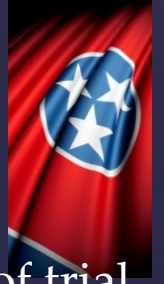
Jury Selection – Rural vs. Urban & a Few Lessons Learned the Hard Way

Origins of a Jury Trial



By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to *Magna Carta*.
The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials.

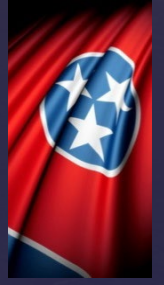
Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence.

It was during the Seventeenth Century that the jury emerged as a safeguard for the criminally accused. Thus, in the Eighteenth Century, Blackstone could commemorate the institution as part of a "strong and two-fold barrier…between the liberties of the people and the prerogative of the crown" because "the truth of every accusation…[must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion." The right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitution and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

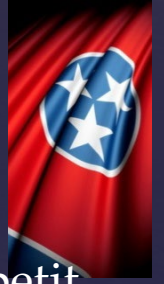
See: https://www.mow.uscourts.gov/jury/history_of_jury_duty

How do your jurors report for duty?

Or



Who can serve as Jurors?



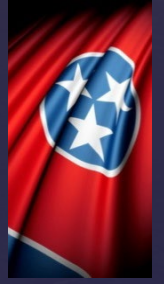
T.C.A. § 22-1-101 states "[i]t is policy of this state that all qualified citizens have an obligation to serve on petit juries or grand juries when summoned by the courts of this state, unless excused. Every person eighteen (18) years of age, being a citizen of the United States, and a resident of this state, and of the county in which the person may be summoned for jury service for a period of twelve (12) months next preceding the date of the summons, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this title.

T.C.A. § 22-1-102 states: [t]he following persons are incompetent to act as jurors:

1) Persons convicted of a felony or any other infamous offense in a court of competent jurisdiction; or

2) Persons convicted of perjury or subornation of perjury.

Initial Checklist



Checklist:

(1) is at least 18 years of age

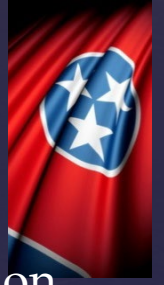
(2) is a United States citizen

(3) is a Tennessee resident

(4) has been a resident of the county for 12 months next preceding the date of the summons; and

(5) has not been convicted of perjury, subornation of perjury, a felony, or any other infamous offense.

Additional Excuses to Consider



A prospective juror may be excused due to a documented mental or physical condition rendering the person unfit for service. See T.C.A. § 22-1-103(a).

A prospective juror may be excused due to extreme physical or financial hardship. See T.C.A. § 22-1-103(b).

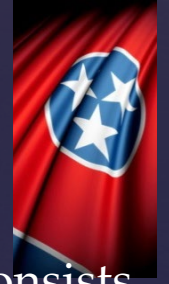
A prospective juror who is seventy-five (75) years of age or older may be excused upon a declaration that he or she is incapable of jury service due to mental or physical condition. See T.C.A. § 22-1-103(e).

The foregoing excuses are temporary, lasting for no more than twenty-four (24) months, unless the Court determines the reason for the excuse is permanent. See T.C.A. § 22-1-103(d).

Unless all parties consent, the law also excludes from service those who are interested in a case or are connected with a party within six degrees. See T.C.A. § 22-1-104.

A juror may be discharged from service for any other reasonable and proper cause in the court's judgment. A state of mind on the juror's part preventing that juror from being impartial shall constitute such cause. See T.C.A. § 22-1-105.

The Appropriate Number of Jurors

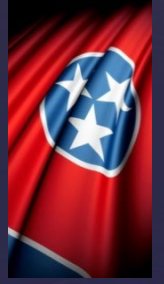


Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24., a “regular jury” in both civil and criminal cases consists of 12 persons.

In civil cases, the parties may agree to a jury of fewer than 12 jurors or agree that a verdict of the majority of jurors will be considered the verdict of the jury.

Tenn. R. Civ. P. 48 - The parties may stipulate that the jury shall consist of any number less than that provided by law, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Less than 12? Alternates?

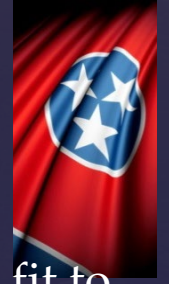


Be aware of *State v. Bobo*, 814 S.W.2d 353, 359 (Tenn. 1991).

In Bobo, the trial court discharged the alternate jurors after the close of all the proof. Approximately an hour after the jury began to deliberate, the trial court discovered that one of the jurors, Selena Coleman, had told the other empaneled jurors that she believed that Johnson, a co-defendant who was being jointly tried with Bobo, had killed her twelve-year-old cousin ten years before. When the remaining jurors were individually questioned about Coleman's statement, they all stated that they could remain impartial and would not consider Coleman's statement during their deliberations. At that point, Johnson's attorney moved for a mistrial, and the trial court overruled the motion, excused Coleman, and replaced her with one of the two alternates, who had been discharged for approximately an hour and a half and who had already returned to work. After determining that the alternate juror had not been prejudiced by anything occurring after her discharge, the court reminded her of her oath and reseated her on the jury, and the jury continued its deliberations. Prior to reseating the alternate juror, the trial court did not recharge the jury and did not instruct the jury to begin their deliberations from the beginning. After one hour and twenty minutes, the jury returned its verdict finding both Johnson and Bobo guilty of second degree murder.

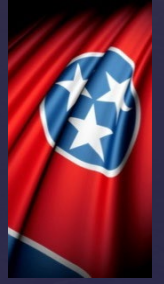
In Bobo, the Tennessee Supreme Court expressed concern because thirteen jurors had participated in the deliberation process but only twelve jurors had decided the guilt or innocence of the defendants. The court was also concerned that it had no assurances that the alternate juror, who had been reseated after deliberations had begun, had actively participated in all of the deliberations. Accordingly, the court held that "the substitution of jurors after final submission of the case, coupled with the trial court's failure to instruct the jury to begin deliberations anew, violated the defendant's right to a trial by jury under Article I, § 6 of the Tennessee Constitution. It then held that reversal was required in this case.

Bobo Cont.



"[I]t is the prerogative of every criminal defendant to waive his right to trial by jury. If the defendant sees fit to waive this right, it is permissible provided the waiver is made in accordance with the safeguards provided by the constitution and implementing statutes or rules of criminal procedure. *State v. Durso*, 645 S.W.2d 753, 758 (Tenn.Crim.App.1983). If the defendants could waive the jury entirely, it stands to reason that they could have consented to a trial by the remaining eleven jurors. But, Rule 23 of the Tennessee Rules of Criminal Procedure requires that waivers of trial by jury must be made in writing and with the approval of the court and the consent of the district attorney general. Without formal compliance with Rule 23, the record should clearly show a voluntary relinquishment of the rights to be tried by a common law jury. We cannot find that voluntary relinquishment on the record before us."

How Long Can Jurors Postpone Service?

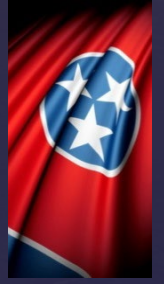


A prospective juror may seek a postponement for no longer than twelve (12) months. T.C.A. § 22-2-315(a).

A second postponement for no longer than twelve (12) months requires a showing of an extraordinary event, such as a death in the prospective juror's family, sudden grave illness, or a natural disaster, or national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted.

Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the juror will appear for jury service within twelve (12) months of the postponement and on which date the court will be in session.

The Jury Pool



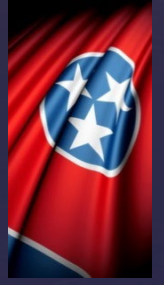
T.C.A. § 22-2-301 provides that [t]he jury coordinator in each county shall select names of prospective jurors to serve in the courts of that county by random automated means, without opportunity for the intervention of any human agency to select a particular name and in a manner that causes no prejudice to any person.

The names, which shall constitute the jury list, shall be compiled from licensed driver records or lists, tax records or other available and reliable sources that are so tabulated and arranged that names can be selected by automated means.

The jury coordinator may utilize a single source or any combination of sources. The jury coordinator is prohibited from using the permanent voter registration records as a source to compile the jury list.

These names shall be selected by random, automated means unless this technology is unavailable, in which case the county may manually select the names. See T.C.A. § 22-2-302. If the names are selected manually, the jury coordinator selects the number of names designated by the presiding judge. The presiding judge may delegate this responsibility, and any other responsibilities related to the jury selection process, to another chancellor or judge who is authorized to conduct jury trials in the county at issue. Tenn. Code Ann. § 22-2-316.

How do your Clerks notify the Jury Pool?



Service of the original jury summons is address in T.C.A. §22-2-307, which states:

(a) The sheriff shall summon jurors by first class mail sent to the regular address of each member of the jury pool, giving notice of such person's selection for jury duty. The summons shall be mailed to the regular address at least ten (10) days prior to the date fixed for such person's appearance for jury service.

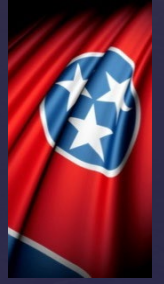
(b) Notwithstanding subsection (a), the sheriff may summon jurors by personal service.

(c) The jury coordinator shall provide sufficient information regarding the members of the jury pool to enable the sheriff to summon the jurors pursuant to this section.

(d) Notwithstanding subsections (a)-(c), the jury coordinator may, at the coordinator's discretion, summon the jurors by first class mail without the assistance of the sheriff.

Most Clerk's send out an introductory letter with the summons. The letter generally provides additional instructions and dates for reporting. Also, it is a good practice to utilize technology to communicate future dates / cancellations with the jury. Most districts now use text messaging programs to communicate with the jury. Also, juror "call-in numbers" with updated voice recordings are a good method to keep jurors informed. Try to be prompt with your messages!

What are we to do with the “no shows”?



What are we supposed to do if prospective jurors fail to appear?

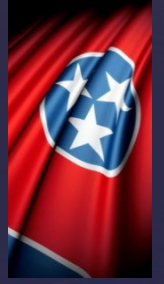
T.C.A. § 22-2-309 provides the following:

“(a) All persons summoned as members of the jury pool shall attend at the time and place designated in the summons, or otherwise respond as specified in the summons, unless excused pursuant to § 22-1-103, granted a postponement pursuant to § 22-2-315, or otherwise discharged in a manner authorized by this title or other binding legal authority.

(b) If a person who has been summoned but not excused or discharged pursuant to subsection (a) fails to appear for service or otherwise respond as directed, a show cause order shall issue and be served upon the person, requiring the person to appear at a date certain and show cause why the person should not be held in civil contempt of court for the person's failure to appear.

(c) Upon the appearance of any person served with a show cause order, the person may make the person’s excuse known. If the person was summoned and if the excuse is sufficient in the opinion of a judge of the court for which the individual was called to jury service, the person shall be excused; but the person shall pay the cost incident to issuance and service of the show cause order, unless waived by the judge. If the excuse is insufficient, the person shall be adjudged in civil contempt of court and shall be assessed a civil penalty of not more than five hundred dollars ($500) and the costs of the show cause order. The court shall suspend payment of that portion of the civil penalty in excess of fifty dollars ($50.00) upon the condition that the person complete the jury service term for which the person was summoned. The civil penalty authorized by this subsection (c) is remedial in nature.

Jury Composition: A Fair Cross-Section

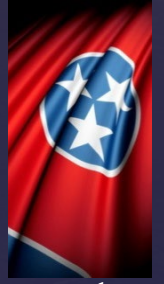


"The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." Interpreting this constitutional provision, the United States Supreme Court has held that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community" and "that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 527–28, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

The Court concluded that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana*, 419 U.S. at 538, 95 S.Ct. 692.

However, the Court expressly declared that defendants are not entitled to a jury of any particular composition because the fair cross-section requirement does not impose a requirement that the jury actually chosen mirror the community or reflect the various distinctive groups in the population. *Taylor v. Louisiana*, 419 U.S. at 538, 95 S.Ct. 692; 3 David S. Rudstein et al., Criminal Constitutional Law § 14.07[3], at 14–67 (2009) ("Rudstein, Criminal Constitutional Law ").

Violation of a Fair Cross-Section



For a defendant to establish a prima facie case of a violation of the fair cross-section requirement, he or she must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community;
(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

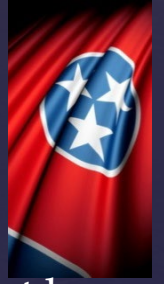
See *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

Accordingly, "a defendant raising a cross-section objection can prevail without showing purposeful discrimination." 6 LaFave, Criminal Procedure § 22.2(d), at 59. If the defendant establishes "a prima facie case of a fair cross-section violation, the burden shifts to the government to rebut that case." Rudstein, Criminal Constitutional Law § 14.07[3], at 14–78.

See *State v. Hester*, 324 S.W.3d 1, 36-47 (Tenn. 2010) (discussing multiple jury selection issues, including a fair cross-section issue).

It is not necessary for the defendant to be a member of the class (a particular gender or race, for instance) to have standing to object to the exclusion of that class. *Taylor*, 419 U.S. at 526.

Procedures to Select a Jury



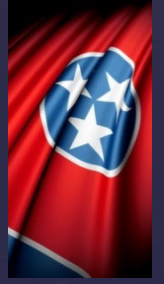
Trial courts should consult **Tenn. R. Civ. P. 47** and **Tenn. R. Crim. P. 24** regarding the detailed procedures that must be followed during the jury selection process. Failure to comply with the rules' requirements may result in a new trial.

Tenn. R. Civ. P. 47 - CIVIL

47.01 - The court shall permit the parties or their attorneys to conduct the examination. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case. The court, upon motion of a party or on its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

47.02 - The court may direct prior to the start of jury selection that one or more jurors in addition to the regular jury of twelve persons be called and impaneled. The additional 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. If one or more additional jurors are called, each party is entitled to one peremptory challenge for each such additional juror, up to the maximum provided by law. Such additional peremptory challenges may be used against any regular or additional juror. The trial court in its discretion may use either of the following methods to select and impanel additional jurors:

Procedures to Select a Jury Cont.



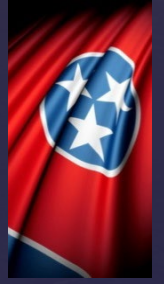
Tenn. R. Civ. P. 47.02 cont.

(1) During the jury selection or the trial of the case, there shall be no distinction made by the court as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the final jury shall be discharged when that jury retires to consider its verdict.

(2) Following the selection of the jury of twelve regular jurors or such other number as the law provides, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace regular jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

Note: Which method do you utilize? I use the first method (single entity), as it seems to keep ALL jurors engaged throughout the entire trial.

Procedures to Select a Jury Cont.

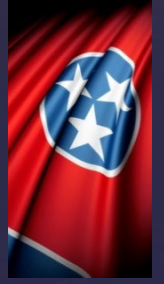


Tenn. R. Civ. P. 47.03

47.03 - After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve (or more if additional jurors are seated) who has been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve (or more) in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge, the name of any juror in the group of twelve (or more) that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

Note: Always make the Peremptory Challenge Forms an Exhibit (1 and 2) (or as a part of the record) but obviously do not send them back to the jury room.

Procedures to Select a Jury – Rule 24



Tenn. R. Crim. P. 24

(1) By Court. The court shall:

(A) cause the prospective jurors to swear or affirm to answer truthfully the questions they will be asked during the selection process;

(B) identify the parties and their counsel; and

(C) briefly outline the nature of the case.

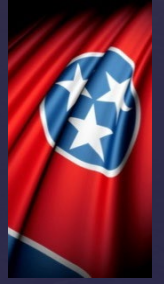
(2) By Counsel. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case.

(b) Questioning Potential Jurors.

(1) Questioning Jurors by Court and Counsel. The court may ask potential jurors appropriate questions regarding their qualifications to serve as jurors in the case. It shall permit the parties to ask questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges.

(2) Questioning Outside Presence of Other Jurors. On motion of a party or its own initiative, the court may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

Tenn. R. Crim. P. 24 Cont.



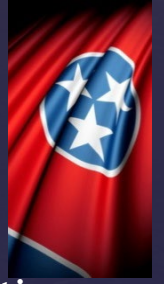
(c) Challenges for Cause.

(1) Procedures. After examination of any juror, the judge shall excuse that juror from the trial of the case if the court is of the opinion that there are grounds for challenge for cause. After the court has tentatively determined that the jury meets the prescribed qualifications, counsel may conduct further examination and, alternately, may exercise challenges for cause.

(2) Grounds. Any party may challenge a prospective juror for cause if:

(A) Cause Provided by Law. There exists any ground for challenge for cause provided by law;
(B) Exposure to Information. The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

Tenn. R. Crim. P. 24 Cont.



(d) Exercising Peremptory Challenge. After the court conducts its initial examination and seats a tentative group of jurors not excluded for cause, the following procedure shall be followed until a full jury has been selected from those jurors and accepted by counsel:

(1) At each round of peremptory challenges, counsel shall submit simultaneously to the court either a blank sheet of paper or a sheet of paper challenging one or more jurors in the group of the first twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) jurors who have been seated. Neither party shall make known the fact that the party has not challenged a juror.

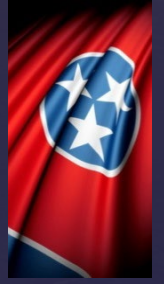
(2) Replacement jurors will be seated in the panel of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) in the order of their selection.

(3) If necessary, additional replacement jurors will be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, the name of any juror in the group of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) that counsel elects to challenge peremptorily. Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.

(4) Alternate jurors are selected in the same manner, unless the single entity process of Rule 24(f)(2)(A) is used.

(5) The trial judge shall keep a list of those challenged. If the same juror is challenged by both parties, each party is charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

Number of Peremptory Challenges – Crim.



Tenn. R. Crim. P. 24(d)

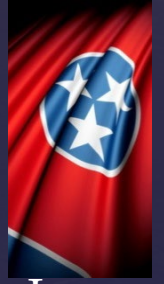
(1) Death Penalty. If the offense charged is punishable by death, each defendant is entitled to **fifteen (15)** peremptory challenges and the state is entitled to fifteen (15) peremptory challenges for each defendant.

(2) Imprisonment More Than Year. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to **eight (8)** peremptory challenges and the state is entitled to **eight (8)** peremptory challenges for each defendant.

(3) Imprisonment Less Than Year or Fine. If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to **three (3)** peremptory challenges for each defendant.

(4) Additional Jurors. For each additional juror selected pursuant to Rule 24(f), each side is entitled to **one (1)** peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror.

Number of Peremptory Challenges – Cont.



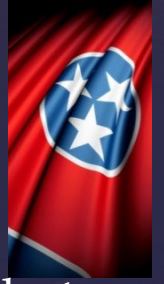
In a criminal case, the number of peremptory challenges depends on the nature of the charged offense. In capital murder cases, each defendant is entitled to 15 challenges, and the state is entitled to 15 challenges per defendant.

If the offense is punishable by imprisonment for more than one year, each defendant is entitled to eight challenges, and the state is entitled to eight challenges per defendant.

Finally, for an offense which is punishable by imprisonment for less than one year and/or by fine, "each side is entitled to three peremptory challenges for each defendant." Tenn. R. Crim. P. 24. Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24, the selection of alternate jurors involves peremptory challenges in addition to those noted above.

Each side is given one peremptory challenge for each additional juror. Since under this model both regular and additional jurors are considered as part of a single jury, peremptory challenges may be used against any such juror, a process commonly known as "backstriking." This procedure provides counsel with considerable flexibility in the exercise of peremptory challenges.

Method of Impaneling – Rule 24

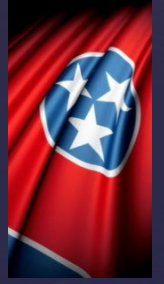


(2) Methods of Impaneling Additional Jurors. The trial court may use either of the following methods to select and impanel additional jurors:

(A) Single Entity. During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.

(B) Separate Entities. Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

What Method do you utilize?



My COVID / Post COVID Method – Single Entity

1. Select Number of Seats available and physically number the seats in the Courtroom. Create corresponding note cards to be randomly drawn by the jurors while checking in for service.

2. Jurors draw a number and sit at the corresponding seat number.

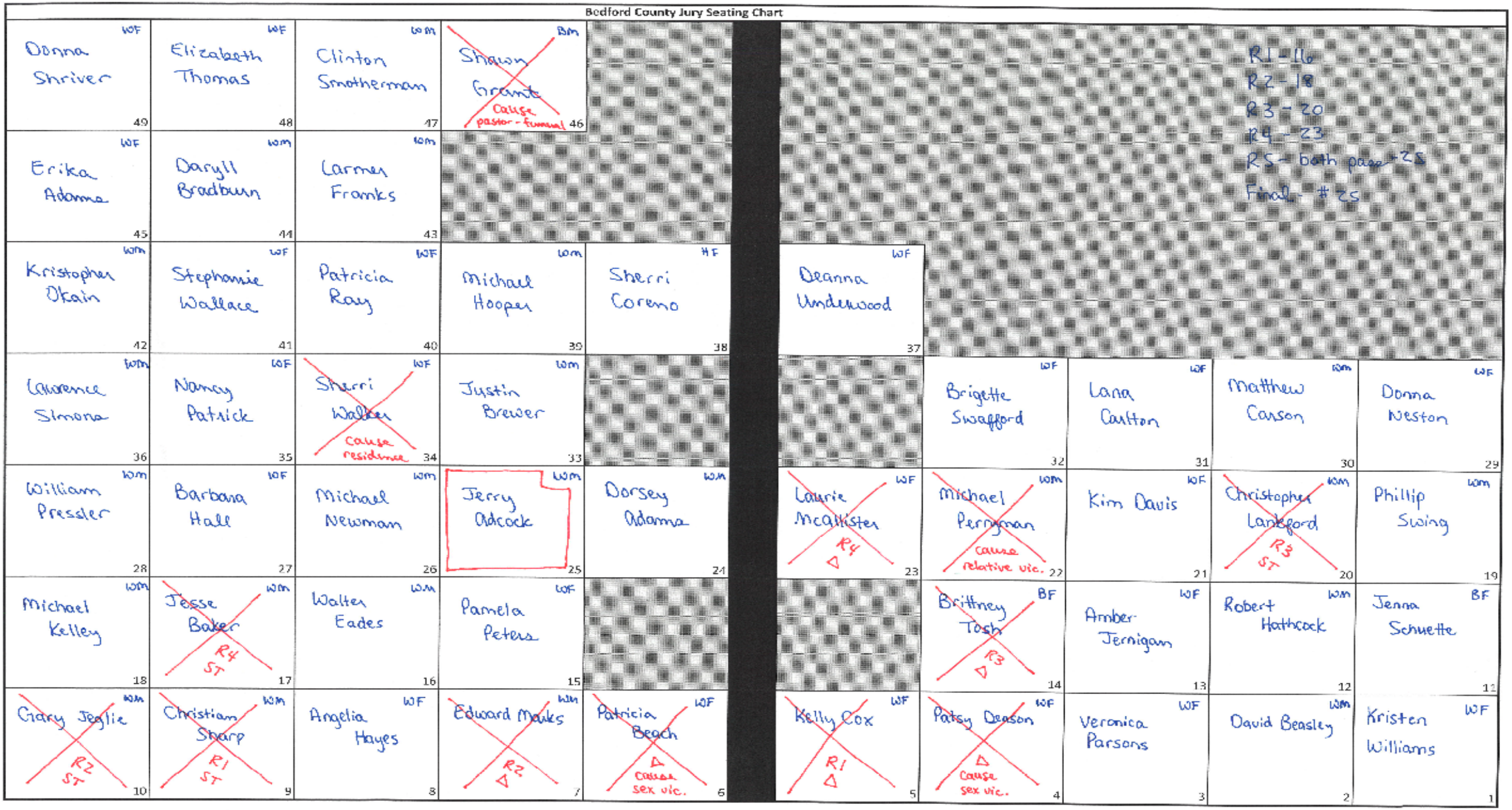
3. Their name is recorded on a jury grid that corresponds with the layout of the Courtroom.

4. The Court and Counsel questions the entirety of the jury pool.

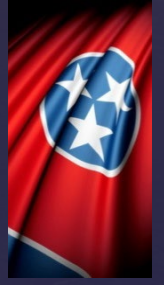
5. After challenges for cause, peremptory challenges begin. The Court announces between each round which juror number counsel will "be striking through." (For example, if I am keeping 14, then during round 1, counsel will be striking through Juror No. 14 (assuming no previously granted challenges for cause in the first 14).

6. Jurors do not "move seats", they simply remain in their assigned seat.

7. After challenges are exhausted or both pass on the same round, have counsel approach and check for consistency before announcing the final jury.


Bedford County Jury Seating Chart
WF Donna Shriver 49
WF Elizabeth Thomas 48
WM Clinton Smotherman 47
BM Shawn Grante Cause pastor - funeral 46
WF Erika Adams 45
WM Daryll Bradburn 44
WM Larmer Franks 43
WM Kristopher Okain 42
WF Stephanie Wallace 41
WF Patricia Ray 40
WM Michael Hooper 39
HF Sherri Coreno 38
WF Deanna Underwood 37
WM Lawrence Simons 36
WF Nancy Patrick 35
WF Sherri Walker Cause residence 34
WM Justin Brewer 33
WF Brigette Swafford 32
WF Lana Caulton 31
WM Matthew Carson 30
WF Donna Weston 29
WM William Pressler 28
WF Barbara Hall 27
WM Michael Newman 26
WM Jerry Adcock 25
WM Dorsey Adams 24
WF Laurie McAllister R4 23
WM Michael Perryman Cause relative vic. 22
WF Kim Davis 21
WM Christopher Lankford R3 ST 20
WM Phillip Swing 19
WM Michael Kelley 18
WM Jesse Baker R4 ST 17
WM Walter Eades 16
WF Pamela Peters 15
BF Brittney Tosh R3 14
WF Amber Jernigan 13
WM Robert Hathcock 12
BF Jenna Schuette 11
WM Gary Jeglie R2 ST 10
WM Christian Sharp R1 ST 9
WF Angelia Hayes 8
WM Edward Marks R2 7
WF Patricia Beach Cause sex vic. 6
WF Kelly Cox R1 5
WF Patsy Deason Cause sex vic. 4
WF Veronica Parsons 3
WM David Beasley 2
WF Kristen Williams 1
R1 - 16
R2 - 18
R3 - 20
R4 - 23
R5 - both pass + 25
Final - # 25

Don’t Forget Juror Admonitions – Rule 24



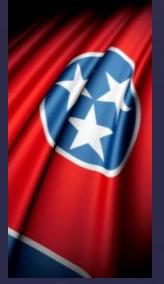
Tenn. R. Crim. P. 24(g)

(g) Admonitions. The court shall give the prospective jurors appropriate admonitions regarding their conduct during the selection process. After jurors are sworn, the court shall also give them appropriate admonitions regarding their conduct during the case. In both situations these shall include admonitions:

(1) not to communicate with other jurors or anyone else regarding any subject connected with the trial;
(2) not to form or express any opinion about the case until it is finally submitted to the jury;
(3) to report promptly to the court:
    (A) any incident involving an attempt by any person improperly to influence any jury member; or
    (B) a juror’s violation of any of the court's admonitions;
(4) not to read, hear, or view any news reports concerning the case; and
(5) to decide the case solely on the evidence introduced in the trial.

The best practice is to give these admonitions each time before the jury leaves the courtroom. Also, it is a good practice to ask them if they were able to keep the admonitions when they return to the courtroom.

Number of Jurors in a Civil Case



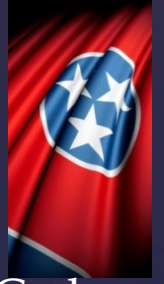
See *Tenn.R.Civ.P. 47.03*

This rule must be read in conjunction with Tenn. Code Ann. § 22-3-104, which places a limit on the total number of peremptory challenges in a civil case. Under this statute, each side in a civil case, irrespective of the number of parties on that side, is limited to a maximum of eight (8) peremptory challenges. That maximum number is not changed by additional peremptory challenges for additional jurors.

For example, under Tenn. Code Ann. § 22-3-104, a civil plaintiff is entitled to four (4) peremptory challenges. If an additional juror is seated, that plaintiff is now entitled to five (5) peremptory challenges (four under Tenn. Code Ann. § 22-3-104 and one for the additional juror). If there are two plaintiffs, under the statute each is entitled to four peremptory challenges. If the court seats additional jurors, no additional peremptory challenges are given to the two plaintiffs since the statutory maximum of eight peremptory challenges per side has been reached.

T.C.A. § 22-3-104 provides that the trial court shall, in its discretion, divide the aggregate number of challenges between the parties on the same side, which shall not exceed eight (8) challenges to the side, regardless of the number of parties.

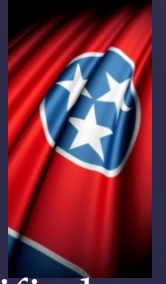
Examination of Potential Jurors



Parties in civil and criminal cases have a right to examine prospective jurors, called "voir dire." Tenn. Code Ann.§ 22-3-101; Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24. The court may also question jurors. At or near the beginning of voir dire, counsel are allowed to introduce themselves and to make brief, non-argumentative remarks about the general nature of the case. Tenn. R. Civ. P. 47.01. Voir dire is used to determine if potential jurors satisfy the statutory requirements to serve and can give the parties a fair and impartial.

The court may allow individual voir dire during the examination process, and this method is frequently used to question prospective jurors regarding the extent of their knowledge of the facts of a high-publicity case as well as their views regarding the death penalty in a capital murder case. Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24; *State v. Reid*, 91 S.W.3d 247, 291-92 (Tenn. 2002) (appendix). However, the court is not required to permit individual voir dire. The method and scope of voir dire are within a court's discretion, and the court will not be reversed absent an abuse of that discretion. See *Reid*, 91 S.W.3d at 291.

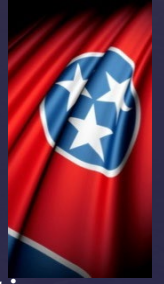
Challenges for Cause



After examination, the trial judge has wide discretion in both civil and criminal cases to excuse unqualified jurors. If not excused by the trial judge, either party to an action may challenge for cause any potential juror who is unqualified, incompetent, or otherwise statutorily excluded from service. See T.C.A. §§ 22-1-101, -102,-104, -105; 22-3-102, -103. Either party may challenge for cause any juror who has completed jury service within the last twenty-four (24) months or who has an adverse interest in a similar suit involving like questions of facts or involving the same parties. T.C.A. 22-3-102, -103.

The party challenging a juror must ask the trial judge to excuse the juror for cause, specifying the reason for the challenge. See, *Dukes v. State*, 578 S.W.2d 659, 664 (Tenn. Crim. App. 1978). The party opposing such a challenge may be allowed upon request to try to rehabilitate the juror before the trial judge rules on the challenge. See, *State v. Thomas*, 158 S.W.3d 361, 379 (Tenn. 2005). The trial judge has wide discretion in ruling on a challenge for cause. See, *State v. Howell*, 868 S.W.2d, 238, 248 (Tenn. 1993). But a trial judge's error in this ruling is harmless if the jury was fair and impartial. *Id*.

Challenges for Cause Cont.



In addition, Tenn. R. Crim. P. 24 provides that in a criminal case a juror may be challenged for cause if the "prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror."

As the Tennessee Supreme Court has found, mere exposure to information regarding a case is not adequate to require the juror's removal: See *State v. Mann*:

"Implicit in Rule 24 is the recognition that jurors do not live in a vacuum. Because certain cases are by their very nature apt to generate publicity, it is not inconceivable that some jurors will have formed an impression or opinion concerning the case. In addressing this problem, the United States Supreme Court has observed:

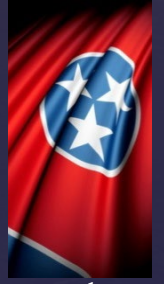
It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have fonned some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Accordingly, jurors may sit on a case, even if they have formed an opinion on the merits of the case, if they are able to set that opinion aside and render a verdict based upon the evidence presented in court.

Accordingly, in interpreting Rule 24, this court has held that prospective jurors who have been exposed to information which will be developed at trial are acceptable, if the court believes their claims of impartiality. With respect to jurors who have been exposed to information which is inadmissible at trial because of its prejudicial effect, Rule 24 implicitly places the burden upon the trial court to assess the level of prejudice apart from the juror[s'] statements. In either case, the determination of impartiality remains a matter within the trial court's discretion. In other words, [a] trial court's findings of juror impartiality may be overturned only for manifest error."

See *State v. Mann*, 959 S.W.2d 503, 531-32 (Tenn. 1997) (internal quotations and citations omitted).

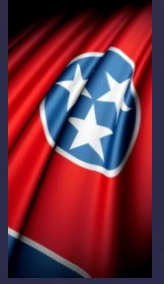
Batson Challenges



In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court concluded that a defendant is not required to establish a long-standing pattern of a prosecutor's discriminatory use of peremptory challenges in order to establish an equal protection violation. Although the propriety of peremptory challenges must be evaluated on a case-by-case basis and the law continues to develop in this area, *Batson* and its progeny provide extensive guidance regarding the manner in which trial courts must evaluate allegations of the discriminatory striking of jurors.

A *Batson* objection can be raised by any party in a civil or criminal case, and the objecting party need not be a member of the suspect class to have standing. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991).

Batson Challenges Cont.



The parties bear the following burdens when this issue is raised:

Batson Three-Step Test:

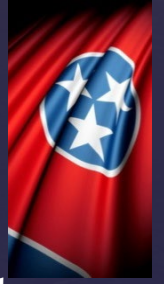
(1) The objecting party must establish a prima facie case of purposeful discrimination;

(2) If the Court concludes a prima facie case has been established, the burden then shifts to the opposing party, which must offer a neutral explanation for the challenge(s).

This explanation must be a clear and reasonably specific account of the opposing party's legitimate reasons for exercising the challenge, but need not be persuasive, or even plausible. The Court may deem the reason offered to be race-neutral unless discriminatory intent is inherent in the opposing party's explanation. However, the Court cannot simply accept a proffered race-neutral reason at face value but must examine the State's challenges in context to ensure that the reason is not merely pretextual.

(3) If the opposing party offers a race-neutral explanation for its challenge(s), the court must determine whether, considering all of the circumstances, the objecting party has established purposeful discrimination. See *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007); *State v. Hugueley*, 185 S.W.3d 356 (Tenn. 2006) (discussing the parties' burdens, the types of proof that are adequate to satisfy those burdens, and the comprehensive findings that must be made by the trial judge).

Batson Challenges Cont.



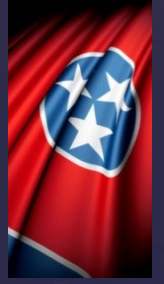
Remember the Court must carefully articulate specific reasons for each finding on the record, i.e. whether a prima facie case has been established; whether neutral explanation has been given; and whether the totality of the circumstances support a finding of purposeful discrimination.

A *Batson* challenge can also be based on a juror's gender. The analysis is the same.

Also, the race of the objecting party does not matter in raising a *Batson* challenge. In other words, a defendant may race a *Batson* challenge even if the defendant is a different race or gender than the juror at issue.

<u>Try to anticipate these challenges as they come, and craft a plan of action to address these challenges, particularly to ensure that the challenged juror does not leave the building.</u>

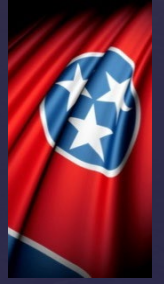
Preventing Juror Knowledge that Defendant is in Custody



Be contentious of ensuring that the jury does not know the Defendant is in custody. Create a process / policy to ensure your court personnel understands the importance of this fact and that measures are taken to ensure the protection of this fact.

Also, be sure to check ahead of trial with defense counsel to ensure that "plain clothes" are available for the Defendant's use.

Preventing Juror Knowledge of Sentencing



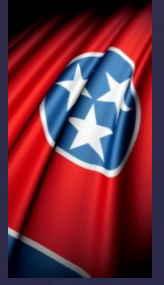
With the exception of capital crimes, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

See T.C.A. § 40-35-201

(a) In all contested criminal cases, the issue of guilt or innocence is submitted to the trier of fact for a verdict on that issue alone. If the defendant is found or pleads guilty, sentence shall be set in accordance with this chapter in a separate sentencing hearing. Nothing in this chapter shall be construed to deprive a defendant of a right to a jury trial as to the defendant's guilt or innocence pursuant to Rule 23 of the Tennessee Rules of Criminal Procedure and appropriate provisions of the United States or Tennessee constitutions.

(b) In all contested criminal cases, except for capital crimes that are governed by the procedures contained in §§ 39-13-204 and 39-13-205, and as necessary to comply with the Tennessee Constitution, article VI, § 14 and § 40-35-301, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses…

The dreaded "Deadlock" jury – What to do?



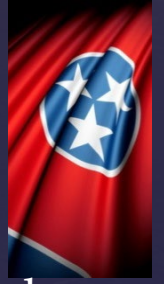
Tenn. R. Crim. P. 31 provides the process to utilize:

First, the jury's verdict shall be unanimous.

Second, the jury shall return the verdict to the judge in open court. Make sure to identify the jury foreperson on the record, and place on the record that he/she has handed you the appropriate verdict form(s) in open court.

If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. If the jury cannot agree on all defendants, the state may try again any defendant on whom the jury was not in agreement.

“Deadlock” jury Cont.



Procedures When No Unanimous Verdict. If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

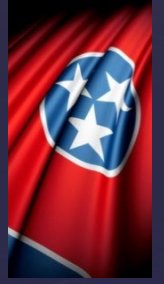
(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

“Deadlock” Jury Cont.



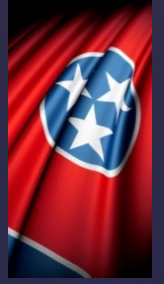
(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

Poll of Jury. After a verdict is returned but before the verdict is recorded, the court shall – on a party’s request or on the court’s own initiative – poll the jurors individually. If the poll indicates that there is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

Remember, the judge must never allow the jurors to give the numbers in their division.

Juror Questions during Deliberation

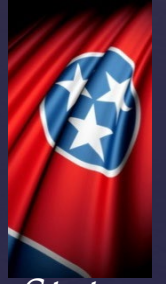


State v. Sparrow, 2013 WL 1089098 (M2012–00532–CCA–R3–CD)(March 14, 2013).

During deliberations, the jury sent the trial court the following question: "should the lesser included second-degree murder be read as second-degree felony murder?" The trial court said that it would inform the jury that the original charge was correct and would not give further instruction. The court said that it would not bring the jury into the courtroom to answer the question. Defense counsel said that he thought the jury should be brought into the courtroom because it would be inappropriate for the judge to speak with the jury in the deliberation room without the parties being present. The court responded that it would have the jury foreperson come into the courtroom and have him relay the answer to the rest of the jury.

The appellant does not contend that the trial court's answer to the jury question was incorrect. However, he complains about the trial court's method of answering the question. The appellant contends that the entire jury should have been brought into the courtroom for the question to be answered. The State contends that the appellant has waived this issue by failing to contemporaneously object. See Tenn. R.App. P. 36(a). Our review of the record reveals that although the appellant expressed displeasure at the idea of the trial court going into the jury room to answer the question, he raised no objection when the trial court brought the jury foreman into the courtroom to receive the answer to the question.

Juror Questions during Deliberation Cont.

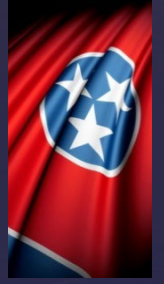


We note that a trial judge has the authority to give supplemental instructions in response to jury questions. *State v. Forbes*, 918 S.W.2d 431, 451 (Tenn.Crim.App.1995). This court has previously stated that when giving a supplemental instruction,

"the appropriate course of action for the trial court would have been to bring the jurors back into open court, read the supplemental instruction ... along with a supplemental instruction emphasizing that the jury should not place undue emphasis on the supplemental instructions, and then allow the jury to resume its deliberations."

State v. Bowers, 77 S.W.3d 776, 791 (Tenn.Crim.App.2001); see also *Spencer v. A–1 Crane Serv.*, 880 S.W.2d 938, 941 (Tenn.1994); *State v. Mays*, 677 S.W.2d 476, 479 (Tenn.Crim.App.1984).

Ex Parte Communications with Jurors



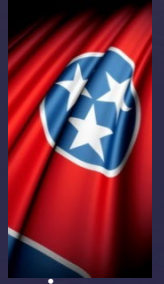
State v. Sparrow, 2013 WL 1089098 (M2012–00532–CCA–R3–CD)(March 14, 2013).

During the Motion for New Trial hearing, defense counsel said that "there was some indication that the Court had talked to the jury out of the presence in—I think that what the Court was doing was talking, saying hello, ... goodbye, ... that sort of thing, but we allege that any communication outside the presence of the jury is potential error." In response, the trial court stated:

"I'm sure I did speak to the jury. Whenever juries come back on the next morning of a prolonged trial I take the opportunity to go back to the jury room, welcome them back, ... make sure that they're all here, not that I don't trust our law clerks to appropriately count, but I make sure that they're all here. Make sure that there are no concerns, family emergencies or otherwise. The Court considers that jury an administrative function of the Court and does not believe it to be inappropriate."

The record does not specifically reflect what, if anything, the trial court said to the jury. Even the appellant alleges that, at most, the court exchanged pleasantries with the jury.

Ex Parte communications with Jurors Cont.



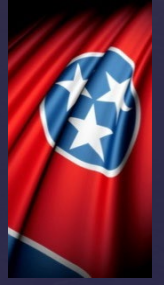
Nevertheless, this court has previously stated that "[g]iven the importance of judicial impartiality and fairness in appearance as well as in fact, it is generally considered improper for the trial judge to communicate with jurors off the record and outside the presence of counsel." *State v. Tune*, 872 S.W.2d 922, 928 (Tenn.Crim.App.1993). Therefore, "[w]hen such ex parte communications relate to an aspect of the trial, the trial judge should usually disclose the communication to counsel for all parties." *Id*. Regardless, such instances are subject to harmless error analysis. *Id*.

Generally, ex parte communications by the trial court and the jury are subject to reversal "where a timely complaining party shows specific prejudice, or where, owing to the nature of the ex parte communication, the reviewing court is unable to determine whether the action was actually harmless." *Id*. (citing *Guy v. Vieth*, 754 S.W.2d 601, 605 (Tenn.1988)). To this end, our supreme court has stated:

"We recognize that there may be times when administrative communications between judge and jury may properly transpire in the absence of counsel, so long as these communications do not contain supplemental instructions relating to the case and are clearly incapable of prejudicing the rights of the parties. In this general category would be communications relating to the jurors' welfare, comforts and physical needs. Such communications must not directly or indirectly refer to the specifics of the case, must be collateral to the issues under consideration, and must not be capable of affecting the deliberative process in any manner."

Guy, 754 S.W.2d at 605 (quoting *Truscott v. Chaplin*, 403 F.2d 644, 645 (3d Cir.1968)).

How late is too late for Jury to deliberate?



State v. Susan Jo Walls, 537 S.W.3d 892 (Tenn. 2017).

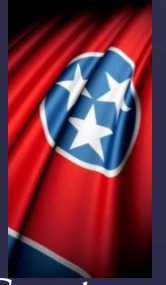
The trial of this matter began on Monday, May 5, 2014. The trial continued through the week until Thursday afternoon, May 8. After closing arguments, the trial court stood in recess for approximately two hours when the defendant suffered a medical emergency. When the proceedings resumed, the trial court instructed the jury around 6:30 p.m., and the jury retired to deliberate. Multiple interactions occurred among the trial judge, the attorneys, and the jury during this time. The jury returned a verdict at 1:05 a.m. the following morning.

To settle this area of law, we now conclude that the correct legal standard for reviewing whether a trial court errs in conducting late-night proceedings is abuse of discretion. "A trial court abuses its discretion when it applies an incorrect legal standard, reaches a conclusion that is not logical, bases its decision on a clearly erroneous assessment of the evidence, or uses reasoning that causes an injustice to the complaining party." *State v. Davidson*, 509 S.W.3d 156, 193 (Tenn. 2016) (citing *State v. Davis*, 466 S.W.3d 49, 61 (Tenn. 2015)); see also *State v. Smith*, 492 S.W.3d 224, 243 (Tenn. 2016).

We conclude that the defendant has waived appellate review of this issue and that plain error review is not applicable to grant her relief from her convictions. Accordingly, we reverse the judgments of the Court of Criminal Appeals. We further conclude that the appropriate standard of appellate review of late-night court proceedings is abuse of discretion.

Lesson: Get the dialog between the Court and the Jurors (in court) on the record…update the record as time passes.

Recall of Jury after having been discharged

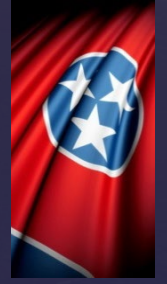


Be mindful that once a jury has returned a verdict, or the jurors have separated and passed from the control of the Court, the jury cannot be reassembled to act on the case for any purpose.

State v. Nash - DUI 4th - failure to move to next phase, and jury was dismissed after guilty phase.

"In conclusion, we reaffirm what the *Clark* Court stated long ago: once a jury has returned a complete verdict, or the jurors have separated and passed from the control of the court, the jury cannot be reassembled to act on the case for any purpose. See 97 S.W.2d at 646. This rule was meant to protect the fundamental guaranty of a fair trial by requiring that jurors remain shielded from improper influences, which can only be accomplished so long as they are under the control of the court or have been properly admonished not to discuss the case. In a bifurcated trial, a jury is not discharged, nor does it pass beyond the trial court's control at the conclusion of the guilt phase of the trial, so long as the jury has been properly admonished not to discuss or read anything about the case and instructed that the jurors remain as jurors until the completion of all stages of the trial. In this case, however, the jury was discharged as if it had completed its duties, and there was no such admonishment. Accordingly, the danger of outside influence was such that it could not be recalled. We conclude that the appropriate remedy is to remand this case to the trial court for the selection of a new jury and a new trial solely on the issue of whether Mr. Nash's conviction is his first, second, third, or fourth DUI offense. The new jury shall also assess the mandatory fine in this case, as the previous jury did not do so."

State v. Nash, 294 S.W.3d 541, 553 (Tenn. 2009)



Questions? Comments?