

**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,**
v.
**QUENTON A. SHEFFIELD, Defendant Below,
Petitioner.**

No. 21-0114

Supreme Court of Appeals of West Virginia

June 14, 2022

Submitted: May 3, 2022

Appeal from the Circuit Court of Cabell
County Honorable Christopher D. Chiles, Judge
Criminal Action No. 19-F-107

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SYLLABUS BY THE COURT

1. "The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction[.]" Syl. Pt. 5, in part, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).

2. "Court rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes." Syl. Pt. 2, *Casaccio v. Curtiss*, 228 W.Va. 156, 718 S.E.2d 506 (2011).

3. "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970).

4. There is a presumption of prejudice to a defendant's right to a fair trial when a discharged alternate juror is recalled and replaces a member of the jury panel who becomes unable or disqualified to perform his or her duties after the jury retires to consider its verdict.

5. The presumption of prejudice that results from the mid-deliberation substitution of a regular juror with a discharged alternate juror can only be overcome when the trial court takes extraordinary precautionary measures to ensure the defendant's right

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to a fair trial. Those measures may include, but are not limited to: (1) re-administering the juror oath to the alternate juror; (2) questioning the alternate juror to confirm that he or she has not been exposed to any improper outside influences; (3) questioning the remaining members of the jury panel to make sure that they can set aside any opinions they formed about the case during their prior deliberations; (4) re-reading the trial court's charge or instructions to the entire jury panel; and (5) instructing the entire jury panel that they must begin their deliberations anew. Given the substantial potential for prejudice from the mid-deliberation replacement of a juror, the length of deliberations before and after the substitution is a factor to be considered when assessing whether the defendant has been prejudiced. This Court will consider the totality of the circumstances in determining whether the extraordinary precautions taken by the circuit court successfully rebut the presumption of prejudice.

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OPINION

HUTCHISON, CHIEF JUSTICE

The petitioner, Quentin A. Sheffield, appeals the January 5, 2021, order of the Circuit Court of Cabell County sentencing him to life in prison without mercy for his conviction of first-degree murder, two to ten years of imprisonment for his conviction of malicious wounding, and five years of imprisonment for his conviction of possession of a firearm by a person prohibited from possessing a firearm.^[1] In this appeal, the petitioner contends that the circuit court committed reversible error during his trial when it dismissed a member of the jury after deliberations began and replaced that juror with an alternate who had been discharged from the case. Upon consideration of the parties' briefs and oral arguments, the submitted appendix record, and the relevant authorities, we find merit to the petitioner's argument. Accordingly, for the reasons set forth below, we reverse the petitioner's conviction and sentencing orders and remand this case for a new trial.

I. Facts and Procedural Background

In April 2019, the petitioner was indicted by a Cabell County grand jury on charges of murder, malicious wounding, and possessing a firearm while being a person prohibited from possessing a firearm. The events giving rise to the charges are not relevant to the issue on appeal. Instead, the facts that are important concern what occurred at trial after the jury retired to begin its deliberations.

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The record reflects that the petitioner's trial commenced on September 29, 2020, and it lasted a total of six days. On the fifth day of trial, the jury retired to begin its deliberations, and the trial court discharged the alternate juror from the case. After the jury had been deliberating for slightly more than an hour, the trial court called a recess because it had been informed that one of the jurors might have had a conversation with a witness while on a lunch break during the middle of the trial. After stopping the deliberations, the trial court proceeded to question each juror individually,

and every juror denied speaking to a witness. At that point, the petitioner moved for a mistrial, arguing that because one of the jurors was not being truthful, there was no other remedy. The State opposed the motion and suggested that the trial court review the surveillance footage from the courthouse cameras to determine which juror had talked to the witness. The trial court agreed to look at the surveillance footage, so it ordered the jury to recess for the day. The trial court also instructed the court clerk to contact the alternate juror and ask her to return the following day. The petitioner objected to recalling the alternate juror.

The next day, through the review of the courthouse video surveillance footage, the trial court determined that Juror B.^[2] had in fact spoken with one of the trial

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witnesses.^[3] The court then questioned Juror B. again, and the following exchange occurred:

THE COURT: My Baliff was able to get a copy of the courthouse security video, and it shows you talking with [the witness], the owner of Metro Cab, at lunch on Thursday, and that was what I was asking about when you said you did not do it.

I would like to play that for you at this point.

JUROR B.: Oh, okay.^[4]

JUROR B.: Okay, I did, yeah, I didn't know that-

THE COURT: You didn't know what?

JUROR B.: That I wasn't allowed to speak to him.

THE COURT: No, but I was asking you yesterday whether you spoke with any witness who had testified and you said no.

JUROR B.: I am sorry. I did not

understand that.

THE COURT: I think because of that I have no choice [sic] to excuse you from this jury.

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After Juror B. was excused, the trial court denied the petitioner's motion for a mistrial and asked the petitioner whether he would prefer to proceed with just eleven jurors or whether he wanted the alternate juror to return to service. Emphasizing that he was not waiving his request for a mistrial, the petitioner stated that he preferred to have twelve jurors.

Thereafter, the trial court informed Juror S., the alternate juror who had returned as requested, that one of the jurors had to be excused due to the juror's conversation with a witness, and that this necessitated Juror S.'s return to service. Juror S. was then asked by the trial court whether she was "okay serving as a juror in this case." She answered affirmatively. The petitioner's counsel asked Juror S. whether she had spoken to anyone about the case after she had been dismissed and left the courthouse the previous day, and she said, "no." The trial court then informed Juror S. that her written notes about the case had been destroyed when she was discharged and asked whether she was still able to be a fair and impartial juror and whether she was able to discuss the case with the other jurors and deliberate without the benefit of her notes. She replied, "yes," and returned to the jury, but the juror's oath was not re-administered to her.

The trial court told the other jurors that Juror B. had been excused because of her conversation with a witness and that Juror S. would be returning for the deliberations. The trial court asked each juror individually if he or she was still able to sit as a fair and

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impartial juror in the case and render a decision in light of what had happened. Each juror responded affirmatively. The jury was also

instructed as follows:

THE COURT: Thank you, ladies and gentlemen. Again, I thank you for being here today.

As you know, from what I have said to each of you on the record in chambers, one of your fellow jurors has been excused and an alternate juror is replacing that excused juror.

Do not consider this substitution for any purposes. Under the law, the alternate juror must participate fully in the deliberations that lead to any verdict.

The Prosecution and the Defendant has [sic] the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This 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 begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place.

The reconstituted jury then began its deliberations and reached a verdict in less than an hour. During that time, deliberations were paused twice while the jury received additional instructions from the trial court. On one occasion, the trial court informed the jury that the court clerk would be bringing them the "[jury] charge, the instructions, everything." The second time, the jury asked the court who two phone numbers belonged to, and the court informed the jury it could not answer that question as the parties and court agreed they were uncertain as to whether the referenced numbers had been admitted as evidence in the case.

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As indicated above, the jury convicted the petitioner of all charges. The mercy phase of the trial was bifurcated, so after reaching its verdict, the jury reconvened to decide whether to afford the petitioner mercy on his first-degree murder conviction. After the jury denied the petitioner a finding of mercy, he filed a post-trial motion asserting error based on the trial court's decision to impanel the discharged alternate juror and not declare a mistrial. The motion was denied, and the petitioner was sentenced by an order entered on January 5, 2021. This appeal followed.

II. Standard of Review

The petitioner argues that the trial court committed reversible error by not granting a mistrial when it became necessary to dismiss a member of the jury after deliberations had begun. "The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Lowery*, 222 W.Va. 284, 288, 664 S.E.2d 169, 173 (2008). In this case, our determination of whether the trial court committed reversible error by not granting a mistrial requires us to interpret the West Virginia Rules of Criminal Procedure. "[O]ur review is plenary on the issues before us pertaining to the interpretation of state statutes and court rules." *State v. Davis*, 236 W.Va. 550, 554, 782 S.E.2d 423, 427 (2015); *see also* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the trial court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). With these standards in mind, we consider the parties' arguments.

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III. Discussion

The sole issue in this appeal is whether the trial court committed reversible error when it replaced a member of the jury during deliberations with the alternate juror who had been discharged from service. The petitioner

argues that the mid-deliberation juror substitution was a violation of Rule 24(c) of the West Virginia Rules of Criminal Procedure. The rule provides, in pertinent part:

Alternate jurors. - The court may direct that more jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. *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 or are found to be unable or disqualified to perform their duties.* Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. *An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.*

W.Va. R. Crim. P. 24(c) (emphasis added). The petitioner contends that the clear and unambiguous language of this rule does not allow the substitution of a member of the jury with an alternate after the jury begins deliberations because the alternate jurors have been discharged. We agree.

"The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the trial courts of this jurisdiction[.]" Syl. Pt. 5, in part, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). With regard to trial jurors, this Court has previously recognized that "Rule 24(c) states that the alternate shall be

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discharged after the jury retires to consider its verdict." *State v. Lightner*, 205 W.Va. 657, 662, 520 S.E.2d 654, 659 (1999). In *Lightner*, the trial judge failed to release the alternate juror when the jury retired, and as a result, the alternate

participated in the jury deliberations and voted on the verdict finding the defendant guilty. On appeal, the defendant argued that the trial court had violated Rule 24(c) and that the error required automatic reversal of his conviction. Upon review, this Court promptly acknowledged that allowing an alternate juror to deliberate with the jury panel was clear error under Rule 24(c). *Lightner*, 205 W.Va. at 662, 520 S.E.2d at 659.

In the case at bar, the trial court discharged the alternate juror after the jury retired to consider its verdict as required by Rule 24(c), but then recalled the alternate after deliberations began to replace the jury member found to be disqualified from performing her duties because of her conversation with a trial witness. Rule 24(c) provides that "[a]lternate jurors . . . shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties" and that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." (Emphasis added). We have held that "[c]ourt rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes." Syl. Pt. 2, *Casaccio v. Curtiss*, 228 W.Va. 156, 718 S.E.2d 506 (2011). Our canons of construction provide that "[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970).

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Rule 24(c) plainly and unambiguously provides that any replacement of a regular juror by an alternate juror must occur before the jury retires to begin its deliberations.

Like other jurisdictions with the same rule, we decline to infer that the provision authorizing pre-submission substitution of jurors also allows for post-submission substitution. *See State v. Sanchez*, 6 P.3d 486, 492 (N.M. 2000) ("Like federal courts, state courts have generally refused to imply from [provisions allowing

alternate jurors to take the place of original jurors who become incapacitated] the authority to make postsubmission substitution." (quotations and citation omitted)). Under our canons of construction, "[i]t is not for this Court arbitrarily to read into [the rule], that which it does not say." *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). Given the absence of any language in Rule 24(c) allowing the substitution of a juror after the jury has retired, we find no authority for a trial court to do so. Consequently, the trial court's replacement of the disqualified jury member after deliberations began with the alternate juror who had been discharged from the case was a clear violation of Rule 24(c).

Having found that the trial court's post-submission juror substitution violated Rule 24(c), we must now determine the legal effect of that error upon the verdict. The petitioner argues the trial court's violation of Rule 24(c) requires the automatic reversal of his conviction. Conversely, the State argues that the error was harmless, and the petitioner's convictions should be affirmed.

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In *Lightner*, the defendant also urged this Court to adopt a reversible *per se* rule for the violation of Rule 24(c) in that case. This Court rejected the defendant's argument in that case, explaining:

We are not convinced that the trial court's failure to promptly discharge an alternate juror is so serious that it should, in every situation, require automatic reversal. Each case must be decided on its own unique set of facts.

Id. at 660, 520 S.E.2d at 657.^[5] We find the same to be true when a discharged alternate juror is recalled and replaces a member of the jury who becomes disqualified during deliberations.

Most jurisdictions that have considered a mid-deliberation substitution of a juror with a discharged alternate have determined the legal

effect of that error on the verdict by utilizing either an expansive harmless error analysis or what has been termed the "presumption of prejudice" doctrine. *State v. Sanchez*, 6 P.3d 486, 493 (N.M. 2000). Simply stated, "[i]f a post-submission substitution has been found to be erroneous, the bulk of courts next focus on the extent to which the error is prejudicial." *Commonwealth v. Saunders*, 686 A.2d 25, 28 (Pa. Super. Ct. 1996). Federal courts addressing the issue have tended to use the harmless error analysis which places the burden of showing prejudice on

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the defendant.^[6] *Id.* In contrast, state courts have generally applied the presumption of prejudice doctrine which shifts the burden to the State. *Id.*

In adopting the presumption of prejudice approach, the Supreme Court of Colorado explained that "because a just verdict cannot be reached if there is an inappropriate interference with or intrusion upon the deliberative process . . . the mid-deliberation replacement of a regular juror with an alternate must be presumed to have prejudiced the defendant." *People v. Burnette*, 775 P.2d 583, 590 (Colo. 1989) (citation omitted). Elaborating further, the *Burnette* court observed that

[t]he potential for prejudice occasioned by a deviation from the mandatory requirements of [Rule] 24[] is great. Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his views and to persuade others. Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision.

Burnette, 775 P.2d at 588 (citations omitted). Indeed, "[t]he environment of the reconstituted jury would be inherently coercive for the alternate juror because the other jurors had already determined their views of the case." *People v. Roberts*, 824 N.E.2d 250, 261 (Ill. 2005);

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see also U.S. v. Quiroz-Cortez, 960 F.2d 418, 420 (5th Cir. 1992) (recognizing "a danger that the other jurors will have already formulated positions or viewpoints or opinions in the absence of the alternate juror and then pressure the newcomer into passively ratifying this predetermined verdict, thus denying the defendant the right to consideration of the case by twelve jurors").

Also employing the presumption of prejudice approach, the Superior Court of Pennsylvania reasoned:

The Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding." Pa.R.Crim.P. 2. Accordingly, when the trial court proceeds in blatant violation of the Rules, without the defendant's consent, the trial court does so at its own risk. Clearly, our Supreme Court adopted Rule 1108(a)^[7] in order to protect both the Commonwealth and the defendant against the perils of post-submission substitution . . . we cannot turn a blind eye to the genuine risk of a tainted verdict. Quite simply, we must [e]nsure that the jury function remains protected.

Saunders, 686 A.2d at 28 (footnote added). Like these courts, we are persuaded that "requiring prejudice to be presumed from a violation of [Rule 24(c)] . . . best accommodates the fundamental concern of protecting the deliberative process of the jury." *Burnette*, 775 P.2d at 590. Accordingly, we now hold that there is a presumption of prejudice to a defendant's

right to a fair trial when a discharged alternate juror is recalled and replaces a

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member of the jury who becomes unable or disqualified to perform his or her duties after the jury retires to consider its verdict.

Under the presumption of prejudice doctrine, there is a recognition that "the factual circumstances in which an unauthorized substitution of an alternate juror during deliberations may occur are manifold and that under certain circumstances the presumption of prejudice that flows from a juror substitution during the course of jury deliberations may be rebutted." *Burnette* 775 P.2d at 591. As one court explained,

it is not always reversible error to recall an alternate who has been discharged. Suppose the alternate in this case had been recalled as she was leaving the courtroom 30 seconds after having been discharged. It would violate Rule 24(c) to put her back on the jury but there would be no prejudice to

the defendants that would warrant reversal of their convictions . . . only prejudicial violations of the rule are reversible errors.

U.S. v. Josefik, 753 F.2d 585, 587 (7th Cir. 1985). Although state and federal courts have taken different approaches to assess the effect of a mid-deliberation juror substitution, it is generally agreed that prejudice "is not shown when the facts surrounding the replacement of an alternate juror [indicate] . . . that the handling of the reconstituted jury was adequate to ensure a fair and impartial jury." *Sanchez*, 6 P.3d at 494. Regardless of the approach used to evaluate the error though, "post-submission substitution is an exception to a rule of criminal procedure, which protects constitutional rights." *Id.* at 495. Therefore, "both approaches require adequate procedural safeguards; absent such precautions at the trial court level, the text of the rule supports reversal." *Id.*

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Evaluating whether the post-submission juror substitution was prejudicial requires an examination of the record and a consideration of what precautionary measures were used by the trial court to preserve the defendant's right to a fair trial. Other state courts have held that the presumption of prejudice can only be rebutted by "a showing that the trial court took extraordinary precautions to ensure that the defendant would not be prejudiced and that under the circumstances of the case, the precautions were adequate to achieve that result." *Burnette*, 775 P.2d at 590. In other words, the record must establish that "sufficient protective measures were taken to [e]nsure the

integrity of the jury function." *Saunders*, 686 A.2d at 28.

Federal courts have "evaluate[d] prejudice to the defendant by examining, among other things, the length of the jury's deliberations before and after substitution of the alternate and the district court's instructions to the jury upon substitution charging the jury to begin its deliberations anew." *Quiroz-Cortez*, 960 F.2d at 420. Also highly relevant is the alternate juror's possible exposure to outside influences during the time he or she was absent from the courtroom. *Id.* These same factors have also been applied by state courts to evaluate the presumed prejudice. For example, in *Roberts*, the Supreme Court of Illinois indicated that

[i]n determining whether a defendant was prejudiced, we will consider the totality of the circumstances, including: (1) whether the alternate juror and the remaining original jurors were exposed to outside prejudicial influences about the case; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew;

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(4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.

Id. at 260. Similarly, the *Saunders* court declared that the

solution begins with the trial court, prior to impaneling the alternate juror, extensively questioning the alternate and remaining jurors. The trial court must [e]nsure that alternate has not been exposed to any improper outside influences and

that the remaining regular jurors are able to begin their deliberations anew. These are fundamental considerations that can not be ignored.

Id. at 29. That court, like all others, emphasized the importance of the instructions to the recomposed jury, finding it critical to that they be directed to begin their deliberations anew. *See id.*

Based on the above, we now hold that the presumption of prejudice that results from the mid-deliberation substitution of a regular juror with a discharged alternate juror can only be overcome when the trial court takes extraordinary precautionary measures to ensure the defendant's right to a fair trial. Those measures may include, but are not limited to: (1) re-administering the juror oath to the alternate juror; (2) questioning the alternate juror to confirm that he or she has not been exposed to any improper outside influences; (3) questioning the remaining members of the jury panel to make sure that they can set aside any opinions they formed about the case during their prior deliberations; (4) re-reading the trial court's charge or instructions to the entire jury panel; and (5) instructing the entire jury panel that they must begin their deliberations anew. Given the substantial potential for prejudice from the mid-deliberation replacement of a juror, the length of

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deliberations before and after the substitution is a factor to be considered when assessing whether the defendant has been prejudiced. This Court will consider the totality of the circumstances in determining whether the extraordinary precautions taken by the circuit court successfully rebut the presumption of prejudice.

Applying our holding to the facts of this case, we find that the presumption of prejudice has not been successfully rebutted. While the trial court took significant steps after Juror B. was excused, the totality of the circumstances

does not indicate that extraordinary precautions were taken to ensure that the petitioner received a fair trial. In that regard, the record shows that Juror S. was recalled to service without the juror's oath being re-administered. The "juror's oath places . . . the responsibility of arriving at a true verdict upon the basis of [the juror's] own opinion and not merely upon acquiescence in the conclusions of [his or her] fellow jurors." *State v. Waldron*, 218 W.Va. 450, 460, 624 S.E.2d 887, 897 (2005). As such, re-administering the juror oath under these circumstances serves as an important reminder to the alternate juror that he or she must fully participate in the deliberations rather than accepting the views the other jury members may have formed during their prior deliberations.

The record also shows that the alternate juror was not thoroughly questioned to determine whether she had been exposed to any outside influences after she was discharged from the case. She was simply asked by defense counsel whether she had spoken to anyone about the case, including her family, and she answered negatively. Given

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that extensive media coverage often accompanies murder trials such as this one and that the alternate juror was absent from the proceedings for almost a day,^[8] we find that the questioning of the alternate juror was insufficient to establish that she had not been subjected to any impermissible influence.^[9]

We also find that the questioning of the remaining jurors regarding their ability to start deliberations from the beginning fell short. Although the critical instruction to begin deliberations anew was given to the reconstituted jury panel, the jurors were never asked individually about their ability to set aside any opinions they had formed prior to the dismissal of Juror B. The fact that the reconstituted jury panel reached a verdict in less than hour-significantly less time than the original jury panel deliberated before the court called for a recess-causes us to question whether the trial court's instructions were followed.

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Finally, we are troubled by the fact that the remaining members of the jury panel were never asked what information, if any, was relayed to them by Juror B. about her conversation with the trial witness.^[10] The failure of the trial court to explore this possible outside influence on the jury's consideration of the case either through the questioning of Juror B. or the other jury members cannot be overlooked. Having thoroughly considered the totality of the circumstances, we find that the presumption of prejudice has not been overcome and that the trial court abused its discretion when it denied the petitioner's motion for a mistrial.^[11] Accordingly, we must reverse the petitioner's conviction and sentencing orders and remand this case for further proceedings.

IV. Conclusion

For the foregoing reasons, the petitioner's conviction and sentencing orders are reversed, and this case is remanded for a new trial.

Reversed and remanded.

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ARMSTEAD, Justice, dissenting:

I dissent from the majority opinion because I believe that Mr. Sheffield was not prejudiced by the substitution of an alternate juror after the start of deliberations. Therefore, he received a fair trial in which a twelve-person jury heard the evidence and rendered its verdict. Accordingly, I believe his convictions should be affirmed.

The majority holds that a presumption of prejudice arises when Rule 24(c) of the West Virginia Rule of Criminal Procedure is violated and for the State to overcome that prejudice, it establishes factors for trial courts to weigh. To reach those conclusions, the majority opinion relies heavily on a Pennsylvania case, *Commonwealth v. Saunders*, 686 A.2d 25 (Pa. Super. Ct. 1996). In that case, the Pennsylvania Superior Court noted the divergent approaches taken by federal and state courts on which party

carries the burden to demonstrate prejudice in cases of post-deliberation juror substitution. See *Id.* at 28. The majority opinion opted to establish a presumption of prejudice and place the burden upon the State to rebut such presumption. However, as noted in *Saunders*, most federal courts place the burden upon the defendant to demonstrate prejudice. *Id.* citing *United States v. McFarland*, 34 F.3d 1508 (9th Cir.1994), *cert. denied*, 515 U.S. 1107, 115 S.Ct. 2257, 132 L.Ed.2d 264 (1995); *United States v. Quiroz-Cortez*, 960 F.2d 418 (5th Cir.1992); *United States v. Helms*, 897 F.2d 1293 (5th Cir.1990), *cert. denied*, 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990);

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United States v. Ashby, 864 F.2d 690 (10th Cir.1988); *United States v. Guevara*, 823 F.2d 446 (11th Cir.1987); *United States v. Foster*, 711 F.2d 871 (9th Cir.1983); [*United States v. Hillard*, 701 F.2d 1052, 1056 (2d Cir.1983), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983)]; *United States v. Kopituk*, 690 F.2d 1289 (11th Cir.1982), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983); *United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Indeed, the issues raised by a post-deliberation substitution of an alternate juror were frequently addressed in the federal courts, resulting in the 1999 Amendments to Rule 24(c) of the Federal Rules of Criminal Procedure which created a mechanism for addressing juror substitution after deliberations have begun.^[4] As noted in the majority opinion, our West Virginia Rule of Criminal Procedure 24(c) provides:

(c) Alternate Jurors. The court may direct that more jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are

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called shall replace jurors who, prior to the time the jury retires to

consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Prior to the 1999 Amendments to the Federal Rule, West Virginia's Rule mirrored the Federal Rule. This Court has stated that "when codified procedural rules . . . of West Virginia are patterned after corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules." *State v. Kaufman*, 227 W.Va. 537, 553 n.33, 711 S.E.2d 607, 623 n.33 (2011) (citations omitted). Thus, an examination of pre-1999 federal cases provides a persuasive guide for us in determining whether the circuit court protected Petitioner's right to a trial by jury while at the same time balancing the unique circumstances the circuit court faced in this case. The Seventh Circuit Court of Appeals dealt with very similar facts to those at bar:

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The defendant was tried before a

jury of twelve regular and two alternate members. At the conclusion of the jury instructions, the two alternate jurors were discharged, and the other jurors retired for deliberations. After two and one-half hours of deliberations, one of the jurors suffered a heart attack and was taken to the hospital. After stopping deliberations, the trial court recalled the two alternate jurors and counsel for the State and the defendant Henderson. The court questioned the alternate jurors about their activities since discharge. The first alternate juror admitted discussing the facts of the case with his wife, but added that she expressed no opinion. Both alternate jurors assured the court of having reached no conclusion about the defendant's guilt.

Henderson v. Lane, 613 F.2d 175, 176 (7th Cir. 1980) (footnote omitted). After conferring with counsel, the trial court substituted the first alternate juror and Mr. Henderson was convicted. *Id.* On these facts, the Seventh Circuit court held that "[t]he juror was reinstated in the presence of the petitioner's attorney only after reaffirming his ability to make a fair decision in the case. Because the essential feature of the jury was preserved, the defendant's Sixth Amendment challenge to the substitution procedure must fail." *Id.*, at 179.

Similarly, the Eleventh Circuit Court of Appeals held:

Our decision that substitution of the alternate juror after deliberations had begun does not constitute reversible error should not be misconstrued as a stamp of approval upon such a practice. As was true in *Phillips*, the trial court's decision to substitute the alternate was made in the context of a trial of truly epic proportions in terms of length, scope and expense to both sides. . . .

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It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is 'the rule' and the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken, as was done below, to ensure that the defendants are not prejudiced.

United States v. Kopituk, 690 F.2d 1289, 1311 (11th Cir. 1982).

In reviewing the record in the case before us, I do not believe that Mr. Sheffield was prejudiced by the substitution of the alternate juror. The circuit court empaneled twelve jurors and two alternate jurors. Immediately prior to deliberations, the circuit court excused the alternate jurors. After deliberations began, the circuit court learned that one of the seated jurors was seen speaking with a witness during the course of the trial. Upon learning of this, the circuit court halted deliberations, held *voir dire* of the entire panel, and ultimately excused the juror who had spoken with a witness. Mr. Sheffield moved for a mistrial. The circuit court then directed that the Clerk contact the first alternate juror and have her report the next day. The alternate juror appeared and joined the remaining 11 jurors in deliberations, after Mr. Sheffield's trial counsel and the circuit court conducted *voir dire* of the alternate juror. That following colloquy, including questions posed by Mr. Sheffield's counsel, Ms. Givens, is the key to demonstrating that Mr. Sheffield was not prejudiced:

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THE COURT: Welcome back.

JUROR: Thank you.

THE COURT: Have a seat.

Something came up yesterday over - which we learned that one of the jurors, we didn't know which one, maybe had a conversation with a witness last Thursday afternoon at lunchtime.

We have now determined who that juror was. We excused that juror which is why we had to bring you back in as the alternate, okay?

Are you okay with serving as a juror on this case, right? Because we talked to your employer and they totally understood and they were fine with this.

JUROR: Yes, sir.

MS. GIVENS: Your honor, I am sorry to interrupt, but I would have just a couple of short questions for her.

THE COURT: Okay.

DIRECT EXAMINATION

BY MS. GIVENS:

Q. When you were excused from the jury yesterday, did you speak to anyone about the case after you left?

A. No, I did not.

Q. You didn't go home and discuss it with your family or anyone?

A. No.

MS. GIVENS: Thank you.

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THE COURT: Anything else?

BY MS. GIVENS:

Q. Would there be any further hardship on you to deliberate this case however long it takes?

A. No.^[2]

(footnote added).

Importantly, all parties and the Court had an opportunity to question the alternate juror before she was seated with the panel. Thereafter, the alternate juror was seated with the remaining eleven jurors, and the circuit court instructed the jury to begin deliberations anew:

Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place.

We will exit and you can start your deliberations from the beginning.

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The jury subsequently deliberated and rendered its verdict, finding Mr. Sheffield guilty on all counts.

The majority opinion gives inadequate weight to the process followed by the circuit court in its effort to protect Mr. Sheffield's right to a trial by jury. The circuit court took significant steps to ensure that Mr. Sheffield was not prejudiced. The alternate juror was questioned and answered all questions satisfactorily. The jury was instructed to start its deliberations from the beginning. The circuit court took appropriate steps in light of the unique circumstances it faced - steps which provided adequate safeguards and did not violate Mr. Sheffield's right to a fair jury trial by twelve persons.

Under these facts, and based upon the federal precedents discussed above, I believe the majority incorrectly determined that there is a presumption of prejudice that the State must overcome. Certainly, if Mr. Sheffield could demonstrate prejudice due to the seating of the alternate juror, he would be entitled to a new

trial. However, there should be no presumption that such prejudice exists and I disagree with the majority's adoption of a rule presuming such prejudice. Instead, adoption of a rule requiring the Petitioner to show prejudice not only provides Petitioner with the opportunity to point to evidence of such prejudice but is also in harmony with our long-standing rule that we give great weight

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to decisions from federal courts regarding the same or similar provisions of the Rules. *See Kaufman*, 227 W.Va. at 553 n.33, 711 S.E.2d at 623 n.33.^[3] In addition, even under the presumption of prejudice standard adopted by the majority, the evidence in this case, nonetheless, shows that the Petitioner was not prejudiced by the seating of the alternate juror. The circuit court took reasonable steps to ensure there was no such prejudice, including the questions asked of the alternate juror and the instructions given to the jury as a whole that it must begin its deliberations anew once the alternate juror joined the jury. Regardless of whether the State bears the burden to show the absence of prejudice, or the

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Petitioner bears the burden to prove prejudice, there simply was no prejudice demonstrated here. Accordingly, I respectfully dissent and would affirm the Petitioner's conviction.

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Wooton, Justice, concurring:

I concur in the Court's judgment, in the entirety of its well-reasoned opinion, and in its two new syllabus points. I agree that a violation of Rule 24(c) of the West Virginia Rules of Criminal Procedure is subject to harmless error analysis because the rule is not constitutionally grounded; that as part and parcel of such analysis, there is a presumption of prejudice to the defendant/petitioner that the State must overcome; and that under the facts and circumstances of this case, the State failed to

overcome that presumption. I write separately, however, to express my view that the circuit court's failure to swear the recalled alternate juror before sending her into the jury room to deliberate was fundamental, structural error that in and of itself rendered the petitioner's conviction invalid. *See State v. Moore*, 57 W.Va. 146, 49 S.E. 1015 (1905), *overruled on other grounds by State v. Grimmer*, 162 W.Va. 588, 589, 251 S.E.2d 780, 782 (1979):

It is hardly necessary to cite authorities to show that a person cannot be legally convicted unless the record shows that the jury which tried the case were sworn according to law. It is not necessary that the oath should be copied into the order, but the record must affirmatively show somewhere and in some way that the jury were sworn in the manner prescribed by law, before there can be a legal conviction.

Moore, 57 W.Va. at 146, 49 S.E. at 1016.

Although the State acknowledges the rule established in *Moore*, it relies on an Oregon case, *State v. Vogh*, 41 P.3d 421 (Or.Ct.App. 2002), for the proposition that the

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rule requiring a jury to be sworn is "legal formalism" which "has since given way to a more functional approach." *Id.*, 41 P.3d at 426. I find *Vogh* to be unpersuasive for several reasons. First, most if not all of the court's discussion is dicta, as the case was decided on the basis of the defendant's procedural default in failing to raise the issue in a motion for new trial. *Id.* at 423. Second, the court recognized the distinction between cases involving untimely swearing of the jury and cases involving failure to swear the jury at all, noting that the only Oregon case on point^[4] involved the former. *Id.* at 425. As to the latter, the court acknowledged that the *Moore* rule is not an outlier, concluding "that the authority is divided and that no particular consensus exists." *Id.* at 425. Third, I wholeheartedly disagree with the court's

conclusion in *Vogh* that the failure to swear the jury in a criminal case, which is part and parcel of constitutional "fair trial" provisions, is subject to a harmless error analysis less rigorous than that articulated by this Court in numerous decisions:

"We have long held that '[e]rrors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.'" Syl. pt. 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). *See also* W.Va. R.Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Further, "[f]ailure to observe a constitutional right constitutes a reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

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State v. DeWeese, 213 W.Va. 339, 352, 582 S.E.2d 786, 799 (2003); *see also State v. Flack*, 232 W.Va. 708, 716, 753 S.E.2d 761, 769 (2013) ("We made clear in Syllabus Point 3 of *Frazier* [*State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727 (2012)] that '[i]n a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'").

In my view, the failure to swear the dismissed-and-subsequently-recalled alternate juror in the instant case deprived the petitioner of his guaranteed right to a trial "by a jury of twelve[,]" W.Va. Const. art. III, § 14, ^[2] in that only eleven members of the panel had taken the required oath as jurors. In that regard, the record is clear that the petitioner never agreed, either orally or in writing, ^[3] to be tried by fewer than twelve jurors. The circuit court presented

the petitioner with a classic Hobson's choice: if he did not agree to have his guilt or innocence decided by an eleven-person jury, the recalled juror would participate in deliberations. Although the petitioner chose the latter option, it is clear from the record that this was not a true choice in that it was not made knowingly, intelligently,

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and voluntarily. *See State v. Redden*, 199 W.Va. 660, 487 S.E.2d 318 (1997), where this Court held that

"Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial.' Syllabus Point 5, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988)."

Id. at 661, 487 S.E.2d at 319, Syl. Pt. 2. Thus, the petitioner cannot reasonably be held to have waived his constitutional rights under article three, section fourteen of the West Virginia Constitution.

"I do not necessarily dispute the contention that 'the fact that the jury at common law was composed of 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics' . . . Yet, under the West Virginia Constitution twelve is indeed the 'magic number' . . . and this Court should be loath to tinker with such a stable and predictable fixture of our criminal jurisprudence."

State v. Lightner, 205 W.Va. 657, 665, 520 S.E.2d 654, 662 (1999) (McGraw, J., dissenting) (citations omitted).

Finally, I reject the State's argument that

because the recalled juror had been sworn earlier, her oath somehow "carried over" despite the fact that she had been excused by the circuit court. The State cites *U.S. v. Turrietta*, 696 F.3d 972 (10th Cir. 2012) as support for its position - yet another case in which the court's entire discussion of jurors'

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oaths is dicta,^[4] as the case was decided on the basis of the defendant's procedural default: defense counsel had deliberately waited until after the verdict was in and the jury discharged to complain that the jury hadn't been sworn, leading the court to observe that "[t]he interests of justice are generally not served by allowing a party to object to an error after the trial has concluded and the party has lost." *Id.* at 985-86. More significantly, however, *Turrietta* has nothing whatsoever to do with whether a juror's oath somehow "carries over" after his or her discharge, and the State has cited no authority for this extraordinary proposition. One can only wonder where the State would have this Court

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draw the line: does an oath "carry over" after discharge for an hour, a day, a week? Not surprisingly, the State avoids asking this critical question, let alone answering it.

For the reasons set forth herein, I respectfully concur.

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Notes:

^[1] The circuit court ordered all sentences to be served consecutively.

^[2] When referring to specific jurors, we use their last initials rather than their full names. See *State v. Wasanyi*, 241 W.Va. 220, 230 n.12, 821 S.E.2d 1, 11 n.12 (2018) ("We refer to juror number one by an initial rather than her full name because of the personal information disclosed herein.").

^[3] When initially questioned, Juror B. was asked by the trial court:

All right, Ms. [B.], it has recently come to our attention that last Thursday at lunchtime during our lunch recess that one of the jurors may have had a conversation with a witness who had previously testified and maybe even asked that witness a couple of questions on the courthouse lawn. Was that you by chance?

Juror B. responded, "No." The Court then asked, "You are sure?" Juror B. said, "I am positive."

^[4] The video was then viewed by all parties.

^[5] In *Lighter*, this Court proceeded to conduct a plain error analysis because the defendant had not objected during the proceedings below to the alternate juror's participation in the deliberations. *Id.* at 661, 520 S.E.2d at 658.

^[6] Prior to 1999, Rule 24(c) of the Federal Rules of Criminal Procedure also provided that alternate jurors who had not replaced a regular juror were to be discharged when the jury retired to deliberate. The language of the rule mirrored our Rule 24. In 1999, the federal rule was amended, and now federal trial courts have discretion to retain alternate jurors after the jury retires to deliberate and to replace a member of the jury panel with an alternate during deliberations. See Fed. R. Crim. Proc. 24 (2002).

^[7] Rule 1108(a) of the Pennsylvania Rules of Criminal Procedure mirrors our Rule 24(c). See *Saunders*, 696 A.2d at 27.

^[8] The record shows that when the alternate juror was discharged, she was merely thanked for her service and was not given any further instruction.

^[9] We note that it is not the duty of defense counsel to question the alternate juror or any remaining members of the jury panel to ensure that the defendant has not been prejudiced by the substitution. Instead, it is the trial court that

must take extraordinary precautions to preserve the defendant's right to a fair trial when it chooses to disregard the mandates of Rule 24(c). As such, the fact that defense counsel in this case only asked the alternate juror if she had spoken to anyone about the case cannot be construed as a waiver of the petitioner's right to assert error based on the violation of Rule 24(c). Furthermore, defense counsel objected to the juror substitution as soon as the trial court announced its intention to recall the discharged alternate juror and continued to renew that objection throughout the proceedings that occurred until the reconstituted jury panel began its deliberations.

^[10] The record does show that defense counsel asked one juror, out of the presence of the others, whether he talked with Juror B. about her conversation with the witness and he replied that he did not know about it. None of the other jurors, however, were asked this question.

^[11] We recognize that an amendment to Rule 24(c) is the best way to provide trial courts with options when faced with the situation of a member of a jury panel becoming unable or disqualified to continue his or her duties after the jury retires to deliberate. However, such a change cannot be made in the context of a judicial opinion; rather, it must occur through our normal rule-making process.

^[1] Federal Rule of Criminal Procedure 24(c)(3) now provides a mechanism for the federal courts to retain alternate jurors. "The court may retain alternate jurors after the jury retires to deliberate. The 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 after deliberations have begun, the court must instruct the jury to begin deliberations anew."

In light of the majority opinion, I believe West Virginia's Rule of Criminal Procedure 24(c) should also be amended to reflect the practice contained in the revised federal rule.

^[2] As demonstrated by this colloquy, Petitioner's counsel had the opportunity to question the

alternate juror prior to the juror joining the remaining jurors and beginning deliberations in this matter. To the extent Petitioner objects to the fact that additional inquiry should have been undertaken, Petitioner had the opportunity to ask additional questions or request additional inquiry by the court and failed to do so. Accordingly, I believe Petitioner waived such objection.

^[3] In addition, affirming the circuit court's seating of the alternate juror, with the accompanying precautions undertaken by the circuit court to protect the Petitioner's rights a fair trial, avoids the additional time and expense of a retrial. Indeed, the majority's reversal of Petitioner's conviction and the likelihood of a retrial, when Mr. Sheffield was not prejudiced, does not further the interests of justice in this case. As this Court has found:

Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.

Bowman v. Leverette, 169 W.Va. 589, 612 n.17, 289 S.E.2d 435, 448 n.17 (1982) quoting *Gosa v. Mayden*, 413 U.S. 665, 685 (1973).

^[1] *State v. Barone*, 986 P.2d 5 (Or. 1999).

^[2] Although the text of article three, section fourteen of the West Virginia Constitution provides for a jury of twelve *men*, the West Virginia Jury Service for Women Amendment, Amendment 1, was approved by the voters on November 6, 1956, making women eligible for jury service.

^[3] See W.Va. R. Crim. P. 23(b) (providing that "[j]uries shall be of 12[.]" unless the parties "stipulate *in writing* with the approval of the court, that the jury shall consist of any number less than 12[.]") (emphasis added).

^[4] Interestingly, much of the dicta supports the proposition that jurors' oaths are critical to their ability to perform the task assigned to them: to well and truly try the case.

Although we do not resolve the issue here, we can readily perceive a difference, in terms of this central function, between a sworn and an unsworn jury. Sworn jurors stand before a judge with uplifted hands and recite an oath designed to impress a duty on their conscience. They promise to carry out their charge-to render a verdict in accordance with the evidence-conscientiously and impartially,

based on the court's instructions on the law. Whether swearing an oath makes jurors more reliable factfinders is a question we are unequipped to answer, but the principle behind the exercise is sound: A juror impressed with the seriousness of his charge is more likely to be attentive at trial and, in turn, more likely to carry out his duty faithfully, with due respect for the ideals underlying the criminal process. See *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir.1984) ("Swearing the jury ... serves to emphasize the importance and seriousness of the juror's task...."). In this sense, it is fair to presume the oath furthers the fair resolution of factual issues.

Turrietta, 696 F.2d at 978.
