

CHAMBERS  
**District Court**

525 W. COLFAX AVE., COURTROOM 5B  
DENVER, COLO. 80202  
MORRIS B. HOFFMAN, JUDGE

April 1, 2013

Hon. Michael L. Bender  
Chief Justice, Colorado Supreme Court  
2 East 14th Ave.  
Denver, CO 80203

Re: Proposed Amendments to Crim. P. 24(e)

Dear Chief Justice Bender:

I write this letter as chair of a subcommittee of the Colorado Supreme Court Advisory Committee on the Rules of Criminal Procedure, and at the direction of the Advisory Committee and its chair, Judge John Dailey.

At our meeting on October 19, 2012, the Advisory Committee recommended changes in Crim. P. 24(e) to correspond to recent statutory amendments dealing with the seating of alternate jurors in district court criminal cases. This transmittal letter details those recommended changes, summarizes the reasons for the changes, discusses one point on which the Advisory Committee was not unanimous and presents both the majority and minority views on that one point.

Prior to the General Assembly's adoption of H.B. 12-1310, both § 16-10-105 and Crim. P. 24(e) left the decision of whether to impanel any alternate juror to the discretion of the trial court. Specifically, the first sentences of both the statute and the Rule provided that the trial court "may" impanel one or more alternate jurors, with the balance of the statute and Rule detailing the procedures for impaneling alternate jurors and their effect on the number of permitted peremptory challenges.

Effective on the Governor's signature on June 7, 2012, the General Assembly amended § 16-10-105 to provide that in trials involving charges of class 1, 2 or 3 felonies, or in any felony victims' rights case, the trial court must seat an alternate if either side requests it. It did so by adding the following language to the end of the statute:

In a case in which a class 1, 2 or 3 felony, as described in section 18-1.3-401(1)(a)(IV) and (1)(a)(V), C.R.S., is charged and in any case in which a felony listed in section 24-4.1-302(1), C.R.S. is charged, the court shall impanel at least one juror to sit as an alternate if requested by any party.

§ 16-10-105.

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The Advisory Committee was unanimous in recommending, at the very least, that some corresponding change be made to Crim. P. 24(e).

A majority of the Advisory Committee recommended that the Rule go beyond the language of the statute, and that it provide that the trial court must seat at least one alternate in all felony trials, if either side requests it. There were several justifications for this approach.

First, the majority expressed the view that expanding the statute to all felony trials is simply good criminal procedure policy. Seating an alternate carries the significant benefit of preventing a mistrial if one of the regular jurors is unable to continue, at the marginal cost of calling in a few more prospective jurors. The majority could see no compelling reason to permit a trial judge, in any felony trial, to forge ahead without an alternate when at least one of the trial lawyers requests an alternate.

The majority also felt a broader rule would be simpler and clearer. Extending the statutory rule of alternates-on-demand to all cases would not really be much of an expansion. Victims' right cases cover, regardless of the class of felony, all homicides, assaults, sexual assaults, kidnappings, robberies, crimes against at-risk victims, retaliation against, intimidation of, or tampering with witnesses or victims, stalking and burglaries. § 24-4.1-302(1). This leaves only a few low level property crimes—*theft, criminal mischief, criminal trespass tampering*—as well as all class four, five and six drug cases, outside the scope of the statutory amendment. In the view of the majority, these minor property and drug crimes seldom go to trial in any event, so expanding the reach of the statute will not come at any significant cost, yet will avoid what the majority thought might be the non-trivial costs of deciding whether the statute applies in any particular case—that is, ferreting through the Victims' Rights Act to decide whether the charged crimes are within that Act.

Accordingly, the majority recommends that the following language be added to the end of the current version of Crim. P. 24(e):

The court shall impanel at least one alternate juror if requested by either the defendant or the prosecution in a felony case.

Redlined and clean versions of the Rule containing this suggested language are attached as Appendices 1 and 2.

A minority of the Advisory Committee expressed several objections to expanding the scope of the rule change beyond the statutory change.

First, the minority pointed out that there are short felony trials that can be, and are, completed without seating an alternate. Both the General Assembly and this Court have recognized, in the prior version of the statute and the current version of the Rule, that the trial court is in the best position to decide what kinds of cases can proceed without an alternate. By taking that discretion away from the trial court in some, but not all, cases, the General Assembly made policy judgments about which kinds of cases need alternates-on-demand and which cases should remain in the trial court's discretion.

The minority also expressed the concern that there is more than a marginal cost in requiring an alternate every time either the defense or prosecution requests one. In the first place, in the minority's view it is an extraordinary imposition to require citizens to sit through criminal trials without getting to deliberate, and anything we can do to soften that impact is a good thing. Increasing the frequency with which we impose this cost on citizens should, in the minority's view be, be met with some skepticism. In addition, it was the minority's view that trial counsel will almost always request an alternate, not only because all trial lawyers can be irrationally risk-averse but also because they often disagree with each other just to disagree.

Moreover, every alternate juror will not just require one extra prospective juror to fill the alternate's seat, but three more prospective jurors to accommodate the additional peremptory challenges. This will not only increase the costs to the system and to participating citizens, it will invariably delay jury selection. The General Assembly has made a policy decision that these kinds of costs do not justify extending this principle of alternates-on-demand to all cases, and the minority of the Advisory Committee thought this policy judgment should not be displaced.

Precisely because these low-level property and drug crimes seldom go to trial, the costs of deciding whether the case is within or outside the statute will likewise be minimal. Moreover, in the minority's view, this alleged "cost" is illusory. Trial judges and lawyers need only to be able to read the largely self-contained list of felony crimes set forth in the Victims Rights Act, at § 24-4.1-302.

Finally, the minority felt that the majority's recommendations would simply re-insert a conflict between the statute and the Rule, the very thing this Committee was trying to avoid in taking up this issue in the first place.

Accordingly, a minority of the Advisory Committee recommends that the conflict between the statute and the Rule be removed by adding the following language to the end of Crim. P. 24(e):

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In any case in which a class 1, 2 or 3 felony is charged and in any case in which a felony listed in section 24-4.1-302(1), C.R.S. is charged, the court, at the request of the defendant or the prosecution, shall impanel at least one alternate juror.

Redlined and clean versions of the Rule containing this suggested language are attached as Appendices 3 and 4.

By the way, both the majority and minority recommend using the language "by the defendant or the prosecution" because that is the language used elsewhere in the Rule (e.g., Crim. P. 24(c)), though we also recognize that other parts of the Rule use the phrase "the state or the defendant" (e.g., Crim. P. 24(d)).

Thank you, and please do not hesitate to contact me or Judge Dailey if you have any questions or if we can be of any further service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Morris B. Hoffman". The signature is fluid and cursive, with a large initial "M" and "H".

Morris B. Hoffman

cc: Hon. J. Dailey

## APPENDIX 1

### Majority Redlined Version

#### Rule 24. Trial Jurors.

(a) through (d) [NO CHANGE].

**(e) Alternate Jurors.**

The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become 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 shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors. THE COURT SHALL IMPANEL AT LEAST ONE ALTERNATE JUROR IF REQUESTED BY EITHER THE DEFENDANT OR THE PROSECUTION IN A FELONY CASE.

(f) through (g) [NO CHANGE.]

## APPENDIX 2

### Majority Clean Version

#### Rule 24. Trial Jurors.

**(b)** through **(d)** [NO CHANGE].

**(e) Alternate Jurors.**

The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become 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 shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors. The court shall impanel at least one alternate juror if requested by either the defendant or the prosecution in a felony case.

**(f)** through **(g)** [NO CHANGE.]

## APPENDIX 3

### Minority Redlined Version

#### Rule 24. Trial Jurors.

(c) through (d) [NO CHANGE].

**(e) Alternate Jurors.**

The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become 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 shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors. IN A CASE IN WHICH A CLASS 1,2 OR 3 FELONY IS CHARGED AND IN ANY CASE IN WHICH A FELONY LISTED IN SECTION 24-4.1-302(1), C.R.S. IS CHARGED, THE COURT, AT THE REQUEST OF THE DEFENDANT OR THE PROSECUTION, SHALL IMPANEL AT LEAST ONE ALTERNATE JUROR.

(f) through (g) [NO CHANGE.]

## APPENDIX 4

### Minority Clean Version

#### **Rule 24. Trial Jurors.**

**(d)** through **(d)** [NO CHANGE].

#### **(e) Alternate Jurors.**

The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become 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 shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors. In a case in which a class 1, 2 or 3 felony is charged and in any case in which a felony listed in section 24-4.1-302(1), C.R.S. is charged, the court, at the request of the defendant or the prosecution, shall impanel at least one alternate juror.