

## 6.25 Deadlocked Jury

### **[Option 1]**

Members of the jury, you have reported that you have been unable to reach a unanimous verdict in this case. I have decided to suggest a few additional thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. You should not, however, change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

I also remind you that in your deliberations you are to consider the instructions that I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

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

I ask that you now return to the jury room and continue your deliberations with these additional comments in mind.

### **[Option 2]**

Members of the jury, you have reported that you are unable to reach a unanimous verdict in this case. I realize and appreciate that you are having some difficulty in reaching unanimity, but that is not unusual.

To attempt to assist you in reaching a unanimous verdict, I want to suggest some additional thoughts for your consideration. Sometimes after hearing this additional instruction and engaging in further discussions, jurors can work out their differences and agree unanimously on a verdict.

Although there is no requirement that you reach a verdict in this case, your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based on the evidence presented and the principles of law on which I have instructed you.

[The Final Jury Instructions that I previously gave you reads: “A separate crime is charged against the Defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” I now add that a jury

may return a verdict on some counts and deadlock on others. In other words, a jury may return a verdict on those counts on which it has agreed and leave blank or write “deadlocked” as to those counts as to which there is not unanimity. I did not tell you that earlier because jurors should be neither encouraged nor discouraged to return a partial verdict. At this stage of your deliberations, however, I want to ensure that you understand your options.]

It is your duty, as jurors, carefully to consider, weigh, and evaluate all the evidence that has been presented during the trial. It is also your duty to discuss your views on the evidence with your fellow jurors. And it is your duty to listen to and consider the views of your fellow jurors.

During your deliberations, you should not hesitate to reexamine your views or request that fellow jurors reexamine their views. Likewise, you should not hesitate to change a viewpoint that you held initially, if you become convinced that that viewpoint is wrong. Nor should you hesitate to suggest that other jurors change their views if you are convinced that they are wrong.

Keep in mind that while each of you must decide the case for yourself, you should do so only after an impartial consideration of all the evidence with fellow jurors and after fairly considering and evaluating the viewpoints of fellow jurors.

No juror, however, should surrender an honest belief as to the weight or effect of the evidence solely because of the opinion of fellow jurors or merely for the purpose of returning a verdict.

I remind you that the Defendant is presumed to be innocent and that the Government, not the Defendant, has the burden of proof. Also, the Government must prove the Defendant guilty beyond a reasonable doubt.

Those of you who believe that the Government has proved the Defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other conscientious members of the jury are not convinced. On the other hand, those who believe that the Government has not proved the Defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other equally conscientious members of the jury do not share that doubt. In short, every individual juror should reconsider and reexamine his or her own views.

Fair and effective jury deliberations require frank and forthright exchange of views. As the jury in this case, you have absolute discretion to conduct your deliberations in any way you deem appropriate. I want to suggest to you, however, that because you have not been able to reach a verdict using the methods you have tried so far, you consider the possibility of trying some new methods.

For example, you may wish to have different jurors lead the discussion for a period. Sometimes reconsidering issues from a new or a fresh perspective is helpful. Or you may wish to engage in what is called “reverse role playing.” That is, you might consider having those of you on one side of an issue present or advocate the other side’s position, and vice versa. Either of these methods might enable you to better understand one another’s positions.

By suggesting these different methods of deliberation, I want to stress that I am not dictating to you how you should conduct your deliberations. Nor am I attempting to pressure you to reach a verdict or demanding that you reach a verdict at all costs. There is no requirement, of course, that you reach a verdict in this case.

Instead, I am merely suggesting that you consider additional or alternative methods of ensuring that each juror has a full and fair opportunity to express his or her point of view and that all jurors strive to consider and understand and engage the views of their fellow jurors.

During your further deliberations, you should also reconsider the instructions that I previously gave you and that you have in the jury room. All the instructions, I remind you, are important. And you should consider this supplemental instruction in conjunction with the other instructions that I have previously given.

Nothing that I have said in this Supplemental Instruction is meant to rush you or pressure you into agreeing on a verdict. I want to emphasize that. Take as much time as you need to discuss things. There is no hurry. I now ask you to take this Supplemental Instruction back into the jury room and continue your deliberations with these additional comments in mind.

#### Comment

Before giving any supplemental jury instruction to a deadlocked jury and before declaring a mistrial or partial mistrial based on jury deadlock or partial deadlock, the Committee recommends the court review Jury Instructions Committee of the Ninth Circuit, A Manual on Jury Trial Procedures §§ 5.4, 5.5, and 5.6 (2013); *see also United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000) (“The most critical factor is the jury’s own statement that it is unable to reach a verdict.”); *Rogers v. United States*, 609 F.2d 1315, 1317 (9th Cir. 1979) (noting that before declaring mistrial based on jury deadlock, “the judge should question the jury . . . either individually or through its foreman, on the possibility that its current deadlock could be overcome by further deliberations”) (internal quotation marks and citation omitted).

The Committee recommends caution when considering whether to give a supplemental instruction (sometimes known as an “Allen charge”) to encourage a deadlocked jury to reach a verdict. *See United States v. Evanston*, 651 F.3d 1080, 1085 (9th Cir. 2011) (noting extraordinary caution to be exercised when giving “Allen charge”).

As the Ninth Circuit explained in *United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir. 2007):

The term “*Allen* charge” is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in *Allen v. United States*, 164 U.S. 492, 501-02 (1896). In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as “dynamite charges,” because of their ability to “blast” a verdict out of a deadlocked jury.

*Allen* “charges are proper ‘in all cases except those where it’s clear from the record that the charge had an impermissibly coercive effect on the jury.’” *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992)). In assessing the coerciveness of an *Allen* charge, the Ninth Circuit considers “(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and (3) any other indicia of coerciveness.” *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007) (citing *United States v. Daas*, 198 F.3d 1167, 1179-80 (9th Cir. 1999)); see also *Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (holding that weekend interval between “standard” *Allen* charge and resumption of deliberations “probably would have diluted any coercive effect”).

In *United States v. Sproat*, 89 F.4th 771 (9th Cir. 2023), the Ninth Circuit held that the trial court did not improperly coerce the jurors into reaching a unanimous guilty verdict by sending them home at 4:30 p.m. on the first day of deliberations, with the instruction to return the next day, in response to the jury saying they were at impasse. *Sproat*, 89 F.4th at 775-776. When the jury returned the next day, the defendant objected again that bringing the jury back was coercive. The parties discussed, the judge gave a partial *Allen* charge which “emphasized the possibility that the jurors would not reach a unanimous verdict, the command that the jurors should not change an honest belief, and the assurance that the jurors could be excused at any time if they concluded that they could not overcome their earlier impasse,” *Id.* at 776, and the jury returned a verdict convicting the defendant on all counts. The Ninth Circuit rejected the defendant’s argument, stating that “even if the jury had been firmly deadlocked, instructing them to return the next day—without more—would not have been the equivalent of an *Allen* charge,” as “[t]elling the jurors to return the next day neither explicitly nor implicitly encouraged them to reach a unanimous verdict.” *Id.* at 775 (“[S]imply excusing the jurors for an evening recess did not equal an instruction to them to strive for a unanimous verdict.”). First, the late-afternoon instruction did not convey that the jurors were required to continue deliberating the next day.” *Id.* at 776. “Second, the court did not ask the jury to identify the nature of its impasse or the vote count before excusing the jurors for the evening . . . Rather, the judge’s inquiries . . . were limited to establishing that the jury was at an impasse and clarifying that there was no unanimity as to any counts. . . . At no point during those exchanges with the jurors did the court ask the jury to reveal vote counts, areas of disagreement, or

specific factual matters on which it disagreed. “*Id.* (quotation marks and citations omitted) Finally, there was no coercion because the court gave the partial *Allen* charge the next day, which the defendant had endorsed.

The Committee presents two options for an *Allen* charge. Option 1 has been approved by the Ninth Circuit in appropriate circumstances. See *United States v. Beattie*, 613 F.2d 762, 765 (9th Cir. 1980) (“Instructions admonishing jurors to reconsider their positions have ‘been consistently approved in the Ninth Circuit when (they are) in a form not more coercive than that in *Allen*.’”); see also *United States v. Steele*, 298 F.3d 906, 910-11(9th Cir. 2002) (identifying three factors to be considered when determining whether an *Allen* charge is coercive and affirming the district court’s decision to give the *Allen* charge presented in Option 1). Option 2 has not been considered by the Ninth Circuit in a published opinion.

Further, the Ninth Circuit has explained:

If the trial judge gives an *Allen* charge after inquiring into the numerical division of the jury, “the charge is per se coercive and requires reversal.” *Ajiboye*, 961 F.2d at 893-94. “Even when the judge . . . is inadvertently told of the jury’s division, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them—that is, if the judge knew which jurors were the holdouts and each holdout juror knew that the judge knew he was a holdout.” *Id.* at 894 (citing *United States v. Sae-Chua*, 725 F.2d 530, 532 (1984)).

*United States v. Williams*, 547 F.3d 1187, 1205 (9th Cir. 2008) (reversing conviction after neutral *Allen* charge when “hold-out” juror knew her identity was known by the court). See *Evanston*, 651 F.3d at 1085-93 (holding that district court committed reversible error by allowing supplemental closing arguments to deadlocked jury after court gave *Allen* charge and inquired as to reason for deadlock).

In addition, after being advised that a jury is deadlocked, a trial judge might consider informing jurors that the court has an additional instruction that may help them break the impasse and solicit the jury’s on-the-record willingness to consider it.

Finally, the bracketed paragraph may be used when a single defendant has been charged with multiple counts. Similar instructions, appropriately modified, also may be used when there are multiple defendants.

*Revised June 2024*