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Brief and Required Short Appendix of Plaintiff-Appellant, Glenn Verser v. Jeffrey Barfield, et al, Docket No. 11-02091, 741 F.3d 734 (7th Circuit Court of Appeals 2013)

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No. 11-2091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Glenn Verser,

Plaintiff-Appellant,

v.

Jeffrey Barfield, Douglas Gooding,
Ryan Robinson, and Chris W. Davis,

Defendants-Appellees.

Appeal From the United States District Court
For the Central District of Illinois,
Case Number 07-3293
The Honorable Judge Harold A. Baker

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT GLENN VERSER

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Oral Argument Requested

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Appellate Court No: 11-2091

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Glenn Verser filed an action in the United States District Court for the Central District of Illinois against Illinois Department of Correction employees Jeffrey Barfield, Chris W. Davis, Ryan Robinson, and Douglas Godding. Doc. 1.[1] Mr. Verser alleged pursuant to 42 U.S.C. § 1983 that the defendants violated his Eighth Amendment right to be free from excessive force when, in the early morning hours of September 2, 2007, they removed him from his cell at the Western Illinois Correctional Center and physically assaulted him. Doc. 1. Because Mr. Verser's claim raised a federal question, the District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

Mr. Verser represented himself at trial. The jury returned a verdict on April 13, 2011, in favor of the defendants, Docs. 190 and 191, and the District Court entered a Rule 58 final judgment in favor of the defendants on April 14, 2011. Doc. 193; Appendix p. A8. On April 25, 2011, Mr. Verser filed a motion for a new trial pursuant to Fed. R. Civ. P. 59. Doc. 195. On May 11, 2011, before the District Court ruled on his motion, Mr. Verser filed a notice of appeal. Doc. 199. On May 19, 2011, Mr. Verser filed arguments supporting his motion for a new trial. Doc. 208. The District Court denied Mr. Verser's motion for a new trial on June 10, 2011. Doc. 209; Appendix p. A9-A15.

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[1] This brief cites the numbered documents in the record on appeal as "Doc. ____." This brief cites documents in the Short Appendix as "Appendix p. ___."

This Court has jurisdiction over Mr. Verser's appeal from the final order of the District Court pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(2). *See Roe v. Elyea*, 631 F.3d 843, 854-55 (7th Cir. 2011) (pursuant to Rule 4(a)(2), a prematurely filed notice of appeal "springs forward" to the date the judgment technically becomes final). Mr. Verser's appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Did the District Court deprive Mr. Verser of his right under Federal Rule of Civil Procedure 48(c) to have the jury polled, when it ordered Mr. Verser excluded from the courtroom at the time the verdict was received?

2. When a district court excludes a person from the courtroom at the time the verdict was received, does the court have a duty to adopt alternative procedures for exercise of the Rule 48(c) right to poll the jury, and if so, what procedures would suffice?

3. Did Mr. Verser waive his right to have the jury polled?

STATEMENT OF THE CASE

Plaintiff-Appellant Glenn Verser sued Illinois Department of Correction employees Jeffrey Barfield, Chris W. Davis, Ryan Robinson, and Douglas Godding for violating his Eighth Amendment right against cruel and unusual punishment. In particular, Mr. Verser alleged that the defendants assaulted him in the early morning hours while transferring him to another cell at the Western Illinois Correctional Center. Mr. Verser represented himself at trial.

At the end of the trial and immediately after dismissing the jury to deliberate, the District Court returned Mr. Verser to the custody of the Department of Corrections and thus excluded him from the rest of the proceedings.

The jury returned a verdict in favor of the defendants, and the District Court entered a final judgment. Mr. Verser filed a motion for a new trial, arguing, among other things, that the District Court deprived him of his right to poll the jury. The District Court denied the motion, and this appeal followed.

After initial briefing in this Court—during which Mr. Verser represented himself—this Court identified three issues related to Mr. Verser's right to poll the jury and appointed counsel to argue them. Appendix A16-A19.

STATEMENT OF FACTS

Plaintiff-Appellant Glenn Verser filed an action *pro se* in the United States District Court for the Central District of Illinois against Illinois Department of Correction employees Jeffrey Barfield, Chris W. Davis, Ryan Robinson, and Douglas Godding. Doc. 1. Mr. Verser alleged that the defendants violated his Eighth Amendment right to be free from excessive force when, in the early morning hours of September 2, 2007, while moving Mr. Verser to a new cell at the Western Illinois Correctional Center, they physically assaulted him. Doc. 1.

At the end of the trial and immediately after dismissing the jury to deliberate, the District Court returned Mr. Verser, still *pro se*, to the custody of the Department of Corrections and thus excluded him from the rest of the proceedings:

> THE COURT: We will be in recess and wait for the return of the verdict. I'm going to return Mr. Verser to the Department of Corrections. Here is your writ. You guys are out of here.
>
> All right. We will be in recess and wait for the jury's verdict. We will let you know what it is, Mr. Verser.
>
> MR. VERSER: All right. Thank you, Your Honor.

Appendix p. A2; Transcript p. 211.

Later, during deliberations, the jury asked the District Court whether there was a video of the cell change. Appendix p. A3; Transcript p. 212. (There was not. Appendix p. A3; Transcript p. 212.) The District Court confirmed this with the defendants' attorney and responded to the jury. Appendix p. A3; Transcript p. 212.

Later yet, the presiding juror reported to the District Court that the jury could not come to an agreement. Appendix p. A3-A4; Transcript p. 212-213. The judge recalled the jury to the courtroom, spoke briefly with the presiding juror, and dismissed the jury to deliberate once again. Appendix p. A4; Transcript p. 213.

The jury returned about an hour later and issued a verdict in favor of the defendants. Appendix p. A5; Transcript p. 214. A juror then made a statement to the District Court:

> JUROR: We could like to make a statement, if we could.
>
> This was a very hard case for us. Many of us – the majority feel that the defendants all had a part to play in what happened to Mr. Verser, but, because there was a lack of evidence, we could not find the defendant guilty.
>
> THE COURT: Responsible? Liable?
>
> JUROR: Yes. Thank you.

Appendix p. A5-A6; Transcript p. 214-215.

Mr. Verser moved for a new trial arguing, among other things, that the District Court deprived him of his right to poll the jury. Doc. 195. The District Court denied the motion, writing that "[h]e was returned to IDOC . . . for valid court house security reasons. The court was not going to keep Verser in the court house and chance his calm acceptance of an adverse ruling which is the predominant result in this type of case." Appendix p. A13.

This appeal followed.

SUMMARY OF ARGUMENT

By excluding Mr. Verser from the courtroom during jury deliberations and thereafter, the District Court denied Mr. Verser his substantial right to poll the jury. This deprivation was error *per se*, and the District Court therefore abused its discretion in denying Mr. Verser's motion for a new trial. Mr. Verser respectfully asks that this Court reverse the District Court's denial of his motion for a new trial, order a new trial, and instruct the District Court to protect Mr. Verser's right to poll the jury at his new trial.

I. Mr. Verser's had an absolute right to poll the jury in order to ensure that no juror was coerced into signing the verdict. Although Mr. Verser's right to poll was not constitutional, it was substantial, and its deprivation constitutes *per se* error requiring reversal. Mr. Verser's right to poll only ripened after the jury returned its verdict, when he would have first learned the jury's verdict, and it expired when the District Court dismissed the jury. Because the District Court excluded Mr. Verser during this entire period—the only period when he could have requested a poll of the jury—the District Court necessarily deprived him of his right to poll the jury. This deprivation was *per se* error, and the District Court therefore abused its discretion in denying Mr. Verser's motion for a new trial.

II. The District Court did not have a good reason for excluding Mr. Verser. Mr. Verser was cooperative and complaisant throughout the proceeding and posed no unusual security risk. But even if Mr. Verser posed a security risk, the District Court should have taken additional steps to protect Mr. Verser's right to poll the

jury. At the very least, the District Court should have advised Mr. Verser of his right to poll the jury, and it should have polled the jury itself. But the District Court failed to take any protective measure, even after the jury asked a question and made two statements during and after deliberations that would have prompted Mr. Verser or an attorney (if Mr. Verser would have had an attorney) to request a poll the jury.

III. Mr. Verser did not waive his absolute right to poll the jury. For one, the District Court excluded Mr. Verser before the jury returned its verdict—the first point at which Mr. Verser could have heard the jury verdict. In other words, the District Court excluded Mr. Verser before his right ripened, before he could have exercised it intelligently. Thus Mr. Verser could not have waived his right, because he did not yet have his right. For another, the District Court ordered Mr. Verser's exclusion in summary fashion, without giving him a chance to object. Under these circumstances, Mr. Verser could not be said to have waived his right—even if he could have waived it at that time.

ARGUMENT

The District Court abused its discretion in denying Mr. Verser's motion for a new trial after it committed *per se* error by depriving him of his right to poll the jury. Mr. Verser respectfully requests that this Court therefore reverse the District Court's order and grant Mr. Verser a new trial, with instructions to protect Mr. Verser's right to poll the jury.

This Court "review[s] a motion for new trial for abuse of discretion." *Whitehead v. Bond*, 680 F.3d 919, 927 (7th Cir. 2012). But at the same time, denial of the right to poll the jury is *per se* error. *United States v. F.J. Vollmer & Co, Inc.*, 1 F.3d 1511, 1522 (7th Cir. 1993) (automatically reversing a district court's denial of a party's right to poll the jury, holding that "[f]ailure to poll the jury upon a timely request is '*per se* error requiring reversal.") (quoting *Government of the Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir. 1989)); *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992) (automatically reversing a district court's denial of a motion for a mistrial based on the court's deprivation of a party's right to poll the jury). The remedy is a new trial. *Id.* (ordering a new trial).

Here, the District Court deprived Mr. Verser of his right to poll the jury by completely excluding him from the courtroom during the only period when he could have requested a poll. The District Court then rejected Mr. Verser's motion for a new trial based on that deprivation. Under this Court's plain rulings in *F.J. Vollmer & Co., Inc.* and *Randle*, the District Court's denial of Mr. Verser's motion for a new trial should be reversed, and Mr. Verser should be granted a new trial.

I. The District Court Deprived Mr. Verser of His Right to Poll the Jury Pursuant to Federal Rule of Civil Procedure 48(c) When it Excluded Him From the Courtroom When the Verdict Was Received.

This Court has repeatedly held that a party has an absolute right to poll the jury. But when the District Court excluded Mr. Verser, a *pro se* litigant, it also absolutely prevented him from requesting a poll during the appropriate time and thus deprived him of his right to poll the jury. The District Court's denial of the right to poll the jury was *per se* error and alone requires a reversal of its rejection of Mr. Verser's motion for a new trial and an order for a new trial.

A. The right to poll the jury is a substantial right, and the right in Federal Rule of Civil Procedure 48(c) derives from the Right in Federal Rule of Criminal Procedure 31(d).

As this Court has explained time and time again, a party has an absolute right to poll the jury. Appendix p. A18 ("A litigant has an absolute right to have a jury polled in order to detect latent divisions in the jury about the verdict."); *see also United States v. Marinari*, 32 F.3d 1209, 1212 (7th Cir. 1994); *United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1522 (7th Cir. 1993); *Mackett v. United States*, 90 F.2d 462, 466 (7th Cir. 1937). The right to poll is a "substantial right," but it is not a constitutional right. *United States v. Sturman*, 49 F.3d 1275, 1282 (7th Cir. 1995); *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992). Either party enjoys the right, unless a party has "expressly waived" it. *F.J. Vollmer & Co., Inc.*, 1 F.3d at 1523; *Mackett v. United States*, 90 F.2d 462, 466 (7th Cir. 1937).

The Supreme Court described the purpose of the right to poll the jury: "to ascertain for a certainty that each of the jurors approves of the verdict as returned;

that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Or, as this Court explained, "The purpose of the jury poll is to ensure unanimity by forcing the jurors to voice their accountability." *Sturman*, 49 F.3d at 1282 (citing *United States v. Shepherd*, 576 F.2d 719, 725 (7th Cir. 1978), *cert. denied*, 439 U.S. 852 (1978)).

The right to poll the jury in a civil trial was codified in 2009 in Federal Rule of Civil Procedure 48(c), which provides:

> 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 or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Fed. R. Civ. P. 48(c). Rule 48(c) is based on Federal Rule of Criminal Procedure 31(d). That rule provides:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Fed. R. Crim. P. 31(d).

The Report of the Judicial Conference on the addition of Rule 48(c) in the 2009 amendments indicates that Rule 48(c) is based on Criminal Rule 31. Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 24 (September 2008) ("The proposed amendment to Rule 48 adds a provision similar to that in corresponding Criminal Rule 31 that allows a court to poll the jury individually on its own and requires a poll at a party's request.") And because Criminal Rule 31 does not codify a constitutional right, *Sturman*, 49 F.3d at 1282;

Randle, 966 F.2d at 1214, courts may look to judicial interpretations of Criminal Rule 31 in applying Rule 48(c). Indeed, this Court suggested as much in its Order. Appendix p. A18 (citing authority applying Criminal Rule 31). Because of the dearth of authority on the right to poll pursuant to Rule 48(c), Mr. Verser relies exclusively on judicial authority applying Criminal Rule 31.

B. The district court deprived Mr. Verser of his right to poll the jury when it prevented him from requesting a poll after the verdict was read but before the jury was discharged.

The District Court deprived Mr. Verser of his right to poll the jury "[a]fter the verdict [was] returned but before the jury [was] discharged," Fed. R. Civ. P. 48(c), for this simple reason: the District Court returned Mr. Verser to the custody of the Department of Corrections, and thus entirely excluded him from the courtroom, before the Court submitted the case to the jury and throughout the rest of the proceedings. In other words, the District Court made it physically impossible for Mr. Verser to request a poll pursuant to Rule 48(c).

Rule 48(c) plainly states the appropriate time for a request to poll: a party may request a poll only *after* the jury returns its verdict but *before* it is discharged. Fed. R. Civ. P. 48(c); *see also United States v. Marr*, 428 F.2d 614, 615 (7th Cir. 1970) ("the right to poll a jury cannot be exercised intelligently until after the verdict has been announced, and a request prior thereto would be premature") (quoting *Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958)). On the front end, a party must request a poll only *after* the jury returns its verdict, because the parties can only know the verdict only after the jury returns it. *Miranda*, 255 F.2d at 18

("Obviously the right cannot be exercised intelligently until after the verdict has been announced in open court so that the defendant and all others present may know what it is."). On the back end, a party must request a poll only *before* the jury is discharged, so that the jury will not be tainted by outside contacts. *Marinari*, 32 F.3d at 1215 (concluding that defense counsel could still request a poll while the jury left the courtroom but remained sequestered in the jury room, because "[t]he jurors had not dispersed and they remained untainted by any outside contact."). By excluding Mr. Verser for the entire proceeding during and after jury deliberations—including the period after the jury returned its verdict and before it was discharged—the District Court absolutely deprived him of his right to poll the jury during the only time when he could exercise that right. By so doing, the District Court undermined the purpose of the jury poll by depriving Mr. Verser of the opportunity "to ensure unanimity by forcing the jurors to voice their accountability." *Sturman*, 49 F.3d at 1282 (citing *Shepherd*, 576 F.2d at725).

But while this out-and-out deprivation of Mr. Verser's right to poll was stark and dramatic, this Court has found a denial of the right to poll under even less striking facts. Thus this Court held in *Randle* that the district court deprived the defendant of his right to poll the jury when the court gave the defendant's attorney insufficient time to request a poll. *Randle*, 966 F.2d 1209. In that case, the judge confirmed the jury's verdict and then, after about 1.5 seconds, began to read the probation officer's memorandum in the presence of the jury. *Id.* at 1213. (The memorandum included the defendant's arrest record for the past twelve months and thus would have

colored any subsequent poll.) As soon as the defendant's attorney realized what the court was reading, he tried to get the judge's attention to request a poll. But by that time, "the damage was done." *Id.* at 1213. This Court held that the 1.5-second interval "clearly was inadequate" and that the court therefore deprived the defendant of his right to poll. *Id.* at 1214; *see also Marinari*, 32 F.3d at 1214 (concluding that a "brief pause" in the district court's concluding comments provided insufficient time for the defendant to request a poll, but that the defendant could (and did) request a poll up and until the jury dispersed from the courthouse). The Court reversed the district court's denial of a mistrial and remanded the case for a new trial, instructing the district court "after the verdict has been read, to afford both counsel a reasonable opportunity to request a poll." *Randle*, 966 F.2d at 1214.

Randle turned on the well established rule that "the parties must be afforded a reasonable amount of time within which to make the request [to poll]." *Randle*, 966 F.2d at 1214 (citing *Shepherd*, 576 F.2d at 724 n. 3 and *Marr*, 428 F.2d at 615). But here the district court denied Mr. Verser *any* time to poll, because it excluded Mr. Verser from the courtroom during the only period when he could have requested a poll—after the jury returned its verdict but before it was discharged. If the district court in *Randle* denied Mr. Randle his right to poll the jury—even with his counsel present in the courtroom, and even with *some* time to request a poll—this case is *a fortiori*: the District Court gave Mr. Verser *no* time to request a poll.

C. The District Court's denial of Mr. Verser's right to poll is *per se* error requiring reversal.

As this Court has explained, denial of the right to poll, or failure to poll upon a timely request by a party, "is *per se* error requiring reversal." *F.J. Vollmer & Co., Inc.*, 1 F.3d at 1522 (quoting *Government of the Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir. 1989)); *see also Randle*, 966 F.2d at1214 (ordering a new trial because the district court denied the defendant a reasonable opportunity to request a poll); *Marinari*, 32 F.3d at 1212 and 1215 ("Given the defendant's absolute right to a poll of the jury at the time it was requested, it was error *per se* for the district court not to recall the jury and conduct an oral poll."). This Court in *Mackett* put a finer point on it: "That a defendant [or party], in either a civil or criminal action, has the right to poll the jury is well settled, and a refusal to permit him to do so is error, for which the verdict will be set aside." *Mackett*, 90 F.2d at 465.

Thus when a district court deprived a party of the right to poll by failing to poll even after the party timely requested a poll, this Court automatically reversed the verdict and ordered a new trial. *F.J. Vollmer & Co., Inc.*, 1 F.3d at 1522. Even more pertinent, when a district court denied a party's motion for a mistrial, which this Court reviews under an abuse-of-discretion standard, *United States v. Danford*, 435 F.3d 682, 686 (7th Cir. 2006), this Court automatically reversed the verdict and ordered a new trial, without even referencing the abuse-of-discretion standard. *Randle*, 966 F.2d at 1214. In other words, in both cases the district court's denial of the defendant's right to poll the jury was "*per se* error requiring reversal." *See F.J. Vollmer & Co., Inc.*, 1 F.3d at 1522 (quoting *Hercules*, 875 F.2d at 418).

The abuse-of-discretion standard applicable to the review of the court's denial of the defendant's motion for a mistrial in *Randle* is the same standard applicable here. And because this Court ruled in *Randle* that the deprivation of the right to poll the jury automatically required reversal of the district court's order and a new trial, without even mentioning the abuse-of-discretion standard, *Randle*, 966 F.2d at 1214, so too here the district court's deprivation of the right to poll the jury automatically requires reversal of the district court's order and a new trial. The district court's denial of Mr. Verser's right to poll the jury was "*per se* error." *F.J. Vollmer & Co., Inc.*, 1 F.3d at 1522.

This Court's approach in *Shepherd* is not to the contrary. In that case, this Court applied a harmless error standard to a right-to-poll claim. *Shepherd*, 576 F.2d at 723-25. The district court in *Shepherd* received the jury verdict and immediately admonished the defendant in the presence of the jury, before any party could request a poll. *Id.* at 722-23. The defendant claimed that the admonishment tainted the jury prior to his later poll of the jury, and that the court therefore effectively deprived him of his right to poll the jury. *Id.* This Court applied a harmless error standard to the judge's admonishment of the defendant prior to the poll, and not to the poll itself, because the defendant fully exercised his right to poll. *Id.* at 723-25. That is very different than Mr. Verser's case, where the District Court completely denied a party the right to poll. As above, this Court has been clear: this kind of complete deprivation of the right to poll is *per se* error.

The approach of the United States Court of Appeals for the First Circuit in *Audette v. Isaksen Fishing Corp.* is also not to the contrary. *Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 958-61 (1st Cir. 1986). The First Circuit ruled in *Audette* that a right-to-poll claim was subject to the harmless error standard in Federal Rule of Civil Procedure 61. *Id.* at 958-61. In that case, the district court declared a mistrial after the jury returned its verdict, but later reversed itself and entered judgment against the defendant. *Id.* at 957-58. The defendant claimed that the court's initial declaration of mistrial lulled him into not requesting a jury poll and thus effectively deprived him of his right to poll the jury. *Id.* at 960. The First Circuit disagreed, ruling that the district court's entry of judgment over the defendant's objection that he was denied the right to poll "was not inconsistent with substantial justice within the meaning of rule 61." *Id.*

Audette is inapt to Mr. Verser's claim for three reasons. First, the harmless error standard is inconsistent with the *per se* error approach of this Court and other circuits. *F.J. Vollmer & Co., Inc.*, 1 F.3d at 1522; *Mackett*, 90 F.2d at 466; *see also Hercules*, 875 F.2d at 418 ("a violation of Rule 31(d) is *per se* error requiring reversal . . . [and] the government's argument that harmless error analysis precludes reversal of the conviction, is irrelevant."); *Hausrath v. New York Central Railroad Co.*, 401 F.2d 634, 638 (6th Cir. 1968) ("It is, however, clearly better practice to grant [a request to poll in a civil case] and error to refuse it.") (citing *Humphries v. District of Columbia*, 174 U.S. 190, 19 S. Ct. 637, 43 L.Ed. 944 (1899)); *United States v. Hiland*, 909 F.2d 1114, 1138 (8th Cir. 1990) ("It is also

reversible error not to allow the defendant a reasonable opportunity to [request to poll the jury]."). Indeed, the First Circuit itself earlier applied a *per se* error approach. *Miranda*, 255 F.2d at 18 ("Since the judgment must be reversed and a new trial ordered because of the denial of the defendant's right to poll the jury it is unnecessary for us to consider the other reasons which he advances for seeking a new trial.").

Next, Rule 61 itself exempts errors that affect a party's substantial rights. Fed. R. Civ. Pro. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). The right to poll the jury is a substantial right. *Sturman*, 49 F.3d at 1282; *Randle*, 966 F.2d at 1214. The harmless error rule therefore does not apply.

Finally, *Audette* involved the district court's *method* of polling the jury, not the court's complete denial of the right to poll the jury. *See Shepherd*, 576 F.2d at 723-25 (applying a harmless error standard to the *method* of polling, where the defendant ultimately exercised the right to poll the jury, but not in his preferred way); *see also United States v. Miller*, 59 F.3d 417, 421 (3d Cir. 1995) (applying a harmless error standard to the district court's collective *method* of polling, but directing courts in the future to poll each juror individually). Unlike the district court in Mr. Verser's case, the district court in *Audette* allowed the defendant plenty of opportunity to poll the jury. Thus the First Circuit examined whether the district court's entry of judgment violated Rule 61, not whether the court's complete denial of the defendant's right to poll the jury violated Rule 61. *Audette*, 789 F.2d at

958-61 ("In these circumstances, we hold that the district court's entry of judgment . . . over Audette's objection that he was thereby effectively denied the right to poll the jury was not inconsistent with substantial justice within the meaning of rule 61."). For these reasons, *Audette* is very different than Mr. Verser's case, and this Court should apply its usual *per se* error rule here.

The District Court itself seems to have applied a harmless error standard in its denial of Mr. Verser's motion for a new trial. Appendix p. A12. But as described above, that approach is inconsistent with the *per se* approach in this and other circuits. Indeed, as the Third Circuit wrote, "a violation of Rule 31(d) is *per se* error requiring reversal . . . [and] the government's argument that harmless error analysis precludes reversal of the conviction, is irrelevant." *Hercules*, 875 F.2d at 418.

Because the District Court's denial of Mr. Verser's right to poll the jury was *per se* error, and because a different standard does not apply, this Court should reverse the district court's denial of Mr. Verser's motion for a new trial and order a new trial.

II. The District Court Should Have Adopted Alternative Procedures.

As an initial matter, there is simply no evidence that the District Court had to exclude Mr. Verser for security reasons. Mr. Verser at no time behaved in a way that suggested that he would pose a security threat. He was respectful, even complaisant, throughout the proceedings. District courts routinely permit criminal defendants and prisoner-plaintiffs to remain in the courtroom during jury

deliberations, and this case posed no unusual circumstances or especial threats to security over and above the typical case. The only suggestion that Mr. Verser's presence posed a security threat came well after the hearing, in the District Court's denial of Mr. Verser's motion for a retrial. Appendix p. A13. The record belies this.

Nevertheless, district courts might from time to time need to exclude a party from the proceedings during jury deliberations for security reasons or other valid reasons. When this happens, given the absolute and substantial nature of the right to poll the jury, *United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994); *United States v. Sturman*, 49 F.3d 1275, 1282 (7th Cir. 1995), the district court must move to protect the right. Thus even in the ordinary case, when both parties are present at the return of the verdict, this Court has said that the district court should ask counsel upon return of the verdict if there are any requests to poll the jury. *Marinari*, 32 F.3d at 1214. A district court that excludes a party for security reasons or other valid reasons should adapt this best practice, with an eye toward ensuring that its adaptation serves the purposes of the right to poll the jury, that is, "to ensure unanimity by forcing the jurors to voice their accountability." *Sturman*, 49 F.3d at 1282.

Thus as necessary, but perhaps not sufficient, measures, a district court must inform the party of the right to poll the jury at the time that the court excludes the party, and the court must conduct a poll on the record, as a matter of course, upon return of the verdict itself. The court might also advise the party early in the proceedings that a *pro se* party risks sacrificing representation when the jury

returns its verdict, if, for whatever reason, the party is absent when the jury returns its verdict. Under the unusual circumstances where a district court excludes a *pro se* party for security reasons or other valid reasons, these measures provide some protection that is consistent with this Court's recommended best practice and with the purpose of the right to poll the jury.

On the other hand, it is insufficient merely to advise the party of the right and offer an opportunity to poll prior to exclusion, because the right "cannot be exercised intelligently until after the verdict has been announced, and a request prior thereto would be premature." *United States v. Marr*, 428 F.2d 614, 615 (7th Cir. 1970) (quoting *Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958)). It is similarly insufficient to obtain a party's telephone number to call the party when the jury returns its verdict. *See United States v. Blount*, 399 F.2d 331, 334 (7th Cir. 1965) (holding that a defendant waived his right to poll when the defendant's attorney voluntarily left the courtroom, left his telephone number for the court to call when the jury returned, but the court was unable to contact him).

Here, the District Court did not need to exclude Mr. Verser for security reasons. But even if it did, it should have at least advised Mr. Verser of the right to poll the jury, and it should have polled the jury itself. Moreover, it might have advised Mr. Verser early in the proceedings that he, as a *pro se* litigant, risked sacrificing representation when the jury returned its verdict. The District Court took none of these precautionary measures, or any others. The District Court therefore deprived Mr. Verser of his right to poll the jury.

III. Mr. Verser Did Not Waive His Right to Poll the Jury When the Court Excluded Him.

Mr. Verser could not have waived his right to poll the jury when the District Court excluded him, for the simple reason that his right was not yet ripe. Rule 48(c) plainly states that the appropriate time to request a poll is only *after* the jury returns its verdict. Fed. R. Civ. P. 48(c). This Court said it only slightly differently: "the right to poll a jury cannot be exercised intelligently until after the verdict has been announced, and a request prior thereto would be premature." *United States v. Marr*, 428 F.2d 614, 615 (7th Cir. 1970) (quoting *Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958)). This is because the parties only know the verdict after the jury returns it in open court. *Miranda*, 255 F.2d at 18; *see also Government of the Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir. 1989) ("Consequently, the only way to effect the Rule's goal of assuring uncoerced unanimity is to have the jury polled *after* the return of the verdict . . . ."). When the District Court excluded Mr. Verser, he did not know the jury verdict—indeed, he could not have known it—and he therefore could not have exercised his right to poll the jury. Mr. Verser's right was not yet ripe, and he therefore could not have waived it.

Moreover, Mr. Verser did not waive his right to poll the jury by being present, but silent. This Court has held that a party may waive the right to poll when the party or the party's attorney is present, but fails to request a poll. Thus in *Marr*, this Court ruled that the defendant waived his right to poll the jury by not requesting it when the jury returned its verdict. *Marr*, 428 F.2d at 615. "There was sufficient time for defense counsel to request a poll before the jury retired, but he

chose not to do so." *Id.* at 615; *see also United States v. Harlow*, 444 F.3d 1255, 1268 (10th Cir. 2006) (holding that the defendant waived his right to poll when he failed to request it, even on the judge's prompting); *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984) (holding that the defendant waived his right to poll when he failed to request it at a post-verdict conference in chambers). In contrast, here the District Court excluded Mr. Verser from the proceedings for the entire period when he could have requested a poll. Under these circumstances, he could not have waived his right to poll by silence.

Mr. Verser also did not waive his right to poll the jury by express waiver. This Court has held that "defendants enjoy an absolute 'right to poll the jury . . . *unless it has been expressly waived* . . . ." *United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1523 (7th Cir. 1993) (emphasis in original) (quoting *Mackett v. United States*, 90 F.2d 462, 465 (7th Cir. 1037)); *cf. United States v. Billingsley*, 766 F.2d 1015, 1020-21 (7th Cir. 1985) (stating that the "preferred practice" is to obtain a "clear and knowing waiver from the defendant on the record" before the defendant absents him- or herself during jury deliberations, in order that the defendant might be present to respond to jury communications). Neither the District Court nor Mr. Verser said anything that could reasonably be construed as an express waiver.

Finally, Mr. Verser did not waive his right to poll the jury by voluntarily absenting himself from the proceedings. This Court has held that a party's attorney may waive the right to poll the jury by voluntarily leaving the proceedings during jury deliberations, even when the attorney left a telephone number for the court to

reach him. *United States v. Blount*, 339 F.2d 331, 334 (7th Cir. 1965). This Court explained:

> Only the alacrity with which defense counsel absented themselves from the courtroom when the jury retired to consider its verdicts explains why they and defendant were not there. It was no fault of the court or of the government. Under these circumstances none of the defendant's rights was violated and we find no error occurred.

Id.; *see also Beldin*, 737 F.2d at 455 (holding that the defendant waived the right to poll the jury, after the defendant's attorney voluntarily left the courthouse to make after-hours parking arrangements and after the attorney neglected to request a poll at a post-verdict conference).

In contrast, Mr. Verser's exclusion from the courtroom was in no way voluntary. Instead, the District Court ordered his exclusion. Here is the exchange:

> THE COURT: All right. Miss Kesler, here, take the exhibits to the jurors, please.
>
> We will be in recess and wait for the return of the verdict. I'm going to return Mr. Verser to the Department of Corrections. Here is your writ. You guys are out of here.
>
> All right. We will be in recess and wait for the jury's verdict. We will let you know what it is, Mr. Verser.
>
> MR. VERSER: All right. Thank you, Your Honor.

Appendix p. A2; Transcript p. 211. The District Court thus not only ordered Mr. Verser's exclusion, but it also ordered his exclusion at the hands of accompanying Department of Corrections officers (the "you guys" in the Court's statement). This is

hardly the kind of voluntary absenting, with alacrity, that formed the basis of a waiver in *Blount*. *Blount*, 339 F.2d at 334. Instead, taking the circumstances in their entirety, Mr. Verser had no choice but to leave. The District Court ordered his exclusion.

True, the court later said that it returned Mr. Verser to custody of the Department of Corrections for security reasons. Appendix p. A13. But there was no evidence that Mr. Verser ever posed a security threat. He was respectful, even complaisant, throughout the proceedings. And in any event he was accompanied by officers to protect against any security threat that he might pose.

In short, Mr. Verser could not have waived his right to poll the jury because his right had not yet ripened. He did not waive it with silence because he was not present when the jury returned its verdict. He did not waive it expressly. And he did not waive it by voluntarily absenting himself. Mr. Verser did not waive his right to poll the jury, and the District Court deprived him of that right.

CONCLUSION

For the foregoing reasons, Mr. Verser respectfully requests that this Court reverse the District Court's denial of Mr. Verser's motion for a new trial and order a new trial. Moreover, Mr. Verser respectfully requests that this Court instruct the District Court to permit Mr. Verser to poll the jury in his new trial, or, if the District Court excludes Mr. Verser, to advise Mr. Verser of his right to poll the jury and to poll the jury itself, or to employ other procedures to ensure that it protects Mr. Verser's right to poll the jury.

Respectfully Submitted,

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January 11, 2013

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellant, Glenn Verser, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with proportionally spaced font. The length of this brief is 7,599 words.

s/ Steven D. Schwinn
Steven D. Schwinn

Dated: February 12, 2013

PROOF OF SERVICE

I hereby certify that on January 11, 2013, I electronically filed the foregoing Brief and Required Short Appendix of Plaintiff-Appellant Glenn Verser with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Steven D. Schwinn
Steven D. Schwinn
Counsel for the Plaintiff-Appellant

Dated: January 11, 2013

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

s/ Steven D. Schwinn
Steven D. Schwinn
Counsel for the Plaintiff-Appellant

Dated: January 11, 2013

APPENDIX

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If you find in favor of each of the defendants and against the plaintiff, you shall say, we, the jury, find in favor of each of the defendants and against the plaintiff. And there are lines to sign.

I don't anticipate you will need to communicate with me, but, if you do, the proper way is in writing. Write out the question. Have the presiding juror sign it. If the presiding juror won't sign it, any juror can sign it. Give it to the court security officer who is at the door. They'll bring it to me and I will answer you in writing.

Swear in Miss Kesler to take charge of the jury.

(Court security officer sworn.)

THE COURT: All right. Jurors, go out. Pick a presiding juror and I will send you in the exhibits in just a minute.

(The jury leaves the courtroom at 10:55 a.m.)

THE COURT: Out of the presence and hearing of the jury, are there any other objections to the court's charge to the jury other than those raised in the conference on jury instructions? Mr. Verser?

MR. VERSER: No.

THE COURT: Mr. Higgerson?

MR. HIGGERSON: No.

THE COURT: All right. The Clerk will now read into the record the Plaintiff's Exhibits to be carried from the bar.

THE CLERK: Plaintiff's A, B, C, D, G, K-1 and M.

THE COURT: Hearing no objection. Read the defendants' exhibits to be carried from the bar.

THE CLERK: 1 and 2.

THE COURT: All right. Miss Kesler, here, take the exhibits to the jurors, please.

We will be in recess and wait for the return of the verdict. I'm going to return Mr. Verser to the Department of Corrections. Here is your writ. You guys are out of here.

All right. We will be in recess and wait for the jury's verdict. We will let you know what it is, Mr. Verser.

MR. VERSER: All right. Thank you, Your Honor.

(After recess. The parties return to court at 11:50 a.m.)

THE COURT: All right. Bring the jury back, Mr. Richardson.

(The jury returns to court at 11:52 a.m.)

THE COURT: All right. Jurors, we are

going to recess for lunch. While you are gone for lunch, don't discuss the case. Don't have any words about the case when you are away from the courthouse. You have to be back in the jury room. Be back in the jury room after an hour. One o'clock. And then continue your deliberations in the jury room.

All right. Take the jury out, please, Mr. Richardson.

(The parties return to court after lunch at 1:25 p.m. with the following question:

THE COURT: No video was made of it, right?

MR. HIGGERSON: That's correct.

THE COURT: That's the evidence as far as I know.

Okay. I'm going to try this in the library. Tell me that's fixed.

All right. This is the written answer I am sending back. Jurors, you asked if there was a video of the cell change. There is not. No video was made of the cell change, signed by me.

(The parties return to court at 2:45 p.m.)

THE COURT: All right. The jury has sent this message to me.

"Judge Baker, at this point all jurors

cannot come to an agreement. What would be the next step? What would the next step be?" Signed Rory Wilson and he calls himself foreman.

THE COURT: Okay. Put them in the box, please, John.

(The jury returns to court at 2:45 p.m.)

THE COURT: All right.

Presiding juror, Mr. Wilson. Show we are assembled. Without revealing how you're divided or what your disputing, is it the feeling that the jury cannot reach a verdict in the case

PRESIDING JUROR: At this time, yes.

THE COURT: At this time. Do you want to take a day off and come back or what? Do you want to go talk about that?

PRESIDING JUROR: Okay.

THE COURT: Go right back out. I don't want to mix in. No pressure. Go back and tell me what you want to do.

THE COURT: Out of the presence and hearing of the jury.

We will just have to wait and see.

In my experience, in 30 minutes they come back with a verdict. And, also, they will disagree and not come back. So I have no idea. We will just wait

and see what they tell us.

(The parties return to court at 3:38 p.m.)

(The jury returns to court.)

THE COURT: Presiding juror, you sent me a question I will answer that first, and then ask if you reached a verdict.

"Can a juror ask a question to the judge after the verdict is read?"

First, I have to have the verdict. Have you reached a verdict?

PRESIDING JUROR: Yes, we have.

THE COURT: Can you give it to Mr. Kaelin, please?

THE COURT: All right. The jury's verdict is as follows. We, the jury, find in favor of each of the defendants and against the plaintiff.

And it's signed by each of the eight jurors. The verdict is received and ordered recorded. Judgment on the verdict in favor of the defendants and each of them and against the plaintiff. The parties shall bear their own costs.

Now, you are discharged. Thank you for your service. Now, what is your question?

JUROR: We could like to make a statement, if we could.

This was very hard for us. Many of us -- the majority feel that the defendants all had a part to play in what happened to Mr. Verser, but, because there was a lack of evidence, we could not find the defendants guilty.

THE COURT: Responsible? Liable?

JUROR: Yes. Thank you.

THE COURT: A just and true verdict. Being a juror is a hard job and I respect you for your diligence. I know jurors are very serious about their work and they want to feel morally justified and they have done justice.

I appreciate that.

(Off record discussion with the jury.)

COURT REPORTER'S CERTIFICATE

I, TONI M. JUDD, United States Court Reporter, hereby certify that the foregoing is a true and accurate transcript from the Record of Proceedings in the above-entitled matter.

Dated this 15th day of November, 2011.

S/Toni M. Judd

Toni M. Judd, U.S. Court Reporter

E-FILED
Thursday, 14 April, 2011 08:33:15 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
for the
Central District of Illinois

GLENN VERSER,
Plaintiff,

vs.

Case Number: **07-3293**

PENNY RUIZ, MAJOR MCKEE, TARA GOINS, WARDEN ZIMMERMAN, TERRI ANDERSON, ROGER WALKER, .CRARY, LT. ASHCROFT, . JENNINGS, ASSISTANT WARDEN WALLS, . BRINK, JANE DOE #1, JANE DOE #2, JANE DOE #3, MAJOR BARFIELD, C/O ROBINSON, CHRIS DAVIS, AND LT. GOODING,
Defendants.

JUDGMENT IN A CIVIL CASE

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendants C/O Robinson, Chris Davis, Lt. Gooding and Major Barfield and against the plaintiff Glenn Verser. Parties are to bear their own costs.

Pursuant to order entered on May 11, 2010, the defendants Penny Ruiz, .McKee, Lt. Ashcroft, . Jennings, Assistant Warden Walls, . Brink, Tara Goins, Warden Zimmerman, Terri Anderson, Roger Walker, . Crary, Jane Doe #1, Jane Doe #2, and Jane Doe #3.

Dated: April 14, 2011

s/ Pamela E. Robinson
Pamela E. Robinson
Clerk, U.S. District Court

E-FILED
Friday, 10 June, 2011 02:58:33 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Glenn Verser,

Plaintiff,

vs. No. 07-3293

Jeffry Barfield, Douglas Gooding,
Ryan Robinson, and William C. Davis,

Defendants

Order On Plaintiff's Motion For A New Trial

On April 11-13, 2011, a jury trial was held on the plaintiff's claim of cruelty by the defendants, Barfield, Gooding, Robinson and Davis. In sum, the plaintiff claimed that he was being held in disciplinary segregation for a grievance he had filed that had slandered a female prison employee by accusing her of meretricious conduct. In protest of the disciplinary action, the plaintiff declared a hunger strike. At about 4:00 a.m. on September 7, 2007, or about two days into the hunger strike, the defendants, following institution procedure for hunger strikes, moved Verser from his double cell into another cell by himself. There, Verser alleged, they held his arms and punched him repeatedly, to punish him and to teach him a lesson about the grievance. The jury returned a verdict for the defendants, and the plaintiff has moved for a new trial [d/e 195] followed by a "supplemental motion for a new trial" [d/e 208], which has been docketed and considered as a brief in support of his motion for a new trial.

The plaintiff first argues that the court erred by refusing to allow the plaintiff to confer privately with one of his witnesses before calling him to the stand. The witness was IDOC inmate Joseph Lewis, the plaintiff's cellmate on the night he was moved to a cell by himself, where Verser claims the beating took place The plaintiff made this request after the trial was in full swing, and immediately before Lewis was to be called to testify before the jury by video conference.

The court denied the plaintiff's request, stating that the court believed the plaintiff was playing games and that, in any event, IDOC security concerns prevented private communications between the plaintiff and another inmate. The court stands by that ruling. First, the plaintiff's request was untimely. He did not explain why he waited until the trial to make his request, nor does he do so now. Lewis was listed as a witness on the proposed final

pretrial order filed in December 2010, four months before the trial. Springing the request on the court in the middle of the trial in open court was, the court still believes, gamesmanship. The plaintiff argued that the defendants talked to their lawyers before testifying as witnesses but the plaintiff was denied that right, implying that he should have had an equal opportunity to coach his witnesses.

Even if the plaintiff had made a timely request to confer privately with his witness by video before the trial, the court would have denied the request. For security, cost, and logistical reasons, the plaintiff's incarceration necessarily limits him to written discovery procedures. The plaintiff maintained during the case that IDOC rules prohibited him from contacting his witnesses [d/e 61], but he never explained the steps he took to attempt to contact those witnesses or the IDOC official response. Nor does he explain why it was essential that he do so, or how it would have made a difference. The defendants never moved for summary judgment on the excessive force claim, so the plaintiff did not need any affidavits to oppose summary judgment. And, all the questions he wished ask Lewis [d/e 61] he was able to at the trial.

The plaintiff next contends that the court erred in denying him the right to call what he denominates his "circumstantial witnesses." Presumably the plaintiff is referring to the court's March 30, 2011, order that struck all of the plaintiff's proposed witnesses except those allegedly present at or near the alleged incident: inmates Lewis and Casa, the defendants, and the plaintiff. The court struck the so-called circumstantial witnesses from the plaintiff's proposed witness list because the plaintiff failed to explain how their testimony was relevant and admissible. The plaintiff still fails to explain how their testimony would have been relevant and admissible. He argues that the defense was allowed to call two "circumstantial" witnesses — Lynch and Moore. Lynch's testimony was relevant and admissible. She laid a foundation for the admission of the plaintiff's health records contemporaneous with the time of the alleged incident. Those records contained no claim by the plaintiff that he had suffered any beating or asked for medical treatment. Moore was not called as a witness.

The plaintiff also asserts that the court erred by denying the plaintiff's request for the admission of an Inmate Handbook from Western Illinois Correctional Center. However, the court specifically stated in its prior order at the final pretrial conference, that although the court did not see the rulebook's relevance, "the plaintiff may bring what he has and make the argument again at trial, for the record." [d/e 168]. This is the court's standard approach because admissibility is best determined during the trial, when the purpose and relevance of the document is clear from the context in which it is offered. The plaintiff asserts that he could have used the rule book to impeach defendant Barfield's testimony, but the plaintiff did not make that attempt at the trial. The court, therefore, did not have the opportunity to rule on the issue.

The plaintiff also argues that the jury was prejudiced because the plaintiff appeared in a yellow jumpsuit on the first day of the trial. The court ameliorated that by ordering the prison to

provide the plaintiff with regular clothes on the subsequent days. In any event, the jury knew from the start of the case that the plaintiff was an inmate in an IDOC prison, and the entire case was about what happened to him in prison. The jumpsuit, while it was inappropriate, was corrected and did not prejudice the jury. It was perfectly obvious to the jury from the nature of the case that Verser, who was seated with two corrections officers behind him, was an inmate of the penitentiary.

The plaintiff also argues in a conclusory fashion that the jury was generally prejudiced against him, but cites no specifics. The jury, of course, in judging the credibility of the plaintiff and the other inmate witnesses, was entitled to consider the evidence that they were convicted felons.

The plaintiff's next argument is that the court had improper communications with the jury in response to the jury's questions to the court during their deliberations. That is a flat misrepresentation of the court's conduct.

After closing arguments were made, the jury instructions read, and the jury began deliberating, the plaintiff was remanded to IDOC custody. During its deliberations, the jury sent a written question to the court:

> "Is there a video surveillance system in this area , where Mr. Verser was supposedly assaulted. Or in this facility at all?" [d/e 183].

The court answered in writing:

> "Jurors:
> You asked if there was a video of the cell change. There is not. No video was made of the cell change.
>
> Harold A. Baker
> U. S. District Judge" [d/e 184].

Later the jury submitted another written question:

> "Judge Baker:
>
> At this point, all jurors cannot come to an agreement. What would the next step be?" [d/e 185]

The jury was returned into open court and the court admonished them not to reveal how they were divided or on what issue but inquired of the presiding jury if they were deadlocked

and could not agree. The court also asked the jury if they wanted to keep on deliberating that day or come back the next day. The presiding juror responded that the jury chose to keep on deliberating. The jury was sent back immediately for further deliberations with no pressure from the court and no other comments were made to them.

Thereafter, the jury reported that they had reached a verdict. They also sent a written note asking if a juror could make a comment after the verdict was read.

"Can a juror make a comment to the judge after the verdict is read?" [d/e 192]

The jury was returned into open court and their verdict was read, recorded and judgment entered in favor of the defendants and against the plaintiff and the jury discharged**.**

The court then allowed the jury to ask questions and allowed any juror, who wished to do so, to make a comment. One juror spoke up and commented that the juror thought the defendants were involved, "had a part to play," but that the plaintiff had not presented enough evidence to prevail. In other words, the juror had not found either side to be completely credible. That is a tie, and, in a civil case, the defendants win in a tie. *Marion v. Radtke*, — F.3d —, 2011 WL 2150784 *2 (7th Cir. 2011) ("This is a civil suit. The burden of production and the risk of non-persuasion rest with the plaintiff in civil litigation.").

The plaintiff asserts that the jury should have been polled, but there was no reason to do so because the verdict was clear and was supported by the evidence and by the questions and comments of the jurors. What was clear to the court from the jury's comments after they were discharged was their displeasure with the presentation of the defendants' case. The case was totally based on credibility, and both sides' stories had holes. The defendants, for example, could not remember the plaintiff at all. That testimony might have been disbelieved by a rational juror unfamiliar with the dynamics of a penitentiary society. On the other side of the case, the plaintiff's cellmate, Lewis, did not recall hearing any scuffle or sounds that might have suggested that the plaintiff was being assaulted—typically one would cry out during or after the assault if one was beaten in the manner described by the plaintiff, or so a reasonable juror might conclude. Further, the plaintiff did not report the purported beating or seek medical care in the days following the incident. He testified that he was too scared to speak up, but a reasonable juror could have disbelieved this from the plaintiff's confrontational demeanor at the trial and his closing argument . And, a reasonable juror could have concluded that the plaintiff made up the assault in retaliation for the disciplinary action taken against him. Of course there were inferences that might have been drawn in the plaintiff's favor. The verdict could have gone either way. Had the jury found for the plaintiff, the court would not have disturbed it. It went the defendants' way because the plaintiff failed to persuade the jury that his version was more likely true than not true. That is not cause for another trial.

The best illustration of exactly what took place between the court and the jury after they retired to consider their verdict (aside from what is shown in the docket above) is the portion of the unedited, "unscoped" real-time transcript printed out by the court reporter and supplied to the court on June 7, 2011. A "real time" copy is attached to this order as **Appendix A.**

The plaintiff argues now for the first time that there was a video surveillance of the area in which he was assaulted, but he never listed that as evidence on the pretrial order or mentioned anything about a video surveillance system while he was presenting evidence at the trial. Nor did he ever seek to compel discovery about this purported video surveillance. A motion for a new trial is not the time to raise claims about evidence that might have been introduced. There was no evidence that video surveillance existed, and the court's response was consistent with that.

The plaintiff's main objection to the proceedings after he was returned to the IDOC seems to be that he was not consulted before the court responded to the jury's questions. Consulting him was not possible or necessary. He was returned to the IDOC when the jury retired to deliberate for valid court house security reasons. The court was not going to keep Verser in the court house and chance his calm acceptance of an adverse ruling which is the predominant result in this type of case

IT IS THEREFORE ORDERED that:

1) The plaintiff's motions for a new trial (d/e's 195, 208) are denied.

2) The plaintiff's motion to stay so that he can supplement his motion for a new trial is denied as moot (d/e 197). The plaintiff has supplemented his motion and the court has considered the supplement in making this ruling.

3) The clerk is directed to send a copy of this order to the Seventh Circuit Court of Appeals, as notice that this court has ruled on the motions for a new trial, clearing the way for appeal.

Enter this 10th day of June, 2011.

/s/Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

APPENDIX A.

After recess. The parties return to court at 2:45
THE COURT: All right. The jury has sent this message to me. Judge Baker, at their point all jurors cannot come to an agreement. What would be the next step? What would the next step be. Signed bury xxxxx. And he calls himself foreman.
THE COURT: Okay. Put them in the box, please, John.
The jury returns to court at 2:45 p.m.
THE COURT: All right.
Presiding juror, Mr. xxxxx. Show we are assembled. Without revealing how you are divided or what your disputing, is it the feeling that the jury cannot

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reach a verdict in the case?
JUROR: At this time, yes.
THE COURT: At this time, do you want to take a day off and come back or what? Do you want to go talk about that? Okay. Go right back out. I don't want to mix in. No pressure. Go back and tell me what you want to do.
THE COURT: Out of the presence and hearing of the jury.
We will just have to wait and see. In my experience in 30 minutes they come back with a verdict. And also they will disagree and not come back. So I have no idea. We will just wait and see what they tell us.
(The parties return to court at 3:38 p.m.)
The jury returns to court.
THE COURT: Presiding juror, you sent me a question I will answer that first and ask if you reached a verdict. Can a juror ask a question to the judge after the verdict is read? First, I have to have the verdict. Have you reached the verdict?
PRESIDING JUROR: Yes, we have.
THE COURT: Can you give it to Mr. Kaelin, please?
All right. The jury's verdict is as follows: We, the jury, find in favor of each of the

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defendants and against the plaintiff.

And it's signed by each of the eight jurors. The verdict is received and ordered recorded. Judgment on the verdict in favor of the defendants and each of them and against the plaintiff. The parties shall bear their own costs.
Now, you are discharged. Thank you for your service. Now, what is your question?
JUROR: We would like to make a statement, if we could.
This was very hard for us. Many of us -- the majority feel that the defendants all had a part to play in what happened to Mr. Verser. But because there was lack of evidence, we could not find the defendants guilty.
THE COURT: Responsible. Liable.
JUROR: Yes. Thank you.
Off the record.
THE COURT: A just and true verdict. Being a juror is a hard job and I respect you for your diligence. I know jurors are very serious about their work and they want to feel morally justified and they have done justice.
I appreciate that.
(Off record discussion with the jury

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 15, 2012

Before

FRANK H. EASTERBROOK, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 11-2091

GLENN VERSER,
Plaintiff-Appellant,

v.

JEFFERY BARFIELD, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois

No. 07-3293

Harold A. Baker, *Judge*.

O R D E R

Glenn Verser, an inmate in Illinois's Stateville Correctional Center, brought a *pro se* lawsuit under 42 U.S.C. § 1983 asserting that certain correctional officers viciously beat him. The case went to trial, and the jury ruled in favor of the defendants. Verser filed a timely motion for new trial, raising a number of points, the most serious of which arises from his exclusion from the courthouse beginning with the time when the jury began its deliberations. On appeal, still acting *pro se*, he argues that the district court abused its discretion when it denied the motion for new trial.

The underlying incident is relatively easy to describe. Verser asserts that in 2007, four correctional officers, all of whom he has named as defendants, held him down and punched

him for "disrespecting" one of their colleagues. At the trial, Verser described the event in his testimony; the defendants all testified that they had no recollection of any such thing. The only other eyewitness testimony came from Verser's former cellmate, Joseph Lewis, who said that he saw some guards (whom he could not identify) move Verser to another cell, and that the guards snapped at Verser. Lewis testified that he could not see into the new cell, and that he did not hear sounds of a scuffle.

At the time the jury retired to deliberate, the court remanded Verser to the custody of the Department of Corrections and told him that he would not be present at the reading of the verdict:

> THE COURT: We will be in recess and wait for the return of the verdict. I'm going to return Mr. Verser to the Department of Corrections. Here is your writ. You guys are out of here. All right. We will be in recess and wait for the jury's verdict. We will let you know what it is, Mr. Verser.
>
> MR. VERSER: All right. Thank you, Your Honor.

Verser left without objection, while the defense counsel remained to await the verdict.

After deliberating for a few hours, the jury submitted a written question to the judge: "Is there a video surveillance system in this area where Mr. Verser was supposedly assaulted[?] Or in this facility at all?" Upon receiving the question, the court reconvened on the record with defense counsel but without Verser (who of course had no lawyer and thus was unrepresented). The court asked the defense lawyer if there was a video surveillance system, and the lawyer replied that there was not. The court then composed the following response: "You asked if there was a video of the cell change. There is not. No video was made of the cell change." The court sent that response to the jury, and deliberations continued.

An hour later the jury sent word that it was deadlocked, but after a brief additional period, it reached a verdict. But with word of the verdict, the foreperson also submitted another written question: "Can a juror ask a question to the judge after the verdict is read?" The court called the jury into the courtroom, again in the presence of defense counsel but without Verser, and responded that, as a matter of tautology, he could not answer a question *after* the verdict until he first *had* the verdict. The jury then submitted the verdict sheet to the court, signed by each juror, finding for the defendants. The court then invited the foreperson to ask his question, and the following colloquy took place:

> THE COURT: Now, what is your question?
>
> JUROR: We would like to make a statement, if we could. This was very hard for us. Many of us – the majority feel that the defendants all had a part to play in what happened to Mr. Verser, but, because there was a lack of evidence, we could not find the defendants guilty.
>
> THE COURT: Responsible? Liable?
>
> JUROR: Yes. Thank you.

With that, the court discharged the jury and thanked them for their service. Verser received the verdict through the prison mail.

As soon as he had it, Verser moved for a new trial, arguing among other things that he was prejudiced by the jury's briefly seeing him in his yellow prison jumpsuit, that the court answered the jury's question about video surveillance incorrectly, that he should have been present when the court answered that question and also when it received the verdict, that the court erred in accepting the verdict in light of the foreperson's reference to "guilt," and finally that the jury should have been polled. The court denied the motion. It found the brief glimpse of the prison clothing to be harmless, especially since this was a civil trial and the jurors knew perfectly well that Verser was a prisoner. With respect to the video surveillance, the court first criticized Verser for not seeking this evidence during discovery and then noted that Verser himself during his opening statement had also told the jury that there was no videotape. The court justified its exclusion of Verser from the courthouse both when the jury's mid-deliberation question was answered and when the verdict was received on security grounds. It was untroubled by the foreperson's reference to "guilt" and commented that "the juror had not found either side to be completely credible. That is a tie, and, in a civil case, the defendants win in a tie." Lastly, the court said without elaboration that it saw no reason to poll the jury.

It is the last point on which we wish to focus. A litigant has an absolute right to have a jury polled in order to detect latent divisions in the jury about the verdict. See FED. R. CIV. P. 48(c); see also *Humphries v. District of Columbia*, 174 U.S. 190, 194-95 (1899) (criminal cases); *United States v. F. J. Vollmer & Co.*, 1 F.3d 1511, 1522 (7th Cir. 1993) (same); 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2504 (3d ed.). Verser's trial took place in April 2011, well after the right to have a civil jury polled was added by the 2009 amendment to the Federal Rules of Civil Procedure. Rule 48(c) reads as follows:

> **Polling**. 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 or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Ordinarily, a party's lawyer will be present when the verdict is received, and thus the party will be able to decide whether to request a poll. Non-prisoner *pro se* litigants can also be expected to be present and in a position to protect their own rights. But it is not clear how the Rule should operate for a person in Verser's position, who has been excluded from the courthouse on security grounds and who is unrepresented. The court did not, as it might have, alert Verser to the fact that he had a right to a poll upon the receipt of the verdict, and so Verser had no opportunity to make an advance request (if this would have been acceptable). Nor did the court postpone the discharge of the jury until Verser had an opportunity to learn what the foreperson had said just after the verdict was received.

We consider this a serious issue that would benefit by a proper adversary presentation. We therefore have decided to recruit counsel for Verser, to brief the following issues and any others that he or she concludes should be advanced on appeal:

- Did the district court deprive appellant Verser of his right under Federal Rule of Civil Procedure 48(c) to have the jury polled, when it ordered that Verser would be excluded from the courtroom at the time the verdict was received?

- For a person such as a prisoner who is excluded from the courtroom for security reasons or other valid reasons, does the court have a duty to adopt alternative procedures for exercise of the Rule 48(c) right to a poll, and if so, what procedures would suffice?

- Did Verser forfeit or waive his right to have the jury polled when he acquiesced in the court's order to return him to custody?

The appointment of counsel and briefing schedule will be set by separate order.