

## Chapter 8.00

### DELIBERATIONS AND VERDICT

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## **8.01 INTRODUCTION**

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

[(4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.]

(5) One more thing about messages. Do not ever write down or tell anyone, including me, how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

### **Use Note**

Bracketed paragraph (4) should be included if the exhibits are not being submitted to the jury except upon request.

An instruction on using electronic technology should be included, see Inst. 8.02.

### **Committee Commentary 8.01** (current through March 1, 2023)

This instruction covers some miscellaneous concepts such as selection of a foreperson, communications with the court and not disclosing numerical divisions that are commonly included in instructions on the jury's deliberations.

In some districts all exhibits are routinely submitted to the jury when deliberations begin. In other districts exhibits are not provided unless the jury asks for them. Bracketed paragraph (4) should be used when the exhibits are not provided unless the jury makes a request.

## **8.02 EXPERIMENTS, RESEARCH, INVESTIGATION AND OUTSIDE COMMUNICATIONS**

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court.

(2) During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media or application [unless specifically instructed to do so by this court], such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer, the Internet, any Internet service, or any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, Twitter, Instagram, WhatsApp, Snapchat or other similar electronic service, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

(3) You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete, or inaccurate. Even using your smartphones, tablets, and computers -- and the news and social media apps on those devices -- may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

### **Use Note**

The bracketed language in paragraph (2) may be used if the court has authorized the jury to use any electronic device or application.

Proposed model instructions for use before and during trial are reprinted below in the commentary.

**Committee Commentary 8.02**  
(current through March 1, 2023)

The purpose of this instruction is to caution jurors at the close of the case that they must not communicate or attempt to gather any information about the case on their own during their deliberations. Paragraphs (2) and (3) are drawn from two sources: the Benchbook (6th ed. 2013), Instruction 2.08 General Instructions to Jury at End of Criminal Case; and the Proposed Model Jury Instructions on the Use of Electronic Technology to Learn or Communicate about a Case, Prepared by the Judicial Conference Committee on Court Administration and Case Management, Updated June 2020 (Proposed Model Instruction for the Close of the Case).

Generally, the court needs to caution jurors that they should not communicate about the case, that they should not do any research or investigation about the case, and that their deliberations should be confined to what they hear in the courtroom.

The Judicial Conference Committee has provided the following instruction for the close of the case:

Throughout your deliberations, you may discuss with each other the evidence and the law that has been presented in this case, but you must not communicate with anyone else by any means about the case. You also cannot learn from outside sources about the case, the matters in the case, the legal issues in the case, or individuals or other entities involved in the case. This means you may not use any electronic device or media (such as a phone, computer, or tablet), the internet, any text or instant messaging service, or any social media apps (such as Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat) to research or communicate about what you've seen and heard in this courtroom.

These restrictions continue during deliberations because it is essential, under our Constitution, that you decide this case based solely on the evidence and law presented in this courtroom. Information you find on the internet or through social media might be incomplete, misleading, or inaccurate. And, as I noted in my instructions at the start of the trial, even using your smartphones, tablets, and computers - and the news and social media apps on those devices - may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom.

You are permitted to discuss the case with only your fellow jurors during deliberations because they have seen and heard the same evidence and instructions on the law that you have, and it is important that you decide this case solely on the evidence presented during the trial, without undue influence by anything or anyone outside of the courtroom. For this reason, I expect you to inform me at the earliest opportunity, should you learn about or share any information about this case outside of this courtroom or the jury room, or learn that another juror has

done so.

Proposed Model Jury Instructions, The Use of Electronic Technology to Learn or Communicate about a Case, Prepared by the Judicial Conference Committee on Court Administration and Case Management, Updated June 2020.

The Judicial Conference Committee also proposed model instructions for use before and during trial. *Id.* They provide as follows:

During Voir Dire of Potential Jurors:

If you are selected as a juror in this case, you cannot discuss the case with your fellow jurors before you are permitted to do so at the conclusion of the trial, or with anyone else until after a decision has been reached by the jury. Therefore, you cannot talk about the case or otherwise have any communications about the case with anyone, including your fellow jurors, until I tell you that such discussions may take place. Thus, in addition to not having face-to-face discussions with your fellow jurors or anyone else, you cannot communicate with anyone about the case in any way, whether in writing, or through email, text messaging, blogs, or comments, or on social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat). [OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

You also cannot conduct any type of independent or personal research or investigation regarding any matters related to this case. Therefore, you cannot use your cellphones, iPads, computers or any other device to do any research or investigation regarding this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. And you must ignore any information about the case you might see, even accidentally, while browsing the internet or on your social media feeds. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom. [OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

Before Trial:

The Sixth Amendment of our Constitution guarantees a trial by an impartial jury. This means that, as jurors, you must decide this case based solely on the evidence and law presented to you here in this courtroom. Until all the evidence and arguments have been presented and you begin to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you start to deliberate, you may discuss the case, the evidence, and the law as it has been

presented, but only with your fellow jurors. You cannot discuss it with anyone else until you have returned a verdict and the case has come to an end. I'll now walk through some specific examples of what this means.

First, this means that, during the trial, you must not conduct any independent research about this case, or the matters, legal issues, individuals, or other entities involved in this case. Just as you must not search or review any traditional sources of information about this case (such as dictionaries, reference materials, or television news or entertainment programs), you also must not search the internet or any other electronic resources for information about this case or the witnesses or parties involved in it. The bottom line for the important work you will be doing is that you must base your verdict only on the evidence presented in this courtroom, along with instructions on the law that I will provide.

Second, this means that you must not communicate about the case with anyone, including your family and friends, until deliberations, when you will discuss the case with only other jurors. During deliberations, you must continue not to communicate about the case with anyone else. Most of us use smartphones, tablets, or computers in our daily lives to access the internet, for information, and to participate in social media platforms. To remain impartial jurors, however, you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

Please note that these restrictions are about all kinds of communications about this case, even those that are not directed at any particular person or group. Communications like blog posts or tweets can be shared to an ever-expanding circle of people and can have an unexpected impact on this trial. For example, a post you make to your social media account might be viewable by a witness who is not supposed to know what has happened in this courtroom before he or she has testified. For these reasons, you must inform me immediately if you learn about or share any information about the case outside of this courtroom, even if by accident, or if you discover that another juror has done so.

Finally, a word about an even newer challenge for trials such as this one—persons, entities, and even foreign governments may seek to manipulate your opinions, or your impartiality during deliberations, using the communications I've already discussed or using fake social media accounts. But these misinformation efforts might also be undertaken through targeted advertising online or in social media. Many of the tools you use to access email, social media, and the internet display third-party notifications, pop-ups, or ads while you are using them. These communications may be intended to persuade you or your community on an issue, and could influence you in your service as a juror in this case. For example, while accessing your email, social media, or the internet, through no fault of your own, you might see popups containing information about this case or the matters, legal

principles, individuals or other entities involved in this case. Please be aware of this possibility, ignore any pop-ups or ads that might be relevant to what we are doing here, and certainly do not click through to learn more if these notifications or ads appear. If this happens, you must let me know.

Because it is so important to the parties' rights that you decide this case based solely on the evidence and my instructions on the law, at the beginning of each day, I may ask you whether you have learned about or shared any information outside of this courtroom. (I like to let the jury know in advance that I may be doing that, so you are prepared for the question.)

I hope that for all of you this case is interesting and noteworthy.

At the End of Each Day of the Case:

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

At the Beginning of Each Day of the Case:

As I reminded you last night and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

ALTERNATIVE 1 (in open court): If you think you might have done so, please let me know now by raising your hand. [Wait for a show of hands]. I see no raised hands; however, if you would prefer to talk to a member of the court's staff privately in response to this question, please do so at the next break. Thank you for your careful adherence to my instructions.

ALTERNATIVE 2 (during voir dire with each juror, individually): Have you learned about or shared any information about this case outside of this courtroom? . . . Thank you for your careful adherence to my instructions.

### **8.03 UNANIMOUS VERDICT**

- (1) Your verdict, whether it is guilty or not guilty, must be unanimous [as to each count].
- (2) To find the defendant guilty [of a particular count], every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.
- (3) To find him not guilty [of a particular count], every one of you must agree that the government has failed to convince you beyond a reasonable doubt.
- (4) Either way, guilty or not guilty, your verdict must be unanimous [as to each count].

#### **Committee Commentary 8.03** (current through March 1, 2023)

Fed. R. Crim. P. 31(a) mandates that jury verdicts in federal criminal trials "shall be unanimous." This also appears to be constitutionally required. *See Johnson v. Louisiana*, 406 U.S. 356, 366-403 (1972) (five justices indicating in dicta that the Sixth Amendment requires unanimous verdicts in federal criminal trials).

Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on the relationship between proof beyond a reasonable doubt and the unanimity requirement. As characterized by the Supreme Court in *In re Winship*, 397 U.S. 358, 363-64 (1970), the reasonable doubt standard plays a "vital" role in our criminal justice system. It is a "prime instrument" for reducing the risk of an erroneous conviction. And it performs the "indispensable" function of "impress[ing] . . . the trier of fact [with] the necessity of reaching a subjective state of certitude [on] the facts in issue."

On the question of whether a specific unanimity instruction is required, see Commentary to Instruction 8.03B Unanimity Not Required – Means.



### **8.03A UNANIMITY OF THEORY**

(No Instruction Recommended.)

#### **Committee Commentary 8.03A** (current through March 1, 2023)

The Committee withdrew this instruction in view of *Richardson v. United States*, 526 U.S. 813 (1999) and *Schad v. Arizona*, 501 U.S. 624 (1991).

Fed.R.Crim.P. 7(c) permits the government to allege in one count of an indictment that "the defendant committed [the offense] by one or more specified means." In *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id.* at 630-33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required.

*Schad* was followed by *Richardson v. United States*, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. *Richardson, supra* at 817, *citing Schad, supra* at 631-32. If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* (citations omitted). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817, *citing Schad v. Arizona, supra*.

Accordingly, the Committee withdrew Instruction 8.03A Unanimity of Theory. In its place is Instruction 8.03B Unanimity Not Required – Means. This instruction covers cases where unanimity is not required because it is alleged the defendant used several possible means to commit a single element of the crime as described in *Schad* and *Richardson*. Instruction 8.03B is discussed in detail in its commentary.

### 8.03B UNANIMITY NOT REQUIRED – MEANS

(1) One more point about the requirement that your verdict must be unanimous. Count \_\_\_ of the indictment accuses the defendant of committing the crime of \_\_\_\_\_ in more than one possible way. The first is that he \_\_\_\_\_. The second is that he \_\_\_\_\_.

(2) The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

#### Use Note

The existence of “multiple factual bases” in a charge warrants a special unanimity instruction where (1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

United States v. Hendrickson, 822 F.3d 812, 823 (6th Cir. 2016) (citations and quotations omitted).

#### Committee Commentary 8.03B (current through March 1, 2023)

In *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring jury unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id.* at 630-33.

*Schad* was followed by *Richardson v. United States*, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999), *citing* *Schad v. Arizona*, *supra* at 631-32 (1991) (plurality opinion). If a fact is an element, “a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it].” *Richardson*, 526 U.S. at 817, *citing* *Johnson v. Louisiana*, 406 U.S. 356, 369-71 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748 (1948); and Fed. R. Crim. Pro. 31(a). On the other hand, if the fact is defined as a means of committing the crime, “a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the

crime.” *Richardson*, 526 U.S. at 817, *citing* *Schad v. Arizona*, *supra* and *Andersen v. United States*, 170 U.S. 481, 499-501 (1898). *See also* *Mathis v. United States*, 136 S.Ct. 2243, 2248-49 (2016) (reiterating this distinction and citing *Schad* and *Richardson*).

This instruction covers situations where the crime charged includes an element that can be committed by multiple means, so jury unanimity on a particular means is not required. The instruction should only be given if the indictment alleges that the defendant committed a single element through more than one means.

The Sixth Circuit has explained:

The existence of multiple factual bases in a charge warrants a special unanimity instruction where (1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

*United States v. Hendrickson*, 822 F.3d 812, 823 (6th Cir. 2016) (*quoting* *United States v. Miller*, 734 F.3d 530, 538–39 (6th Cir. 2013)).

Statutes the courts have analyzed on this point include:

– 18 U.S.C. § 2 (terms listed in § 2 describe various means by which the elements of the crime can be accomplished, and do not require jury unanimity as to each of these terms, *United States v. Davis*, 306 F.3d 398, 414 (6th Cir. 2002)).

– 18 U.S.C. § 111 (harming or threatening a federal officer under § 111(a)(1) states a singular crime which can be committed six ways, *United States v. Kimes*, 246 F.3d 800, 809 (6th Cir. 2001)).

– 18 U.S.C. § 401(3) (where defendant was convicted of criminal contempt for violating a court order, and the indictment contained alternative specifications that defendant violated the order by (1) filing a false return for 2008 and by (2) failing to file amended returns for 2002 and 2003, a specific unanimity instruction was not warranted because the court order was handed down in its entirety all at once and defendant’s actions had a single unifying theme based on faulty legal theories and the specifications were sufficiently related to avoid a risk of serious unfairness, *United States v. Hendrickson*, 822 F.3d 812, 823-24 (6th Cir. 2016)).

– 18 U.S.C. § 666 (theft of government services under § 666 exemplifies an offense which can be committed by a variety of acts, *United States v. Sanderson*, 966 F.2d 184, 188-89 (6th Cir. 1992)).

– 18 U.S.C. § 922(g)(1) (when the indictment charges a felon possessed more than one

firearm, the particular firearm is not an element, but “instead the means used to satisfy the element of ‘any firearm’,” *United States v. DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004)).

– 18 U.S.C. § 924(c) (offenses of possessing, using, or carrying a firearm generally do not require jury unanimity as to a specific gun; this general rule has exceptions which were handled properly with an instruction requiring the jury to agree on “one instance” of firearm possession in furtherance of a drug trafficking crime, *United States v. Steele*, 919 F.3d 965, 973 (6th Cir. 2019)).

– 18 U.S.C. § 1001 (duty to disclose and concealment of material information as alternative ways to prove violation of single offense, *United States v. Zalman*, 870 F.2d 1047, 1055 n.10 (6th Cir. 1989)). *See also* *United States v. Hixon*, 987 F.2d 1261, 1265 (6th Cir. 1993) (three subsections are separate means of committing single offense).

– 18 U.S.C. § 1512(b)(3) (where defendant pressured a witness to conceal facts and to provide false information, omission of a special unanimity instruction was not plain error because the charge of hindering communication of information to a law enforcement officer involved a single element that could be proved by multiple means, and while the statutory term “information” was broad, it raised no risk of serious unfairness in this case, *United States v. Eaton*, 784 F.3d 298, 308-09 (6th Cir. 2015)).

– 18 U.S.C. § 1962(d) (RICO conspiracy does not require unanimity for the particular racketeering acts; court does not resolve whether RICO conspiracy requires unanimity for categories or types of racketeering acts, *United States v. Rios*, 2016 WL 3923881, 18-19 (6th Cir. July 21, 2016)).

– 21 U.S.C. § 848 (the “series of violations” language in the Continuing Criminal Enterprise statute made each individual violation an element, so the jury had to agree unanimously on each violation rather than merely agreeing that there had been a series of violations. *Richardson v. United States*, 526 U.S. 813, 824 (1999)).

*Cf.* 18 U.S.C. § 1425 (“Rather than defining two crimes, [subsections (a) and (b)] provide two means by which unlawful naturalization can be obtained.” *United States v. Damrah*, 412 F.3d 618, 622 (6th Cir. 2005) (analyzing the issue in the context of a duplicity claim)) and 18 U.S.C. § 242 (“[T]he Fourteenth Amendment and Eighth Amendment excessive force standards describe two alternative methods by which one crime could be committed, rather than two crimes.” *U.S. v. Budd*, 496 F.3d 517 (6th Cir. 2007) (analyzing the issue in the context of a constructive amendment claim)).

**8.03C – UNANIMITY REQUIRED: STATUTORY MAXIMUM PENALTY INCREASED  
(CONTROLLED SUBSTANCES: 21 U.S.C. § 841)**

(This instruction has been withdrawn and replaced with Instruction 14.07A.)

## **8.04 DUTY TO DELIBERATE**

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

(3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

### **Use Note**

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury.

### **Committee Commentary 8.04** (current through March 1, 2023)

Case law on a related issue, the *Allen* charge, is discussed in the Commentary to Instruction 9.04.

This instruction is for use before deliberations begin as part of the court's final instructions to the jury. Its content is heavily dependent on cases dealing with post-deliberation *Allen* charges. In *United States v. Sawyers*, 902 F.2d 1217, 1220-21 (6th Cir.1990), the Sixth Circuit said that an *Allen* charge "probably would have its least coercive effect if given along with the rest of the instructions before the jury ever start(s) deliberating."

In *Allen v. United States*, 164 U.S. 492, 501-502 (1896), the district court gave some lengthy supplemental instructions which, as paraphrased by the Supreme Court in its opinion, included the following concepts:

- 1) that in a large proportion of cases absolute certainty could not be expected;
- 2) that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

- 3) that it was their duty to decide the case if they could conscientiously do so;
- 4) that they should listen, with a disposition to be convinced, to each other's arguments;
- 5) that, if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one given that it had made no impression upon the minds of so many equally honest and intelligent persons; and
- 6) that if, on the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The Supreme Court analyzed these supplemental instructions as follows:

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

The Supreme Court noted that these instructions were "taken literally" from instructions approved by the Massachusetts Supreme Court in *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1, 2-3 (1851). The *Tuey* instructions included the following additional concepts, not noted by the Supreme Court in its *Allen* opinion:

- 7) that in order to make a decision more practicable, the law imposes the burden of proof on one party or the other;
- 8) that in a criminal case the burden of proof is on the government to prove every element of the charge beyond a reasonable doubt; and
- 9) that if the jurors are left in doubt as to any element, then the defendant is entitled to the benefit of that doubt and must be acquitted.

The records in the *Allen* case indicate that the actual instruction given by the district court only included a shortened version of these additional concepts. In the course of giving the supplemental instructions, the district court in *Allen* included the following from *Tuey*:

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government." See Records and Briefs, United States Supreme Court, Vol. 829, October Term 1896, *Allen v. United States*, Docket No. 371, Transcript of Record pp. 137-38. Except for one First Circuit decision, *Pugliano v. United States*, 348 F.2d 902, 903-04 (1st Cir. 1965), no cases appear to have noticed or discussed this omission from the Supreme Court's opinion in *Allen*.

Despite substantial judicial and scholarly criticism of *Allen* in the years since it was decided, the Supreme Court reaffirmed *Allen's* constitutional validity in *Lowenfield v. Phelps*,

484 U.S. 231 (1988). Referring to the *Allen* Court's analysis quoted above, the Court said that "[t]he continuing validity of this Court's observations in *Allen* are beyond dispute." *Lowenfield, supra* at 237.

Sixth Circuit decisions have repeatedly emphasized that the instructions approved by the Supreme Court in *Allen* "approach 'the ultimate permissible limits' for a verdict urging instruction." See, e.g., *United States v. Harris*, 391 F.2d 348, 354 (6th Cir. 1968) (quoting *Green v. United States*, 309 F.2d 852, 855 (5th Cir.1962)). "Our . . . circuit has determined that the wording approved at the turn of the century represents, at best, 'the limits beyond which a trial court should not venture in urging a jury to reach a verdict.'" *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) (quoting *Harris, supra* at 354). "Any variation upon the precise language approved in *Allen* imperils the validity of the trial." *Scott, supra* at 337. Accord *Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984); *United States v. Giacalone*, 588 F.2d 1158, 1166 (6th Cir. 1978); *United States v. LaRiche*, 549 F.2d 1088, 1092 (6th Cir. 1977).

Among the more important variations that the Sixth Circuit has criticized or disapproved are the following: 1) statements regarding the expense and burden of conducting a trial, *United States v. Harris, supra*, 391 F.2d at 354 ("questionable extension"); 2) statements that the case must be decided at some time by some jury, *id.* at 355 ("coercive . . . [and] misleading"); 3) omitting statements reminding jurors that they should not surrender an honest belief about the outcome of the case simply because other jurors disagree, *United States v. Scott, supra*, 547 F.2d at 337 ("one of the most important parts of the *Allen* charge"); and 4) statements that juror intransigence would delay the trial of other cases and add to the court's backlog, *Scott, supra* at 337 ("impermissibly coercive").

These and other Sixth Circuit cases provide further guidance regarding the appropriate content of an *Allen* charge. In *United States v. Barnhill*, 305 F.2d 164, 165 (6th Cir. 1962), the district court's supplemental instructions stressed the importance of reaching a verdict, and the duty of each individual juror to listen to the views expressed by the other jurors and to give those views due weight and consideration in attempting to arrive at a verdict. These statements were balanced with a reminder that each juror had the right to his own beliefs, and that if it developed that they could not agree, a mistrial would be declared and the case would be submitted to another jury. The Sixth Circuit affirmed, stating that these instructions "complied with the standards approved ... in *Allen*."

In *United States v. Markey*, 693 F.2d 594, 597 (6th Cir. 1982), the district court concluded its instructions to the jury with the comment that the courthouse would be available the next morning, which was Christmas Eve day, if the jury was not able to reach a consensus that afternoon. The Sixth Circuit affirmed, stating that this comment "was not 'likely to give the jury the impression that it was more important to be quick than to be thoughtful'."

In *United States v. Harris, supra*, 391 F.2d at 355, the Sixth Circuit explained as follows why instructions indicating that the case must be decided at some time by some jury were coercive and misleading:



The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right ... to remain free from the stigma and penalties of a criminal conviction until he has been found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury.

The Sixth Circuit then noted that in *Thaggard v. United States*, 354 F.2d 735, 739 (5th Cir. 1965), the Fifth Circuit had said that, "[An] *Allen* charge should be approved only so long as it 'avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial'."

Harris and subsequent Sixth Circuit cases have said that there is a clear distinction between language stating that the case "must be decided at some time," which is improper, and language stating that the case "must be disposed of at some time," which is not. *Harris, supra* at 356. "The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." *United States v. LaRiche, supra*, 549 F.2d at 1092.

In *Williams v. Parke, supra*, 741 F.2d at 850-52, the Sixth Circuit upheld the defendant's state court conviction against constitutional attack. In rejecting the argument that the state trial court's supplemental instructions violated due process, the Sixth Circuit emphasized that the instructions had not included the criticized language from *Allen* singling out minority jurors. *Id.* at 850. *See also* *Lowenfield v. Phelps, supra*, 484 U.S. at 237-38 (noting same omission in the course of affirming a state court conviction). The Sixth Circuit also emphasized that the trial court's instructions implicitly advised the jurors of their "right to continue disagreeing" by alluding to the possibility that a new jury might be necessary, and by telling them that they should return to court if they could not agree. *Williams, supra* at 850. *See also* *Hyde v. United States*, 225 U.S. 347, 383 (1912) (district court's instruction that it was not the court's intention to unduly prolong the deliberations, and that if the jurors could not conscientiously agree, they would be discharged, eliminated potential coercive effect of other instructions).

In *United States v. LaRiche, supra*, 549 F.2d at 1092-93, the Sixth Circuit rejected the defendant's argument that the district court's *Allen* charge constituted plain error because it did not remind the jurors of the government's burden of proof. But in doing so the Sixth Circuit did say that "it may be desirable for a judge to restate the beyond a reasonable doubt standard in an *Allen* charge." *Id.* at 1093. *See also* *United States v. Lewis*, 651 F.2d 1163, 1165 (6th Cir. 1981) (given the weakness of the evidence against the defendant, and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt).

In *United States v. Giacalone, supra*, 588 F.2d at 1166-67, the Sixth Circuit noted that in *Kawakita v. United States*, 343 U.S. 717 (1952), the Supreme Court implicitly approved an *Allen*

charge which later became the basis for Devitt and Blackmar Instruction 18.14. That instruction, which is intended for use as a supplemental instruction when the jurors fail to agree, states:

The Court wishes to suggest a few thoughts which you may desire to consider in your deliberations, along with the evidence in the case, and all the instructions previously given.

This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

However, 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 you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

In order to bring twelve minds to an unanimous result, you must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment,

which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both court and counsel, including of course the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "NOT GUILTY".

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the government.

Above all, keep constantly in mind that, unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all the time which you may feel is necessary. (The bailiffs have been instructed to take you to your meals at your pleasure, and to take you to your hotel whenever you may be ready to go.)

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women.

In *United States v. Nickerson*, 606 F.2d 156, 158-59 (6th Cir. 1979), the Sixth Circuit concluded that an instruction similar to Devitt and Blackmar Instruction 18.15 was not coercive. *See also* *United States v. Lewis*, supra, 651 F.2d at 1165 (characterizing Devitt and Blackmar Instruction 18.15 as having been "approved" in *Nickerson*). Instruction 18.15 is a milder and shorter version of the Allen charge. It states:

I am going to ask you that you resume your deliberations in an attempt to return a verdict.

As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to individual judgment. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. No

juror, however, should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

The instruction recommended by the Commentary to ABA Standards for Criminal Justice, Trial by Jury Standard 15-4.4, states:

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.

Instruction 8.04 incorporates the best parts of these various instructions in plain English form.

The "every reasonable effort" language in paragraph (1) is essentially a plain English restatement of the language in other instructions that the jurors have a duty to deliberate with a view to reaching an agreement if they can do so without violence to individual judgment.

The "keep an open mind" language in paragraph (1) is patterned after the "open mind" language found in other pattern instructions.

The "try your best" language at the end of paragraph (1) summarizes the "every reasonable effort" theme stated in the first sentence for emphasis.

The "do not ever change your mind" language at the beginning of paragraph (2) is a plain English restatement of the "do not surrender" language found in other instructions. The adverb "ever" was included to provide an appropriate balance to the "do not hesitate" language and the other strong language in the first paragraph encouraging jurors to reach agreement.

The "just because other jurors see things differently" language, and the "just to get it over with language," in paragraph (2) is a plain English restatement of language in other instructions. See Federal Judicial Center Instruction 10.

The "your own vote" language in paragraph (2) is a plain English restatement of the language in other instructions that the verdict must represent the considered judgment of each

juror. The "only if you can do so honestly and in good conscience" language is drawn from the 1985 version of Ninth Circuit Instruction 7.01.

Paragraph (3) tells the jurors that no one will be allowed to hear their deliberations and that no record will be made of what they say. It is based on concepts included in Federal Judicial Center Instruction 9.

Paragraph (4) summarizes the deliberation process and relates it to the government's burden of proof. This approach is consistent with the concluding sentences recommended by Federal Judicial Center Instruction 10. It rejects the "seek the truth" language found in other instructions for the reasons more fully explained in the Committee Commentary to Instruction 1.02. Such language incorrectly assumes that the "truth" is somewhere in the evidence presented, overlooks the possibility that the proofs do not satisfactorily establish the truth one way or the other, and thereby shifts attention away from the government's obligation to convince the jury beyond a reasonable doubt. *But see* United States v. LaRiche, *supra*, 549 F.2d at 1093 (rejecting the defendant's argument that such language distorts the jury's function and dilutes the government's burden of proof).

## **8.05 PUNISHMENT**

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

### **Committee Commentary 8.05** (current through March 1, 2023)

It is standard practice to include an instruction telling the jurors that if they find the defendant guilty, it is the judge's job to determine the appropriate punishment, and that they cannot consider what the possible punishment might be in deciding their verdict.

The Sixth Circuit cited this instruction and quoted paragraph (2) in support of its conclusion on an issue involving cross-examination on penalties in *United States v. Bilderbeck*, 163 F.3d 971, 978 (6th Cir. 1999).

This instruction remains appropriate in cases involving a verdict of not guilty by reason of insanity in the wake of *Shannon v. United States*, 512 U.S. 573 (1994). That decision is discussed in detail in the Commentary to Pattern Instruction 6.04 on the insanity defense.

## 8.06 VERDICT FORM

(1) I have prepared a verdict form that you should use to record your verdict. The form reads as follows: \_\_\_\_\_.

(2) If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it, and return it to me.

### Use Note

The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

### Committee Commentary 8.06 (current through March 1, 2023)

Many pattern instructions include an explanation to the jurors about how to use the verdict form, either as part of a general instruction on deliberations or as a separate instruction.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" when this approach is preferred.

In *United States v. Escobar-Garcia*, 893 F.2d 124, 126 (6th Cir. 1990), in a prosecution for illegal entry to the United States under 8 U.S.C. § 1326, the Sixth Circuit noted that exigent circumstances may arise to justify using special interrogatories to the jury but cautioned against using them in the interest of judicial economy. Subsequent cases have established that special interrogatories are proper to satisfy the Sixth Amendment right to jury trial. *See, e.g.*, Instructions 14.07A and 14.07B, which recommend the use of special verdict forms to satisfy the requirements of *Appendi v. New Jersey*, 530 U.S. 466 (2000).

## **8.07 LESSER OFFENSE, ORDER OF DELIBERATIONS, VERDICT FORM**

- (1) As I explained to you earlier, the charge of \_\_\_\_\_ includes the lesser charge of \_\_\_\_\_.
- (2) If you find the defendant not guilty of \_\_\_\_\_ [or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree], then you must go on to consider whether the government has proved the lesser charge of \_\_\_\_\_.
- (3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

### **Use Note**

The bracketed language in paragraph (2) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

The bracketed language in the last sentence of paragraph (3) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

### **Committee Commentary 8.07** (current through March 1, 2023)

This instruction explains the order and manner in which greater and lesser offenses should be considered. Lesser included offenses are defined in Pattern Instruction 2.03.

One issue is whether the jury should be allowed to consider a lesser offense only after it agrees unanimously the defendant is not guilty of the greater offense, or whether it may also consider a lesser offense if it is unable to reach agreement on the greater offense. The "every reasonable effort" language in brackets in paragraph (2) is included as an option so the district court may in its discretion use either approach. No Supreme Court or Sixth Circuit authority compels one approach over the other. A panel of the Sixth Circuit has held that it was not error for the district judge to omit the "every reasonable effort" language in the paragraph (2) brackets. In *United States v. Amey*, 1995 WL 696680, 1995 U.S. App. LEXIS 35527 (6th Cir. 1995) (unpublished), the district court instructed the jury on lesser included offenses using an instruction substantially similar to Pattern Instruction 8.07 but omitting the bracketed language on "every reasonable effort" in paragraph (2). A panel of the Sixth Circuit affirmed the decision, explaining:

We note, first, that the defendant's requested "reasonable efforts" instruction, if given in this case would not have constituted error. See, e.g., *United States v. Tsanas*, 572 F.2d at 346 ("we cannot say either form of instruction is wrong as a matter of law"); Sixth Circuit



District Judges Association, Pattern Criminal Jury Instructions section 8.07, Committee Commentary (1991 ed.) (“the Committee takes no position on which approach should be used”). However, given what even Tsanas recognizes to be the speculative advantages to be gained by a defendant from a “reasonable efforts” instruction, we conclude that the failure to give that instruction also cannot be held to constitute error. We thus decline to reverse the conviction.

*Amey*, 1995 WL at 5, 1995 U.S. App. LEXIS at 14-15.

Case law in other circuits indicates that neither of the options is legally incorrect, and that the district court may choose between them as the court sees fit, unless the defendant objects, in which case the court should give whichever option the defendant elects. *See United States v. Jackson*, 726 F.2d 1466, 1469-70 (9th Cir.1984).

Giving the defendant the right to elect the option to be given is based on the Second Circuit's decision in *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978). In his opinion for the Court in *Tsanas*, Judge Friendly explained that the two available options had advantages and disadvantages for both the prosecution and the defense. With regard to the option that requires the jury to unanimously find the defendant not guilty of the greater offense before moving on to consider a lesser offense, he first described its advantages:

[This] instruction . . . has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree.<sup>7</sup>

7. It might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid reprosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, such a reprosecution apparently is barred by the double jeopardy clause regardless of the form of instruction. *See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

*Tsanas*, *supra* at 346.

He then went on to describe the disadvantages of such an instruction:

But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the

defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.

*Id.* at 346.

With regard to the option that allows the jury to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense, Judge Friendly said:

An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides--the mirror images of those associated with the [option discussed above]. It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser.

*Id.*

He then concluded as follows:

With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is his readier conviction for a lesser rather than a greater crime. As was said in *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), albeit in a different context: It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

*Id.*

In *United States v. Jackson*, *supra*, 726 F.2d at 1469-70, the Ninth Circuit found this reasoning persuasive, and joined the Second Circuit in holding that the district court should give whichever option the defendant elects. In addition to the reasons advanced by Judge Friendly, the Ninth Circuit argued that this approach "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." The Ninth Circuit explained that if the jury must unanimously agree on a not guilty verdict on the greater offense before moving on to a lesser, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. *See also Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978) (referring to Judge Friendly's opinion in *Tsanas* as a "well-reasoned rule").

The bracketed language in paragraph (2) allows the district court to use either approach. If the district court believes that the jurors may move on to consider a lesser offense even if they cannot unanimously agree on a verdict on the greater charge, the bracketed language should be added to the unbracketed language used in paragraph (2). If the court believes that this concept is not appropriate, the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence should be used instead of "Your foreperson" when this approach is preferred.

## **8.08 VERDICT LIMITED TO CHARGES AGAINST THIS DEFENDANT**

(1) Remember that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges which I described]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

[(2) Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.]

### **Use Note**

Any changes made in paragraphs (1) and (2) should be made in paragraphs (2) and (3) of Instruction 2.01 as well.

Bracketed paragraph (2) should be included if the possible guilt of others has been raised as an issue during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

### **Committee Commentary 8.08** (current through March 1, 2023)

The purpose of this instruction is twofold. The first purpose is to remind the jurors that their verdict is limited to the particular charge made against the defendant. The second is to remind them that their verdict is limited to the particular defendant who has been charged. The instruction is a plain English restatement of various concepts found in comparable instructions.

Paragraph (2) should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases the jury may be required to decide the guilt of other persons not charged in the indictment. Paragraph (2) may also require modification in cases in which the defendant has raised an alibi defense or has argued mistaken identification. Where the defendant claims that someone else committed crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (1) and (2) are also covered in Instruction 2.01. Corresponding deletions or modifications should be made there as well.

## **8.09 COURT HAS NO OPINION**

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

### **Committee Commentary 8.09** (current through March 1, 2023)

A panel of the Sixth Circuit has suggested that giving this instruction may help avoid error if the district judge questions the witnesses. In *United States v. Voyles*, 1993 WL 272448, 1993 U.S. App. LEXIS 19381 (6th Cir. 1993) (unpublished), the panel concluded that the questions the district judge asked witnesses during the trial were within the judge's authority and did not require the conviction to be reversed. In support of this conclusion, the panel noted that the district judge gave Pattern Instruction 8.09. *Voyles*, 1993 WL at 4, 1993 U.S. App. LEXIS at 11.

Similarly, a panel of the Sixth Circuit found no error in comments the judge made to the jury, in part because the district court gave an instruction identical to Pattern Instruction 8.09. In *United States v. Frye*, 2000 WL 32029, 2000 U.S. App. LEXIS 446 (6th Cir. 2000) (unpublished), the district court told the jury during voir dire that the court had approved the wire-tap used in the case. A panel of the Sixth Circuit found no error in refusing to strike the jury venire because of the comment and explained, "Due to the innocuous nature of the comment made to the jury, and based upon the curative instruction given by the court, it cannot be said that Frye was harmed to such an extent that reversal of the conviction is warranted." *Frye*, 2000 WL at 3, 2000 U.S. App. LEXIS at 8-9, *citing* *United States v. Mosely*, 810 F.2d 93, 99 (6th Cir. 1987).

## **8.10 JUROR NOTES**

(1) Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

### **Use Note**

If note-taking is permitted, the court should also give a preliminary instruction on juror note-taking.

### **Committee Commentary** (current through March 1, 2023)

In *United States v. Johnson*, 584 F.2d 148 (6th Cir. 1978), the Sixth Circuit held that it was within the sound discretion of the trial court to allow the jury to take notes during the course of trial and use them in deliberations. *Id.* at 157. The Sixth Circuit particularly noted that allowing the jury to take notes during the course of trial is appropriate where numerous defendants are charged in a multi-count indictment. *Id.* at 158. The Committee recognizes the common practice of allowing the jury to take notes, especially in complex cases. This instruction is designed to accommodate that practice.

The language of the first paragraph is based upon the last two paragraphs of Eleventh Circuit Trial Instruction 2.1 (1997 ed.). The language of the second paragraph is based upon language in Fifth Circuit Pattern Instruction 1.02, Alternative B (2001 ed.).