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## **One Less Juror: A Defendant's Right to Juror Substitution**

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## One Less Juror: A Defendant's Right to Juror Substitution

Cover Page Footnote

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## ONE LESS JUROR: A DEFENDANT'S RIGHT TO JUROR SUBSTITUTION

### SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. McDuffie<sup>1</sup>  
(decided May 8, 2012)

#### I. FACTUAL BACKGROUND

Recently, the Appellate Division, Second Department reviewed *People v. McDuffie*<sup>2</sup> to determine whether defendant had properly submitted a jury substitution waiver, and thus, properly waived his right to a jury trial.<sup>3</sup>

In *McDuffie*, defendant was brought up on charges of second-degree murder and criminal possession of a weapon.<sup>4</sup> One day after deliberations began, Juror Number One declined to continue serving on the jury.<sup>5</sup> Consequently, the court allowed defendant and his attorney to confer about whether to substitute one of the alternate jurors for Juror Number One, while the court proceeded with another case.<sup>6</sup> When defendant's case reconvened, the court signed the juror substitution form previously signed by defendant, without first speaking with him.<sup>7</sup> The alternate juror was then seated and deliberations continued.<sup>8</sup> Shortly after, the jury reached a verdict of guilty.<sup>9</sup> Defendant subsequently appealed the decision, claiming that the juror substi-

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<sup>1</sup> 943 N.Y.S.2d 594 (App. Div. 2d Dep't 2012).

<sup>2</sup> *Id.* at 594.

<sup>3</sup> *Id.* at 595.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *McDuffie*, 943 N.Y.S.2d at 595.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 594, 595.

tution was invalid.<sup>10</sup>

After reviewing the record before it, the appellate court concluded that the juror substitution was invalid and ordered a new trial.<sup>11</sup> The court found that defendant's "election," allowing substitution of the juror, had not been completed according to the New York State Constitution or Criminal Procedure Law section 270.35.<sup>12</sup> The court based its decision on the fact that the record had neither indicated that the consent form was signed in "open court" nor that the court had conducted a colloquy to ensure that defendant was making a knowing and understanding waiver.<sup>13</sup>

One of the bases for the appellate court's ruling was the decision in *People v. Teatom*,<sup>14</sup> which was decided only a few months prior to *McDuffie*. In *Teatom*, defendant was charged with driving while intoxicated and other traffic infractions, after he drove his vehicle off the road and struck a telephone pole.<sup>15</sup> Defendant was later convicted following a jury trial, and subsequently, appealed the conviction.<sup>16</sup> One of the grounds for the appeal was that the trial court had failed to comply with Criminal Procedure Law section 270.35.<sup>17</sup> The appellate court agreed with defendant, reversed the trial court's decision, and ordered a new trial.<sup>18</sup> The court arrived at its decision despite the fact that the juror had been discharged upon defendant's request.<sup>19</sup>

The appellate court observed that the trial court had not obtained a signed consent from defendant until the day after the juror had been substituted.<sup>20</sup> Rather, the trial court had allowed the deliberations of the previous day to continue after discharging the original juror, substituting the alternate, and only directing the jury to restart the deliberation process.<sup>21</sup> Further, the court found that the record

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<sup>10</sup> *Id.* at 595.

<sup>11</sup> *McDuffie*, 943 N.Y.S.2d at 595, 596.

<sup>12</sup> *Id.* at 595.

<sup>13</sup> *Id.*

<sup>14</sup> 936 N.Y.S.2d 379 (App. Div. 3d Dep't 2012).

<sup>15</sup> *Id.* at 380.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 381. Defendant also appealed his conviction on the ground that the conviction for driving while intoxicated was not properly supported by evidence of his intoxication because he had only become intoxicated after the accident, which bore no witnesses. *Id.* at 380.

<sup>18</sup> *Teatom*, 936 N.Y.S.2d at 381.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

had not indicated that the consent form was signed in open court.<sup>22</sup> The court deemed this a violation of “defendant’s fundamental right to a trial by a jury of 12.”<sup>23</sup>

In order to fully understand the issue of juror substitution, it is necessary to explore the history of a criminal defendant’s right to trial by a jury. The two concepts are inextricably linked because a defendant’s right to juror substitution emerged as a result of the need to protect a defendant’s right to a jury trial. This Note will explore the history of a criminal defendant’s right to trial by jury and its nexus with the juror substitution process.

## II. HISTORY OF FEDERAL RIGHT TO TRIAL BY JURY

Under federal law, a defendant’s right to a jury trial is enumerated in Article III, section 2, clause 3 of the United States Constitution.<sup>24</sup> The provision provides:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.<sup>25</sup>

Prior to being codified in the United States Constitution, the right to trial by jury had been in existence in England and linked to credible sources, such as the Magna Carta.<sup>26</sup> Its function of protecting defendants against arbitrary rulings was set out in the Declaration and Bill of Rights of 1689 as an important objective of the “revolutionary settlement.”<sup>27</sup> The declaration “[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies,” was “adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765.”<sup>28</sup> The authors of the

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<sup>22</sup> *Id.*

<sup>23</sup> *Teatom*, 936 N.Y.S.2d at 381.

<sup>24</sup> U.S. CONST. art. III, § 2. *See* *Duncan v. Louisiana*, 391 U.S. 145, 152-53 (1968) (suggesting that the right to trial by jury was included in the federal Constitution because defendants in the colonies were being tried by judges controlled by the King, and in some cases, being sent back to England to be tried for offenses that occurred in the Colonies).

<sup>25</sup> U.S. CONST. art. III, § 2.

<sup>26</sup> *Duncan*, 391 U.S. at 151.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 152.

declaration considered it one of the most important of the rights and liberties possessed by the colonists.<sup>29</sup> Thereafter, the importance of the right to trial by jury was re-established by the proposition and adoption of the Sixth Amendment within the Bill of Rights.<sup>30</sup> It provided in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”<sup>31</sup>

Along with the Sixth Amendment, Rules 23 and 24 of the Federal Rules of Criminal Procedure were enacted to clarify the boundaries of the right to a jury trial. Rule 23(a) provides that if a defendant is entitled to a jury trial, waiver can be achieved, but only if it is in writing, the government consents, and it is approved by the court.<sup>32</sup> Rule 23(b) provides that even though a jury consists of twelve individuals, at any time prior to a verdict, the parties can agree and stipulate in writing to a jury of less than twelve individuals, or alternatively, that the court may allow fewer than twelve jurors to return a verdict upon finding good cause to excuse a juror after the beginning of deliberations.<sup>33</sup> The rule further provides that “[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.”<sup>34</sup> Rule 24 (c) provides that the court may retain alternate jurors after deliberations have commenced in the event that a juror needs to be replaced.<sup>35</sup> However, the rule further provides that “[t]he court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 153. See Sanjay Chhablani, *DISENTANGLING THE SIXTH AMENDMENT*, 11 U. PA. J. CONST. L. 487 (2009). The author points out that the Supreme Court has incorporated the provisions of the Sixth Amendment into the rights guaranteed by the Due Process Clause of the Fourteenth Amendment, and thus, provides defendants being tried in state courts with the same procedural safeguards as defendants being tried in the federal courts. *Id.* at 494. However, two of the Sixth Amendment provisions were not incorporated to apply in the same respect to state courts. *Id.* at 549 n.24. The first is that even though unanimity is required for a jury verdict in federal courts it is not required in state court. *Id.* Second, even though a twelve-member jury is required in federal court a jury of less than this amount is proper in state courts. *Id.*

<sup>31</sup> U.S. CONST. amend. VI.

<sup>32</sup> FED. R. CRIM. P. 23(a).

<sup>33</sup> FED. R. CRIM. P. 23(b).

<sup>34</sup> *Id.*

<sup>35</sup> FED. R. CRIM. P. 24(c).

after deliberations have begun, the court must instruct the jury to begin its deliberations anew.”<sup>36</sup>

### A. United States Supreme Court Cases

One of the seminal cases in which the United States Supreme Court dealt with a defendant’s right to substitute a juror was *Patton v. United States*.<sup>37</sup> In *Patton*, defendants were brought up on charges of bribing a “federal prohibition agent.”<sup>38</sup> The charge carried a sentence of one year in a federal penitentiary.<sup>39</sup> A jury of twelve individuals was assembled and the trial began.<sup>40</sup> It continued for approximately seven days until one of the jurors became ill and was unable to continue.<sup>41</sup>

As a result, the prosecutor and defense counsel, with defendant’s consent, stipulated in court that the trial be allowed to continue with the eleven remaining jurors.<sup>42</sup> Thereafter, the court consented to the stipulation, stating that: (1) both parties were entitled to a twelve-member jury; and (2) a mistrial had to be declared unless they were willing to waive any objections and agree to resolve the matter with the remaining eleven member jury.<sup>43</sup> After the court’s statement, all the parties renewed the earlier stipulation.<sup>44</sup> Defense counsel then stated that after conferring with the defendants and all of the counselors, they all wished to continue the trial with the remaining eleven jurors, as long as the defendants were able to waive the “presence of the twelfth juror.”<sup>45</sup> The trial continued with the eleven jurors and ended the next day with the conviction of the defendants for the charged crimes.<sup>46</sup>

The defendants subsequently appealed their convictions to the circuit court, claiming that they did not have the authority to waive

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<sup>36</sup> *Id.*

<sup>37</sup> 281 U.S. 276 (1930).

<sup>38</sup> *Id.* at 286.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Patton*, 281 U.S. at 286.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 286.

<sup>45</sup> *Id.* at 286-87.

<sup>46</sup> *Id.* at 287.

their constitutional right to a jury consisting of twelve individuals.<sup>47</sup> The court of appeals, in turn, certified the question to the United States Supreme Court to determine whether, under the Constitution, if a federal trial has begun with a twelve member jury and a juror later becomes “incapacitated” and unable to carry out his/her duties, the parties can choose to have the remaining eleven jurors proceed and render a verdict, thus waiving the right to a trial and verdict by a twelve member jury pool.<sup>48</sup>

In arriving at its decision, the Court first examined the meaning of “trial by jury.”<sup>49</sup> The Court interpreted it to be inclusive of all the “essential elements” in America and England when the Constitution was ratified and through its existence at common law.<sup>50</sup> The court determined that “jury” meant a panel consisting of “twelve men, neither more nor less.”<sup>51</sup> The Court declared that there was no distinct difference between the right to completely waive a jury trial and the right to consent to a verdict by less than twelve jurors, and thus, concluded that they should be treated the same.<sup>52</sup>

However, in arriving at its decision, the court interpreted the constitutional provision as a privilege extended to the accused, and thus, a right that he may “forego at his election.”<sup>53</sup> The Court cautioned that denying a defendant the right to waive the privilege would in essence turn the right into an overbearing requirement.<sup>54</sup> In holding that a defendant possesses the right to waive trial by a jury or to consent to a verdict by less than twelve jurors, the Court cautioned that though a defendant possessed the right, it did not mean that it should be instituted in all circumstances.<sup>55</sup> The court explained that trial by jury is the “normal” and “preferable” way of disposing of a criminal matter for a non-petty offense, and thus, should not be second-guessed.<sup>56</sup> The court established that in order for there to be a constitutional waiver, defendant’s “express and intelligent consent,” the consent of the prosecuting attorney, and the approval of the court

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<sup>47</sup> *Patton*, 281 U.S. at 287.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 288.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Patton*, 281 U.S. at 290.

<sup>53</sup> *Id.* at 296, 298.

<sup>54</sup> *Id.* at 298.

<sup>55</sup> *Id.* at 312.

<sup>56</sup> *Id.*



must be acquired.<sup>57</sup> Furthermore, the court cautioned that courts must use “sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial,” and increase the level of caution according to the degree of the offense.<sup>58</sup>

Later in *Duncan v. Louisiana*,<sup>59</sup> the Supreme Court held that all criminal cases that would have fallen within the purview of the Sixth Amendment, had they been tried in federal court, were guaranteed the right to trial by a jury.<sup>60</sup> In *Duncan*, defendant was originally tried in a district court in the state of Louisiana.<sup>61</sup> According to the facts, defendant was driving on a highway when he noticed two of his younger cousins, who were negroes, talking to four other white boys.<sup>62</sup> Defendant, knowing of recent racial tensions at his cousins’ school, pulled over, spoke to the white boys and encouraged his cousins to get into his car and leave.<sup>63</sup> The parties presented differing stories as to the series of events that followed.<sup>64</sup> The white boys stated that defendant hit one of them while the negroes stated that defendant had only touched the boy.<sup>65</sup> The trial judge subsequently found defendant guilty of simple battery, sentenced him to sixty days in parish prison and imposed a one hundred and fifty dollar fine.<sup>66</sup>

Under Louisiana law, the conviction carried a maximum sentence of two years and a fine of three hundred dollars.<sup>67</sup> Defendant originally sought a jury trial, but his request was denied because Louisiana only allowed jury trials in death penalty cases or cases that carried a sentence of “imprisonment at hard labor.”<sup>68</sup> Defendant appealed his conviction to the Louisiana Supreme Court, arguing that the denial of his right to a jury trial violated his constitutional right.<sup>69</sup> The Louisiana court denied defendant’s writ, finding no error in the law.<sup>70</sup> Defendant subsequently appealed to the United States Su-

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<sup>57</sup> *Patton*, 281 U.S. at 312.

<sup>58</sup> *Id.* at 312-13.

<sup>59</sup> 391 U.S. 145 (1968).

<sup>60</sup> *Id.* at 149.

<sup>61</sup> *Id.* at 146.

<sup>62</sup> *Id.* at 147.

<sup>63</sup> *Id.*

<sup>64</sup> *Duncan*, 391 U.S. at 147.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 146, 147.

<sup>67</sup> *Id.* at 146.

<sup>68</sup> *Id.*

<sup>69</sup> *Duncan*, 391 U.S. at 146.

<sup>70</sup> *Id.*

preme Court, claiming Sixth and Fourteenth Amendment violations of the right to trial by a jury in a state case where the charged crime carried a sentence of up to two years.<sup>71</sup>

The Supreme Court held that defendant was entitled to a jury trial, and thus, the court erred when it failed to provide it to defendant.<sup>72</sup> The Court, in forming its decision, explained that the right to a jury trial is extended to defendants in criminal matters to prevent “oppression by the government.”<sup>73</sup> The Court stated that the framers of the Constitution included the right to a jury trial in order to guard citizens against arbitrary governmental actions.<sup>74</sup> The Court further observed that a defendant’s right to be tried by his peers is a necessary safeguard against the “overzealous prosecutor” and a “compliant, biased or eccentric judge.”<sup>75</sup> The Court expressed that crimes bearing sentences of up to six months did not require a trial by jury if they are petty offenses in every sense.<sup>76</sup>

Shortly thereafter, the Supreme Court faced a similar issue in *Williams v. Florida*.<sup>77</sup> In *Williams*, defendant was brought up on robbery charges in Florida state court.<sup>78</sup> Prior to trial, he filed a motion requesting a jury of twelve instead of the six-juror requirement under Florida law in cases other than capital cases.<sup>79</sup> The motion was denied and defendant was convicted and given a life sentence.<sup>80</sup> The Court needed to answer the question of whether the Constitution guaranteed a defendant the right to trial by a jury of twelve members, as opposed to a lesser amount.<sup>81</sup>

In *Williams*, the Court rejected the premise in *Patton* that the authors of the Constitution intended that a constitutional jury must include the exact characteristics of the common law jury.<sup>82</sup> The Court found it more fitting to inquire into the function of the jury and

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<sup>71</sup> *Id.* at 146-47.

<sup>72</sup> *Id.* at 162.

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Duncan*, 391 U.S. at 156.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 159.

<sup>77</sup> 399 U.S. 78 (1970).

<sup>78</sup> *Id.* at 79.

<sup>79</sup> *Id.* at 79-80.

<sup>80</sup> *Id.* at 80.

<sup>81</sup> *Id.* at 86.

<sup>82</sup> *Williams*, 399 U.S. at 99.

its importance to the purpose of the trial.<sup>83</sup> Based on its analysis, the Court concluded that the twelve-member requirement was not an “indispensable component of the Sixth Amendment.”<sup>84</sup> The Court emphasized that the inherent protection afforded by a jury derives from its role in providing the “commonsense judgment” of a group of average citizens, and “the community participation and shared responsibility that results from that group’s determination of guilt or innocence.”<sup>85</sup>

Further, the Court pointed out that it was not the size of the group that provided the benefit; it was the fact that the group was big enough to foster deliberation free from outside intimidation and “provide a fair possibility” of getting representatives from a “cross-section of the community.”<sup>86</sup> The Court further stated that it did not find this result any less likely with a group of six jurors, and accordingly, ruled that defendant’s right to trial by a jury was not violated when Florida provided a jury of six individuals instead of twelve.<sup>87</sup>

## B. Second Circuit Cases

One of the main cases in the Second Circuit dealing with juror substitution is *United States v. Hillard*.<sup>88</sup> *Hillard* was the Second Circuit’s first discussion of the implications of Rule 24(c) on the substitution of jurors.<sup>89</sup> The case involved defendants who were appealing their convictions from charges related to a heroin operation.<sup>90</sup>

One of the issues raised on appeal was that an improper juror substitution had taken place after the case was submitted to the jury.<sup>91</sup> A juror had been substituted for an original juror who had fallen ill after two and-a-half days of deliberations and a three-day holiday break.<sup>92</sup> The juror was substituted after the judge discussed different possibilities with counsel and defendants refused to stipulate to an

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<sup>83</sup> *Id.* at 99-100.

<sup>84</sup> *Id.* at 100.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Williams*, 399 U.S. at 100, 103.

<sup>88</sup> 701 F.2d 1052 (2d Cir. 1983).

<sup>89</sup> *Id.* at 1055.

<sup>90</sup> *Id.* at 1054.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1054-55.

eleven-member jury or a one-day adjournment.<sup>93</sup> As a result, the judge proceeded with the juror substitution after he decided that further delay of the deliberations would lead to a negative result.<sup>94</sup> The court found that the substitute juror who had been asked to remain after the case was submitted to the jury was kept separate and only accompanied the jury when it went to the courtroom to listen to testimony or to re-read or get additional jury instructions.<sup>95</sup>

The court in *Hillard* dealt with an asserted challenge to Rule 24(c), that any substitution of a juror after the beginning of deliberations was a violation of the rule, and as such, required reversal.<sup>96</sup> Rule 24(c), at the time, only provided for the replacement of jurors “prior to the time the jury retire[d] to consider its verdict” and required discharge of alternates “after the jury retire[d] to consider its verdict.”<sup>97</sup> Though the court agreed with defendant’s view that the rule limited the substitution of jurors to the pre-deliberation stage, it disagreed that a violation of the rule required per se reversal of a verdict.<sup>98</sup> The court ruled in accord with the Fifth Circuit, that absent prejudice to a defendant, a violation of Rule 24(c) did not implicate per se reversal of a verdict.<sup>99</sup> The court, thereafter, found that there was no prejudice to defendant because the substitute juror did not influence the deliberations by the twelve original jurors because he was kept separate until the substitution took place; and further, the juror had stated that he was not swayed by his discussions with another alternate juror.<sup>100</sup> The court also cautioned that absent “a change in the rule, juror substitution should be permitted only in complex cases where thorough precautions are taken to ensure that the defendants are not prejudiced.”<sup>101</sup>

In arriving at its decision, the court also considered whether the substitution procedure outlined in Rule 24(c) was consistent with the features of the jury that were essential to its operation.<sup>102</sup> The court found that Rule 24(c) was indeed consistent with the essential

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<sup>93</sup> *Hillard*, 701 F.2d at 1055.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1057.

<sup>97</sup> *Id.*

<sup>98</sup> *Hillard*, 701 F.2d at 1057-58.

<sup>99</sup> *Id.* at 1058.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1061.

<sup>102</sup> *Id.* at 1056.

feature of the jury.<sup>103</sup> Based on this finding, the court concluded that the substitution by the court was proper because: (1) the alternate was chosen at the same time and through the same procedure as the other jurors; (2) he heard all the same evidence and instructions as the original jurors; and (3) the replacement juror re-affirmed that he would be able to “consider the evidence and deliberate fairly and fully” and stipulated that his discussion of the case with the second alternate had not impacted his opinion of the case.<sup>104</sup> The court also found it persuasive that the judge had instructed the jury to start the deliberation process anew after the substitution.<sup>105</sup>

In a more recent case, *United States v. Carmenate*,<sup>106</sup> the Second Circuit dealt with a challenge to a waiver under Rule 23(a) of the Federal Rules of Criminal Procedure.<sup>107</sup> There, the court emphasized the importance of creating a record evidencing a jury waiver that is inclusive of a formal questioning or colloquy of the defendant (even though it is not required for a constitutional waiver of the right to trial by a jury).<sup>108</sup>

In *Carmenate*, defendant was convicted of bank fraud in a bench trial.<sup>109</sup> Defendant appealed the conviction claiming that the trial court violated his constitutional right to trial by jury.<sup>110</sup> Defendant’s claim on appeal arose from the fact that, during a pre-trial conference, he informed the court that he wished to have a bench trial in order to avoid having an employee of the bank he was accused of defrauding, testify against him in front of a jury.<sup>111</sup> The prosecution consented to the bench trial and the court requested a written waiver at the final pre-trial conference.<sup>112</sup> Defendant later claimed that his constitutional right was violated because: (1) he did not sign a written waiver in accordance with Rule 23(a) of the Federal Rules of Criminal Procedure; and (2) his oral consent to the waiver was not “knowing, voluntary, or intelligent,” because it did not apprise him of the

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<sup>103</sup> *Hillard*, 701 F.2d at 1056.

<sup>104</sup> *Id.* at 1056-57.

<sup>105</sup> *Id.* at 1057.

<sup>106</sup> 544 F.3d 105 (2d Cir. 2008).

<sup>107</sup> *Id.* at 106.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Carmenate*, 544 F.3d at 106.

<sup>112</sup> *Id.*

scope of the right and the repercussions of his waiver.<sup>113</sup>

However, the court disagreed with defendant and held that his waiver was indeed “knowing, voluntary, and intelligent.”<sup>114</sup> The court arrived at its decision by evaluating the three requirements of Rule 23(a) of the Federal Rules of Criminal Procedures.<sup>115</sup> Specifically, the rule requires that to waive a jury trial: (1) the defendant must put the waiver in writing; (2) the government must give its consent; and (3) the court must approve the waiver.<sup>116</sup> The court restated its previous recommendation that prior to granting a waiver, a court should inform the defendant of the importance of a jury trial and of the process of selecting the jury; and also, that if the defendant waives the right to a jury trial, the judge will be the sole decision maker in the case.<sup>117</sup> However, the court explained that the recommendations were merely suggestions and not required for a constitutional waiver.<sup>118</sup>

Subsequently, the court went on to explain that a court must evaluate all the circumstances of the case prior to granting a defendant’s waiver.<sup>119</sup> The court further explained, however, that even though these steps were not taken in defendant’s case, the flaw was not fatal.<sup>120</sup> The court concluded that defendant’s waiver was indeed valid because defendant: (1) was present at the original pre-trial conference where his attorney informed the court of his wish to proceed with the bench trial; (2) was also present at the final pre-trial conference where his written consent was obtained; and (3) the court reviewed defendant’s request at the beginning of the bench trial and questioned defendant about his decision.<sup>121</sup>

Defendant also argued that the waiver presented to the court was invalid because it had been signed by his counselor and not by him.<sup>122</sup> With regard to this argument, the court agreed with the First, Fourth, and Tenth Circuits and rejected the notion that this was re-

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 107.

<sup>116</sup> *Carmenate*, 544 F.3d at 107.

<sup>117</sup> *Id.* at 107-08.

<sup>118</sup> *Id.* at 108.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 108.

<sup>121</sup> *Carmenate*, 544 F.3d at 108.

<sup>122</sup> *Id.* at 109.

versible error.<sup>123</sup> The court concluded that while Rule 23(a) seemed to require a defendant's signature on the written waiver, the absence of defendant's signature was not reversible error as long as the defendant's waiver is otherwise "knowing, voluntary and intelligent."<sup>124</sup> Here, the court concluded that "defendant's waiver was knowing, voluntary and intelligent."<sup>125</sup>

### III. HISTORY OF NEW YORK'S RIGHT TO TRIAL BY JURY

The right to trial by jury in New York State was first set out in the original Charter of Liberties and Privileges in 1683, which was ratified by the first legislature.<sup>126</sup> The right was also recognized by New York in its first constitution after it became a state.<sup>127</sup> Article I, Section 2 of the New York Constitution, guarantees a criminal defendant the right to a jury trial as it existed at common law.<sup>128</sup> This implied a jury of twelve members, because at common law a jury was comprised of twelve individuals.<sup>129</sup> Originally, this right was considered so fundamental that no party was allowed to waive it.<sup>130</sup> A defendant was precluded from waiver even in instances where the defendant explicitly requested and consented to be tried by a jury of less than twelve jurors.<sup>131</sup> In 1846, an amendment to the constitution was passed which provided for waiver of the right to trial by jury in civil actions.<sup>132</sup> This amendment allowed a defendant in a civil case to waive the right to trial by jury, thereby allowing trial by a single judge or trial by a jury of less than twelve members.<sup>133</sup> This would later impact waivers of trial by jury in the criminal arena.

In 1858, the Court of Appeals decided *Cancemi v. People*.<sup>134</sup> In *Cancemi*, an eleven-member jury convicted defendant of murder.<sup>135</sup> Defendant, his counsel, and the prosecuting attorney consent-

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *People v. Gajadhar*, 880 N.E.2d 863, 865 (N.Y. 2007).

<sup>127</sup> *Id.* at 865.

<sup>128</sup> *People v. Page*, 665 N.E.2d 1041, 1043 (N.Y. 1996).

<sup>129</sup> *Id.* at 1043.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Gajadhar*, 880 N.E.2d at 865.

<sup>133</sup> *Id.* at 865-66.

<sup>134</sup> 18 N.Y. 128 (1858).

<sup>135</sup> *Id.* at 130-31.

ed to the dismissal of the twelfth juror after the jurors were impanelled and the trial had begun.<sup>136</sup> Defendant subsequently appealed his conviction claiming that the judgment should be reversed because he was tried by a jury of only eleven members, a panel not recognized at common law, and thus, unconstitutional.<sup>137</sup> The court agreed, and held that a withdrawal of one juror rendered the verdict unconstitutional.<sup>138</sup> The court reasoned that the constitution and laws required a twelve member jury when a case is brought out of an indictment, and thus, neither a defendant nor a prosecuting attorney were in a position to consent to any change in the number.<sup>139</sup>

Post-*Cancemi*, New York courts continued to adhere to the twelve-juror requirement for a constitutional trial. However, in 1935 the Judicial Counsel sought legislative amendment to the constitution.<sup>140</sup> It proposed the establishment of a “concurrent resolution” in the constitution providing for waiver of a jury trial for criminal defendants who were not being charged with capital offenses.<sup>141</sup> The resolution was passed in 1937, ratified by voters and became effective January 1, 1938.<sup>142</sup> The amendment provided that waiver of a jury trial may be accomplished in a manner to be determined by law, except in cases where a defendant was charged with a crime that carries as its punishment, death.<sup>143</sup> Later that same year, the constitution was again amended to include the express provision that waiver of a trial by jury was to be made in writing, signed by defendant in open court, and with approval from the presiding judge or justice.<sup>144</sup> Since 1938, the State constitution has not been modified and currently provides that

[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be pre-

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<sup>136</sup> *Id.* at 129, 130-31.

<sup>137</sup> *Id.* at 131.

<sup>138</sup> *Id.* at 138.

<sup>139</sup> *Cancemi*, 18 N.Y. at 138.

<sup>140</sup> *Gajadhar*, 880 N.E.2d at 866.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Page*, 665 N.E.2d at 1043.

<sup>144</sup> *Id.*; see also *Gajadhar*, 880 N.E.2d at 866-67 (stating that in 1938 an amendment was made to Article I, Section 2, inserting language that specified the procedure for waiver of a jury trial).



scribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.<sup>145</sup>

In 1963, the Court of Appeals in *People v. Duchin*<sup>146</sup> established that a defendant had the right to waive his constitutionally protected right to trial by jury.<sup>147</sup> The court declared that the right to a jury trial is designed to benefit the defendant, and thus, when a defendant chooses to waive the right and be tried by a judge, he is entitled to such a waiver.<sup>148</sup> However, the court announced that this could only be accomplished if such waiver is made to the satisfaction of the presiding judge, it is clear that the waiver is being executed in good faith—not used to gain an unfair advantage—and the defendant is found to be aware of the repercussions of the decision.<sup>149</sup>

A few years later, the Court of Appeals in *People v. Ryan*<sup>150</sup> dealt with the issue of juror substitution after the beginning of jury deliberations.<sup>151</sup> In *Ryan*, defendants were convicted of first-degree robbery and second-degree assault after an alternate juror was substituted for an original juror who had become ill five hours into jury deliberations.<sup>152</sup> Defendants subsequently challenged their convictions arguing that the alternative juror had been unconstitutionally substituted.<sup>153</sup>

In *Ryan*, the Court of Appeals distinguished between pre-deliberation substitutions and substitutions occurring after deliberations had begun.<sup>154</sup> The court recognized that the case before it, which involved substitution of a juror after deliberations had begun,

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<sup>145</sup> N.Y. CONST. art. I, § 2.

<sup>146</sup> 190 N.E.2d 17 (N.Y. 1963).

<sup>147</sup> *Id.* at 17.

<sup>148</sup> *Id.* at 17.

<sup>149</sup> *Id.* at 17-18.

<sup>150</sup> 224 N.E.2d 710 (N.Y. 1966).

<sup>151</sup> *Id.* at 711.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 712.

was one of first impression.<sup>155</sup> The court observed that prior to a 1952 amendment of section 358-a of the Code of Criminal Procedure, the procedural rule at issue, substitutions were only allowed during the pre-deliberation stage because alternate jurors were dismissed once the case was turned over to the jury.<sup>156</sup> The court further observed that after the amendment, section 358-a provided that:

[a]fter final submission of a case, the court may discharge the alternate jurors, or if the court deem it advisable he may direct that one or more of the alternate jurors be kept in the custody of the sheriff or one or more court officers, separate and apart from the regular jurors until the jury have agreed upon a verdict. If after the final submission of the case and before the jury have agreed upon a verdict, a juror die or become ill, or for any other reason he be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take the place of the discharged juror in the jury room and the jury shall then renew its deliberations with the alternate juror, who shall be subject to the same rules and regulations as though he had been selected as one of the original jurors.<sup>157</sup>

Even though this provision authorized juror substitution after a case has been submitted to the jury, the Court of Appeals concluded that this procedure was not permissible under the New York State Constitution.<sup>158</sup> However, instead of finding section 358-a unconstitutional, the court merely nullified the jury's verdict and ordered a new trial under Article I, Section 2 of the New York State Constitution.<sup>159</sup> Specifically, the court interpreted the New York State Constitution as recognizing a complete waiver of the right to a jury trial by a writing signed by defendant in open court and with the judge's approval.<sup>160</sup> As a result, the court held that consent solely by defense counsel did not amount to a constitutional waiver of the right to trial

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<sup>155</sup> *Ryan*, 224 N.E.2d at 712.

<sup>156</sup> *Id.* at 711.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 713. The court believed it would allow a decision by thirteen jurors instead of the constitutionally required twelve. *Id.*

<sup>159</sup> *Ryan*, 224 N.E.2d at 713.

<sup>160</sup> *Id.*

by jury because the defendants were neither present nor consulted.<sup>161</sup>

As a result of *Ryan*, the Legislature adopted Criminal Procedure Law section 270.35, which is consistent with Article I, Section 2 of the New York State Constitution; it expressly authorizes the substitution of an original juror after deliberations have begun, where defendant personally consents in writing and in open court.<sup>162</sup> Criminal Procedure Law, section 270.35 provides that

[i]f at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If the discharged juror was the foreperson, the court shall designate as the new foreperson the juror whose name was second drawn and called. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.<sup>163</sup>

Another seminal case in New York's history with regard to juror substitution is *People v. Page*.<sup>164</sup> In *Page*, the Court of Appeals established the minimum requirements for compliance with Criminal Procedure Law section 270.35. There, defendant was charged and subsequently found guilty of grand larceny in the third degree and

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<sup>161</sup> *Id.* at 711, 713.

<sup>162</sup> *Gajadhar*, 880 N.E.2d at 867-68.

<sup>163</sup> N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1999).

<sup>164</sup> 665 N.E.2d 1041 (N.Y. 1996).

“unauthorized use” of a motor vehicle, after he stole a car.<sup>165</sup> Twelve jurors and two alternates were chosen to serve on the jury for the trial.<sup>166</sup> During the course of the trial, an original juror was substituted by an alternate, after he failed to attend court.<sup>167</sup> Even though defense counsel objected to the substitution of that juror, defendant failed to raise an issue regarding that substitution on his appeal.<sup>168</sup>

During deliberations, one of the original twelve jurors fell ill and asked to be dismissed.<sup>169</sup> As a result, the court conducted an extensive inquiry, determined that the juror was indeed sick and unable to continue with the deliberations, and thus, excused him.<sup>170</sup> In turn, defense counsel requested that the court substitute the second alternate for the sick juror due to defendant’s continued incarceration and the previous substantial delays.<sup>171</sup> After defense counsel’s consent was recorded, the court directly questioned defendant as to whether he consented to the substitution and whether he had discussed it sufficiently with counsel.<sup>172</sup> Upon defendant’s verbal affirmative response, but without written consent, the court substituted the juror and instructed the jury to start deliberations anew.<sup>173</sup> The jury recommenced deliberations and the next morning agreed on a verdict to convict defendant.<sup>174</sup>

Defendant subsequently “moved to set aside the verdict” based on Criminal Procedure Law, section 330.30, contending that the court’s substitution of one of the original twelve jurors during deliberations, absent defendant’s written consent, amounted to a constitutional and statutory violation.<sup>175</sup> The trial court denied defendant’s motion, declaring that the purpose for the “waiver rule” would be defeated if defendant were allowed to seek substitution of a juror and then claim that his consent was invalid.<sup>176</sup> The appellate court, sub-

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<sup>165</sup> *Id.* at 1042.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* The court substituted the juror without inquiring whether the juror would be returning the following day. *Id.*

<sup>168</sup> *Page*, 88 N.Y.2d at 1042.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Page*, 88 N.Y.2d at 1042.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1042-43.

<sup>176</sup> *Id.* at 1043.

sequently, affirmed the decision.<sup>177</sup>

Thereafter, defendant appealed to the Court of Appeals, arguing that his consent was deficient because it was not accompanied by a signed writing.<sup>178</sup> In opposition, the State argued that the statute's language requiring written consent for the substitution of a juror was merely a "technicality" and not a prerequisite to compliance, as long as the record reflected that the consent to substitution was "knowing, intelligent and voluntary."<sup>179</sup> The Court of Appeals explicitly disagreed with the lower courts' decisions, concluding that both Criminal Procedure Law, section 270.35 and the state constitution required that consent be obtained through a writing signed in open court "in the presence of the court," and thus, cannot be disregarded as a mere technicality.<sup>180</sup>

The Court of Appeals in *Page* further explained that the proponents of the amendment proposed that consent be in writing in order to protect a defendant's rights and to ensure that a defendant understood the undertaking.<sup>181</sup> Moreover, the court recognized that the proponents of Criminal Procedure Law, section 270.35 intended the writing requirement as a safeguard because an individual as a result of human habit will generally think twice before signing a paper, especially when it waives one of the most important privileges a citizen possesses.<sup>182</sup> As a result, the Court of Appeals concluded that based on the history of constitutional waiver, the requirement that a defendant signs a written waiver is "critical" to a "knowing, intelligent and voluntary waiver" of the right to a jury trial.<sup>183</sup>

Two years later in *People v. Ortiz*,<sup>184</sup> the Court of Appeals reaffirmed its ruling in *Page*. In *Ortiz*, defendant was convicted of third-degree criminal sale and third-degree "criminal possession of a controlled substance."<sup>185</sup> During trial and prior to deliberations, a jury member failed to show up in court, and when contacted, became hostile.<sup>186</sup> As a result, the juror was dismissed and the trial judge in-

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<sup>177</sup> *Id.*

<sup>178</sup> *Page*, 88 N.Y.2d at 1043.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1044.

<sup>182</sup> *Id.*

<sup>183</sup> *Page*, 88 N.Y.2d at 1044.

<sup>184</sup> 705 N.E.2d 1199 (N.Y. 1998).

<sup>185</sup> *Id.* at 1199.

<sup>186</sup> *Id.*

quired whether the parties wished to consent to a juror substitution.<sup>187</sup> Counsel for both parties agreed and the court further inquired with defendant whether he wished to consent.<sup>188</sup> Defendant responded in the affirmative and was later convicted.<sup>189</sup> Defendant later appealed his conviction, claiming that his oral assent was invalid because Criminal Procedure Law, section 270.35 required a written instrument for juror substitutions, before and after deliberations began.<sup>190</sup> In light of the principles espoused in *Page* and *Ryan*, the court held that there were no statutory violations of Criminal Procedure Law, section 270.35, observing that defendant's oral consent to discharge a jury member was valid because it occurred prior to the beginning of deliberations.<sup>191</sup>

In *People v. Jeanty*,<sup>192</sup> the court further clarified its precedent regarding the procedural requirements for a valid juror substitution. There, three cases were consolidated for appeal on the question of whether the trial court properly applied Criminal Procedure Law, section 270.35 in replacing original jurors with alternates.<sup>193</sup> In *Jeanty*,<sup>194</sup> the court replaced an original juror after he was involved in an accident and the court ascertained that he could not give a definite time for his return.<sup>195</sup> In *People v. Jones*,<sup>196</sup> the court replaced two jurors after they called the court and reported that they would not be able to appear for trial that day.<sup>197</sup> In the third case, *People v. Artis*,<sup>198</sup> the court replaced an ill juror after she stated that she was ill and was unable to continue with the trial that day.<sup>199</sup>

The court concluded that the legislature in amending the stat-

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Ortiz*, 705 N.E.2d at 1199.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1200.

<sup>192</sup> 727 N.E.2d 1237 (N.Y. 2000).

<sup>193</sup> *Id.* at 1240.

<sup>194</sup> 688 N.Y.S.2d 607 (App. Div. 2d Dep't 1999). Defendant was convicted of first-degree robbery, second-degree robbery, second-degree assault, fourth-degree criminal possession of a weapon, and third-degree assault. *Id.* at 607.

<sup>195</sup> *Jeanty*, 727 N.E.2d at 1240-41.

<sup>196</sup> 260 A.D.2d 647 (App. Div. 2d Dep't 1999). Defendant was convicted of second-degree murder and second degree "criminal possession of a weapon." *Id.* at 647.

<sup>197</sup> *Jeanty*, 727 N.E.2d at 1241.

<sup>198</sup> 694 N.Y.S.2d 5 (App. Div. 1st Dep't 1999). Defendant was convicted of second-degree burglary and was sentenced as a "second felony offender." *Id.* at 5.

<sup>199</sup> *Jeanty*, 727 N.E.2d at 1241.

ute in 1996 intended to create a bright line rule.<sup>200</sup> The court explained that if an original juror is absent and does not appear within two hours of the scheduled time for the resumption of a trial, and the court has undertaken a “reasonably thorough inquiry,” the court, in its discretion, may substitute the original juror.<sup>201</sup> The court explained that the amendment was made as a result of a prior decision where a court’s substitution of an original juror after only forty-five minutes of the original juror not appearing, was found improper.<sup>202</sup> The court also noted that the amendment was intended to ratify another decision in which the court found no error was committed where the trial court waited two hours before replacing an original juror who had not appeared for the continuance of the trial.<sup>203</sup> The court refuted defendants’ assertions that: (1) the rule should be parsed and the requirement of a reasonable inquiry only be applied in cases where the cause of a juror’s absence is known; and (2) that the two-hour part of the rule should only be applied when the juror’s whereabouts are unknown.<sup>204</sup> In rejecting this view, the court stated that the statute made no distinction between the two scenarios.<sup>205</sup>

Further, the court explained that if the reasonable inquiry shows that there is a likelihood that the original juror will not be appearing in two hours, the court may, in its discretion, decide to discharge the juror.<sup>206</sup> The court also explained that the two-hour period is “not an arbitrary cut off point,” but rather, “strikes a constitutionally acceptable balance between the need to avoid uncertainty and delay, and the defendant’s right to an orderly jury trial.”<sup>207</sup> The court found that in each of the cases presented for appeal, the trial court conducted a “reasonably thorough inquiry” and determined that the jurors were not going to be returning within the two-hour window, and accordingly, held that the substitutions were made in accordance with Criminal Procedure Law, section 270.35(2).<sup>208</sup>

The court’s ruling in this case, is one that, as it expressed, built on other previous holdings regarding the validity of a juror sub-

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<sup>200</sup> *Id.* at 1240.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1242.

<sup>203</sup> *Id.*

<sup>204</sup> *Jeanty*, 727 N.E.2d at 1242.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1243.

<sup>207</sup> *Id.* at 1245.

<sup>208</sup> *Id.* at 1244.

stitution.<sup>209</sup> This holding is justified based upon the court's careful balance of the countervailing interests of the defendant and the government. As the court pointed out, the two-hour rule prevents either party from obtaining an unfair advantage based on the effect the absentee juror had on the case.<sup>210</sup> The rule is practical because it allows for the prompt trial of a defendant and proper expenditure of limited judicial resources.

Recently, in *People v. Gajadhar*,<sup>211</sup> the Court of Appeals reaffirmed the precedent established in *Page*, that a defendant cannot consent to substitution of a juror after deliberations have begun, simply by way of oral consent.<sup>212</sup> In *Gajadhar*, defendant was tried before a twelve-juror panel and other alternate jurors.<sup>213</sup> After the presentation of the case, defense counsel informed the court that defendant would not seek substitution of a juror in the event that an original juror was incapacitated, following the commencement of deliberations.<sup>214</sup> As a result, the court dismissed the alternates pursuant to Criminal Procedure Law, section 270.35, which provided that a new juror may not be substituted for an original juror after deliberations had begun, without defendant's consent.<sup>215</sup> During deliberations, a juror fell ill and had to be hospitalized.<sup>216</sup> Rather than face a mistrial, defendant requested that deliberations continue with the eleven remaining jurors.<sup>217</sup> Defendant signed a waiver in open court, waiving his right to trial by a twelve-member jury, and the trial court granted defendant's request.<sup>218</sup>

Defendant was subsequently convicted of first-degree attempted robbery and second-degree felony murder.<sup>219</sup> Thereafter, defendant filed an appeal, claiming his waiver was invalid because the state constitution prohibited a defendant from consenting to a jury consisting of less than twelve jurors.<sup>220</sup> The Court of Appeals reject-

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<sup>209</sup> See *supra* text accompanying notes 202-03.

<sup>210</sup> See *supra* text accompanying note 207.

<sup>211</sup> 880 N.E.2d 863 (N.Y. 2007).

<sup>212</sup> *Id.* at 868.

<sup>213</sup> *Id.* at 864.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Gajadhar*, 880 N.E.2d at 864.

<sup>217</sup> *Id.* at 863.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 864-65.

<sup>220</sup> *Id.* at 865.



ed this contention, concluding that defendant's waiver was constitutionally valid.<sup>221</sup> The court explained that "because a noncapital criminal defendant is free to waive a jury entirely . . . it follows that if a juror becomes unavailable after deliberations have begun and there are no alternates that can be substituted, a defendant should be permitted to request that an 11-member jury decide his fate."<sup>222</sup>

#### IV. CONCLUSION

The precedent established by the aforementioned cases illustrates the vital role the right to a jury trial plays in our criminal justice system. A jury trial is not just a formalistic right, it is a privilege guaranteed to a defendant. As such, even though this right is one that remains fiercely protected over time, the courts recognized that procedures needed to be put in place to allow a defendant to relinquish the right and allow a court to substitute a juror, thus, striking an appropriate balance between protecting a defendant and allowing him to have some control over his destiny.

To accomplish this goal, a court must ensure that a defendant's waiver complies with constitutional, as well as statutory mandates. The requirement that a defendant's waiver of the right to a jury trial must be in writing is one that is essential to the protection of a defendant's right as well as one that shows the impartiality of our adversarial system. The right to a jury trial and the right to consent to a waiver protects the defendant in whatever he or she decides is the best strategy for a favorable resolution of the case. The requirement that a waiver be in writing also provides significant protection to the prosecution because it helps to preserve the defendant's right on the record in the event that there is a claim that there was no waiver. Also, it allows the adversarial system to run more efficiently by preventing people from later denouncing their waivers and utilizing more judicial resources to resolve an appeal. Requiring a written waiver preserves the consent in writing, and as both the federal and New York State legislature wisely realized, gives the defendant a moment to reflect on the decision being made.

It is also important to realize that there is a significant difference between pre-deliberation substitutions and substitutions occurring after deliberations have begun, as the stage at which the substitu-

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<sup>221</sup> *Gajadhar*, 880 N.E.2d at 863.

<sup>222</sup> *Id.* at 869.

tion takes place serves to define the standards to be used to ensure that a defendant receives a fair trial. In general, courts uniformly agree that pre-deliberation substitutions rarely pose a problem with regard to the question of whether a defendant was tried by a jury of twelve following such a substitution. This is because, in essence, the substitution happens before the pivotal moment when the number of jurors deciding the case actually has a significant impact on a defendant. However, substitutions occurring after jury deliberations have a direct effect on the outcome of a case. Accordingly, it is sensible that the standards for juror substitution occurring post-deliberation are higher.

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