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IN THE FIFTH DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL** (Filed under seal) **Case No. 061500526** **Judge James L. Shumate**

Defendant WARREN STEED JEFFS respectfully submits the following memorandum in support of his Motion for New Trial based on prejudicial errors that substantially effected the defendant's rights to trial by jury, trial by an impartial jury, and due process. This motion is based on the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 7, 10, and 12 of the Utah Constitution, and Utah Rules of Criminal Procedure, Rule

18(g) and 24(a), and the following Points and Authorities.

POINTS AND AUTHORITIES

I. INTRODUCTION

Under Rules of Criminal Procedure Rule 24(a), a trial court may "grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." The interest of justice requires a new trial based on the substantial compromise of the right to trial by jury and its essential element of unity of verdict that stemmed from the ignorance and violation of the alternate juror rule in Utah Rules of Criminal Procedure, Rule 18(g). This rule mandates the discharge of alternate jurors once the principal jurors retire to deliberate and forbids the substitution of a principal juror once deliberations have begun. Rule 18(g) seeks to protect the right to trial by jury, which includes the sanctity of the deliberative process and unity of verdict. Additionally, Jeffs moves for a new trial based on the violation of his right to a verdict rendered by an impartial jury.

The Court erroneously retained and recalled an alternate juror and replaced a biased principal juror well after the case was submitted for deliberations. The replacement of a deliberating juror violated the plain meaning of Rule 18(g) and, therefore, gives rise to a presumption of prejudice affecting Jeffs' right to trial by jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 10 of the Utah Constitution.

Although this is an issue of first impression in Utah, several other state jurisdictions have considered violations of alternate juror rules and statutes similar to Rule 18(g). All of the jurisdictions which mandate the discharge of alternate jurors upon submission hold that replacing

a deliberating juror with an alternate violates the plain meaning of the statute or rule. Further, some of these jurisdictions consider the mid-deliberation substitution to constitute *per se* reversible error. Other jurisdictions treat it as a rebuttable presumption of prejudice which can only be overcome by a showing that the trial court took extraordinary precautions to ensure the integrity of the deliberative process and unity of verdict.

Under the circumstances of this case, the prejudice inuring from the violation of Rule 18(g) was not cured by the Court's efforts to salvage the deliberations. Before replacing the biased juror, the Court did not conduct the appropriate voir dire of the remaining principal jurors and inadequately instructed the reconstituted jury regarding the duty to deliberate anew. Additionally, the reconstituted jury deliberated for about three hours compared to the 13 hours spent by the original jury. The relatively short period of deliberation by the reconstituted jury indicates that deliberations did not begin anew and the verdict was influenced by the prior deliberations.

Additionally, the participation of the biased and deceptive juror in 13 hours of deliberations violated Jeffs' right to trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 12 of the Utah Constitution. This claim is related to the inadequacy of the procedures used to reconstitute jury. The failure to take extraordinary precautions to ensure that the remaining original jurors set aside all prior deliberations resulted in a verdict tainted by the biased juror. As such, the verdict was rendered by the reconstituted jury with the lingering taint of the excused juror.

Jeffs did not knowingly and intelligently waive his right to trial by jury since the Court, prosecution, and defense counsel were all acting under the misconception that the alternate juror

could be properly substituted after deliberations were underway. Neither the Court nor counsel advised Jeffs' regarding the prohibition against mid-deliberation substitutions. Furthermore, the defense counsel's erroneous concurrence in the substitution did not waive Jeffs' right to seek relief for the inadequacies in the procedures taken in an attempt to protect the deliberative process.

Undoubtedly, the discovery of Juror H's deception and bias late in deliberations created an unexpected and unusual problem for the Court and parties to confront. Unaware of the requirements of Rule 18(g), the parties were left to speculate whether mistrial or mid-deliberation substitution was the appropriate remedy. Upon research and reflection of the law forbidding mid-deliberation substitution and the irrefutable prejudice therefrom, a new trial is necessary to protect the right to trial by eight impartial jurors. Justice requires that the interest in judicial economy give way to right to a unanimous verdict by an impartial jury.

II. STATEMENT OF FACTS

At approximately 3:10 p.m. on Friday, September 18, 2007, the jury retired to consider the verdict. The Court permitted the four alternate jurors to leave the courthouse with the admonishment to avoid discussing the case with anyone. The principal jury deliberated until 5:00 p.m.

The jury reconvened to continue deliberations on Monday, September 21, 2007, at approximately 9:00 a.m. At approximately 2:40 p.m., the jury sent a note to the Court, which read: "We have a hung jury regarding the second count. We do not believe further deliberation is needed. How do we go about it at this point?" The Court told the jurors to review Instruction 16 on the deliberative process and directed them to resume deliberations. At about 8:09 p.m., the

jury informed the Court that it was close to reaching a verdict on both counts but wanted to "sleep on it." At this juncture, the jury had deliberated for about 13 hours, including approximately two hours on Friday and 11 hours on Monday.

At 9:00 a.m. on Tuesday, September 22, 2007, when the jurors reconvened to deliberate, the Court received a note from Juror S. The Court held an in-chambers meeting in the presence of counsel and the defendant. Juror S was called into chambers to explain the note. The Court read the note, which stated:

> I am really concerned about a personal experience of one of the jurors in here that, according to her, she did not report on her questionnaire. It involves a rape. And she told us that she didn't say it on her questionnaire because she didn't want anyone to read it if she wrote it. I was wondering what to do. I really think it affects her opinion. Please shed some light on what to do about this.

Transcript, 9/25/07, p. 3.

Juror S identified Juror H as the person who failed to disclose the rape. She clarified that Juror H was the victim of the rape. TR, 9/25/07, p. 4. Juror S explained that Juror H disclosed the rape experience on Monday. She further related, "We got in a fight. And I walked out because I confronted her." TR, pp. 3-4.

Juror H was called into chambers for questioning. The Court told Juror H that it came to its attention that she was not "completely honest" in answering the questionnaire about a sexual offense earlier in her life.[1] Juror H acknowledged that when she was 13 years old and in a private school, "something happened." She stated that she only spoke about the incident with her

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[1] Question 29 stated, "Have you or anyone close to you ever been sexually abused or assaulted? If yes, please explain." Juror H stated that two relatives were molested but was unaware of the details. She did not disclose any facts pertaining to her own experience with sexual abuse or assault. During jury selection and individual voir dire of Juror H, there was no discussion of her rape experience since it was concealed. Voir Dire TR., 9/12/07.

parents and police and was concerned about who might read the questionnaire. The Court, *sua sponte,* excused Juror H. TR, 9/25/07, pp. 5-6.

The Court explained to counsel that it had already directed the its secretary to contact the four alternates. The Court learned that the first alternate had plans to leave town on Thursday and it would likely excuse her. TR, 9/25/07, p. 6. A brief recess was taken in order to assemble the alternates.

At 9:58 a.m., the judge, counsel, and the defendant reconvened in chambers. The Court announced that one of the jurors was excused and the four alternates were in the courtroom. The State moved for a mistrial on the grounds Juror S had contaminated the jury's deliberation. It argued that the Supreme Court would reverse if a conviction was attained and, if an acquittal occurred, the State would have no remedy. The defense opposed the motion. The Court took the motion under advisement and separately called each alternate into chambers for individual voir dire. No mention was made of Rule 18(g). TR, 9/25/07, pp. 8–13.

The Court excused the first alternate since she was scheduled to leave town on Thursday. It opined that the second and third alternates were still qualified to sit, but the fourth alternate was exposed to media on the case. The Court erroneously observed that the statute required the seating of the second alternate. The Court denied the State's motion for mistrial and impaneled the second alternate, Juror K, as the substitute juror. TR, 9/25/07, pp. 14, 22-23.

The Court related that its law clerk was unable to locate an instruction on beginning deliberations anew to read to the reconstituted jury. The defense counsel requested time to have his office look for an appropriate instruction. The Court decided to proceed with jury instructions without giving the defense time to research the matter. TR, 9/25/07, pp. 11, 22-23.

The Court stated that it would tell the jury that one of its members was excused and they would need to begin deliberations anew and freely express their opinions. TR, 9/25/07, pp. 23. The Court instructed the jury as follows:

> Ladies and gentlemen, members of the jury, you need to understand that we have had to excuse one of your members. And I am now going to replace that member with [Juror K].
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> . . .
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> Now, members of the jury, because of the release of the prior jury member, it will be necessary for you to begin your deliberations anew. Your determination on how you want to proceed with that is totally up to you. However, I am going to admonish you and direct you and instruct you to completely disregard any comments, statements, positions taken by the excused juror. You are now a fresh panel, ready to go back with all eight of your opinions available for resolution of this case, consideration of the matter under the instructions given you. And let me remind you again, as I did last night, to keep open minds. Remember, you are not partisans. You are not advocates but, rather, judges in this position. And it's now your responsibility to go back and exercise that judgement. We'll release and excuse you to go back into the jury room to continue your deliberations.

TR, 9/25/07, p. 25.

Following approximately three hours of deliberations, the reconstituted jury returned guilty verdicts on both counts.

III. ARGUMENT

A. Violation of Right to Trial by Jury

The substitution of the alternate juror during deliberations violated Rule 18(g) and raises a presumption of prejudice against Jeffs' right to trial by jury

The retention and recall of the alternate juror to replace the deliberating juror violated the plain meaning of Rule 18(g), which reads in pertinent part:

> The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, *prior to the time the jury*

> *retires to consider its verdict,* become unable or disqualified to perform their duties. . . . Except in bifurcated proceedings, an alternate juror who does not replace a principal juror *shall be discharged when the jury retires to consider its verdict.*

Ut. R. Crim. P. R. 18(g). (Emphasis added).

Although research disclosed no Utah case law interpreting Rule 18(g), several other state jurisdictions with nearly identical statutes or court rules have concluded that the substitution after the jury retires for deliberations violates the plain meaning of the statute or rule. Furthermore, these jurisdictions hold that such violation of the alternate juror statute or rule creates a presumption of prejudice against the defendant's right to trial by jury. *See,* Alcalde v. State, 74 P.3d 1253, 1257-59 (Wy. 2003); State v. Sanchez, 6 P.3d 486, 494-95 (N.M 2000); State v. Murray, 757 A.2d 578, 587-92 (Conn. 2000); State v. Dushame, 616 A.2d 469, 471-72 (N.H. 1992); State v. Bobo, 814 S.W.2d 353, 355-58 (Tenn. 1991); People v. Burnette, 775 P.2d 583, 586-87 (Col. 1989); State v. Lehman, 321 N.W.2d 212, 217-25 (Wis. 1982); Cantrell v. State, 577 S.W.2d 605, 607 (Ark. 1979); Hayes v. State, 735 A.2d 1109, 1114-20 (Md. App. 1999); Commonwealth v. Saunders, 686 A.2d 25, 27-29 (Pa. Super. 1996); Thurman v. Commonwealth, 611 S.W.2d 803, 804 (Ky. App. 1980); People v. Ryan, 224 N.E.2d 710, 712-13 (N.Y. App. 1966).

Plain meaning of the alternate juror rule

Under statutes and rules similar to the Utah alternate juror rule, other jurisdictions hold that the mandatory language which states that the alternate juror "*shall* be discharged" upon submission of the case to the regular jury forbids the retention and recall of alternates to replace a deliberating juror. Burnette, 775 P.2d at 587-88; Dushame, 616 A.2d at 471-72; *see generally,*

People v. Roberts, 824 N.E.2d 250, 257 (Ill. 2005)(explaining critical distinctions between alternate juror rules expressly mandating discharge of alternate jurors and those containing no mandate). Once the case is submitted, the alternates cease to function as members of the jury and the trial court has no authority to recall and reconstitute the alternate. Bobo, 814 S.W.2d at 355.

The plain meaning of the alternative juror rules and statutes similar to Rule 18(g) only authorize the trial court to substitute regular jurors with alternates *"prior to submission"* of the case for consideration of verdict. If a deliberating juror becomes ill or otherwise disqualified, the trial court must either declare a mistrial or, if authorized by law, continue the deliberations with one less juror. Dushame, 616 A.2d at 472; Burnette, 775 P.2d at 587; *see also,* Ut. R. Crim. P. R. 17(f)(authorizing completion of trial with less that required number of jurors with the consent of accused and approval of court).

Presumption of prejudice

The prohibition against replacing deliberating jurors is grounded on the integrity of the deliberative process inherent in the right to trial by jury. More particularly, the right to jury trial includes the essential element of "unity of verdict," meaning that the *same* jurors must engage in the *entire* deliberative process. *See,* Lehman, 321 N.W.2d at 220; Bobo, 814 S.W.2d at 356; State v. Corsaro, 526 A.2d 1046, 1052-53 (N.J. 1987). The deliberative process affords each juror the "opportunity to review the evidence in light of each juror's perception, memory and reaction and to reach their consensus through deliberations which are the common experience of all of them." Lehman, 321 N.W.2d at 220; *see,* Burnette, 775 P.2d at 587.

Injecting an alternate juror into the deliberative process jeopardizes the integrity and unity of the verdict. First, if some of the original jurors have already formed opinions on guilt or

innocence, a danger exists that the replacement juror will not have a meaningful or realistic opportunity to express opinions and persuade the others. Burnette, 775 P.2d at 587. Second, the new juror has been excluded from the "dynamics of prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision." Id.. Third, while the original jurors' may have been influenced by the excused jurors' views, the alternate has not. Id.; *see also,* ABA Standards for Criminal Justice, § 15-2.7 (1986), Commentary (disapproving of practice of substituting an alternate during deliberations because "it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the earlier group discussion.").

Both federal and state jurisdictions, regardless of whether the alternate juror rule prohibits or permits mid-deliberation substitutions, recognize that replacing a deliberating juror with an alternate endangers the right to trial by jury. *See generally,* Sanchez, 6 P.3d at 489-95; Bobo, 814 S.W.2d at 356-58; Hayes, 735 A.2d at 1112-19. If the remaining original jurors are incapable of disregarding the prior deliberations, the verdict is not unanimously rendered by the reconstituted jury. Instead, the verdict is a product of the prior deliberations, influenced by the participation of the excused juror and in the absence of the alternate juror. In short, the unity of verdict is presumed prejudiced by the injection of a new juror.

Rule 18(g) was violated in the instant case and, therefore, Jeffs' right to trial by eight jurors is presumed prejudiced

Turning to the instant case, a new trial is warranted based on the violation of Rule 18(g). The retention and recall of Juror K contravened both the plain language of the rule and the right to trial by jury which the rule seeks to protect. First, the Court erroneously failed to discharge

the alternate jurors as mandated by the rule. The rule contains clear and mandatory language, stating that a trial court "shall" discharge the alternate jurors "when the jury retires to consider its verdict." Ut. R. Crim. P. R. 18(g). This initial error on Friday set the stage for the subsequent violation, which arose when Juror K was recalled and replaced Juror H after 13 hours of deliberation by the principal jury. Rule 18(g) only permits substitution *prior* to the time the jury retires for deliberations.

Given the clear mandate that the alternates *shall* be discharged upon submission to the jury, this Court did not have authority to retain or recall the alternate juror once the case was submitted for deliberations. *See,* Dushame, 616 A.2d at 471-72; Burnette, 775 P.2d at 586-87. When the problem with Juror H came to light, the Court should have either declared a mistrial or determined whether Jeffs would consent to a verdict with seven jurors pursuant to Rule 17(f). No mention was made of the later option because the Court, prosecutor, and defense counsel all incorrectly perceived that the Court had authority to retain and recall alternate jurors. This misconception of the law infringed on Jeffs' right to trial by jury.

Under Article I, Section 10 of the Utah Constitution, Jeffs was entitled to a trial by eight jurors and an unanimous verdict. As recognized by the above authorities, the alternate juror requirements in Rule 18(g) affect this constitutional right. By adopting this rule over one that permits post-submission substitution, the Utah rule-makers intended to afford the greatest protection possible to safeguard the deliberative process and unity of verdict. *See,* Dushame, 616 A.2d at 472; Burnette, 775 P.2d at 587; Lehman, 321 N.W.2d at 220; Bobo, 814 S.W.2d at 356. Since Rule 18(g) foreordained the discharge of Juror K upon submission of the case to the principal jury, injecting her into the deliberative process was a clear violation of Rule 18(g)

and the constitutional values that it seeks to protect. As such, a presumption arises that Jeffs' right to trial by jury was prejudiced by the upset of the deliberative process and unity of verdict.

Per se reversible error

In recognition of the mandatory nature of Rule 18(g) and its purpose of protecting the integrity of the deliberative process, a new trial is merited because Jeffs' right to trial by jury was prejudiced. Violations of alternate juror rules which foreordain the discharge of alternates upon submission for verdict constitute *per se* reversible error on appeal in some jurisdictions. *See,* Murray, 757 A.2d at 591-92; Dushame, 616 A.2d at 472; Bobo, 814 S.W.2d at 357-58; Cantrell, 577 S.W.2d at 607; Ryan, 224 N.E.2d at 713. Two of these jurisdictions found the post-submission substitution to violate the state constitutional right to trial by jury. Bobo, 814 S.W.2d at 356 ("[A] litigant has the constitutional right to have all issues of fact submitted to the same jury at the same time."); Ryan, 224 N.E.2d at 713. The other three jurisdictions did not reach the constitutional issue, but reversed based on the violation of the alternate juror statutes. Murray, 757 A.2d at 59192; Dushame, 616 A.2d at 472; Cantrell, 577 S.W.2d at 607.

These jurisdictions require strict adherence to the alternate juror rule forbidding post-submission substitutions to ensure protection of the integrity of the deliberative process. Dushame, 616 A.2d at 472. Strict adherence to the mandate to discharge the alternates upon submission avoids the difficult task of evaluating the extent of prejudice inuring from the post-submission substitution, including assessing the capability of the remaining original jurors to disregard their prior deliberations and be receptive to the alternate's contrary views. *See,* Bobo, 814 S.W.2d at 57-58; Ryan, 224 N.E.2d at 713.

Because the alternate juror rule obligates the trial court to discharge the alternate jurors

upon submission of the case to the jury, the alternates cease to function as members of the jury panel and, therefore, are unqualified to participate in the deliberations. Dushame, 757 A.2d at 592; *see also,* Murray, 757 A.2d at 591-92; Cantrell, 577 S.W.2d at 605; Ryan, 224 N.E.2d at 713. As such the alternates are considered non-jurors and if they are erroneously placed into deliberations after the case is submitted, they are considered a "13th juror." *See,* Murray, 757 A.2d at 591-92; Bobo, 814 S.W.2d at 356. This characterization of alternate as a non-juror once the case is submitted guarantees the unity of verdict in that the same jurors shall participate in the entire deliberations without disruption by a non-juror. If one of the principal jurors becomes unavailable to complete deliberations, the trial court must either declare a mistrial or, if permitted by rule or statute, attain the consent of the parties to proceed with less than the required number of jurors. *See,* Dushame, 616 A.2d at 472.

The Tennessee Supreme Court explained the interest of justice served by adhering to the mandate against post-submission substitutions, as follows:

> We realize the burdens that are imposed on the trial courts when a juror suddenly becomes ill or otherwise disqualified from jury service during the deliberative process, especially where the trial has been lengthy and complex in nature. . . . *It is impossible to say that the remaining eleven jurors would be capable of disregarding their prior deliberations, even with an instruction to do so, and become receptive to the alternate's attempt to assert a view that might be non-conforming. And the inability to assess the effect of this error on the defendant's convictions persuades us that reversal must be automatic.*

State v. Bobo, 814 S.W.2d 353,358 (Tenn. 1991)(emphasis added).

In deference to the mandates of Rule 18(g) and Article I, Section 10 of the Utah Constitution, this Court should grant a new trial. By virtue of this rule, Alternate Juror K was no longer a member of the jury and, therefore, was disqualified from participating in deliberations.

Once Juror H was excused, only seven qualified jurors remained. As emphasized above, it was impossible for this Court to ensure that the remaining seven jurors were capable of disregarding all their prior deliberations and consider the views of the alternate. The Court was, therefore, obligated to either declare a mistrial or determine if the defendant would stipulate to a verdict by seven jurors pursuant to Rule 17(f). Instead, the recall of Alternate Juror K to serve as part of the jury usurped the unity of verdict by essentially inserting a ninth juror into the deliberative process.

Treating the impermissible substitution as *per se* error places a premium on the value of the right to trial by eight jurors over the policy of judicial economy. It further avoids speculation on whether the verdict was free from the prejudice inherent in disrupting the deliberative process shortly after the principal jury announced that it was close to rendering a verdict.

Presumed prejudice to right to jury trial not eradicated by Court's attempts to salvage the deliberative process

Alternatively, if this Court does not treat the presumption of prejudice as a per se violation of the constitution, it should evaluate the extent of prejudice against Jeffs' right to trial by jury. In other jurisdictions with alternate juror rules or statutes similar to Rule 18(g), appellate courts consider the mid-deliberation substitution reversible error unless the state shows that the trail court took extraordinary measures to ensure the integrity of the deliberative process. *See e.g.*, Alcalde v. State, 74 P.3d 1253, 1257-59 (Wy. 2003); State v. Sanchez, 6 P.3d 486, 494-95 (N.M 2000); Burnette, 775 P.2d at 587-88; Plate v. State, 925 P.2d 1057, 1059-61 (Alaska. Ct. App. 1996); Commonwealth v. Saunders, 686 A.2d 25, 27-29 (Pa. Super. 1996). These jurisdictions presume prejudice to the right to trial by jury, but evaluate whether the trial court

employed extraordinary safeguards to effectively protect the deliberative process given the totality of the circumstances. Alcalde, 74 P.3 at 1258; Burnette, 775 P.2d at 590. This approach is based on the analysis undertaken in federal and state jurisdictions that authorize the trial court to retain and recall alternate jurors after deliberations have begun. *See generally,* Sanchez, 6 P.3d at 489-95 (summarizing various jurisdictional approaches to post-submission substitutions); Hayes, 735 A.2d at 1113-20 (same).

Extraordinary safeguards: voir dire and instructions

The extraordinary safeguards must be sufficient to ensure the return of a just verdict, free from "inappropriate interference with or intrusion upon the deliberative process." Burnette, 775 P.2d at 590. The safeguards primarily revolve around the trial court's obligation to (1) investigate the jurors' capability to deliberate anew; and (2) properly instruct the reconstituted jury to begin deliberations anew.

Before impaneling the alternate, the trial court must extensively question both the alternate and remaining original jurors. Alcalde, 74 P.3 at 1258-59; *see also,* Sanchez, 6 P.3d at 495. The trial court must voir dire the remaining original jurors to determine if they are capable of beginning deliberations anew by setting aside all of the opinions, statements, and positions expressed and formulated during the prior deliberations. United States v. Ashby, 864 F.2d 690, 695-95 (10th Cir. 1989); Alcalde, 74 P.3 at 1258-58; Saunders, 686 A.2d at 29; Burnette, 775 P.2d at 590-91; Lehman, 321 N.E.2d at 224. The trial court must seek assurances from each of the original jurors that he or she is able to disregard the previous deliberations; it is insufficient to cursorily inquire whether any of the remaining jurors would have a problem with beginning deliberations anew. Plate v. State, 925 P.2d at 1061; *see also,* Ashby, 864 F.2d at 695-95.

The investigation into the remaining original jurors' capability to set aside previous deliberations is especially critical when the reason for excusing the juror was based on bias, misconduct, or prejudicial outside influences. *See,* Ashby, 864 F.2d at 695-95 (excused juror exposed to media report); People v. Roberts, 824 N.E.2d 250, 124-25 (Ill. 2005)(excused juror contacted by defense witness during trial); Threats v. State, 582 N.E.2d 396, 399-01 (excused juror failed to disclose familiarity with defendant's wife), *see generally,* State v. Jenkins, 861 A.2d 827, 838-39 (N.J. 2004)(discussing need to consider nature of cause for excusing juror based on personal problem versus bias)("Before a court reconstitutes a jury based on the discharge of a deliberating juror who admits to a disabling bias, the court must satisfy itself that the deliberative process has not been poisoned.").

Instruction to deliberate anew

The instruction to the reconstituted jury must clearly state that the original jurors must set aside all opinions, statements, and positions developed before the substitution. Ashby, 864 F.2d at 694-95; Alcalde, 74 P.3d at 1259; People v. Renteria, 93 Cal, App. 4th 552, 557 (Ca. App. 2001); Saunders, 686 A.2d at 569-70. Under California law, a trial court is expressly authorized to make mid-deliberation substitutions. *See,* Renteria, 93 Cal. App.4th at 557. The trial court is required to explain the right to unanimous verdict free from all prior deliberations. *See,* Renteria, 93 Cal. App.4th at 557. The patterned jury instruction on beginning deliberations anew reads:

> One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. Do not consider this substitution for any purpose. The alternate juror must participate fully in the deliberations that lead to any verdict. *The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict.* The right will only be assured if you begin your deliberations again, from the beginning. Therefore, *you must set aside and disregard all past deliberations* and decide this case as if

those earlier deliberations had not taken place.

Cal. Crim. Jury Instr. 3575. [Emphasis added].

Comparative length of time in deliberations before and after substitution

The ability of the original jurors to disregard prior deliberations becomes more doubtful as the original deliberations progress in time. State v. Jenkins, 861 A.2d at 840; State v. Corsaro, 526 A.2d 1046,1052-53 (N.J. 1987). Similarly, if the original jurors' deliberations have progressed towards completion or the issue of guilt has already been decided on some of the counts, the likelihood that the reconstituted jury beginning deliberation anew is unrealistic. Jenkins, 861 A.2d at 840; Corsaro, 526 A.2d at 1052-54. "In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated." Corsaro, 526 A.2d at 1054.

Accordingly, it is important to compare how much time was spent in deliberations before and after the substitution. *See,* Ashby, 864 F.2d at 694-95; Roberts, 824 N.E.2d at 260; Burnette, 775 P.2d at 590-91; Corsaro, 526 A.2d at 1052-53. If the reconstituted jury deliberated a relatively shorter period of time in comparison with the length of time of the original jury's deliberation, doubt remains that the right to trial by jury was free from the prejudice caused by the erroneous substitution. *See,* Burnette, 775 P.2.d at 590-91. Conversely, if the original jury deliberated for a short period of time and the reconstituted jury deliberated for a longer period,

the integrity of the verdict is more likely protected by adequate voir dire and instructions. *See,* Ashby, 864 F.2d at 694-95.

Inadequacies of safeguards in instant case

The exacting and proper use of extraordinary safeguards was essential given the totality of the circumstances in the instant case. The risk of prejudice against the right to trial by jury and unity of verdict was readily apparent in light of the following circumstances: (1) the original jury had deliberated for 13 hours before the bias of Juror H was detected; (2) after a total of approximately seven and three-quarter hours of deliberations, the original jury announced on the second day of deliberations that it reached a verdict on Count One but was deadlocked on Count Two; (3) after deliberating about five hours and twenty minutes longer, the original jurors announced that they were close to reaching a verdict but wanted to "sleep on it;" (4) sometime on the second day of deliberations, Juror H disclosed her rape experience to the jury; (5) a confrontation occurred between Juror H and Juror S over Juror H's failure to disclose the rape experience in the jury questionnaire; and (6) the reconstituted jury deliberated for only three hours in comparison to the 13 hours spent in deliberations by the original jury.

No voir dire of remaining original jurors

The Court's remedial efforts to protect the unity of verdict were inadequate. First and foremost, the Court did not voir dire any of the remaining original jurors to ascertain if they were capable of setting aside the prior 13 hours of deliberations, which had progressed to near completion. It did not even make a cursory or general inquiry of the remaining original jurors' capability to do so. Consequently, the Court also failed to obtain assurances from the remaining original jurors confirming their capability of disregarding prior deliberations. Given the totality

of circumstances enumerated above, the absence of any voir dire of the remaining original jurors was a deathblow to the shield of protection over the integrity of the right to trial by jury.

Inadequate instruction to reconstituted jury

In aggravation of the lack of voir dire, the Court's instruction to the reconstituted jury was both confusing and incorrect. The Court instructed:

> Ladies and gentlemen, members of the jury, you need to understand that we have had to excuse one of your members. And I am now going to replace that member with [Juror K].
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> . . .
>
> Now, members of the jury, because of the release of the prior jury member, it will be necessary for you to begin your deliberations anew. *Your determination on how you want to proceed with that is totally up to you. However, I am going to admonish you and direct you and instruct you to completely disregard any comments, statements, positions taken by the excused juror.* You are now a fresh panel, ready to go back with all eight of your opinions available for resolution of this case, consideration of the matter under the instructions given you. And let me remind you again, as I did last night, to keep open minds. Remember, you are not partisans. You are not advocates but, rather, judges in this position. And it's now your responsibility to go back and exercise that judgement. We'll release and excuse you to go back into the jury room *to continue your deliberations.*

TR, 9/25/07, p. 25 (emphasis added).

The problem with this instruction is threefold. First, it informs the reconstituted jury that it was free to proceed as it deemed fit: "[I]t will be necessary for you to begin your deliberations anew. Your determination on how you want to proceed with that is totally up to you." The Court's bestowing of discretion on the jury on how to begin deliberations anew sent a conflicting message with the obligation to totally disregard all prior deliberations. The remaining original jurors could have interpreted this leeway as authorizing them to educate Alternate Juror K on their own conclusions and opinions formulated in the previous deliberations.

Secondly, the instruction to proceed as the jurors deemed fit was further confused by the

Court's admonition to disregard any comments, statements, and positions taken by the excused juror. The deliberation anew instruction must clarify that all prior deliberations must be disregarded. *See,* Ashby, 864 F.2d at 694-95; Alcalde, 74 P.3d at 1259; People v. Renteria, 93 Cal, App. 4th 552, 557 (Ca. App. 2001); Saunders, 686 A.2d at 569-70. This portion of the instruction ignores the comments, statements, and positions formulated by each of the remaining original jurors in the prior deliberations. As discussed above, the hallmark of the deliberation process and unity of verdict is the group dynamics and "interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision." Burnette, 775 P.2d at 587; *see also,* Lehman, 321 N.W.2d at 220. The previously formulated and expressed opinions, statements, and positions of the remaining original jurors were products of the group dynamic and interplay, which included the excused juror. The Court's limited admonition to disregard only the excused juror's opinions directly authorized the original jurors to still consider their own and each other's previously formulated opinions and positions. To add to the confusion, the Court ended the instruction by directing the reconstituted jury to go "back into the jury room *to continue your deliberations*."

Thirdly, the instruction failed to inform the reconstituted jury about the need for unity of verdict and integration of the new juror into the deliberative process. This deficiency in the instruction is apparent when compared to the model instruction in California which clarifies the reconstituted jury's duty, as follows:

> The alternate juror must participate fully in the deliberations that lead to any verdict. *The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict.* The right will only be assured if you begin your deliberations again, from the beginning. Therefore, *you must set aside and disregard all past deliberations* and decide this case as if those earlier deliberations had not taken place.

Cal. Crim. Jury Instr. 3575. [Emphasis added.]

The relatively short time in deliberations by the reconstituted jury indicates that the procedural safeguards were inadequate to ensure that the remaining original jurors were each capable of disregarding the prior deliberations and that the reconstituted jury understood its duty to deliberate anew. The above inadequacies in the procedural safeguards, both separately and in combination, failed to overcome the presumed prejudice to Jeffs' right to due process, trial by jury, and unity of verdict under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 10 of the Utah Constitution. In the interest of justice, the Court should grant a new trial to remedy the substantial infringement on Jeffs' right to trial by jury.

B. Violation of Right to Impartial Jury

The participation of the biased and deceptive juror in 13 hours of deliberation also violated Jeffs' rights to due process and a fair and impartial jury under Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 10 of the Utah Constitution. "The essence of a fair trial requires the securing and preservation of an impartial jury, neither tainted by prejudice nor exposed to extraneous influence." State v. Hightower, 680 A.2d 649, 660 (N.J. 1996).

Ordinarily, when a deliberating juror is excused for bias, a mistrial must be declared. Banks, 928 A.2d at 848; Jenkins, 861 A.2d at 839. In cases involving bias or misconduct by a deliberating juror, a trial court must take every reasonable precaution to protect the defendant's right to a fair and impartial trail. *See,* Ashby, 864 F.2d at 695-95. The participation of a biased juror in deliberations presents the clear potential for engendering bias among other jurors, thereby producing a tainted verdict. Threat, 582 N.E.2d at 401.

As discussed above, the safeguards to protect the right to trial by jury were inadequate to ensure that the original remaining jurors could realistically set aside the prior deliberations. The use of extraordinary safeguards when replacing a deliberating juror is also necessary to protect the right to trial by a fair and impartial jury. Burnette, 775 P.2d at 590, *see,* Ashby, 864 F.2d at 695-95. The inadequate safeguards failed to ensure that the remaining original jurors were capable of rendering a fair and impartial verdict free from the contamination of the biased excused juror.

C. Lack of Knowing and Intelligent Waiver of Constitutional Rights

When a procedural error implicates the constitutional right to trial by jury and unity of verdict, review of the error is not precluded unless the defendant knowingly and intelligently waived the constitutional right. Sanchez, 6 P.3d at 496-97; Bobo, 814 S.W. 2d at 358-59. An alternate juror rule which requires the discharge of alternate jurors upon submission and forbids post-submission substitution implicates the right to trail by jury and, therefore, must be knowingly and intelligently waived. Bobo, 814 S.W. 2d at 358-59.

The acquiescence or consent of defense counsel in the substitution of a deliberating juror, when such substitution is prejudicial to the defendant's right to trial by jury does not preclude relief. Corsaro, 526 A.2d at 345-49 (holding right to trial by jury violated when court substituted intoxicated juror upon request of defense counsel when original jury had reached a partial verdict). The defense counsel's failure to object to an improper instruction regarding the duty to deliberate anew does not preclude review since an inadequacy in such an instruction implicates the substantial right to trial. Renteria, 93 Ca. App.4th at 560.

In the instant case, all of the defense attorneys were unaware of the prohibition against post-submission substitution in Rule 18(g). As such, they did not advise Jeffs regarding the mandates

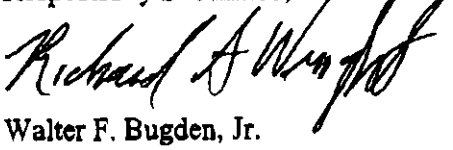
of the rule and the constitutional rights implicated by the erroneous substitution.

Apparently, neither the Court nor prosecutors were aware of the mandates of Rule 18(g). The Court, all defense counsel, and all prosecutors operated under the misconception that the Court had authority to retain, recall, and impanel an alternate juror after deliberations were underway. The Court and parties were also unaware of the precise procedural safeguards necessary to protect the right to trial against the presumed prejudice. Additionally, due to the misconception of the law, the Court and attorneys did not consider the option of continuing deliberations with the seven original jurors.

A new trial is warranted to correct the the manifest injustice suffered by Jeffs from the erroneous and prejudicial post-submission substitution. The integrity of the verdict was compromised by the violation of Rule 18(g) and the inadequate procedures used to safeguard the right to trial by eight impartial jurors. Accordingly, the interest of justice warrants a new trial because Jeffs' constitutional rights were substantially impaired.

DATED this 4th day of December 2007.

Respectfully Submitted,



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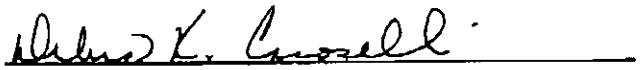
WRIGHT, JUDD & WINCKLER

Attorneys for Defendant Jeffs

CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of December, 2007, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL(Filed Under Seal) by the method indicated below, and addressed to the following:

Brock R. Belnap Washington County Attorney 178 North 200 East St. George, UT 84770	___ HAND DELIVERY ✓ U.S. MAIL ___ OVERNIGHT MAIL ___ FACSIMILE
Craig L. Barlow Assistant Attorney General 5272 South College Drive Suite 200 Murray, UT 84123	___ HAND DELIVERY ✓ U.S. MAIL ___ OVERNIGHT MAIL ___ FACSIMILE