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Post-Instruction Issues: Jury Deliberations and Verdict

*John F. Decker**

I. INTRODUCTION

After a jury in a criminal case has received the evidence presented by the state and the defense, has heard closing argument from counsel, and has been provided instruction about the law that is pertinent to resolution of the case, it enters the critical stage of deliberating the fate of the accused and arriving, if possible, at a verdict. However, a myriad of problems can occur during this stage. Consider the following examples. A juror visits the scene of a crime and proceeds to take measurements, which indicate that the defendant in no way could have shot the accused from the angle discussed during trial. The juror informs other jurors of this information, which causes the jury foreperson to send a note about this to the judge. Second, consider a case where a jury foreperson informs a judge that another juror has stated that she will not make her decision based on the evidence presented at trial, but rather on her own moral beliefs. Third, a judge declares a mistrial after two hours of deliberations in order to catch a plane to Palm Springs for his long-planned two-week vacation, even though the jurors give no indication that they are deadlocked. Fourth, an alternate juror goes to the jury room with twelve jurors to deliberate. Immediately, this alternate reports to the twelve that defendant is "guilty as hell." This is not discovered until after several hours of deliberations. In yet another case, a jury returns a sealed verdict finding defendant guilty. After reading the guilty verdict in open court, several jurors become agitated and the foreperson immediately advises the court that they had apparently signed the wrong verdict form. Or, assume an accused is on trial for battery of an employee. The evidence indicates that the accused, without provocation, had slapped his employee in the

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face with his open hand. The trial court instructs the jury that a battery has occurred if the accused "intentionally or knowingly without legal justification and by any means causes bodily harm" to his victim. During jury deliberations, the trial judge receives the following note from the jury foreperson: "If a person merely slaps another in the face, is this 'bodily harm'? Could you please clarify what you mean by 'bodily harm'? We want further instruction." The judge refuses to respond to the question. Finally, assume a court releases jurors from deliberations on their verdicts to their homes for the night, instructing them to refrain from discussing the case or their deliberations until they reconvene the next morning. Defense counsel makes an objection and insists on a sequestration.

The focus of this Article involves examination of this very important part of a criminal trial and the multitude of concerns, like the hypotheticals described above, that can arise following commencement of jury deliberations. Part II of this article examines jury questions and requests ranging from asking for clarification of instructions to requests for examination of physical evidence in the jury room.[1] Part III addresses the troublesome problem of when it is determined that the fact finder has been exposed to or has been considering "extraneous matter," information not in evidence that carries the potential of prejudicing the case.[2] Next, Part IV deals with communications between the judge and jury that may be problematic on appeal.[3] Most important here is the prohibition against ex parte communication between the judge and jury. Other concerns that can arise from these communications are allegations that the judge's conduct effectively "coerced" the jury to reach a premature verdict, where the judge might have ordered a mistrial because of the great difficulty the jurors were having in reaching a verdict. Part V reflects a discussion of the problems arising when a jury claims it is unable to reach a verdict.[4] This subject is tied to the judge's decision to order a mistrial, where in some instances it is claimed that the trial court's order was too soon and in others too late. Part VI examines whether sequestration may be required during deliberations.[5] Part VII then discusses several issues that have arisen as a result of the

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1. *See infra* Part II (discussing general rules governing jury instructions, questions of law or fact, requests for review of testimony or evidence, and questions unique to capital cases).

2. *See infra* Part III (examining the ramifications of extraneous matter on jury deliberations).

3. *See infra* Part IV (discussing types of prohibited communications between the jury and the judge).

4. *See infra* Part V (examining the concerns arising from deadlocked juries).

5. *See infra* Part VI (discussing the Illinois Supreme Court Rules that permit juries to be sequestered to eliminate problems associated with extraneous matter).

Illinois law authorizing jury note taking.[6] Part VIII considers the procedures for receiving a jury verdict, including polling a jury and problems associated with the jury's completion of verdict forms.[7] Finally, Part IX addresses the possibility of seating an alternate juror during deliberations.[8]

II. QUESTIONS AND REQUESTS FROM THE JURY

A. *General Rules*

A trial court has a "duty to answer the jury's question if clarification is requested, the original instructions are incomplete, the jurors are confused, or the question concerns a point of law arising from the facts over which doubt or confusion exists."[9] A trial court, however, may exercise its discretion and properly decline to answer a jury's question during deliberations where:

> (1) the instructions are readily understandable and sufficiently explain the relevant law, (2) further instructions would serve no useful purpose or would potentially mislead the jury, (3) the jury's inquiry involves a question of fact, and (4) the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or the other.[10]

In responding to a jury question or request, the "proper procedure" is to address the entire jury, with the defendant present.[11] Where the exchange between the judge and jury regarding instructions occurs outside the presence of the defendant and his attorney, it may constitute reversible error.[12] In one case, however, where the trial court had

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6. *See infra* Part VII (examining the controversy surrounding note taking by jurors).

7. *See infra* Part VIII (discussing jury polling and the problems that arise from incomplete jury verdict forms).

8. *See infra* Part IX (examining concerns that arise through the use of alternate jurors).

9. People v. Carroll, 751 N.E.2d 44, 47 (Ill. App. Ct. 2d Dist. 2001).

10. People v. Brown, 745 N.E.2d 173, 184 (Ill. App. Ct. 4th Dist. 2001) (citing People v. Childs, 636 N.E.2d 534, 539 (Ill. 1994)); *see also* People v. Reid, 554 N.E.2d 174, 179 (Ill. 1990) (noting several circumstances where a court may appropriately decline to answer a jury's question).

11. People v. Sparks, 731 N.E.2d 987, 992 (Ill. App. Ct. 4th Dist. 2000) (disapproving the trial court's action in summoning the foreperson back to the courtroom alone, but holding that no error had occurred, in part, because the court simply informed the foreperson that no further clarification of the law would be provided).

12. People v. Harmon, 244 N.E.2d 358, 361–62 (Ill. App. Ct. 1st Dist. 1968) (holding that reversible error had occurred where the jury informed the bailiff it had a question about the law, and the judge told the bailiff to tell the jury that legal questions would be resolved by the court, as such communication between the court and the jury occurred outside the presence of the defendant and his attorney).

instructed the jury that they had received all instructions available, after consulting with the prosecution and defense counsel, the trial court did not abuse its discretion by providing the same response to later jury questions without again consulting the parties.[13] Occasionally, where the trial judge is unavailable, a substitute judge may be called upon to address a jury question. A substitute judge, appointed after the jury begins its deliberations, has the authority and, where necessary, the obligation to rule on issues that arise during jury deliberations. The substitute judge's failure to address such issues could be a basis for reversal.[14]

In response to jury questions, a trial court cannot submit new charges or new theories to the jury after it commences its deliberations because doing so deprives the defense of the opportunity to address the new issue in closing argument.[15] The Illinois Supreme Court has held that this type of communication is contrary to both an accused's right to due process and Illinois statutory mandate.[16] Where a jury arrives at a verdict before the trial judge has an opportunity to respond to a question from the jury, however, there is no error.[17] Finally, the mere fact that a jury asks a question of the trial court or requests review of evidence cannot be used by the defense to establish that the jury had a reasonable doubt about the defendant's guilt.[18]

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13. People v. Hemphill, 594 N.E.2d 1279, 1285 (Ill. App. Ct. 1st Dist. 1992).

14. People v. Hill, 735 N.E.2d 191, 197 (Ill. App. Ct. 1st Dist. 2000) (reversing the trial court's conviction where a substitute judge refused to answer the jury's question).

15. People v. Millsap, 724 N.E.2d 942, 946 (Ill. 2000). In *People v. Millsap*, an accountability instruction was given, after the jury had commenced deliberations, in response to a jury question about whether the accomplice was equally guilty as an offender who actually caused injury in a home invasion. *Id.* at 945. On appeal, the defendant argued that the accountability instruction violated federal constitutional due process and 735 ILL. COMP. STAT. 5/2-1107(c), which requires instructions to be communicated to the parties prior to closing argument. *Id.* at 947. The Illinois Supreme Court held that the instruction constituted reversible error even though there was evidence presented at trial that indicated there may have been another person present with the defendant in the victim's home during the robbery because the defendant was deprived of the opportunity to address the accountability issue during closing arguments. *Id.* at 948.

16. *Id.* at 947.

17. People v. Sims, 519 N.E.2d 921, 935 (Ill. App. Ct. 1st Dist. 1987) (upholding defendant's conviction and finding no error had occurred where the judge was presiding over an argument in another case when the jury sent a question to the judge, and the judge was unable to answer the question before the jury reached a verdict).

18. People v. Minniweather, 703 N.E.2d 912, 916 (Ill. App. Ct. 4th Dist. 1998) ("That the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision.").

B. *Questions Regarding Law/Instructions*

In cases where the jury raises an explicit question about a point of law arising from facts over which there is doubt or confusion, the court must attempt to clarify the issues in the minds of the jury members. Case law indicates that the judge should respond to the jury's questions even though the jury was initially given proper instructions.[19] Where the jury is obviously confused about the law, answers to jury questions are essential.[20] The failure to clarify an instruction that is confusing to the jury will require reversal when such failure may have been prejudicial to the defendant.[21] The clearest basis for a finding of

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19. People v. Cortes, 692 N.E.2d 1129, 1142 (Ill.), *cert. denied*, 525 U.S. 882 (1998); People v. Sanders, 469 N.E.2d 287, 290 (Ill. App. Ct. 1st Dist. 1984).

20. People v. Childs, 636 N.E.2d 534, 541–42 (Ill. 1994) (reversing a defendant's conviction where a trial court refused to answer a jury's question as to whether the defendant could be found guilty of armed robbery and either voluntary or involuntary manslaughter, or alternatively, if a finding of armed robbery mandated a guilty verdict for murder, as the trial court's initial erroneous instruction contributed to juror confusion); People v. Landwer, 664 N.E.2d 677, 682–83 (Ill. App. Ct. 2d Dist. 1996) (determining that a trial court's failure to answer a jury's question, asked on three separate occasions, as to the meaning of the word "originated," in conjunction with a defendant's entrapment defense, was reversible error); People v. Shannon, 564 N.E.2d 198, 202–03 (Ill. App. Ct. 4th Dist. 1990) (requiring reversal where the trial court refused to respond to a juror inquiry during deliberations as to whether the "intent" requirement of an aggravated battery charge was satisfied if a defendant merely intended to throw a rock that injured a victim, or instead, if it was required that the intent was to do bodily harm by throwing the rock).

21. People v. Brown, 745 N.E.2d 173, 184 (Ill. App. Ct. 4th Dist. 2001); People v. Flynn, 526 N.E.2d 579, 583 (Ill. App. Ct. 1st Dist. 1988); People v. Morris, 401 N.E.2d 284, 286 (Ill. App. Ct. 2d Dist. 1980); *see also* People v. Kucala, 288 N.E.2d 622, 626–27 (Ill. App. Ct. 1st Dist. 1972) (ordering a new trial because the trial court's failure to respond to the jury's written request for clarification as to when a "forcible felony starts," for purposes of their understanding of forcible felony instruction relating to the murder charge, was prejudicial to the defendant).

In *People v. Brown*, the trial judge refused to respond to the jury's question as to whether it could convict the defendant of the instant charge based on a prior incident. *Brown*, 745 N.E.2d at 180. The appellate court reversed, holding that such a question suggested jury confusion regarding the concept of *limited purpose* for which "other-conduct" evidence had been admitted (that is, in regard to the issues of a defendant's intent, knowledge, and lack of accident) and was further complicated by the fact that the instructions failed to state this evidence could "only" be considered for this limited purpose. *Id.* at 184.

In *People v. Flynn*, the trial court refused to answer jury questions regarding (1) an additional charge that had been nolle prossed by the State, and (2) whether opposing lawyers could have called a co-defendant to the stand. *Flynn*, 526 N.E.2d at 582. The appellate court found reversible error because refusing to answer question (1) may have caused the jury to infer that the defendant pled guilty to nolle prossed charge, and refusing to answer question (2) should have resulted in the jury not being informed that the co-defendant had a right to refuse to testify. *Id.* at 583.

In *People v. Morris*, the jury asked the trial court if a person could be found guilty of burglary based on his possession of stolen property even though the person himself never entered the burglarized premises, and while the trial court had not previously instructed the jury on the theory of accountability, it responded that the jury "must decide the case on the instructions as given."

reversible error occurs when the trial court either: (1) refuses to permit the jury to inform the court as to which portion of the instructions were confusing or (2) indicates that it has no authority whatsoever to clarify Illinois Pattern Jury Instructions.[22] However, where further clarification of an instruction will somehow require the judge to reflect upon his or her opinion of the strength of the evidence or to direct the jury to conclude that the defendant is likely guilty, the trial court cannot attempt to further clarify an instruction.[23]

Where the instructions themselves are "clear and in common language which the jury could understand," the judge may respond that no further clarification is required.[24] Thus, if the trial court simply advises the jury to utilize the "common meaning" of the words in an instruction about which they have questions, the trial court's action may be satisfactory, assuming the words are not clearly ambiguous.[25] Giving a jury a dictionary to determine the "common meaning" of terms of the instruction, however, is error.[26]

As with a judge's original instructions to a jury, if the trial court misstates the law when responding to a jury question about the

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Morris, 401 N.E.2d at 285. The appellate court reversed the defendant's conviction because the jury was obviously confused and may have convicted the defendant as an accomplice even though there was no charge to that effect. *Id.* at 286.

22. *Compare* People v. Land, 340 N.E.2d 44, 45–46 (Ill. App. Ct. 1st Dist. 1975) (holding that the trial judge's statement, "I cannot interpret the instructions for you, you must read these instructions and interpret them yourself. . . . I wish I could, but it would be error if I did," constituted reversible error because a trial court cannot refuse to consider jury questions regarding instructions), *with* People v. Reid, 554 N.E.2d 174, 180–81 (Ill. 1990) (stating that no abuse of discretion or prejudice to defendant occurred where the jury asked if it could find the defendant guilty of one charge and not guilty of another, the judge directed the jury to follow the original instructions, and the jury thereafter found defendant guilty of murder and armed robbery), *and* People v. Sanders, 345 N.E.2d 757, 761–62 (Ill. App. Ct. 1st Dist. 1976) (holding that the trial court properly refused to inquire into a statement from the jury foreperson that the jury was having difficulty with "the interpretation of one of the instructions," as the jury request for clarification was too general to warrant a response from the court).

23. People v. Charles, 360 N.E.2d 1214, 1217 (Ill. App. Ct. 3d Dist. 1977).

24. *Id.*

25. *Compare* People v. Lee, 745 N.E.2d 78, 92 (Ill. App. Ct. 1st Dist. 2001) (finding that the trial court's refusal to attempt to clarify the terms "legally responsible" and "aiding and abetting" was proper), People v. Tokich, 734 N.E.2d 117, 122 (Ill. App. Ct. 4th Dist. 2000) (holding that the trial court's refusal to define "reasonable doubt" was proper), *cert. denied*, 531 U.S. 1174 (2001), *and* People v. Jedlicka, 405 N.E.2d 844, 849–50 (Ill. App. Ct. 2d Dist. 1980) (upholding the trial court's refusal to clarify questions about the meaning of "deception" and "permanently deprive," among others), *with* People v. Sparks, 731 N.E.2d 987, 992 (Ill. App. Ct. 4th Dist. 2000) (holding the trial court's failure to answer a jury request that was not factual, but one of pure law (to wit, does the crime of unlawful restraint have a minimum time element) was error although not reversible).

26. *Jedlicka*, 405 N.E.2d at 851 (finding the jury's use of a dictionary was error, but not reversible error).

instructions, the misstatement is clear error.[27] In addition, it is reversible error for a trial court to respond to questions about the law by providing supplemental instructions that rely on additional legal theory that was not supported by evidence.[28] Of course, if the trial court correctly addresses the jury's question regarding a point of law, a defendant has no basis whatsoever to claim prejudice.[29] Moreover, where a defendant not only fails to object to the trial court's refusal to clarify a jury instruction, but also specifically agrees to the refusal, the issue may be waived.[30] Where the trial court, in response to a jury question about the law, refers to a particular portion of the jury instructions as helpful in answering their question, this does not amount to improper emphasis of a particular basis for liability.[31]

C. *Questions Regarding Facts/Interpretation of Evidence*

Obviously, a jury trial presupposes that the *jury* resolves *all* questions of fact crucial to the issue of guilt or innocence. Therefore, if the jury's question calls for the trial court's evaluation of facts or evidence, it will constitute reversible error for a judge to answer such questions.[32] The

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27. *See* People v. Shaw, 713 N.E.2d 1161, 1173–74 (Ill. 1998) (reversing where the trial court erroneously answered a jury question about an armed robbery charge based on an accountability theory); People v. Dennis, 692 N.E.2d 325, 336 (Ill. 1998) (reversed due to the trial court's erroneous instruction).

28. People v. Wilson, 726 N.E.2d 740, 748 (Ill. App. Ct. 2d Dist. 2000). In *People v. Wilson*, the jury asked the trial judge, during deliberations, whether to "perform the act" in a murder case meant that the accused "actually pull[ed] the trigger" or, instead, that he "participated" in the killing. *Id.* at 745. The trial court then gave the jury instructions on accountability, a theory of liability to which defense counsel's closing statement did not open the door and for which no evidence supported giving such an instruction. *Id.* Consequently, the appellate court reversed the defendant's conviction. *Id.* at 749; *see* People v. Jamison, 566 N.E.2d 58, 60 (Ill. App. Ct. 3d Dist. 1991) (finding reversible error where the trial judge responded to a jury communication that permitted the jurors to convict on an accomplice theory not alleged in the information nor argued at trial); *see also* People v. Millsap, 724 N.E.2d 942, 947 (Ill. 2000) (holding that giving accountability instructions after deliberations began runs afoul of a defendant's right to make an effective closing argument).

29. *See, e.g.*, People v. Cortes, 692 N.E.2d 1129, 1142 (Ill.) (holding that the trial court properly responded to a jury question regarding when the intent to commit a felony must be formed in relation to a felony murder charge), *cert. denied*, 525 U.S. 882 (1998).

30. People v. Kinney, 691 N.E.2d 867, 871 (Ill. App. Ct. 4th Dist. 1998) (determining that plain error had not occurred where the trial court refused to respond to a jury request in an aggravated criminal sexual assault trial as to meaning of "force," even though the trial court should have responded to such a question).

31. People v. Harris, 554 N.E.2d 367, 374 (Ill. App. Ct. 1st Dist. 1990) (finding no abuse of discretion where jury questions reflected confusion on the issues of felony murder and accountability, and the court directed the jury to consider the murder and accountability instructions).

32. *See* People v. Sampson, 408 N.E.2d 3, 7–8 (Ill. App. Ct. 1st Dist. 1980) (reversing a defendant's conviction where a judge answered a note that did not ask for a review of witness

judge has no discretion whatsoever to evaluate the strength of the evidence, or lack thereof, for the benefit of the jury.[33] However, merely because a judge's response is factually consistent with the evidence presented at trial does not necessarily connote a judge's "stamp of approval" with the State's position regarding what facts occurred.[34]

D. *Requests for Review of Testimony*

It is within the discretion of the trial court to allow or refuse a jury request to review a transcript of witness testimony,[35] or to allow testimony to be read from a court reporter's notes.[36] The trial court is in the best position to determine if review will help or hurt the jury's deliberations, and consequently, the trial court's discretion will only be disturbed where there exists an obvious abuse of discretion.[37] However, the trial court's assessment as to whether the review will be helpful must start from the assumption that the jury's request, in and of itself, is indicative that the jury will find it helpful.[38] In any event, the failure of the defense to object to the trial court's denial of a jury request for review of a transcript of testimony may be interpreted as a waiver.[39]

In cases where a trial court refuses a jury request for a review of testimony in such a way as to suggest it has no discretion to allow such

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testimony but, in effect, for an answer to "what happened"). In *People v. Sampson*, the judge answered in a way so as to reflect the version and sequential order of events as told by the prosecution's witness. *Id.* at 8. Consequently, the judge's answer usurped the jury's function of determining the facts and prejudiced the defendant's right to have the jury resolve the factual issue as to whether the prosecution witness was credible. *Id.*

33. People v. Williams, 322 N.E.2d 819, 825–26 (Ill. 1975) (determining that jury questions as to: (1) whether a piece of evidence had been fingerprinted; (2) why a window sill in the victim's home was not fingerprinted; and (3) whether it could examine a police report not admitted into evidence, were properly refused because the judge does not possess discretion to offer answers to such questions); People v. Lee, 745 N.E.2d 78, 92–93 (Ill. App. Ct. 1st Dist. 2001) (upholding the trial court's direction to the jury to "continue to deliberate," where the jury questioned the meaning of "legally responsible" and "aiding and abetting," in combination with a factual hypothetical); People v. Marsan, 637 N.E.2d 540, 543 (Ill. App. Ct. 1st Dist. 1994) (holding that the trial judge's refusal to answer a question regarding whether fingerprints could be lifted from paper was proper).

34. People v. Kliner, 705 N.E.2d 850, 891–92 (Ill. 1998), *cert. denied*, 528 U.S. 831 (1999) (upholding the judge's ex parte response to a jury question regarding dates of certain photos as "Feb.1998").

35. *Id.* at 891.

36. People v. Thomas, 730 N.E.2d 618, 627 (Ill. App. Ct. 4th Dist. 2000); People v. Pallardy, 417 N.E.2d 851, 854 (Ill. App. Ct. 2d Dist. 1981).

37. People v. Pierce, 308 N.E.2d 577, 578 (Ill. 1974) (upholding the refusal of a jury request to review certain witness testimony).

38. People v. Modrowski, 696 N.E.2d 28, 37 (Ill. App. Ct. 1st Dist. 1998); People v. Taylor, 424 N.E.2d 1246, 1252 (Ill. App. Ct. 1st Dist. 1981).

39. People v. Flores, 538 N.E.2d 481, 491 (Ill. 1989).

review, its refusal will normally constitute reversible error.[40] In other words, the court's refusal must be based on its conclusion that such review is unwarranted in the case at hand and not on its conclusion that any review of testimony is inappropriate per se.[41] Furthermore, some earlier Illinois case law held that a trial court's refusal to allow the review of testimony is a proper exercise of its discretion only if the court had considered the jury's specific request and the reasonableness thereof.[42] A more recent Illinois Supreme Court case, however, held that where a trial judge, in response to a written request for a transcript, simply wrote "no" on the bottom of the note, such response did "not indicate that the denial of the transcripts was based upon the trial judge's mistaken belief that she had no discretion to provide the transcripts."[43] Obviously, if the trial court never receives a jury request for a review of testimony, this will be reversible error per se.[44]

When the trial court refuses to allow jury review of testimony because it was "brief" and "uncomplicated," such refusal will be upheld.[45] It would appear that if the trial court believes reexamination of certain testimony might emphasize certain evidence over other evidence, that determination may be considered, at least in part, as a basis to refuse review.[46] Also, where the jury requests *portions* of a

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40. People v. Queen, 310 N.E.2d 166, 169 (Ill. 1974) (requiring reversal where the jury asked for "defendant's words on the stand," and the trial judge responded, "I cannot have any testimony of any witnesses read to you," because the judge's declaration suggested he thought he was without authority to allow the jury request).

41. *See* People v. Autman, 317 N.E.2d 570, 572 (Ill. 1974) (reversing the trial court's summary refusal to allow the jury to review testimony); *see also* People v. Tansil, 484 N.E.2d 1169, 1173 (Ill. App. Ct. 2d Dist. 1985) (noting that the trial court generally has the discretion to allow or refuse a jury request to review testimony, but "it is reversible error for a trial court to refuse to exercise that discretion in the erroneous belief that it has no discretion as to the question presented").

42. People v. Jackson, 325 N.E.2d 450, 457–58 (Ill. App. Ct. 1st Dist. 1975) (reversing the defendant's conviction where the trial court failed to make a "preliminary determination" of the jury's request to review testimony, as the trial judge erroneously believed he had no discretion to rule on the matter).

43. People v. Kliner, 705 N.E.2d 850, 891 (Ill. 1998), *cert. denied*, 528 U.S. 830 (1999).

44. People v. Davis, 433 N.E.2d 1376, 1381 (Ill. App. Ct. 4th Dist. 1982) (finding reversible error per se where the bailiff failed to communicate a jury request to the trial judge).

45. People v. Taylor, 424 N.E.2d 1246, 1252 (Ill. App. Ct. 1st Dist. 1981) (affirming an armed robbery conviction where the jury request for review of testimony was made only after one and one-half hours of deliberation, witness testimony was "brief" (no more than three or four hours), and testimony was "uncomplicated").

46. People v. Singletary, 391 N.E.2d 440, 451 (Ill. App. Ct. 1st Dist. 1979) (upholding refusal to allow the jury to review testimony of only two of the multiple witnesses since the jury might have "single[d] out" the testimony of the two); *accord* People v. Page, 350 N.E.2d 262, 263 (Ill. App. Ct. 3d Dist. 1976) (determining that the trial court properly refused to allow the jury to review four of thirteen witnesses' testimonies).

witness's testimony, the trial court is not obligated to have all of the witness testimony repeated.[47]

Finally, where the jury indicates that a review of testimony is necessary to reach a verdict, and the trial court in the exercise of its discretion allows such jury review, the defendant's claim that he was thereby harmed will rarely be successful.[48] The Illinois Appellate Courts have made reference to other concerns in their evaluation of the appropriateness of the trial court's decision to allow or deny review of testimony, including: (1) the length of testimony and whether its reading would cause unreasonable delay;[49] (2) whether the request for review of testimony actually involves a request for the trial court's opinion regarding conflicts in the evidence;[50] (3) whether neither the defendant nor his attorney was present during the judge/jury exchange;[51] and (4) whether the testimony, which the trial court refused to allow the jury to reexamine, was inculpatory or exculpatory.[52]

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47. People v. Reynolds, 373 N.E.2d 650, 653–54 (Ill. App. Ct. 1st Dist. 1978) (finding that a trial court did not abuse its discretion when it granted a jury request to read portions of a police officer's testimony identifying defendants, while refusing the defendants' request that cross-examination testimony of the officers also be read to the jury); *see also* People v. Modrowski, 696 N.E.2d 28, 37 (Ill. App. Ct. 1st Dist. 1998) (holding that no abuse of discretion had occurred in allowing the jury to review a witness's prior inconsistent statement placed in evidence, but refusing to furnish the jury with a copy of the witness's in-court testimony); People v. Creque, 573 N.E.2d 1297, 1303–04 (Ill. App. Ct. 1st Dist. 1991) (upholding the trial court's decision to permit jury review of only the prosecution witnesses' testimony, and allowing review of direct examination without related cross-examination). *But see* People v. DeRossett, 604 N.E.2d 500, 515–16 (Ill. App. Ct. 4th Dist. 1992) (allowing a jury to review only a portion of one State witness's testimony was reversible error).

48. *See* People v. McClellan, 390 N.E.2d 131, 136 (Ill. App. Ct. 1st Dist. 1979) (upholding the trial court's allowance of the jury to review testimony when the jury stated it could not reach a verdict without review of witness testimony because there was no indication as to how the defendant might have been harmed thereby).

49. People v. Rogers, 442 N.E.2d 529, 533–34 (Ill. App. Ct. 1st Dist. 1982) (upholding review of testimony after noting that the testimony was not lengthy, and therefore, reading it to the jury would not cause unreasonable delay).

50. People v. Baggett, 450 N.E.2d 913, 917 (Ill. App. Ct. 1st Dist. 1983) (upholding the refusal to allow review because the jury actually sought the court's opinion regarding evidence with its request); People v. Bell, 447 N.E.2d 909, 917 (Ill. App. Ct. 1st Dist. 1983) (upholding the refusal to answer a specific juror question about witness testimony).

51. *See* People v. Briggman, 316 N.E.2d 121, 125 (Ill. App. Ct. 1st Dist. 1974) (reversing where the trial court refused to answer a jury question, coupled with the fact that neither the defendant nor defense counsel was present during the juror communication).

52. People v. Pierce, 308 N.E.2d 577, 578–79 (Ill. 1974) (holding that it was not error for the trial court to deny review of witness testimony because the evidence was "unequivocally incriminating and damaging to the defendant").

E. Requests for Examination of Exhibits/Evidence/Crime Scene

The determination as to whether certain exhibits should be taken to the jury room is within the sound discretion of the trial judge.[53] Of course, these exhibits must first be admitted into evidence.[54] Impeachment evidence of the alleged criminality, however, may not be taken to the jury room, even if admitted into evidence.[55] Nonetheless, the likes of photos of a crime scene,[56] a transcript of a recorded conversation relating to a drug transaction, as well as the tape recording itself,[57] a defendant's voluntary confession,[58] and physical evidence[59] have been allowed into the jury room. If the trial court sees no purpose in allowing the item to go to the jury room, however, its refusal will be upheld.[60]

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53. People v. Allen, 160 N.E.2d 818, 823 (Ill. 1959) (upholding the trial court's decision to allow a door lock, crowbar, screw driver, and gloves to be taken to the jury room, where all items were admitted into evidence).

54. People v. Williams, 670 N.E.2d 638, 657 (Ill. 1996) (holding that the trial court has no discretion to allow items not admitted into evidence to go to the jury during deliberations), *cert. denied*, 520 U.S. 1122 (1997); People v. Holcomb, 18 N.E.2d 878, 878–79 (Ill. 1939) (determining that reversible error had occurred when the trial court allowed exhibits to be taken into the jury room when such exhibits were not admitted into evidence); People v. Ramos, 742 N.E.2d 763, 773 (Ill. App. Ct. 1st Dist. 2000) (upholding the trial court's refusal to allow a police report into the jury room, when such report was not admitted into evidence), *cert. denied*, 532 U.S. 1073 (2001).

55. People v. Carr, 368 N.E.2d 128, 131 (Ill. App. Ct. 2d Dist. 1977) (finding that prior inconsistent statements and prior consistent statements taken to jury room, amongst other problems, gave rise to reversible error). *But see* People v. Vida, 752 N.E.2d 614, 624 (Ill. App. Ct. 1st Dist. 2001) (holding that plain error had not occurred where a trial court conferred with counsel for both sides regarding a jury request to see a witness's prior inconsistent written statement to police, and the defense counsel failed to object to its publication in the jury room); People v. Herron, 578 N.E.2d 1310, 1320 (Ill. App. Ct. 2d Dist. 1991) (allowing the jury to review a prior inconsistent statement when the jury was instructed that the statement was not to be considered as substantive evidence).

56. People v. Diggs, 225 N.E.2d 665, 669 (Ill. App. Ct. 1st Dist. 1967) (allowing a marked photo of the burglarized premises to be taken into a jury room).

57. People v. Criss, 719 N.E.2d 776, 785–87 (Ill. App. Ct. 1st Dist. 1999) (holding that a trial court properly allowed a transcript of a recorded conversation to be taken into a jury room, where a jury request was related to a defendant's predisposition in his claim of entrapment).

58. People v. Hudson, 626 N.E.2d 161, 177 (Ill. 1993) (determining no abuse of discretion had occurred when a trial court sent a defendant's voluntary confession to capital murder into a jury room, although not pursuant to a jury request).

59. People v. Watson, 438 N.E.2d 453, 457 (Ill. App. Ct. 3d Dist. 1982) (upholding the allowance of blood stained panties into a jury room during a trial of a defendant's alleged indecent liberties with a three-year-old child).

60. People v. Govin, 572 N.E.2d 450, 457 (Ill. App. Ct. 4th Dist. 1991) (refusing a jury request to permit the replay of tapes of telephone conversations between an informant and defendant into the jury room, even though such tapes (or transcript of tapes) were played in court, was proper); People v. Canada, 225 N.E.2d 639, 646 (Ill. App. Ct. 1st Dist. 1967) (upholding a

Evidence that is admissible should not go into the jury room if its presence in the jury room would be prejudicial.[61] Merely because potentially prejudicial evidence is allowed into the jury room, however, does not always warrant reversal.[62] Most disputes about evidence being allowed into a jury room center on photographs of homicide victims. In a murder prosecution, some of the reasons for admitting photos of the decedent are "to prove the nature and extent of injuries, the position, condition and location of the body, and the manner and cause of death; to corroborate a defendant's confession; and to aid in understanding the testimony of a pathologist or other witness."[63] Once admitted, as with other evidence, it is within the discretion of the court to permit such photos to be sent to the jury room.[64]

Occasionally, a deliberating jury's curiosity may trigger its request to visit the scene of the alleged crime. A jury request to visit a crime scene after deliberations have commenced can presumably be denied.[65]

F. Questions Unique to Capital Cases (or Questions During Sentencing Phase)

In a capital case, following the guilt phase of a trial wherein the accused is convicted of murder, the jury will thereafter consider

court's refusal to allow an anatomical chart to be taken to a jury room in a murder trial because the jury had unrestricted time to examine the chart immediately prior to retiring to the jury room).

61. People v. Thigpen, 713 N.E.2d 633, 640 (Ill. App. Ct. 1st Dist. 1999) (reversing the trial court's decision to allow photos into the jury room, where the photos related to the victim of a separate homicide, even though such "other crimes" evidence was marginally relevant to establish a common plan or scheme); People v. Lee, 551 N.E.2d 300, 302–03 (Ill. App. Ct. 1st Dist. 1990) (finding harmless error where the trial court permitted the jury's request to examine vials of blood, showing that the defendant and the homicide victim had different blood types, over a defense objection that such vials fed the jury's "ghoulish interest" and raised their passion because the jury could not have discerned the difference between the vials); *see also* People v. Blue, 724 N.E.2d 920, 934 (Ill. 2000) (holding that exposing a jury to a headless, torso mannequin wearing the bloodied and brain-splattered uniform of a deceased police officer killed in a shooting was prejudicial to the defendant because the admission of such evidence and its extended period of exposure to the jury outweighed the probative value of the placement and nature of the officer's injuries, reinforcing the State's claim that the defendant knew he was shooting at a police officer).

62. People v. Pace, 587 N.E.2d 1257, 1267 (Ill. App. Ct. 2d Dist. 1992) (sending containers of a victim's blood into a jury room was error, but harmless).

63. People v. Chapman, 743 N.E.2d 48, 69 (Ill. 2000), *cert. denied*, 533 U.S. 956 (2001).

64. *Id.*; People v. Harris, 695 N.E.2d 447, 465 (Ill. 1998) (affirming the trial court's discretion to send to a jury photographs depicting a homicide victim's injuries because it depicted at close range the position of the murder victim in his car when he was shot), *cert. denied*, 525 U.S. 1042 (1998).

65. *Cf.* People v. Reyes, 439 N.E.2d 1089, 1096 (Ill. App. Ct. 1st Dist. 1982) (failing to object to the court's refusal of a jury request to visit a crime scene constitutes the defendant's waiver of such an argument for purposes of appeal).

evidence in aggravation and mitigation at a capital sentencing hearing before it begins its deliberations to determine if the defendant should be sentenced to death. Naturally, given the gravity of the potential sanction faced by the accused, more unusual jury questions may be forthcoming in this type of proceeding. For example, in *People v. Brooks*,[66] the jury submitted a question during deliberations in the sentencing phase of a capital sentencing proceeding, asking whether a defendant sentenced to natural life in prison is always subject to twenty-three hours-per-day confinement to their cells or, instead, whether such confinement applied only to inmates on death row.[67] The Illinois Supreme Court ruled that the trial court did not abuse its discretion when it answered that death row inmates are so confined, but did not remind the jury that natural life inmates could also be segregated twenty-three hours per day.[68] In contrast, in *People v. Cloutier*,[69] the Illinois Supreme Court held that the jury foreman's request for a chronological order of events, during the State's presentation of evidence in the aggravation-mitigation stage of a capital sentencing hearing, amounted to an "innocuous technical violation of the judge's admonition to refrain from discussing of the case" before being instructed to begin deliberations because the note did not imply that a discussion of the evidence had already occurred.[70]

III. JURY CONSIDERATION OF EXTRANEOUS MATTER

Jury consideration of significant extraneous matter or information not introduced into evidence, which prejudices the accused in the eyes of the jury, carries a great potential for reversible error. Thus, a reversal (or mistrial) must be ordered where: (1) the jury or any of its members gain access to and *consider* extraneous matter; (2) the matter is obviously *indicative of* the defendant's *guilt*; and (3) it is evident that the jury was *influenced* by the matter.[71] While not every instance in which extraneous or unauthorized information reaches the jury will the error be considered so prejudicial as to require reversal, if the

66. People v. Brooks, 718 N.E.2d 88 (Ill. 1999).

67. *Id.* at 114.

68. *Id.*

69. People v. Cloutier, 687 N.E.2d 930 (Ill. 1997), *cert. denied*, 524 U.S. 906 (1998).

70. *Id.* at 938–40.

71. *See* People v. Holmes, 372 N.E.2d 656, 660 (Ill. 1978) (determining that several jurors' decisions to visit a Florsheim shoe store to inspect heels of shoes, so as to determine if a shoe print in the snow at a crime scene matched the defendant's shoe, prejudiced the defendant because the jurors' "independent investigation" and consideration of "extraneous information" denied the defendant an opportunity to confront the incriminating information).

extraneous information improperly brought to the jury's attention "was in the nature of evidence with which the defendant had not been confronted at trial and which he had no opportunity to refute," it will be deemed reversible error.[72]

In order to demonstrate such prejudice, jurors may be required to testify at an evidentiary hearing as to the nature of outside influences or communications, although evidence relating to the effect of such influences on the *mental processes* of the jurors is inadmissible.[73] Even where the matter was brought to the attention of the trial court before the verdict, the denial of a defendant's motion for a mistrial, where members of a jury may have been exposed to extraneous influence, will not be grounds for reversal unless it reasonably appears that at least some of the jurors were influenced to such an extent that the defendant was deprived of a fair trial.[74] A mistrial, therefore, is not the only remedy available to the trial court in such a situation. The trial court may inquire as to the effect of the outside influence, and if it determines the outside influence will not contaminate the jury's verdict, the inquiry may be sufficient to resolve the matter.[75]

In some cases, it appears the court will be willing to presume the extraneous matter influenced the jury. In *People v. Hanson*,[76] for example, the jury in an armed robbery trial was allowed to take a coat belonging to a defendant, which had been introduced into evidence, into the jury room.[77] In the pocket of the coat, the jury discovered currency that had been cut, though the currency had not been admitted into evidence.[78] The appellate court ruled that the defendant was said to have suffered prejudice as a consequence of the jury's consideration of

72. *Id.*

73. People v. Hobley, 696 N.E.2d 313, 339 (Ill. 1998) (citing *Holmes*, 372 N.E.2d at 656). In *People v. Hobley*, the court remanded the case where a defendant presented several juror affidavits, which the trial court failed to consider in post-trial hearing, alleging: (1) jurors were intimidated by non-jurors during their deliberations; (2) jurors were prejudiced by the "expert" opinion of the jury foreman, a police officer; (3) jurors brought newspapers into the jury room that contained articles about the case; (4) jurors were subjected to intolerable physical conditions, including lack of air conditioning and running out of clothes and money while sequestered; and (5) a number of jurors left their rooms contrary to a sequester order. *Id.* at 339–43.

74. *See* People v. Watson, 635 N.E.2d 795, 798–800 (Ill. App. Ct. 1st Dist. 1994) (holding that a mistrial was not required where, during deliberations, two jurors read newspaper articles about the case); People v. Morrow, 628 N.E.2d 550, 556–67 (Ill. App. Ct. 1st Dist. 1993) (upholding the trial court's refusal to order a mistrial after learning that a discharged juror had informed other jurors that she had received hang-up calls).

75. *Morrow*, 628 N.E.2d at 556.

76. People v. Hanson, 404 N.E.2d 801 (Ill. App. Ct. 2d Dist. 1980).

77. *Id.* at 804.

78. *Id.*

the cut currency because the currency itself was suggestive that defendant shared in the robbery proceeds, and the jury might have believed the cuts in the currency were attributable to defendant's struggle with a robbery victim who cut him with razor blades.[79] Accordingly, his conviction was reversed on appeal.[80]

In contrast to cases where courts have presumed that extraneous matter has influenced the jury, where the extraneous matter is not necessarily indicative of a defendant's guilt and it is not evident that it might have influenced the jury, a claim of prejudice will most likely be unsuccessful. Thus, where a jury received soup and beverage cups that reflected written notations such as "SUSPICIOUS PERSONS," "CALL THE POLICE," "LOCK OUT CRIME," "LOCK YOUR CAR," and "NEVER GIVE A BURGLAR AN EVEN BREAK" during jury deliberations following a theft trial, defendant's conviction was affirmed inasmuch as there was no evidence that the jury gave serious consideration to the notations or allowed them to influence their verdict.[81] Accordingly, "the probability of prejudice [was] not clearly evident."[82] In a case such as this, where the jury is still deliberating and available for individual voir dire, unfair outside influence will be avoided if the trial court immediately inquires of each juror as to what effect the extraneous information might have on their deliberations, and if no influence is apparent, instruct them to disregard the matter in question.

Where the jury gains access to extraneous matter not itself in evidence but which refers to a matter in evidence, a claim of prejudice will have little basis. For instance, a district court held that when several jurors saw a piece of paper posted outside a courtroom that listed similar additional charges pending against a defendant, there was no prejudice since the pending criminal charges had been referred to in the testimony of a State witness.[83]

As to the troublesome area of juror consideration of potentially prejudicial newspaper articles, either before or during deliberations, case law suggests a reviewing court is most likely to find reversible error where the articles implicating defendant either (1) *actually*

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79. *Id.* at 804–05.

80. *Id.* at 806.

81. People v. DeBartolo, 322 N.E.2d 251, 257 (Ill. App. Ct. 2d Dist. 1975).

82. *Id.* at 257–58. In this case, it is important to note that an alert Assistant State's Attorney promptly inquired of the respective jurors as to whether they were influenced by the notations and the jurors reported that they were not. *Id.* at 257. In addition, these notations did not deal specifically with the defendant or his case. *Id.* at 258.

83. People v. Eddington, 453 N.E.2d 1383, 1386–88 (Ill. App. Ct. 1st Dist. 1983).

prejudiced the jury,[84] or (2) potentially prejudiced the jury *and* the trial court took no action to guard against the possible outside influence.[85] In assessing whether a defendant had a fair trial, the extent of the publicity is not as important as what was reported and whether the jurors were influenced by the publicity.[86] A key question, then, is whether the jurors are capable of laying aside their opinions, which have been influenced by publicity surrounding the case, and whether their assertions that they have such capability satisfies the court.[87]

IV. COMMUNICATIONS WITH THE JURY

Beyond the communications between judges and juries considered above, there are other situations where communications with a jury, by a judge or others, might arguably contaminate a jury's verdict. As with "extraneous matter" concerns, the case law in this Part centers on the issues of whether: (1) the unauthorized communication was considered by the jury or its members; (2) the communication itself somehow incriminated the accused; and (3) the communication interfered with the jury deliberations to the detriment of the accused.

A. *Judge's Communication with the Jury*

1. General Prohibitions Against Ex Parte Communications

As a general rule, early Illinois case law held it was plain error for a trial judge to hold any communication about the proceeding with the jury after they had commenced their deliberation, unless the communication took place in open court.[88] In 1984, however, the United States Supreme Court ruled that an unrecorded ex parte communication between a trial judge and a juror could be harmless

84. Irvin v. Dowd, 366 U.S. 717, 727–28 (1961) (finding actual prejudice to a defendant where eight of twelve jurors were convinced the defendant was guilty during voir dire examination).

85. People v. Cain, 224 N.E.2d 786, 790 (Ill. 1967) (reversing where the trial court failed to conduct a meaningful examination of a juror who admitted seeing a prejudicial article, did not instruct the juror not to communicate extraneous matter to other jurors, and did not instruct the entire jury to disregard such information).

86. People v. Sims, 612 N.E.2d 1011, 1026–27 (Ill. App. Ct. 5th Dist. 1993) (failing to sequester the jury was not error where the trial court questioned prospective jurors during voir dire about the publicity of the case and instructed the jury several times to avoid news stories about the case).

87. People v. Taylor, 462 N.E.2d 478, 482 (Ill. 1984) (citing *Irvin*, 366 U.S. at 723).

88. *See, e.g.*, People v. Beck, 137 N.E. 454, 456 (Ill. 1922) ("The law is well settled in this state that it is error for which a judgment will be reversed for a trial judge to hold any communication with the jury after their retirement to deliberate upon their verdict, except in open court.").

error.[89] The Court reasoned that "[w]hen an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing."[90] More recently, the Illinois Supreme Court stated that it is necessary to show prejudice before a jury verdict will be set aside because of an unauthorized communication with the jury.[91]

The burden is on the State, rather than the defendant, to prove beyond a reasonable doubt that any error in the giving or the substance of an ex parte response to a jury inquiry is harmless.[92] In capital cases, the no prejudice or harmless error rule holds true even if a trial court answers jury questions submitted during deliberations in the sentencing phase while the defendant was absent.[93] Obviously, an ex parte

89. Rushen v. Spain, 464 U.S. 114, 117–20 (1983) (per curiam) (holding that communication could be harmless error in cases where ex parte communication lacked any significance in regard to the culpability of the accused).

90. *Id.*

91. People v. Kliner, 705 N.E.2d 850, 890–92 (Ill. 1998), *cert. denied*, 528 U.S. 830 (1999). In *People v. Kliner*, the court held that ex parte communication, while violative of constitutional rights, is harmless error where no harm or prejudice results. *Id.* at 892. In *Kliner*, the jury made six written inquiries that were the subject of an ex parte response: (1) a request for the transcript of trial, to which the court answered, "no"; (2) the jury's inquiry as to when certain pictures were taken, to which the court responded, "Feb.1988"; (3) the jury's announcement, "We are done for today!," to which the judge did not respond; (4) the jury's statement, "Someone wishes to walk around block . . . to get fresh air and clear their head," to which the court answered, "No, sorry"; (5) the jury's statement, "We are done for today," and the court's response that transportation was coming and to continue to deliberate; and (6) a note signed by seven jurors complaining about poor hotel and food, to which the court did not respond. *Id.* at 891–92; *see also* People v. Canaday, 275 N.E.2d 356, 362 (Ill. 1971) (finding no prejudice had occurred where the communication regarded when the jury was to appear).

92. People v. Childs, 636 N.E.2d 534, 538–40 (Ill. 1994) (reversing the defendant's conviction where the trial judge, while dining in a restaurant with an Assistant State's Attorney on the case, was informed that the jury had questions about the instructions (that were in fact erroneous), and the trial judge told the bailiff to tell the jury to follow the original erroneous instructions that were already given); People v. Ross, 709 N.E.2d 621, 628–29 (Ill. App. Ct. 1st Dist. 1999) (finding reversible error where the trial court made an ex parte inquiry of the jury, outside the presence of defense counsel, as to whether they could reach a verdict that evening); People v. Comage, 709 N.E.2d 244, 246 (Ill. App. Ct. 4th Dist. 1999) (determining that reversible error occurred when the trial court violated a defendant's right to be present and to have a fair trial by responding "no" to a jury request to define "knowingly" in a jury instruction, without informing the defendant or his counsel); People v. Oden, 633 N.E.2d 1385, 1390 (Ill. App. Ct. 5th Dist. 1994) (finding reversible error where the trial court failed to answer a jury query regarding what constituted "constructive possession," where an unlawful use of weapons charge involved the alleged possession of a weapon, and a supplemental instruction was given outside the presence of the defendant and his counsel). *But see* People v. Crockett, 731 N.E.2d 823, 834–36 (Ill. App. Ct. 1st Dist. 2000) (holding that it was clear error for the trial court to fail to inform defendant of a jury question regarding the definition of "abet," but the error was harmless).

93. People v. Brooks, 718 N.E.2d 88, 114–15 (Ill. 1999) (holding that even though the capital defendant was absent during the trial court's response to jury questions during jury deliberations

communication between a juror and a judge will not constitute prejudice if the communications had nothing to do with the defendant's alleged criminal liability.[94] Furthermore, the current technological age may significantly contribute to the avoidance of ex parte communication problems. In an Illinois Appellate Court opinion, a trial court's use of a telephone to contact the parties for purposes of determining a response to a jury question has been held in certain circumstances not to be an ex parte communication.[95]

2. Inquiry into the Numerical Division of a Jury

It is error for a trial court to inquire into the numerical division of a jury on the theory that it may subtly coerce jurors, particularly those not in agreement with the majority, to reach a verdict.[96] Such an inquiry,

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in the sentencing phase, there was no prejudice where defense counsel expressed all the concerns the defendant could have expressed had he been present), *cert. denied*, 529 U.S. 1039 (2000); People v. McDonald, 660 N.E.2d 832, 849–51 (Ill. 1995) (upholding a defendant's conviction despite the trial court's improper ex parte communication to the jury in the sentencing phase of a capital murder trial, which refused to answer the jury's question about mitigating evidence and directed the jury to rely on the original instructions that were readily understandable and sufficiently explained the law, as the communication was harmless error); People v. Johnson, 585 N.E.2d 78, 96–97 (Ill. 1991) (determining that although the trial judge's failure to inform the parties of a jury request during deliberations in the aggravation-mitigation phase was "highly improper," where the jury was requesting DSM-III-R and the psychiatric expert's reports, the communication was harmless error because these documents were never admitted into evidence and, as such, could not have been delivered to the deliberating jury), *cert denied*, 506 U.S. 834 (1992). *But see* People v. Walker, 440 N.E.2d 83, 90 (Ill. 1982) (reversing where the cumulative effect of a trial court's error, including an ex parte response to a jury question during the sentencing stage regarding whether a defendant would be eligible for parole, was prejudicial).

94. People v. Steidl, 568 N.E.2d 837, 847–48 (Ill. 1991) (informing the jury when dinner would be brought and when sequestration would occur was not prejudicial even though the communication was ex parte); People v. Veal, 374 N.E.2d 963, 985–86 (Ill. App. Ct. 1st Dist. 1978) (holding that a jury communication through the bailiff to the judge regarding concerns about personal safety in the hotel where jurors were sequestered, a juror's communication regarding a death in the family, several jurors' statements that too much time was being wasted, and a juror's question about another juror's remark during the testimony of a witness were not prejudicial inasmuch as all remarks were reported to the parties by the judge and none "had any bearing on the merits of the criminal trial").

95. People v. Smith, 747 N.E.2d 1081, 1088–89 (Ill. App. Ct. 1st Dist. 2001) (affirming a conviction where a trial court contacted the defense counsel, who in turn talked to the defendant on a private phone, and the dialogue with the judge, with the Assistant State's Attorney present, resolved the problem without objection from defense regarding procedure).

96. People v. Roman, 618 N.E.2d 786, 788 (Ill. App. Ct. 1st Dist. 1993) (reversing where the trial court inquired into the numerical breakdown of the jury on four different occasions); *accord* People v. Sanchez, 422 N.E.2d 58, 61–62 (Ill. App. Ct. 1st Dist. 1981). *Contra* People v. Griggs, 467 N.E.2d 397, 400–01 (Ill. App. Ct. 5th Dist. 1984) (finding that although error had occurred, such error was not reversible error because there was no indication that the inquiry interfered with jury deliberations). *But see* Brasfield v. United States, 272 U.S. 448, 450 (1926) (holding that because the inquiry into numerical division of the jury is "coercive," the "inquiry itself" should be regarded as grounds for reversal). In *People v. Kirk*, 394 N.E.2d 1212, 1217–18 (Ill. App. Ct. 1st

however, is most often harmless error.[97] It is only prejudicial if the numerical division inquiry is determined to be somehow coercive.[98] Therefore, when a trial court receives an *unsolicited* statement from the jury that reflects the numerical division of the jurors and then orders the jurors to keep deliberating, there is no error.[99]

3. "Coercing" a Verdict

Closely intertwined with the "inquiry into the numerical division" and "deadlocked jury" concerns (discussed below) are defense claims that a judge's communication tended to "coerce" the jury into reaching a verdict. In *People v. Santiago*,[100] the following occurred:

> Twice the trial judge improperly asked for the numerical division of the jury and the second inquiry, which reflected an eleven to one split, was made after the judge already knew that the jury had divided eight to four in favor of returning a verdict of guilty; immediately after he first discovered that the jury was divided in favor of a verdict of guilty, the trial judge gave the jury a *Prim* instruction which, inter alia, urged the jurors to reach an agreement; on the fourth day of deliberations the jury was called into court three times at the insistence of the judge who repeatedly questioned the foreman regarding the state of deliberations; over the course of the deliberations the foreman indicated that the jury was deadlocked and that further deliberations might not help. By virtue of the trial court's actions in this case, the jury may well have believed that the court concurred with the majority and that deliberations would continue until a unanimous verdict of guilty was returned. Such a verdict cannot be said to have been reached without *improper prodding* from a trial court and should not be allowed to stand.[101]

Dist. 1979), the Illinois Appellate Court held that the *United States v. Brasfield* holding is not constitutionally binding because the decision was only based on an exercise of the United States Supreme Court's supervisory power, and, accordingly, such inquiries can constitute harmless error.

97. *See, e.g.*, People v. Golub, 165 N.E. 196, 199 (Ill. 1929); People v. Eppinger, 688 N.E.2d 325, 329–30 (Ill. App. Ct. 3d Dist. 1998); People v. Schaff, 618 N.E.2d 566, 569–70 (Ill. App. Ct. 1st Dist. 1993); People v. Iozzo, 552 N.E.2d 1308, 1314 (Ill. App. Ct. 2d Dist. 1990).

98. *See infra* note 101 and accompanying text (discussing a situation where a court's inquiry was held to be coercive).

99. People v. Watkins, 688 N.E.2d 798, 806 (Ill. App. Ct. 1st Dist. 1997).

100. People v. Santiago, 439 N.E.2d 984 (Ill. App. Ct. 1st Dist. 1982).

101. *Id.* at 997–98 (emphasis added). *But cf. Golub*, 165 N.E. at 199 (finding error, but not reversible error, where a trial court asked about the jury's numerical division, learned it was 9-3, and thereafter stated that the jury "ought not to have any difficulty in reaching a verdict on th[e] evidence"); People v. Green, 415 N.E.2d 595, 598–99 (Ill. App. Ct. 1st Dist. 1980) (inquiring into the numerical division of the jury, without the breakdown on guilt or innocence, giving a *Prim* instruction that deleted reference to an individual juror's duty to decide the case for himself, and sequestering the jury for the night after eleven hours of deliberation, and after ten members

Any judicial intervention into the jury's deliberations in which the court informs the jury of the consequences of the failure to reach a verdict by a certain time can be coercive.[102] Some decisions state that merely informing the jury that it will be sequestered if it fails to reach a verdict after a certain time can be coercive, although whether such communication will be found to be coercive depends on the length of time that the jury deliberates before it returns with a guilty verdict.[103] Other decisions hold that where the possibility of sequestration is not presented in a "threatening manner," there is no coercion.[104]

If the court, in effect, forces the jury to arrive at a verdict at all costs, this will be reversible error.[105] In one case, coercion and prejudicial error occurred based on the judge's following comment to the jury:

> There is no reason at all why this jury cannot arrive at verdicts in this case. I repeat, I don't care what your verdict is, but *you can't be deadlocked.* You heard one day of evidence and it is a question of you either believe one side or you believe the other. *You can't be deadlocked.*[106]

There is not necessarily coercion or error merely because a judge asks the jury if it can reach a verdict within a certain time frame, however, lest the judge be required to sequester the jury overnight,[107] or because he or she advises the jury that it will be allowed to deliberate only for a

informed the court they did not believe additional deliberation would lead to verdict, did not give rise to prejudice). For a discussion of *People v. Prim*, 289 N.E.2d 601 (Ill. 1972), see *infra* Part V.A.

102. People v. Ross, 709 N.E.2d 621, 630 (Ill. App. Ct. 1st Dist. 1999) (containing extensive discussion of "coerced" verdicts case law).

103. *Id.* (reversing where the trial court interrupted deliberations, wherein the court asked the jury if it could reach a verdict that evening and the jury responded "yes," because the jury's return of a verdict within fifteen minutes was the result of coercion); People v. Friedman, 494 N.E.2d 760, 765 (Ill. App. Ct. 1st Dist. 1986) (reversing defendant's conviction where the jury returned a verdict within five minutes of being told they would be sequestered, because the trial court's communication amounted to coercion).

104. People v. Morales, 666 N.E.2d 839, 845–46 (Ill. App. Ct. 1st Dist. 1996); *accord* People v. Fields, 675 N.E.2d 180, 186–87 (Ill. App. Ct. 1st Dist. 1996) (determining that the trial court's statement that transportation was coming did not coerce a guilty verdict); People v. Saldana, 496 N.E.2d 757, 765–66 (Ill. App. Ct. 2d Dist. 1986) (informing the jury that it may be sequestered was not coercive).

105. Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam) (finding coercion where the judge told the jury, "You have got to reach a decision in this case").

106. People v. Robertson, 416 N.E.2d 323, 324–25 (Ill. App. Ct. 1st Dist. 1981).

107. People v. Sanders, 345 N.E.2d 757, 760–61 (Ill. App. Ct. 1st Dist. 1976) (holding that no coercion had occurred where the trial court asked if the jury was capable of reaching a verdict in the next forty five minutes). *But see Ross*, 709 N.E.2d at 630 (reversing as coercive where an ex parte inquiry as to whether the jury could reach a verdict that evening had occurred during trial).

limited time.[108] Similarly, it is not reversible error when a judge states that "a verdict had to be reached by 11 p.m. or everybody would be going home," because that remark could be interpreted to mean that the jury would simply resume deliberations the next morning.[109]

In cases such as *People v. Gregory*[110] where a judge's interaction with a jury somehow suggests the judge is informing jurors to heed the majority at all costs before they have rendered a final verdict, such judicial coercion will trigger a reversal.[111] In *Gregory*, a bailiff, while in open court, advised the judge that the jury had a verdict, while the judge simultaneously examined and read into the record a jury note which said, "If the record is split on one charge, how do we fill out the guilty forms: guilty; not guilty? Both forms or one?"[112] The bailiff insisted the jury had a verdict, whereupon the judge concluded he did not have to answer the question.[113] The judge then asked the jury if they had reached a verdict, to which they responded in the affirmative.[114] As the judge examined the verdict forms, he stated "guilty" on the two charges at issue, whereupon the jury told him to examine the forms more carefully.[115] The judge repeated that the verdict was "guilty," whereupon a juror said the judge should examine the other form.[116] Now realizing that ten jurors had signed the guilty forms and two the not guilty forms, he responded, "Oh, Lord."[117] At that point, the judge gave the jury a supplemental instruction saying there were not "enough" signatures on the guilty verdict form, returned the same forms, and ordered them to continue to deliberate.[118] After an hour, the jury returned the guilty verdict forms with twelve signatures, while the not guilty signatures were scratched out.[119] The appellate court ruled that the jury could have concluded that (1) the judge's "inattention to the detail of the verdict forms was born of his expectation that the jury would return such guilty verdicts" and his "Oh, Lord" comment suggested that something had gone "awry," and (2) his

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108. People v. Duszkewycz, 189 N.E.2d 299, 301–02 (Ill. 1963) (holding that no coercion had occurred where the jury reached a verdict after being given one more hour to deliberate).

109. People v. Gregorich, 389 N.E.2d 619, 621–22 (Ill. App. Ct. 5th Dist. 1979).

110. People v. Gregory, 540 N.E.2d 854, 859 (Ill. App. Ct. 2d Dist. 1989).

111. *Id.*

112. *Id.* at 855.

113. *Id.*

114. *Id.*

115. *Id.* at 856.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

supplemental instruction that there were not "enough" signatures and his return of the *same* verdict forms, rather than replacing them with new ones, was a veiled suggestion that the two holdouts should "heed the majority."[120] Thus, the trial judge's actions required a reversal.[121]

Another illustration of a trial judge's conduct that was considered coercive is *People v. Katalinich*.[122] In *Katalinich*, the defendant was charged with three counts of aggravated battery.[123] The judge provided the jury with three sets of verdict forms for the aggravated battery counts and three more sets for the included offenses of battery.[124] After deliberating, the jury stated it had reached a verdict.[125] The jury found defendant not guilty of either aggravated battery or battery of alleged victim number one but guilty of battery of victims number two and three.[126] The aggravated battery verdict forms, however, were blank for victims two and three.[127] The trial judge did not inquire as to why the latter forms were blank but rather told the jury it "must" return to the jury room to complete the blank verdict forms.[128] When the jury returned, the verdict forms reflected guilty verdicts for aggravated battery.[129] The appellate court concluded that the jury may well have been hung on the aggravated battery counts, which explained the blank forms, and that telling it that it "must" return to the jury room and "must" complete the forms coerced a verdict.[130]

B. Communications with a Jury by Other Persons

Where an individual in an official capacity communicates information that may influence the jury's decision regarding the defendant's liability, or coerces the jury to reach a verdict, prejudice is a clear possibility.[131] Further, any third-party communication with a juror

120. *Id.* at 858–60.

121. *Id.* at 860.

122. People v. Katalinich, 506 N.E.2d 356 (Ill. App. Ct. 4th Dist. 1987).

123. *Id.* at 356.

124. *Id.* at 357.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 359–60.

131. *See* Parker v. Gladden, 385 U.S. 363, 363–66 (1966) (per curiam) (holding that the bailiff's statement to the jury that defendant was guilty, and "'if there [was] anything wrong the Supreme Court [would] correct it,'" gave rise to "such a probability [of] prejudice" that a defendant's right to due process was violated); Mattox v. United States, 146 U.S. 140, 150–52 (1892) (requiring reversal where a bailiff allegedly told a jury that a defendant had killed two other men and had attempted to commit another crime during the trial); United States *ex rel.* Tobe

during trial about a matter pending before the jury is presumptively prejudicial, and, as such, the burden rests upon the State to establish such contact was harmless.[132] Where the third-party communication during deliberations has no relationship to the defendant's possible guilt, however, the communication will ordinarily not be considered erroneous *and* prejudicial.[133]

V. DEADLOCKED JURY: *PRIM* INSTRUCTION AND MISTRIAL ORDERS

A. *General Concerns*

In *Allen v. United States*,[134] the United States Supreme Court approved the so-called *Allen* charge directed to deadlocked juries, which encouraged jurors voting in the minority to give "proper regard and deference to the opinions of each other," consider their "duty" to reach a verdict, and if possible, heed the majority.[135] Noting that the *Allen* charge had been "severely criticized" and "discouraged or prohibited in certain jurisdictions," in *People v. Prim*,[136] the Illinois Supreme Court approved the so-called *Prim* charge which deleted the

v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974) (affirming the district court's granting of habeas corpus relief where the bailiff's communication to the jury that "'[y]ou must reach a decision'" was "presumptively prejudicial," and had to be rebutted by evidence that the communication was harmless); People v. Kawoleski, 145 N.E. 203, 203–04 (Ill. 1924) (finding reversible error had occurred where the sheriff in charge of the jury stated that "it should not take more than two or three minutes to convict").

132. People v. Burns, 709 N.E.2d 672, 676 (Ill. App. Ct. 1st Dist. 1999) (holding that a conversation between a juror and the defendant's family was harmless).

133. People v. Rettig, 278 N.E.2d 781, 781–82 (Ill. 1972) (affirming a defendant's conviction despite a sheriff's two or three minute conversation with the jury about a noon meal and another matter no one could recall because the communication was "highly imprudent" but not prejudicial); People v. Mills, 237 N.E.2d 697, 703 (Ill. 1968) (finding no error or prejudice where a juror asked the bailiff if he could ask the bailiff some questions, and the bailiff responded in the negative); People v. Cart, 429 N.E.2d 553, 563–64 (Ill. App. Ct. 2d Dist. 1981) (holding that there was no indication that an apparently drunken bailiff's call to a juror, inquiring about the outcome of deliberations, followed by a juror remark that the jury would reconvene the next morning, was prejudicial); People v. Martinez, 360 N.E.2d 495, 496–98 (Ill. App. Ct. 1st Dist. 1977) (affirming a defendant's conviction where one juror said, "Hello" to the trial attorney, and the attorney responded, "Hello. I wish I could say something to you but I can't." Thereafter, another juror approached and told the attorney, "You must have done something right . . . we're all tied up," and the attorney responded "Oh, really?"); People v. Trejo, 352 N.E.2d 68, 76 (Ill. App. Ct. 2d Dist. 1976) (determining that there was no indication that the bailiff's remarks to the jury coerced or hastened the verdict, or were otherwise prejudicial to defendant).

134. Allen v. United States, 164 U.S. 492 (1896).

135. *Id.* at 501.

136. People v. Prim, 289 N.E.2d 601 (Ill. 1972).

"heed the majority" suggestion of *Allen*.[137] The Court gave the following instruction:

> 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.[138]

Although the instruction itself is no longer challenged, other claims have been raised that relate to the problem of a potentially deadlocked jury. These claims will now be explored.

B. Claims that the Prim *Instruction Is Premature*

Earlier Illinois cases held that it was premature to give a *Prim* instruction if there was no indication that the jury was deadlocked.[139] However, later cases ruled that a *Prim* instruction could be given even before deliberations.[140] Today, it is clearly up to the trial court's broad discretion whether to give such an instruction and, accordingly, when to give the instruction.[141] Such a determination is dependent upon the

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137. *Id.* at 607, 609–10.

138. *Id.* at 609.

139. People v. Jackson, 325 N.E.2d 450, 458–59 (Ill. App. Ct. 1st Dist. 1975) (reversing the trial court's decision to give a *Prim* instruction after ten hours of deliberation because the jury foreperson advised the judge they would reach verdict).

140. People v. Preston, 391 N.E.2d 359, 363–64 (Ill. 1979) (dictum) (citing People v. Viser, 343 N.E.2d 903, 912 (Ill. 1975) (*Allen* charge; pre-*Prim* trial)).

141. People v. Chapman, 743 N.E.2d 48, 70–71 (Ill. 2000) (upholding the trial court's refusal to give an instruction where the defense requested the instruction to be given before deliberations began), *cert denied*, 533 U.S. 956 (2001); People v. Douglas, 567 N.E.2d 544, 549–50 (Ill. App. Ct. 1st Dist. 1991) (affirming the trial court's refusal to provide a *Prim* instruction even though the court was informed that the jury was deadlocked); *see also* People v. Dortch, 441 N.E.2d 100, 106 (Ill. App. Ct. 1st Dist. 1982) (holding that the delivery of *Prim* instructions to a jury that was not deadlocked was not prejudicial despite the fact that the defendant was found guilty forty-five minutes later); People v. McNeal, 419 N.E.2d 460, 463–64 (Ill. App. Ct. 1st Dist. 1981) (upholding the trial court's decision to give *Prim* instructions to prospective jurors during voir dire and again after all the evidence was presented).

circumstances of each case, including the amount of deliberation time already spent and the difficulty of the issues before the jury.[142] Merely because the jury returns a guilty verdict soon after the *Prim* instruction cannot be used as a basis for concluding that the verdict was per se coerced.[143]

C. Variations from Prim

Supplemental instructions, which include mention of the necessity of a new trial if no verdict is reached, are not reversible error despite *Prim*'s disapproval of the same.[144] So too, instructions that delete any reference to the individual juror's duty to decide the case for himself is not necessarily cause for reversal.[145] It should be mentioned, however, that variations from *Prim* have, by and large, received a cool reception from the appellate courts, although they have not always been deemed cause for reversal.[146] Of course, advising the jury that it *must* reach a verdict will constitute reversible error.[147] Another basis for reversal will arise where the *Prim* instruction is given along with an inquiry as to whether the jury can reach a verdict without regard to the death penalty. This procedure implicitly suggests to the jury that the judge is of the opinion that the defendant is guilty.[148]

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142. *Chapman*, 743 N.E.2d at 70–71 (upholding a refusal to give *Prim* instruction before deliberation began); *Preston*, 391 N.E.2d at 363 (finding that *Prim* instructions that were given after six hours of deliberation were not premature).

143. People v. Martinez, 611 N.E.2d 1027, 1037–38 (Ill. App. Ct. 1st Dist. 1993) (finding that the jury was not coerced because it reached a verdict fifteen minutes after the *Prim* instruction was given); People v. Hugues, 595 N.E.2d 1, 7 (Ill. App. Ct. 1st Dist. 1991) (denying coercion after the jury reached a verdict fifty minutes after the *Prim* instruction was given).

144. *Preston*, 391 N.E.2d at 364.

145. People v. Green, 415 N.E.2d 595, 598 (Ill. App. Ct. 1st Dist. 1980).

146. *See* People v. Bibbs, 428 N.E.2d 965, 971–72 (Ill. App. Ct. 1st Dist. 1981) (holding that *Prim* should have been followed, but variant instruction was not reversible error).

147. People v. Ferro, 551 N.E.2d 1378, 1385–86 (Ill. App. Ct. 2d Dist. 1990) (finding that the statement, "If you are not going to be able to reach a verdict, I am going to house you in a local motel somewhere until this jury does reach a verdict," conveyed to jurors the idea that they must reach a verdict, and as such, constituted coercing a verdict and reversible error); People v. Robertson, 416 N.E.2d 323, 324–25 (Ill. App. Ct. 4th Dist. 1981) (finding that the statement, "I don't care what your verdict is, but you can't be deadlocked," was reversible error); People v. Pankey, 374 N.E.2d 1114, 1115–17 (Ill. App. Ct. 1st Dist. 1978) (reading to jury "A New Judge's Creed" and stating, "There is no such thing as a hung judge—you will now retire to determine your verdict," was reversible error because the statement strongly suggested that there is no such thing as a hung jury).

148. People v. Baltimore, 288 N.E.2d 659, 665–66 (Ill. App. Ct. 2d Dist. 1972) (holding that a judge's submission of an interrogatory to the jury after many hours of deliberation, which asked whether a verdict could be reached without regard to imposing the death penalty, may have been misconstrued by the jury and was plain error on the part of the judge).

In addition, where a jury is having difficulty reaching an agreement, reversal exists where the trial court directs critical remarks at a particular juror. For example, in *People v. Branch*,[149] after twenty-four hours of deliberation, the jury foreperson sent a note to the judge indicating a particular juror could not bring himself to vote guilty since "they" could not put anyone in jail and had, from the beginning, stated "they" were uncomfortable serving on the jury.[150] Without discussing the note with counsel, the judge acknowledged the jury's "dilemma," commented that the juror in question "evidently should not have received jury service," and further stated that this jury's responsibility would not be "cut . . . short" because of the dilemma.[151] The judge instructed the jury pursuant to *Prim* and directed the jury to deliberate further.[152] The jury later returned with a guilty verdict.[153] The appellate court reversed, stating that the judge's remarks had the "effect of intimidating the juror into changing his vote by implying that his refusal to defer to the majority position should have disqualified him from jury service."[154]

Finally, the judge is under no responsibility to tell the jury that they could be discharged without reaching a verdict.[155] Indeed, the Illinois Supreme Court strongly disfavors informing a jury about the possibility of a mistrial stating, "To inform the jury that its inability to reach a verdict might be grounds for a mistrial would not aid in its given task, but rather would tend only to complicate the deliberations, making that task even more difficult."[156]

D. Claims that a Mistrial Order Should Have or Should Not Have Been Granted

In a jury trial, the length of jury deliberations and the point at which a mistrial order is warranted is a matter within the discretion of the trial

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149. People v. Branch, 462 N.E.2d 868 (Ill. App. Ct. 1st Dist. 1984).

150. *Id.* at 872.

151. *Id.*

152. *Id.*

153. *Id.* at 869.

154. *Id.* at 873–74.

155. People v. Allen, 365 N.E.2d 460, 464 (Ill. App. Ct. 1st Dist. 1977).

156. *Id.* at 467; *see* People v. Prim, 289 N.E.2d 601, 610 (Ill. 1972) ("[T]elling a jury that if they fail to agree on a verdict the case must be retried is not correct."); *see also* People v. Pulliam, 680 N.E.2d 343, 354–55 (Ill.) (holding that the trial court properly refused to answer a jury question during capital sentencing deliberations, as to "what happens if we cannot reach a unanimous decision on either verdict," while directing the jury to continue deliberating), *cert. denied*, 522 U.S. 921 (1997).

court.[157] How long the jury will be required to deliberate *after* the *Prim* instruction is given is also within the broad discretion of the trial court.[158] In cases where the jury advises the trial court at some point that it is "deadlocked and cannot see any possibility of reaching a verdict," the court is not required to order a mistrial and, accordingly, can order deliberations to continue.[159] This is particularly true where the jury deliberates briefly before declaring that unanimity is impossible.[160] Thus, the amount of time spent in deliberations, whether a jury should continue deliberations after it has indicated it is deadlocked, and whether to sequester a jury that has stated on more than one occasion that it cannot reach a verdict are all matters within the clear discretion of the trial court.[161] Furthermore, there is no fixed time a jury must deliberate before a judge determines the jury is deadlocked and *orders* a mistrial, and, as such, a trial judge enjoys "great latitude" in the exercise of this discretion.[162] Thus, if a jury is dismissed after only several hours have passed, the dismissal will not be considered an abuse of discretion where it appears as though the jury was unable to reach a verdict.[163]

VI. SEQUESTRATION OF THE JURY DURING DELIBERATIONS

One way to avoid jury bias resulting from media publicity or other outside influences is to sequester the jury. Prior to 1997, trial courts were required to keep the jury together and not allow them to separate during deliberations prior to rendering a verdict.[164] The decision to

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157. People v. Daily, 242 N.E.2d 170, 172 (Ill. 1968) (finding no abuse of discretion for the trial court to require the jury to return to deliberating after six and one half hours of deliberation, where the trial lasted four days, numerous witnesses were examined, and testimony was conflicting).

158. People v. Kirk, 394 N.E.2d 1212, 1218 (Ill. App. Ct. 1st Dist. 1979).

159. *Allen*, 365 N.E.2d at 464; *accord* People v. Cowan, 473 N.E.2d 1307, 1309 (Ill. 1985); People v. Douglas, 567 N.E.2d 544, 550 (Ill. App. Ct. 1st Dist. 1991); People v. Dungy, 461 N.E.2d 485, 491–92 (Ill. App. Ct. 1st Dist. 1984); People v. Bravos, 252 N.E.2d 776, 783–84 (Ill. App. Ct. 1st Dist. 1969).

160. *See, e.g.*, People v. Kegley, 590 N.E.2d 922, 930–31 (Ill. App. Ct. 2d Dist. 1992) (noting that a jury declared that it could not reach a verdict after one and one-half hours of deliberation).

161. People v. Harris, 691 N.E.2d 80, 85 (Ill. App. Ct. 1st Dist. 1988).

162. People v. Preston, 391 N.E.2d 359, 363 (Ill. 1979).

163. People v. Mays, 179 N.E.2d 654, 656 (Ill. 1962) (four hours); People v. Cooper, 483 N.E.2d 309, 314–15 (Ill. App. Ct. 1st Dist. 1985) (nine hours).

164. *See* People v. Ritzert, 308 N.E.2d 636, 637–39 (Ill. App. Ct. 2d Dist. 1974); 725 ILL. COMP. STAT. 5/115-4(m) (2000). Section 115-4(m) of the Illinois Compiled Statutes states:

> In the trial of a capital or other offense, any juror who is a member of a panel or jury which has been impaneled and sworn as a panel or as a jury shall be permitted to separate from other such jurors during every period of adjournment to a later day, until final submission of the cause to the jury for the determination, except that no such

sequester the jury during trial, prior to deliberations, however, was within the sound discretion of the trial court.[165] Effective in 1997, Illinois Supreme Court Rule 436 provides that sequestration during deliberations is no longer mandatory. Specifically, Rule 436 provides:

> (a) In criminal cases, either before or after submission of the cause to the jury for determination, the trial court may, in its discretion, keep the jury together in the charge of an officer of the court, or the court may allow the jurors to separate temporarily outside the presence of a court officer, overnight, on weekends, on holidays, or in emergencies.
>
> (b) The jurors shall, whether permitted to separate or kept in charge of officers, be admonished by the trial court that it is their duty (1) not to converse with anyone else on any subject connected with the trial until they are charged; (2) not to knowingly read or listen to outside comments or news accounts of the procedure until they are discharged; (3) not to discuss among themselves any subject connected with the trial, or form or express any opinion on the cause until it is submitted to them for deliberation; and (4) not to view the place where the offense was allegedly committed.[166]

While there is a scarcity of Illinois cases on the issue, those cases that discuss discretionary sequestration *during trial* may offer guidance as to how Rule 436 will be applied.

The usual basis for ordering a sequestering of the jury during the course of the trial is to achieve insulation of the jury from prejudicial media reports. So long as the trial court has properly admonished the jury to disregard extraneous matter, not discuss the matter with anyone, *and* there is no showing of *actual* prejudice to the defendant, however,

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> separation shall be permitted in any trial after the court, upon motion by the defendant or the State or upon its own motion, finds a probability that prejudice to the defendant or to the State will result from such separation.

ILL. COMP. STAT. 5/115-4(m).

165. People v. Saltz, 393 N.E.2d 1292, 1294 (Ill. App. Ct. 2d Dist. 1979).

166. ILL. SUP. CT. R. 436. See Committee Comments on the Illinois Supreme Court Rule 436, which state the following:

> This proposed rule is intended to allow jurors to go home for an evening, weekend, holiday, or emergency and dispense with the need to accommodate the jurors in a hotel overnight, even if the cause has been submitted to them for final deliberation. The Code of Criminal Procedure presently requires "an officer of the court * * * to keep [jurors] together and prevent conversation between the jurors and others" (except interpreters), after final submission of the cause to the jury for determination. 725 ILCS 5/115-4. This proposed rule provides that in appropriate cases, jurors may separate temporarily after being admonished with regard to their duties. It does away with the blanket requirement that they be sequestered and guarded.

Id. comm. cmt.

the failure to sequester will not constitute reversible error.[167] The decision not to sequester a jury is within the sound discretion of the trial court.

An after-the-fact consideration of the appropriateness of the judge's decision not to sequester is not dependent on the correctness of the trial court's decision when examined in retrospect, but rather "whether upon the record as a whole the defendant received a trial before a fair and impartial jury."[168] In any event, a reviewing court will be prompted to conclude that the accused suffered no actual prejudice if (1) the media gave the matter limited coverage,[169] (2) the defense did not challenge any jurors during voir dire for cause because of the publicity,[170] (3) the defense exercised none of its peremptory challenges,[171] (4) a considerable lapse of time existed between the commission of the crime and the trial,[172] and (5) the trial court was diligent in insuring that a fair and impartial jury free of prior prejudices was selected.[173]

The decision *to* sequester is likewise within the sound discretion of the trial court.[174] For example, a trial court's order to sequester jurors so as to avoid possible threats to the jury, after the jury learned about the vandalism of an excused juror's son's automobile, was upheld as proper.[175] It is fair, then, to assume the appellate courts will be quite deferential regarding whether sequestration during deliberations should have occurred. Presumably, so long as the trial court properly admonishes the jury, as Rule 436 requires, the decision to sequester or not to sequester during deliberations will be upheld.

VII. JUROR NOTE TAKING

Whether jurors should be permitted to take notes, and refer to their notes during deliberations, is a matter of controversy. Some studies

167. People v. Brisbon, 478 N.E.2d 402, 407 (Ill. 1985); People v. Yonder, 256 N.E.2d 321, 328 (Ill. 1969); People v. Sims, 612 N.E.2d 1011, 1027 (Ill. App. Ct. 5th Dist. 1993); People v. Knippenberg, 388 N.E.2d 806, 810 (Ill. App. Ct. 5th Dist. 1979).

168. *Yonder*, 256 N.E.2d at 328.

169. *Saltz*, 393 N.E.2d at 1294 (finding that a juror who had seen a single prejudicial article while not sequestered did not contaminate the jury).

170. *Yonder*, 256 N.E.2d at 327 (finding that forty-four out of one hundred eleven prospective jurors had not seen any pretrial publicity, and none of the jurors were challenged for cause).

171. People v. Brinn, 204 N.E.2d 724, 727 (Ill. 1965) (finding that a lack of challenges was strong evidence that impartial jury was possible after voir dire).

172. *Knippenberg*, 388 N.E.2d at 810 (trial took place more than five years after offense and lapse of time can dissipate feelings of prejudice in the community).

173. *Id.* at 809.

174. People v. Bolla, 448 N.E.2d 996, 1002–03 (Ill. App. Ct. 2d Dist. 1983).

175. *Id.* at 1003–04.

suggest note taking may aid jurors in their recollection of evidence presented at trial.[176] Many courts, however, are skeptical, suggesting that jurors may attach undue weight to their notes, which may be inaccurate or misleading, rather than their own personal recollection.[177] Some courts outside of Illinois may place restrictions on their use, such as instructing jurors that they may take notes for their own use but may not share them with other jurors during deliberations.[178] Illinois has specific legislation on the subject in the Code of Criminal Procedure:

> The members of the jury shall be entitled to take notes during the trial, and the sheriff of the county in which the jury is sitting shall provide them with writing materials for this purpose. Such notes shall remain confidential, and shall be destroyed by the sheriff after the verdict has been returned or a mistrial declared.[179]

The juror note taking provision is mandatory, and, as such, a trial judge cannot prohibit jurors from taking notes.[180] However, such error may be deemed harmless where the evidence against the accused was overwhelming.[181] In addition, where a defendant fails to object to such a prohibition, and the attorneys agree, the matter is waived.[182] While there are no criminal cases in Illinois addressing this issue, one civil case has held that an attorney has no right during argument to tell the jury to take notes of certain information conveyed.[183]

VIII. TAKING THE JURY VERDICT

A. *Polling of the Jury*

The polling of a jury after verdict, so as to ascertain if the verdict is a true reflection of each individual juror's choice, has been deemed a "substantial right."[184] There is no requirement that a juror's response

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176. *E.g.*, David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 59–61 (1994).

177. *See, e.g.*, People v. Morales, 559 N.Y.S.2d 869, 869 (N.Y. App. Div. 1990) (holding that note taking during supplemental charge over objections of counsel and prosecutor deprived a defendant of a fair trial).

178. Johnson v. State, 887 S.W.2d 957, 958 (Tex. Crim. App. 1994).

179. 725 ILL. COMP. STAT. 5/115-4(n) (2000). Notably, there is no case law interpreting the "shall remain confidential" language and what it means.

180. People v. Strong, 653 N.E.2d 938, 941–43 (Ill. App. Ct. 1st Dist. 1995).

181. *Id.* at 943.

182. People v. Layhew, 564 N.E.2d 1232, 1240 (Ill. 1990).

183. Ettelsohn v. Kirkwood, 33 Ill. App. 103, 103 (Ill. App. Ct. 1st Dist. 1889).

184. People v. Herron, 332 N.E.2d 623, 624 (Ill. App. Ct. 1st Dist. 1975) (citing to three cases in support of finding that polling a jury after a verdict is a "substantial right": People v. Townsend, 284 N.E.2d 414 (Ill. App. Ct. 5th Dist. 1972); People v. DeStefano, 212 N.E.2d 357 (Ill. App. Ct. 1st Dist. 1965); Nomaque v. People, 1 Ill. 145 (1825)).

be in any specific form, and the principal question is "whether the court, upon hearing the juror's response, reasonably believes that the juror has freely assented to the verdict."[185] The affirmative request for polling must occur and is not waived by a failure to object to the trial court's refusal.[186]

In a 1979 opinion, *People v. Kellogg*,[187] the Illinois Supreme Court established several rules regarding polling a jury.[188] These rules were as follows:

(1) When a judge polls a jury, each juror should be asked whether the announced verdict is his or her own;[189]

(2) The poll should seek to obtain an "unequivocal expression from each juror";[190]

(3) The trial court may exercise its discretion to select the specific form of a question to poll the jury as long as it gives each juror an opportunity to dissent;[191]

(4) If a juror hesitates or indicates some ambivalence in his or her answer, however, then the trial judge has a duty to determine the juror's present intent by allowing the juror an opportunity to unambiguously state his or her present state of mind;[192]

(5) During the poll, jurors must be able to disagree expressly, have the right to inform the court of mistakes, to request permission for the jury to reconsider its verdict, or to disagree expressly with the verdict;[193]

(6) Although the jury polling process should not be "another arena for deliberations," each juror must have the opportunity to express his or her opinion without any coercive influences of other jurors and without influence from the court itself;[194]

(7) A court must either discharge the jury or direct it to engage in further deliberations if a juror dissents from the verdict;[195]

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185. *Id.* at 625.

186. *DeStefano*, 212 N.E.2d at 367–68.

187. People v. Kellogg, 397 N.E.2d 835 (Ill. 1979).

188. *Id.*

189. *Id.* at 837.

190. *Id.*

191. *Id.* For example, "'Was this then and is this now your verdict?'" *Id.*

192. *Id.* at 837–38.

193. *Id.* at 838.

194. *Id.* For example, the court itself "must carefully avoid the possibility of influencing or coercing the juror." *Id.*

195. *Id.*

(8) The determination of the trial judge is subject to review, and if the record reflects that a juror did not assent to the verdict during polling or the interrogation prevents a juror from dissenting then the verdict cannot stand.[196]

In light of *Kellogg*, any ambiguity or hesitancy on the part of a juror during polling should prompt a further colloquy between the judge and the juror.[197] When a juror during polling *dissents* from a verdict—that is, states he or she did *not* agree with the verdict—the proper remedy is for the trial court to either direct the jury to continue deliberations or discharge the jury and order a mistrial.[198] However, merely because a juror states during the polling that reaching a decision was difficult is not the equivalent of dissent. For example, where a juror responded to the trial judge's polling of the jury regarding defendant's sentence of death with, "Reluctantly, yes your Honor," this was not an equivocal response requiring further inquiry.[199]

Additionally, the polling of less than all twelve jurors will not be considered error when the defense did not object thereto.[200] Thus, where the court clerk forgot to ask two jurors whether this was their verdict, defendant suffered no prejudice where none of the jurors expressed dissatisfaction with the verdict before the court accepted it.[201] Impeachment of a jury verdict, in which the claim involves the sufficiency of a juror's answers to polling questions, however, is not permitted where the concern involves the *process* by which a verdict is reached rather than reference to extraneous matter.[202] To illustrate, where a juror's answer during polling was that the verdict was a

196. *Id.*

197. *See, e.g.*, *id.* (requiring judicial inquiry in response to a juror's question, "Can I change my vote?"); People *ex. rel.* Paul v. Harvey, 292 N.E.2d 124, 125–27 (Ill. App. Ct. 1st Dist. 1972) (Court: "Is this and was this your verdict?" Juror: "Well, it wasn't exactly, no" required inquiry and constituted reversible error); *see also* People v. Preston, 391 N.E.2d 359, 364–65 (Ill. 1979) (affirming the trial court's decision to inquire and determine if a juror's vote of guilty was proper when, during polling, juror responded "compromise"). *But see* People v. Cabrera, 480 N.E.2d 1170, 1173 (Ill. App. Ct. 1st Dist. 1985) (Juror: "Can I say what I have to say or do I have to give a yes, or no answer?" Court: "Yes or No." Juror: "Yes." The lack of further inquiry was upheld).

198. People v. Smith, 649 N.E.2d 71, 73–74 (Ill. App. Ct. 2d Dist. 1995) (reversing where neither further deliberation nor discharge occurred and other evidence indicated that a dissenting juror may have been coerced to change his verdict).

199. People v. McDonald, 660 N.E.2d 832, 850–51 (Ill. 1995).

200. People v. Galloway, 393 N.E.2d 608, 610 (Ill. App. Ct. 1st Dist. 1979).

201. *Id.*

202. People v. Preston, 391 N.E.2d 359, 365–66 (Ill. 1979) (noting that a juror's affidavit that describes the process of reaching a verdict and the motives behind it is not permitted).

"compromise" with which she agreed, that answer did not form the basis for impeachment of the jury's verdict.[203]

B. Completion of Verdict Forms

Very important to the jury trial process is proper completion of verdict forms. The Illinois Supreme Court has said that "[w]hen the jury has reached a verdict, the jury foreperson tenders the verdict forms to the trial judge. It is then his *duty* to review the verdict and to determine whether it is proper in both form and substance."[204] Therefore, it is implicit that the jury be provided appropriate verdict forms.[205]

A jury's finding "does not become a verdict until it has been properly received, accepted by the court, and entered into the record."[206] Prior to both rendering a judgment and separating the jury, a trial court may require the jury to amend the verdict so as to more accurately reflect the jury's finding.[207] Thus, where the jurors had erroneously signed an instruction rather than the verdict forms provided, it was proper to direct them back to the jury room to complete their task.[208] Similarly, where jurors erroneously signed only one of three verdict forms, they were properly sent back to the jury room.[209] On the other hand, "once judgment has been entered and the jury has separated, the trial court is foreclosed from any action regarding the verdict, except mistrial or post-trial relief, if circumstances are sufficiently grave to require the verdict be set aside."[210]

Once a verdict has been returned, it is considered valid "if the jury's intention can be ascertained with reasonable certainty."[211] "A verdict is not to be construed with the same strictness as an indictment."[212] For

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203. *Id.*

204. People v. Almo, 483 N.E.2d 203, 207 (Ill. 1985) (emphasis added).

205. People v. Biggerstaff, 679 N.E.2d 118, 120–21 (Ill. App. Ct. 5th Dist. 1999) (finding that not providing an acquittal option on a verdict form constituted reversible error). In *People v. Biggerstaff*, the court held that the verdict form option of "not guilty of first-degree-murder" did not allow the jury to find the defendant not guilty of involuntary manslaughter, which the defendant's attorney actively pursued. *Id.*

206. *Almo*, 483 N.E.2d at 207 (citing People v. Wilson, 281 N.E.2d 626, 630 (Ill. 1972)).

207. People v. Davis, 433 N.E.2d 1376, 1383 (Ill. App. Ct. 4th Dist. 1982).

208. People v. Arnett, 96 N.E.2d 535, 538–39 (Ill. 1951).

209. People v. Wilson, 281 N.E.2d 626, 630 (Ill. 1972).

210. *Davis*, 433 N.E.2d at 1383. See also *Williams v. People*, 44 Ill. 478 (1867), in which the court held that once a jury is discharged and separated, the jury cannot, without consent of the accused, be brought together to find another verdict or amend a verdict.

211. People v. Polk, 294 N.E.2d 113, 118 (Ill. App. Ct. 2d Dist. 1973).

212. *Id.*

example, a verdict was not void even though it provided that the jury found the defendant guilty of the offense of indecent liberties with a child, without the verdict including the material element that he had engaged in an act of sexual intercourse.[213] In other words, it is only necessary that the trial court can determine that it was the intent of the jury to find the defendant guilty of the charge in question.[214] Verdicts must be construed liberally and "all reasonable intendments indulged in their support."[215] A verdict is to be held insufficient only if there is a definite doubt as to its meaning.[216] In determining the meaning of a verdict, "the entire record is to be searched and all parts of the record are to be interpreted together."[217] In addition, if the verdict forms completed by the jury were forms submitted by defense counsel, the defendant cannot complain about their form.[218]

C. *Inconsistent Verdicts*

1. Guilt Phase

No requirement for logical consistency in verdicts exists so long as the verdicts are legally consistent.[219] Where verdicts inconsistently acquit and convict of separate crimes arising from the same act, there is no legal inconsistency (albeit logical inconsistency) where the respective crimes are composed of different elements.[220] For instance, a guilty verdict on a charge of aggravated battery is not fatally inconsistent with an acquittal on a charge of attempted murder because, although the evidence was insufficient to prove the element of specific intent to kill, the evidence was sufficient to show that the defendant intentionally or knowingly caused great bodily harm or used a deadly

213. *Id.*

214. People v. Orlando, 43 N.E.2d 677, 681 (Ill. 1942).

215. People v. Bailey, 62 N.E.2d 796, 798 (Ill. 1945).

216. *Id.*

217. *Id.*

218. People v. Villarreal, 761 N.E.2d 1175, 1184 (Ill. 2001).

219. "Logically inconsistent" verdicts arise when a verdict, although not based on the same facts, involves "both the acceptance and rejection of the same theory of the case proposed by the State or defense." People v. Hill, 735 N.E.2d 191, 197 (Ill. App. Ct. 1st Dist. 2000); *see also* People v. White, 288 N.E.2d 705, 707 (Ill. App. Ct. 1st Dist. 1972) (finding a guilty verdict on aggravated battery and an acquittal on attempted murder charges not fatally inconsistent, even though both charges arose from the same incident). "Verdicts are legally inconsistent if they necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist." *Hill*, 735 N.E.2d at 197.

220. People v. Joyner, 278 N.E.2d 756, 760 (Ill. 1970) (the Supreme Court required a new trial after the defendants had been convicted of murder because the record showed that the defendants could have been found guilty of manslaughter).

weapon in the commission of a felony.[221] "[V]erdicts of guilty of crime A but not guilty of crime B are legally inconsistent," however, where both crimes arise out of the same facts and require the same essential element or elements.[222] Where the jury returns with legally inconsistent verdicts, it is not error for the trial court to send the jury back to deliberate the verdicts and return with legally consistent verdicts.[223]

In addition, the trial court must be alert to double jeopardy considerations and the Illinois "same physical act" doctrine. Whether multiple crimes are considered the same offenses or a lesser-included offense of a greater offense for double jeopardy purposes is determined by reference to "whether each provision requires proof of a fact which the other does not."[224] Moreover, in Illinois, prejudice results "where more than one offense is carved from the same physical act."[225]

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221. *White*, 288 N.E.2d at 708; *see also* People v. Dawson, 326 N.E.2d 755, 756–57 (Ill. 1975) (holding that it is not inconsistent that defendant was found guilty of armed robbery but not guilty of felony murder); People v. Acevedo, 351 N.E.2d 359, 365 (Ill. App. Ct. 1st Dist. 1976) (determining that it is not inconsistent for a defendant to be convicted of murder of one victim and convicted of involuntary manslaughter of another victim).

222. People v. Murray, 340 N.E.2d 186, 194 (Ill. App. Ct. 1st Dist. 1975) (dictum) (citing People v. Pearson, 306 N.E.2d 539, 542–43 (Ill. App. Ct. 1st Dist. 1973) (finding that the defendant was guilty on two counts of aggravated battery and not guilty on two counts of armed violence was legally inconsistent given the same facts and elemental composition of crimes)).

223. People v. Almo, 483 N.E.2d 203, 206–07 (Ill. 1985) (holding that where the jury returned with guilty verdicts on murder and voluntary manslaughter, the trial court properly instructed the jury to return with verdicts on one or the other, but not both, since it is legally inconsistent for both verdicts to stand); People v. Britt, 638 N.E.2d 282, 291–92 (Ill. App. Ct. 4th Dist. 1994) (affirming a first-degree murder conviction and finding that where the jury returned guilty verdict forms for both first degree murder and involuntary manslaughter, it was not error for the court to instruct the jury to return to the jury room and find either first degree murder *or* involuntary manslaughter).

224. Blockburger v. United States, 284 U.S. 299, 304 (1932); *see also* 1 JOHN F. DECKER, ILLINOIS CRIMINAL LAW §§ 1.20–1.24 (3d ed. 2000) (discussing lesser-included offenses). Over the years, no less than four different approaches to identifying a lesser included offense have surfaced in Illinois judicial opinions. 1 *id.* § 1.20. First, there exists the "statutory definition or abstract elemental composition approach," which inquires if *each* offense requires proof of an element or fact not required of the other. 1 *id.* § 1.21. If the *language of an offense* does not require proof of a different element or fact when compared to a similar offense, then one of the offenses (the one requiring proof of less elements or facts) is necessarily a lesser included offense of the other. 1 *id.* Second, there exists the "evidentiary approach," which focuses on the *evidence offered at trial* and asks whether the evidence presented offers the possibility that the accused may either (1) be guilty of a greater crime carrying the greater proof of elements or facts or (2) be guilty, instead, of a lesser related crime carrying less elements or facts that need to be proven for a conviction. 1 *id.* § 1.22. Third, there is the "pleadings or charging instruments approach," which looks at the *indictment or information* charging a defendant with a greater offense and inquires whether implicit in the greater charge is the possibility of a conviction for a lesser offense that requires proof of less elements or less facts. 1 *id.* § 1.23. Fourth, there exists an "inherent relationships approach" where similar offenses are examined to determine if they *relate to the same interest* so that proof of a lesser offense is necessarily presented as a part of the showing of the commission of the greater offense. 1 *id.* § 1.24. For example, if one were to

2. Capital Sentencing Phase

In regard to capital sentencing proceedings, inconsistent verdict claims may appear. In *People v. Mahaffey*,[226] the court rejected a claim that jury death penalty eligibility verdicts were inconsistent where the jury returned a finding of eligibility based on murder in the course of a felony but not on the ground of multiple murders.[227] The defendant claimed that the murder in the course of a felony involved the mens rea element of intent or knowledge and that finding was contradicted by the sentencing jury's refusal to find eligibility based on multiple murders.[228] The Illinois Supreme Court, however, stated that the jury could have found the requisite intent or knowledge as to one victim but not the other, which would account for the discrepancy.[229]

Additionally, in *People v. Kidd*,[230] the jury determined that the defendant was eligible for death for murdering two or more individuals, but the jury failed to find evidence warranting the death penalty based on felony murder.[231] The defendant claimed that the refusal to find eligibility on felony murder was inconsistent with the finding of first-degree murder under section 9-1(A)(1)–(2) of the Criminal Code of 1961 during the guilt phase of his trial.[232] The Illinois Supreme Court, however, indicated that the record contained ample evidence that the

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examine if theft (taking another's property) is a lesser included offense of robbery (taking another's property through force or threat of force), the first approach compares the statutory language of each crime, the second considers the evidence offered at trial and asks whether the evidence could lend itself to not guilty of the greater offense but guilty of the lesser, the third considers whether the allegation in the charging instrument not only allege the possibility of commission of the greater but also implicitly the commission of the lesser crime, and the fourth focuses on whether each crime carries a common interest, to wit, "taking another's property." Currently, the Illinois Supreme Court follows the "pleadings or charging instrument approach." People v. Hamilton, 688 N.E.2d 1166, 1168–70 (Ill. 1997). Convicting a defendant of both a greater offense and a lesser included offense violates the double jeopardy prohibition of the Fifth Amendment. 1 DECKER, *supra*, § 1.19. In the example above, obviously it would be double jeopardy to convict an accused of both robbery and the lesser included offense of theft if the accused was only involved in a single taking of another's property.

225. People v. King, 363 N.E.2d 838, 844 (Ill.), *cert. denied*, 434 U.S. 894 (1977). This doctrine, developed in *King*, states that it is prejudicial to impose against an accused multiple convictions that arise out of the "same physical act" where the offenses are, by definition, lesser included offenses. *Id.* at 844–45; *see also* 1 DECKER, *supra* note 224, § 1.25 (discussing the physical act doctrine).

226. People v. Mahaffey, 651 N.E.2d 1055 (Ill. 1995).

227. *Id.* at 1069–70.

228. *Id.* at 1069.

229. *Id.* at 1070.

230. People v. Kidd, 687 N.E.2d 945 (Ill. 1997), *cert. denied*, 523 U.S. 1084 (1998).

231. *Id.* at 961.

232. *Id.*; *see also* 720 ILL. COMP. STAT. 5/9-1(a)(1)–(2) (2000) (intentional and/or knowing murder).

defendant either intentionally or knowingly killed his victims and, thus, the general verdict finding on first-degree murder was not contradicted by the jury's eligibility determination regarding felony murder.[233]

D. Impeaching the Jury Verdict

In some instances, a defendant will attempt to impeach a jury verdict by resorting to the testimony or an affidavit of a juror that reflects the jury action was not based on a careful assessment of the evidence. These efforts fall into two broad categories:

> In the first category are those instances in which it is attempted to prove by a juror's testimony or affidavit the motive, method or process by which the jury reached its verdict. These, almost without exception, have been held inadmissible. The second category involves those situations in which the testimony or affidavit of a juror is offered as proof of conditions or events brought to the attention of the jury without any attempt to show its effect on the jurors' deliberations or mental processes. In most jurisdictions such proof is admissible.[234]

An example of the first category of juror impeachment, having no legal utility, is where a juror alleged the verdict was a result of "compromise."[235] An example of the second category of verdict impeachment, which is a basis for attacking a verdict, is a juror's statement that the jury verdict involved consideration of some type of "outside influence."[236]

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233. *Id.* at 961–62.

234. People v. Holmes, 372 N.E.2d 656, 658 (Ill. 1978) (citations omitted). An example of the United States Supreme Court's approach to this issue surfaced in *Tanner v. United States*, 483 U.S. 107 (1987). In *Tanner*, a defendant sought to impeach a jury verdict based on a trial juror's claim that several jurors had consumed alcoholic beverages at lunch during trial, which resulted in their sleeping through the afternoon proceedings and that a second juror had confirmed the assertion about jurors' consumption of alcohol. *Tanner*, 483 U.S. at 113–16. This second juror also admitted that he and three other jurors had regularly smoked marijuana during the trial and that another had ingested cocaine during the trial. *Id.* at 115–16. The Court responded first by pointing out there existed a "firmly established common-law rule in the United States flatly prohibit[ing] the admission of juror testimony to impeach a jury verdict." *Id.* at 117. Later, an exception to the common-law rule surfaced whereby evidence of "extraneous influence" alleged to have affected a jury verdict was deemed admissible. *Id.* This exception, also called "outside influence," became part of Federal Rule of Evidence 606(b). *Id.* at 121. Here, the Court relied on the inside/outside influence distinction and concluded the alleged juror misconduct was *not* an "outside influence" within the meaning of Rule 606(b). *Id.* at 125. Further, the Court found the evidence was such that it could not be claimed that the defendant was denied the right to an impartial and *competent* jury as guaranteed by the Sixth Amendment right to a jury trial. *Id.* at 126–27.

235. *Holmes*, 372 N.E.2d at 658.

236. People v. Hobley, 696 N.E.2d 313, 339–41 (Ill. 1998) (noting that four jurors were threatened by non-jurors to find a defendant guilty).

Case law has held that in a variety of situations, a jury verdict was not impeached. For example, a deliberating juror's receipt of an anonymous telephone threat was not sufficient to impeach the credibility of a jury's verdict and entitle a defendant to a new trial.[237] Similarly, in a case where a jury foreman, who was a police officer, offered "expert" testimony during deliberations based on his experience as a police officer and told other jurors that they did not understand what it was like to be a police officer, his action did not amount to an injection of outside evidence that would permit impeachment of the jury's verdict.[238] However, where non-jurors approached jurors sequestered in a hotel restaurant and allegedly made threatening remarks suggesting that a defendant had to be found guilty, an evidentiary hearing was required.[239] Finally, where a deliberating jury foreperson, according to an affidavit of a juror submitted after the jury had given its verdict, told the other jurors during the capital sentencing stage that after convicting a defendant of first-degree-murder they were bound to vote for the death penalty, the statements were not extraneous matter and merely part of the deliberative process.[240] As such, no evidentiary hearing involving possible impeachment of the jury's death penalty verdict was required.[241]

E. *Unique Verdict Problems in Capital Cases*

1. Death Penalty Eligibility Findings During Sentencing

In a capital case before a jury, after a finding of guilty to first-degree murder, the State can request a separate sentencing hearing to determine the existence of any statutory aggravating circumstances that may warrant the death penalty ("eligibility stage").[242] If a jury finds a defendant to be eligible beyond a reasonable doubt, the jury then proceeds to examine any information relevant to additional aggravating factors, as well as mitigating factors ("aggravation and mitigation stage").[243] If a jury unanimously determines there are no mitigating factors sufficient to preclude the imposition of the death penalty, a

237. People v. Reid, 583 N.E.2d 1, 3–4 (Ill. App. Ct. 1st Dist. 1991) (refusing a retrial where all jurors agreed with the verdict during jury polling, despite a deliberating juror's testimony regarding the effect of threat on his mental processes, because such testimony was inadmissible).

238. *Hobley*, 696 N.E.2d at 341–42.

239. *Id.* at 339–41.

240. People v. Towns, 623 N.E.2d 269, 279–80 (Ill. 1993).

241. *Id.*

242. 720 ILL. COMP. STAT. 5/9-1(d) (2000).

243. *Id.* § 5/9-1(e).

defendant is then sentenced to death.[244] Considering the sanction at issue, a body of case law that addresses capital jury verdicts has developed in recent years.

One type of claim that may arise involves the trial court influencing a jury's capital sentencing finding. In one case, a defendant was placed on notice as to the State's intent to seek the death penalty under two eligibility factors—multiple murder and the exceptionally brutal or heinous murder of a child.[245] The trial judge during sentencing commented about the "planned" and "preconceived" nature of the murders, which the defendant claimed he had no opportunity to rebut because it was not part of the case.[246] The trial court's comments, which were supported by the evidence, were proper, however, because "the sentencing body may consider any relevant aggravating factors, statutory and nonstatutory, in the process of selecting among that class of defendants who will actually be sentenced to death."[247]

2. Problems with Sentencing Stage Verdict Forms

In recent years, the Illinois Supreme Court has addressed the adequacy of death penalty eligibility phase verdict forms. In *People v. Mack*,[248] the Illinois Supreme Court declared that an eligibility-stage verdict form used in a capital case purporting to set out, as a specific finding, the elements of the offense "must do so completely or be held insufficient."[249] In *Mack*, the court deemed a verdict form insufficient when the form purported to set out the eligibility elements found in section 9-1(b)(6) of the Criminal Code of 1961, but the verdict failed to include the requisite mental state of intent or knowledge.[250] It read: "We, the jury, unanimously find beyond a reasonable doubt that the following aggravating factor exists in relation to this Murder. Larry Mack killed Joseph Kolar in the course of an Armed Robbery."[251] The court ruled that this "verdict does not state that defendant was found eligible for the death penalty, nor does it simply state that a statutory

244. *Id.* § 5/9-1(g).

245. People v. Chapman, 743 N.E.2d 48, 60 (Ill. 2000), *cert. denied*, 533 U.S. 956 (2001).

246. *Id.* at 83.

247. *Id.* at 84.

248. People v. Mack, 658 N.E.2d 437 (Ill. 1995).

249. *Id.* at 443.

250. *Id.* at 439–40 (discussing 720 ILL. COMP. STAT. 5/9-1(b)(6) (1979)). The defendant killed the victim in the course of another felony; in performing the acts that caused the death of the murdered individual, the defendant acted with intent to kill or with knowledge that his acts created a strong probability of death or great bodily injury; and the felony was one of the designated felonies. *Id.*

251. *Id.*

aggravating factor [including essential elements thereof] was found to exist."[252] As such, the defendant's death sentence was reversed.[253]

The death eligibility verdict form does not have to follow any particular format, nor does it have to use the exact statutory language. The Illinois Supreme Court has stated that "[w]hile such actions may be the most efficient way of ensuring the verdict form accurately states the law, that is not what is required."[254] Thus, where the defendant claimed the verdict failed to include an affirmative finding that he actually killed the victim, the verdict's language, "in performing the acts which caused the death of the murdered person," belied such a claim.[255] Where the verdict form incorporates the necessary elements, including reference to the required mental state and the victim's injuries as caused by the defendant, it is sufficient.[256] In determining the meaning of a verdict, "all parts of the record will be searched and interpreted together."[257]

Where a verdict form is invalid, neither the trial court nor the Illinois Supreme Court, upon review, can usurp the jury's invalid death-eligibility verdict by making an independent finding as to the existence of a statutory aggravating factor without violating the defendant's constitutionally protected due process rights in having the jury determine death eligibility.[258] Thus, when a verdict form fails to include the requisite mens rea, the Illinois Supreme Court ruled, "deficiency in the eligibility finding is *not amenable to resentencing or harmless error* analysis by this court."[259] In that case, the failure of defense counsel to raise the issue was not dispositive because the error was considered plain error.[260]

As previously stated, if an eligibility verdict form omitted the mens rea, it is clear error. It was not plain error (where defense counsel failed to object), however, when the same jury during the guilt-innocence phase of the defendant's trial found the defendant guilty of intentional or knowing murder of three victims, thus making the requisite finding

252. *Id.* at 444.

253. *Id.*

254. People v. Kuntu, 752 N.E.2d 380, 398 (Ill. 2001) (citing *Mack*, 658 N.E.2d at 437).

255. *Id.* at 397–98 (finding a verdict form sufficient to satisfy 720 ILL. COMP. STAT. ANN. 5/9-1(b)(6) (West 1994)).

256. People v. Williams, 739 N.E.2d 455, 484–88 (Ill. 2000) (satisfying 720 ILL. COMP. STAT. ANN. 5/9-1(b)(6) (West 1994)), *cert. denied*, 533 U.S. 953 (2001).

257. People v. McNeal, 677 N.E.2d 841, 853–54 (Ill. 1997) (holding that verdict forms merely containing parenthetical references to the form of first degree murder are sufficient).

258. *See* People v. Shaw, 713 N.E.2d 1161, 1183 (Ill. 1998).

259. People v. Williams, 737 N.E.2d 230, 254 (Ill. 2000) (emphasis added) (noting that the invalid verdict that was based on felony murder), *cert. denied*, 532 U.S. 996 (2001).

260. *Id.* at 254–55.

regarding the defendant's mens rea.[261] In addition, where a jury during the guilt phase was instructed as to the mental states of intentional, knowing, and felony murder of two victims, "[t]he jury's return of [two] general verdicts [of guilty] raises a presumption of intentional murder."[262] As such, when the defendant waived his right to a jury for purpose of sentencing, the trial court was not required to make additional findings regarding the defendant's mental state when it found the defendant death-eligible based on multiple murders.[263]

Although the court has demonstrated its willingness to invoke the plain error doctrine when it encounters a defective death eligibility verdict form, it has not done so uniformly. In one case, failure of the defense to object to the sufficiency of an eligibility verdict form constituted a waiver.[264]

If there are multiple bases for death eligibility, a defendant's challenge of one verdict eligibility finding is mooted by another that is satisfactory.[265] In addition, "the fact that the jury was correctly instructed and returned a legally correct eligibility verdict form is wholly irrelevant in determining whether the State actually presented sufficient evidence to prove eligibility."[266] Finally, once the State has pursued one basis for the death penalty and failed, it would be

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261. People v. McCallister, 737 N.E.2d 196, 218 (Ill. 2000) (holding no error had occurred where felony murder and multiple murder verdicts made no reference to mens rea); *see also* People v. Childress, 633 N.E.2d 635, 648–49 (Ill. 1994) (finding no reversible error had occurred where an omission of mens rea on a verdict form occurred, and the same jury made the finding at the guilt phase that the defendant was guilty of knowing and intentional murder).

262. People v. Casillas, 749 N.E.2d 864, 883 (Ill. 2000) (finding that the trial court did not have to make additional findings regarding mental state at sentencing), *cert. denied*, 534 U.S. 1043 (2001).

263. *Id.* at 882–83.

264. People v. Williams, 739 N.E.2d 455, 485–86 (Ill. 2000).

265. *Id.* at 484–88; People v. Buss, 718 N.E.2d 1, 44–46 (Ill. 1999) (holding that although death eligibility verdicts based upon felony murder and multiple murder, which omitted necessary mental states, were invalid, a valid third verdict form based on the murder of a child provided the basis for defendant's eligibility for capital punishment), *cert. denied*, 529 U.S. 1089 (2000); People v. Macri, 705 N.E.2d 772, 798–99 (Ill. 1998) (affirming a death sentence where a death eligibility verdict form based on felony murder was invalid for failure to include mens rea, but another verdict form found defendant eligible under 720 ILL. COMP. STAT. 5/9-1(b)(11), to wit, murder committed in a cold, calculated and premeditated manner), *cert. denied*, 528 U.S. 829 (1999); People v. Jackson, 695 N.E.2d 391, 409–11 (Ill.) (determining that even though a felony murder eligibility verdict form was invalid, a multiple murder verdict form formed a basis for eligibility), *cert. denied*, 525 U.S. 970 (1998); People v. Williams, 692 N.E.2d 1109, 1122 (Ill.) (holding that where a felony murder eligibility verdict form was invalid, the murder of a police officer verdict form formed the proper basis for eligibility), *cert. denied*, 525 U.S. 882 (1998).

266. People v. West, 719 N.E.2d 664, 679–80 (Ill. 1999) (holding that the evidence was insufficient as a matter of law).

impermissible to conduct another eligibility determination without violating double jeopardy.[267]

IX. ALTERNATE JURORS

Although the juror replacement procedure is governed by statute,[268] the dismissal of a juror and the "impaneling of an alternate" are at the discretion of the trial judge.[269] A defendant does have a right to a fair and impartial jury; however, this is not interpreted to mean that a defendant has the right to a "tribunal of his own choosing."[270] Moreover, the discharge of a juror by the trial judge does not warrant reversal, unless there is a clear showing of prejudice to a defendant.[271]

Courts in several cases have rejected defendants' claims of prejudice, as a result of a juror having been dismissed and substituted with an alternate, even once deliberations have begun.[272] For instance, a defendant's claim of prejudice was unwarranted when a juror was dismissed shortly after deliberations began, upon indicating to the trial court that he had difficulty understanding English and could not follow the evidence, and was replaced with an alternate juror who had been dismissed by the trial court two and one-half hours prior.[273] Nevertheless, one court has found that a defendant was entitled to a new trial because he was prejudiced by an improper jury verdict when an alternate juror, who was dismissed at commencement of trial, remained to deliberate with the panel of twelve jurors, stayed overnight with the sequestered jurors, signed the verdict form, and took part in the jury polling.[274]

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267. *Id.* at 681 (remanding for resentencing other than death required).

268. 725 ILL. COMP. STAT. 5/115-4(g) (2000).

269. People v. Rose, 548 N.E.2d 548, 556 (Ill. App. Ct. 1st Dist. 1989) (upholding the replacement of a juror who was late for trial (citing Snyder v. Poplett, 424 N.E.2d 396, 401 (Ill. App. Ct. 4th Dist. 1981))).

270. People v. Ward, 609 N.E.2d 252, 265 (Ill. 1992).

271. *Rose*, 548 N.E.2d at 556.

272. People v. Hudson, 626 N.E.2d 161, 181 (Ill. 1993) (upholding the trial court's dismissal of an ill juror who sat through the guilt/innocence phase of a capital sentencing case, and assigning an alternate juror who heard all of the evidence at trial and at the sentencing phase because defendant did not suffer prejudice), *cert. denied*, 513 U.S. 844 (1994); *Ward*, 609 N.E.2d at 265 (finding no prejudice where the trial court dismissed an ill juror and substituted an alternate juror); People v. Patterson, 413 N.E.2d 1371, 1377–78 (Ill. App. Ct. 3d Dist. 1980) (removing a juror was not prejudicial where the juror heard an Assistant State's Attorney in an elevator refer to a defendant charged with rape as "Chester the Molester," whereupon the judge, during voir dire of the juror, learned that the juror had not informed the other jurors of the remark).

273. People v. Hayes, 745 N.E.2d 31, 36–39 (Ill. App. Ct. 1st Dist. 2001).

274. People v. Babbington, 676 N.E.2d 1326, 1333–34 (Ill. App. Ct. 1st Dist. 1997).

While Illinois case law states that a deliberating juror may not be replaced "if the request for discharge stems from the juror's minority views or doubts regarding the sufficiency of the evidence,"[275] the United States Court of Appeals for the Eleventh Circuit has upheld a dismissal of a deliberating juror when it was determined that she was not basing her decision on the sufficiency of the evidence.[276] That juror made comments to other jurors that she did not have to abide by the law and obey the court's instructions.[277] The court held that the trial court did not abuse its discretion when it dismissed the juror for "impermissible nullification."[278] The court, however, did not decide to what extent a juror must actively engage in debate before the juror could be replaced with an alternate.[279] Whether Illinois courts would likewise deem it appropriate to remove a juror during deliberations where it was obvious the juror was basing his or her decision about a defendant's fate on matters beyond the law and the evidence is unclear.

X. CONCLUSION

In a criminal trial, numerous and complex difficulties may arise once evidence has been presented, arguments made, and instructions given. A jury may need clarification of instructions or be the recipient of an extra-evidentiary outside influence. A judge may engage in ex parte communication that proves problematic on appeal or take actions that coerce the jury into reaching a verdict. Indeed, at this phase of the criminal proceeding, the actions or inactions of a judge or jury could prove to mean the difference between life and death for a capitally charged defendant. As Yogi Berra once said, "It ain't over 'til it's over."[280]

The jury's deliberations and arrival at a verdict play a critical role in our criminal justice system and require careful examination by those in the legal profession. The academician, practitioner, and student of criminal law must have an understanding of the intricacies that still arise in this late stage of the trial.

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275. *Hayes*, 745 N.E.2d at 41 n.3.

276. United States v. Abbell, 271 F.3d 1286, 1304 (11th Cir. 2001).

277. *Id.* at 1303.

278. *Id.* at 1304 n.19. Jury nullification is a controversial concept whereby jurors are allowed to base their verdicts on concerns, such as their perception that it would be immoral to convict someone for violating certain laws, rather than basing their decision on the existing law and evidence presented. *See generally* M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101 (1993).

279. *Abbell*, 271 F.3d at 1304 n.19.

280. YOGI BERRA, THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID," 121 (1998).