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*Pollitt v. State*

## The Parties' Express Consent Is Required To Appoint A Replacement For An Excused Juror When Alternate Jurors Have Not Been Chosen

By Jeffrey D. Moffatt

Under Maryland Rule 4-312(b)(3), trial judges have complete discretion to select alternate jurors for non-capital trials. When alternates have not been chosen, the Rules provide various remedies for replacing a juror who becomes, or is discovered to be, disabled and must be removed from jury service. In *Pollitt v. State*, 344 Md. 318, 686 A.2d 629 (1996), the Court of Appeals of Maryland held that if a jury is impanelled without alternates and a sworn juror is excused prior to the start of trial, a substitute juror may only be *sua sponte* appointed from the remaining venire with the express consent of both parties.

Following his arrest for assault and battery, Frederick Pollitt ("Pollitt") elected a jury trial in the Circuit Court for Wicomico County. Expecting a short trial, neither the court nor the parties requested alternate jurors. After exhausting their peremptory challenges, both parties consented to the first twelve people in the remaining venire and the jury was sworn. Before opening statements had begun, however, the trial judge noticed that juror number one had difficulty hearing. With the parties' consent, the judge excused the juror from duty.

Pollitt believed that when the trial judge then asked if either party objected to selecting another juror, the judge would allow the parties to exercise additional peremptory challenges with respect to the replacement juror. Since the potential jurors who were approved on *voir dire* but not selected remained in the court room, the judge decided, for the sake of convenience, to simply impanel the next person on the jury list as juror number one. After the judge ordered the replacement juror sworn, Pollitt immediately requested a bench conference where he moved to strike the new juror. The judge denied the motion on the grounds that Pollitt had exercised all of his strikes and additional strikes were only permitted for selecting alternate jurors, and the new juror was not an alternate. The trial progressed and the defendant was convicted.

In the Court of Special Appeals of Maryland, Pollitt presented two arguments. First, by refusing to allow additional strikes the trial judge denied him his right to make an informed and comparative rejection of a potential juror. Second, by impanelling a substitute juror, the judge effectively chose an alternate juror without permitting additional challenges as required by Maryland Rule 4-313(a)(5). The intermediate appellate court affirmed the circuit court conviction. Pollitt petitioned the Court of Appeals of Maryland for a writ of certiorari to review the issues before the court of special appeals.

In the court of appeals, Pollitt again argued that by denying additional peremptory challenges the trial judge violated his right to make informed and comparative rejections of jurors as set forth in *Spencer v. State*. *Pollitt*, 344 Md. at 322, 686 A.2d at 631 (citing *Spencer v. State*, 20 Md. App. 201, 314 A.2d 727 (1974)). In *Spencer*, after counsel executed their strikes, the court clerk arbitrarily altered the order in which jurors were selected. *Pollitt* at 322, 686 A.2d at 631. Doing so thwarted defense counsel's strategy for having desirable jurors impanelled on the jury. *Id.* at 322, 686 A.2d at 631. After acknowledging that the jury selection process afforded the parties the right to attempt to both choose and reject potential jurors in order to obtain a favorable jury, the *Spencer* court then held that the clerk's act "'affirmatively misled'" defense counsel and denied the defendant that right. *Id.* at 322-23, 686 A.2d at 631 (quoting *Spencer*, 20 Md. App. at 208, 314 A.2d at 732).

In the case at bar, Pollitt contended that his right to comparative rejection was violated in

like manner. *Id.* at 322-23, 686 A.2d at 631. Pollitt argued that, as in *Spencer*, his strikes were based upon his understanding of which jurors from the jury list were likely to become eligible for selection. *Pollitt* at 323, 686 A.2d at 631. The court of appeals, however, distinguished *Spencer* from the present case. *Pollitt* at 323, 686 A.2d at 631. The court held that, unlike *Spencer*, no affirmative denial occurred here because no one could have predicted the disability of the initial juror. *Pollitt* at 323, 686 A.2d at 631.

Pollitt also argued that by simply choosing the next juror from the remaining venire, the trial judge effectively selected an alternate juror without allowing the parties to exercise additional peremptory challenges as required by rule. *Id.* at 324, 686 A.2d at 631-32. While the court of appeals did not expressly hold that the trial judge had selected an alternate juror, it nevertheless found the judge's novel approach logical and held it to be appropriate if all parties consent. *Id.* at 325, 686 A.2d at 632.

The court of appeals also found that in this circumstance, however, Pollitt had not consented to the *sua sponte* selection. *Id.* at 325-26, 686 A.2d at 632-33. Because Pollitt believed that he would be allowed additional peremptory challenges, his consent to calling the next juror was conditioned on his ability to challenge the replacement juror with an additional strike as if the juror was being chosen as an alternate. *Id.* at 326, 686 A.2d at 632-33. Finding that belief to be entirely reasonable in light of the circumstances, the court of appeals ruled that when the judge refused to allow additional strikes, petitioner's conditional consent was extinguished. *Id.* at 326, 686 A.2d at 633. Without the parties' consent to *sua sponte* selection of a replacement juror or to proceeding with only eleven jurors, the court held that the trial judge "had no choice but to declare a mistrial." *Id.* at 326, 686 A.2d at 633.

After a trial commences, dismissal of jurors for various valid reasons is not uncommon. Prior to *Pollitt*, when jurors were dismissed in criminal cases, courts could proceed in one of three ways: (1) if an alternate juror was chosen, instate the alternate juror as a voting juror as provided in Maryland Rule 4-312(b); (2) conclude the trial with only eleven jurors, with consent of the parties as provided in Maryland Rule 4-311(b); or (3) declare a mistrial as provided in Article 27, section 594, of the Maryland Annotated Code. *Pollitt*, 344 Md. at 324-25, 686 A.2d at 632. In *Pollitt*, the trial judge added, and the court of appeals affirmed, a fourth option of *sua sponte* selection from the remaining venire.

This opinion will force attorneys to make another important strategic decision on perhaps only a moment's notice. When a jury is impanelled without alternates and a sworn juror is then dismissed, attorneys must now choose from among the following options: (1) force a mistrial by withholding consent both to the *sua sponte* selection and to proceeding with only eleven jurors; (2) proceed with only eleven jurors; or (3) give express consent to the *sua sponte* selection. Unfortunately, with respect to the last option, *Pollitt* leaves an important procedural question unanswered: if the parties consent to replacing the dismissed juror, do they each then have the right to strike the person called? If so, then how many more strikes are available to the parties thereafter? If not, then practically speaking, this holding creates one additional *de facto* strike of the eleven members of the jury who were successfully sworn.