

6.26 Script for Post-Allen Charge Inquiry

Comment

If the jury indicates that it is deadlocked after an *Allen* charge is given, the Committee recommends polling the jury to confirm that they “cannot agree on a verdict on one or more counts,” Fed. R. Crim. P. 31(b)(3), and, thus, that there is a basis to declare a mistrial. As the Ninth Circuit noted in *Brazzel v. Washington*, 491 F.3d 976, 982 (9th Cir. 2007):

A hung jury occurs when there is an irreconcilable disagreement among the jury members. A “high degree” of necessity is required to establish a mistrial due to the hopeless deadlock of jury members. *See Arizona v. Washington*, 434 U.S. 497, 506 (1978). The record should reflect that the jury is “genuinely deadlocked.” *Richardson v. United States*, 468 U.S. 317, 324-25 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); *see also Selvester [v. United States]*, 170 U.S. [262,] 270 [(1898)] (“But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution.”).

In *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000), the court noted that “[i]n determining whether to declare a mistrial because of jury deadlock, relevant factors for the district court to consider include the jury’s collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury.” *Id.* at 1029 (citing *United States v. Cawley*, 630 F.2d 1345, 1348-49 (9th Cir. 1980)). “The most critical factor is the jury’s own statement that it is unable to reach a verdict.” *Cawley*, 630 F.2d at 1349. “Without more, however, such a statement is insufficient to support a declaration of a mistrial.” *Hernandez-Guardado*, 228 F.3d at 1029. “On receiving word from the jury that it cannot reach a verdict, the district court must question the jury to determine independently whether further deliberations might overcome the deadlock.” *Id.*

A suggested script for this purpose follows:

“*To the [Presiding Juror] [Foreperson]*: In your opinion, is the jury [[hopelessly deadlocked] [unable to agree on a verdict]] [as to one or more counts]?”

“*To all jurors*: If any of you disagree with the [Presiding Juror’s] [Foreperson’s] answer, please tell me now.”

If the response to the first question is “yes,” then ask:

“Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?”

If the response is “no,” then ask the entire panel the following:

“[*To all jurors*]: Without stating where any juror stands, do any of you believe there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?”

See also Jury Instructions Committee of the Ninth Circuit, A Manual on Jury Trial Procedures § 5.5 (2013).

NOTE: It is per se error to give a second *Allen* charge where the jury has not requested one, because the second *Allen* charge “conveys a message” of “impermissible coercion.” *United States v. Evanston*, 651 F.3d 1080, 1085 (9th Cir. 2011).

Revised Sept. 2019