

THE CRIMINAL RULES COMMITTEE RECOMMENDS THE FOLLOWING PROPOSAL:

1. Criminal Rule 23(a)—Clarifying waiver of a jury trial in a misdemeanor case.

The Rule 23(a) proposal would clarify that court approval and government consent is required when a defendant waives a jury trial in a misdemeanor case.

In May 2013, the Criminal Rules Committee first considered the Rule 23(a) language and discussed the ambiguity of whether court approval and government consent was required when a defendant waives a jury trial in a misdemeanor case. At that meeting, the committee did not recommend any change. In 2017, the court of appeals answered the question. In *Treptow v. State*, 408 P.3d 1220 (Alaska Ct. App. 2017), the defendant argued that the rule did not require court approval and government consent when the defendant waived a jury trial in a misdemeanor case, unlike a felony case. The Alaska Court of Appeals disagreed with this interpretation and held that Rule 23(a) required court approval and government consent in both felony and misdemeanor cases. The proposal is to amend Rule 23 by adding clarifying language based on the *Treptow* opinion.

To clarify the rule, the Criminal Rules Committee recommends the following proposal:

Rule 23. Trial by Jury or by the Court.

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the government. ~~In felony cases, the waiver must be in writing with the approval of the court and the consent of the state.~~ In misdemeanor cases, the defendant's waiver may be in writing or made on the record in open court. In felony cases, the defendant's waiver must be in writing.

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THE CRIMINAL RULES COMMITTEE RECOMMENDS THE FOLLOWING PROPOSAL:

2. Criminal Rule 23(c)—Findings in a nonjury trial.

The proposed change to Rule 23(c) would specify the findings the court must make in a criminal nonjury trial.

The committee discussed Rule 23 governing criminal trials and *Klecka v. State*, 2014 WL 819504 (Alaska App. 2014). In *Klecka*, the defendant was convicted of the criminal offense of disorderly conduct under AS 11.61.110(a)(6). The case was tried to the district court without a jury. In its written decision, the district court relied on the wrong legal test and the wrong burden of proof. The court of appeals vacated the verdict and remanded the case to the district court.

The committee discussed whether there is a danger of wrongful conviction that could escape review in a judge-tried case. The committee considered the parallel federal criminal rule that requires the court to state specific findings of fact in a nonjury trial. The committee agreed that the trial court should state the elements of each offense charged and find whether the prosecution proved each element beyond a reasonable doubt. Also, the court should state the burden of proof for any defense asserted by the defendant, and whether the burden has been met.

The Criminal Rules Committee recommends the following proposal:

Rule 23. Trial by Jury or by the Court.

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(c) Trial Without a Jury. In a case tried without a jury, the court shall ~~make a general finding and shall, in addition, on request, find the facts specially state, orally or in writing, the elements of each offense charged and find whether the prosecution has proved each element beyond a reasonable doubt. The court shall also state the burden of proof for any defense asserted by the defendant, and whether the burden has been met. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.~~

THE CRIMINAL RULES COMMITTEE RECOMMENDS THE FOLLOWING PROPOSAL:

3. Criminal Rule 24(b)(2)—Allowing mid-deliberation juror substitution.

The proposed change to Rule 24(b)(2) would allow an alternate juror to replace a regular juror after deliberations have begun.

The supreme court asked the Criminal Rules Committee to consider whether Rule 24(b)(2) should be amended to allow an alternate juror to be retained after the jury retires to deliberate and, after deliberations begin, for an alternate juror to replace a regular juror who becomes disqualified or unable to serve. This issue arose in *Coffin v. State*, 425 P.3d 172 (Alaska App. 2018). In that case, the court of appeals held that, despite a violation of Criminal Rule 24(b)(2), substituting an alternate juror for a regular juror after deliberations had already begun did not violate the defendant's constitutional rights under the facts of the case, and the trial court employed procedural safeguards. The appellate court noted that the parallel federal criminal rule allowed mid-deliberation juror substitution as well as a number of other states.

Over the course of three meetings, the Criminal Rules Committee discussed the proposal including review of Federal Criminal Rule 24. While the committee favored the proposal, it wanted to bolster the language taken from the federal rule. The committee included the federal rule language that the jury must be instructed to start its deliberations anew. But it included more detailed rule language specifying the retained alternate juror's duties. It further required the court to inquire of each juror individually, outside the presence of the other jurors, to determine if each juror could set aside any opinion formed during deliberations, and consult and exchange views with the other jurors, including the alternate juror. While two members still expressed reservations about allowing mid-deliberation juror substitution, the committee voted unanimously in favor of the proposal with the added provision that the parties must consent to replacement of the regular juror.

Also, the committee recommended changing the number of undesignated alternate jurors from two to four in subsection (b)(2)(B) to match the number for designated alternate jurors in subsection (b)(2)(A). Listing two instead of four jurors in (b)(2)(B) was an apparent oversight when the undesignated-alternate-juror method was added to the rule in 1992.

The Criminal Rules Committee recommends the following proposal:

Rule 24. Jurors.

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(b) Alternate Jurors.

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(2) Procedures.

(A) The court may direct that not more than four jurors in addition to the regular panel be called and impaneled 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 unable or disqualified to perform their duties. ~~An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~ The additional peremptory challenges allowed by section (b)(1)(B) may be used against an alternate ~~juror~~ jury only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror; or-

(B) The court may direct that ~~not more than four~~ one or two jurors be called and impaneled in addition to the number of jurors required by law to comprise the jury. The court may excuse jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. If more than the required number are left on the jury when the jury is ready to retire, the clerk in open court shall select at random the names of a

sufficient number of jurors to reduce the jury to the number required by law. ~~The jurors selected for elimination shall be discharged after the jury retires to consider its verdict.~~

(C) The court may retain and renumber alternate jurors selected under (b)(2)(A) or (B) after the jury retires to deliberate. The court shall instruct all retained alternate jurors that, until discharged, the jurors must not:

- (i) communicate with any person, including other jurors, on any subject connected with the trial;
- (ii) allow any other person to discuss the case in the juror's presence;
- (iii) conduct any investigation or research concerning the case;
- (iv) not read, view, or listen to any reports about the case in any form;
and
- (v) form any conclusions about the case.

(D) If a juror becomes unable or disqualified to perform their duties after deliberations have begun, the court may replace the juror with an alternate juror with the consent of all parties.

The court must ensure that the alternate juror has complied with the court's instructions. The court must ensure that the alternate juror will set aside any opinion formed about the case. The court must instruct the jury to begin its deliberations anew. The court must also inquire of each juror individually, outside the presence of the other jurors, and determine whether each juror can set aside any opinion formed during deliberations, and consult and exchange views with the other jurors, including the alternate, when deliberations begin anew.

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