



1999

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Jennifer Golub

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Recommended Citation

Golub, Jennifer (1999) "Recent Developments: Hayes v. State: Substitution of an Alternate Juror May Be Done at Any Time before the Jury Closes the Jury Room Door to Begin Deliberations," *University of Baltimore Law Forum*: Vol. 30 : No. 1 , Article 15.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol30/iss1/15>

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*Hayes v. State***Substitution of an Alternate Juror May Be Done at any Time before the Jury Closes the Jury Room Door to Begin Deliberations**

By Jennifer Golub

In a case of first impression, the Court of Appeals of Maryland recently considered the meaning of the phrase “when the jury retires to consider its verdict” from Md. Rule 4-312(b)(3), and how it applies to substituting an alternate juror. The court of appeals found the rule’s intention to be that the substitution of an alternate juror is impermissible after the jury has left the courtroom to consider its verdict and has closed the jury room door for deliberations. *Hayes v. State*, 355 Md. 615, 735 A.2d 1109 (1999). The court declared that closing the jury room door marks the point at which the ability to substitute a juror ends.

Following closing arguments and jury instructions in the trial of John Hayes (“Hayes”), Judge Kahl of the Circuit Court for Baltimore County thanked and excused the alternate juror. The judge directed the remaining jurors to retire to the jury room and begin deliberations. Soon thereafter, the judge called Hayes back into the courtroom and told him that one of the jurors became ill as soon as the jury had left to begin deliberations. The judge notified Hayes that because he felt actual jury deliberations had not yet begun, he would substitute the sick juror with the excused alternate juror who had not yet left the building. Defense counsel objected.

The jury convicted Hayes of robbery and various handgun charges and sentenced him to twenty-five years in prison. Hayes appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court’s holding. Hayes then appealed to the Court of Appeals of Maryland, which reversed the intermediate appellate court’s decision.

The major issue before the court of appeals was at what point in a trial does the jury “retire to consider its verdict,” pursuant to Maryland Rule 4-312(b)(3). *Hayes*, 355 Md. at 620, 735 A.2d at 1111. The court highlighted Rule 4-312(b)(3) as the current law dealing with alternate jurors in criminal cases. *Id.* at 621, 735 A.2d at 1112 (citing Md. Rule 4-312(b)(3)). In capital cases, the court noted, the rule provides for two alternate jurors, subject to restrictions of the judge. *Id.* Furthermore, the rule provides that an alternate cannot be substituted during actual deliberations or sentencing. *Id.* In non-capital cases, an alternate who does not replace a juror shall be discharged “when the jury retires to consider its verdict.” *Id.* (citing Md. Rule 4-312(b)(3)).

Because the court had not previously considered the meaning of the phrase “when the jury retires to consider its verdict,” nor had the court ever determined the effect of a

violation of the rule, the court turned to both state and federal case law of other jurisdictions which have dealt with the issue of timing and violations regarding the substitution of an alternate juror. *Id.* at 622-23, 735 A.2d at 1112-13. In so doing, the court analyzed two categories of cases: (1) cases where the substitution was made before the beginning of deliberations; and (2) cases where the substitution was made after the commencement of deliberations. *Id.* In the former situation, most courts have upheld the substitution prior to the commencement of deliberations, and in the latter, courts have been mixed in their holdings. *Id.*

The court examined Rule 24(c) of the Federal Rules of Criminal Procedure (“FRCP”) which allows, foregoing its amendment in April of 1999, substitution “prior to” the time the jury retires. *Id.* However, the court observed that in practice, this rule has been applied beyond its limitations. *Id.* The court then focused on the most recent changes to FRCP 24(c). *Id.* at 625, 735 A.2d at 1114. The Supreme Court’s April, 1999 amendment to FRCP 24(c) became effective December 1, 1999, and the rule now allows substitution of alternates after deliberations have begun. *Id.* The new provision states that “when the

jury retires to consider the verdict, the court, in its discretion, may retain the alternate jurors during deliberations.” *Id.* (quoting Amendments to the Federal Rules of Criminal Procedure, 119 S. Ct. Ct. R-5, 8 (1999)). The rule now indicates, however, that if an alternate replaces an impaneled juror after deliberations have begun, the jury should be instructed to begin new deliberations. *Id.* The court acknowledged that the change to Rule 24(c) allows the federal courts to continue a practice already in existence. *Id.* at 626, 735 A.2d at 1115.

The court of appeals also discussed various cases which address the meaning of the current language of Rule 24(c). *Id.* at 626-34, 735 A.2d at 1115-20. The federal cases cited by the court show that, prior to the amendment, federal courts allowed jurors to be substituted after the start of deliberations, concluding that substantial rights were not violated. *Id.* The court noted that federal cases also suggested that it was permissible to recall an alternate juror who had been discharged. *Id.* at 632, 735 A.2d at 1118. The court recognized that other decisions have been upheld by the use of the harmless error doctrine. *Id.* at 634, 735 A.2d at 1119.

The court of appeals stated that they could not change the language of Rule 4-312(b)(3), nor could they “circumvent the rule through an expansive harmless error or presumptive non-prejudice doctrine that is entirely foreign to our jurisprudence.” *Id.* at 635, 735 A.2d at 1119-20. Any change in the rule,

the court held, must come from the legislature. *Id.* at 635, 735 A.2d at 1120.

In the instant case, the court of appeals concluded that an alternate juror may be substituted for a regular juror until such a time as the jury enters the jury room to consider its verdict, and closes the door if (1) the alternate juror remained qualified, and (2) the regular juror is properly discharged. *Id.* The closing of the door, however, is the point at which any ability to substitute ends because, up until that point, the defendant is not prejudiced as the jury has not discussed the case and the alternate juror has not been subjected to outside influences. *Id.* at 636, 735 A.2d at 1120.

The court defended its holding as a practical standard which addresses time lapses between closing arguments and deliberations, and promotes simplicity and fairness in administration. *Id.* The court opined that the rule, as set forth, will lead to easy compliance, and moots the issue as to what happened after the door closed. *Id.* The exact time the door closed, the court stated, could be established through objective and extrinsic evidence. *Id.* The court also added that the time the door closed should be made a matter of record. *Id.* at 637, 735 A.2d at 1120. Through its ruling, the court rendered moot another issue raised by Hayes, that a discharged alternate may not be recalled, because jurors should remain qualified until substitution is no longer allowed, or until the door closes. *Id.* at 637, 735 A.2d at 1121.

The court applied its holding to the petitioner’s case, and found that

Hayes did preserve his complaint regarding the substitution. *Id.* The court remanded the case back to the Circuit Court for Baltimore County to determine how it was concluded that deliberations had not yet begun. *Id.* at 638, 735 A.3d at 1121. There was nothing on the record to make that issue clear to the court of appeals, nor was there any evidence shown that there was any examination of the dismissed alternate to determine whether he was subjected to any outside influences. *Id.*

In *Hayes*, the Court of Appeals of Maryland declined to follow federal practice. Accordingly, Maryland law is now distinctively different from federal law with regard to the substitution of alternate jurors. It is important for Maryland practitioners to recognize this distinction so that they may tailor their litigation to comply with the correct interpretation of the rule which applies in their respective situations. The court also sets forth a bright line test in a case of first impression and provides that, in Maryland, deliberations commence when the jury room door shuts and the time the door shuts should be made part of the record.