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# Comments: Time for Change: Maryland's Inadequate Treatment of Alternate Jurors and the Federal Solution

Andrea N. Silvestri  
*University of Baltimore School of Law*

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# TIME FOR CHANGE: MARYLAND'S INADEQUATE TREATMENT OF ALTERNATE JURORS AND THE FEDERAL SOLUTION

## I. INTRODUCTION

Imagine you are suffering from terminal cancer.<sup>1</sup> Although your life expectancy is reduced to mere months, you bravely endure a jury trial in an effort to recover damages from the doctor who you believe misdiagnosed your malignant tumor.<sup>2</sup> After days of waiting, the jury returns a verdict in your favor and you feel a sense of peace knowing that your children and grandchildren will be financially secure after your death.<sup>3</sup> To your disappointment, the verdict is appealed because of a procedural error in which the alternate jurors were not dismissed, as required by the Maryland Rules, but rather were present in the jury room during deliberations and then substituted for regular jurors.<sup>4</sup> As your health continues to deteriorate, you suffer through months of agonizing waiting as your case is brought before the Court of Special Appeals of Maryland. Unfortunately, the appellate court reverses the trial court's verdict because of the court's mistreatment of the alternate jurors.<sup>5</sup> You are back at square one and are faced with a new trial, which seems like an insurmountable task given your current health.<sup>6</sup>

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1. See generally *Brockington v. Grimstead*, 176 Md. App. 327, 933 A.2d 426 (Ct. Spec. App. 2007), cert. granted, 403 Md. 304, 941 A.2d 1104 (2008).
  2. *Id.*
  3. See *New Trial Ordered in \$1.9 Million City Malpractice Case: Appeals Court Faults Trial Judge in Use of Alternate Jurors*, BALT. SUN, Sept. 8, 2007, at 5B. After an eight-day trial, a Baltimore city jury awarded \$4.4 million to Joyce Grimstead. *Id.* Baltimore City Circuit Judge Thomas Noel reduced the judgment to \$1.9 million after applying Maryland's state malpractice caps. *Id.*
  4. See *id.* at 341, 933 A.2d at 433–34.
  5. See *id.* at 364, 933 A.2d at 447. The Court of Special Appeals of Maryland concluded that “[t]he trial court committed legal error by substituting the alternate jurors for two regular jurors during deliberations,” and that the remedy is reversal of judgment and a new trial. *Id.*
  6. See Nicole Fuller, *Malpractice Suit Plaintiff Is Awarded \$4.4 Million: Cancer Was Misdiagnosed, Woman Says*, BALT. SUN, Nov. 17, 2005, at 4B. After the jury trial, Grimstead stated that she is still undergoing chemotherapy but has been told that she will likely die soon. *Id.*

This devastating sequence of events is the reality that Maryland resident Joyce Grimstead recently faced.<sup>7</sup> Her already painful disease was further worsened by Maryland's inadequate treatment of alternate jurors. Joyce Grimstead's unfortunate ordeal must serve as a "wake-up call" to the Maryland Legislature and the Court of Appeals of Maryland to reform the Maryland Rules.

This Comment will advocate for change to Maryland's policies regarding alternate jurors by illustrating that the current rules do not work and are in desperate need of reform. Part II will outline the relevant law that provides the right to a jury trial in both civil and criminal cases. Part III will lay the foundation regarding the use of alternate jurors and specifically discuss Maryland's treatment of alternate jurors. Next, through a thorough analysis of the *Brockington v. Grimstead* decision in Part IV, this Comment will highlight the unworkable nature of the Maryland Rules. Part V will expand on the inadequacies of the Maryland Rules, discussed in Part IV, and specifically address the negative effects of the inadequate rules on clients, judges, jurors, and alternate jurors. Part VI will explore the federal reforms to the alternate juror process both in the criminal and civil systems, which have served as the basis for Maryland's unsuccessful efforts at alternate juror reform, which are discussed in Part VII. Lastly, in Part VIII, this Comment will make practical recommendations for reform that attempt to strike a balance between promoting judicial economy and preserving the sanctity of jury deliberations.

## II. THE RIGHT TO A JURY TRIAL

The Sixth Amendment of the U.S. Constitution guarantees the right to a jury trial in criminal proceedings.<sup>8</sup> This right is made applicable to the states by the Due Process Clause of the Fourteenth Amendment.<sup>9</sup> In conjunction with the Constitution, the Maryland Declaration of Rights further protects the right to a jury trial in all criminal proceedings.<sup>10</sup>

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7. See generally *Brockington*, 176 Md. App. 327, 933 A.2d 426 (2007), cert. granted, 403 Md. 304, 941 A.2d 1104 (2008) (finding that the substitution of alternate jurors for regular jurors after jury deliberations had begun constituted reversible error and entitled the defendant to a new trial).

8. See U.S. CONST. amend. VI. This right has been modified to extend to crimes where the maximum penalty exceeds six months. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

9. See *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

10. See *Stokes v. State*, 379 Md. 618, 625–26, 843 A.2d 64, 68 (2004) (exploring the origins of the right to a jury trial).

The right to be judged by a jury of one's peers is not a right possessed only by the criminally accused, but rather, civil litigants can also demand a jury trial when certain criteria are met.<sup>11</sup> The Seventh Amendment of the Constitution, which affords civil litigants the right to a jury trial, is applicable in federal courts "[i]n suits at common law, where the value in controversy shall exceed twenty dollars."<sup>12</sup> Although the U.S. Supreme Court has "consistently held that the Seventh Amendment is not incorporated into the Fourteenth Amendment, and consequently is not applicable to state court proceedings,"<sup>13</sup> nearly every state constitution ensures the right to trial by jury in civil cases.<sup>14</sup>

In Maryland, the civil litigant's right to a jury trial is established in Articles 5 and 23 of the Maryland Declaration of Rights, which is found in the Maryland constitution.<sup>15</sup> Article 5 preserves the right to trial by jury for cases in which a jury trial rightfully could have been demanded at English Common Law<sup>16</sup> and Article 23 ensures this right when the amount in controversy exceeds \$10,000.<sup>17</sup> Both the Maryland Code<sup>18</sup> and the Maryland Rules mandate that the civil jury consist of six jurors but do allow a verdict of less than six to be accepted with the agreement of both parties and the court.<sup>19</sup>

### III. THE ROLE OF ALTERNATE JURORS

#### A. *Benefits of Impanelling Alternate Jurors*

Many states, including Maryland, and the federal criminal system impanel additional jurors who serve as "alternates."<sup>20</sup> Alternate jurors replace a seated juror during the trial if a member of the jury becomes ill or incapacitated for any reason.<sup>21</sup> Some states even allow alternate jurors to replace seated jurors after deliberations have

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11. U.S. CONST. amend. VII.

12. *Id.*

13. *Davis v. Slater*, 383 Md. 599, 617 n.12, 861 A.2d 78, 89 n.12 (2004) (quoting *Bringe v. Collins*, 274 Md. 338, 341, 335 A.2d 670, 673 (1975)).

14. See Charles A. Rees, *Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301, 350 (1997).

15. MD. CONST., Declaration of Rights, arts. 5(b), 23.

16. See *id.* art. 5(a)-(b).

17. *Id.* art. 23.

18. See MD. CODE ANN., CTS. & JUD. PROC. § 8-421(b) (LexisNexis 2007).

19. See MD. R. 2-511(b).

20. See Valeriee D. Marek, Comment, *The Silent Alternate Juror: A Violation of the Constitutional Right to Trial by Jury?*, 58 CHI.-KENT L. REV. 765, 769-70 (1982).

21. See *id.*

commenced.<sup>22</sup> The use of alternate jurors enables judges to avoid declaring a mistrial, which wastes valuable judicial and client resources.<sup>23</sup> This waste of time and money could not be avoided at common law, when courts were required to declare a mistrial if a juror became unable to continue service during the trial.<sup>24</sup>

### *B. Maryland's Treatment of Alternate Jurors*

The Court of Appeals of Maryland adopted Maryland Rule 2-512 and its criminal counterpart Maryland Rule 4-312 to address the selection, substitution, and discharge of alternate jurors.<sup>25</sup> Both rules require that alternate jurors “be drawn in the same manner, have the same qualifications, be subject to the same examination” as seated jurors.<sup>26</sup> Until discharged from service, alternates serve the same functions and possess the same privileges as seated jurors.<sup>27</sup> The similarities between the alternates and the seated jurors allow for a seamless substitution should it occur during the trial.<sup>28</sup>

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22. See, e.g., ARIZ. R. CRIM. P. 18.5(h); WASH. R. CRIM. P. 6.5; IDAHO R. CRIM. P. 24(d)(2). Many states, including Maryland, do not allow substitution of alternates after the jury retires to deliberate because of concerns regarding the sanctity of jury deliberations. See MD. R. 4-312.
  23. See *People v. Collins*, 552 P.2d 742, 745 (Cal. 1976).
  24. See *James v. State*, 14 Md. App. 689, 699–700, 288 A.2d 644, 650 (Ct. Spec. App. 1972) (explaining that, at common law, when a juror became unable to continue service during a trial, whether because of the death, illness, or misconduct of a juror or other cause necessitating his discharge, the practice was to discharge the entire jury and begin de novo by forming a new jury panel).
  25. See MD. R. 2-512, 4-312. Both rules address when alternate jurors must be discharged and when alternates can replace seated jurors. The rules are similar in all pertinent ways except that Maryland Rule 2-512 applies in the civil context while Maryland Rule 4-312 applies in criminal cases. See *Brockington v. Grimstead*, 176 Md. App. 327, 344, 933 A.2d 426, 434 (Ct. Spec. App. 2007).
  26. See MD. R. 2-512(b), 4-312(b).
  27. See *Stokes v. State*, 379 Md. 618, 633, 843 A.2d 64, 73 (2004) (explaining that alternates are selected in the same manner as regular jurors, subjected to the same voir dire and tests of impartiality, and hear the same evidence, jury instructions, and closing arguments).
  28. See American Judicature Society, *Use of Alternate Jurors*, [http://www.ajs.org/jc/juries/jc\\_decision\\_alternate.asp](http://www.ajs.org/jc/juries/jc_decision_alternate.asp) (last visited Feb. 22, 2008).  
Pre-submission substitution usually raises no major issues. This is because the jurors have been instructed in almost every jurisdiction that they are not to discuss the case among themselves before they have retired to deliberate. Thus, there is really no difference between regular and alternate jurors before the jury retires to deliberate.

*See id.*

## 1. When Substitution of Alternate Jurors Can Occur in Maryland

Unlike some states, which allow for the substitution of alternates after the jury has commenced deliberations,<sup>29</sup> the Maryland Rules forbid this practice.<sup>30</sup> Pursuant to the Maryland Rules, “[w]hen the jury retires to consider its verdict, the trial judge shall discharge any remaining alternates who did not replace another jury member.”<sup>31</sup> The use of the word “shall” indicates a mandatory provision, and the Court of Appeals of Maryland “has with increasing rigidity” applied this principle in statutory interpretation.<sup>32</sup>

## 2. *Hayes v. State*

In 1999, the Court of Appeals of Maryland specifically interpreted “when the jury retires to consider its verdict” in order to determine the exact time when alternate jurors must be dismissed in accordance with the Maryland Rules and the point at which they can no longer replace a seated juror.<sup>33</sup> In *Hayes v. State*,<sup>34</sup> the court replaced a seated juror with an alternate juror, after the original jury had gone into the deliberation room to begin discussions.<sup>35</sup> The court of appeals held that “the closing of the [jury] door” is the point when the jury retires to consider its verdict and the point at which deliberations have commenced.<sup>36</sup> After this point, the substitution of an alternate juror is no longer permitted.<sup>37</sup> The court of appeals reasoned that this standard is practical because “compliance with it can be established through objective and extrinsic evidence, without the need to question jurors as to what went on in the jury room after the door was closed.”<sup>38</sup> If a substitution occurs after the closing of jury doors, as

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29. See *supra* note 22 and accompanying text.

30. See *Stokes*, 379 Md. at 629, 843 A.2d at 70.

31. Md. R. 2-512(f)(3), 4-312(f)(3).

32. *Pope v. Sec’y of Pers.*, 46 Md. App. 716, 717, 420 A.2d 1017, 1018 (Ct. Spec. App. 1980).

33. See *Hayes v. State*, 355 Md. 615, 622, 735 A.2d 1109, 1112–13 (1999). Since the *Hayes* decision, the organization of the Maryland Rules has changed, but the same mandatory language regarding the substitution and discharge of alternate jurors is present. See Md. R. 2-512 (amended 2007); see also Md. R. 4-312 (amended 2007).

34. 355 Md. 615, 735 A.2d 1109 (1999).

35. See *id.* at 618, 735 A.2d at 1110. One of the seated jurors became ill after the jury went into the deliberation room. The trial judge then replaced this juror with an alternate, who had been dismissed but had not left the courthouse. *Id.*

36. *Id.* at 635, 735 A.2d at 1120.

37. *Id.*

38. *Id.* at 636, 735 A.2d at 1120.

in *Hayes*, prejudice to the defendant is presumed and reversal is required,<sup>39</sup> unless the State rebuts the presumption.<sup>40</sup>

### 3. *Stokes v. State*

In 2004, the Court of Appeals of Maryland once again analyzed the Maryland Rules regarding alternate jurors and addressed the harm that results when alternate jurors are present in the jury room during deliberations.<sup>41</sup> The *Stokes* court specifically analyzed the harm that resulted when four alternate jurors were present in the jury room and observed the deliberations in violation of Maryland Rule 4-312(f)(3).<sup>42</sup> The court of appeals held that “[t]he presence of alternate jurors [in the jury room] who have no legal standing as jurors injects an improper outside influence on jury deliberations and impairs the integrity of the jury trial,”<sup>43</sup> and consequently invades the privacy, impartiality, and secrecy of the jury room.<sup>44</sup> The presence of alternates in the jury room further harms the jury process by creating a lack of accountability for the alternate jurors who are able to influence other jury members while having no responsibility regarding the outcome of the case.<sup>45</sup>

According to *Stokes*, the presence of alternates impinges “upon the defendant’s constitutional right to a jury trial as guaranteed by the Maryland [c]onstitution and Maryland Rules of Procedure to create a presumption of prejudice.”<sup>46</sup> The presumption of prejudice can only be rebutted by an affirmative showing that the presence of the alternates did not or could not have caused prejudice.<sup>47</sup> Rebutting this presumption is an almost impossible task because Maryland Rule 5-606(b) forbids any inquiry “into the proceedings inside the jury

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39. *Stokes v. State*, 379 Md. 618, 636, 843 A.2d 64, 75 (2004).

40. *See id.* at 641-42, 843 A.2d at 78.

41. *See id.* at 634, 843 A.2d at 73.

42. *Id.* at 624, 843 A.2d at 67. Although the specific Maryland Rule was numerically different during the *Stokes* decision, the substance of the rule remains identical today. *See MD. R. 4-312 (amended 2007)*.

43. *Stokes*, 379 Md. at 638, 843 A.2d at 76.

44. *Id.* at 634, 843 A.2d at 73.

45. *Id.*

46. *Id.* at 638, 843 A.2d at 75. The presumption of prejudice avoids specific inquiry into the “sanctified space of the jury room to determine what impact the presence of alternates had on the outcome of deliberations.” *Brockington v. Grimstead*, 176 Md. App. 327, 363, 933 A.2d 426, 447 (Ct. Spec. App. 2007). Also, presuming prejudice to the defendant recognizes that once deliberations have commenced, the six jurors become a joint body and inserting new members midstream would have an effect on the unit. *Id.*

47. *See Stokes*, 379 Md. at 641, 843 A.2d at 78.

room or into the juror's mental processes . . . ."<sup>48</sup> If the prejudice is not rebutted, reversal is required and the defendant is entitled to a new trial.<sup>49</sup>

Similar to Maryland courts, "almost every court" throughout the nation considers the presence of alternate jurors in the jury room to be error.<sup>50</sup> However, courts in various jurisdictions differ as to the remedy afforded when this error occurs.<sup>51</sup> A majority of courts adopt the same view as Maryland courts and presume prejudice when alternates breach the sanctity of the jury room.<sup>52</sup> Courts in other jurisdictions go beyond the presumption of prejudice approach and adopt the reversible error per se approach.<sup>53</sup> In these courts, the presence of an alternate in the jury room during deliberations will automatically "void the trial."<sup>54</sup> Courts adopting the reversible error per se approach, as well as courts in jurisdictions such as Maryland where prejudice is presumed, represent the majority viewpoint that the presence of alternate jurors in the jury room is an error.<sup>55</sup>

#### IV. *BROCKINGTON v. GRIMSTEAD*

##### A. *Trial Court*

*Brockington v. Grimstead* illustrates the obstacles and conflicts that the current alternate juror rules create at both trial court and appellate court levels.<sup>56</sup> This case originated in the Baltimore City Circuit

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48. *Id.* at 641–42, 843 A.2d at 78; *see also* MD. R. 5-606 ("[A] sworn juror may not testify as to . . . the jury's deliberations . . . [or] the sworn juror's mental processes in connection with the verdict."). Public policy forbids any inquiry into the juror's mental process and deliberations because it destroys the secrecy and sanctity of juror deliberations. *See Stokes*, 379 Md. at 637, 843 A.2d at 75.

49. *Stokes*, 379 Md. at 642, 843 A.2d at 78 (holding that the presumption of prejudice to the defendant was not overcome; therefore, reversal is mandated and the case must be remanded for a new trial).

50. *Id.* at 634, 843 A.2d at 73.

51. *Id.*

52. *See, e.g.*, *State v. Crandall*, 452 N.W.2d 708 (Minn. Ct. App. 1990); *Falcon v. State*, 874 P.2d 772 (Nev. 1994); *Jones v. Sisters of Providence in Wash., Inc.*, 970 P.2d 371 (Wash. Ct. App. 1999).

53. *See, e.g.*, *Bouey v. State*, 762 So. 2d 537, 539–40 (Fla. Dist. Ct. App. 2000); *Commonwealth v. Smith*, 531 N.E.2d 556, 560–61 (Mass. 1988); *State v. Bindyke*, 220 S.E.2d 521, 533 (N.C. 1975).

54. *Bindyke*, 220 S.E.2d at 533; *see also Bouey*, 762 So. 2d at 539; *Smith*, 531 N.E.2d at 560–61.

55. *See Stokes*, 379 Md. at 633–37, 843 A.2d at 73–75.

56. *Brockington v. Grimstead*, 176 Md. App. 327, 331–41, 933 A.2d 426, 428–33 (Ct. Spec. App. 2007).



Court when Joyce Grimstead filed a complaint “alleging that [Dr. McNeal Brockington] negligently failed to diagnose and [failed to] treat her cancer . . . during the five-year period [when] he was her primary care physician.”<sup>57</sup> Mrs. Grimstead “prayed a jury trial.”<sup>58</sup> “After *voir dire*, but before selection of the jury,” the circuit court asked counsel for both sides if “they would consent to a verdict [of] five jurors,” if circumstances occurred in which one juror was unable to continue service until the verdict.<sup>59</sup> While Mrs. Grimstead consented to this practice, Dr. Brockington required the verdict to be from six jurors.<sup>60</sup> The jury consisted of six regular jurors and two alternate jurors.<sup>61</sup>

Nine days after the start of the trial and after closing arguments, the jury recessed for the evening to begin deliberations the next day.<sup>62</sup> In the jurors’ absence, the circuit court announced its plan to send the two alternates into the jury room to observe deliberations, but not participate.<sup>63</sup> The court viewed this practice as a safeguard against a mistrial if one of the jurors became unable to continue jury service during the course of deliberations and found it especially relevant in this situation because Dr. Brockington would not accept a verdict of less than six jurors.<sup>64</sup> Dr. Brockington did not object to this practice but rather consented to the alternates’ presence in the jury room.<sup>65</sup> Although Mrs. Grimstead objected to this practice, the court decided that the alternates would be present in the jury room unless she could produce authority supporting her objection.<sup>66</sup>

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57. *Id.* at 331, 933 A.2d at 428.

58. *Id.*

59. *Id.* Although a jury must consist of six persons, “[w]ith the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable or disqualified to perform a juror’s duty.” MD. R. 2-511(b).

60. *See Brockington*, 176 Md. App. at 331, 933 A.2d at 428.

61. *Id.* at 333, 933 A.2d at 429.

62. *Id.*

63. *Id.*

64. *Id.* at 333, 335–36, 933 A.2d at 429–30. The trial judge explained that he had done this in the past and that he did not “‘see where there [was] any harm’ in the alternate jurors’ listening to, but not participating in, the deliberations until such time as it might become necessary to substitute them.” *Id.* at 335, 933 A.2d at 430 (alteration in original).

65. *Id.* at 334–35, 933 A.2d at 430. Brockington’s counsel specifically responded to the trial judge’s suggestion to have the alternates in the jury room, “Your Honor, I think the last trial [before you], which finished two weeks ago, we did the same thing, Your Honor suggested. I didn’t object then. I don’t object now.” *Id.* (alteration in original).

66. *Id.* at 333–34, 933 A.2d at 429.

The following day, the jury returned for the first day of deliberations.<sup>67</sup> Due to time constraints, counsel for Mrs. Grimstead did not produce authority supporting her previous objection so the court allowed the alternates to observe deliberations.<sup>68</sup> In an effort to assure Mrs. Grimstead and Dr. Brockington that this practice would not prejudice the deliberations, the court instructed the two alternate jurors to remain as “neutral as possible” while observing the deliberations.<sup>69</sup> Following the court’s instruction, the jurors, including the two alternates, retired to the jury room to begin deliberations.<sup>70</sup>

During the first day of deliberations, the jury informed the court that they were deadlocked at three and three,<sup>71</sup> and they remained unable to reach a verdict at the end of the first day of deliberations.<sup>72</sup> The court decided that the jury would continue deliberations after the Friday holiday and reconvene the following Monday morning.<sup>73</sup> Before the Monday morning proceedings began, juror number four presented a letter from his doctor to the court asking to be excused from service.<sup>74</sup> Dr. Brockington objected to dismissing this juror at this stage of deliberations because it would be extremely prejudicial to disturb the dynamics of a deadlocked jury.<sup>75</sup> In the alternative, Mrs. Grimstead reasoned that this was an ideal time to substitute juror number four with one of the alternate jurors, both of whom were still present in the jury room.<sup>76</sup> The court decided that the juror would deliberate for the day and at the end of the day’s deliberations it would determine whether to dismiss him for medical reasons.<sup>77</sup>

After several hours of deliberating on day two, the jury was still deadlocked at three to three, and Dr. Brockington asked the court to declare a hung jury if the jury did not reach a verdict by the end of

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67. *Id.* at 334, 336, 933 A.2d at 429–30.

68. *Id.* at 334–35, 933 A.2d at 429–30.

69. *Id.* at 335–36, 933 A.2d at 430. According to the trial judge, remaining as neutral as possible involved the alternate jurors not making any facial or body expressions and not reflecting how they felt about anything that was said in the deliberation room. *Id.*

70. *Id.*

71. *Id.* at 336, 933 A.2d at 430–31.

72. *See id.* At this point, Dr. Brockington, through his counsel, was prepared to move for a mistrial due to the deadlocked jury. *Id.* at 336, 933 A.2d at 430.

73. *Id.* at 336, 933 A.2d at 431.

74. *Id.* In the letter, the doctor informed the court that juror number four had a “damaged heart” and should not be serving on the jury at all. *Id.*

75. *Id.* at 336–37, 933 A.2d at 431.

76. *See id.* at 335, 337, 933 A.2d at 430–31.

77. *See id.* at 336–37, 933 A.2d at 431.

the day's deliberations.<sup>78</sup> Although he did not initially object to the alternates' presence in the jury room, Dr. Brockington then objected to the presence of the alternates in the jury room and to the possible substitution of juror number four, the juror with the medical note, with one of the alternates.<sup>79</sup> Dr. Brockington relied on Maryland Rule 2-512(f)(3),<sup>80</sup> which requires the dismissal of alternate jurors before the jury retires to deliberate,<sup>81</sup> and the court of appeals' decision in *Stokes v. State*.<sup>82</sup> The circuit court denied the motion for a mistrial and "asserted that it had [fully] complied with *Stokes* by instructing the alternate jurors not to participate in the deliberations."<sup>83</sup> With the jury still deadlocked, the court then dismissed juror number four for medical reasons.<sup>84</sup>

The next day, which was the third day of deliberations, the court once again received a doctor's note from one of the seated jurors.<sup>85</sup> Following the doctor's excuse, the court dismissed juror number five for medical reasons.<sup>86</sup> The court then replaced jurors four and five with the two alternate jurors.<sup>87</sup> With the alternates now serving as seated jurors, the jury resumed deliberations.<sup>88</sup>

When the substitutions occurred, Dr. Brockington objected to the dismissal of the seated jurors and to the substitution of the alternate jurors.<sup>89</sup> Dr. Brockington once more directed the court to *Stokes* and additionally referred it to *Hayes v. State*.<sup>90</sup> On November 15, 2005, the jury reached a verdict.<sup>91</sup> Finding that Dr. Brockington was negligent in his care and treatment of Mrs. Grimstead, the jury ruled in favor of Mrs. Grimstead.<sup>92</sup>

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78. *Id.* at 337, 933 A.2d at 431.

79. *Id.* at 338, 933 A.2d at 432.

80. *Id.* Maryland Rule 2-512(b) is now encompassed in Maryland Rule 2-512(f)(3).

81. Md. R. 2-512(b).

82. 379 Md. 618, 843 A.2d 64 (2004). For a discussion of *Stokes v. State* see *supra* Part III.B.3.

83. *Brockington*, 176 Md. App. at 339, 933 A.2d at 432.

84. *Id.*

85. *Id.* The note was from juror number five's doctor and simply said that he would be unable to serve on the jury for the next two days. *Id.*

86. *See id.*

87. *Id.*

88. *Id.* "The court did not instruct the jurors about the process they should follow, *i.e.*, whether they should start deliberating anew or pick up deliberations where the original jury had left off." *Id.* at 339, 933 A.2d at 432-33.

89. *Id.* at 339, 933 A.2d at 433.

90. *Id.* at 338-40, 933 A.2d at 432-33.

91. *Id.* at 340, 933 A.2d at 433.

92. *See id.* at 341, 933 A.2d at 433.

*B. Appellate Review in the Court of Special of Appeals*

Dr. Brockington appealed on the grounds that the trial court erred as a matter of law when it allowed alternate jurors to be present in the jury room, instead of discharging them when the jury retired to deliberate.<sup>93</sup> Dr. Brockington asserted that the court further erred when it substituted the alternates for seated jurors, in violation of the Maryland Rules.<sup>94</sup> In response to this appeal, Mrs. Grimstead asserted that Dr. Brockington consented to the alternates' presence in the jury room and therefore could not attack their subsequent substitution on appeal, because that was the purpose of their continued presence in the jury room.<sup>95</sup> Because of this consent, Mrs. Grimstead maintained that Dr. Brockington waived the right to advance his arguments on appeal.<sup>96</sup> Dr. Brockington countered this argument by asserting that he never consented to waiving the requirements of Maryland Rule 2-512(f)(3),<sup>97</sup> and that he timely objected to the substitution of the alternates.<sup>98</sup>

After analyzing the pertinent law in Maryland regarding alternate jurors and waiver, the Court of Special Appeals of Maryland reversed the trial court's decision in favor of Mrs. Grimstead and remanded the case for a new trial.<sup>99</sup> The court of special appeals began by applying the principles of *Stokes* and *Hayes* and concluded that both cases mandate that prejudice to Dr. Brockington be presumed by the presence and participation of the alternates in the jury room, which destroyed the sanctity of the deliberations.<sup>100</sup> The appellate court held that the circuit court did not have the authority to ignore the Maryland Rules and the mandate of *Stokes* and *Hayes* and consequently erred when it did so.<sup>101</sup>

Although *Hayes* and *Stokes* mandate that prejudice to Dr. Brockington be presumed from the presence and substitution of the alternates in violation of the Maryland Rules, the court of special appeals recognized that actual prejudice to Dr. Brockington

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93. *Id.*

94. *Id.*

95. *Id.* at 341–42, 933 A.2d at 434.

96. *Id.*

97. Maryland Rule 2-512(f)(3) states: "When the jury retires to consider its verdict, the trial judge shall discharge any remaining alternates who did not replace another jury member."

98. *See Brockington*, 176 Md. App. at 342, 933 A.2d at 434.

99. *Id.* at 364–65, 933 A.2d at 447.

100. *Id.* at 363, 933 A.2d at 446–47.

101. *Id.*

resulted.<sup>102</sup> The late substitution of the alternates changed the delicate dynamics of a hung jury, which ultimately led to the verdict against Dr. Brockington.<sup>103</sup> Moreover, when the alternates joined the jury, the trial court gave no instruction for the jury to begin deliberations anew.<sup>104</sup> The substitution of the alternates also deprived Dr. Brockington of other available remedies, such as the granting of a mistrial, which was an appropriate remedy given that the jury was deadlocked.<sup>105</sup>

The court of special appeals thoroughly entertained Mrs. Grimstead's waiver argument and concluded that Dr. Brockington was not precluded from advancing his arguments on appeal.<sup>106</sup> Although the court of appeals has never expressly ruled that the requirements of Maryland Rule 2-512(f)(3) are waivable, the court of special appeals assumed that the requirements can be waived in their analysis.<sup>107</sup> The court of special appeals acknowledged that Dr. Brockington expressly consented to the presence of the alternate jurors in the jury room in violation of the Maryland Rules and therefore implicitly consented to their substitution during deliberations.<sup>108</sup> However, Dr. Brockington announced, prior to the substitution of the alternates, that he was no longer consenting to the jury deliberation process, which included the substitution of the alternate jurors in violation of the Maryland Rules.<sup>109</sup> At a minimum, this announcement was an effective retraction of his previous consent to permit the substitution of alternate jurors, and occurred before any substitution took place.<sup>110</sup> Additionally, after this retraction, Dr. Brockington timely objected to the substitution of the alternate jurors in violation of the Maryland Rules.<sup>111</sup> Consequently, Dr.

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102. *Id.* at 364, 933 A.2d at 447.

103. *Id.*

For more than 10 hours over the course of 2 days (with a three-day holiday weekend in the middle), the jury deliberated without reaching verdict. . . . Three hours and 37 minutes after the substitution of the two alternates, the jury reached a verdict. The inference is strong, from the timing of events, that the change in the composition of the jury mid-deliberations caused a change in the outcome of the case, to Brockington's prejudice.

*Id.*

104. *Id.*

105. *See id.*

106. *See id.* at 362, 933 A.2d at 446.

107. *See id.*

108. *See id.* at 353–54, 933 A.2d at 441.

109. *See id.* at 353, 360, 933 A.2d at 440–41, 444–45.

110. *See id.* at 358–59, 933 A.2d at 444.

111. *See id.* at 354, 933 A.2d at 441.

Brockington was not precluded from challenging the substitution of alternate jurors on appeal.<sup>112</sup>

The court of special appeals recognized the trial court's interest in "averting a mistrial due to a hung jury after a long and complex trial."<sup>113</sup> However, the court emphasized that "[a]ny remedy to this problem . . . must comport with the Maryland Rules."<sup>114</sup> The court further emphasized that until the Maryland Rules are changed by amendment or by legislative action, alternate jurors may not participate in jury deliberations in any capacity.<sup>115</sup>

## V. SHORTCOMINGS WITH MARYLAND'S TREATMENT OF ALTERNATE JURORS

As seen in *Brockington*, the Maryland Rules fail when a seated juror becomes unable to continue service during deliberations or specifically anytime after the jury retires to deliberate.<sup>116</sup> When this occurs, a mistrial must be declared,<sup>117</sup> and considerable time, effort, and money is wasted, which defeats the entire purpose of the alternate juror system.<sup>118</sup> Aside from the wasted resources, there is substantial human cost that results from experiencing a lengthy trial that results in a mistrial.<sup>119</sup> It is illogical that the Maryland Rules only provide for the substitution of an alternate juror during the trial when it is just as likely that a seated juror would become unable to continue service during deliberations.<sup>120</sup>

The unworkable nature of the rules puts trial judges in difficult situations because they want to take proactive measures to prevent

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112. *See id.* at 362, 933 A.2d at 446.

113. *See id.* at 364, 933 A.2d at 447.

114. *Id.*

115. *Id.*

116. *See Hayes v. State*, 355 Md. 615, 635-38, 735 A.2d 1109, 1120-21 (1999) (holding that it was reversible error under the Maryland Rules to permit substitution of an alternate juror once jurors entered the room and closed the door to commence deliberations), *rev'g* 123 Md. App. 588, 720 A.2d 6 (Ct. Spec. App. 1998).

117. However, a mistrial does not have to be declared if the parties agree to accept a verdict from less than the required amount of jurors. *See* MD. R. 2-511(b); *see also* MD. R. 4-311(b).

118. *See Marek, supra* note 20, at 796. The purpose of the alternate juror system is to "provide a substitute, should one of the regular jurors become ill or incapacitated, so as to prevent the multitude of mistrials experienced at common law." *Id.*

119. *See id.*

120. *See id.*; *see also* MD. R. 2-512(b), 4-312(b) (demonstrating that the Maryland Rules are in accord with an alternate juror system that only allows substitutions before the jury retires to deliberate).

mistrials but cannot do so without violating the Maryland Rules.<sup>121</sup> Trial courts throughout the nation have attempted to carve out exceptions to the mandatory dismissal of alternates when the jury retires to deliberate and have allowed post-submission substitution of alternates during deliberations.<sup>122</sup> These late substitutions “endanger the defendant’s substantive right to a trial by an impartial jury and compromise the sanctity and freedom of the deliberation process.”<sup>123</sup>

Moreover, Maryland jurisprudence “has zealously guarded against intrusions into the jury room and jury deliberations” and against any efforts by the trial judge that would compromise the sanctity of jury deliberations, such as allowing the alternate jurors to be present in the jury room or substituted after the jury retires to deliberate, which could prejudice the defendant.<sup>124</sup> This prejudice will likely result in reversible error unless it can be rebutted.<sup>125</sup> When trial judges take such action, costly appeals result, such as in *Brockington*, and appellate courts are forced to analyze if the presumed prejudice to the defendant has been rebutted.<sup>126</sup> Appellate courts must also evaluate if the defendant consented to the presence of the alternates in the jury room and therefore consented to the prejudice that their presence caused.<sup>127</sup> These appeals, like mistrials, waste valuable judicial resources and time. Additionally, clients are forced to face further litigation, and their lives are once again disrupted. These judicial and human costs result even though the trial judge likely violated the Maryland Rules in an effort to guard against a mistrial.<sup>128</sup>

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121. See *Brockington v. Grimstead*, 176 Md. App. 327, 335, 363-64, 933 A.2d 426, 430, 446-47 (Ct. Spec. App. 2007). The trial judge in this case admitted that he violated the Maryland Rules by allowing alternates to be present in the jury room, with some regularity, in an effort to prevent mistrials. See *id.* at 335, 933 A.2d at 430.

122. See Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV. 847, 853-61 (1994) (discussing the approaches taken by several federal district courts).

123. See *id.* at 882.

124. See *Stokes v. State*, 379 Md. 618, 633, 638, 843 A.2d 64, 72, 76 (2004).

125. See *id.* at 642, 843 A.2d at 78.

126. See *id.* at 631-32, 843 A.2d at 72; *Brockington*, 176 Md. App. at 330-31, 933 A.2d at 427-28.

127. See *Brockington*, 127 Md. App. at 341-42, 933 A.2d at 433-34. The issue of waiver and if counsel consented to the presence of the alternates in the jury room should not be a determinative factor for appellate review. Lawyers are advocates for their clients and would be persuaded to consent to a procedure that would allow alternates to be in the jury room or improperly substituted if they thought that the alternates would identify with their client’s position. See *id.* at 361, 933 A.2d at 445.

128. See *id.* at 335, 933 A.2d at 430. The trial judge explained that his reason for allowing the alternates in the jury room to listen but not to deliberate was a proactive measure

Maryland's treatment of alternate jurors is also negatively affecting the citizens who are called to serve as alternates.<sup>129</sup> The selected alternates "may suffer high emotional and financial costs, as well as the burden of lost time" after they hear the entire case and then are abruptly dismissed, never becoming part of the decision-making process.<sup>130</sup> The longer the case, the more feelings of dissatisfaction occur among alternates whose time and mental energy investment is not rewarded by participation in the verdict.<sup>131</sup> These feelings of dissatisfaction can extend to the seated jurors who often develop a "team spirit" during a long trial and are negatively affected when a valuable member of the team is abruptly dismissed.<sup>132</sup> Additionally, there is concern that jurors identified as "alternates" may be less inclined to be attentive and alert during the trial because they do not expect to become seated jurors.<sup>133</sup> This poses a significant problem if these jurors eventually do become voting members of the jury.

## VI. FEDERAL REFORMS REGARDING ALTERNATE JURORS

The federal criminal and civil systems have reconfigured their rules regarding alternate jurors to allow for greater flexibility when a seated juror becomes ill or incapacitated during deliberations.<sup>134</sup> Although both the civil and criminal rules have recently changed, the differing court systems have approached the use of alternate jurors differently.<sup>135</sup>

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in the event that a problem resulted and one of the seated jurors needed to be dismissed during deliberations. In that situation, one of the alternates would be ready to replace the juror and could become the sixth required juror. *Id.*

129. See E-mail from Hon. Dennis Sweeney Jr., Chair of the Council on Jury Use and Management, to Author (Mar. 7, 2008, 10:13 EST) (on file with author).
130. See Mary Kaluk Lanning, Comment, *The Unnecessary Alternate Juror*, 73 U. COLO. L. REV. 1047, 1049 (2002).
131. E-mail from Hon. Dennis Sweeney Jr., *supra* note 129.
132. See *id.*
133. See Timothy S. Robinson, *A Judge Tries to Keep the Wallflowers Awake*, WASH. POST, Feb. 25, 1980, at C1.
134. See generally FED. R. CIV. P. 48; FED. R. CRIM. P. 24(c) (providing for a jury of six to twelve members in civil trials and the appointment of alternate jurors in criminal trials).
135. See *supra* notes 20-22 and accompanying text.



*A. Reforms to the Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure eliminated the concept of alternate jurors by the 1991 amendments to the rule.<sup>136</sup> Prior to these amendments, former Rule 47(b) enabled the federal district courts to impanel alternate jurors in an effort to “prevent mistrials in cases of long duration when a regular juror died, or became so ill that she was unable to continue her duties or otherwise became or was found to be disqualified, leaving the jury with fewer than twelve members.”<sup>137</sup> Like the Maryland Rules, former Rule 47(b) allowed an alternate juror to replace a seated juror during trial but had a mandatory provision that required the dismissal of the alternates when the jury retired to consider its verdict.<sup>138</sup>

The abolishment of the concept of alternate jurors resulted from a number of factors. Former Rule 47(b) was based on the assumption that a jury must consist of exactly twelve members.<sup>139</sup> Operating under this assumption, alternate jurors were needed if one juror became unable to serve during the trial.<sup>140</sup> This assumption has subsequently been dismissed and now the minimum size of a jury in compliance with the U.S. Constitution is six members.<sup>141</sup>

Additional factors that led to the elimination of alternate jurors were the juror dissatisfaction and difficulties that resulted from the alternate juror process.<sup>142</sup> The former rule’s requirements that alternate jurors sit through the entire trial but then be dismissed before becoming voting members of the jury was a source of dissatisfaction with the jury system.<sup>143</sup> The Advisory Committee recognized the burden the former rule placed on alternates “who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.”<sup>144</sup> Additionally, this provision led to increased confusion and even mistrials when district court judges, in violation of former Federal Rule 47(b), allowed alternates to be

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136. See 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2484 (3d ed. 2008).

137. *Id.*

138. *Id.*

139. FED. R. CIV. P. 47 advisory committee’s note (1991 amend.).

140. *See id.*

141. *See Ballew v. Georgia*, 435 U.S. 223, 230-31 (1978) (holding that the constitutional right to a jury trial guarantees the right to have at least six jurors).

142. *See* FED. R. CIV. P. 47 advisory committee’s note (1991 amend.).

143. *See id.*

144. *See id.*

present in the jury room and substituted for seated jurors after the required dismissal.<sup>145</sup>

With the abolishment of alternate jurors, Rule 48 was heavily amended in 1991 to address situations where the use of alternate jurors would have been appropriate under the prior rules.<sup>146</sup> Under Rule 48, the court will now decide the exact number of jurors, which can range from six to twelve members.<sup>147</sup> Seating more than six jurors does not harm either party but rather “increases the representativeness of the jury.”<sup>148</sup>

Judges can reduce the possibility of a mistrial by seating a jury of larger than six if they contemplate that the trial will be lengthy or complex.<sup>149</sup> If a juror needs to be excused during deliberations, a mistrial will not result, as it did formerly, because “a sufficient number will remain to render a unanimous verdict of six or more.”<sup>150</sup> All impanelled jurors participate in the verdict and “[n]o juror who endures to the end of the trial will be prevented from participating in the deliberations.”<sup>151</sup>

### *B. Reforms to the Federal Rules of Criminal Procedure*

Unlike the federal civil system, the federal criminal system has not eliminated alternate jurors altogether.<sup>152</sup> However, the Federal Rules of Criminal Procedure regarding alternate jurors were changed in 1983 and then again in 1999.<sup>153</sup> Particularly, the rules were amended to address the dilemma that results when a seated juror needs to be replaced during deliberations.<sup>154</sup>

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145. See *Hanson v. Darkside Surgery Ctr.*, 872 F.2d 745, 748–49 (6th Cir. 1989).

146. See Matthews Lane, A Survey of the December 1991 Amendments to the Federal Rules of Civil Procedure, 59 TENN. L. REV. 367, 394 (1992) (recognizing that Rule 48 has been rewritten completely).

147. See FED. R. CIV. P. 48. “A jury must initially have at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).” *Id.*

148. See FED. R. CIV. P. 48 advisory committee’s note (1991 amend.). If alternates are eliminated and more than six jurors are seated and return a verdict, greater community representation results. See Albert D. Brault, *Jury Trial – How Many Jurors?*, 37 MD. B.J. July-Aug. 2004, at 32, 37.

149. See David S. Siegel, *The Recent (Dec. 1, 1991) Changes in the Federal Rules of Civil Procedure*, 142 F.R.D. 359, 370 (1992).

150. FED. R. CIV. P. 48 advisory committee’s note (1991 amend.).

151. Siegel, *supra* note 149, at 369.

152. See FED. R. CRIM. P. 24(c)(1).

153. See Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1516 (2001).

154. See *id.* at 1495–96.

Prior to the 1999 amendments, Rule 24(c) mandated the dismissal of alternate jurors once the jury retired to deliberate, as an effort to protect the sanctity of jury deliberations.<sup>155</sup> The federal rules before the 1983 amendments did not provide for the jury to consist of fewer than twelve persons without the express consent of both parties.<sup>156</sup> Thus, in the former federal criminal system, the illness or incapacitation of a juror during deliberations would inevitably result in a mistrial unless the parties consented to a verdict of less than twelve jurors.<sup>157</sup>

In an effort to provide courts a remedy other than declaring a mistrial, Rule 23(b)(3) was added in 1983.<sup>158</sup> This rule allows a jury of eleven to return a verdict, even without the agreement of both parties, if the court finds good cause to excuse a juror after the jury has retired to deliberate.<sup>159</sup> Good cause for excusing a juror is within the discretion of the trial court and generally involves juror sickness, family emergency, or juror misconduct.<sup>160</sup>

The 1983 Advisory Committee noted that there had been other proposals to amend the rules to allow for post-submission substitution of alternates after the jury retired to consider its verdict.<sup>161</sup> The Advisory Committee rejected these proposals in favor of proceeding with eleven jurors.<sup>162</sup> The committee was worried that permitting substitution of an alternate during deliberations would negatively affect the jury's group dynamic and compromise the privacy and secrecy of jury deliberations.<sup>163</sup> The rejection of post-substitution proposals reaffirmed that alternates could not be substituted after the jury retired to consider its verdict.<sup>164</sup>

Despite the court's ability to proceed with eleven jurors, trial courts continued to misuse alternate jurors.<sup>165</sup> Judges largely formulated their own rules regarding alternate jurors, which involved

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155. *See id.* at 1516.

156. *See* FED. R. CRIM. P. 23 advisory committee's note (1983 amends.).

157. *See* Markovitz, *supra* note 153, at 1496.

158. *See* FED. R. CRIM. P. 23(b) advisory committee's note (1983 amends.). "It is the judgment of the Committee that when a juror is lost during deliberations . . . it is essential that there be available a course of action other than mistrial." *Id.*

159. FED. R. CRIM. P. 23(b)(3).

160. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9th Cir. 1995).

161. *See* FED. R. CRIM. P. 23 advisory committee's notes (1983 amends.).

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Jeffrey T. Baker, *Criminal Law- Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining a Defendant's Rights to an Impartial Jury Under Rule 24(c)*, 41 VILL. L. REV. 1213, 1214 (1996).

disregarding the mandatory discharge of alternates when the jury retires to consider its verdict.<sup>166</sup> Some courts allowed alternates to sit in on jury deliberations while others sequestered the alternate jurors during the course of deliberations.<sup>167</sup> Other courts not only violated the rules by not dismissing the alternates but also by substituting the alternates after the jury began deliberations.<sup>168</sup>

The actions of the federal trial courts forced the U.S. Supreme Court to examine the effect on the verdict when alternates are present in the deliberation room.<sup>169</sup> In *United States v. Olano*,<sup>170</sup> an alternate juror remained with the jury during the entirety of the deliberations.<sup>171</sup> The Court agreed that former Rule 24(c) of the Federal Rules of Criminal Procedure was violated, but the majority held that the presence of the alternates did not interfere with the jury's deliberations.<sup>172</sup> Essentially the Court adopted a harmless error test when alternates are present in the jury room and required the defendant to make an affirmative showing that he was prejudiced.<sup>173</sup>

After *Olano*, the Federal Rules of Criminal Procedure were again amended in 1999 to provide greater flexibility for courts when jurors need to be replaced during deliberations.<sup>174</sup> The amendments aimed to provide clear guidance for lower courts regarding the substitution of alternate jurors, in expectation that trial courts would stop violating the rules.<sup>175</sup> The 1999 amendments repealed the mandatory dismissal of alternate jurors after the jury retires to consider its verdict and enabled courts to retain alternate jurors during the course of deliberations.<sup>176</sup> The retention of the alternates was intended to give the court more options in "long" and "costly" trials.<sup>177</sup>

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166. *See id.*

167. *See id.* at 1214–15.

168. *See id.* at 1215.

169. *United States v. Olano*, 507 U.S. 725, 739 (1993).

170. *Id.*

171. *Id.* at 729.

172. *See id.* at 739–40.

173. *See id.* at 740–41. The Court of Appeals of Maryland declined to adopt the federal approach of "circumventing the rule through an expansive harmless error or presumptive non-prejudice doctrine. . . ." *Hayes v. State*, 355 Md. 615, 635, 735 A.2d 1109, 1120 (1999).

174. *See* Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 222 (2005).

175. *See id.*

176. *See* FED. R. CRIM. P. 24 advisory committee's note (1999 amends.).

177. *See id.*

[T]he Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at

The option to retain alternates imposes additional responsibility on the courts to ensure that the sanctity of jury deliberations is not compromised.<sup>178</sup> These steps include instructing the retained jurors not to “discuss the case with anyone until” substituted or discharged, and separating the alternate jurors during deliberations.<sup>179</sup> Additionally, the rule specifically requires that the court instruct the jury that deliberations must begin anew if the retained alternates are substituted.<sup>180</sup> This requirement “emphasizes the importance of ensuring that each member of a jury is a dynamic participant in the entire deliberation process.”<sup>181</sup>

## VII. MARYLAND’S PAST EFFORTS AT REFORM

Like the federal courts, Maryland has recognized the shortcomings with its treatment of alternate jurors both in the civil and criminal sectors.<sup>182</sup> The numerous proposed reforms attempted to strike a balance between preventing unnecessary mistrials and preserving the sanctity of jury deliberations.<sup>183</sup> Unfortunately, unlike the federal courts, Maryland’s efforts at reforming the alternate juror process have been unsuccessful.<sup>184</sup>

The suggested reforms to Maryland’s treatment of alternate jurors are largely seen in the work of the Standing Committee on the Rules of Practice and Procedure.<sup>185</sup> Pursuant to the Maryland constitution, the Court of Appeals of Maryland regulates the practice, procedure, and judicial administration of the courts in the state.<sup>186</sup> As part of this authority, the court of appeals appoints a “standing committee of lawyers, judges, and other persons competent in judicial practice, procedure, or administration” to assist the court of appeals in this regulation.<sup>187</sup> The Standing Committee on the Rules of Practice and Procedure, referred to as the Rules Committee, meets monthly to

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the time the jury retires to deliberate and to use Rule 23(b) to proceed with eleven jurors or to substitute a juror or jurors with alternate jurors who have not been discharged.

*Id.*

178. See FED. R. CRIM. P. 24(c)(3).

179. *Id.*; see also FED. R. CRIM. P. 24 advisory committee’s note (1999 amends.).

180. FED. R. CRIM. P. 24(c)(3).

181. Markovitz, *supra* note 153, at 1517.

182. See *Brockington v. Grimstead*, 176 Md. App. 327, 350–51, 933 A.2d 426, 439 (Ct. Spec. App. 2007), *cert. granted*, 403 Md. 304, 941 A.2d 1104 (2008).

183. See *id.* at 350–51, 933 A.2d at 439.

184. See *id.*

185. See *id.*; see also *infra* text accompanying notes 186–226.

186. MD. CONST. art. 4, § 18(a).

187. MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (LexisNexis 2006).

consider amendments and additions to the Maryland Rules of Procedure and to propose recommendations for change to the court of appeals.<sup>188</sup> Not surprisingly, the Rules Committee's recommendations for reform have mirrored the changes to the Federal Rules of Civil and Criminal Procedure regarding alternate jurors.<sup>189</sup> The Rules Committee has sought to attain the same flexibility for Maryland that the federal criminal and civil systems have achieved when a seated juror needs to be replaced during the jury's deliberations.<sup>190</sup>

#### *A. Reforms Based on the Federal Rules of Civil Procedure*

In May 2001, the Rules Committee debated and considered changes to the Maryland Rules that were modeled after Federal Rules of Civil Procedure 47 and 48.<sup>191</sup> The proposed changes eliminated the concept of alternate jurors in the civil system, and required all jurors to deliberate and participate in the verdict.<sup>192</sup> This reform also involved amending the language of Maryland Rule 2-511(b) so that civil juries no longer must consist of six jurors, but would enable a civil jury to consist of no fewer than six jurors, identical to the Federal Rules of Civil Procedure.<sup>193</sup>

The reforms that the Rules Committee considered in May 2001 resulted from the recommendations of the Council on Jury Use and Management (CJUM).<sup>194</sup> The Conference of Circuit Judges created the CJUM in 1998 with much encouragement from Court of Appeals of Maryland's Chief Judge Robert Bell.<sup>195</sup> The primary purpose of the CJUM was to study Maryland's jury practices and problems and to make recommendations for areas of improvement.<sup>196</sup> It was

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188. Maryland Standing Committee on Rules of Practice and Procedure, <http://www.courts.state.md.us/rules/index.html> (last visited Aug 29, 2008).

189. See FED. R. CIV. P. 48; Minutes of the Standing Committee on Rules of Practice and Procedure, May 18, 2001, at 7-8, <http://www.courts.state.md.us/rules/minutes/5-18-01.pdf> [hereinafter May 18 Minutes]; see also FED. R. CRIM. P. 24(c).

190. See May 18 Minutes, *supra* note 189, at 12.

191. *Id.*

192. *Id.*

193. FED. R. CIV. P. 48; May 18 Minutes, *supra* note 189.

194. See May 18 Minutes, *supra* note 189, at 2.

195. Council on Jury Use and Management, 2000 Report and Recommendations 1 (2000), <http://www.courts.state.md.us/juryrpt1.pdf>.

196. See *id.*

anticipated that through the work of the CJUM, jury service could become more relevant and convenient for Maryland citizens.<sup>197</sup>

Reform of the alternate juror process was part of CJUM's agenda.<sup>198</sup> The CJUM analyzed the plight of alternate jurors and recognized the frustration that alternate jurors experience.<sup>199</sup> Not designating certain jurors as alternates in the civil system and requiring all impanelled jurors to deliberate would allow alternates to "remain involved in the process, deliberating and rendering a verdict rather than being abruptly cut off when the trial ends," which "allows [for] additional ideas and input from jurors, and makes alternates feel more connected to the process."<sup>200</sup> The CJUM's recommendations protect the court if one or two of the jurors become ill during deliberations because the trial judge is empowered to impanel more than six jurors.<sup>201</sup> As long as at least six jurors are still available to return the verdict, a mistrial need not be declared.<sup>202</sup>

The suggested reforms seemed like an ideal way to address both the problems of alternate juror dissatisfaction and mistrials, but the Rules Committee struggled with the CJUM's recommendations.<sup>203</sup> Although the Maryland constitution provides that a civil jury must consist of "at least 6 jurors,"<sup>204</sup> the Maryland Code (and the Maryland Rules) mandates that "the jury shall consist of six jurors."<sup>205</sup> The Rules Committee concluded that because of the mandatory

197. See *id.*; see also Chief Judge Robert M. Bell, State of the Judiciary Address (Jan. 23, 2002), <http://www.courts.state.md.us/soj2002.html>.

198. Council on Jury Use and Management, *supra* note 195, at 9.

199. *Id.*

200. Janet Stidman Eveleth, *Court Considers Jury Reforms*, MD. B. BULL., Mar. 15, 2003, at 4, available at [http://www.msba.org/departments/commpubl/publications/bar\\_bult/2003/march03/juryreform.htm](http://www.msba.org/departments/commpubl/publications/bar_bult/2003/march03/juryreform.htm) (alteration in original).

201. See May 18 Minutes, *supra* note 189, at 7.

202. See *id.*

203. See *id. passim*.

204. MD. CONST., Declaration of Rights, art. 5(b). In 1991, the Conference of Circuit Judges proposed a legislative agenda to the Legislature that sought to change the Maryland Declaration of Rights to provide that a civil jury could consist of "at least six jurors." Brault, *supra* note 148, at 36. Maryland voters ratified the amendment in November 1992. *Id.*

205. MD. CODE ANN., CTS. & JUD. PROC. § 8-421 (LexisNexis 2006). In 1992, after the Maryland constitution was changed to allow for a civil jury of at least six jurors, there was a request for the Legislature to adopt a statute incorporating this change. Brault, *supra* note 148, at 36. That same year, the Maryland Legislature passed § 8-306 (now § 8-421) which mandated that civil juries consist of six jurors and explicitly declined to reconcile the requirements of the Maryland constitution with the Maryland Code. See *id.* "In interpreting the statute, Circuit Judges were advised that they had no authority to have more than six jurors decide a case." *Id.*

requirement in the Maryland Code,<sup>206</sup> they could not recommend a rule change to the court of appeals that would alter the six-person jury requirement and allow more than six jurors to be impanelled and participate in the verdict.<sup>207</sup>

The Rules Committee still supported the CJUM's recommendations and proposed to the legislature that it amend the Maryland statute to conform to the Maryland constitution.<sup>208</sup> This change would enable a civil jury to consist of "at least six" jurors so that impanelling more than six jurors and eliminating alternate jurors could be accomplished.<sup>209</sup> The court of appeals supported this legislative initiative and Chief Judge Bell regarded this reform as a way to avoid alternate juror dissatisfaction and reduce the possibility of future mistrials.<sup>210</sup> Legislation incorporating these reforms was introduced in three successive years but has not made it out of committee.<sup>211</sup> Kelly O'Connor, legislative liaison for the House Judiciary Committee, explained to the Rules Committee that a majority of the House Judiciary Committee felt that there was not enough discontent with the alternate juror process to warrant a change in the law regarding the size of civil juries.<sup>212</sup> The Honorable Joseph C. Murphy, Jr., Chair of the Rules Committee, is still unclear about the exact reasons why the General Assembly rejected the proposed changes.<sup>213</sup>

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206. Although there is also the mandatory requirement of six jurors in Md. Rule 2-511(b), the Rules Committee has the power to recommend changes to these rules. See Brault, *supra* note 148, at 37.

207. See May 18 Minutes, *supra* note 189, at 18.

208. See *id.* at 18-19.

209. Brault, *supra* note 148, at 36-37.

210. Bell, *supra* note 197.

211. See H.D. 614, 2004 Leg., 421st Sess. (Md. 2004); H.D. 53, 2003 Leg., 420th Sess. (Md. 2003); H.D. 113, 2002 Leg., 419th Sess. (Md. 2002). The 2002 and 2003 legislation, introduced by the Chairman of the Judiciary Committee, sought to increase the size of the civil jury to at least six jurors. H.D. 53, 2003 Leg., 420th Sess. (Md. 2003); H.D. 113, 2002 Leg., 419th Sess. (Md. 2002). The legislation introduced in 2004, also sponsored by the Chairman of the Judiciary Committee, allowed the court to impanel more than six but not more than nine jurors in a civil suit. H.D. 614, 2004 Leg., 421st Sess. (Md. 2004). The legislation proposing that a civil jury consist of more than six, but no more than nine, jurors is consistent with the current practice of the Superior Court for the District of Columbia. Brault, *supra* note 148, at 37.

212. Minutes of the Standing Committee on the Rules of Practice and Procedure, Feb. 14, 2003, at 1-2, <http://www.courts.state.md.us/rules/minutes/02-14-03.pdf>.

213. E-mail from Hon. Joseph Murphy Jr., Chair of the Rules Committee, to Author (Feb. 21, 2008, 11:25 CST) (on file with author).



*B. Reforms Based on the Federal Rules of Criminal Procedure*

Although the reforms to eliminate the concept of alternate jurors in the civil system failed because of a lack of cooperation from the legislature,<sup>214</sup> the Rules Committee formulated another set of reforms based on the Federal Rules of Criminal Procedure's 1999 amendments.<sup>215</sup> In its 152nd Report to the Court of Appeals of Maryland, the Rules Committee proposed changes to both Maryland Rule 2-512(b)<sup>216</sup> and Maryland Rule 4-312(b)<sup>217</sup> that allowed the court to retain alternate jurors after the jury retires to deliberate.<sup>218</sup> Based on Federal Rule of Criminal Procedure 24(c), the proposed changes required the court to ensure that retained alternates do not discuss the case with anyone and if an alternate does replace a seated juror, the court must instruct the jury to begin deliberations anew.<sup>219</sup>

The Reporter's Notes set forth in the Rules Committee's Report explained that the proposed amendments "reflect[ed] a change in the policy underlying the current rule as enunciated in *Hayes v. State*."<sup>220</sup> Like the prior proposed reforms, these reforms originated as suggestions from the CJUM.<sup>221</sup> Although retaining the alternate jurors would have reduced the likelihood of declaring mistrials in both the civil and criminal trials, the court of appeals considered and rejected the amendments to both rules.<sup>222</sup> While the exact reason for the rejection is unknown, the Honorable Dennis Sweeney, Chair of the CJUM, reasoned that the Court of Appeals of Maryland might have preferred the bright line rule of discharging the alternate jurors when deliberations begin because it avoids judgment calls about what to do with the alternates if they are retained.<sup>223</sup> Judge Sweeney also explained that the court of appeals might have rejected the proposed reforms to prevent questions regarding when and how an alternate

214. *See id.*

215. Notice of Proposed Rule Changes, 152nd Report of the Standing Committee on Rules of Practice and Procedure, July 30, 2003, at 92, <http://www.courts.state.md.us/rules/reports/152ndreport.pdf> [hereinafter Notice].

216. MD. R. 2-512(b) (current version at MD. R. 2-512(f)(3)).

217. MD. R. 4-312(b) (current version at MD. R. 4-312(f)(3)).

218. *See* Notice, *supra* note 215, at 87-88, 93-94.

219. *Id.* at 87-88, 92, 93-94.

220. *Id.* at 92.

221. *See id.*

222. *See Brockington v. Grimstead*, 176 Md. App. 327, 351, 933 A.2d 426, 439 (Ct. Spec. App. 2007). The court of appeals rejected the proposed rule changes on November 12, 2003. *Id.*

223. E-mail from Hon. Dennis Sweeney Jr., *supra* note 129.

can replace a seated juror and what instructions must be given when deliberations begin anew with the retained alternate.<sup>224</sup>

On January 1, 2008, changes took effect that reorganized the Maryland Rules regarding alternate jurors in both the criminal and civil arenas.<sup>225</sup> Although the Maryland Rules no longer have specific sections labeled “alternate jurors,” the rules are essentially the same as before the changes. Unfortunately, the rules still require the mandatory dismissal of alternates when the jury retires to deliberate, so despite the organizational changes, Maryland’s treatment of alternate jurors is still inadequate.<sup>226</sup>

## VIII. RECOMMENDATIONS FOR MARYLAND REFORM

The Maryland Rules should be amended to eliminate the concept of alternate jurors altogether in the civil system.<sup>227</sup> This reform would require the cooperation of the Maryland General Assembly to change the Maryland Code, which mandates a jury of six.<sup>228</sup> This is a better alternative for the civil system, rather than retaining alternate jurors during deliberations, because it coincides with Maryland’s commitment to preserving the sanctity of jury deliberations.<sup>229</sup> Although retaining alternate jurors during deliberations is beneficial in reducing the possibility of mistrials, there have been concerns that retaining alternate jurors and then substituting them during the jury’s deliberations could affect the dynamics of the jury.<sup>230</sup> Furthermore, adopting the federal civil practice will increase the representiveness of the jury and best utilize the skills of all jurors, who undoubtedly have valuable insights to contribute to deliberations.<sup>231</sup>

Eliminating alternate jurors altogether and impanelling more than twelve jurors is not a possibility in the criminal system. Although

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224. *See id.*

225. *See* MD. R. 2-512(b) (current version at MD. R. 2-512(f)(3)); MD. R. 4-312(b) (current version at MD. R. 4-312(f)(3)).

226. *See id.*

227. E-mail from Hon. Joseph Murphy Jr., *supra* note 213. Judge Murphy believes that at this point, adopting the federal rule for civil cases, which would allow alternate jurors to participate in deliberations as regular jurors, is the best option for reform. *Id.*

228. *See supra* Part VI.A.

229. *See* Stokes v. State, 379 Md. 618, 634 nn.4-5, 843 A.2d 64, 73 nn.4-5 (2004).

230. *See* FED. R. CRIM. P. 23 advisory committee’s note (1983 amends.) (discussing the potential negative impact on group dynamics in the jury room when jurors are substituted after the start of deliberations).

231. E-mail from Hon. Dennis Sweeney Jr., *supra* note 129.

juries of twelve are not expressly required by the U.S. Constitution,<sup>232</sup> both the Maryland Rules and the Maryland constitution require a jury of twelve unless the State and the defendant agree otherwise.<sup>233</sup> Impanelling more than twelve jurors and requiring all of the impanelled jurors to participate and reach a unanimous verdict would require changes to the Maryland Rules and the Maryland constitution, which would be met with much resistance. However, retaining alternate jurors in criminal trials is still a viable option for reform that should be adopted. This option would still preserve the sanctity of jury deliberations because the alternate would not join the deliberations unless that alternate became a voting member of the jury.<sup>234</sup> If the alternate is substituted, the trial judge must instruct the deliberations to begin anew.<sup>235</sup>

Despite the fact that the criminal and civil rules regarding alternate jurors are currently identical, there is no requirement that the two systems have to be the same.<sup>236</sup> The reforms of the Federal Civil and Criminal Rules of Procedure recognize that the two systems are different and the success of both reforms demonstrates that it can be beneficial to tailor change to the individual needs of each system.<sup>237</sup> Whether Maryland chooses to eliminate the concept of alternate jurors altogether in the civil system or to retain alternate jurors after the jury retires to deliberate in both civil and criminal cases, either alternative would give the trial judge options when a juror cannot continue deliberations. These options would promote judicial economy not only by avoiding costly mistrials but by preventing appeals in cases such as *Brockington*.<sup>238</sup> Both alternatives also protect the sanctity of the jury deliberations, which Maryland has continually held is of the utmost concern.<sup>239</sup>

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232. See *Williams v. Florida*, 399 U.S. 78 (1970). The Court ruled that the twelve juror requirement "appears to have been a historical accident," and that this requirement has not been "immutably codified" into the Constitution. See *id.* at 89-90, 102-03 nn.49-50. However, the Court clarified that states were still at liberty to formulate their own jury size requirements. See *id.* at 103 n.50.

233. See *Stokes*, 379 Md. at 627-28, 843 A.2d at 69.

234. See *supra* Part VI.B.

235. See *supra* Part VI.B.

236. E-mail from Hon. Dennis Sweeney Jr., *supra* note 129. The Council on Jury Use and Management recommends different rules for criminal and civil cases. The CJUM has generally been supportive of adopting the federal civil and criminal practices because it would avoid a potential, unnecessary and wasteful mistrial while best utilizing the resources of alternate jurors who invest time and energy into the case. See *id.*

237. See *supra* Part VIII.

238. See *supra* Part III.A.

239. See *supra* note 226 and accompanying text; see also *supra* Part VIII.

## IX. CONCLUSION

Although there have been attempts to reform the alternate juror process for some time,<sup>240</sup> these failed attempts are of little solace to people like Joyce Grimstead whose lives are forever changed by Maryland's inability to effectively utilize alternate jurors. The benefits of change are evident while the consequences of inaction are frightening.<sup>241</sup> The Maryland Legislature and the Court of Appeals of Maryland have an obligation to take action and reform the alternate juror system, as so many other jurisdictions have, to better address the needs of the judicial system and the needs of Maryland citizens.

*Andrea N. Silvestri*

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240. See *supra* note 188 (showing the Standing Committee's reform suggestions); see also *supra* Part VI.

241. See *supra* Part I.