete in federal cases.

States that require a jury of twelve members have taken two views. Some states contend that deliberations by more than twelve jurors is the equivalent of a trial by more than twelve jurors. The other states contend that, because only twelve jurors consider the issues at one time, the right to a jury trial by twelve jurors remains intact. The former states appear to believe that the discharged juror affected the verdict. But since determining the discharged juror’s probable effect is pure speculation, the focus should be on the verdict’s being reached after the deliberations and vote of twelve jurors. Viewed in this light, twelve jurors, not thirteen, render the decision, and no constitutional violation occurs.

The second constitutional consideration concerns the quality of the deliberations; whether an alternate juror’s effectiveness in the jury room is reduced or enhanced when a substitution during deliberations is made. The effectiveness of a substituted juror depends on how much deliberation has already occurred, the jury’s composition and characteristics, and the dynamics of the deliberations. A ju-

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27 For a listing and short discussion of these four factors, among others, see N.J. Supreme Court Committee Report, supra note 6, at 15-16.
28 See Ballew v. Georgia, 435 U.S. 223 (1978) (six-member jury is minimum); Colgrove, 413 U.S. at 157 (1973); Williams, 399 U.S. at 102.
31 This belief is implied in the courts’ decisions. See note 29 supra.
32 See United States v. Lamb, 529 F.2d 1153, 1159 (9th Cir. 1975) (dissent); N.J. Supreme Court Committee Report, supra note 6, at 16. The case and article talk of the speculativeness of determining the coercion on a substituted juror and a substituted juror’s effect on the deliberations.
ror's ability to deliberate effectively is central to the jury trial right.

The right to a jury trial in the federal courts is guaranteed in criminal and civil cases by the sixth and seventh amendments. The Supreme Court in Williams and Colgrove established that in federal and state criminal and civil trials it is the substance of the common law right to trial by jury, and not the procedural details, which is required by these amendments. The purpose of the jury trial in criminal cases is to prevent government oppression, "and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues." The Supreme Court in Williams set forth the jury's essential feature as "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." The jury makes such a judgment if it consists "of a group of laymen representative of a cross section of the community who have the duty and opportunity to deliberate, free from outside attempts at intimidation . . . ." The substitution of an alternate juror who was absent from the prior deliberations would not affect significantly the exercise of the group's commonsense judgment, so as to rise to the level of a constitutional violation.

Missing the prior deliberations is a serious problem. The alternate juror is likely to be lost and unsure of exactly what to do or say, because he was not a part of the prior deliberations. Thus, without first requiring the other jurors to explain their reasons for previously

65 (2d ed. 1980) [hereinafter cited as G. STUCKEY]; N.J. Supreme Court Committee Report, supra note 6, at 16.
34 The amendment reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. CONST. amend. VI.
35 See note 17 supra.
36 See Colgrove, 413 U.S. at 156-57; Williams, 399 U.S. at 99-100, 102-03. See also Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981).
37 399 U.S. at 87, 100. See Colgrove, 413 U.S. at 157.
38 413 U.S. at 157.
39 399 U.S. at 100. But see 26 J. CRIM. L. & C. 121, 122 (1935) [hereinafter cited as Comment, People v. Bruneman]. At common law, a jury trial had three requisites: the issues of fact were decided by twelve jurors, the jurors were supposed to be impartial, and the decision had to be unanimous. Id.
41 Professor Wright bases his statement, that substitution during deliberations is reversible error, primarily on the problem of the missed prior deliberations. WRIGHT, supra note 5, at 52. Accord, People v. Ryan, 19 N.Y.2d 100, 104, 224 N.E.2d 710, 712, 278 N.Y.S.2d 199, 202-03 (1966). See also Comment, People v. Bruneman, supra note 39, at 123 (expresses concern over substitution and missed prior deliberations). Contra, 8 MOORE'S FEDERAL PRACTICE ¶ 24.05 (2d ed. 1975).
made decisions, the alternate juror will find it difficult to contribute meaningfully to the remaining deliberations, and to vote intelligently.

Some states have alleviated this problem by requiring a jury instruction ordering the deliberations to start anew in the event of a substitution.\textsuperscript{42} It is unrealistic, however, to believe juries will start at the very beginning. Nevertheless, the purpose and effect of the instruction is not diminished, because it tells the jury to thoroughly brief the alternate juror as to what has been discussed and decided, and the reasons for any decisions. With this information, the alternate juror may intelligently attack currently held positions and may make a fully informed decision when he votes.\textsuperscript{43} The alternate juror is thus placed in substantially the same position as the other jurors.\textsuperscript{44} Although the alternate juror misses the dynamics of the prior deliberations,\textsuperscript{45} these dynamics are quickly rekindled if the alternate juror sparks the prior discussion back to life with questions or objections.

The quality of the deliberations, and the ultimate verdict, depend on a variety of factors. Jury studies have examined such factors as sex, age, race, education,\textsuperscript{46} occupation, socioeconomic status,\textsuperscript{47} na-

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  \item \textsuperscript{42} See People v. Collins, 17 Cal. 3d 687, 693-94, 552 P.2d 742, 746-47, 131 Cal. Rptr. 782, 786-87 (1976), cert. denied, 492 U.S. 1077 (1977); Commonwealth v. Haywood, Mass. Adv. Sh. at 965; State v. Trent, 79 N.J. 251, 256-57, 398 A.2d 1271, 1273-74 (1979). The court in Collins pointed out the concern expressed by Professor Wright and the New York court in Ryan with the missed prior deliberations, and how the instruction to begin anew remedies the problem. 17 Cal. 3d at 694 n.4, 552 P.2d at 747 n.4, 131 Cal. Rptr. at 787 n.4. Collins emphasized that part of the jury trial right is the requirement that each juror participates in all deliberations. \textit{Id.} at 694, 552 P.2d at 746, 131 Cal. Rptr. at 787. \textit{But see} United States v. Evans, 635 F.2d 1124, 1128 (4th Cir. 1980) (possible consequences of missed prior deliberations pure conjecture).
  \item \textsuperscript{43} See United States v. Barone, 83 F.R.D. 565, 567 (S.D. Fla. 1979). If one or more expressed doubts the trial judge, at his discretion, could prohibit the substitution. \textit{See} State v. Miller, 76 N.J. 392, 407, 388 A.2d 218, 225 (1978) (situation might arise where it is better not to substitute).
  \item \textsuperscript{44} See United States v. Barone, 83 F.R.D. at 573; Tanner v. State, 242 Ga. 437, 438, 249 S.E.2d 238, 239-40 (1978); G. Stuckey, \textit{supra} note 33, at 164; \textit{N.J. Supreme Court Committee Report, supra} note 6, at 16.
  \item \textsuperscript{45} G. Stuckey, \textit{supra} note 33, at 165.
tionality, knowledge about a specific case and previous juror experience as influencing a juror’s deliberations and decision. Similar studies have also shown such elements of the trial as the attorneys’ competency, juror sympathy for a defendant, the “body language” of the trial participants, the crime, unanimous versus majority verdicts and the number of prosecution and defendant arguments affect and are affected by jury deliberations.


50 See, e.g., Broeder, Previous Jury Trial Service as Affecting Juror Behavior, 1965 Ins. L.J. 138.

51 See R. Simon, supra note 46: “The evidence as manifested by empirical studies shows that there is some relationship between verdicts and the jurors’ personal and social characteristics; but the relationship is not strong.” Id. at 41. Social status significantly affects juror performance at the deliberation stage. Id. at 46.

52 See, e.g., J. FRANK, COURTS ON TRIAL 122 (1949); Cramer, A View from the Jury Box, 6 LITIGATION 3 (1979). See also H. KALVEN & H. ZEISEL, THE AMERICAN JURY 351-74 (1966) [hereinafter cited as H. KALVEN].


54 See, e.g., Vidmar, Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors, 22 J. PERSONALITY & SOC. PSYCH. 211 (1972). E.g., Alder, Socioeconomic Factors Influencing Jury Verdicts, 3 N.Y.U. Rev. L. & SOC. CHANGE 1-4 (1973); Kessler, supra note 33, at 84. “Body Language” refers to, inter alia, gestures, the manner in which things are said, and dress of the participants in a trial.

55 See H. KALVEN, supra note 52, at 301-05; R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 106 (1967); Castantini, supra note 46, at 24-27.

56 See, e.g., M. SAKS, JURY VERDICTS 20-27, 91-99 (1977) [hereinafter cited as M. SAKS]. This study has been noted for the quality and methodology of the research, and for its being thus far uncontested. R. SIMON, supra note 46, at 75-76.

The dynamics of group deliberations are also an important consideration. Deliberations in smaller juries differ from those in larger juries, although no significant differences in verdicts have been found. Furthermore, the verdict in most cases reflects the majority vote on the first ballot. The initial majority will listen to a dissenter voice his views and attempt to change the dissenter's mind. A dissenter might not voice his objections, particularly in a larger group, although the presence of an ally encourages most dissenters to voice their convictions. Unless the dissenting juror has an ally, the chances of which are greater in larger juries, the dissenting juror

61 See M. Saks, supra note 56, at 105; R. Simon, supra note 46, at 75. But see Rosenblatt, supra note 60, at 263 (larger jury more likely to reach correct decision); Note, Statistical Analysis and Jury Size: Ballew v. State of Georgia, 56 DENVER L.J. 659, 671 (1979) [hereinafter cited as Note, Statistical Analysis].
63 See, e.g., Kessler, supra note 33, at 84; Lempert, supra note 62, at 694; Rosenblatt, supra note 60, at 264.
64 See Kessler, supra note 33, at 83-84. Cf. Lempert, supra note 62, at 694 (citing Hawkins).
65 See S. Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgements, reprinted in READINGS IN SOCIAL PSYCHOLOGY 180 (3d ed. E. Maccoby, T. Newcomb & E. Hartley eds. 1958); Kessler, supra note 33, at 84.
66 See, e.g., M. Saks; supra note 56, at 18; Lempert, supra note 62, at 673; Rosenblatt, supra note 60, at 264; Thomas & Fink, Effects of Group Size, 60 PSYCH. BULL. 371 (1963). See also Note, Statistical Analysis, supra note 61, at 667. But see Asch, supra note 65, at 177, 183 (some individuals did not succumb to majority pressure, even though there were no allies).
67 See, e.g., M. Saks, supra note 56, at 18; Kessler, supra note 33, at 84; Lempert, supra note 62, at 673; Note, Statistical Analysis, supra note 61, at 670. Empirical data shows twelve-person juries hang 5.5% of the time, while six-person juries hang 2.4% of the time, supporting the propositions that allies are needed to resist majority pressure and allies are more likely to be found in larger groups. Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. Rev. 710, 719-20 (1971).
usually goes against his better judgment and succumbs to the majority. A hung jury, on the other hand, results when the dissent has successfully resisted majority pressure.

The studies reveal, and commonsense dictates, that the nature and extent of the effect of an alternate juror's substitution is pure speculation. Although some changes in result are inevitable, they would seem rare. A change may also not be for the worst; perhaps a jury would thus avoid an incorrect result. A change in procedure to allow the substitution during deliberations of an alternate juror who was absent from the prior deliberations would not inure to the advantage or detriment of either the defendant, the plaintiff, or the state.

In its jury decisions, the Supreme Court has also admitted changes in result would occur, as changes would occur if substitution during deliberations was allowed, but the Court dismissed the changes as insignificant. In Williams v. Florida, the Court, in concluding that juries of less than twelve members are constitutional, opined that reducing a jury to six members could lead to fewer hung juries, but dismissed this fact as a nondiscernible difference. The Court, however, relied on an unsupportable factual foundation in reaching this conclusion. Research has shown that a reduction to

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68 See Note, On Instructing Deadlocked Juries, 78 YALE L.J. 100 (1968). See also R. SIMON, supra note 46, at 64; Lempert, supra note 62, at 673 n.90.

69 H. KALVEN, supra note 52, at 462. Kalven and Zeisel also state that hung juries will occur more often where four or five jurors dissent at the beginning of the deliberations. Id. at 463. See M. SAKS, supra note 56, at 3.

70 See R. SIMON, supra note 46, at 45-46. See also N.J. Supreme Court Committee Report, supra note 6, at 16.

71 For example, an alternate juror, who has made up his mind and will not be persuaded otherwise, may be substituted for a juror who, along with all the other jurors, has decided differently, resulting in a mistrial. This result, however, is good if the alternate juror was correct in his judgment.

72 See notes 46-69 supra and accompanying text (indicates that changes in procedure would not produce many changes in result).

73 See Lempert, supra note 62, at 677-78 n.100.

74 See Williams v. Florida, 399 U.S. 78, 101 n.48 (1970). See also Colgrove v. Battin, 413 U.S. 149, 159 n.1.5 (1973) (convincing empirical evidence of the correctness of Williams). However, as Lempert stated: "The Supreme Court ignored the matter of the hung jury in Colgrove and assumed away any difficulties in Williams." Lempert, supra note 62, at 678.

75 399 U.S. at 101 n.48.

76 For some discussion of the problems with the studies relied upon by the Supreme Court in Williams and Colgrove, see M. SAKS, supra note 56, at 9-11, 37-59; R. SIMON, supra note 46, at 74-75; Zeisel & Diamond, Convincing Empirical Evidence On Six Member Jury, 41 U. CHI. L. REV. 281 (1974). For a thorough discussion of the use of applied social research by the courts, see THE USE • NONUSE • MISUSE OF APPLIED SOCIAL RESEARCH IN THE
six members causes a significant reduction in minority views, and that the presence of an ally is almost essential for a dissenter to hold out. This suggests that the reduction in hung juries would be more substantial than the Court anticipated. In addition, studies have disproved the conclusion in Williams that jurors in the dissent are influenced by the proportionate size of the majority against them. A decrease in jury size from twelve to six members also significantly reduces the representation of the community. Finally, research generally does not support the Court's point in Colgrove v. Battin that smaller juries deliberate better. Nevertheless, such studies have not convinced the Court that the change occurring in the six-member jury's exercise of its commonsense judgment is significant enough to rise to constitutional dimensions.

In Apodaca v. Oregon, the Court sustained a state law allowing nonunanimous jury verdicts in noncapital criminal cases. Four justices noted that a unanimous verdict requirement results in hung juries in situations where nonunanimous juries convict or acquit. Yet, no constitutional infirmity was found.

The Court in Williams, Colgrove, and Apodaca viewed the jury's basic function as having been effectively carried out. The interposition of the jury between the accused and the state, and the jury's subsequent judgment, was not considered significantly altered when a six-member or nonunanimous jury was involved. Similarly, substi-

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77 Zeisel, supra note 67, at 715. See M. Saks, supra note 56, at 18-19, 90-91; R. Simon, supra note 46, at 75-76; Lempert, supra note 62, at 668-79; Zeisel, Twelve Is Just, 10 Trial 13 (1974) (72/100 twelve-person juries will contain a minority; 47/100 six-person juries will contain a minority); Note, Statistical Analysis, supra note 61, at 656; Note, The Jury Size Question in Pennsylvania: Six Of One and A Dozen Of The Other, 53 Temple L.Q. 89, 90 n.6 (1980) [hereinafter cited as Note, Jury Size].

78 See notes 66-68 and accompanying text supra.

79 See, e.g., Lempert, supra note 62, at 676-70; Note, Statistical Analysis, supra note 61, at 668; Zeisel, supra note 67, at 719-20. But see M. Saks, supra note 56, at 89-90 (results of experiment inconclusive because sample not large enough).

80 Zeisel, supra note 67, at 719-20. See also M. Saks, supra note 56, at 17-18 (logarithmic function).

81 See note 73 supra.

82 413 U.S. at 159 n.15.

83 See Ballew v. Georgia, 435 U.S. 223, 232 (1978); M. Saks, supra note 56, at 12, 105; Lempert, supra note 62, at 693-95; Note, Jury Size, supra note 77, at 90 n.5; Rosenblatt, supra note 60, at 263.

84 See Ballew v. Georgia, 435 U.S. at 240-41.

85 406 U.S. 404 (1972) (4-4-1 decision).

86 Id. at 411 (these four judges followed the Williams analysis).
tuting alternate jurors during deliberations is no more detrimental to a criminal defendant or a civil party than is a jury’s reduction from twelve to six members\textsuperscript{87} or allowing nonunanimous verdicts.\textsuperscript{88} Finally, while the parties in a jury trial are not entitled to a particular verdict, they are entitled to a jury’s fair and thorough consideration of the issues, which is attained through jury deliberations.\textsuperscript{89} The substitution during deliberations of an alternate juror who is absent from the prior deliberations does not affect significantly the jury deliberations.

A third constitutional consideration, whether alternate jurors are more susceptible to improper influence than the other jurors, is a legitimate concern that a court can negate through the use of proper procedures. A court sequestering the deliberating jurors should also separately sequester the alternate jurors.\textsuperscript{90} Courts that dismiss alternate jurors, but tell them to “stand-by,” should instruct them that they are still under their jurors’ oath and cannot discuss the case with anyone.\textsuperscript{91} In any event, a court should conduct a careful voir dire of the alternate jurors, as they are needed, to determine (1) if there has been any improper influence, and (2) if the alternate juror can render a fair decision.\textsuperscript{92}

The fourth and final constitutional concern, whether jurors will feign an illness or otherwise become disqualified to avoid a difficult decision,\textsuperscript{93} is a very speculative one\textsuperscript{94} that a judge can take steps to

\textsuperscript{87} See notes 76-84 and accompanying text supra.

\textsuperscript{88} 45\% fewer hung juries occur in jurisdictions allowing majority verdicts. H. Kalven, supra note 52, at 461. The Ninth Circuit has also noted the importance of minority view consideration and how unanimity ensures such consideration. United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). A unanimous verdict impinges more on the jury trial right than substitution during deliberations. Henderson v. Lane, 613 F.2d 175, 178 (7th Cir. 1980).

\textsuperscript{89} “No group, in short, has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined.” Apodaca, 406 U.S. at 413.

\textsuperscript{90} See Johnson v. Duckworth, 650 F.2d 122, 125 (7th Cir. 1981) (when jurors are sequestered, so are the alternate jurors); United States v. Barone, 83 F.R.D. 565, 567 (S.D. Fla. 1979) (alternate juror sequestered separately from “regular” jurors).

\textsuperscript{91} See United States v. Lamb, 529 F.2d 1153, 1157 (9th Cir. 1975) (court did not hold juror to jurors’ obligation).

\textsuperscript{92} See Henderson v. Lane, 613 F.2d at 179 (alternate juror examined to determine if he could make a fair decision before substitution was allowed); United States v. Barone, 83 F.R.D. at 571 (alternate juror questioned before substitution to determine if he had been prejudiced and if he had adhered to his jurors’ obligation).

\textsuperscript{93} See United States v. Lamb, 529 F.2d at 1156; United States v. Virginia Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964). See also Wright, supra note 5, at 53 n.17.

\textsuperscript{94} See United States v. Lamb, 529 F.2d at 1158 (dissent). But see Henderson v. Lane, 613 F.2d at 178.
minimize. As part of his jury instructions, a judge should emphasize each juror’s responsibility as a juror. A judge could also threaten to hold any juror found faking an illness in contempt of court. A contempt threat may not be necessary, however, since it is unlikely that an instruction prohibiting a feigned illness will be disobeyed. When a juror does ask to be discharged because of illness, the judge should conduct a careful voir dire to determine if the juror is faking, including an examination by a qualified physician. The judge could also describe the voir dire procedure when he reads the jury instructions. When a court discharges a juror because of illness, the court risks the implication that the discharged juror was a lone dissenter whose place will be taken by a more pliable alternate juror. Although such a view is highly speculative, a court should take the preceding precautions to avoid such an implication. Any effect, whether the precautions are taken or not, is constitutionally insignificant.

Although the substitution of an alternate juror who was absent from the prior deliberations will have an effect, it is too insignificant to deprive a party of the jury deliberations necessary for the jury to reach the requisite commonsense community judgment. Since this is the constitutional standard established by Williams and its progeny, the substitution during deliberations of an alternate juror who was absent during the prior deliberations is therefore not of constitutional dimension.

2. Due Process—Sixth and Fourteenth Amendments

The sixth amendment right to a jury trial in criminal cases ap-

95 Cf. United States v. Barone, 83 F.R.D. at 571 (court inquired into whether substituted juror had adhered to his jurors’ obligation).
97 See People v. Collins, 17 Cal. 3d at 696, 552 P.2d at 748, 131 Cal. Rptr. at 788 (comprehensive, exacting hearing conducted by trial judge).
98 See, e.g., United States v. Lamb, 529 F.2d at 1155 (court discharged juror due to death of co-worker); United States v. Allison, 481 F.2d 468, 469-70 (5th Cir. 1973) (court questioned the discharged juror); United States v. Barone, 83 F.R.D. at 566-67 (doctor examined and the court discharged the juror pursuant to the doctor’s recommendation). See also Henderson v. Lane, 613 F.2d at 176; United States v. Meister, 484 F. Supp. 442, 443 (S.D. Fla. 1980). Both of these cases dealt with jurors who suffered heart attacks. No voir dire or examination by a physician is required under these or similar circumstances.
99 See notes 66-68 and accompanying text supra.
100 See Henderson v. Lane, 613 F.2d at 178 (nonunanimous verdict requirement impinges more on “mistrial right” of the defendant).
plies to the states through the fourteenth amendment.\textsuperscript{101} It is unclear to what extent the sixth amendment right to a jury trial applies to the states.\textsuperscript{102} If wholly applicable, the right as applied through the fourteenth amendment would not be impaired, because the sixth amendment right to a jury trial is not affected significantly by substitution during deliberations.\textsuperscript{103} If the sixth amendment is not wholly applicable to the states, a court must determine if substitution during deliberations of an alternate juror who was absent from the prior deliberations results in a fourteenth amendment due process violation. Required is an examination of (1) "[w]hether [substitution] inhibits the functioning of the jury as an institution to a significant degree and [(2)], if so, whether any state interest justifies the disruption so as to preserve its constitutionality."\textsuperscript{104}

Although substitution during deliberations does not significantly inhibit the functioning of the jury,\textsuperscript{105} even if it did an important state interest justifies and outweighs any disruption. Judicial economy,\textsuperscript{106} the reason for substitution during deliberations, was deemed a sub-

\textsuperscript{101} Duncan v. Louisiana, 391 U.S. 145 (1968); Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981).

\textsuperscript{102} See Apodaca, 406 U.S. at 366 (1972) (Powell, J., concurring and finding it is not). It appears that the four "majority" justices were reading Duncan in this manner. The three dissenting justices stated it is wholly applicable.

\textsuperscript{103} See notes 27-100 and accompanying text supra.

\textsuperscript{104} Ballew v. Georgia, 435 U.S. 223, 231 (1978). This same test would apply if substitution during deliberations in civil and criminal trials were attacked in federal courts based on a fifth amendment due process argument. See, e.g., Hibben v. Smith, 191 U.S. 310 (1903). Different constructions and applications are appropriate in certain cases. See, e.g., French v. Barber Asphalt Paving Co., 181 U.S. 324 (1901). But here, since the assumption is that the sixth amendment is wholly applicable to the states, the same application would be appropriate. See United States v. Lamb, 529 F.2d 1153, 1156 n.4 (9th Cir. 1975) (fifth amendment due process violation contention not reached).

State civil trials present a separate concern because the seventh amendment has not been held applicable to the states through the fourteenth amendment. See, e.g., Fay v. New York, 322 U.S. 261, 288 (1947). Because civil disputes often involve property interests, procedural due process is required. See, e.g., Leis v. Flynt, 439 U.S. 438, 441 (1979); Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976). A state may regulate its courts' procedures, unless the procedures are contrary to fundamental liberty or fundamental justice. See, e.g., Patterson v. New York, 432 U.S. 197 (1977). The seventh amendment right to a jury trial has not been declared fundamental. See Leis v. Flynt, 439 U.S. at 441; Mathews v. Eldridge, 424 U.S. at 333-35. Therefore, a state adopting the substitution during deliberations procedure would not violate procedural due process.

\textsuperscript{105} See notes 27-100 and accompanying text supra.

stantial state interest by the Supreme Court in *Burch v. Louisiana*. The Court in *Burch*, however, did not find the state interest in judicial economy sufficient to overcome the constitutional disruption in allowing a nonunanimous verdict by a six-man jury in a criminal trial. The Court, however, noted that the state interest in *Burch* was merely speculative, whereas the benefits of substitution during deliberations are far from speculative. No statistics are available to show the frequency of mistrials due to juror incapacity or disqualification during deliberations, but the problem has arisen enough that commentators and drafters have asked for relief, and some states have provided relief.

Because alternate jurors are normally used in trials of significant duration, a mistrial causes the waste of much time and money. A second trial also displaces other trials, further adding to the cost, delay, and congestion currently plaguing United States' courts. The cost to the judicial system is the combination of these explicit and implicit costs.

Not all mistrials are unnecessary, however, for they are an important tool in protecting litigants' rights. But mistrials occurring when a deliberating juror becomes incapacitated or disqualified are unnecessary and their substantial judicial costs can be avoided if courts permit alternate juror substitution during deliberations. The

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107 441 U.S. 130, 139 (1979).
108 Id.
109 See note 7 *supra*.
110 See notes 8 & 9 and accompanying text *supra*.
111 See notes 1 & 2 and accompanying text *supra*.

Lasker states that the cost of delay goes beyond the denial of rights and also includes the effect on the judges, who "sense keenly the lack of time to reflect, the perils of hasty decision." Lasker, *The Court Crunch, supra*, at 250.

113 The implicit cost to the courts of the lost trial time is similar to the cost in economics of "missed opportunities or foregone alternatives." An example is that steel "used for armaments is not available for the manufacture of cars." C. McCONE, ECONOMICS 497 (6th ed. 1975). Likewise, the court time used for retrials is court time unavailable for new trials.

state interest is sufficient to justify the assumed minimal disruption in the jury’s functioning.

3. Double Jeopardy—Federal and State

The third constitutional argument made against the substitution during deliberations of an alternate juror absent from the prior deliberations is that such substitution results in a trial by two twelve-member juries. In federal and state criminal trials, such a result violates the fifth and fourteenth amendment guarantees against placing a defendant in double jeopardy.

There are not two juries of twelve jurors, however, but one jury of regulars and alternates. A substitution during deliberations, like a pre-deliberations substitution, is not the start of a second trial, but a continuation of the first. A substitution furthers the defendant’s right to have his trial completed by the particular tribunal that began it. More specifically, the trial is completed by the jury that the defendant’s counsel helped select. A substitution also avoids the needless anxiety, expense, ordeal and embarrassment of starting over if the court declares a mistrial. Thus, alternate juror substitution during deliberations does not place the defendant in double jeopardy. Alternatively, the doctrine of manifest necessity also defeats a

115 See N.J. Supreme Court Committee Report, supra note 6, at 16.
116 The pertinent part of the amendment reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.
118 See Leser v. United States, 358 F.2d 313, appeal dismissed, 385 U.S. 802 (9th Cir. 1966);
120 The general policy behind the double jeopardy clause is to avoid just these things. In a famous quote Justice Black stated:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

121 See Leser v. United States, 390 F.2d 634, 635 (9th Cir.), cert. denied, 391 U.S. 953 (1968); Leser v. United States, 358 F.2d at 318; People v. Collins, 17 Cal. 3d 687, 696-97, 552 P.2d 742, 748, 131 Cal. Rptr. 782, 788 (1976); People v. Lanigan, 22 Cal. 2d 569, 140 P.2d 24 (1943).
double jeopardy claim. The doctrine states that after jeopardy has attached a court can discontinue the trial and reprosecute the defendant if the court determines that “the defendant’s interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.”

Where incapacitation or disqualification occurs during deliberations, one of three things is possible: (1) the parties will stipulate to a verdict by fewer than twelve jurors; (2) the court will grant a mistrial; or (3) the court will permit substitution. Stipulation is the preferred, but rarely chosen, alternative, because any possible constitutional objections are then waived by the defendant. A mistrial, on the other hand, results when the jury contains fewer members than are required by statute or the Constitution. Because mistrials involve aborting one trial and beginning another, they are directly contrary to “the defendant’s interest in proceeding to verdict.” But since the defendant’s constitutional right to a jury trial is at stake, manifest necessity requires a mistrial. Substitution, alternatively, results in the continuation of the present trial and promotes, rather than inhibits, the defendant’s interest in proceeding to verdict. Like the stipulation procedure, substitution also reduces the emotional and financial burdens of multiple trials for the defendants and the courts. It also avoids the risk that a second jury might convict the defendant where the first jury would acquit. Manifest


123 A mistrial is considered better, because the prosecutor may drop the case, the defendant will know the prosecutor’s case, and, in the civil context, the plaintiff may have to forego suing because of limited financial resources. See United States v. Meinter, 484 F. Supp. 442, 443 (S.D. Fla. 1980); G. STUCKEY, supra note 33; Lempert, supra note 62, at 676-78. Cf. Note, Statistical Analysis, supra note 61, at 668 n.55 (same results with a hung jury).

124 This assumes the Patton requirements are met. See note 23 supra. See also United States v. Baccari, 489 F.2d 274, 275 (10th Cir. 1973), cert. denied, 417 U.S. 914 (1974); Leser v. United States, 358 F.2d at 317-18. But see Henderson v. Lane, 613 F.2d 175, 179 (7th Cir. 1980) (Patton waiver is unnecessary if there is no constitutional deprivation). See also Note, Rule 24(e), supra note 10, at 1613.


126 See United States v. Potash, 118 F.2d 54 (2d Cir.), cert. denied, 313 U.S. 584 (1941); Findlater, supra note 120, at 719-20; Note, Mistrial, supra note 114, at 939-41. See also People v. Collins, 17 Cal. 3d at 696-97, 552 P.2d at 748, 131 Cal. Rptr. at 788.

127 Some authorities believe that substitution limits a defendant’s “right” to a mistrial. United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975); WRIGHT, supra note 5, at 53 n.17. However, as pointed out in Henderson, a nonunanimous verdict requirement impinges more on the “mistrial right.” 613 F.2d at 178.

128 See note 120 supra. See also M. FRIEDLAND, DOUBLE JEOPARDY 41 n.2 (1969); Note, The Aftermath of North Carolina v. Pearce: A Harsher Sentence on Retrial, 7 SUFFOLK U.L. REV.
necessity and the public demand for justice prefer substitution during deliberations to a mistrial.\textsuperscript{129}

B. Presence and Subsequent Substitution of Alternate Jurors During Deliberations

The substitution during deliberations of alternate jurors present during the prior deliberations involves many of the same constitutional considerations, analysis, and conclusions as for the substitution during deliberations of alternate jurors absent from the prior deliberations. One important distinction, of three made, however, is that alternate jurors present in the jury room during deliberations do not miss the prior deliberations. That is essential to the alternate juror's contributing meaningfully to the deliberations and voting knowledgeably.\textsuperscript{130}

A second alleged distinction made between alternate jurors absent and those present during deliberations is that an alternate juror present during deliberations results in a jury of thirteen jurors.\textsuperscript{131} This is of no constitutional consequence in federal courts, because the sixth and seventh amendments do not require twelve-member juries.\textsuperscript{132} The thirteen-member jury accusation is also not a realistic one. Alternate jurors do not contribute anything to the deliberations

\textsuperscript{108} (1972); 25 WASH. & LEE L. REV. 60 (1968). Compare this to the choice by defendants of a mistrial or hung jury over a continuation of the original trial. \textit{See} note 123 and accompanying text \textit{supra}.

\textsuperscript{129} In Jones v. State, 232 Ga. 324, 332-33, 206 S.E.2d 481, 486 (1974), the Georgia Supreme Court stated that a less stringent examination of alternatives to mistrial would be undertaken where neither the state nor the defendant is at fault, and that parties in a civil or criminal action are not responsible when a substitution is necessary. In accord with the Jones rationale, a less stringent examination of the substitution alternative to a mistrial is advocated. The substitution alternative easily survives such scrutiny and is superior to a mistrial. \textit{See} Johnson v. Duckworth, 650 F.2d 122, 126 (7th Cir. 1981) (substitution of alternate juror who was present during deliberations is the alternative most “faithful to the jury-trial guarantee”). \textit{See also} United States v. Evans, 635 F.2d 1124, 1128 (4th Cir. 1980) (defendant's preferring substitution dissipates manifest necessity for mistrial).

\textsuperscript{130} \textit{See} notes 41-45 and accompanying text \textit{supra}. \textit{See also} Johnson v. Duckworth, 650 F.2d at 126 (alternate juror's presence during deliberations beneficial if substitution becomes necessary).


\textsuperscript{132} \textit{See} notes 17-20, 24-25 & 28 and accompanying text \textit{supra}.
or verdict. The effect of their presence on the deliberations and verdict is like that of an "unused book." It is of no effect.

The last alleged distinction made between absent and present alternate jurors is that allowing alternate jurors in the jury room during deliberations violates the "cardinal principle" of secret and private jury deliberations. This contention has kept all the states but Indiana from permitting alternate jurors to attend deliberations. Indiana courts resolve any problems by admonishing alternate jurors not to participate in any way during the deliberations, unless they are substituted for a deliberating juror. The other courts' response has been to emphasize that the alternate jurors' very presence in the jury room may inhibit certain jurors from participating freely in the deliberations, and that even a silent alternate juror's physical reactions to jury comments and decisions could affect the deliberations. The Supreme Court in Williams stated that group deliberations and freedom from outside intimidation during deliberations are part of the jury trial right. The inquiry then is "whether the presence of the alternate juror is the sort of invasion of the jury's privacy that will tend to stifle the jury's debate, thus endangering the

133 This assumes the alternate jurors do not participate in the deliberations or vote of the deliberating jurors.

134 United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973). The court in Allison also specifically stated that the presence during deliberations of an alternate juror did not result in a verdict by greater than twelve jurors. Id. at 470.


136 United States v. Chatman, 584 F.2d at 1361; United States v. Lamb, 529 F.2d 1153, 1160 (9th Cir. 1975) (dissent); United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972); United States v. Virginia Erection Corp., 335 F.2d at 872; People v. Adame, 36 Cal. App. 3d at 407-08, 111 Cal. Rptr. at 465; State Highway Comm'n v. Dunks, 166 Mont. 239, 531 P.2d 1316, 1318 (1975); State v. Bindyke, 220 S.E.2d at 533, 534-35; Brigman v. Oklahoma, 350 P.2d at 322; State v. Cuzick, 530 P.2d at 289. See also United States v. Barone, 83 F.R.D. 565, 573 (S.D. Fla. 1979); WRIGHT, supra note 5, at 52 (reversible error to allow alternate juror in jury room during deliberations). Some courts hold an alternate juror's momentary and inadvertent presence in the jury room is harmless. See notes 195 & 202 and accompanying text infra.

137 See notes 195 & 202 and accompanying text infra.


139 399 U.S. 78, 100 (1970).
defendant's right to trial by jury."

Jurisdictions not allowing alternate jurors to attend deliberations have held explicitly and implicitly that alternate jurors are strangers to the jury, because of their status as alternate jurors. The alternate juror is, however, a non-participating "regular juror," as FR Crim P 24(c) and FRCP 47(b) illustrate by stating in part:

Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

The parties select the alternate jurors along with the other jurors, who then sit as one body throughout the trial. If a court discharges a juror, the alternate juror replaces him and functions as any other member of the jury; "an alternate is in every respect a juror." Furthermore, the regular jurors will view the alternate jurors as ordinary jury members, because of the similarity in treatment and function. A juror who is inhibited by an alternate juror's presence will most likely be inhibited by the other jurors as well. The presence of the alternate jurors in the jury room should therefore be no different than the presence of each other. Thus, permitting alternate jurors in the jury room would not adversely affect jury secrecy and privacy. As an added precaution, a court could conduct a voir dire to determine if the alternate jurors' presence in the jury room would inhibit any of the regular jurors. If any juror would be inhibited,

140 Johnson v. Duckworth, 650 F.2d 122, 125 (7th Cir. 1981). See also notes 36-40 and accompanying text supra.
141 See note 138 supra.
142 See notes 3 & 4 supra.
143 Johnson v. Duckworth, 650 F.2d at 125.
145 See notes 134-35 supra; Comment, Alternate Jurors, supra note 135, at 738. See also Ruffin v. State, 50 Del. 83, 123 A.2d 461, 466 (1956) (alternate jurors and regular jurors similar); Tanner v. State, 242 Ga. 437, 438, 249 S.E.2d 238, 240 (1978); Comment, Bruneman v. State, supra note 39, at 738 (no reason to believe presence of alternate jurors would restrict honest comment).

The Seventh Circuit in Johnson v. Duckworth stated: "Other 'strangers' to the regular jury stand in sharp contrast to the alternate." 650 F.2d at 125. The court further stated: "We do not agree that alternate jurors pose the inherent risk of influencing the jury's judgment, or inhibiting its debate, that is possessed by the presence of other strangers." Id. at 126.
146 See Johnson v. Duckworth, 650 F.2d at 126. Alternate jurors are not strangers or outsiders to the jury. See Henderson v. Lane, 613 F.2d 175, 178-79 (7th Cir. 1980); Potter v. Perine, 543 F.2d 1048, 1049-50 (6th Cir. 1976); People v. Valles, 24 Cal. 3d 121, 124-27, 593 P.2d 240, 242-43, 154 Cal. Rptr. 543, 544-47 (1979) (implied in holding).
substitution would not be allowed.\textsuperscript{148}

Alternate juror participation in the deliberations prior to substitution is another concern of adversaries to this procedure's implementation.\textsuperscript{149} Courts should instruct alternate jurors not to participate, unless they replace a deliberating juror.\textsuperscript{150} Assuming that the alternate jurors will not participate,\textsuperscript{151} courts could also take steps to minimize or avoid the effect of an alternate juror showing a positive or negative reaction through his facial expressions or otherwise.\textsuperscript{152} The court could keep an alternate juror and his reactions hidden from the deliberating jurors' view by setting up some kind of a partition, or placing him in another room to listen to the deliberations via an intercom system.\textsuperscript{153} The court would be responsible for preventing abuses. Although the alternate jurors' ability to effectively gauge the deliberations would be less than if partitions or an intercom system were not used, having them is preferable to no exposure to the deliberations. However, regardless of whether these precautions are taken, the familiarity of the jurors with the alternate jurors prevents any effect on the deliberations from rising to the level of a constitutional violation.\textsuperscript{154}

III. Present State of the Law

A. Federal Courts

Seven United States Circuit Courts of Appeal have considered alternate juror substitution during deliberations, generally in criminal appeals. In \textit{United States v. Allison},\textsuperscript{155} the Fifth Circuit held that a stipulation of the parties allowing an alternate juror to be present

\begin{notes}
\textsuperscript{149} See note 138 and accompanying text \textit{supra}. See also Johnson v. Duckworth, 650 F.2d at 122-26 (this problem not addressed by the Seventh Circuit when they determined substitution in a state trial of an alternate juror present during the deliberations was constitutional).
\textsuperscript{150} See notes 191-92 and accompanying text \textit{infra}.
\textsuperscript{151} It is reasonable to assume the alternate jurors will follow the judge's instructions. See note 96 and accompanying text \textit{supra}.
\textsuperscript{152} See note 138 \textit{supra}.
\textsuperscript{153} Placing a partition between the jurors or putting the alternate jurors in another room acknowledges a difference exists between the alternate jurors and the deliberating jurors. A difference does exist, but the alternate jurors are still jurors. The distinction is not between jurors and outsiders, but between two different types of jurors.
\textsuperscript{154} No constitutional violation occurs, because the minute effect, if any, on the deliberations would not stifle deliberation. Thus the jury trial right is preserved. See note 145 and accompanying text \textit{supra} (presence of alternate juror during deliberations does not affect the deliberating jurors). See also Johnson v. Duckworth, 650 F.2d at 126 (presence of alternate jurors would not inhibit debate).
\textsuperscript{155} 481 F.2d 468 (5th Cir. 1973).
\end{notes}
during deliberations was not plain error requiring reversal. Not only did the court carefully instruct the alternate juror not to participate, but the state also failed to prove that the alternate juror participated in the deliberations, took part in any jury votes, or by his presence restrained any of the deliberating jurors from exercising independence of thought and action. The court remanded the case to the district court for an evidentiary hearing to determine if such prejudice occurred.156 The Fifth Circuit also held in a civil case that no prejudice resulted when an alternate juror, who attended deliberations with the consent of counsel and was instructed by the court not to participate, spoke during the deliberations.157 Finally, a district court in the Fifth Circuit allowed a substitute juror during deliberations following a seven-month criminal trial. The alternate juror had not been formally discharged and had had no outside contact or contact with the deliberating jurors.158

The Seventh Circuit, in Johnson v. Duckworth159 and Henderson v. Lane,160 has taken the most liberal position about the substitution of alternate jurors during deliberations. In Johnson, the court held that the presence and subsequent substitution of an alternate juror during deliberations in a state criminal trial did not violate the defendant's sixth and fourteenth amendment rights.161 Similarly, in Henderson, the court held that a state criminal court's substitution of an alternate juror during deliberations did not violate the defendant's sixth and fourteenth amendment jury trial rights.162 Because the defendant's counsel in Henderson examined the alternate juror before the court allowed him to deliberate, and found his ability to make a fair decision was unimpaired, "the essential feature of the jury was preserved."163

In Leser v. United States,164 the Ninth Circuit held that, where the defendants were present but did not object, a stipulation by the de-

156 Id. at 470-72.
159 650 F.2d at 122.
160 613 F.2d 175 (7th Cir. 1980).
161 650 F.2d at 126. In Johnson, Johnson was convicted of second degree murder in Indiana. Certiorari was denied by the Supreme Court and the case was before the Seventh Circuit on a writ of habeas corpus.
162 613 F.2d at 175.
163 Id. at 179.
164 358 F.2d 313, appeal dismissed, 385 U.S. 802 (9th Cir. 1966).
fendants’ counsel allowing the substitution of an alternate juror during deliberations was binding on the defendants, and did not constitute double jeopardy. The Ninth Circuit’s decision in United States v. Lamb stated that a lack of objection by defendant’s counsel when the judge instructs an alternate juror to remain ready was not a Leser stipulation. The court stated further that if a court temporarily released the alternate juror from his jurors’ obligations, after the stand-by order and before the substitution, even a Leser stipulation would be ineffective. The court held that, although the jury was told to begin anew, the alternate juror’s substitution during deliberations was reversible error.

The Fourth Circuit has adopted a negative view of substituting alternate jurors who have attended prior deliberations. In United States v. Chatman, the court regarded as plain error the presence of an alternate juror in the jury room during the deliberations, even though the defendant’s counsel consented to the procedure. Likewise, in United States v. Virginia Erection Corp., relied upon by Chatman, the court overturned a jury verdict because the trial court had allowed an alternate juror to retire with the jury. The Fourth Circuit based the Virginia Erection decision on four grounds: (1) the defend-

165 Id. at 317. Not requiring an explicit knowing and intelligent waiver by the defendant, as required for the waiver of constitutional rights, implies that the court considered this alternative a procedural violation, although not necessarily a constitutional violation. The dissent in United States v. Lamb cited Leser as holding that the substitution process does not deprive a defendant of his right to a full consideration of his case by an impartial jury panel. 529 F.2d 1153, 1162 (9th Cir. 1975).
166 358 F.2d at 318. The Sixth Circuit has also found the Leser rule persuasive. United States v. Davis, 608 F.2d 699 (6th Cir. 1979).
167 529 F.2d at 1153.
168 Id. at 1157.
169 Id. The Ninth Circuit also spoke of the difficulties involved in such substitutions: the coercive effect upon a substituted juror of a jury which has already decided the case, and its limiting the accused’s right to a mistrial because a juror may feign an illness rather than hang a jury. Id. at 1156. See Wright, supra note 5, at 53 n.17.
170 584 F.2d 1358 (4th Cir. 1978). The court in Lopez felt that Lamb may have undermined Leser. The dissent in Lamb stated that Leser and Lamb read together produced a conclusive presumption of no prejudice when there is an express waiver and a conclusive presumption of prejudice where there is no waiver. 529 F.2d at 1160. The majority in Lamb distinguished Leser on the grounds that there was no stipulation, that counsel for the defendant did not object to the alternate jurors “standing-by,” that the original jury had reached a guilty verdict at one point, and that the alternate juror was dismissed for a short while, being relieved of her jurors’ obligation. Id. at 1157. Lopez reinforces the court’s adherence to the Leser holding.
171 Id. at 1361.
172 335 F.2d 868 (4th Cir. 1964).
ant must personally consent to the alternate juror’s attending the deliberations; (2) the presence of the alternate juror violates FRCrimP 23(b); (3) the alternate juror’s mere presence violates the privacy and secrecy of the jury and could affect the deliberations, and the court’s admonishment to the alternate juror not to participate did not cure the error; and (4) the alternate juror’s presence violates constitutional provisions requiring a jury of exactly twelve members.173

The Fourth Circuit has taken a less restrictive stance, however, on the substitution during deliberations of an alternate juror who has not attended prior jury deliberations. In United States v. Evans,174 the court recently allowed the substitution of a discharged alternate juror during deliberations. Although his counsel advised to the contrary, the defendant expressly consented to the procedure.175 The court in Evans also dismissed the alleged problems of missed prior deliberations as conjecture.176 The implication of Chatman, Virginia Erection, and Evans is that the Fourth Circuit does not consider the substitution during deliberations of an alternate juror who was absent from the prior deliberations to be as prejudicial as the substitution during deliberations of an alternate juror who was present during the prior deliberations.

The Tenth Circuit is in general agreement with the Fourth Circuit’s interpretation. In United States v. Beasley,177 the court held that the presence of alternate jurors during deliberations was plain error, although it hedged as to the effect of the substitution during deliberations of an alternate who had not attended the prior deliberations.178 The court stated that once the prescribed number of jurors had become the jury, any other persons involved are strangers to the “jury’s” deliberations, and their presence in the jury room destroys the sanctity and privacy of the jury.179 The Tenth Circuit also, in United States v. Baccari,180 upheld a stipulation by counsel and the defendants that provided for the substitution of an alternate during

173 Id. at 870-72. The constitutional provisions the court found violated were Article III, Section 2, Clause 3 of the Constitution and the sixth amendment. It has been noted by other courts that the constitutional premise for the Virginia Erection decision no longer exists. See, e.g., Henderson, 613 F.2d at 177 n.5.
174 635 F.2d 1124 (4th Cir. 1980).
175 Id. at 1127 n.3.
176 Id. at 1128.
177 464 F.2d 468 (10th Cir. 1972). See also Note, Rule 24(e), supra note 10 (case comment on Beasley).
178 464 F.2d at 469.
179 Id. at 470.
180 489 F.2d 274 (10th Cir. 1973).
deliberations, although the court based its decision on the stipulation's having met the criteria for the waiver of constitutional jury rights.  

B. State Courts

1. Substitution During Deliberations of Alternate Jurors Absent From the Prior Deliberations

State courts are increasingly willing to allow substitution during deliberations of an alternate juror kept separate from the deliberating jurors. In People v. Collins, the California Supreme Court stated that the state statute allowing alternate juror substitution during deliberations was to include a required instruction that the jury begin deliberations anew upon the substitution. The court stressed that a vital part of the jury trial right was for each juror to have engaged in all of the deliberations.

Massachusetts and New Jersey have adopted the California approach, allowing substitution during deliberations only where the "Collins instruction" has been given, whereas Georgia allows substitution without a Collins instruction. The Georgia Supreme Court, in Tanner v. State, noted the similarities between alternate jurors and regular jurors, and stated that the substituted alternate juror should listen and ask questions to understand the prior deliberations.

The New York view, followed in Rhode Island and Kentucky, is that substitution during deliberations is unconstitutional. In People v. Ryan, the New York Court of Appeals based its decision on three grounds: (1) an alternate juror substitution results in a jury of thirteen members, a violation of the New York constitution; (2) the alternate juror missed the prior deliberations; and (3) the de-
liberating jurors will probably have formulated preliminary positions, and any substantial agreement will be almost impossible for an alternate juror to overcome.\textsuperscript{190}

2. Substitution During Deliberations of an Alternate Present During the Prior Deliberations

Indiana is the only state that allows the substitution of alternate jurors who are present during the deliberations prior to substitution. Indiana’s courts instruct the alternate jurors not to participate before substitution.\textsuperscript{191} The Indiana position rejects the view that the alternate juror is a stranger to the jury whose presence during deliberations results in prejudice to the defendant.\textsuperscript{192} The Georgia position is somewhat more restrictive than Indiana’s, in that the state can overcome the presumption of injury to the defendant from the presence of alternate jurors during deliberations.\textsuperscript{193}

The California position, on the other hand, is that the presence of alternate jurors during deliberations violates the defendant’s right to a jury trial,\textsuperscript{194} although an alternate juror’s momentary and inadvertent presence before deliberations have begun will not invalidate a verdict.\textsuperscript{195} This position, however, may be changing. In \textit{People v. Valles},\textsuperscript{196} the California Supreme Court held that “the presence of alternates in the jury room during deliberations is not necessarily detrimental to a defendant’s right to a jury trial . . . defense counsel may stipulate to such procedure.”\textsuperscript{197} \textit{Valles} thus overruled by implication an earlier appellate court case holding that the presence of alternate jurors during deliberations so violated the jury trial right that the consent of counsel could not render harmless the resulting error.\textsuperscript{198}

\begin{footnotes}
\item 190 \textit{Id.} at 104, 224 N.E.2d at 712-13, 278 N.Y.S.2d at 202.
\item 192 \textit{Johnson v. State}, 267 Ind. at 259-60, 369 N.E.2d at 625.
\item 193 See \textit{Johnson v. State}, 235 Ga. 486, 220 S.E.2d 448 (1975) (twelve jurors signed affidavits that they were unaffected by the alternate juror’s presence; presumption overcome).
\item 196 24 Cal. 3d 121, 593 P.2d 240, 154 Cal. Rptr. 543 (1979).
\item 197 \textit{Id.} at 125, 593 P.2d at 242, 154 Cal. Rptr. at 545.
\item 198 \textit{People v. Bruneman}, 4 Cal. App. 2d at 79-81, 40 P.2d at 893-94.
\end{footnotes}
The Washington Supreme Court, in State v. Cuzick, held that an alternate juror’s presence during deliberations is a substantial intrusion on the right of the jury to deliberate in private, and was therefore prejudicial. The court considered the alternate juror a stranger to the deliberations. North Carolina follows Cuzick, but holds no error results if the alternate juror is present momentarily and inadvertently in the jury room before deliberations have begun, and the judge determines that deliberations have not begun.

IV. Conclusion

A stipulation by the parties allowing the substitution during deliberations of alternate jurors who are either present or absent during the prior deliberations is preferrable but rare, because defendants believe that a retrial is in their best interests. Because of the expense, delay and court congestion, however, retrials are in no one’s best interests, particularly in trials of longer duration where alternate jurors are normally used.

Nevertheless, judicial economy and efficiency should not sacrifice the jury trial rights of parties. Thus, substitution during deliberations, whether the alternate jurors are present or absent during the prior deliberations, are excellent available options. When the trial court administers these procedures pursuant to certain guidelines, they protect the parties’ interests in their jury trial right and promote the efficient administration of justice.

A judge should, in his discretion, decide whether to allow alternate juror substitution during deliberations where the alternate juror does not attend the prior deliberations. The judge presided over the entire trial, and can determine if prejudicial effect is a real possibility. The court should not relieve the alternate juror of his obligations as a juror, whether he is sequestered or allowed to go home. Prior to


The Washington Supreme Court in Cuzick also found its statute requiring dismissal of alternate jurors upon submission of the case to the jury was violated when the alternate jurors were not dismissed, and by itself this violation was sufficient to vitiate the verdict. 85 Wash. 2d 146, 530 P.2d 288, 289 (1975). Accord, Woods v. Commonwealth, 287 Ky. at 312, 152 S.W.2d at 997; Commonwealth v. Krick, 164 Pa. Super. at 576, 67 A.2d at 647; Patten v. State, 221 Tenn. at 337, 426 S.W.2d at 503.
202 220 S.E.2d at 534-35.
substitution, the court should also conduct a careful voir dire of the alternate juror to determine if he has been subject to any impermissable outside influence and can still make a fair decision. A court should require the discharged juror to submit to a voir dire, including a physical examination if the juror alleges an illness, unless the illness requires immediate hospitalization. The voir dire ensures that the necessity for discharge exists. The court should further instruct the regular jurors to begin deliberations anew, or to summarize to the alternate juror the extent of the deliberations to that point. As an added precaution, the court could voir dire the regular jurors to determine if they could begin deliberations anew, summarize the prior deliberations, or keep an open mind as to any criticisms or arguments the alternate juror may have.

If the judge allows an alternate juror to be present during the deliberations before substitution is made, a preliminary voir dire could be used to determine if the alternate juror's presence would inhibit any juror during the deliberations. Because the alternate juror is with the regular jurors throughout the trial, the problem of outside influence is greatly reduced. The court should, however, conduct a precautionary voir dire before the alternate juror is substituted to determine if he is capable of making a fair decision. Although perhaps unnecessary, the voir dire will help allay any doubts a party might have as to the alternate juror's objectivity. The court should also voir dire any regular juror seeking a discharge to ensure a necessity for discharge exists. As a final precaution, although unnecessary, the court could ask the regular jurors if they would seriously consider the substituted juror's arguments and viewpoints.

By adopting the above procedures, legislatures and courts can improve the efficiency of the administration of justice without jeopardizing the parties' constitutional rights. Adopting procedures that combine justice and judicial efficiency is an important goal, as Chief Justice Burger has recognized:

If we want to improve the administration of justice in this country, we must try some things some lawyers and judges may not find convenient or agreeable. . . . Our thinking must be imaginative, innovative, and dynamic, and we must experiment and search constantly for better ways, always remembering that our objective is fairness and justice, not efficiency for its own sake.204

203 See note 112 and accompanying text supra.
204 See Burger, supra note 112, at 1127-28.
Courts should adopt and legislatures should enact procedures providing for the substitution of alternate jurors during deliberations, for they achieve the important combined goals of justice and judicial efficiency.

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