Chapter 9. Supplemental Instructions

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9.01 Retention of Alternate Jurors

At this time, the regular jurors will begin their deliberations in the case. Nevertheless, the alternate jurors are not excused. While the jury conducts its deliberations, you *(describe what is expected of alternate jurors; e.g., you should continue to report to the courtroom at 9 a.m. each morning until I excuse you)***.**

During this time, you must continue to observe all the restrictions I have instructed you on throughout the trial. That is, you must not discuss this case with anyone, including your fellow alternate jurors, the regular jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. Do not even remain in the presence of anyone discussing the case. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.

While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the Internet to search for information about the parties, witnesses, lawyers, or anything else associated with the trial. Do not visit the scene of the alleged offense or conduct any kind of investigation of your own. Should you be asked to participate in reaching a verdict in this case, the only information you will be

allowed to consider in deciding this case is what you learned in this courtroom during the trial.

Comment

A question may arise concerning the role of the alternate jurors once the regular jurors have begun their deliberations. In 1999, Federal Rules of Criminal Procedure, Rule 24(c)(3) was amended to permit the trial court to retain alternate jurors after the regular jurors begin their deliberation. As amended, the rule provides:

> Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

To enable to court to replace a regular juror with an alternate if necessary, the court should consider retaining the alternate jurors. The court must instruct the alternate jurors that they are subject to all the restrictions covered in Instruction 2.01(Recesses). The court must also instruct them that they are not to discuss the case with anyone, including the regular jurors and each other unless and until they replace a regular juror during deliberations.

As the rule reflects, the court may replace a regular juror with an alternate. Even once deliberations have begun, the defendant is not constitutionally entitled to have the original jurors render a verdict. *Claudio v. Snyder*, 68 F.3d 1573 (3d Cir. 1995). The trial court's decision to remove a juror will be reviewed for abuse of discretion. *See United States v. Kemp*, 500 F.3d 257, 301-06 (3d Cir. 2007); *see also United States v. Jimenez*, 513 F.3d 62 (3d Cir. 2008) (upholding refusal to strike juror and reaffirming abuse of discretion standard); *United States v. Boone*, 458 F.3d 321, 327-30 (3d Cir. 2006) (discussing removal of juror for refusal to deliberate or for nullification).

The only requirement if the court replaces a juror with an alternate is that the court instruct the jury to begin its deliberations anew.

(Revised 12/2009)

9.02 Response to Jury Questions

Members of the jury, I have received a note from you that says *(read note from jury)***.**

Let me respond by instructing you as follows: *(response to note determined after consultation with counsel)***.**

Keep in mind that you should consider what I have just said together with all the other instructions that I gave you earlier. All these instructions are important, and you should consider them together as a whole.

You should now return to the jury room and resume your deliberations.

Comment

See Sixth Circuit § 9.01.

In some cases, the jury will have a question while it is deliberating. The trial court has discretion concerning the appropriate procedure and response. *United States v. Sriyuth*, 98 F.3d 739, 751 (3d Cir. 1996). In *United States v. Ulloa*, 882 F.2d 41, 45 (2d Cir. 1989), the Second Circuit suggested a four-step response to jury questions:

> (1) The jury's question should be submitted in writing, (2) the question should be marked as a court exhibit and read into the record, (3) counsel should be afforded an opportunity to suggest appropriate responses, and (4) once the jurors are recalled, the question, if substantive, should be read into the record in their presence.

The court should then read its response to the question. The Committee recommends this approach. *See United States v. Sriyuth*, 98 F.3d 739, 751 (3d Cir. 1996) (noting that the court should read the response to the jury's question, but finding no error where the court responded with written instructions). *See also United States v. Woodson*, 508 F. App'x. 189, 2013 WL 49761 (3d Cir. 2013) (non-precedential) (affirming trial court's grant of new trial on ground that court answered jury question without first consulting with counsel).

A jury question signals that at least some of the jurors are uncertain or confused, and the trial court's response should address and seek to clear up the jurors' uncertainty. *See United States v. Combs*, 33 F.3d 667, 669-70 (6th Cir. 1994). As a result, a supplemental instruction generally should neither provide just a yes or no answer nor merely reiterate earlier instructions. *Combs*, 33 F.3d at 669-70. Instead, the court must "tak[e] pains adequately to explain the point that obviously is troubling the jury." *Combs*, 33 F.3d at 670. At the same time, "the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions." *Combs*, 33 F.3d at 670. In *United States v. Tsai*, 954 F.2d 155, 161 (3d Cir. 1992), the court noted that it would have been better had the trial court been "linguistically consistent in the original and supplemental instructions," but also remarked that "[r]esponses to a juror's question are generally extemporaneous and ad hoc, and cannot be expected to be delivered in polished prose." *See also United States v. Perez,* 531 F. App'x. 246, 2013 WL 3770659 (3d Cir. 2013) (non-precedential) (court's refusal to answer jury question with instruction requested by defendant not an abuse of discretion); *United States v. Davis*, 2013 WL 1800037 (3d Cir. 2013) (non-precedential) (holding trial court did not commit error by reading two instructions in response to jury question); *United States v. Wade*, 451 F. App'x. 173 (3d Cir. 2012) (non-precedential) (discussing trial court's supplemental instructions and finding no error).

In *Ross v. District Attorney of the County of Allegheny*, 672 F.3d 198 (3d Cir. 2012), the trial court received a request to speak with an individual juror after the jury had reported that it had reached a verdict but before the verdict had been returned. The court met *in camera* with the juror along with defense counsel, the prosecution, and the court reporter; the defendant was not present. During the *in camera* conference, the court instructed the juror on her obligation to vote to convict or not convict. The Third Circuit held that, although the trial court should be cautious about meeting with and instructing an individual juror apart from the other members of the jury, the trial court in Ross's case had not committed error. The court emphasized that the juror never wavered in her assertion that the defendant was guilty and the trial court never commented on the specifics of the case. *Ross*, 672 F.3d at 211-13. The court also concluded that Ross's Fifth Amendment rights were not violated by his absence at the conference because his presence would not have contributed to the fairness of the proceeding and may well have been counterproductive, given that the juror was expressing concern about possible retaliation. *Ross*, 672 F.3d at 211-13.

In some cases, the trial court may reopen the record in response to a jury question. *See, e.g., United States v. Benjamin*, 512 F. App'x. 170, 2013 WL 364901 (3d Cir. 2013) (non-precedential).

(Revised 11/2013)

9. 03 Reading of Testimony

Members of the jury, you have requested that *(describe what will be read; e.g., that a portion of (name of witness's) testimony)* **be read. The court reporter will now read that to you.**

Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Do not give it undue weight just because it is being read to you. Consider all the evidence together as a whole.

Comment

See Sixth Circuit § 9.02.

This instruction may be given if the court decides to permit testimony to be read to the jury.

In *United States v. Zarintash*, 736 F.2d 66, 69-70 (3d Cir. 1984) (citations omitted), the Third Circuit discussed the reading of testimony for the jury:

> A trial court has broad discretion in deciding whether to accede to a jury's request for a reading of testimony. But this discretion is based upon a limited, twofold rationale: first, that requests to read testimony may slow the trial where the requested testimony is lengthy; second, that reading only a portion of the testimony may cause the jury to give that portion undue emphasis. Thus, . . . a trial judge abuses his discretion where the refusal to read requested testimony is not supported by one of these reasons.

In *Zarintash*, the court held that the trial court had committed reversible error by refusing the jury's request to read the testimony of two witnesses. 736 F.2d at 71. In *United States v. Bertoli*, 40 F.3d 1384, 1400-01 (3d Cir. 1994), while expressing some concern that giving the jury the written transcript rather than reading the testimony would cause the jury to give it undue weight, the Third Circuit upheld the trial court's decision to provide the jury with transcripts of the

testimony of twelve witnesses. When responding to a request that portions of the testimony be read to the jury, the court should also consider three general concerns:

> (1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court "should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith."

United States v. Rodgers, 109 F.3d 1138, 1143 (6th Cir. 1997) (citations omitted). *See also United States v. Shabazz*, 564 F.3d 280, 285-86 (3d Cir. 2009) (holding that trial court committed error by refusing to allow requested testimony to be read to jury but that the court cured the error by later giving the jury access to the transcript).

In *Bertoli*, the court noted that the trial court "should accompany the transcripts with a cautionary instruction to focus on the entire testimony and evidence." 40 F.3d at 1401. This instruction cautions the jury to consider the testimony read to the jury along with all the other evidence. However, if the defendant does not request an instruction, failure to give an instruction is not plain error. *See United States v. Harper*, 314 F. App'x. 478 (3d Cir. 2008) (non-precedential).

(Revised 12/2009)

9.04 Sending Jury Home Overnight

We are about to stop for the *(day)(week)* **and recess** *(until tomorrow)(until next week)***, and I want to remind you of the instructions I gave you earlier about your conduct as jurors.**

During this recess and all other recesses, do not discuss this case with anyone, including your fellow jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. Do not even remain in the presence of anyone discussing the case. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.

While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the Internet to search for information about the parties, witnesses, lawyers, or anything else associated with the trial. Do not visit the scene of the alleged offense or conduct any kind of investigation of your own. The only information you are to consider in deciding this case is what you learned in this courtroom during the trial.

You are being entrusted with a great responsibility in being permitted to return to your homes *(for the evening)(for the weekend)***. I am sure that each of you**

will make every effort to ensure that none of the restrictions is violated.

You must return to the courtroom at *(fill in day and time)***. You must not begin your deliberations again until all twelve of you are present.**

Comment

See Instruction 2.01 (Recesses). This instruction should be given when the jury is permitted to return home overnight or over a weekend during its deliberations.

9.05 Deadlocked Jury - Return for Deliberations

Members of the jury, I am going to ask you to return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And often after further discussion, jurors are able to work out their differences and agree.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

With that instruction, I will return you to the jury room. Thank you.

Comment

See United States v. Brennan, 326 F.3d 176, 193 (3d Cir. 2003); *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969); 6th Circuit § 9.04. *See also United States v. Cocchiola*, 358 F. App'x. 376 (3d Cir. 2009) (non-precedential) (affirming conviction where trial

court gave instruction essentially identical to 9.05).

This instruction may be given if the jurors report that they are deadlocked. *See United States v. Wecht*, 541 F.3d 493 (3d Cir. 2008) (noting that court gave Instruction 9.05). When a jury reports that it is deadlocked or asks whether it must continue deliberating, the court has broad discretion in overseeing the jury's deliberations. *See United States v. Trala*, 386 F.3d 536 (3d Cir. 2004); *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 935-36 (3d Cir. 1974) (noting that "[a]bsent peculiar evidence indicative of coercion, it is proper for a judge to instruct a deadlocked jury to continue deliberations and attempt to arrive at a verdict"). However, the court should approach the decision to instruct in such circumstances with caution. The court must also take steps to insure that no juror reveals either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla*, 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979).

The court may give a supplemental charge encouraging the jurors to continue their deliberations, but the charge cannot be used to coerce or "blast" a jury into reaching a verdict. *United States v. Jackson*, 443 F.3d 293 (3d Cir. 2006). The propriety of the supplemental charge will be assessed in the context in which it was given. *Jackson*, 443 F.3d at 297.

The Third Circuit has cautioned courts concerning instructions to a deadlocked jury and prohibits use of the charge approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896), because it is too coercive. In *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969), the court cautioned that *Allen* charges are a perennial source of problems and specifically stated:

> Hereafter, in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his. Such an instruction will be deemed error, normally reversible error.

In *United States v. Eastern Medical Billing, Inc.,* 230 F.3d 600 (3d Cir. 2000), the court reaffirmed *Fioravanti* and stated:

> We recognize that when faced with a deadlocked jury, a district court may, in its discretion, provide further instruction to the jurors. In doing so, however, the court should do no more than encourage the jurors to fulfill their duty, and possibly draw their attention again to the same rules governing their task that were explained to them during the original instruction.

230 F.3d at 615. In *United States v. Burley*, 460 F.2d 998, 999 (3d Cir.1972), the court condemned the supplemental charge as unduly coercive because it stressed the importance of considering the burdens and expense to the government if the case had to be retried. In

Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973), the court held that it was plain error to instruct the jury during the charge in chief that the minority jurors should give special consideration to the views of the majority in order to reach a verdict. *But see United States v. Graham*, 758 F.2d 879 (3d Cir. 1985) (agreeing that instruction constitutes error, but disagreeing with plain error analysis). In *United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003), the court stated that telling the jury that it has to reach a decision is coercive and discussed the possible coercive effect of emphasizing the likelihood that continued deliberations would extend into a weekend or holiday.

The Third Circuit has made specific suggestions concerning the supplemental charge to the jury that claims to be deadlocked. In *Fioravanti*, the court noted that if a trial court was inclined to instruct the jury, the court should give the following instruction, found at Mathes and Devitt, 1965, § 79.01.[1]

> It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

412 F.2d at 420 n.32. The court has also encouraged the use of language "urging the jurors to re-examine their own view but not to 'surrender [their] honest conviction as to the weight or effect of evidence solely because of the opinion of [their] fellow jurors, or for the mere purpose of returning a verdict.'" *Brennan*, 326 F.3d at 193-93. In *Trala*, 386 F.3d at 542, the court held that an instruction informing the jurors that they may fail to reach a verdict is necessary only when there is "some evidence of coercion." The model instruction is based on the recommendations of the Third Circuit in these cases. It does not differentiate between majority and minority jurors, nor does it address the necessity of retrying the case if the jurors fail to reach a verdict. Further, it incorporates the language specifically suggested in *Brennan* and *Fioravanti*.

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[1] O'Malley's current instruction includes this language in a much longer instruction, which, in part, advises the minority jurors to reassess their views, a position specifically rejected by the Third Circuit. *See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] § 20.08.

In addition to providing this guidance, the Third Circuit has rejected challenges to the supplemental charges given in specific cases. *See, e.g., Jackson*, 443 F.3d 293; *Brennan*, 326 F.3d 176. In *Brennan*, the court emphasized specific language in reaching its conclusion that the supplemental instruction was not error:[2]

> The Court's charge did express a belief to the jury that it had not deliberated for a sufficient period of time, but this was not affirmative coercive conduct . . . . In addition, while the Court emphasized the desirability of a verdict, this instruction was tempered by the caution that "[u]nder no circumstances must any juror yield

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[2] In *Brennan*, the Third Circuit stated that the following charge was "not error, plain or otherwise":

> All right. Now, in regard to that, as I told you in my original instructions, this case is an important one to the Government. It is equally important to the defendant. It is desirable if a verdict can be reached but your verdict must reflect the consent, conscientious judgment of each juror. Under no circumstances must any juror yield his conscientious judgment.
>
> You have deliberated for only five days in a case that previously took 19 days to try. It is normal for jurors to have differences. This is quite common. Frequently, jurors, after extended discussions may find that a point of view, which originally represented a fair and considered judgment, might well yield on the basis of argument and upon the facts in the evidence.
>
> However, and I emphasize this, no juror must vote for any verdict unless after full discussion or consideration of the issues and exchange of views it does represent his or her considered judgment.
>
> Further consideration may indicate that a change in original attitude is fully justified upon the law and all of the facts. I do want to read to you a statement contained in the Supreme Court Opinion which is well-known to the bench and Bar and it is this. "That although a verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his or her fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinion of each other, that is with their duty to decide the case if they could conscientiously do so."
>
> You're reminded also that the Prosecution bears the burden of proving each element of the offense beyond a reasonable doubt. Do not ever change your mind just because the other jurors see something different or just to get the case over with. As I've told you before, in the end your vote must be exactly that, your vote. And important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.
>
> With that instruction, I will return you to the jury room. Thank you.

Brennan, 326 F.3d at 193.

> his conscientious judgment." The Court also warned the jurors: "[d]o not ever change your mind just because the other jurors see something different or just to get the case over with." Perhaps most importantly, the Court reminded the jury: "As important as it is for you to reach a unanimous agreement it is just as important that you do so honestly and in good conscience.". . . [T]hese warnings and reminders removed any possibility that the supplemental charge could be considered as coercive. Moreover, the District Court did not suggest that the jury was required to reach a verdict, nor did it emphasize the burdens or costs of a new trial.

Brennan, 326 F.3d at 193.

In *Jackson*, the court held that the following supplemental charge was proper even though it mentioned that a new trial would be required if the jury failed to reach a verdict.

> All right. In this case, ladies and gentlemen, you've been deliberating less than two hours, and that's included some time to have lunch. I want to re-read to you slightly different words, but the same concept that I said before. I'd like you to go back into the jury room and talk some more about the evidence.
>
> And, remember my entire instructions, that your job is to be the finders of facts, that you should consider the evidence, you should consider my instructions on the law, and that you should render a verdict based on the evidence. And, that should be your guide, what the evidence is in this case and what the instructions were on the law.
>
> Now, it's your duty as jurors to talk with one another and deliberate in the jury room. You should try to reach agreement, if you can, without doing violence to our [sic] individual judgment. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to reexamine your own opinion and change your mind if you are convinced that you are wrong. But, don't give up your honest belief just because the others thing [sic] differently or merely to get the case over with.
>
> Remember that the Government has to prove its case beyond a reasonable doubt. And, if they do not do this, then you must return a verdict of not guilty. If they have done this, then you must return a verdict of guilty.
>
> So, I ask you to remember my instructions on what is reasonable doubt and all the other instructions that I gave you. And, remember that your oath as jurors is to decide the case on the evidence in the courtroom and the instructions of the law, and to render a verdict if you possibly can, on the charge.
>
> Now, if you can't get beyond count one, then you can't go on to counts two and three, because they're all tied together. *And, if that's the case, then the case will have to be retried in front of another jury.* So, go back in front - go back please and continue to deliberate. Thank you very much.

443 F.3d at 296-97 (emphasis added). The Third Circuit stressed that the charge must be evaluated in context and stated "[w]e will only find a charge to be unduly coercive where the supplemental charge caused the jury to be 'influenced by concerns irrelevant to their task' and 'reached its subsequent verdict for reasons other than the evidence presented to it.'" 443 F.3d at 297 (citations omitted). The court distinguished the charges it had disapproved in *Burley*, 460 F.2d 998 (3d Cir. 1972),[3] and *Eastern Medical Billing, Inc*., 230 F.3d 600,[4] explaining the distinction as follows:

> By comparison, the supplemental charge given here merely mentioned that "the case will have to be retried before another jury," and nothing more. Unlike in *Burley* and *Eastern Medical Billing, Inc.*, the District Court did not stress the time, expense or burden of a new trial, and it never hinted at its belief as to Jackson's guilt or innocence. Indeed, it emphasized, much to the advantage of the defendant, that the government had to prove its case beyond a reasonable doubt and that "if they do not do this, then you must return a verdict of not guilty." The Court stressed the government's burden of proof and the jurors' responsibility to consider honestly the evidence. The Court told all the jurors to reexamine their views without hesitation, but not to surrender those beliefs for the sake of

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[3] In *Burley*, the Third Circuit reversed the conviction where the judge had included the following language in the supplemental charge:

> Another thing you should bear in mind is this: If this jury cannot agree, the case is going to have to be tried again. It took almost a week - did take a week - and all those witnesses are going to have to be called back to testify again. They will be subject to examination, cross-examination, and so forth. So, it is not an insignificant event when a jury does not agree in a case like this. It can produce great additional expense to the government and additional - well, I think I have said enough.

460 F.2d at 999.

[4] In *Eastern Medical Billing,* the Third Circuit reversed the convictions, stating in part:

> The District Court also erred by telling the jury that another trial would be both time-consuming and burdensome to all persons involved, because this portion of the instruction may have been interpreted by the jurors as complaining that if they did not agree upon a dispositive verdict, they would have wasted the Court's time and energy, and imposed upon the Court and the parties by making them endure another trial. Thus, the instruction created the potential that the jurors' deliberation was influenced by concerns irrelevant to their task in the same manner we found impermissible in *Burley*.

> expediency. Consequently, any undue coercion created in this case by the brief mention of a new trial was mitigated by these accompanying strong warnings and reminders.
>
> Although our inquiry in these matters is fact-specific, we have generally concluded that a charge is unduly coercive when the trial court not only states that a new trial will result, but goes further and unduly emphasizes the consequences, i.e., time, toil, or expense, that will accompany a failure to arrive at an unanimous verdict. That did not occur here. We are therefore persuaded that the charge did not so prejudice the jury's deliberations such that the jury reached its verdict upon considerations of matters other than the evidence in the record. Accordingly, the giving of this charge was not beyond the permissible bounds of the District Court's discretion.

443 F.3d at 297 (citations omitted). *Jackson* thus seems to permit the court to inform the jury in the supplemental instruction that failure to reach a verdict will result in retrial of the case.

See also United States v. Figueroa, 683 F.3d 69 (3d Cir. 2012) (holding that trial court did not commit error by recalling jurors who had been discharged due to deadlock but had not dispersed and proceeding with trial and jury deliberation on bifurcated count which had not been presented to the jury before its discharge); *United States v. Boone*, 458 F.3d 321, 327 (3d Cir. 2006) (explaining that jury instructions, to be coercive, "generally involve substantial and explicit pressure from the court for a verdict or for a particular result," and holding that trial court's instructions to jurors regarding their oath to deliberate and need to attempt to reach a verdict were not coercive). In *Boone*, the Third Circuit considered the trial court's handling of claims of juror misconduct. The court emphasized that "a district court should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations." 458 F.3d at 329. The court also commented that it is "manifest" that "a juror who refuses to deliberate or who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role." 458 F.3d at 329.

The American Bar Association suggests that language concerning the duty to deliberate be included in the final instructions as a prerequisite to giving the supplemental charge. *See American Bar Association, Criminal Justice Trial by Jury Standards*, Standard 15-5.4 (3d ed. 1996). The language in paragraph 2 of the instruction is similar but not identical to the language in Instruction 3.16 (Election Of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty To Deliberate; Communication With Court) informing the jury concerning its duty to deliberate. If the court prefers to track the language of Instruction 3.16 more closely, the court may give the following instruction:

> It is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each

other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that, your own vote. It is important for you to reach unanimous agreement, but it is just as important that you do so honestly and in good conscience. Under no circumstances must any juror yield his or her conscientious judgment. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

(Revised 10/2012)

9.06 Deadlocked Jury - Discharge

Comment

See United States v. Crosley, 634 F. Supp. 28 (E.D. Pa. 1985); Ninth Circuit, § 7.8.

If the jury indicates that it is still deadlocked after the court has given instruction 9.05 (Deadlocked Jury - Return for Deliberations), the Committee recommends the procedure set out below be followed and recorded. In *United States v. Wecht*, 541 F.3d 493, 501 (3d Cir. 2008), the Third Circuit held that courts should follow this procedure before declaring a mistrial, describing the procedures set out in this Comment as the ideal. The Third Circuit stressed the importance of following the procedures set out here immediately before declaring a mistrial to ensure that the court's decision takes all the jury's deliberations into account. *Wecht*, 541 F.3d at 501-02. However, the court also held that this procedure is not mandatory.

The recommended procedure is as follows:

First, to determine whether a supplemental charge is necessary, the court should question the foreperson, but must take steps to ensure that the foreperson does not reveal either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla*, 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979). For example, the court may address the foreperson as follows:

> Advise me of the status of deliberations. If the jury is divided, I do not want to know the numbers or the direction. I only want to know whether in your judgment there is a reasonable probability that the jury can arrive at a unanimous verdict in this case if sent back for further deliberations.

Second, if the foreperson indicates that the jury is deadlocked, the court should question each juror, asking "Do you agree that there is a hopeless deadlock which cannot be resolved by further deliberations?"

Third, if jurors' answers reflect that they are deadlocked, the court should excuse the jury and hold a hearing with counsel and the defendant. The court should elicit the positions of all the parties, taking particular care to get a record of the position of the defendant(s) and defense counsel on whether to declare a mistrial. In *Wecht*, the Third Circuit emphasized that the trial court must comply with the mandate of Federal Rule of Criminal Procedure 26.3 and elicit the position of the parties "at an opportune moment."[5] The court held that consultation with counsel

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[5] Rule 26.3 provides:

> Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

five days before the declaration of the mistrial did not comply with the Rule. *Wecht*, 541 F.3d at 502.

If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial. *See United States v. Dinitz*, 424 U.S. 600 (1976); *Wecht*, 541 F.3d at 504-11; *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). When the defendant does not consent to the mistrial, the courts consider a number of factors to determine whether the mistrial represents an abuse of discretion and whether it bars further prosecution:

1. a timely objection by the defendant;
2. the jury's collective opinion that it cannot agree;
3. the length of jury deliberations;
4. the length of the trial;
5. the complexity of the issues presented to the jury;
6. any proper communications between the judge and jury;
7. the effects of exhaustion and the impact of coercion of further deliberations on the jury.

See Crosley, 634 F. Supp. at 30 (citing *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978)); *see also Wecht*, 541 F.3d at 504-11 (discussing assessment of manifest necessity in absence of finding by trial court).

If the court concludes that a mistrial is necessary, the court should make an explicit finding of manifest necessity. For example, the court may state:

> Based on an evaluation of the following factors *(state factors relevant to case)*, I find that the jury is unable to reach a verdict, that further deliberations would be futile, and that there is no alternative but to declare a mistrial for reasons of manifest necessity and to dismiss the jury.

Fourth, the court should call the jury back into the courtroom and discharge the jurors.

(Revised 12/2009)

9.07 Taking the Verdict

Comment

Different judges adopt different procedures for taking the verdict. We have included three approaches to taking the verdict and two approaches to polling the jury. In addition, a slightly different approach is found in § 2.09 of the *Benchbook for U.S. District Court Judges* (March 2000 rev.). Regardless of the variation adopted, it is clear that the defendant must be present when the verdict is taken. *See* F.R. Crim. P., Rule 43(a)(2).

Alternative One:

(1) The judge should tell the jury, "I have been informed that the jury is ready to return its verdict. Has the jury unanimously agreed upon its verdict?"

(2) If the foreperson's answer is yes, the judge should ask the foreperson to please give the verdict form to the courtroom deputy, who will in turn give the verdict form to the judge.

(3) The judge should then give the jury the following instruction:

> I will now return your verdict to the courtroom deputy for publication. Please pay careful attention as the verdicts are read because following publication you may be polled; that is, I may ask each individual juror whether the verdict as published constitutes his or her individual verdict in all respects.

(4) The courtroom deputy then publishes the verdict:

> **Deputy:**
>
> Will the foreperson please rise.
>
> In the case of The United States of America against *(name of defendant)* how say you on Count 1 of the indictment, guilty or not guilty?
>
> Count 2 of the indictment?
>
> (Ask for each defendant and each count. Follow verdict sheet given to jury.)
>
> Members of the jury, hearken to your verdict as the court has understood and recorded it. In the case of The United States of America against *(name of defendant)*, you find the defendant *(guilty)(not guilty)* on Count 1, *(guilty)(not guilty)* on Count 2, etc. in the manner and form as he stands indicted and so say you all.
>
> (State for each defendant and each count.)

(5) Judge: "Does either party request a poll of the jury?"

(6) If either party asks the court to poll the jury, follow the procedure for polling below.

(7) If polling is not requested or, if requested, once polling is complete, the judge should direct the courtroom deputy to file and record the verdict announced.

(8) The judge may then wish to thank the jurors before discharging them. The judge may wish to express the following thoughts:

(i) Thank you for your service. I understand the sacrifice required of you and hope that you understand that jury service is a necessary aspect of our justice system.

(ii) Now that you have returned your verdict, you may discuss the case with whomever you choose, although I suggest that you not talk about the view of your fellow jurors.

(iii) I will not comment on the verdict; that is not my role. This was a difficult case. It was well presented by the parties. The jury system offers the best way to resolve criminal cases.

(iv) Let me remind you one last time that the jury is the keystone of our judicial system. You represent the conscience of the community. The jury is an important aspect of citizen control over government.

<u>Alternative Two:</u>

(1) The judges asks the foreperson: "Has the jury reached a verdict?"

(2) If the answer is yes, the judge then asks, "Is the verdict unanimous; that is, have all twelve of the jurors agreed to the verdict which you are about to state?"

(3) If the answer is yes, the judge then informs the foreperson, "You may read the jury's verdict from the verdict slip."

(4) After the verdict has been read, the court asks, "Do counsel require polling?"

<u>Alternative Three:</u>

(1) When the jury returns to the courtroom, the judge has them all stand.

(2) The courtroom deputy then asks the foreperson of the jury if the jury has reached a unanimous verdict.

(3) If the answer is yes, the courtroom deputy asks for the verdict envelope.

(4) The courtroom deputy gives the envelope with the verdict form to the judge. The judge reviews the verdict form.

(5) The judge then returns the verdict form to the courtroom deputy who then returns the

form to the foreperson.

(6) The courtroom deputy then asks the foreperson, "On Count I, what is the verdict?"

After the foreperson responds, the courtroom deputy then asks the entire panel, "Is that your verdict, so say you all?"

The courtroom deputy then proceeds as above with respect to each of the remaining counts and with respect to each defendant.

Polling the Jury

While the defendant has a right to have the jury polled, the trial court has discretion to determine the manner in which the jurors will be polled. *Government of the Virgin Islands v. Hercules*, 875 F.2d 414 (3d Cir. 1989); *see also Felix v. Government of Virgin Islands*, 290 F.Supp. 2d 625 (D.C.V.I. 2002). Polling the jury eliminates uncertainty concerning the verdict and assures both that the verdict is unanimous and that no juror's vote has been coerced. *Hercules*, 875 F.2d at 418. As a result, polling should entail individual questioning of the jurors and not mere reliance on the signatures on the verdict form. *Hercules*, 875 F.2d at 419. In *United States v. Miller*, 59 F.3d 417, 421 (3d Cir. 1995), the Third Circuit adopted a supervisory rule governing polling:

> In the future, whenever a party timely requests that the jury be polled, the procedure shall be conducted by inquiry of each juror individually, rather than collectively. Recognizing that circumstances in each case may vary widely, we leave to the discretion of the district courts – keeping in mind the purposes of the polling rule – whether a separate inquiry should be conducted for each count of an indictment or complaint, for each of a number of defendants, or for a variety of issues.

If any defendant requests that the jury be polled, each juror must be asked to affirm the verdict as to each defendant. If no defendant objects, the court may ask each juror whether the verdict reflects that juror's verdict on all the counts, as in Alternative One, below, rather than questioning each juror as to each count, as in Alternative Two.

<u>Alternative One:</u>

Counsel for the defense has asked the court to poll the jury.

When I call your number, please answer this question yes or no. Did the jury foreperson correctly state the verdict which you found with respect to each count of the indictment?

Juror Number 1 . . . .
(Repeat for each juror and each defendant.)

If the jurors all answer in the affirmative, the court then states:

> Having polled the jury as requested, and receiving affirmative response to the question, the court directs that the verdict be recorded as announced.

Alternative Two:

Counsel for the defense has asked the court to poll the jury. My deputy will ask each of you in turn whether you find the defendant *(name of the defendant)* guilty or not guilty on each count of the indictment? Please answer yes or no to each question my deputy asks you.

Deputy: Juror Number 1, please rise.

Do you find the defendant *(name of defendant)* guilty or not guilty on Count 1 of the indictment? Count 2 of the indictment?

(Repeat for each defendant and each count.)

If any juror repudiates the verdict, *see* Instruction 9.09 (Return to Deliberations After Polling).

9.08 Partial Verdict

Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish.

You should understand that if you choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.

Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours.

I would ask that you now return to the jury room and resume your deliberations.

Comment

See Sixth Circuit § 9.03

This instruction should not be included in the final charge to the jury and should not be given absent special circumstances. Instead, the jury should be encouraged to return verdicts on all the charges and defendants in the case. It may become appropriate, however, if the jurors indicate that they want to return a partial verdict and are deadlocked on the other counts. In some cases, this instruction may be appropriate after the jury has deliberated for an extensive period of time without reaching a verdict; the length of the deliberations that may persuade the court to give this instruction will depend on various factors including the following: any prior communications with the jury, the nature and complexity of the charges, the length of the trial, the amount of evidence the jury must evaluate and the position of the parties.

Federal Rules of Criminal Procedure, Rule 31(b) provides:

Partial Verdicts, Mistrial, and Retrial.

(1) Multiple Defendants. If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.

(2) Multiple Counts. If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.

(3) Mistrial and Retrial. If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.

In *United States v. Fiorilla*, 850 F.2d 172, 177 (3d Cir. 1988), the Third Circuit recognized that the trial court's discretion extends to taking partial verdicts. *See also United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994) (approving practice of instructing jury that it could return partial verdict).

The court must exercise caution in its handling of partial verdicts. In *United States v. Rivas*, 99 F.3d 170, 173 (5th Cir. 1996), the Fifth Circuit held that the trial court committed error when it instructed the jury to cease deliberations on the count as to which it had reached a verdict. As this instruction explains, until the jury returns the verdict to the court, it is free to continue deliberating on all charges.

9.09 Return to Deliberations After Polling

When I polled the jury one of your members gave an answer which indicates that you may not have reached a unanimous verdict. For this reason I am asking you to return to the jury room to consider your verdict further. Whenever you have reached a unanimous verdict, you may return it in court. If you are not unanimous in your verdict, then you should continue your deliberations.

After you return to the jury room, please try to reach a unanimous verdict. Each of you is free to change your vote on any issue submitted to the jury for decision. You may change your vote at any time until I discharge the jury.

Comment

See 1A O'Malley et al., *supra,* § 20.09.

Federal Rule of Criminal Procedure 31(d) provides:

> Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

The Third Circuit has held that if the polling reveals a lack of unanimity, the trial court has discretion regarding how to proceed. *United States v. Fiorilla*, 850 F.2d 172 (3d Cir. 1988); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983). The court may continue the polling, provided the court does not coerce the dissenting juror(s) into agreement. *Fiorilla*, 850 F.2d 172. Conversely, the court may stop the polling process and instruct the jury to continue its deliberations. *Aimone*, 715 F.2d 822. *See also United States v. Carraway*, 108 F.3d 745, 751-52 (7th Cir. 1997) (holding that the trial court had not abused its discretion by directing the jury to deliberate further after a jury poll revealed that one juror did not support the guilty verdict); *United States v. Chigbo*, 38 F.3d 543 (11th Cir. 1994) (rejecting challenge to manner in which trial court addressed lack of unanimity revealed in polling); *United States v. Gambino*, 951 F.2d 498 (2d Cir. 1991) (stating that the "weight of authority suggests that when the trial judge continues to poll the jury after one juror disagrees with the verdict, reversible error occurs only when it is apparent that the judge coerced the jurors into prematurely rendering a decision, and not merely because the judge continued to poll the jury").