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THE JURY POLL AND A DISSENTING JUROR: WHEN A JUROR IN A CRIMINAL TRIAL DISAVOWS THEIR VERDICT IN OPEN COURT

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INTRODUCTION

In the theatre of American jury trial litigation, the reading of the verdict in open court is the ultimate climax. All eyes are drawn to the jury's foreperson, the judge, clerk or bailiff, as the case may be, as the fate of the accused is announced in open court. If the jury convicts, the accused may poll the jury. Presumably, once a defendant is found guilty, the story is over; however, that is not always the case.

Often the jury poll is overlooked as an essential component of the accused's constitutional right to a jury trial.[1] Once the accused requests a jury poll, the trial judge will ask jurors if the verdict "was and still is their verdict." Often when asked that question in open court a juror will change his or her mind and verdict. When this happens a judge is presented with a dilemma. The judge may either reject the verdict and send the jury back for further deliberations, or declare a mistrial.

It is the position of this author that the polling of juries in criminal cases should be made mandatory and that when a juror unambiguously rejects an earlier verdict of guilty in open court, the trial judge must declare a mistrial. The alternative choice of further deliberations must be rejected because it insinuates that the dissenting juror is wrong. This option is tantamount to a judge ordering the lone juror to abandon his or her reservations and endorse a verdict of guilty. It is nothing less than directing a

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1. In Illinois, the right to poll the jury is available in both criminal and civil trials. Except for some historic background material, this paper is limited to the jury poll in criminal trials.

verdict, a practice that, in a criminal jury trial, is constitutionally defective.

This issue was addressed in an Illinois trial that was recently on appeal in an Illinois appellate court.[2] There, Daniel Quisenberry was charged with first-degree murder.[3] In April of 1999, after a three-day trial, the jury returned with a verdict of guilty.[4] On defense counsel's request, the jury was polled.[5]

Before the poll, the court addressed the jury. "At this time, ladies and gentlemen, the court will conduct what we call a polling of the jury. What this means is I will read the names of the jurors, and I would like for you to respond: 'Yes, that is my verdict' or 'No, that is not my verdict,' whichever the case might be . . . . "[6] The court then proceeded to poll the jurors. The first eleven jurors responded in the affirmative.[7] When the court reached the twelfth, and final juror, the following ensued:

> COURT: Donna Wilson?
>
> JUROR: I can't say yes.
>
> COURT: You cannot say yes. Okay. Then, it would be the position of the court that we do not have a unanimous decision in the case. What I will do is I will recess, unless we have objections from counsel.
>
> MR. CURRENT (STATES ATTORNEY): We would object at this point, Your Honor.
>
> COURT: Ted, will you please take the jurors back into the jury box.
>
> BAILIFF: Yes, sir. (Jurors not present).
>
> COURT: You folks may be seated. What is your objection? What is your position?
>
> MR. CURRENT: We would like the jury to deliberate. We had a verdict, and then one of the jurors apparently has changed their mind. We would ask the jury to continue deliberating.
>
> COURT: That's what I was going to say.
>
> MR. CURRENT: Pardon?
>
> MR.RAU (DEFENSE COUNSEL): I thought you were going to send them home this evening.

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2. People v. Quisenberry, 7 N.E.2d 356 (Ill. 2000).
3. R. Vol. I, C 5 (on file with The John Marshall Law Review).
4. R. Vol. V 150, lines 2-4.
5. *Id.* at lines 7-8.
6. *Id.* at lines 9-15.
7. *Id.* at lines 16-24, 151, at lines 1-13.

COURT: I was going to ask counsel if they had any objections to sending the jurors home for the night and bring them back tomorrow morning to continue deliberating in the case.

MR. CURRENT: No. We object. We want them to continue deliberating right now.

MR. RAU: I would like them excused for the evening.

COURT: If we don't have an agreement, then I will leave them out right now.

MR. CURRENT: I don't agree, Your Honor.

COURT: I will need a blank verdict form so they have two.

MR. CURRENT: I think I can go to my office and get one.

COURT: I need a clean copy of the verdict form. Can you call over to the Lincoln Lounge and see if they can make arrangements if we bring them over for supper right now and maybe take them over for supper. Would you bring the foreperson back in only.

BAILIFF: Yes, sir.

COURT: Just have a seat. Sir, basically in order to have a verdict, it has to be a unanimous verdict. So I am going to ask the jurors to continue to deliberate in the case. I will send them back in a blank copy of this Verdict form, and I am going to ask the secretary to call over to the restaurant and see if they can make arrangements for you folks to go over and have supper as quickly as possible. As soon as we can do that, then I will have the bailiff take you folks over for your evening meal. Thank you.[8]

After a recess the jury returned a unanimous verdict of guilty.[9] The trial record is silent as to how long the deliberation lasted or whether the jury returned the verdict before or after the dinner.[10]

This case presents an excellent opportunity to explore the nature of jury poll practice and what responsibilities a judge may have when a juror disavows the verdict. Section one examines the origin of the jury poll and the three common views associated with the right of an accused to poll the jury. Section two examines the options available to a judge when a jury poll results in a juror dissenting in open court. Section three focuses on Illinois' use of the jury poll and Section four applies those principles to the case of Daniel Quisenberry and argues that upon the juror's refusal to endorse the verdict of guilty in open court, the judge must declare

8. *Id.* at R. Vol. V, 151-54.
9. R. Vol. V, 154, lines 16-18.
10. *See generally* R. Vol. V.

a mistrial.

I. ORIGINS AND USE OF THE JURY POLL

The purpose of a jury poll is to create individual responsibility for the verdict and to eliminate any uncertainty as to the verdict.[11] The judge or the clerk asks each juror in open court whether the returned verdict was and still is the juror's verdict.[12] At times, the inquiry may be addressed to the entire venire collectively.[13] This process was designed to afford members of the jury an opportunity to freely express their verdict in open court, unhampered by the fears or the errors which may have plagued their private deliberations.[14]

The origins of the jury poll can be traced back to Sir Matthew Hale in 1713.[15] In *History of the Pleas of the Crown*, Hale discussed the role of jurors and rules of a trial by jury.[16] In discussing the return of the verdict, he wrote " . . . [n]ow touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are finable."[17] Hale went on to set out three alternate views regarding the right of a party to poll the jury.[18] The trial judge may refuse to allow a poll of the jury, allow it in the exercise of discretion, or grant the accused an absolute right to poll the jury.[19] Trial court judges throughout the United States currently practice all three alternatives.[20]

A. Jurisdictions Without A Right to Jury Poll

Least popular of the three alternatives is the absolute bar to jury polling.[21] Only three states, Connecticut,[22] Maine,[23] and

11. *See* State v. Cleveland, 78 A.2d 560, 563 (N.J. 1951) (reversing defendant's jury verdict of guilty when the polled jurors failed to designate whether the defendant was guilty of first or second degree murder).

12. *Id.* at 562.

13. State v. Hoyt, 47 Conn. 518, 533 (Conn. 1880).

14. 8 WIGMORE, EVIDENCE § 2355 (McNaughton rev. 1961) (1940).

15. *See generally* Sir Matthew Hale, History of the Pleas of the Crown (1st Am. Ed., 1847); *see also Notable Hales* (illustrating the history and accomplishments of the Hale family in England and America), *at* http://www.argonet.co.uk/users/ghale/notable.html (last visited Feb. 5, 2002).

16. 2 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 293-305 (1847).

17. *Id.* at 299.

18. *Id.* at 299-30.

19. C.R. McCorkle, Annotation, *Accused's Right to Poll of Jury*, 49 A.L.R. 2d 619 §§ 3-5 (2001).

20. *Id.*

21. *Id.* at § 5.

22. *See Hoyt*, 47 Conn. at 533 (affirming the trial judge's refusal to poll the jurors individually at defendant's request because justice did not require the recognition of the individual polling procedure in Connecticut).

Massachusetts[24] currently follow this model.[25] The justification for denying a jury poll is premised on the manner in which a verdict is received.[26] Upon the delivery of a verdict, the trial judge in these jurisdictions may address the panel as a whole and inquire as to the unanimity of the verdict.[27] The lack of dissent at this point is, according to the above-mentioned three states, the functional equivalent of an affirmative response.[28]

As early as 1828, Massachusetts considered whether an accused has a right to poll a jury.[29] In *Fellow's Case*, after the defendant was convicted of counterfeiting, he made a motion to poll the jury.[30] Although the motion was denied, the judge made a general inquiry of the entire jury, following the custom of the time.[31] In upholding the decision, the court of appeals said:

> The course of proceeding on the part of the court was according to uniform and immemorial usage in Massachusetts, and our own practice since our separation from that Commonwealth .... It is of no consequence whether the question proposed by the clerk to the jury, as to their affirmation of their verdict, be directed to them jointly or separately; in either case, all are called on by way of inquiry, whether, in open court, they consent to the verdict signed, or announced, *ore tenus*, by their foreman .... [I]t may also be remarked that, in consequence of the motion or request of the defendant's counsel, mentioned in the exception, the judge gave a distinct, cautionary direction to the jury, that if any juror was dissatisfied with the verdict, he should express his dissent.[32]

It should be noted that while not allowing for the poll, these states proclaim to protect the basic interests served by the poll, namely the certainty of a unanimous verdict and the protection of the jurors from undue coercion in their private deliberations.[33]

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23. Fellow's Case, 5 Me. 333 (Me. 1828).

24. *See* Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 515, 517-19 (Mass. 1832) (affirming the denial of the defendant's motion to individually poll the jury because the common practice in Massachusetts and considerations of justice did not require such); *see also* Commonwealth v. Tobin, 125 Mass. 203, 208 (Mass. 1878) (granting defendant a new trial when the jury verdict was recorded and the jury responded by silence because a legal verdict was not returned until the jury orally uttered their verdict).

25. C.R. McCorkle, Annotation, *Accussed's Right to Poll of Jury*, 49 A.L.R. 2d 619 (2001).

26. *Tobin*, 125 Mass. at 207.

27. McCorkle, *supra* note 19, at § 5.

28. *Id.*

29. Fellow's Case, 5 Me. 333 (Me. 1828).

30. *Id.*

31. *Id.*

32. *Id.* at 335-36.

33. United States v. Miller, 59 F.3d 417, 420 (3rd Cir. 1995).

B. Discretionary Polling Jurisdictions

Some jurisdictions recognize that it is within the trial judge's discretion whether to allow a party to poll the jury.[34] Four states permit discretionary polling: Colorado[35]; New Hampshire[36]; Rhode Island[37]; and South Carolina.[38] Canada also allows for discretionary polling.[39] The standard of review on appeal is whether the trial judge abused his or her discretion in disallowing a jury poll.[40]

The general assumption in these states is that a verdict delivered and received in open court is a reliable reflection of the juror's intent.[41] This assumption may, however, be rebutted if there are outward signs of possible dissent or dissatisfaction with the verdict by one or more jurors.[42] Such signs are not an absolute prerequisite to allowing a jury poll.[43] In fact, there need not be any outward signs from a dissenting juror in order for a trial judge to allow for a jury poll.[44] This is evidenced by the words of the Colorado Court of Appeals which advised that "[a]s a matter of practice, when a demand for a poll is made it should be granted."[45]

Despite the sage advice of the Colorado court, many judges in Colorado and other discretionary polling jurisdictions do not permit a poll when requested by the accused. The refusal of this request is rarely, if ever, considered an abuse of discretion.[46] The refusal of a poll presents a paradox for the accused in those states because the right to poll does not exist absent "serious doubts as to the integrity of the verdict."[47] Yet, without a poll, the accused may

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34. McCorkle, *supra* note 19, at § 4.

35. *See, e.g.,* Ryan v. People, 114 P. 306 (Colo. 1911) (holding that there was no reversible error where an individual jury poll was not demanded because considerations of justice do not require a poll unless the defendant specifically demands it).

36. *See, e.g.,* State v. Grierson, 69 A.2d 851, 853 (N.H. 1949) (stating that a jury poll is allowed at the discretion of the trial judge and subject to an abuse of discretion standard).

37. *See e.g.*, State v. Sousa, 110 A. 603, 604 (R.I 1920) (stating the right to grant a jury poll is within the discretion of the trial judge and subject to an abuse of discretion standard).

38. *See, e.g.*, State v. Simon, 120 S.E. 230, 232 (S.C. 1923) (finding that there is no absolute right to have the jury polled, but will usually be granted if the defendant raises the issue in a motion).

39. McCorkle, *supra* note 19, at § 4.

40. *Grierson*, 69 A.2d at 855.

41. *Ryan*, 114 P. at 108.

42. McCorkle, *supra* note 19, at § 4.

43. *Id.*

44. *Ryan*, 114 P. at 108.

45. *Id.*

46. McCorkle, *supra* note 19, at § 4.

47. Commonwealth v. Stewart, 377 N.E.2d 693, 700 (Mass. 1978) (stating that the length of jury deliberations alone was not sufficient to warrant a jury poll).

not be able to make the necessary showing of a flawed verdict.

The request to poll the jury has been denied in a number of cases, even in an extreme situation where there was a bomb threat against the jury.[48] Motions requesting a poll have been denied in cases where the period of deliberation was suspect,[49] the deliberations themselves may have been tainted,[50] or where the defense counsel could not provide a basis for the request.[51]

C. *Poll by Right Jurisdictions*

The vast majority of states and the federal court system recognize the right of an accused to poll the jury in both felony and misdemeanor trials.[52] This right is either a creation of the common law[53] or a statute.[54]

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48. *See* State v. Evans, 627 So.2d 664, 668 (La. Ct. App. 1993) (finding that a bomb threat did not taint the jury verdict because the jurors were largely unaware of the situation during deliberations).

49. *See, e.g.,* United States v. Miller, 59 F.3d 417, 421 (3rd Cir. 1995) (denying the defense's motion to poll after an especially short deliberation); Pulliam v. State, 345 N.E.2d 229, 234 (Ind. 1976) (holding that there was no abuse of discretion where newspaper article chastising deadlocked juries may have contributed to the unanimous verdict of guilty); Commonwealth v. Caine, 318 N.E.2d 901, 908 (Mass. 1974) (denying a motion to poll the jury which convicted the defendant of first degree murder in five hours; after four and one half hours the jury inquired whether unanimity was required on the degree of murder).

50. *See, e.g.,* United States v. D'Anjou, 16 F.3d 604, 611 (4th Cir. 1994), *cert. denied,* 512 U.S. 1242 (1994) (discussing concern over whether jurors had read a certain newspaper article during deliberations and holding it not to be reversible error).

51. *See, e.g.,* State v. Wise, 41 S.C.L. (7 Rich.) 412 (1854) (finding that defendants did not have any recognized right to ask the opinion of each juror); Commonwealth v. Dias, 646 N.E.2d 1065, 1068 (Mass. 1995) (holding that it was not reversible error when the lone dissenting juror did not make an audible or discernable dissent).

52. *See* Jaca Hernandez v. Delgado, 375 F.2d 584, 585 (5th Cir. 1967) (stating "[i]t is true that the right to poll the jury is one of long standing in both the federal . . . and most state courts"); *see, e.g.*, Miranda v. United States, 255 F.2d 9, 17-18 (1st Cir. 1958) (holding that "[t]he right of the defendant to have the jury polled, as thus recognized and established by Rule 31(d) [of the Federal Rules of Criminal Procedure], is of ancient origin and basic importance"); McCorkle, *supra* note 13, at § 4; *see also* Stewart v. State, 41 So. 631, 632 (Ala. 1906).

53. *See* People v. Cabrera, 480 N.E.2d 1170, 1173 (Ill. App. Ct. 1985) (confirming that an essential part of a defendant's right to a trial by jury is that the verdict be freely achieved and that the jury poll "is one method of safeguarding defendant's right to be tried by an impartial jury").

54. *See* Brown v. State, 63 Ala 97, 102 (1879) (confirming that "[i]n all criminal cases, whether felony or misdemeanor, the right of polling the jury is secured . . . by [the] statute"). In *Brown*, the statute relied upon originally enacted in 1852, provided "[w]hen a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party." *Id. See also* Fed. R. Crim Pro. 31(d) (allowing a poll of the jury at the request of any

In felony trials, the accused may poll the jury regardless of the manner in which the verdict is delivered:

> We think a defendant on trial in a criminal case, . . . has the right to have the jury polled, whether it be an oral or a sealed verdict. He has no right to say in what manner it shall be done, nor to propound any question, but simply to know that the verdict given by the foreman is the verdict of each juror, and we think it is error in the [c]ourt to deny it when demanded.[55]

In some jurisdictions, unless waived by prior agreement, the accused may exercise his right to poll the jury in misdemeanor cases, even when the delivery of the verdict is sealed. Further, some jurisdictions extend the right to poll the jury to the prosecution as well.

Poll by right jurisdictions have noted the importance of the jury poll.[56] The poll has been characterized as "an essential part of the right of trial by jury."[57] "It is guaranteed by both the Constitution and the statute, and ought to be maintained and preserved by the courts as essential to the protection of the rights of the citizen."[58] The importance of such a right is magnified in capital litigation[59] and in combined litigation of multiple indictments or multiple count indictments.[60]

Refusal of a trial judge to poll the jury upon request is reversible error. The absolute nature of the right has long been recognized. For example, a Missouri appellate court reversed a violation of a liquor law conviction, because the trial judge denied a request to poll the jury.[61] In Illinois, an appellate court reversed a conviction where the trial court denied a defendant's request for a jury poll, but did not issue a ruling on defendant's request.[62] Significantly, that court overturned the conviction even though the verdict was open and the accused did not raise the issue in a

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party or upon the court's own motion).

55. State v. Young, 77 N.C. 498, 498 (1877).

56. *See* Brooks v. Gladden, 358 P.2d 1055, 1056-57 (Ore. 1961) (confirming that it is "firmly established . . . that the right to have the jury polled is absolute"); *see also* Carver v. Commonwealth, 256 S.W.2d 375, 377 (Ky. Ct. App. 1953) (confirming that "[t]he most substantial right of the accused in a felony case, incident to this constitutional privilege of being present when the verdict is returned, is the right to poll the jury . . .").

57. Temple v. Commonwealth, 77 Ky. (14 Bush) 769, 771 (1879).

58. *Id.*

59. *See* Commonwealth v. Martin, 109 A.2d 325, 328 (Pa. 1954) (noting that "[m]anifestly, the right is of especial importance were a verdict carrying capital punishment has been rendered").

60. *See* People v. Hoffman 24 N.Y.S.2d 59, 61 (1940) (stating "[t]he right to poll the jury in any case is a substantial one, but it was particularly so under the facts of this case.") In *Hoffman*, the defendants were convicted on nine counts and were denied the opportunity to poll the jury. *Id.* at 60.

61. State v. Reppetto, 66 Mo. App. 251, 253 (1896).

62. People v. DeStefano, 212 N.E.2d 357, 368 (Ill. App. Ct. 1965).

motion for a new trial.[63]

The right to poll a jury is not a self-executing right. A trial judge is not bound to poll the jury unless the accused makes a timely request.[64] Properly timed requests can be made after a verdict is announced, but before it is filed,[65] before the jury separates or is discharged,[66] or before the sentence is pronounced. It is premature to poll a jury when they first report an inability to agree on a verdict.

When the accused has been afforded a reasonable opportunity to request a poll of the jury, the failure to do so generally constitutes a waiver.[67] For example, consent to the discharge and separation of the jury prior to rendition of the verdict,[68] and the voluntary absence of the accused or defense counsel from the courtroom at the time the verdict is delivered constitutes a waiver.[69] These situations have been considered a waiver despite strong statements that waiver of the right to poll the jury should never be implied.[70] Or in the words of the Georgia Court of

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63. *Id.* at 367.

64. *See* State v. Vaszoricha, 98 A.2d 299, 314 (N.J. 1953), *cert. denied* 346 U.S. 900 (1953) (noting that the poll of a jury, while not a right of a defendant nor necessary for conviction, may be requested if timely, and may be waived by failure to make such a request).

65. *See* Commonwealth v. Schmous, 29 A. 644, 645-46 (Pa. 1894) (holding that "[a]ccording to the well settled practice in the oyer and terminer, the request to poll the jury came too late, and should have been denied. The verdict in due form had already been not only announced, but recorded and affirmatively responded to by the entire jury").

66. Bridges v. State, 122 So. 533, 534 (1929).

67. *See* U.S. v. Dye, 61 F. Supp. 457, 459 (W.D. Ky. 1945) *citing* Humphries v. District of Columbia, 174 U.S. 190, 194 (1899) (concluding that while the defendant had a right to have the jury polled, the failure to make such a request constituted a waiver of that right).

68. *See* Vaughan v. State, 71 S.E. 945 (Ga. Ct. App. 1911) (stating when the right to poll the jury can be lost).

> The right to poll the jury is lost as soon as the jury have dispersed and again become a part of the general public; and where the accused in a criminal case consents that the jury may disperse when they have found their verdict, and they do separate and disperse, leaving the verdict in the possession of the foreman, to be returned into court next morning, the right to poll the jury is lost, and can not be asserted by any reassembling of the jury, when the verdict is delivered by the foreman to the clerk of the court in pursuance of the agreement.

Id.

69. *See* Clemens v. State, 185 N.W. 209, 217-18 (Wis. 1922) (providing that it has repeatedly held that a verdict should not be received in the absence of the accused and his counsel unless the right of the accused to be present in person and to have counsel present has been waived, however, it would be unreasonable to expect the court to wait at length). Therefore, because both the accused and counsel absented themselves voluntarily, the right of the accused and his counsel to be present at the time of the reception of the verdict and the right to poll the jury was waived. *Id.*

70. *See* Wooten v. State, 92 S.E. 233, 233 (Ga. Ct. App. 1911) (holding that

Appeals:

> The right to poll the jury should never be denied where demanded in time. The demand is always in time when made after the verdict is published and before the jury is dispersed, and before sentence. A waiver of the right should never be implied.[71]

II. WHAT HAPPENS WHEN A JUROR CHANGES HIS OR HER MIND?

During the polling, the trial judge or a member of the court's staff asks the jury collectively or individually whether the delivered verdict was and is his or her own verdict.[72] Occasionally a juror shows apprehension, expresses doubt or even completely disaffirms his or her earlier written verdict.[73] Should this occur, the trial judge can clarify the juror's behavior by asking whether the juror is affirming or disaffirming his or her verdict. The judge should carefully choose his or her words while attempting to ascertain what the juror is saying because too much persistence may be seen as judicial coercion.[74] Alternatively, if the judge does not probe at all, the verdict remains ambiguous and the conviction will likely be reversed on appeal.[75]

A juror's response is not always ambiguous; there are times when a juror simply refuses to endorse an earlier vote of guilty.[76] In this situation a judge has two options. The judge may either send the jurors back for further deliberations until a unanimous

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the court committed reversible error in refusing the defendant's demand for a jury trial).

71. *Id.*

72*See, e.g.,* Matthews v. United States, 252 A.2d 505, 505 (D.C. 1969) (providing the dialogue between the court and a juror during a jury poll).

73. *See, e.g.,* United States v. Edwards, 469 F.2d 1362, 1366 (5th Cir. 1972) (noting that a juror being polled stated that the verdict was hers but that she was "still in doubt").

74. *See* Jenkins v. United States, 380 U.S. 445, 446 (1965) (reversing the court of appeals and remanding for a new trial after finding that the trial judge's statement had a coercive effect). Slightly more than two hours after the jury retired to deliberate, the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict on both counts because of "insufficient evidence." *Id.* The judge thereupon recalled the jury to the courtroom and in the course of his response stated, "[y]ou have got to reach a decision in this case." *Id.* The Supreme Court granted certiorari to consider whether under the circumstances of this case the statement was coercive. *Id.* The Solicitor General in his brief to the Court stated: "[o]f course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Id.*

75. *See* People v. Kellogg, 397 N.E.2d 835, 838 (Ill. 1987) (upholding the court of appeals reversal and finding the verdict ambiguous because the trial judge did not ascertain whether it was the juror's desire to change her vote as she had asked, or whether she desired to abide by the verdict she had signed).

76. *See generally* State v. Imlah, 281 P.2d 973 (Or. 1955).

verdict is reached or declare a mistrial.[77]

This Section addressed three concerns. First, it focuses on what constitutes an affirmation of verdict and what kind of response is simply too weak to support a conviction. Next, it explores the limits on the judge's ability to extract a definite statement from a reluctant juror, and concludes with a discussion of a judge's options when a juror simply rejects their earlier position.

A. Ambiguous or Unclear Responses

Ruling on the motion to poll is the first step in what can be a long and difficult process. The very essence of the jury poll is to demand a juror to affirm an earlier verdict of guilty.[78] Trouble begins when the answer is not a simple "yes" or "no."

The validity of a verdict is put in jeopardy when a juror gives an equivocal, ambiguous, inconsistent, or evasive answer.[79] Similar concerns arise when the juror's assent is reluctant or conditional.[80]

Case law is split as to what constitutes too much reluctance to endorse a verdict. When jurors are asked whether they agree with the verdict, their response need not be a simple "yes" or "no." For example, in *Johnson v. U.S.*,[81] a juror, when asked to affirm the verdict, responded, "[g]uilty, I guess." The judge stated that he interpreted the response as an affirmation of the verdict and accepted the verdict as unequivocal and unanimous.[82] The

77. *See Matthews*, 252 A.2d at 506 (reversing a conviction based on the uncertainty discovered during the jury poll); *see also* Martin v. Morelock, 32 Ill. 485, 488 (1863) (articulating that the trial judge determines that when any juror dissents from the verdict submitted to the court, the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations or to discharge it).

78. *See* Humphries v. District of Columbia, 174 U.S. 190, 194 (1899) (providing that FED. R. CRIM. P. 31(d) establishes an absolute right to have the jury polled, and that the object of a poll is to give each juror an opportunity, before verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and parties "to ascertain for a certainty that each of the jurors approves of the verdict as returned"); *see also* United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976) (providing that the purpose of the poll is to test the un-coerced unanimity "[o]f the verdict by requiring each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman").

79. *See* State v. Austin, 6 Wis. 205, 207 (Wis. 1858) (emphasizing the necessity for a clear, unanimous verdict).

80. *See id.* (indicating that the jury should be sent out to reconsider the verdict when a juror expresses any doubt about a verdict); *see also Matthews*, 252 A.2d at 506 (indicating that a juror unsuccessfully attempted to make her verdict conditional).

81. 470 A.2d 756, 759 (D.C. 1983).

82. *Id.* at 760.

conviction was upheld.[83] Courts do not explore the degree of reluctance or willingness of jurors to assent to the verdict; the only relevant question is whether the juror agrees to it, and if he or she does, that is sufficient.[84] Georgia's acceptance of such verdicts continues to this day.[85]

An early North Carolina case exemplifies the very outer edge of an acceptable affirmation. In *State v. Goodwin*,[86] upon being polled, a juror noted the process by which he arrived at his verdict of guilty. The juror noted that in the beginning of the deliberations he was not prepared to vote guilty, but realized that the majority was going to vote guilty.[87] He therefore, accepted the will of the majority and changed his vote, but seemingly not his mind.[88] The court looked only to extrinsic evidence of possible jury tampering or other misconduct, and did not consider the manner in which the juror reached his decision or whether the juror presently accepted the guilty verdict.[89]

As discussed further in the next Section, a judge may, under certain circumstances, send a jury back for further deliberations when a juror changes positions in open court. This was the case in *State v. Imlah*.[90] There, an Oregon judge polled the jury after the announcement of the guilty verdict.[91] One of the jurors responded "[y]es; with reluctance."[92] He gave this answer twice and then said "[y]es."[93] The judge sent the jurors back for further deliberations.[94]

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83. *Id.*

84. *See* Parker v. State, 6 S.E. 600, 601 (Ga. 1888) (finding that there was no error in overruling the motion for a new trial where one of the jurors, when polled, answered that he agreed to the verdict, but did so reluctantly). The *Parker* Court expanded on its reasoning stating that:

> If a juror agrees to a verdict, that in law is sufficient. If verdicts are to be set aside because some of the jurors agree to them reluctantly, very few verdicts in important cases would be allowed to stand. The law does not inquire as to the degree of reluctance or willingness with which a juror's mind assents to the verdict. Its only inquiry is does he agree to it? If he does, that is sufficient.

Id.

85. *See, e.g.*, Hanson v. State, 372 S.E.2d 436, 439 (Ga. 1988) *citing* Young v. State, 236 S.E.2d 1, 6 (Ga. 1977) (holding that "reservations" about the verdict do not prevent the verdict from being unanimous). "The requirement is that a juror agree to the verdict." *Id.* at 440. "In this case, the juror on two occasions answered affirmatively that the verdict was his in the jury room and still his upon being polled." *Id.*

86. 27 N.C. 401, 401 (1845).

87. *Id.*

88. *Id.*

89. *Id.* at 405.

90. 281 P.2d 973 (Or. 1955).

91. *Id.* at 975.

92. *Id.*

93. *Id.*

94. *Id.*

When the judge ordered the jury back, he polled them again. The reluctant juror at this time answered [n]o.[95] The judge then sent the jury back for another round of deliberations.[96] After the third return, the juror reluctantly answered [y]es."[97] In upholding the guilty verdict, the Supreme Court of Oregon held that reluctance to vote guilty, thereby condemning the defendant to his death, was insufficient for setting aside the verdict.[98]

Other courts have held that in order to have a valid conviction, the jury verdict must reflect a belief that the accused is in fact guilty beyond a reasonable doubt.[99] These courts have looked past mere words and held that the situation in which the verdict was given negates the words spoken by the juror. For example, in *U.S. v. McCoy*,[100] a polled juror responded [y]es, with a question mark."[101] The judge told the juror to respond either "yes" or "no."[102] The juror said "yes"[103] and the circuit court reversed the conviction.[104]

The list of responses that have led to mistrials or reversals of conviction is long and diverse. In *Solar v. U.S.*,[105] a juror replied "I said not guilty and I changed it to guilty in a way," ending with, "[g]uilty, I suppose."[106] The judge eventually accepted the verdict as unanimous but was reversed.[107] In *State v. Bell*,[108] a juror gave reluctant and evasive answers. The judge ordered the clerk to poll the jury five times, eventually leading to a straight "[y]es."[109] This was held to deprive the accused of his right to fair trial and a conviction by a unanimous verdict.[110]

B. Ordering Further Deliberations

Issues arising out of a jury poll are especially problematic due

95. *Imlah*, 281 P.2d at 975.
96. *Id.*
97. *Id.*
98. *Id.* at 980-81.
99. *See, e.g.*, Sincox v. U.S., 571 F.2d 876, 878 (5th Cir. 1978), *citing* United States v. Gipson, 553 F.2d 453, 456 (5th Cir. 1977) (providing that it is thus settled law that a federal criminal defendant has a constitutionally based right to a unanimous jury verdict).
100. 429 F.2d 739 (D.C. Cir. 1970).
101. *Id.* at 741.
102. *Id.*
103. *Id.*
104. *Id.*
105. 86 A.2d 538 (D.C. 1952).
106. *Id.* at 539-40.
107. *Id.* at 540-41. When an individual juror expresses doubt about his or her verdict the judge should decline to accept the verdict and require the jurors to deliberate further. *Id.* at 541.
108. 537 A.2d 496 (Conn. App. Ct. 1988).
109. *Id.* at 500.
110. *Id.* at 502.

to timing. The return of the verdict signals the end of a long and expensive process. The state, the court, and the accused have invested a great deal of time and resources to get to that point. Any aberration in the jury poll can, potentially, require an even greater investment of those scarce resources. It is at this point that the judge must balance the right of the accused to a fair trial with concerns for judicial economy. The judge must strike a balance, which protects all the parties while not always resorting to beginning the process over again.

When faced with situation a judge must tread carefully. If a judge merely repeats a question until there's a firm answer[111] he or she risks reversal for depriving the juror an opportunity to express feelings about the verdict in an unambiguous way.[112] Conversely, if a judge merely accepts the conditional or ambiguous response the potential for reversal looms equally large. The desire for an unambiguous yes or no answer is in fact fertile ground for reversal.[113]

Occasionally, a judge may continue questioning a juror after receiving an ambiguous, inconsistent, equivocal or evasive answer.[114] For example, when an Alabama juror answered, "I reckon so" when asked if his verdict was guilty,[115] the judge questioned the juror further. Eventually the juror agreed that the verdict of the jury was guilty and that was in fact his verdict.[116] On appeal, the conviction was upheld recognizing that the original answer was evasive, but that the subsequent confirmation of the verdict had remedied the problem.[117]

Evasive answers are relatively common. In a California trial a juror did not want to give a straight answer. [118] When asked

111. *See* People v. Bennett, 507 N.E.2d 95, 100 (Ill. App. Ct. 1987) (noting that in the present matter juror Smith twice stated that she was not sure about her verdict).

112. *See id.* (noting that because a juror was not allowed the opportunity to express her feelings about the verdict in "an unambiguous manner," the defendant was entitled to a new trial).

113. *See* People v. Kellogg, 397 N.E.2d 835, 838 (Ill. 1987) (repeating the initial question twice after a juror asked whether she could change her mind, the juror finally gave an affirmative answer which was accepted by the trial judge, however, such an ambiguous response does not indicate a unanimous verdict).

114. *See* People v. Garfield, 633 N.E.2d 919, 928 (Ill. App. Ct. 1994) (upholding conviction after juror changed his answer from dissent to agreement with guilty verdict).

115. Martin v. State, 124 So. 392, 392-93 (Ala. Ct. App. 1929).

116. *Id.* at 392.

117. *See id.* at 392-93 (holding that "there was no impropriety in receiving the verdict of the jury because of the, at first, evasive answer of one of the jurors as to its being 'his verdict,'" and "[t]he court was fully authorized to find, from the examination of the juror on the poll, that the verdict returned represented his convictions").

118. People v. Burnett, 22 Cal. Rptr. 320, 323 (Cal. Ct. App. 1962).

about her verdict she responded, "[h]ow do you do that when you are in doubt? I guess you say '[y]es'."[119] The judge followed up with questions about her verdict until she finally answered twice that her answer was in fact guilty.[120] The further probing of the juror was upheld as proper.[121] The questioning of the juror allowed the trial judge to determine whether the juror was affirming her verdict, disaffirming her verdict, or was undecided. By removing the ambiguity from the equation, the trial judge allowed the juror to freely and openly express her concerns about the verdict.[122]

Some judges take a different approach and rather than dance around the problem, require a juror to make a definite statement. In an early North Carolina case, the juror tried to avoid the poll question.[123] When asked if his verdict was guilty, the juror responded, "[w]ell, I suppose I must go with the rest."[124] The judge demanded the juror to respond either 'guilty' or 'not guilty.' The juror responded 'guilty.'[125] In upholding the judgment the court of appeals held that the last answer of the juror was an assent to the verdict.[126]

Another problem occasionally presents itself in the polling of a jury and presents a novel problem for the judge. This is the problem of a conditional assent.[127] In these cases a juror says "guilty, so long as . . .".[128] The most common type of conditioned assent is a guilty verdict conditioned on mercy or as light a sentence as possible.[129] Again, there is conflicting authority on

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. State v. Sheets, 89 N.C. 543 (1883).
124. *Id.* at 544.
125. *Id.*
126. *Id.* at 550.
127. *See, e.g.,* Matthews v. United States, 252 A.2d 505, 506-07 (D.C. 1969) (finding where a juror stated that her verdict of guilty was conditional, the jury could not be said to have freely and fairly arrived at a unanimous verdict and her subsequent statement of "guilty" in response to the court's directive that she had to answer either guilty or not guilty did not remove the uncertainty); *see also* Cook v. United States, 379 F.2d 966, 970 (5th Cir. 1967) (reversing a judgment of conviction upon the verdict, and ordering a new trial because most of the jurors answered, "guilty, as noted on the bottom of the verdict," or "guilty based on the note at the bottom," and the notation in question was a request for "every degree of leniency possible").
128. *See* State v. Woods, 542 P.2d 319, 324 (Kan. 1975) (ruling that a new trial was not warranted where each juror stated that guilty verdict was his or her true verdict although several jurors recommended leniency because a few things remained to be proved and more things could have been brought out).
129. *See* Southworth v. State, 125 So. 345, 348 (Fla. 1930) (rejecting the argument that the verdict of guilty of first degree murder was not the verdict of the two jurors because they answered that the verdict was guilty, but "with mercy").

how such conditional assent should be interpreted.

In *State v. Woods*,[130] several jurors, upon being polled, affirmed the verdict but recommended leniency.[131] This was based on the jurors' belief that "a few things remained to be proved," and "there could have been some more things brought out.[132] The judge accepted the guilty verdict and the conviction was upheld.[133]

Other cases show similar situations in which one or more jurors declare a guilty verdict along with opinions or pleas for leniency. In some jurisdictions the trial judge need only hear the word "guilty" and may treat the rest as "surplusage."[134] This may occur even if more than one juror gives a guilty verdict along with a recommendation of leniency.[135]

III. THE ILLINOIS POSITION

When a trial judge faces a problem in the polling process, such as an ambiguous answer that the judge cannot clarify through further questioning,[136] or a juror changes his or her mind, a judge has three options. The judge may in certain circumstances and with the consent of the defendant, accept a non-unanimous verdict of guilty,[137] or he or she may require further deliberations by the jury,[138] or declare a mistrial.[139]

The determination of what constitutes an ambiguous or disavowing answer and which remedy is chosen upon a flawed jury poll is largely within the court's discretion.[140] This vast discretion has permitted the development of inconsistent, and even

130. 542 P.2d 319 (Kan. 1975).

131. *Id.* at 323.

132. *Id.*

133. *Id.* at 324. The court found that there was no abuse of discretion by the trial judge because the "counsel for the defense did not request the trial court to inquire further into the matter nor ask the trial court to direct the jury to resume its deliberations." *Id.*

134. State v. Lewis, 91 P.2d 820, 827 (Nev. 1939).

135. State v. Woods, 542 P.2d 319, 323 (Kan. 1975).

136. There is a great deal of precedent regarding subsequent questioning by a judge as a curative of a potentially defective verdict. *See, e.g.*, United States v. Brooks, 420 F.2d 1350, 1351-53 (D.C. Cir. 1969) (questioning a juror who did not initially agree to the verdict on an armed robbery count, but subsequently affirmed after the court explained that "[the court] cannot have any reservations under the jury system").

137. This option will not be discussed because it is rare and not relevant to the present discussion.

138. *See, e.g., Brooks*, 420 F.2d at 1354 (permitting further deliberations after two jurors indicated confusion).

139. *See* People v. Preston, 391 N.E.2d 359, 363 (Ill. 1979) (stating that the trial judge must be given "great latitude" in determining whether to declare a mistrial).

140. *See Woods*, 542 P.2d at 324 (concluding that whether additional questions should have been asked was a matter within the discretion of the trial court).

conflicting, precedents making the resolution of any particular jury poll issue impossible to predict.

The next Section examines the methods an Illinois judge may employ in questioning a juror to ascertain his or her intent to confirm or disavow an earlier verdict, followed by a discussion of the ramifications of requiring further jury deliberation. Finally, the last Section discusses what constitutes judicial coercion in Illinois.

A. Illinois' Requirements for Unambiguous Answer

The role of the jury and the jury poll has a long history in Illinois. In 1898 the court of appeals stated that the purpose of the jury poll is "to ascertain whether any juror had been coerced into agreeing upon a verdict — coerced by his associate jurors."[141]

Illinois judges have responded variously to ambiguous answers or to disavowals of verdicts.[142] Judges have demanded a "yes" or "no" answer, ignored potential ambiguities and further questioned jurors as to their actual verdict. Each choice presents difficulties.

Perhaps the most common reaction to an unorthodox answer by a juror during a poll is for a judge to demand a simple "yes" or "no" answer. This was the court's approach in *People v. Cabrera*.[143] The following is the colloquy between judge and a juror in *Cabrera*:

> COURT: [the jurors] I'm going to ask you this question, and I want you to pay attention to it. Was this and is this now your verdict, Miss Cancinelli?
>
> JUROR: Can I say what I have to say, or do I have to give a yes, or no answer?
>
> COURT: I want a yes or no answer. Was this and is this now your verdict?
>
> JUROR: I found in my own person mind- -
>
> COURT: I said I want a yes or no answer. Was this and is this now your verdict?
>
> JUROR: Yes.[144]

The trial court accepted the verdict of guilty and the

141. Ritchie v. Arnold, 79 Ill. App. 406, 409 (3rd Dist. 1898).

142. *See infra* text and accompanying notes 77-102 (discussing examples of how Illinois judges have responded to ambiguous answers or disavowals of verdicts).

143. 508 N.E.2d 708 (Ill. 1987).

144. *Id.* at 713-14.

defendant appealed.[145] The appellate court upheld the conviction finding that the primary purpose of the jury poll is to determine whether the juror's verdict was free from coercion and freely arrived at.[146] The court also noted the importance of observing the juror's demeanor and body language in order to determine whether the juror truly assents to the verdict.[147] The appellate court recognized that the trial judge is in the best position to gauge such factors.[148] Therefore, the trial judge is given a great amount of discretion in deciphering a juror's intent to endorse or refute the earlier guilty verdict. The Supreme Court of Illinois upheld the conviction holding that "[a] trial court's determination as to a juror's voluntariness of his assent to the verdict will not be set aside unless the trial court's conclusion is clearly unreasonable."[149]

Simply repeating the question until a juror gives a "yes" or "no" answer does not guarantee that the verdict will be upheld. In *People v. Kellogg*,[150] the jury was polled and the following conversation took place:

> CLERK: Susan M. Vesecky, was this then and is this now your verdict?
>
> JUROR: Yes. Can I change my vote?
>
> COURT: The question is, was this then, and is this now your verdict?
>
> JUROR: (No response).
>
> COURT: Was this then and is this now your verdict?
>
> JUROR: Yes, Sir.[151]

The appellate court reversed the conviction and the Illinois Supreme Court affirmed.[152] The *Kellogg* Court noted the importance of obtaining an unequivocal expression of each juror.[153] This provides a forum for a juror to express him or herself unhampered by the "fears or the errors which may have attended the private proceedings" of the jury room.[154] The trial court has a

145. *Id.* at 714.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Cabrera*, 480 N.E.2d at 714.
150. 397 N.E.2d 835 (Ill. 1979).
151. *Id.* at 837.
152. *Id.*
153. *Id.*
154. *Kellogg*, 397 N.E.2d at 837, *citing* 8 WIGMORE, EVIDENCE, § 2355 at 717 (rev. ed. 1961).

further duty to inquire when it appears that the juror may not truly assent to the verdict.[155] In fact, the court must "ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his present state of mind."[156]

Some trial judges have gone further than merely ignoring a potentially ambiguous response or demanding a yes or no answer. In *People v. Harvey*,[157] the following exchange took place:

COURT: Is this and was this your verdict?

JUROR: Well, it wasn't exactly, no.

COURT: Did you sign this?

JUROR: Yes, I did.

COURT: Then it's your verdict.[158]

In overturning the conviction the appellate court noted that the juror indicated possible dissent from the earlier verdict and that the judge had a duty to further inquire as to the present state of mind of the juror.[159]

A similar failure to inquire as to present state of mind occurred in *People v. Bennett*.[160] In *Bennett*, the trial judge addressed the jury as a whole and asked "[w]as this and is this now your verdict?"[161] The question was not repeated to each juror.[162] The first four jurors responded in the affirmative, the fifth juror, however, did not, and the following dialogue ensued:

CLERK: Smith.

JUROR: Smith, Not sure.

COURT: Pardon?

JUROR: I'm not sure.

COURT: Is this

JUROR: This is my verdict.

COURT: It is your verdict.[163]

155. *Kellogg*, 397 N.E.2d at 837.
156. *Id.* at 837-38.
157. 292 N.E.2d 124 (Ill. App. Ct. 1972).
158. *Id.* at 125-26.
159. *Id.* at 127.
160. 507 N.E.2d 95 (Ill. App. Ct. 1987).
161. *Id.* at 97.
162. *Id.*
163. *Id.* at 97-98.

The court made no further inquiry to Juror Smith and continued to poll the remaining jurors.[164] The rest of the jurors answered in the affirmative, and the judge accepted the verdict as unanimous and denied the defendant's motion for a mistrial.[165] The appellate court reversed on the basis of a flawed jury poll.[166] The defense contended, and the appellate court agreed, that it was unclear when the juror stated, "[t]his is my verdict" whether the juror intended to revert to the original verdict or whether "[t]his is my verdict" referred to a changed verdict.[167] Regardless of the intended meaning, the appellate court held that the juror's response was either unacceptably ambiguous or was coerced by the judge into accepting a verdict which the juror no longer endorsed.[168]

A common response to a disavowing juror is for a judge to refuse to entertain a discussion. In *People v. Riddle*,[169] a poll of the jury led to answers by two of the eleven jurors,[170] which brought the unanimity of the verdict into question. The following exchange took place during the poll:

COURT: Mr. Gunter, is this your verdict?

JUROR: Yes, sir.

COURT: Are you satisfied with it?

JUROR: In a way I was and in a way I wasn't.

COURT: Do you want this to be your verdict?

JUROR: I guess it will have to be.

COURT: And do you want me to accept it?

JUROR: Yes, sir.

COURT: Mrs. Christian, is this your verdict?

JUROR: Yes, sir.

COURT: Are you satisfied with it?

JUROR: In some ways and in some ways not.

COURT: Do you want me to accept it?

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164. *Id.* at 98.
165. *Bennett*, 507 N.E.2d at 98.
166. *Id.* at 100.
167. *Id.*
168. *Id.*
169. 363 N.E.2d 881 (Ill. App. Ct. 1977).
170. *Id.* at 883.

JUROR: Yes, sir.[171]

The trial court accepted the verdict of each juror.[172] In upholding the verdict, the appellate court held that although the answers were "unorthodox," there was no evidence that the judge coerced the jurors.[173]

Interpreting the jurors' intent from an ambiguous answer is difficult. Unfortunately, this is not the only problem, which may arise from a jury poll. Once it is determined that a juror does in fact disavow an earlier guilty verdict, the judge must decide how to proceed. The following Section addresses the options available to the trial judge.

B. Basis of Appeals Stemming from Flawed Jury Poll

Once a trial judge determines that a juror has in fact changed his or her verdict, the judge has three options available. In certain rare circumstances, the accused may agree to be bound by a non-unanimous verdict of guilty, the jury may be required to continue deliberations, or the judge may declare a mistrial. For the present discussion only the last two options will be addressed.

Appeals arising out of flawed jury polling generally fall into two categories: (1) claims of ineffective assistance of counsel, stemming from either failure to poll a jury or failing to ask for a mistrial upon an "event" during the poll itself, or (2) is there proper judicial coercion forcing the disavowing juror to re-endorse the earlier verdict.

In Illinois all parties to litigation have the right to poll the jury, although this right may be waived.[174] For example, counsel may agree to the jury returning a sealed verdict.[175] It follows that since the right may be waived, counsel's waiver of her client's right to poll the jury, or failure to poll, may be seen as a tactical decision that does not, in and of itself, constitute ineffective assistance of counsel.[176]

More important is how defense counsel reacts to a changed verdict during the polling process. It is remarkable how often a juror either changes their verdict upon being polled or at least expresses doubt about the earlier pronouncement. Despite the frequency of such occurrences, the proper way to manage the situation is often a mystery to even the most learned advocates and judges. This becomes quite clear in viewing the claims of

171. *Id.*
172. *Id.*
173. *Id.*
174. People v. Pickett, 296 N.E.2d 856, 858 (Ill. 1973).
175. *Id.*
176. *See* People v. Carter, 407 N.E.2d 584, 591 (Ill. App. Ct. 1980) (finding that defense counsel's failure to request a jury poll is an exercise of "judgment, discretion or trial strategy").

ineffective assistance of counsel for failure to pursue a mistrial.

For example, in *People v. Flynn*,[177] the defendant was charged with home invasion, residential burglary, and robbery. The court polled the jury upon their rendering a guilty verdict. The following dialogue resulted:

> CLERK: Were these then and are these now your verdicts?
>
> JUROR: They were not then but they are now.
>
> COURT: Okay. That's fine.
>
> COURT: Okay. Just so there is no question about this Miss Hoffer, about your answer. What you really said to me, and I think the other people, although at one time you didn't agree, you now—
>
> JUROR: That's correct.
>
> COURT: — You now agree on these two verdict forms?
>
> JUROR: That's correct.
>
> COURT: Is that correct?
>
> JUROR: Yes.[178]

On appeal, the defendant argued both that the trial court erred in accepting the juror's "inconsistent" statements during polling, and that defense counsel's failure to object to the verdict constituted ineffective assistance of counsel.[179]

The appellate court noted that the trial judge must not "hinder a juror's expression of dissent during polling"[180] and that "[w]hen a juror indicates some hesitancy in an answer, the trial court must determine that juror's true answer by affording her the opportunity to make an unambiguous statement as to her present state of mind."[181] The appellate court held the trial court's determination that assent was voluntary was not clearly unreasonable in that case.[182]

The ineffective assistance of counsel claim is addressed separately. Any claim of ineffective assistance of counsel is governed by the two-part *Strickland*[183] standard. In order to sustain a claim of ineffective assistance of counsel, the defendant

177. 685 N.E.2d 376, 377 (Ill. App. Ct. 1997).
178. *Id.* at 380.
179. *Id.*
180. *Id.* at 385.
181. *Id.*
182. *Flynn*, 685 N.E.2d at 385.
183. *See* Strickland v. Washington, 466 U.S. 688, 687 (1984) (describing the Court's two-part test required to reverse a conviction based on ineffective assistance of counsel).

must prove: (1) that counsel's performance was deficient; and (2) that the deficiency caused actual prejudice.[184] To demonstrate prejudice, the defendant must prove a "reasonable probability that but for the attorney's unprofessional errors, the result of the proceeding would have been different.[185] A reasonable probability is a probability sufficient to undermine confidence in the outcome."[186] The appellate court concluded that since the trial judge was correct in accepting the verdict, an objection would have been overruled and therefore any omission of counsel did not satisfy the second prong of the *Strickland* test.[187]

The United States District Court for the Northern District of Illinois came to a similar conclusion in denying a *habeas corpus* petition in *United States ex rel. Jenkins v. Roth*.[188] In *Roth*, the Circuit Court of Lake County, Illinois convicted the defendant of robbery.[189] Upon the return of the verdict the judge asked defense counsel if he had any post-trial motions.[190] Defense counsel did not raise a request for a jury poll.[191] The following day, a juror contacted defense counsel and stated, "that she did not believe Jenkins was guilty and, although she had signed the unanimous verdict, she had expected to be polled and given an opportunity to express her dissatisfaction with the verdict."[192] Jenkins' attorney filed a post-trial motion contending that a unanimous jury had not convicted Jenkins.[193] After a hearing, the motion was denied.[194] Similar claims were rejected in a post-conviction petition.[195] In denying the petition for *habeas corpus*, the District Court held that the defendant was not deprived of due process of law and that the conviction was proper.[196] Despite the valid conviction, Jenkins would be entitled to a new trial if he could make a proper claim of ineffective assistance of counsel.[197] In discussing that claim, the court noted that the second prong of the *Strickland* test was satisfied.[198] The defendant had shown actual prejudice and a

184. *Id.*
185. *Id.* at 694.
186. *Id.*
187. *Flynn*, 685 N.E.2d at 385.
188. U.S. *ex rel.* Jenkins v. Roth, No. 96-C5227, 1997 WL 126957 *3 (N.D. Ill. Mar. 13, 1997).
189. *Id.* at *1.
190. *Id.* at *3.
191. *See id.* (indicating that after hearing no post-trial motions, the judge discharged the jury).
192. *Id.*
193. *Jenkins*, 1997 WL 126957 at *3.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *See Jenkins*, 1997 WL 126957 at *3 (indicating that the second prong of the *Strickland* test should not be addressed until it is determined that the first

substantial likelihood that absent counsel's failure to poll, the outcome would have been different.[199] Yet the claim of ineffective assistance failed, because the first prong of the test was not met.[200] Since there was no outward sign of a non-unanimous jury, it was not a clear error to waive a poll of the jury.[201]

Successful appeals based on ineffective assistance of counsel are rare. Even more rare are reversals based on a failure to poll or react to a faulty poll. In fact, no Illinois defendant has been able to meet the seemingly impossible standards of *Strickland* in this area of the law. A successful appeal can be found, however, in other jurisdictions. *Sincox v. United States*[202] is a particularly extreme example of ineffective assistance of counsel in a polling situation.

In *Sincox*, the defendant was found guilty of two counts of obstruction of justice.[203] Upon being polled the following took place:

> COURT: Mr. Lewis, is this your verdict?
>
> JUROR: Yes. With reasonable doubt.
>
> COURT: With reasonable doubt.[204]

The judge accepted the verdict and continued to poll the remaining jurors.[205] There was no objection by defense counsel.[206] After the jury was polled, the defendant asked his counsel if "that was not a mistrial but was told to be quiet."[207] The defendant later told his counsel that he wished to appeal, however, this request was not granted.[208] Since the defendant had paid his counsel "all his money," he was unable to secure new representation.[209]

On appeal, the defendant's trial attorney admitted that he had been "dumbfounded" and "confused" by the events of the trial.[210] He further stated that he did not object because he thought it would be a futile gesture. Eventually counsel realized the magnitude of his mistake and characterized it as "inexcusable

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prong is satisfied, and acknowledging that had the first prong been satisfied, Jenkins' claim would have passed the second prong of the test).

199. *Id.* at *4.
200. *Id.*
201. *Id.*
202. 571 F.2d 876 (5th Cir. 1978).
203. *Id.* at 877.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Sincox*, 571 F.2d at 877.
208. *Id.*
209. *Id.*
210. *Id.*

neglect."[211] The Circuit Court of Appeals held that the mistake was in fact inexcusable and of "grand proportion[s]," especially since, unlike his attorney, the defendant himself was able to immediately grasp the ramifications of a juror convicting despite the presence of reasonable doubt.[212]

Such a blatant example of substandard representation is shocking. More shocking still is that the system allows for both the judge and defense counsel to ignore the juror's statement and permit a verdict of guilty to be entered.

The next Section examines more closely, what constitutes judicial coercion of a reluctant juror.

C. Judicial Coercion in Illinois

While the basis of modern protections against judicial coercion is difficult to trace, a substantial step was taken on August 14, 1670, when William Penn was arrested for preaching Quaker beliefs to a large crowd on Gracechurch Street in London,[213] in violation of the Conventicles Act.[214] In accordance with the Act, Penn and others, demanded and were granted a jury trial.[215]

During the course of deliberations, the jury informed the judge that eight jurors were ready to convict, but four would not.[216] The judge responded with a threat to the holdout jurors and ordered further deliberations.[217] When further deliberations did not result in a unanimous verdict of guilty, the judge advised the jurors that: "[they] shall not be dismissed till [the court has] a verdict that the court will accept; and [they] shall be locked up, without meat, drink, fire, and tobacco; [they] shall not think thus to abuse the court; [they] will have a verdict by the help of God, or [they] shall starve for it."[218] When this final threat did not produce the desired conviction, the judge arrested the jurors, fined them, and ordered them imprisoned until the fines were paid.[219] Four jurors refused to pay the fines and were granted a writ of *habeas corpus*.[220] Eventually the jurors were released, the penalties were reversed, and the system was changed to insure that jurors would

211. *Id.*
212. *Sincox*, 571 F.2d at 879-80.
213. Steven M. Fernandes, *Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law*, 27 SW. U.L. REV. 99, 102-03 (1997).
214. "A conventicle is an unlawful assembly or meeting for the exercise of religion." *Id.* at n.32.
215. *Id.* at 103.
216. *Id.*
217. *Id.*
218. Fernandes, *supra* note 213, at 103.
219. *Id.* at 104.
220. *Id.*

no longer be punished for their verdicts.[221]

Two hundred and twenty six years later the Supreme Court would similarly address the boundaries of judicial coercion in the United States. *Allen v. U.S.* [222] examined the limits of judicial persuasion in regard to a deadlocked jury.[223] In *Allen*, the judge was presented with a deadlocked jury and, in an attempt to break the deadlock, gave a supplemental instruction to the jury regarding the need for a unanimous verdict.[224] The trial judge encouraged the jurors to listen and give merit to each other's beliefs and return a unanimous verdict if at all possible.[225] The Supreme Court upheld the verdict finding that the instruction did not constitute judicial coercion.[226] *Allen* was not, however, the final word on what constitutes permissible judicial encouragement. Illinois' rule regarding judicial encouragement for unanimous verdicts comes from *People v. Prim*.[227]

After four hours of deliberations, the *Prim* jury was unable to come to a unanimous verdict on the three counts of armed robbery, attempted armed robbery and murder.[228] When the foreman told the judge that he thought the jury might be able to come to a unanimous verdict, the judge spoke to the jury and stated:

> I'm going to send you back. I just want to let you know that in a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not a mere acquiescence of conclusions of others, yet you should examine the question submitted with proper regard and deference to the opinions of each other and you should listen to each other's opinions with the dispositions to be convinced . . .[229]

The jury returned with a guilty verdict fifteen minutes later.[230]

In upholding the conviction, the Illinois Supreme Court outlined the development of "dynamite" charges, or directives from the bench to the jury regarding the importance of reaching a unanimous verdict. The court sought to find an acceptable compromise between the need to find a tool to foster unanimity and protect jurors from coercion. Eventually the court looked to the ABA project on Minimum Standards for Criminal Justice[231]

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221. *Id.*
222. 164 U.S. 492 (1896).
223. *Id.*
224. *Id.* at 501.
225. *Id.*
226. *Id.*
227. 289 N.E.2d 601 (Ill. 1972).
228. *Id.* at 607.
229. *Id.*
230. *Id.*
231. *Id.* at 608.

and its recommendations for dealing with deadlocked juries.[232]

The court did not provide a specific instruction, which a judge could read to a deadlocked jury.[233] Rather, the court looked to general principles, which would promote progress in deliberations, but would not unduly pressure jurors to accept the will of the majority at the expense of their own beliefs.[234]

When considering whether a *Prim* or an *Allen* charge is improper, an important factor is whether the judge had inquired into the numerical division of the deadlocked jurors. In the federal system, such an inquiry is *per se* error.[235] In Illinois, such an inquiry is not *per se* reversible error, but is a significant factor in an overall evaluation of the circumstances and whether the trial judge improperly coerced a juror to endorse a verdict.[236] This factor

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232. The ABA standard provides that the instructions should include the following:

> (i) that in order to return a verdict, each juror must agree thereto;
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> (iii) that each juror must decide the case for himself but only after an impartial consideration of the evidence with his fellow jurors;
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> (iv) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinions of his fellow jurors, or for the mere purpose of returning a verdict.

Michael J. Crowley, *Jury Coercion in Capital Cases: How Much Risk are We Willing to Take*, 57 U. CIN. L. REV. 1073, 1088 (1989).

233. The court did, however, provide an example of what it considered an appropriate instruction. The example reads:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. 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 with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine 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.
>
> You are not partisans. You are judges —judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Prim, 289 N.E.2d at 609.

234. *Id.* at 608-10.

235. Brasfield v. United States, 272 U.S. 448, 450 (1926).

236. *Compare* People v. Santiago, 439 N.E.2d 984, 996 (Ill. App. Ct. 1982) (reversing a conviction where the judge inquired into numerical division of jurors and repeatedly gave *Prim* instruction until conviction was returned); People v. Eppinger, 688 N.E.2d 325 (Ill. App. Ct. 1998) (upholding a conviction despite revelation of numerical division of jurors before issuance of *Prim*

is especially significant because of the likelihood that the singled out juror will feel pressured to accept the will of the court and of the majority of the jurors.[237]

D. Applying Prim *to Jury Poll Situations*

Some distinction has been made in *Prim* cases between situations in which the judge had inquired as to the division of the jurors and situations where the information just came out naturally. Certainly a judge who inquires as to the numerical division and then gives a *Prim* instruction may be attempting to improperly influence a jury. Improper motives aside, it is of little importance *how* the division was made known. Of greater concern is that the dissenting juror is singled out and subjected to considerable pressure to accept the view of the majority.[238] Where the majority of jurors favor conviction it is not difficult to imagine that a juror who is singled out and given a *Prim* instruction is likely to construe this as a directive from the judge to convict.

That same logic applies to a situation in which a juror disavows an earlier verdict when polled in open court. The problems for this juror are magnified and are more severe than a juror who has received a *Prim* instruction. His or her identity as a dissenter is now public, exposing the juror to possible public ridicule, pressures to conform, and safety concerns. More importantly, a judge's order to further deliberate under these circumstances conveys to the juror that the change of heart and vote is wrong and that the juror must go back and convict the accused.

IV. *QUISENBERRY* SHOULD HAVE BEEN DECLARED A MISTRIAL

Consider the holdout juror in *People v. Quisenberry*.[239] The jury indicated that they had reached a verdict, the guilty verdict was delivered and the jury polled on request by defense counsel. The first eleven jurors endorsed their earlier verdict of guilty. Then, to the surprise of all, the twelfth juror said, "she could not say yes." Several mistakes were made after the juror responded to the poll. The first error was the judge's failure to inquire further. At the very least, the juror's answer was ambiguous. As previously discussed, when confronted with an ambiguous or

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charge to jury).

237. Protections against pressuring jurors do not only seek to protect individuals. In fact, the entire jury can be subject to judicial coercion. *See, e.g.*, People v. Baltimore, 288 N.E.2d 659 (Ill. App. Ct. 1972) (holding the trial judge's reported inquiry as to the juror's present state of mind and whether they could agree on a sentence apart from the death penalty was reversible error).

238. *Eppinger*, 688 N.E.2d at 329.

239. No. 98-CF-884, (4th Dist. 1999).

unclear answer, a judge has a duty to further inquire as to the intent of the juror. This was not done.

Defense counsel made the second, and by far the most serious, mistake. As discussed, the judge had various options; clearly a mistrial would be the safest route for the accused. Eleven of the twelve jurors had affirmed their guilty verdict and the twelfth juror had disavowed her verdict. At this point, competent counsel would have sought a mistrial. However, counsel failed to do so and his failure cannot be reasonably construed as a tactical decision. It is more likely that counsel did not appreciate the legal significance of the juror's declaration, and like the attorney in *Sincox*, he was "dumbfounded."

The failure of the judge to consider each option is illustrated by the colloquy, which took place after the jury had left the courtroom. No reference was made of any possible alternative other than ordering the jury to further deliberate. Nor was there discussion as to how the judge should instruct the jurors. The only discussion between the parties and the court was whether the jury would be allowed to eat dinner before they continued their deliberations. The error was compounded when the judge addressed only the foreperson, instructing *him* that the verdict must be unanimous and that he was going to send the jury to deliberate further.

Beyond the failure of the judge to consider alternatives, the court erred both in content and delivery of the message to the foreperson. Moreover, the instruction regarding further deliberation should have been addressed to the jury as a whole. By removing all but the foreperson from the courtroom, there is no record as to what the foreperson told the jury regarding further deliberations. Like the children's telephone game, it is unlikely that the court's message was relayed by the foreperson in the manner, in which the judge delivered it.

The *Prim* line of cases mandates that an instruction to deliberate further be noncoercive and its ultimate goal is to promote freedom in deliberations and respect the individual merit of a juror's beliefs.[240] No such message was delivered here. Instead the jurors were ordered out of the courtroom and told only that they would be allowed to eat as quickly as possible in order to allow further deliberations. It is easy to imagine the confusion of the jury as a whole, and the discomfort of the twelfth juror especially under these circumstances.

Quisenberry's appeal was denied and an opinion was not issued. Although defense counsel did not move for a mistrial or object to the judge's conduct,[241] the issue could have been reviewed

240. *Prim*, 289 N.E.2d at 608.

241. People v. Enoch, 522 N.E.2d 1124, 1130 (Ill. 1988).

nonetheless through a claim of ineffective assistance of counsel or by invoking the plain error doctrine.[242] Had counsel raised the proper issues, *Quisenberry* may have been reversed and remanded for a new trial because the first trial was unconstitutional. Counsel was ineffective, as evidenced by his failure to seek a mistrial or at least some protection for the standout juror. Moreover, the judge failed to consider alternatives to further deliberations. He compounded his failure by giving misguided instructions to the foreperson and not instructing the jury personally and completely.

CONCLUSION

Each accused person in Illinois has the inherent right to poll the jury upon the return of a verdict of guilty.[243] As previously discussed, the process itself has the potential to create many problems for the trial judge and for appellate review. These problems could in large be eliminated by the implementation of two new rules.

The first rule should mandate that each jury be polled when a verdict is returned. The right to a poll is an important right.[244] Unfortunately, defense counsel often ignores this right. When that occurs, the courts should not treat it as a "tactical decision." Once a jury returns a verdict of guilty, there is no "cost" to requesting a poll. Even in the absence of visible evidence of duress, it is possible that one or more jurors would not endorse their verdict, which may have been coerced, when asked to reaffirm it in open court. To eliminate the possibility that a verdict was coerced; each jury should be polled as a matter of course.

Second, the trial judge should be required to further inquire into an ambiguous response given by a polled juror to determine that juror's present intent. If the juror's response is ultimately unambiguous and the juror disavows the earlier verdict, the judge must declare a mistrial. There is no alternative to a mistrial under these circumstances because the holdout juror has been identified publicly. A juror should not be humiliated and subjected to public scorn. That is what happens when a judge rejects his or her change of vote and orders further deliberations. While admittedly the cost of such a remedy may be high, it is a necessary response to preserve the right of the accused to a fair trial and the right of every juror to dignity and respect.

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242. People v. Rush, 606 N.E.2d 132, 137 (Ill. App. Ct. 1992).

243. *Supra* note 1.

244. WIGMORE, *supra* note 14, at §2355. Polling the jury ensures certainty of the verdict and gives each juror an opportunity of free expression in open court. If a juror disagrees with the verdict just announced a dilemma is created. The validity of the verdict is questioned. *Id.*