

### 27.3 Substitution of Alternates

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G.S. 15A-1215(a) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason at any time before final submission of the case to the jury. The exercise of this power rests in the sound discretion of the trial judge and is not reversible error absent a showing of an abuse of discretion. *State v. Nelson*, 298 N.C. 573 (1979). For example, no abuse of discretion was found where the trial judge discharged a juror and substituted an alternate juror before the beginning of deliberations where the original juror:

- Exhibited a “lack of attention.” *State v. Barbour*, 43 N.C. App. 38, 43 (1979).
- Telephoned defense counsel at home and persisted in discussing personal matters with him, including his marital status, before counsel was able to end the conversation. *State v. Price*, 301 N.C. 437 (1980).
- Could not attend the trial on Saturday where it was apparent the case would not be concluded on Friday and court was not going to be convened the following Monday and Tuesday due to religious holidays. *Nelson*, 298 N.C. 573.
- Failed, with explanation, to return to the courtroom after the lunch break and defendant did not object to the substitution. *State v. Carr*, 54 N.C. App. 309 (1981).
- Overheard something about the case that conceivably could have affected his impartiality. *State v. Harrington*, 335 N.C. 105 (1993).
- Was unable to obtain child care for her sick child. *State v. Davis*, 325 N.C. 607 (1989).

An alternate must be discharged on final submission of the case to the jury and cannot be substituted for a juror after the jury has begun its deliberations. *See* G.S. 15A-1215(a); *State v. Bunning*, 346 N.C. 253 (1997) (substitution of an alternate juror for an incapacitated juror after jury deliberations had started violated the defendant’s right to a trial by a jury of twelve as guaranteed by article I, section 24 of the N.C. Constitution because it resulted in a verdict rendered by eleven jurors plus two jurors who each participated partially).

If a juror is replaced by an alternate *after deliberations have begun*, trial counsel need not object to preserve the issue for appeal because “[a] trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand.” *Bunning*, 346 N.C. 253, 257. A violation of a defendant’s state constitutional right to have the verdict determined by twelve jurors constitutes error per se. *Id.*

G.S. 15A-2000(a)(2) authorizes a trial judge to replace a juror with an alternate juror if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason

before the beginning of deliberations at a capital sentencing hearing. As in noncapital cases, a trial judge's decision relating to the competency and service of a juror in a capital case is not reviewable on appeal absent a showing of abuse of discretion. *See State v. Tirado*, 358 N.C. 551 (2004) (trial judge did not abuse his discretion when, prior to the start of deliberations in the guilt-innocence phase, he discharged and replaced a juror who had pending felony warrants against her); *State v. Holden*, 321 N.C. 125 (1987) (no abuse of discretion found where trial judge replaced a juror with an alternate after learning before starting the sentencing phase of a capital case that the juror would not impose the death penalty under any circumstances).

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**Practice note:** If you are opposed to the trial judge's ruling on the substitution of an alternate, you should object and state your reasons on the record in order to ensure preservation of the issue for appellate purposes. Although G.S. 15A-1215(a) does not require the trial judge to make specific findings to support his or her decision, you should request that the judge place the reasons for the ruling on the record. *Cf. State v. Carr*, 54 N.C. App. 309 (1981) (finding that even though defendant did not object to the seating of an alternate juror, did not request additional findings, and did not move for mistrial, either then or at the conclusion of the trial, statements made by the trial judge were sufficient for appellate court to find no abuse of discretion).

You also may want to move for a mistrial if you believe that the error resulted "in substantial and irreparable prejudice to the defendant's case," G.S. 15A-1061, or if "[i]t is impossible for the trial to proceed in conformity with law" due to the trial judge's ruling. G.S. 15A-1063(1); *see also State v. Nelson*, 298 N.C. 573 (1979); *Carr*, 54 N.C. App. 309.

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