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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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BORDEN, J., with whom PALMER, J., joins, concurring. I agree with the majority in its rejection of the claim by the defendant, Keith LaBrec, that his constitutional right to a jury trial was violated by the trial court's instruction to the jury when, during the jury's deliberations, the court substituted the alternate for the disqualified regular juror. I reach that result, however, by a different route from that of the majority. I conclude that the defendant's claim does raise an issue of constitutional magnitude and is, therefore, reviewable under the first two prongs of *State* v. *Golding*, 213 Conn. 233, 239, 567 A.2d 823 (1989), but that his claim fails on the merits under the third prong of *Golding*, namely, that ''the alleged constitutional violation *clearly*[1] exists and *clearly* deprived the defendant of a fair trial . . . .'' (Emphasis added.) Id., 240.

The principal question presented is whether the following instruction, delivered to the jury when the court substituted the alternate for the disqualified regular juror, deprived the defendant of his constitutional right to a jury trial: ''Ladies and gentlemen of the jury, a circumstance has arisen which has caused the court to ask one of the members of the jury to be excused. And we, in that case, have the right to bring in the alternate juror. And based upon that, it is required that you begin your deliberations all over again. Now I am sure that some of the torment and discussion that has occurred over the course of the last many hours of jury deliberations are not necessary to completely relive. But it is required that you, in essence, begin your jury deliberations all over again. *And I think that perhaps it would be helpful to begin by getting the alternate juror [to] have some understanding of where you've been and what you've discussed, and then go from there. I trust that the foreman of the jury will share the discussions with [the substituted juror] and it is possible that it will not take as long as you think.*'' (Emphasis added.)

It is useful to understand what the defendant does not claim on appeal. He does not claim that there was anything improper about the court's instructions, given twice, that the jurors ''begin your deliberations all over again.'' Indeed, that is essentially what General Statutes § 54-82h (c) requires.[2] Nor does the defendant claim that the trial court's instructions were *less* than what the constitution requires. The defendant's claim, instead, as I understand it, is that the instructions said too much: focusing on the certain portions of the instructions, which we have emphasized in this opinion, the defendant claims that these instructions necessarily told the jurors to reincorporate into their deliberations the prior discussions to which the now disqualified juror must have contributed and, therefore, tainted the ensuing

deliberations by injecting into them the deliberations of someone who was no longer a member of the jury, namely, the disqualified juror.

Because the defendant did not take an exception to these instructions at the time—when, of course, the error, if any, could easily have been remedied—he may only prevail, if at all, under *Golding* or the plain error doctrine.[3] I would reject both bases for reversal of the judgment.

The majority reasons that this claim is not of constitutional magnitude and, therefore, fails to satisfy the second prong of *Golding* because the ''claimed failure to instruct the jury adequately on its duty to begin its deliberations anew . . . simply does not implicate the core sixth amendment guarantees in the same manner'' as such constitutional instructional improprieties as the elements of the offense, the burden of proof and the presumption of innocence. The majority also relies on our decision in *State* v. *Williams*, 231 Conn. 235, 242–45, 645 A.2d 999 (1994), in which we addressed the constitutionality, under our state constitution, of mid-deliberation substitution of an alternate juror, under General Statutes (Rev. to 1991) § 54-82h (c), which we assumed did not provide for such a substitution. We stated therein: ''Having determined that the numerical composition of a noncapital jury does not implicate rights under the state constitution, we conclude, similarly, that the mechanisms for providing for and dismissing alternate jurors, and the circumstances under which they may be substituted for regular jurors, do not implicate constitutional rights.'' Id., 244.[4]

Unlike the majority, I conclude that the defendant's claim raises a question of constitutional dimension. First, a claim that the court's instructions impermissibly encouraged the jury's deliberations to be tainted by the participation of someone who was no longer a member of the jury does, in my view, implicate a core function of the jury. Although thus far we have, as the majority indicates, determined only that instructions on the elements of the offense, the burden of proof, and the presumption of innocence implicate the defendant's constitutional rights, in my view instructions that arguably encourage the jury to take into account the views of a nonjuror are equally constitutional in nature. It is axiomatic that jury deliberations are to be conducted only among the members of the jury. Therefore, an instruction that arguably encourages a jury to include in its deliberations the views of one who is no longer one of its members implicates its core function of deliberation. Indeed, many federal courts have so concluded, in effect. ''Most of the federal courts that have addressed the issue . . . have held that when circumstances require, substitution of an alternate juror in place of a regular juror after deliberations have begun does not violate the Constitution, *so long as the judge instructs*

*the reconstituted jury to begin its deliberations anew and the defendant is not prejudiced by the substitution*. See, e.g., *United States* v. *Guevara*, 823 F.2d 446, 448 (11th Cir. 1987); *Peek* v. *Kemp*, 784 F.2d 1479, 1484–85 (11th Cir. 1986) (en banc), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986); *Miller* v. *Stagner*, 757 F.2d 988, 995 (9th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S. Ct. 1269, 89 L. Ed. 2d 577 (1986), and cert. denied sub nom., *Freeman* v. *Stagner*, 475 U.S. 1049, 106 S. Ct. 1271, 89 L. Ed. 2d 579 (1986); *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985), cert. denied sub nom., *Soteras* v. [*United States*], 471 U.S. 1055, 105 S. Ct. 2117, 85 L. Ed. 2d 481 (1985); *United States* v. *Hillard*, 701 F.2d 1052, 1056–57 (2nd Cir. 1983); *United States* v. *Evans*, 635 F.2d 1124, 1128 (4th Cir. 1980). But see *United States* v. *Lamb*, 529 F.2d 1153, 1156–57 (9th Cir. 1975) (en banc) (finding impermissible coercion of juror when original jury required four hours to render verdict but reconstituted jury required only twenty-nine minutes).'' (Emphasis added.) *Claudio* v. *Snyder*, 68 F.3d 1573, 1575–76 (3d Cir. 1995).

Second, our decision in *State* v. *Williams*, supra, 231 Conn. 235, does not control this question. It is true that we used broad language in that case that could be taken to mean that the whole question of instructions to the jury upon mid-deliberation of a substitute juror is nonconstitutional. See id., 244 (''the mechanisms for providing for and dismissing alternate jurors, *and the circumstances under which they may be substituted for regular jurors, do not implicate constitutional rights*'' [emphasis added]). I do not read that language so broadly, however, and do not think that it was so intended. The question before us in *Williams* involved only whether the *fact* of such a substitution was constitutional, and did not involve the question of an instruction that arguably could be taken to encourage the reconstituted jury to consider the views of the dismissed juror. In fact, in that case we specifically noted, with emphasis, that the trial court, when it made the substitution, laudably gave extensive and explicit instructions designed to ensure that no such consideration would take place.[5]

Having concluded that the defendant has met the first two *Golding* requirements, I also conclude, nonetheless, that his claim of a constitutional violation fails on its merits. First, it cannot be denied that the court's instructions did tell the jury, twice, to begin anew—to ''begin your deliberations all over again.'' That is what the constitution requires. *Claudio* v. *Snyder*, supra, 68 F.3d 1577. Second, the challenged part of the instructions, in which the court told the jury and its foreman, ''And I think that perhaps it would be helpful to begin by getting the alternate juror [to] have some understanding of where you've been and what you've discussed, and then go from there,'' and ''I trust that the foreman of the jury will share the discussions with'' the new

juror, were phrased in very tentative terms and did not specifically refer to the contribution, if any, of the disqualified juror. Thus, those instructions were very generic, general and tentative in tone. Although I agree with the majority that, in the future, trial courts should refrain from any such remarks in order to avoid even the risk or perception of encouraging a rehashing of what the disqualified juror may have said, I cannot conclude that it is likely that the jury heard the remarks as requiring such a rehashing, or that the foreman felt obligated to engage in such a rehashing. Indeed, because the defendant did not take the opportunity to challenge the instructions while the case was still in the trial court, although not depriving him of review under the first two prongs of *Golding*, we are deprived of knowing with any degree of confidence whether the process of bringing the alternate juror up to date, so to speak, which the trial court suggested but did not direct, ever even took place. Therefore, it is not reasonably possible that the challenged instructions misled the jury into believing that it should, in its new deliberations, repeat or consider what, if anything, the disqualified juror had said.

This analysis also leads me to conclude that the trial court's instructions did not constitute plain error. To put it simply, the challenged language, although imprudent, did not affect the fundamental integrity of the judicial system.

[1] Our familiar four part test for a criminal appellant to prevail is stated in *State* v. *Golding*, supra, 213 Conn. 239–40: ''[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail.'' The first two prongs involve whether the claim is reviewable, and the second two prongs involve the merits of the claim. *State* v. *Andresen*, 256 Conn. 313, 325, 773 A.2d 328 (2001).

In this connection, I note my long-standing confusion about the meaning of ''clearly'' in the third prong of *Golding*. I do not know what it means, if anything. Either a constitutional violation exists or it does not. That is a question of law, and I simply do not know what an ''unclear'' constitutional violation looks like.

In addition, I also note what seems to me to be an overlap in most cases—that is, in all cases that do not involve structural constitutional errors—between the second part of *Golding*'s third prong, namely, that the constitutional violation ''deprived the defendant of a fair trial''; *State* v. *Golding*, supra, 213 Conn. 240; and the fourth prong, namely, that ''if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.'' Id. They overlap because they are the same question. In other words, if the error was harmless, then the defendant was not deprived of a fair trial; or, if the defendant was deprived of a fair trial, then the error cannot be considered harmless. Put another way, an appellate court cannot decide whether a defendant was deprived of a fair trial—and, therefore, is entitled to a new, *fair* trial—without first deciding whether the error was harmless. See *State* v. *Stevenson*, 269 Conn. 563, 573–74, 849 A.2d 626 (2004) (equating deprivation of fair trial and *Golding* analysis for purposes of prosecutorial misconduct claim).

These questions are, of course, more academic than real, because as I

read our line of cases under *Golding*, it seems to me that none of them turns on whether the claimed constitutional violation was ''clear'' or not; and in none of them did we determine that the defendant was deprived of a fair trial under the second prong, but that the error was harmless beyond a reasonable doubt under the third prong. I simply point out these linguistic anomalies because I think our formulation ought to correspond to what we actually do in such cases.

[2] General Statutes § 54-82h (c) provides: ''Alternate jurors shall attend at all times upon trial of the cause. They shall be seated when the case is on trial with or near the jurors constituting the regular panel, with equal opportunity to see and hear all matters adduced in the trial of the case. If, at any time, any juror shall, for any reason, become unable to further perform the duty of a juror, the court may excuse such juror and, if any juror is so excused or dies, the court may order that an alternate juror who is designated by lot to be drawn by the clerk shall become a part of the regular panel and the trial or deliberation shall then proceed with appropriate instructions from the court as though such juror had been a member of the regular panel from the time when the trial or deliberation began. If the alternate juror becomes a member of the regular panel after deliberations began, the jury shall be instructed by the court that deliberations by the jury shall begin anew. A juror who has been selected to serve as an alternate shall not be segregated from the regular panel except when the case is given to the regular panel for deliberation at which time such alternate juror may be dismissed from further service on said case or may remain in service under the direction of the court.''

[3] ''Our jurisprudence regarding the plain error doctrine is well established. As we recently repeated: [p]lain error review is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.'' (Internal quotation marks omitted.) *State* v. *Pierce*, 269 Conn. 442, 450, 849 A.2d 375 (2004).

[4] We then held, however, that the defendant had not shown that the assumed invalid substitution of the alternate juror was harmful under General Statutes (Rev. to 1991) § 54-82h (c). *State* v. *Williams*, supra, 231 Conn. 244–45. As the majority aptly notes, we subsequently overruled the harmless error portion of *Williams* in *State* v. *Murray*, 254 Conn. 472, 497–99, 757 A.2d 578 (2000), but we did not disturb its analysis under the state constitution. In *Murray*, we held that the violation of General Statutes (Rev. to 1999) § 54-82h (c), which did not permit substitution of a discharged alternate juror after deliberations had begun, was structural error not subject to harmless error analysis because, once discharged, the alternate simply ceased to be a juror. Id., 498. In this connection, moreover, I regard as unwise dictum the passage in *Murray* following that holding; see id., 498–99; in which we suggested that it would be impossible for the remaining jurors to disregard their prior deliberations even if instructed to do so, and I would decline to follow that suggestion.

[5] We stated: ''Specifically, the trial court instructed the jury as follows: 'Ladies and gentlemen of the jury, as I've told you earlier, we have lost one of the jurors . . . . We have contacted the alternate juror . . . and he is here and he's available to sit on this case.

'' 'In order to proceed further with deliberations with [the alternate juror], in other words, a jury of twelve, *it would be necessary that the jury, you eleven people, start your deliberations anew, start right from the beginning where you started Friday afternoon, late in the afternoon when the case was given to you for deliberation, when the exhibits were delivered in there.*

'' 'And it would be necessary for all of you individually to disregard anything that was said during the course of the discussions you had. And I don't want to get into what they were, but it's obvious, to some extent, they at least involved the selection of a foreman and a determination as to what parts of the transcript you wanted read back and maybe some other things were said, that you'd be required to erase that from your minds and start anew and disregard anything that anybody may have said or any ideas or opinions or thoughts any of you may have had based on the discussions.

'' 'In other words, *start fresh from the first moment you walked into the jury room. And only if all eleven of you can do that can twelve of you continue to deliberate because [the alternate juror] was not present during those first deliberations.*' '' (Emphasis in original.) *State* v. *Williams*, supra, 231 Conn. 240–41 n.8.