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ADVANCE SHEET HEADNOTE
July 1, 2024

2024 CO 56

No. 22SC712, *Castro v. People*—Mid-Deliberations Juror Substitution—Alternate Juror—Standard of Reversal—Presumption of Prejudice—§ 16-10-105, C.R.S. (2023)—*People v. Boulies*, 690 P.2d 1253 (Colo. 1984)—*People v. Burnette*, 775 P.2d 583 (Colo. 1989)—*United States v. Olano*, 507 U.S. 725 (1993)—*Carrillo v. People*, 974 P.2d 478 (Colo. 1999)—*James v. People*, 2018 CO 72, 426 P.3d 336.

The supreme court concludes that section 16-10-105, C.R.S. (2023), is ambiguous as to whether a trial court has authority to replace a regular juror with an alternate juror during deliberations. But the supreme court further concludes that, regardless of whether substituting a regular juror with an alternate juror during deliberations is error, it is potentially prejudicial to the defendant. So, instead of delving into the appropriate standard of review to ascertain whether an error occurred in this mid-deliberations juror-substitution case, the supreme court presumes that a mid-deliberations substitution of a regular juror with an alternate juror always prejudices the defendant. It follows that the only relevant inquiry on review is whether reversal is warranted. And that question turns on whether the

precautions employed by the trial court, when considered in light of the surrounding circumstances, overcome the presumption of prejudice to the defendant.

Hence, the supreme court explicitly proclaims the continued vitality of the principle it first articulated in *People v. Burnette*, 775 P.2d 583 (Colo. 1989), and then reinforced in *Carrillo v. People*, 974 P.2d 478 (Colo. 1999): Substitution of a regular juror with an alternate juror during deliberations raises a presumption of prejudice to the defendant's right to a fair trial, but that presumption may be overcome by taking the precautions delineated in those cases. Here, the supreme court concludes that the trial court complied with the precautions laid out in *Burnette* and *Carrillo*. Indeed, the trial court's approach provides a textbook example of the proper effectuation of the teachings of those cases. Because the meticulous precautions employed by the trial court were sufficient under the circumstances of this case to rebut the presumption of prejudice to the defendant, the supreme court affirms the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 56

Supreme Court Case No. 22SC712
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA2389

Petitioner:

Ricardo Castro,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
July 1, 2024

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE GABRIEL, joined by **JUSTICE HOOD**, concurred in the judgment.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 Trial by jury is perhaps the most vital cog in the wheel of our criminal justice system. We have long attached "great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams v. Florida*, 399 U.S. 78, 87 (1970). Accompanying this hallowed tradition is the right in felony cases to a fair and unanimous verdict by a jury of twelve free from outside interference. Colo. Const. art. II, § 23; *Ramos v. Louisiana*, 590 U.S. 83, 90–93 (2020); *People v. Boulies*, 690 P.2d 1253, 1255–56 (Colo. 1984). Because the incapacitation of a juror in the middle of deliberations can place this right in jeopardy, our court has developed a framework to shield the right while preventing a mistrial. We now reaffirm this framework.

¶2 In the case before us, a juror became incapacitated after deliberating for approximately nine hours on felony charges brought against the defendant, Ricardo Castro. To salvage the trial, the court replaced the unavailable juror with an alternate juror. Although it acknowledged that mid-deliberations juror substitution raises a presumption of prejudice to the defendant, *People v. Burnette*, 775 P.2d 583, 590 (Colo. 1989), it rightly explained that such a presumption may be overcome by taking the thorough precautions developed in *Burnette* and *Carrillo v.*

People, 974 P.2d 478, 492 (Colo. 1999). After applying such precautions, the court instructed the reconstituted jury to begin deliberations anew.

¶3 The reconstituted jury deliberated for five and a half hours and then returned a guilty verdict. Castro appealed, arguing that the trial court had reversibly erred by replacing a regular juror with the alternate juror. But a division of the court of appeals upheld the trial court's actions. *People v. Castro*, No. 18CA2389, ¶¶ 6, 29 (Aug. 11, 2022).

¶4 Before us, Castro maintains that whether the trial court has authority to replace a regular juror with an alternate juror after deliberations have begun presents a question of statutory interpretation subject to de novo review. Relying on that standard of review, he urges us to conclude that the controlling statute, section 16-10-105, C.R.S. (2023), does not allow for the mid-deliberations substitution of a juror and, therefore, the trial court erred. Castro then reminds us that in *James v. People*, 2018 CO 72, 426 P.3d 336, we adopted a harmlessness standard of reversal in a situation in which the alternate juror was inadvertently permitted to be present and briefly participate as a thirteenth juror during the first ten minutes of deliberations. This, he asserts, is also the appropriate standard of reversal in a mid-deliberations juror-substitution situation. Consequently, he asks us to reject the presumption-of-prejudice standard of reversal from *Burnette* and *Carrillo*. And, because in his view the People have failed to establish that the mid-

deliberations substitution in this case was harmless, he argues that his conviction must be reversed.[1]

¶5 We see it differently. Because section 16-10-105 is ambiguous as to whether a trial court has authority to replace a regular juror with an alternate juror during deliberations, there is no way to assess whether a trial court errs in making such a substitution. But regardless of whether substituting a regular juror with an alternate juror during deliberations is error, it is potentially prejudicial to the defendant. So, instead of delving into the appropriate standard of review to ascertain whether an error occurred here, we presume that a mid-deliberations substitution of a regular juror with an alternate juror always prejudices the defendant. It follows that the only relevant inquiry for us is whether reversal is warranted. And that question turns on whether the precautions employed by the

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[1] We granted certiorari to review the following issues:

> 1. Whether the standard of review for a trial court's decision to substitute an alternate juror for a deliberating juror is de novo or abuse of discretion, or whether the standard of review is subsumed by the prejudice analysis.
>
> 2. Whether the court of appeals erred by applying the presumption-of-prejudice test from *People v. Burnette*, 775 P.2d 583 (Colo. 1989), to the trial court's mid-deliberations substitution of the alternate juror instead of a harmlessness analysis as adopted by *James v. People*, 2018 CO 72[, 426 P.3d 336].

trial court, when considered in light of the surrounding circumstances, overcome the presumption of prejudice to the defendant.

¶6 Hence, today, we explicitly proclaim the continued vitality of the principle we first articulated over three decades ago in *Burnette* and then reinforced a decade later in *Carrillo*: Substitution of a regular juror with an alternate juror during deliberations raises a presumption of prejudice to the defendant's right to a fair trial, but that presumption may be overcome by taking the precautions delineated in those cases.[2] This is the standard of reversal we apply here.[3]

¶7 Any contention that it is improper to use the presumption-of-prejudice standard in this factual scenario without first finding (or at least assuming) error—because it's a standard of reversal—is an attempt to exhume a hypothesis that has been six feet under since we necessarily buried it in *Carrillo*. The *Carrillo* court used this standard of reversal without first finding or assuming error.

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[2] In this opinion, any reference to a defendant's right to a fair trial includes a defendant's right in a felony case to a fair and unanimous verdict by a jury of twelve without outside interference.

[3] Just a few weeks ago, we explained that our prior opinion in *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119, recognized three standards of reversal for preserved nonstructural errors: constitutional harmless error, nonconstitutional harmless error, and a standard requiring that the effect of the error on the proceedings be constitutionally material to the claim advanced. *People v. Crabtree*, 2024 CO 40, ¶ 27, __ P.3d __. The standard of reversal from *Burnette* and *Carrillo* we apply today is unique to mid-deliberations juror substitution. Thus, it is not surprising that it wasn't included in *Hagos* among the standards of reversal for preserved nonstructural errors.

Irrespective of whether there was error, it felt compelled to impose a rebuttable presumption of prejudice vis-à-vis Carrillo's right to a fair trial.

¶8 Here, applying *Burnette* and *Carrillo*, as we must, we conclude that the trial court complied with the precautions laid out in those cases. Indeed, the trial court's approach provides a textbook example of the proper effectuation of the teachings of *Burnette* and *Carrillo*. Because the meticulous precautions employed by the trial court were sufficient under the circumstances of this case to rebut the presumption of prejudice to Castro, we affirm the division's judgment.[4]

I. Facts and Procedural History

¶9 Castro lived with N.G., a child, and her grandmother for some months. During that timeframe, Castro dated N.G.'s grandmother and became close with N.G. and the rest of her family. When Castro and N.G.'s grandmother broke up, he left Denver but remained in contact with the family. Several years later, he returned to Denver, and N.G.'s grandmother allowed him to stay with her while he resettled.

[4] Under *Burnette* and *Carrillo*, the precautions employed by a trial court to prevent prejudice to the defendant must be considered in light of the surrounding circumstances. For the sake of convenience and to avoid repetition, when discussing how the presumption of prejudice may be overcome, we don't always mention that the surrounding circumstances must be taken into account.

¶10 Shortly after Castro's return, N.G., who was nine at the time, spent a weekend with her grandmother and slept in her grandmother's bed. One day, Castro returned home at 5 a.m. and insisted on sleeping in the bed with the two of them, instead of in his own bed in a separate room. N.G.'s grandmother acquiesced. When the grandmother later got up to use the bathroom, Castro scooted closer to N.G., pulled down her pajama pants and underwear, and started fondling her vagina. Castro then inserted his penis into N.G.'s vagina, causing her pain, and repeatedly whispered in her ear, "It's okay, sweetheart." When he heard the grandmother returning, he stopped and moved to the other side of the bed.

¶11 N.G. made an outcry, and the People subsequently charged Castro with sexual assault on a child and sexual assault on a child by one in a position of trust. At the end of Castro's jury trial, counsel delivered their closing arguments on a Thursday afternoon. The court then announced that Juror W was the alternate juror. Before Juror W left the courtroom, the trial judge instructed her that he was not discharging her but merely recessing her, and that she remained "under all the same admonitions that [she was] under during the trial." That is, she had to (1) keep an open mind and (2) avoid internally deliberating about the case, discussing it with anyone, and viewing any media coverage of it. The twelve regular jurors commenced deliberations that afternoon.

¶12 On Friday, the jury continued deliberations before recessing for the weekend. Between Thursday and Friday, the jury deliberated for approximately nine hours. Unfortunately, over the weekend, Juror C suffered a heart attack and was hospitalized.

¶13 On Monday morning, the court spoke with Juror C's daughter and learned that Juror C was "not going to be able to, at any time in the reasonable future, be part of this jury." Accordingly, Juror C was discharged without objection.

¶14 Given the circumstances, the court presented three options to the parties: (1) declare a mistrial; (2) replace Juror C with the alternate juror and start deliberations anew; or (3) proceed with the eleven remaining regular jurors if both parties agreed. The defense declined to stipulate to an eleven-person jury, and the court wanted to avoid a mistrial, if possible. So, the court decided to pursue option two and brought the eleven remaining regular jurors into the courtroom to inquire whether they thought it would be possible to restart their deliberations with the alternate juror. After explaining that this would require them to tear up or erase any notes made during deliberations thus far and to "[s]tart completely over," the court directed them to return to the deliberations room to discuss whether "it would be impossible for [them] to not consider in any verdict the deliberations that [they'd] already had." The court further elaborated that the decision did not have to be unanimous, but that it wanted "to know whether any of [the jurors]

ha[d] hesitations about whether [they could] do this or not after talking with each other."

¶15 The jury returned to the deliberations room and after approximately half an hour sent out the following note:

> We were unanimous on the first count as of Friday, end of day. In fact, wanted an extra hour on Friday, because we believed we could decide the second [count].
>
> If the question is whether we can approach new deliberations w/ an open mind, because the alternate will be bringing new perspective, yes, we believe it's feasible.
>
> If the question is whether we can enter new deliberations in the same state of mind as Thursday, no, we can't undo all the conversations/learning from prior deliberations.
>
> That being said, we'd like to complete our service w/ the alternate + see this case through to the end.

¶16 After discussing the note and some case law with the parties, the court concluded that under *Carrillo* there is a presumption of prejudice to the defendant when a regular juror is replaced with an alternate juror in the middle of deliberations. But the court found the jury's note mitigated any presumed prejudice:

> But in my judgment we've gotten a note from this jury that overcomes every dimension of that prejudice that you can imagine. They said—and they are being very nuanced about this—they said in the third paragraph, If the question is can we pretend like we never heard any of the earlier deliberations? The answer is of course we can't.
>
> But they're saying in the second paragraph, if the question is can we start deliberations anew with an open mind? Meaning, that we'll

> listen to anything new that [Juror W] wants to contribute, then the answer to that is yes.
>
> And then in the fourth paragraph they are begging to continue.

¶17 Having assured itself that the eleven remaining regular jurors could begin deliberations anew, the court next questioned the alternate juror to determine whether she had followed the instructions it gave her immediately before recessing her. Juror W responded in the affirmative. She also attested that she was willing to rejoin the jury and that she could think of no reason why she should not participate in deliberations. Finally, the court asked Juror W to promise that if during the deliberations one of the jurors said, "Oh, we've already decided that, remember?," Juror W would "speak up and say, 'No, you haven't; remember the judge told us to start over.'" Juror W obliged. This exchange between the court and Juror W took place outside the presence of the eleven remaining regular jurors.

¶18 In light of Juror W's assurances, the court brought back into the courtroom the eleven remaining regular jurors and instructed the reconstituted jury:

> You are to begin your deliberations anew. And I want to talk for a minute about what that means. It doesn't mean that you have to pretend you haven't been spending—that you didn't spend all of Friday talking with each other and with somebody else, [the juror who had a heart attack], and not with [Juror W] about this case. Obviously, you've done that. That's happened.
>
> But . . . you have to begin your deliberations anew. Which means you cannot say, "Oh, remember, we've already worked through that. We

> have already all decided that this element of that charge has or has not been proven beyond a reasonable doubt."
>
> You have to start over. You have to be open. And you indicated in your [note] that you would be open to this new point of view that [Juror W] may bring. But it was not just a new point of view. It's that now that she's in the jury and available to give you that new point of view, you have to start over. You have to start over with each element of each count.
>
> And my staff will bring you new verdict forms back in case you filled out your verdict forms in part already. We'll bring you a new set of blank ones, verdict forms.
>
> You've elected a foreperson. I want you to start over and discuss who the foreperson should be. You should talk about that again.
>
> I want [you] to erase any notes, if you've made any notes. . . . If you've written any notes on the whiteboard, please erase those as you go in.
>
> If you've made separate notes . . . during deliberations, separately, I want you to destroy those notes. Again, that's to help you—I don't want you to go back saying, "Oh, wait, remember we talked about this element and we've already decided all that." You're starting everything anew.

¶19 The reconstituted jury was dismissed to recommence deliberations. But, immediately after the jury exited, Castro's counsel informed the court that he believed the case law required *individual* questioning of the eleven remaining regular jurors about whether they could begin deliberations anew. The court recalled those jurors and questioned each separately. All eleven confirmed without hesitation that they were willing and able to start deliberations anew. One juror even responded, "I actually look forward to having the opportunity to go through it again with a new perspective, because it is so serious, I want to make

sure we're doing our due diligence." Satisfied with each individual juror's affirmations, the court again instructed the reconstituted jury to begin deliberations anew.

¶20 At that time, Castro made a motion for a mistrial, which the trial court denied. The jury then deliberated for approximately five and a half hours before returning guilty verdicts on both counts.

¶21 Castro appealed his conviction. He argued that the trial court violated his right to a fair trial by an impartial jury when it replaced a regular juror with an alternate juror in the midst of deliberations. According to Castro, there could be no assurance of a just verdict when Juror W was allowed to intrude upon the deliberative process. In his view, such interference with the jury's deliberations raised a presumption of prejudice to his right to a fair trial, and the trial court's procedural precautions were insufficient under *Burnette* and *Carrillo* to overcome that presumption.

¶22 The People countered that (1) the trial court enjoyed discretion under section 16-10-105 to replace a regular juror with an alternate juror during deliberations; (2) the principles and precautions identified in *Burnette* and *Carrillo* guided the exercise of that discretion; and (3) to the extent the court erred due to an abuse of discretion, harmless error was the governing standard of reversal

pursuant to *James*.[5] In the alternative, the People asserted that, if the statute prohibited the mid-deliberations substitution of a regular juror with an alternate juror, the only question on appeal was whether reversal was warranted, and here it wasn't because the error was harmless. Thus, under either position, the People nudged the court to use the outcome-determinative standard of reversal our court applied in *James*.[6]

¶23 A division of the court of appeals unanimously affirmed in an unpublished opinion. The division first concluded that it did not need to pass judgment on the appropriate standard of review because it found no error under either the de novo standard urged by Castro or the abuse-of-discretion standard championed by the People. *Castro*, ¶ 18. It then turned to *Burnette* and *Carrillo*, acknowledging that both supported the proposition that mid-deliberations juror substitution "raises a presumption of prejudice to the defendant's right to a fair trial, [which] may be overcome" by adequate procedural precautions. *Castro*, ¶ 19 (alteration in original) (quoting *Burnette*, 775 P.2d at 588); *see also Carrillo*, 974 P.2d at 488.

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[5] The People didn't specify whether the standard of reversal was constitutional or nonconstitutional harmless error. And *James* didn't have to resolve which type of harmless error standard applied in that case because the prosecution prevailed under either. ¶ 19, 426 P.3d at 341.

[6] Interestingly, before us, the parties seem to have flipped sides. The People urge us to stand by the presumption-of-prejudice standard set out in *Burnette* and *Carrillo*, and Castro asks us to proclaim *James* and its outcome-determinative standard of reversal (constitutional harmless error) controlling.

¶24 But the division hastened to add that both the Supreme Court and our court have declined to apply the presumption-of-prejudice standard to determine whether reversal is warranted in the related factual situation in which an alternate juror is permitted to be present as a thirteenth juror during deliberations. *Castro*, ¶¶ 20–22 (first citing *United States v. Olano*, 507 U.S. 725, 737–39 (1993); and then citing *James*, ¶ 19, 426 P.3d at 341). The division noted that the Supreme Court in *Olano* held that the mere presence of alternate jurors as extra jurors during deliberations should not be presumed prejudicial and should, instead, be subject to an outcome-determinative standard of reversal. *Id.* at ¶ 21 (citing *Olano*, 507 U.S. at 737–39). Continuing, the division pointed out that our court has likewise declined to presume prejudice and has applied an outcome-determinative standard of reversal to the presence (and brief participation) of an alternate juror as a thirteenth juror during the very beginning of deliberations.[7] *Id.* at ¶¶ 20–22 (citing *James*, ¶ 19, 426 P.3d at 341).

¶25 And, explained the division, both *Olano* and *James* reflect recent changes in the landscape of standards of reversal. *Id.* at ¶ 22. Specifically, observed the

[7] In *James*, the error was preserved, so the outcome-determinative standard of reversal we applied was harmless error. ¶ 19, 426 P.3d at 341. In *Olano*, the error was unpreserved, so the outcome-determinative standard of reversal applied by the Supreme Court was plain error. 507 U.S. at 730, 741.

division, the Supreme Court has developed, and our court has accepted, the structural error/trial error dichotomy:

> [E]rrors in the trial process can require reversal in the absence of some determination of their likely impact on the outcome of the particular proceedings at issue only if they can be categorized as structural error, a limited class of errors described by the Court as including errors concerning rights protecting some interest other than the defendant's interest in not being erroneously convicted; errors the effects of which are too hard to measure, in the sense of being necessarily unquantifiable and indeterminate; and errors that can be said to always result in fundamental unfairness.

Id. (quoting *James*, ¶ 15, 426 P.3d at 339).

¶26 Rather than resolve whether, post-*James*, the presumption-of-prejudice standard marshaled by *Burnette* and *Carrillo* continues to apply in Colorado to the mid-deliberations replacement of a regular juror with an alternate juror, the division assumed, as Castro contended, that it does. *Id.* at ¶¶ 22–23 (quoting *James*, ¶ 20, 426 P.3d at 341). Accordingly, the division applied the lessons of *Burnette* and *Carrillo* without deciding whether to extend the holding in *James* to mid-deliberations juror substitution.

¶27 The division then determined that any presumption of prejudice caused by the substitution of Juror C with Juror W "was adequately rebutted by the trial court's precautions coupled with the other circumstances of this case." *Id.* at ¶ 23. Thus, ruled the division, the trial court had not erred in making this substitution. *Id.* at ¶ 29.

¶28 Castro now asks us to (1) resolve the standard of review for a trial court's mid-deliberations substitution of a regular juror with an alternate juror; and (2) address whether the division erred by applying the presumption-of-prejudice standard of reversal, rather than the constitutional harmless error standard of reversal.

II. Analysis

A. Authority to Replace a Regular Juror with an Alternate Juror After Deliberations Have Begun

¶29 Whether a trial court may replace a regular juror with an alternate juror after deliberations have begun is "necessarily predicated" on whether the trial court has discretion to require an alternate to remain available after the jury has retired to deliberate. *Carrillo*, 974 P.2d at 488. Two legal sources—a rule and a statute—guide trial courts with regard to the discharge of jurors. *See* Crim. P. 24(e); § 16-10-105.

¶30 Colorado Rule of Criminal Procedure 24(e) instructs courts not to discharge the alternate "until the jury renders its verdict *or until such time as determined by the court*." (Emphasis added.) Such language gives courts the authority to retain alternate jurors and call on them, if necessary, to replace regular jurors during deliberations.

¶31 But the language of the statute is no paragon of clarity, raising questions about whether it affords the same authority. Section 16-10-105 states,

> The court may direct that a sufficient number of 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 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 shall be discharged when the jury retires to consider its verdict or at such time as determined by the court*.

(Emphases added.)

¶32 The parties disagree over whether the rule or the statute controls. In *Carrillo*, however, we stated that the timing of discharging alternates "is a matter of substance and not merely a matter of court procedure, [and thus] we look to the statute, which controls." 974 P.2d at 488. We conform to that holding today and accordingly turn our focus to the statute.

¶33 The paramount rule of statutory interpretation is to effectuate the legislature's intent by giving the language of the statute its plain and ordinary meaning. *People v. Weeks*, 2021 CO 75, ¶ 25, 498 P.3d 142, 151. Appellate courts must read a statute as a whole, aiming to give consistent, harmonious, and sensible effect to all of its parts. *Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002).

¶34 Section 16-10-105 defies such straightforward construction. While the plain language of the second sentence suggests that a trial court may substitute regular jurors with alternate jurors only prior to deliberations, the plain language of the fourth sentence implies just the opposite—that trial courts have the discretion "to

substitute alternates at a later stage of the proceedings, including once deliberations have started." *Carrillo*, 974 P.2d at 489. Thus, we find the statute ambiguous on the question of a trial court's authority to replace a regular juror with an alternate juror during deliberations. *Id.*; *see also Elder v. Williams*, 2020 CO 88, ¶ 18, 477 P.3d 694, 698 ("A statute is ambiguous when it is reasonably susceptible of multiple interpretations.").

¶35 But this is hardly breaking news. We reached the same conclusion in *Carrillo* in 1999, a quarter of a century ago, and the legislature hasn't deemed fit to clarify the internal inconsistency in the statute. So, as in 1999, we are stuck with the ambiguity.

¶36 Of course, when, as here, the plain language of a statute contains a latent ambiguity, this court may determine the intent of the General Assembly by considering the statute's legislative history. *Rowe v. People*, 856 P.2d 486, 489 (Colo. 1993). Here, however, such history only muddies the waters further, so it is of no help to us. If this sounds a bit like a broken record, it should: We've sung this tune before—in *Carrillo*. *See* 974 P.2d at 489. But the lyrics we belted out in *Carrillo* have gone as unnoticed as the thud of a tree falling in the forest when nobody is around to hear it.

¶37 A look at the statutory history is helpful in understanding the genesis of the ambiguity we've been saddled with for more than thirty years.[8] While the statute's second sentence has remained intact over the years, the statute's fourth sentence has weathered two changings of the tide. *Id.* We thus turn our attention to the fourth sentence.

¶38 Before 1990, the fourth sentence required that an alternate juror be discharged at the time the jury retires to consider its verdict. § 16-10-105, 8A C.R.S. (1986). Then, in 1990, swept in by a wave of response to two mistrials caused by the incapacitation of jurors in the midst of deliberations, our General Assembly amended the fourth sentence. *Carrillo*, 974 P.2d at 489. Under the 1990 amendment, an alternate juror could not be discharged "until the jury render[ed] its verdict or until such time as determined by the court." Ch. 117, sec. 5, § 16-10-105, 1990 Colo. Sess. Laws 923, 924.

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[8] We use "statutory history" as a reference "to the evolution of a statute as it is amended over time by the legislature," which is different from "legislative history," a reference "to the development of a statute during the legislative process and prior to enactment or amendment." *Carrera v. People*, 2019 CO 83, ¶ 24 n.6, 449 P.3d 725, 730 n.6 (quoting *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 30 n.2, 433 P.3d 22, 29 n.2).

¶39 The 1990 amendment, however, created a different problem—many trial courts could not properly sequester alternate jurors throughout the deliberations.[9] *Carrillo*, 974 P.2d at 489. Believing that the pendulum had swung too far the other way, the legislature reacted the following year (in 1991), and the tide changed again, this time flowing back out in an apparent attempt to return things to the way they were prior to the 1990 amendment. *Id.* But while the operative language of the 1991 amendment revived the pre-1990 rigid requirement that an alternate juror "be discharged when the jury retires to consider its verdict," it also added the equivocal phrase "or at such time as determined by the court." Ch. 80, sec. 6, § 16-10-105, 1991 Colo. Sess. Laws 428, 429–30; *see also* § 16-10-105, C.R.S. (2023). With these flummoxing edits, ambiguity was sown, and that ambiguity continues to blossom in 2024.

¶40 Not surprisingly, divisions of the court of appeals have disagreed over whether the 1991 amendment gives trial courts the discretion to delay the discharge of an alternate juror once deliberations commence. *Compare People v. Montoya*, 942 P.2d 1287, 1295 (Colo. App. 1996) (explaining that, like the pre-1990

[9] Jurors (including alternates) are almost never sequestered now, and, in any event, it is not necessary to sequester alternate jurors to have them available to replace regular jurors during deliberations. As occurred here, many trial courts recess alternate jurors as deliberations are about to commence. The trick is to do as the trial court did here and provide alternate jurors appropriate admonishments regarding their conduct while deliberations are taking place.

statute, the 1991 amendment requires trial courts to dismiss alternate jurors at the start of deliberations), *with People v. Carrillo*, 946 P.2d 544, 549 (Colo. App. 1997) (concluding that the 1991 amendment returned things to their pre-1990 state "with one important addition: [t]he trial court in its discretion may dismiss the alternate at a different time" than when the jury retires to deliberate), *aff'd on other grounds,* 974 P.2d at 480. This court, however, has determined it unnecessary to crack this conundrum because, regardless of the answer, a mid-deliberations juror substitution "raises a presumption of prejudice to the defendant's right to a fair trial." *Carrillo,* 974 P.2d at 490.

¶41 Today, we stick to the course chartered by *Carrillo*. Thus, we echo what we said there: Whether statutory authority for mid-deliberations juror substitutions exists or not, the presumption of prejudice to the defendant's right to a fair trial applies.[10]

¶42 True, as Castro reminds us, our jurisprudence regarding the mid-deliberations presence of an alternate juror as a thirteenth juror has progressed since *Carrillo*, *see James*, ¶¶ 13–15, 426 P.3d at 339–40, and we followed *Olano*, not *Carrillo*, in *James*. As we demonstrate next, however, that line of cases is inapposite.

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[10] It hardly bears stating that our General Assembly is free to clean up section 16-10-105. In the meantime, though, we remain in the dark about the legislative intent behind the statute, so we reaffirm that *Carrillo* continues to be good law.

Our case law on the replacement of a regular juror with an alternate juror mid-deliberations represents a different and distinguishable evolutionary branch.

B. Evolution of Two Lines of Deliberations Cases: The Presence of an Alternate Juror and the Replacement of a Regular Juror with an Alternate Juror

¶43 Our cases addressing the mid-deliberations *presence* of an alternate juror as a thirteenth juror share a common ancestor with our cases addressing the mid-deliberations *substitution* of a regular juror with an alternate juror. Over time, however, these cases have evolved into two distinct lineages. To understand these distinguishable but related case species, we must trace their evolution.

¶44 We begin with the grandfather of both evolutionary branches, *Boulies*, 690 P.2d at 1254–55, which gave birth to the presumption-of-prejudice analysis. There, the trial judge gave the alternate juror permission to "go in and listen" to the deliberations so long as she remained silent and did not vote. *Id.* at 1255. Following the jury's guilty verdicts and an unsuccessful direct appeal, Boulies sought and received postconviction relief on the ground that an unauthorized person (a thirteenth juror) had been present in the jury room during deliberations. *Id.* at 1254. The People appealed to our court, and we vacated the postconviction order and remanded the case for an evidentiary hearing to determine whether the alternate juror had actually retired with the regular jurors to deliberate. *Id.* at 1255.

¶45 Because *Boulies* involved an issue of first impression, we took the opportunity to clarify that the presence of a thirteenth juror during deliberations violates both "the cardinal principle that the deliberations of the jury shall remain private and secret in every case," *id.* at 1256 (quoting *United States v. Va. Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)), and the "fundamental right to a jury trial free from the intrusion of non-jurors," *id.* We didn't stop there; of particular interest here, we went on to reject the People's position that, even assuming the alternate was present during deliberations, Boulies was required to establish "that the alternate had some effect on those deliberations." *Id.* at 1255. Instead, we articulated the principle that became the very DNA of these deliberations cases: "[W]e view the presence of an alternate juror during the jury's deliberations as sufficiently impinging upon the defendant's constitutional right to a jury trial *to create a presumption of prejudice* that, if not rebutted, requires reversal." *Id.* at 1255–56 (emphasis added). To rebut the presumption, we said, a party must produce evidence establishing that the error was harmless beyond a reasonable doubt. *Id.* at 1256 n.5.

¶46 Our case law took its next evolutionary step with *Burnette*, which extended the presumption-of-prejudice analysis to situations in which a regular juror is replaced with an alternate juror in the middle of deliberations. 775 P.2d at 590. In that case, the jury deliberated for four and a half hours and then recessed for the

day. *Id.* at 585. A severe snowstorm moved in overnight and snowed in one of the regular jurors, which prompted the court to recall the alternate juror. *Id.* The reconstituted jury found Burnette guilty, but a division of the court of appeals reversed based on the trial court's failure to take adequate precautionary steps to guard against prejudice to Burnette as a result of the juror substitution. *Id.* at 584. We agreed with the division and affirmed. *Id.* at 585. Perhaps most notably, we laid out a set of principles that began to fill in the distinct phenotype of mid-deliberations juror-substitution cases.

¶47 Recognizing that the mid-deliberations substitution of a regular juror with an alternate juror implicates unique sources of potential prejudice, our court voiced concern for the "real danger" that the alternate juror (1) "will not have a realistic opportunity to express his views and to persuade others"; (2) "will not have been part of the dynamics of the prior deliberations"; and (3) will not "have had the benefit of the unavailable juror's views." *Id.* at 588. In addition, we worried that "a lone juror who cannot in good conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate." *Id.* Borrowing from cases involving the mid-deliberations presence of an alternate juror as a thirteenth juror, we determined that these risks warranted a presumption of prejudice. *Id.* at 590. But we concluded that in the context of the mid-deliberations substitution of a regular

juror with an alternate juror, such a presumption could be overcome only if the trial court took "extraordinary precautions" to ensure a defendant would not be prejudiced and if those precautions achieved the intended result.[11] *Id.*

¶48 Four years after we decided *Burnette*, the Supreme Court dealt with a case involving the "mere presence" of alternate jurors as extra jurors during deliberations. *Olano*, 507 U.S. at 740–41. And while *Olano* is obviously not an offspring of *Boulies*, we discuss it here because it impacted one of the two evolutionary branches that sprouted from *Boulies*.

¶49 The trial court in *Olano* allowed two alternate jurors to attend deliberations so long as they did not participate. *Id.* at 729. As our court had done in *Boulies*, the Supreme Court in *Olano* acknowledged that the presence of alternate jurors during deliberations contravenes "the cardinal principle" that deliberations "remain private and secret." *Olano*, 507 U.S. at 737 (quoting Fed. R. Crim. P. 23(b) advisory committee's note to 1983 amendments); *accord Boulies*, 690 P.2d at 1256. But the *Olano* Court emphasized that the "primary" purpose of this principle "is

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[11] When we decided *Burnette*, neither Crim. P. 24(e) nor section 16-10-105 permitted the replacement of a regular juror with an alternate juror during deliberations. *Burnette*, 775 P.2d at 586. Having acknowledged that the trial court had violated the rule and the statute through its mid-deliberations juror substitution, we proceeded to consider "the legal effect [on] the verdict of the improperly constituted jury." *Id.* at 587. It's in that context that we applied the presumption of prejudice from *Boulies* and discussed how that presumption may be rebutted. *Id.*

to protect the jury's deliberations from improper influence." 507 U.S. at 737–38. And because the trial court there had instructed the alternates not to participate in deliberations, an instruction the law assumed they followed, the Supreme Court declined to presume prejudice to Olano and his codefendant. *Id.* at 740. Under these circumstances, the Court reasoned that the mere presence of the alternates did not taint the deliberations with outside influence. *Id.* at 739 (noting the alternates' presence was substantively similar to "the presence in the juryroom of an unexamined book"). Thus, rather than apply the presumption-of-prejudice standard of reversal, the Court applied the outcome-determinative standard of reversal governing unpreserved errors (plain error). *Id.* at 741.

¶50 Importantly, though, the Court in *Olano* cautioned that the presence of an alternate during deliberations may prejudice the defendant in some circumstances. *Id.* at 739. More specifically, the Court identified two ways in which such prejudice might occur: (1) if the alternate "actually participate[s] in the deliberations, verbally or through 'body language'"; and (2) if the alternate's "presence exert[s] a 'chilling' effect on the regular jurors." *Id.*

¶51 Mindful of *Olano*, we circle back now to the two evolutionary branches that grew from *Boulies*—specifically, the tips of those branches (the youngest descendants of *Boulies*). Since *Olano*, our court has decided two cases of key import—one involving the mid-deliberations substitution of a regular juror with

an alternate juror, and the other involving the mid-deliberations presence of an alternate juror as a thirteenth juror. *See Carrillo*, 974 P.2d at 488; *James*, ¶ 5, 426 P.3d at 337. These two case types applied different standards of reversal. A close inspection of *Carrillo* and *James* highlights the utility of their dual methodologies—each applicable in a different factual context.

¶52 The jury in *Carrillo* deliberated for a little over four hours and then returned guilty verdicts on all the charges brought against Carrillo and his codefendant. 974 P.2d at 488. But as the trial court polled the jurors individually, one juror said that he found Carrillo not guilty of one of the charges. *Id.* Because one of the verdicts was not unanimous, the court ordered the jury to return to the deliberations room and reconsider all the verdicts. *Id.* at 482–83. Within an hour, the jury sent the court a note indicating that it had "come to believe" that the holdout juror "did not hear all of the testimony, does not fully understand all of the charges and instructions, and did not hear some discussion in deliberations."[12] *Id.* at 483. Under these circumstances, observed the jury, it did not believe it could render a unanimous verdict. *Id.* Over Carrillo's and his codefendant's objections, the court replaced the holdout juror with an alternate juror. *Id.* at 483. The

[12] The holdout juror had reported during jury selection that he was hard of hearing but that his doctor had told him he didn't need hearing aids. *Carrillo*, 974 P.2d at 482.

reconstituted jury then deliberated for more than six hours and returned unanimous guilty verdicts on all the charges. *Id.* at 484.

¶53 On review, our court cautioned that the case raised the "specter" of the dangers first warned of in *Burnette*. *Id.* at 491. For one, there was the risk that a lone juror might feign illness to be relieved of any decision-making responsibility. *Id.* There was also the concern that, following the substitution of the holdout juror, the eleven remaining regular jurors would be unable to set their previous deliberations aside and start deliberating anew. *Id.* at 491–92. And there was the peril that the dismissal of the holdout juror might be misinterpreted as indicative of the court's views on the merits of the case—i.e., that the court believed the holdout juror had reached the wrong result. *Id.* at 491. We reiterated what we said in *Burnette*: In situations in which an alternate juror replaces a regular juror during deliberations, the presumption of prejudice may be rebutted only under unusual circumstances. *Id.* at 492.

¶54 Elaborating, we declared that adherence to the *Burnette* precautions provides the requisite protection to overcome the presumption of prejudice. *Id.* And, chaperoned by *Burnette*, we found that the presumption had been rebutted there by the trial court's diligence in (1) informing the alternate juror at the end of the trial that she was not discharged and was still subject to the court's admonitions; (2) confirming that the alternate juror had continued to heed the

court's admonitions between the time she was recessed and the time she was called back; (3) instructing the eleven remaining regular jurors to put their previous deliberations out of their minds and begin deliberating anew; and (4) receiving individual assurances from those eleven jurors that they could do so. *Id.* Furthermore, the evident nature of the holdout juror's hearing impairment, which he had disclosed from the start, allowed this court to feel confident that the problem was not manufactured. *Id.* Lastly, the reconstituted jury deliberated for two hours longer than the original jury; surrendered the notes from the first round of deliberations before the second round of deliberations; and submitted a question that demonstrated it was analyzing the evidence and the law afresh. *Id.* at 492–93. Together, these circumstances persuaded us that the reconstituted jury had indeed deliberated anew. *Id.* at 493.

¶55 Tellingly, *Olano* and its outcome-determinative standard of reversal did not factor into our decision in *Carrillo*. *See Carrillo*, 974 P.2d at 491. Instead, in discerning whether reversal was warranted, we applied the presumption-of-prejudice standard from *Burnette*. So, today, we simply make explicit what was already implicit in *Carrillo*: The presumption-of-prejudice standard of reversal continues to apply in Colorado in mid-deliberations juror-substitution cases after *Olano*.

¶56 But what do we make of our most recent opinion of relevance, *James*, where we looked to *Olano*, not *Burnette* and *Carrillo*, for guidance, and we accordingly applied an outcome-determinative standard of reversal, not the presumption-of-prejudice standard of reversal? Differently propounded, how do we square *James*, an *Olano* apostle, with *Burnette*, *Carrillo*, and today's decision? The answer is that *Olano* and *James* are "apples," whereas *Burnette*, *Carrillo*, and this case are "oranges." Recall that *Olano* and *James* both involved the presence of alternate jurors as extra jurors during deliberations, not the mid-deliberations substitution of regular jurors with alternate jurors.

¶57 *Olano* itself explained that an alternate's *mere presence* in deliberations, without more, is not enough to support a presumption of prejudice, but an alternate's *participation* in deliberations is an altogether different beast that may well justify the presumption. 507 U.S. at 739 (acknowledging that "[t]here may be cases where an intrusion should be presumed prejudicial" and explaining that "the presence of alternate jurors during jury deliberations might prejudice a defendant . . . because the alternates actually participated in the deliberations, verbally or through 'body language'" (citing *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973))). With *extra* jurors, participation is merely a *possibility*; with *substituted* jurors, by contrast, it is the *expectation*. To presume prejudice in the latter but not the former is not a contradiction—far from it, it is a recognition that

inherent in each situation are differing levels of threat to the defendant's right to a fair trial.

¶58 We realize that, unlike the alternate jurors in *Olano*, the alternate juror in *James* actually participated in the deliberations. But, as Castro concedes, that doesn't render *James* apposite. For in *James*, the extra juror did not deliberate on the verdict. Rather, his presence and participation in the deliberations was minimal—he was removed from the jury room after the first ten minutes of deliberations, and not much occurred during those ten minutes: the jury selected the alternate juror as the foreperson, took a preliminary vote to get a sense of what the group thought, and began discussing the elements of the charges. *James*, ¶¶ 1–2, 5, 426 P.3d at 336–37. And to our point, such minimally invasive participation is *only* possible in extra-juror situations. Hence, while *James* technically involved the participation (as opposed to the mere presence) of an alternate juror during deliberations, it is of the extra-juror ilk, not of the substituted-juror ilk.

¶59 Based on the factual situation we confronted in *James*, we were understandably inclined to rely on *Olano*. *Id.* at ¶¶ 6, 13, 426 P.3d at 337, 339. Indeed, our approach there was influenced by (1) *Olano*'s refusal to presume prejudice from an alternate's mere presence during deliberations, and (2) our endorsement of the Supreme Court's refined jurisprudence on the nature and

effect of errors committed in the trial process (i.e., the structural error/trial error dichotomy). *Id.* at ¶¶ 13, 15, 426 P.3d at 339–40.

¶60 Following *Olano*, *James* applied an outcome-determinative standard of reversal (harmless error), scrutinizing whether there was a reasonable possibility that the erroneous presence of the alternate during deliberations "would have adversely affected the verdict of a typical jury." ¶ 20, 426 P.3d at 341. Considering the limited intrusion of the alternate and the overwhelming evidence supporting the conviction, we had little difficulty concluding that the alternate's presence was harmless, regardless of whether it was viewed as a constitutional or nonconstitutional error.[13] *Id.* at ¶¶ 19, 21, 426 P.3d at 341.

¶61 Seizing on a sentence from our opinion in *James*, Castro contends that we have explicitly drawn into question the authoritativeness of our line of cases on the mid-deliberations substitution of a regular juror with an alternate juror (i.e.,

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[13] Notably, the court of appeals in *James* had found the error harmless on a slightly different basis. ¶ 6, 426 P.3d at 337. That division had been persuaded by the trial court's questioning of each juror after the verdict was returned and the affirmation by each juror that the alternate had not influenced his or her verdict. *Id.* Although we acknowledged that CRE 606(b) generally forbids inquiry into a jury's mental processes during deliberations, we stated that "it is *not* forbidden to inquire whether an outside influence was brought to bear upon any juror." *Id.* at ¶ 20, 426 P.3d at 341 (emphasis added). Still, we ultimately declined to address whether the trial court's questioning of the jurors was permissible under CRE 606(b) because we rested our harmlessness determination on other grounds. *Id.* at ¶ 21 n.1, 426 P.3d at 341 n.1.

Burnette and its offspring). *Id.* at ¶ 20, 426 P.3d at 341. But this argument cannot take Castro far. In *James*, we didn't address whether *Burnette* and its descendants remained authoritative. We simply said that, "*[w]hatever may be the continued vitality of our juror-substitution line of cases* . . . , we [did] not understand the considerations expressed in those cases to govern the harmlessness of an 'intrusion' by an alternate upon the deliberations of a properly constituted jury." *Id.* (emphasis added). Our point was that, regardless of whether our mid-deliberations juror-substitution cases retained validity (an issue that was *not* before us), the concerns that motivated those decisions didn't control in *James* because *James* involved an extra-juror situation, not a substituted-juror situation.

¶62 As we make clear today, however, our mid-deliberations juror-substitution line of cases is alive and kicking after *James*. Accordingly, while *James* adhered to *Olano* (apples to apples), we lean on *Burnette* and *Carrillo* (oranges to oranges).

¶63 In short, although the presumption-of-prejudice standard has been supplanted by an appropriate outcome-determinative standard in extra-juror cases, it has not been banished to extinction. No, it continues to have application in cases involving the mid-deliberations substitution of regular jurors with alternate jurors. And any contention that it is improper to use the presumption-of-prejudice standard in this factual scenario without first finding (or at least assuming) error—because it's a standard of reversal—is an attempt to board the

ship that set sail when we decided *Carrillo* in 1999. The *Carrillo* court used this standard of reversal without first finding or assuming there was error. It reasoned that, *irrespective of whether there was error*, a rebuttable presumption of prejudice was warranted with respect to Carrillo's right to a fair trial.

¶64 We discuss next why we hold on to the remaining vestiges of the presumption-of-prejudice standard in mid-deliberations juror-substitution cases.

C. The Presumption-of-Prejudice Standard Serves a Necessary Function in Mid-Deliberations Juror-Substitution Cases

¶65 "Form follows function." First coined in the architectural context, then embraced as a biological principle, this concept is useful in demonstrating that the applicable standard of reversal must follow the function to be served.

¶66 The primary concern in felony cases involving either an extra juror or a substituted juror during deliberations is ensuring the defendant's right to a fair trial. *See Olano*, 507 U.S. at 737–38; Colo. Const. art. II, § 23. In the former, this threat comes from the presence and potential participation of a thirteenth juror, but in the latter, this threat can come either from the lingering influence of the dismissed juror or from outside information the alternate has learned since the trial's conclusion. Moreover, juror-substitution cases face the additional threat that the alternate juror may not have "a realistic opportunity to express his views and to persuade others," making the jury, at least in practice, a jury of eleven.

Burnette, 775 P.2d at 588. To avoid reversal, there must be assurances that the deliberations do not fall prey to one of these dangers. The function of the standard of reversal is to ascertain whether such assurances exist. And the form of the presumption-of-prejudice standard is best suited to serve that function in mid-deliberations juror-substitution cases.

¶67 For starters, as its moniker suggests, the constitutional harmless error standard proposed by Castro requires error. In cases of a thirteenth juror, that standard fits like a glove: It is obviously error to permit an alternate to attend deliberations as a thirteenth juror. But in cases of a substituted juror, the answer is not so clear. As we explained earlier, given the ambiguity in section 16-10-105, we cannot say whether it is error to substitute a regular juror with an alternate juror mid-deliberations. So, why would we use a standard of reversal that applies to *errors*? In our view, it is more logical to presume prejudice to the defendant's right to a fair trial, and to then hinge our decision to affirm or reverse on whether that presumption is overcome by the precautionary measures taken by the court.

¶68 Castro nevertheless insists that, although functionally similar to the presumption-of-prejudice standard, the constitutional harmless error standard would be more protective of the jury's deliberative process. Interestingly, though, he admits that the analysis he advances would consider the same factors that are relevant under the presumption-of-prejudice standard.

¶69 But if the same factors are pertinent to both standards, then the principal difference in the analysis is that, rather than presuming prejudice and inquiring whether the procedures effectuated by the trial court suffice to rebut that presumption, constitutional harmlessness begins with the assumption that the trial court committed an error and that the People must bear the burden of proving beyond a reasonable doubt that the error was harmless. *See Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. This would unfairly put the People behind the eight ball: Why should the People be required to prove the harmlessness of an error beyond a reasonable doubt when we don't even know if there was an error in the first place?

¶70 Moreover, unlike the harmlessness standard, the presumption-of-prejudice standard allows us to balance our duty to ensure a fair trial with the significant interest in avoiding a mistrial. Reversing a conviction "entails substantial social costs." *People v. Casias*, 2012 COA 117, ¶ 56, 312 P.3d 208, 219 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). "[I]t forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; [and] victims may be asked to relive their disturbing experiences." *Id.* (alteration in original). In this regard, we are keenly aware that this is a sexual assault case and that the victim is a child.

¶71 Although the foregoing social costs may both be "acceptable and . . . necessary" to protect a defendant's right to a fair trial, *id.* (omission in original) (quoting *Mechanik*, 475 U.S. at 72), employing the prophylactic precautions prescribed in *Burnette* and *Carrillo* allows us to avoid them. This is not possible under the constitutional harmlessness standard. Indeed, were we to review for constitutional harmless error, it would telegraph to trial courts that it is error to replace a regular juror with an alternate juror during deliberations, regardless of the social costs of declaring a mistrial. Talk about a catch-22: Declare a mistrial or intentionally commit error.[14]

[14] We considered the option of assuming without deciding that a mid-deliberations juror substitution is error, and then reviewing for constitutional harmless error. But if we're going to decline to decide if such a substitution is error, then why not take the error question out of the equation altogether and simply impose a rebuttable presumption of prejudice—à la *Burnette* and *Carrillo*? At any rate, we are obligated to cling to the presumption-of-prejudice approach shepherded by *Burnette* and *Carrillo* because we may not betray our old friend, stare decisis, "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *The Federalist* No. 78 (Alexander Hamilton) (Henry Lodge ed. 1888)), *superseded on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071, *as recognized in CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008).

III. Application

A. Standard of Review

¶72 Castro argues for de novo review based on his position that the pertinent question we must answer is whether a trial court has statutory authority to substitute a deliberating juror. *See People v. Kembel*, 2023 CO 5, ¶ 24, 524 P.3d 18, 23 (stating that whether a trial court has statutory authority is a question of law that we review de novo). The People, by contrast, push for an abuse of discretion standard of review.

¶73 As we've explained, instead of delving into the appropriate standard of review to ascertain whether an error occurred, we presume that a mid-deliberations substitution of a regular juror with an alternate juror always prejudices the defendant. It follows that the only relevant inquiry is whether reversal is warranted. And that question turns on whether the precautions employed by the trial court, when considered in light of the surrounding circumstances, overcome the presumption of prejudice to the defendant. This is the standard of reversal we apply here.

¶74 In conducting this inquiry, we are mindful that "the fact that a trial court has taken extraordinary precautions, in and of itself, is insufficient to rebut the presumption of prejudice to the defendant's right to a fair trial." *Carrillo,* 974 P.2d at 493. Rather, we must assure ourselves that "under the circumstances of the case,

the precautions were adequate to achieve that result." *Id.* (quoting *Burnette*, 775 P.2d at 590). Accordingly, we concentrate now on whether the trial court's precautions were sufficient to protect Castro's right to a fair trial.

B. The Trial Court's Precautions Successfully Rebutted the Presumption

¶75 The trial court's actions in this case provide a model for trial courts to apply the principles and precautions outlined in *Burnette* and *Carrillo*. And because the precautions implemented by the trial court successfully rebutted the presumption of prejudice raised by the mid-deliberations substitution of Juror C with Juror W, we perceive no basis for reversal.

¶76 To begin, the court took all appropriate precautions with respect to Juror W. At the close of trial, after announcing that Juror W was the alternate, the court made clear to her that it was simply recessing her, not discharging her. The court also instructed her that she was not to internally deliberate about the case, discuss the case with anyone, or view any media coverage of the proceedings, and that she was to keep an open mind regarding the case. Once the trial court recalled Juror W, it questioned her and confirmed that she had adhered to its admonitions. Juror W also attested that she was willing and able to participate in the deliberations and promised to remind the other jurors that deliberations were to begin anew.

¶77 Next, the court closely followed the requisite precautions handed down by *Burnette* and *Carrillo*. The court explained the situation to the eleven remaining regular jurors and then gave them time to reflect on and discuss whether they could restart deliberations. Once the court received their confirmation that they could do so, it thoroughly instructed them about their responsibility to begin deliberations anew and to remain open to Juror W's point of view. At defense counsel's request, the court then questioned those jurors individually to confirm that they were willing and able to start deliberations anew. And the eleven remaining regular jurors relinquished their notes from the first deliberations.

¶78 Notably, the circumstances here do not present one of the major concerns articulated in *Burnette* and *Carrillo*. It is clear from the record that Juror C's health issues were genuine.

¶79 Castro, however, argues that the prejudice to him is clear because the original jury deliberated for approximately nine hours, whereas the reconstituted jury deliberated for only five and a half hours. And he points out that the original jury had admittedly made substantial progress, reaching a unanimous decision on one count and stating it needed perhaps an hour to reach a decision on the second count. According to Castro, after all of this, it is inconceivable the eleven remaining regular jurors could simply set aside the discussions during the first round of deliberations and return to square one.

¶80 But we agree with the division that five and a half hours is still a substantial amount of time to deliberate. *Castro*, ¶ 28. Comparing the time the original jury and the reconstituted jury spent in deliberations is relevant, *see Burnette*, 775 P.2d at 590; *Carrillo*, 974 P.2d at 492, but not dispositive. We're aware of no authority supporting the proposition that shorter second deliberations necessarily signal that the reconstituted jury failed to start from scratch. This is especially true given that matters like organizing the exhibits or deciding on a procedure for selecting the foreperson may be more streamlined the second time around. *Castro*, ¶ 28. We decline Castro's invitation to engage in any line-drawing over what constitutes a sufficient amount of time for a second take at deliberations. Nor are we willing to speculate about the reconstituted jury's deliberations.

¶81 As for the progress the original jury made before Juror W was called upon to deliberate, we recognized in *Carrillo* that, so long as the appropriate precautions are taken, an alternate juror may substitute a regular juror even after the jury has completed deliberations and even though the replaced juror was a lone holdout. 974 P.2d at 491–92. Here, the circumstances were not so extreme. What's more, following the first round of deliberations, the eleven remaining regular jurors

affirmed both in their written note to the trial judge and during individual questioning that they were willing and able to return to square one.[15]

¶82 In sum, we conclude that the trial court meticulously implemented the precautions outlined in *Burnette* and *Carrillo*. We further conclude that those precautions were sufficient under the circumstances of this case to rebut the presumption of prejudice to Castro stemming from the mid-deliberations substitution of Juror C with Juror W.

IV. Conclusion

¶83 Life happens—including during jury deliberations. It is not rare for a juror to unexpectedly become incapacitated in the middle of deliberations. The legislature sought to address this situation through section 16-10-105. But in its 1991 amendment of that statute, it contradicted itself. It may well be that the legislature has not corrected that ambiguity because it agrees with the approach we took in *Burnette* and *Carrillo*. Even so, it would be preferable to have the legislature clarify its intent. So long as we are left to guess what that intent is, we have little choice but to continue along the path cleared by *Burnette* and *Carrillo*.

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[15] Castro additionally argues that he was prejudiced by Juror C's participation because Juror C was a former judge and had legal expertise. Because this contention is beyond the scope of the questions we agreed to review, we do not address it.

¶84 For the foregoing reasons, we proclaim the continued vitality of the presumption-of-prejudice standard of reversal in our mid-deliberations juror-substitution cases. And, applying that standard, we conclude that Castro was not prejudiced by the mid-deliberations substitution of Juror C, a regular juror, with Juror W, an alternate juror. Accordingly, we affirm the division's judgment.

JUSTICE GABRIEL, joined by **JUSTICE HOOD**, concurred in the judgment.

JUSTICE GABRIEL, joined by JUSTICE HOOD, concurring in the judgment.

¶85 In purported accordance with our prior decision in *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), the majority does not decide whether the mid-deliberation substitution of an alternate juror was error (or even assume without deciding that an error occurred) and applies a presumption of prejudice standard, concluding that the presumption of prejudice was overcome here. Maj. op. ¶¶ 6–8, 40–41, 67, 70, 83–84.

¶86 I do not agree that it is appropriate to apply a presumption of prejudice standard without at least assuming that an error occurred. The presumption of prejudice standard is a standard of reversal. Accordingly, it cannot be untethered from a determination (or at least an assumption) of error.

¶87 Moreover, I do not believe that the presumption of prejudice standard that the majority employs survived our decision in *James v. People*, 2018 CO 72, 426 P.3d 336.

¶88 Accordingly, I would assume without deciding that it was error to substitute an alternate juror mid-deliberation, and I would apply the constitutional harmless error standard that we, in *James*, ¶¶ 20–21, 426 P.3d at 341, concluded applies in cases like this one involving alternate juror participation in deliberations. Doing so, I would conclude that the error here was harmless beyond a reasonable doubt.

¶89 Because I reach the same conclusion as the majority, although for different reasons, I concur in the judgment, only.

I. Factual and Procedural Background

¶90 The pertinent facts are not disputed.

¶91 Ricardo Castro was charged with sexual assault on a child pursuant to section 18-3-405(1), C.R.S. (2023), and sexual assault on a child by one in a position of trust pursuant to section 18-3-405.3, C.R.S. (2023), arising out of conduct involving his former girlfriend's nine-year-old granddaughter. Castro exercised his right to a jury trial, and a jury of thirteen was constituted, including Juror C, who was a retired bankruptcy judge, and Juror W, whom the trial court would later identify as the alternate juror.

¶92 The case proceeded to a three-day trial, and before the jury began deliberations, the court advised Juror W that the court was not going to discharge her but rather would "recess" her and allow her to return home or to work. In doing so, the court instructed Juror W to continue to follow all of the admonitions that the court had given during the trial: "Don't decide the case. Don't discuss the case with any of those curious loved ones or friends or family or co-workers. Don't view any media coverage of the case, and continue to keep your mind open."

¶93 The twelve remaining jurors began deliberations and discussed the case for about forty-five minutes before recessing for the evening. The jury reconvened

the next day and continued deliberating until the evening, when the court recessed for the weekend. At that point, the jury had deliberated for approximately nine hours and forty-five minutes.

¶94 Over the weekend, Juror C suffered a heart attack and was hospitalized. Based on information provided by Juror C's daughter, the court determined that he would not be able to continue as part of the jury and discharged him.

¶95 The court then discussed with the parties three possible alternatives, in light of Juror C's circumstances: (1) declare a mistrial; (2) continue with a jury of eleven, which would require both parties' consent; or (3) substitute Juror W for Juror C.

¶96 Defense counsel declined to stipulate to a jury of fewer than twelve members, and the People opposed a mistrial. As a result, the court decided to reconstitute the jury with Juror W, which the court determined would be proper as long as the court took the precautionary measures set forth in our prior case law.

¶97 To that end, the court brought the eleven remaining jurors into the courtroom, advised them of Juror C's absence, and asked whether they would be able to start deliberations anew with Juror W. The court emphasized that this "means tear up your notes, all the notes that you've made during your deliberations, erase any notes you've made on the whiteboard. Start completely over with an alternate. That's what the law requires for me to bring the alternate

back in." Having asked whether the jurors could do this, the court allowed them to return to the jury room to discuss the matter.

¶98 The jurors did so, and after approximately thirty minutes, they sent the court a note, stating, "We were unanimous on the first count as of Friday, end of day. In fact, [we] wanted an extra hour on Friday, because we believed we could decide the second." The jurors nonetheless said, "[W]e believe it's feasible" to start deliberations anew with an open mind as to Juror W's potentially new perspective. They clarified, however, that they could not enter new deliberations in the same state of mind as they had before their initial round of deliberations because they could not "undo all the conversations/learning from prior deliberations." That said, they expressed their desire to complete their jury service with the alternate and "see this case through to the end."

¶99 In the court's view, although Castro was entitled to a presumption of prejudice from the mid-deliberation substitution of an alternate juror, the jury's note overcame "every dimension of that prejudice that you can imagine." The court thus brought Juror W back to the courtroom to confirm that she (1) had, in fact, followed all of the court's admonitions, including its admonitions not to decide the case, not to discuss the case with others, and to avoid external influences; and (2) was willing to rejoin the jury and begin deliberations. Juror W answered affirmatively on both points.

¶100 Having undertaken the foregoing precautionary measures, the court informed the jurors that Juror W would substitute for Juror C and instructed them to start deliberations anew, stressing, "It doesn't mean that you have to pretend you haven't been spending—that you didn't spend all of Friday talking with each other and somebody else, [Juror C], and not with [Juror W] about this case," but "[y]ou have to be open" and "[y]ou have to start over with each element of each count." The court also informed the jurors that they would have to (1) repeat the foreperson election process, (2) destroy any notes from their prior deliberations, and (3) use new verdict forms. And the court asked Juror W to promise to speak up if any of the other jurors was not, in fact, honoring their commitment to start over.

¶101 The court then instructed the reconstituted jury to begin its deliberations, but on defense counsel's further request, the court opted to speak with each of the eleven original jurors individually, to confirm that they were willing to begin deliberations anew. All eleven said that they were.

¶102 The reconstituted jury then began deliberations, and after approximately five and one-half hours, the jury returned a guilty verdict on both counts.

¶103 Castro subsequently appealed, arguing, as pertinent here, that the trial court had reversibly erred by substituting Juror W for Juror C. A division of our court of appeals affirmed, however, assuming without deciding that the presumption of

prejudice standard had survived *James* and determining that the precautions taken by the trial court, coupled with the other circumstances of the case, overcame any presumption of prejudice. *People v. Castro*, No. 18CA2389, ¶¶ 23, 54 (Aug. 11, 2022).

II. Analysis

¶104 I begin by discussing the alternate juror statute and rule. I then assume without deciding that it was error to substitute the alternate juror mid-deliberation, and I proceed to discuss what I believe to be the proper standard of reversal and to apply that standard to the facts before us.

A. Section 16-10-105 and Crim. P. 24(e)

¶105 Section 16-10-105, C.R.S. (2023), provides, in pertinent part:

> 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 unable or disqualified to perform their duties. . . . An alternate juror *shall* be discharged when the jury retires to consider its verdict or at such time as determined by the court.

(Emphases added.)

¶106 Crim. P. 24(e), in turn, provides, in pertinent part, "Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties. . . . An alternate juror *shall not* be discharged until the jury renders its verdict or until such time as determined by the court." (Emphasis added.)

¶107 As an initial matter, I note that a legitimate question exists as to whether these provisions conflict.

¶108 Section 16-10-105 can reasonably be read to prohibit the mid-deliberation substitution of an alternate juror. As we acknowledged in *Carrillo*, 974 P.2d at 489, a plain reading of the language, "prior to the time the jury retires to consider its verdict," suggests that an alternate juror can replace sitting jurors only *before* the jury begins deliberations. Moreover, when read in light of that language, and presuming that the legislature did not intend to draft a facially self-contradictory statute, the statute's mandate that any alternate juror be "discharged when the jury retires to consider its verdict or at such time as determined by the court," § 16-10-105, arguably suggests that the court has discretion to discharge the alternate juror, but only *before* the jury begins deliberating, *People v. Montoya*, 942 P.2d 1287, 1295 (Colo. App. 1996).

¶109 Crim. P. 24(e), in contrast, does not condition the substitution of an alternate juror on either a regular juror's inability to proceed or a disqualification occurring before the jury begins deliberations. Accordingly, the rule appears to permit mid-deliberation substitution in the trial court's discretion. Such a reading finds further support in the rule's additional mandate that an alternate juror is not to be discharged until the jury renders its verdict or until such other time as the court may determine. Crim. P. 24(e).

¶110 As we determined in *Carrillo*, 974 P.2d at 488, however, the matter of when an alternate juror may be substituted for a regular juror is a matter of substance, not procedure. Accordingly, the statute controls. *Id.*

¶111 The question thus becomes whether the trial court erred under section 16-10-105 when it substituted Juror W in the middle of the jury's deliberations. Although this is an interesting question that we may need to address at some point, I need not decide it in this case because assuming without deciding that the substitution violated the statute, I believe that the application of the proper standard of reversal is dispositive here. I turn to that issue next.

B. Applicable Standard of Reversal

¶112 As noted above, the majority applies the presumption of prejudice standard from *Carrillo*, 974 P.2d at 490–91, untethered from any determination, or even assumption, of error. Maj. op. ¶¶ 6–8, 40–41, 67, 70, 83–84. For two reasons, I respectfully submit that this approach is mistaken.

¶113 First, I do not believe that it is appropriate to apply a standard of reversal that is not tied to any determination of error. By definition, standards of reversal are applied only after an appellate court concludes (or at least assumes) that an error occurred. *See, e.g.*, *Pettigrew v. People*, 2022 CO 2, ¶ 54, 501 P.3d 813, 825 (assuming without deciding error before addressing harmlessness); *Zoll v. People*, 2018 CO 70, ¶ 22, 425 P.3d 1120, 1127 (same); *Crider v. People*, 186 P.3d 39, 41–42

(Colo. 2008) (determining that the trial court had erred before considering whether the error was harmless). And unlike the majority, I do not believe that *Carrillo* intended to suggest otherwise. Specifically, although we perhaps could have been more clear in *Carrillo*, I read that case as implicitly assuming without deciding that an error had occurred. To the extent that *Carrillo* did otherwise, I respectfully submit that we erred in that regard.

¶114 On this point, I am unpersuaded by the majority's expressed concern that reviewing for constitutional harmless error in this case could suggest that mid-deliberation substitution of a juror might be an error requiring a mistrial. Maj. op. ¶ 71 & n.14. If section 16-10-105 so requires, then it is not for us to ignore that statutory command because we do not like the result. Rather, the matter becomes a policy issue for the legislature to address.

¶115 Second, I believe that in *James*, we effectively overruled the presumption of prejudice standard that we had applied in *Carrillo*, adopting instead a structural error/harmless error dichotomy. In *James*, ¶ 2, 426 P.3d at 337, we considered whether the district court's failure to recall an alternate juror for approximately ten minutes into the jury's deliberations was reversible error, and we ultimately concluded that any error was harmless. To reach this conclusion, we provided a detailed history of the standards of reversal that had applied in cases like the one there before us. *Id.* at ¶¶ 9–15, 426 P.3d at 337–40.

¶116 Specifically, we began by noting that in *People v. Boulies*, 690 P.2d 1253, 1255–56 (Colo. 1984), we had concluded that the presence of an alternate juror during jury deliberations raised a presumption of prejudice that, if unrebutted, required reversal. *James*, ¶ 10, 426 P.3d at 338. We then explained how we had subsequently applied that presumption of prejudice in *People v. Burnette*, 775 P.2d 583, 590 (Colo. 1989), and *Carrillo*, 974 P.2d at 488, both of which involved scenarios in which an alternate juror was substituted for a regular juror after deliberations had begun. *James*, ¶¶ 11–12, 426 P.3d at 338–39.

¶117 We proceeded in *James* to observe, however, that although we had largely relied on federal authorities in deciding *Boulies*, federal law had changed since that time. *Id.* at ¶ 13, 426 P.3d at 339. In particular, we noted that in *United States v. Olano*, 507 U.S. 725, 739, 741 (1993), which was decided after both *Boulies* and *Burnette*, the Supreme Court had considered the presence of an alternate juror in the jury room and concluded that an alternate juror's mere presence in the jury room should *not* be presumed to be prejudicial. *James*, ¶ 13, 426 P.3d at 339. Instead, in *Olano*, 507 U.S. at 739–41, the Supreme Court had described two ways in which the presence of alternate jurors during deliberations might be prejudicial and resolved the case by noting that the defendants had not objected to the participation of the alternates in the jury room and had not made a specific showing of prejudice.

¶118 Finally, we observed in *James*, ¶ 15, 426 P.3d at 339, that in the time since our above-described analyses of the presence or participation of alternate jurors in deliberations, the jurisprudence of both the Supreme Court and of our court concerning the nature and effect of trial errors had been substantially refined. In particular, we noted that in *People v. Novotny*, 2014 CO 18, ¶ 21, 320 P.3d 1194, 1201, we indicated that we had largely come to accept the structural error/trial error dichotomy that the Supreme Court had developed. *James*, ¶ 15, 426 P.3d at 339. Accordingly, we stated, with specific reference to our decision in *Boulies*, "that our reliance on federal case law for the proposition that an error of constitutional magnitude is committed by the mere presence of an alternate juror in the jury room during deliberations has turned out to have been mistaken." *Id.* at ¶ 16, 426 P.3d at 340. Instead, we stated that we are required to analyze an alternate juror's erroneous involvement in deliberations for prejudicial impact. *Id.* We then proceeded to address whether the alternate's presence in the jury room, though error, was harmless, and we concluded that it was. *Id.* at ¶¶ 19–21, 426 P.3d at 341.

¶119 In my view, our foregoing analysis in *James* made abundantly clear that our prior presumption of prejudice standard had turned out to be incorrect and that the proper standard was to review under a structural error/trial error dichotomy, under which the former requires reversal but the latter does not, absent a showing of prejudice (i.e., that the error was not harmless). Indeed, I concurred in the

judgment in *James*, writing separately to express my view that the majority had adopted a false dichotomy because I believed that a third standard of reversal—a presumption of prejudice standard—existed and should have applied in that case, given that the error there defied harmless error review. *Id.* at ¶¶ 24–25, 426 P.3d at 342 (Gabriel, J., concurring in the judgment). The majority, however, *rejected* this view, and, as a result, I perceive no basis for resurrecting the presumption of prejudice standard now, barring a decision to overrule *James* and follow my concurring opinion in that case. *See also Johnson v. Schonlaw*, 2018 CO 73, ¶ 11, 426 P.3d 345, 348 (noting, in a case decided the same day as *James*, that in *James*, the court had rejected the notion that the erroneous participation of an alternate juror in deliberations could defy harmless error review).

¶120 In so concluding, I am unpersuaded by the majority's view that *James* intentionally followed *Olano* and not *Burnette* and *Carrillo* because the factual circumstances in the respective cases were distinct. Maj. op. ¶¶ 56–62. For the reasons discussed above, the majority's analysis reads into *James* reasoning that simply is not there and, in my view, ignores much of what we actually said in *James*, as well as the import of our lengthy discussion in that case regarding the development of the law regarding standards of reversal.

¶121 Accordingly, consistent with *James*, I believe that we are required to apply a constitutional harmless error standard of reversal in this case, and I proceed to do so.

C. Constitutional Harmless Error

¶122 We review preserved trial errors of constitutional dimension under a constitutional harmless error standard. *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. This standard requires an appellate court to reverse unless it determines that the error was harmless beyond a reasonable doubt. *Id.* An error meets this standard when no reasonable possibility exists that the error might have contributed to the conviction. *Id.*

¶123 The evidence on which the People may rely to establish constitutional harmless error depends on the facts of the individual case. *See Crider*, 186 P.3d at 43 (stating that "the likelihood of prejudice must be evaluated in the totality of the circumstances, on a case-by-case basis").

¶124 For example, we have relied on the overwhelming nature of the evidence of guilt to conclude that an error of constitutional dimension was harmless. *See, e.g.*, *Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991) ("A constitutional error is harmless when the evidence properly received against a defendant is so overwhelming that the constitutional violation was harmless beyond a reasonable doubt."); *see also Pettigrew*, ¶¶ 56–59, 501 P.3d at 825–26 (concluding that a

constitutional error was harmless beyond a reasonable doubt because, among other things, the evidence against the defendant was overwhelming).

¶125 In the present context, although I do not believe that the presumption of prejudice standard survived *James*, I would conclude that the factors that we set forth in *Burnette*, 775 P.2d at 590–91, for determining whether the presumption of prejudice has been overcome are likewise useful in assessing whether an error was harmless.

¶126 Specifically, in *Burnette*, 775 P.2d at 590, we determined that the presumption of prejudice may be overcome "only 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." Such precautions include (1) inquiring whether the regular jurors could disregard their prior deliberations and any opinions that they had formed on the questions presented; (2) inquiring whether the regular jurors could be receptive to the alternate juror's effort to assert a non-conforming view; (3) instructing the alternate juror not to discuss with others the alternate juror's view of the case and to refrain from forming an opinion based on information that the alternate might learn after being discharged; (4) upon the alternate juror's return to the courthouse to participate in deliberations, questioning them regarding their activities since being discharged and their

present ability to be fair; and (5) obtaining assurances from the remaining regular jurors and the alternate juror that the reconstituted jury's ability to render a fair verdict would not be impaired by the substitution. *Id.* at 590–91. We also suggested that an appellate court could consider the time spent in the first round of deliberations, as compared with the second, to determine whether the jury had, in fact, followed the court's instructions. *Id.* at 590.

¶127 In my view, these factors, among the other circumstances of a case, are instructive in determining whether any error in substituting an alternate juror in the middle of jury deliberations was harmless. I would thus apply those factors here, and doing so leads me to conclude that any error was harmless beyond a reasonable doubt.

¶128 In this case, as noted above, the court meticulously took the precautionary measures that we had identified in *Burnette*. Specifically, the court instructed Juror W when it "recessed" her to continue to abide by all of the admonitions that the court had given during the trial, including the admonitions not to discuss the case with others and to avoid exposure to external information that could affect her opinion of the case. In addition, when the court recalled Juror W, it asked her whether she had followed its instructions, repeating each admonition individually, and she confirmed that she had done so.

¶129 The court also explained to the original eleven jurors that to be able to reconstitute the jury, they would need to be willing to start their deliberations anew. The court then gave those jurors time in the jury room to discuss whether they could do so, and they responded that they could. And the court took the extra step of confirming this with each juror individually.

¶130 To ensure that the jurors would actually begin anew, the court further instructed the original jurors to destroy any notes concerning their initial deliberations and to select a new foreperson, and the court provided the reconstituted jury with blank verdict forms.

¶131 Finally, I note that the reconstituted jury took five and one-half hours to reach a verdict, which, although admittedly not as lengthy a deliberation as the initial session, was sufficiently lengthy to suggest that the jury had, in fact, heeded the court's instructions.

¶132 Given all of the foregoing, I would conclude that any error in allowing the mid-deliberation substitution of Juror W was harmless beyond a reasonable doubt. Indeed, to conclude otherwise, notwithstanding the trial court's extraordinary efforts to ensure a fair trial, would all but render the arguable error here structural. For the reasons set forth above, however, I do not believe that our current case law would support such a conclusion.

III. Conclusion

¶133 For these reasons, I disagree with the majority's application of a presumption of prejudice standard, particularly without at least assuming that an error had occurred. Instead, I would assume without deciding that the mid-deliberation substitution was erroneous, and in accordance with *James*, ¶ 21, 426 P.3d at 341, I would review for harmless error. Doing so here, I would then conclude that any error was harmless beyond a reasonable doubt.

¶134 Accordingly, I respectfully concur in the judgment, only.