

Testimony of Charles Zennaché

SB 798-2

Mr. Chairman, Senators.

Thank you for allowing me to testify about SB 798-2 and I want to thank Senator Prozanski for sponsoring this bill at my request.

I am a Circuit Court Judge in Lane County. I want to make clear that the views I am expressing here are my own and I do not speak on behalf of the Oregon Judicial Department.

SB 798-2 addresses two different but related issues. First, the bill addresses the manner in which alternate jurors are selected in criminal cases. Second, it gives the trial judge the authority to substitute an alternate juror for a juror who dies, becomes ill, or is otherwise unable to complete deliberations. Both of these changes mirror changes that have been approved by the Council on Court Procedure to Oregon Rule of Civil Procedure 57, which governs the selection of jurors in civil cases.

In criminal cases, the accused has a right to trial by jury: either a 6 person jury (for misdemeanors) or a 12 person jury (for felonies). Each of the parties is entitled to a certain number of peremptory challenges – the right to remove a potential juror for any reason they deem fit. If the trial is to a six person jury, each party gets three peremptory challenges and if it is to a 12 person jury, each party gets six peremptory challenges. The court may also appoint alternate jurors, who sit through a case and hear the evidence just like the other jurors. These alternate jurors are there if one of the other jurors becomes ill or is otherwise unable to complete deliberations.

Currently Oregon law provides that alternate jurors are to be selected “after the jury is impaneled and sworn.” Likewise, the law gives each side additional peremptory challenges for use only against alternate jurors (1 each if up to 2 alternates are being selected, 2 each if up to 4 alternates are being selected, 3 each if up to 6 alternates are being selected). However, many judges throughout the

state are, by agreement of the parties, utilizing methods of selecting jurors that depart from the statutory procedure. For instance, it is common for judges not to swear the jury prior to the selection of alternate jurors. Similarly, many judges and lawyers fear that alternate jurors may not pay close attention to the evidence and arguments if they know they are alternates and therefore believe they are not likely to participate in deliberations. To avoid this issue, many judges chose to conduct jury selection in a manner which does not identify who the alternate jurors are until the completion of the case. The changes to ORS 136.260 found in section 3 of the bill are designed to give trial judges discretion over how jurors are selected. This eliminates any argument that such procedures are somehow invalid despite the agreement of the parties because they are not in compliance with current statutes.

The second change that SB 798-2 makes to existing law is to allow trial judges to replace a juror who dies, becomes ill, or is otherwise unable to complete deliberations with one of the alternate jurors who have sat through the case. Under current law, the trial judge is required to discharge alternate jurors when the jury begins its deliberations. The only exception to this requirement now is in the situations where the defendant is to be tried on enhancement facts – facts that if found by the jury give the trial judge the discretion to impose a greater sentence than would otherwise be imposed. Thus, under current law, if a juror becomes ill and is unable to complete deliberations just moments after deliberations have started, the trial judge has no discretion to replace that juror with one of the alternate jurors. Instead, the judge must either get the parties to agree to proceed with fewer jurors or declare a mistrial. This means that in situations where the trial has lasted many weeks, taxpayers may have to bear the cost of retrying the case even though there are alternate jurors available who have sat through the entire case, who have heard all the evidence, and who have listened to all the arguments of counsel. Section 1 of SB 798 gives the trial judge the discretion to replace a juror who cannot complete deliberations with an alternate juror, provided that neither party can establish that it is prejudiced as a result. If the judge chooses to replace the juror, the trial judge is to instruct the jury to begin deliberations anew. I want to be clear that the bill does not require the judge to replace the juror with an alternate, thus the trial judge continues to have the discretion to declare a mistrial if the judge feels substituting the alternate is inappropriate for any reason.

Of course, as an alternative to replacing a juror, the parties might stipulate to proceeding with just the remaining jurors.

Thank you for taking the time to listen to me and for considering this bill. I am happy to answer any questions you may have.