

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**May 18, 2021**

**Opinion No. 21-08**

**Substitution of Alternate Jurors in Non-Bifurcated Criminal Trials**

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**QUESTION**

Rule 24(f) of the Tennessee Rules of Criminal Procedure requires that alternate jurors “be discharged when the jury retires to consider its verdict.” However, Rule 24(c) of the Federal Rules of Criminal Procedure allows a court to retain alternate jurors to substitute for regular jurors after deliberations have begun. Does a Tennessee criminal court judge have inherent authority, in a non-bifurcated trial, to follow the Federal Rules of Criminal Procedure for the purposes of retaining alternate jurors after deliberations have started?

**OPINION**

No. Pursuant to Tenn. R. Crim. P. 24(f)(2), alternate jurors in a non-bifurcated trial must be dismissed once the jury retires to deliberate. Additionally, replacing a juror with an alternate juror after deliberations have begun may be structural constitutional error.

**ANALYSIS**

The Tennessee Rules of Criminal Procedure allow alternate jurors to replace regular jurors any time before the jury retires to deliberate. Tenn. R. Crim. P. 24(f)(2). However, alternate jurors “shall be discharged when the jury retires to consider its verdict.” *Id.* Retention of alternate jurors after the jury retires to deliberate violates the rule in non-bifurcated trials. *State v. Rayfield*, 507 S.W.3d 682, 701 (Tenn. 2015); *State v. Bobo*, 814 S.W.2d 353, 355-56 (Tenn. 1991); *c.f. State v. Hester*, 324 S.W.3d 1, 64, 67 (Tenn. 2010) (finding no error in a bifurcated capital trial when an alternate juror did not participate in guilt phase deliberations but replaced a juror before penalty phase deliberations).

We have found no cases or statutes that provide inherent authority to trial courts to apply a different rule. On the contrary, the Tennessee Supreme Court has indicated that trial courts do not have authority to adopt procedures different than those set out in the Tennessee Rules of Criminal Procedure. *See State v. Soller*, 181 S.W.3d 645, 648 (Tenn. 2005) (trial court did not have authority under Tenn. R. Crim. P. 11 to alter the terms of a plea agreement); *see also State v. Gonsales*, No. E2002-02687-CCA-R3-CD, 2003 WL 22697299, at \*5-6 (Tenn. Crim. App. Nov. 14, 2003) (trial court exceeded its authority under Tenn. R. Crim. P. 35 when it modified the defendant’s sentence without a request from either party for modification) (no perm. app. filed). Indeed, the Tennessee Supreme Court has explicitly held that failure to timely dismiss alternate jurors under Tenn. R. Crim. App. 24 is error. *Rayfield*, 507 S.W.3d at 682.

Additionally, substituting an alternate juror for a regular juror after deliberations begin may violate the state constitution. The Tennessee Constitution guarantees criminals defendants the right to a trial by jury and a unanimous jury verdict. Tenn. Const. art. I, § 6; *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993). That right includes “the constitutional right to have all issues of fact submitted to the same jury at the same time.” *Bobo*, 814 S.W.2d at 356. In *Bobo*, the Tennessee Supreme Court concluded that substitution of an alternate juror after deliberations had begun coupled with failure to instruct the jury to begin deliberations anew constituted structural constitutional error. *Bobo*, 814 S.W.2d at 356-58; *see also State v. Harvey*, No. E2008-01081-CCA-R3-CD, 2010 WL 5550655, at \*26 (Tenn. Crim. App Dec. 30, 2010) (observing that the *Bobo* court’s analysis “counsels against finding [juror] substitution errors can ever be merely procedural”) (no perm. app. filed).

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