

JURY NOTE ESSENTIALS

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I. GENERAL PRINCIPLES:

A. Defendants' Rights to be Present and to be Heard:

1. Rights to Be Present and to Be Heard under Rule 43 and Due Process Clause

A defendant has the right to be informed of the substance of all communications from the jury and has a right to be heard before the court provides a response. See Super. Ct. Crim. R. 43; Rogers v. United States, 422 U.S. 35 (1975) (right to be present under Fed. R. Crim. P. 43); Hallmon v. United States, 722 A.2d 26, 27-28 (D.C. 1998) (“With respect to notes to and from the jury, this court has consistently held that a defendant and his counsel have the right to be informed of all communications from the jury and to offer their reactions before the trial judge undertakes to respond”); see also Johnson v. United States, 804 A.2d 297, 306 (D.C. 2002) (quoting Hallmon); Smith v. United States, 542 A.2d 823, 826 (D.C. 1988) (reversible error where court refused to allow defense counsel to read notes from jury and instead told them that it would put the notes in the record and counsel would be able to see them “in due course”); Wilson v. United States, 419 A.2d 353, 356 (D.C. 1980) (“Before responding to a communication from a jury, the court should inform the accused and his counsel and permit them to state their position.”); Roberts v. United States, 402 A.2d 441 (D.C. 1979) (reversible error for the trial judge, outside of the presence of defendants, to receive and respond to a note from the jury); cf. United States v. United States Gypsum Co., 438 U.S. 422, 460 (1978) (discussing the “hazards of *ex parte* communications with a deliberating jury or any of its members”)

[NB: The right to be present is a personal right that may be violated even if counsel is present without the defendant. See Harris v. United States, 489 A.2d 464, 470 n.5 (1985)(presence of counsel considered in assessment of prejudice). Likewise, a defendant’s right to be present encompasses his right to have counsel present to advocate for him. See Allen v. United States, 649 A.2d 548, 556 (D.C. 1994) (error for court to respond to jury note while defendant was in courtroom, but defendant’s counsel was absent).]

The violation of a defendant’s right to be present when the court receives and responds to jury notes should be argued not only as a violation of Rule 43 but also as a violation of a defendant’s constitutional rights. See Wade v. United States, 441 F.2d 1046 at 1049 & n. 10 (D.C. Cir. 1971) (suggesting without deciding that Federal Rule 43 incorporates constitutional safeguards at reinstruction stage); Hazel v. United States, 599 A.2d 38 (1991) (the right to presence for reinstruction under Rule 43 “is arguably reflective of a protection of the Due Process Clause of the Fifth Amendment requiring constitutional “knowing and intelligent waiver” by the defendant); Winestock v. United States, 429 A.2d 519, 528 (D.C. 1981) (right to be present at all stages of the trial is of “constitutional dimension”); Cf. Kimes v. United States, 569 A.2d 104, 108, 110 (D.C. 1989) (defendant constitutionally guaranteed personal right to presence at “any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure”) (internal quotation and citation omitted).

2. Rights to presence & to be heard not absolute

A defendant's rights to be present and to be heard is not absolute. For example, a defendant may not have a right to presence either under Rule 43 or under the Due Process Clause for the mere transmittal of evidence or a readback of testimony to the jury. See, e.g., McConnaughey v. United States, 804 A.2d 334, 341 (D.C. 2002) (mere transmittal of evidence to jury, without more, not a communication; thus no right to be present); Harris v. United States, 489 A.2d 464, 467-68 (D.C. 1985) (no error where defendant was not present for readback of testimony to jury); Quarles v. United States, 349 A.2d 690, 692 (D.C. 1975) (where no "unusual circumstances" were presented, no right to be present for transmittal to jury of photographs admitted into evidence).

[NB: Arguably, these cases were incorrectly decided on the basis of whether the defendant had a right to be present rather than on the basis of whether the violation of this right was prejudicial (see infra). A defendant should have a right to be present when a court reads and responds to jury notes. It is of no significance that the defendant has no ability to contribute to the proceedings -- he has the right to be present "at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure." Kimes v. United States, 569 A.2d 104, 108 (D.C. 1989) (pursuant to Rule 43 and the Due Process Clause, defendant had a right to be present at the return of the jury's verdict)].

A defendant may waive his right to be present. Cf. Wade, 441 F.2d at 1050 (right to presence during response to jury questions not waived where defendant was not instructed to remain available during deliberations).

3. Violation of the Rights to Be Present and to Be Heard may be Harmless

Abrogation of a defendant's rights to be present and to be heard may be deemed harmless error. Rogers v. United States, 422 U.S. 35, 40 (1975) (violation of Fed. R. Crim. P. 43 may be deemed harmless error); Smith v. United States, 389 A.2d 1356 (1978) (violation of right to be present under Super. Ct. Crim. R. 43 may be deemed harmless error). In making the determination if the violation of defendant's right to be present was harmless in the context of jury notes, the Court should consider both "the nature of the information conveyed to the jury" and "the manner in which it was conveyed." Rogers, 422 U.S. at 40 (error not harmless where court's response to jury note in defendant's absence may have improperly induced the jury to reach a compromise verdict and where court did not inform counsel that it had unilaterally communicated with the jury); cf. Hallmon v. United States, 722 A.2d 26, 27 (D.C. 1998) (violation of right to presence harmless where jury's request for a written copy of the instructions did not "concern a substantive matter in the case" and jury was told that "any part of the instruction' could be re-read in open court upon request"); Hazel v. United States, 599 A.2d 38, 47 (D.C. 1991) (where defendant was present for receipt and discussion of jury note, but agreed upon reinstruction was delivered in defendant's absence violation of right to presence harmless error because "reinstruction was an entirely mechanical process, which might just as well have been sent to the jury in writing").

B. Court's duties:

1. Duty to read & respond to notes in timely fashion

The court has broad discretion in determining whether and how to respond to a jury note, Davis v. United States, 510 A.2d 1051, 1052-53 (D.C. 1986); Murchison v. United States, 486 A.2d 77, 83 (D.C. 1984), but there are limits. Apart from the court's duty to instruct the jury adequately on the law and clarify any apparent confusion the jury has about the law (see I.B.2&3 below), the court:

a. *cannot choose not to read jury notes.* Foster v. George Washington Univ. Med. Ctr., 738 A.2d 791, 797 (D.C. 1999) (error for court to return note to jury without reading its contents).

b. *cannot delegate its duty to instruct the jury to anyone else.* Thus, when a response to a jury note is provided, the judge, not the clerk, must deliver that response. "In matters of substance, including the response to virtually any jury note during deliberations, the clerk should not be expected to act as oral messenger." Foster v. George Washington Univ. Med. Ctr., 738 A.2d 791, 796-98 (D.C. 1999) (improper for clerk to pass on to jury the judge's command that they rewrite the note; "judge's decision to have the clerk address the jury created a risk of miscommunication even of as seemingly uncomplicated a directive"); see also Hallmon v. United States, 722 A.2d 26, 27 (D.C. 1998) (improper for clerk to respond directly to note from the jury).

c. *must deliver the supplemental instruction (assuming it is warranted) in a timely fashion*, and the court certainly should not permit the jury to render a verdict before reinstruction is provided. See Bollenbach v. United States, 326 U.S. 607, 613-14 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue."); Alcindore v. United States, 818 A.2d 152, 159 n.11 (D.C. 2003) (where jury indicated its confusion in note also stating that it had reached a verdict, error for court to accept verdict; court should have reinstructed jury and sent it back to deliberate); cf. Coleman v. United States, 779 A.2d 297 (D.C. 1994) (immediate clarifying instruction required where Drew evidence improperly admitted at trial to check juror misuse). Of course, where a jury has expressed its confusion, the fact that it then announces that it has reached a verdict does not mean that supplemental instruction is no longer needed. See Potter v. United States, 534 A.2d 943, 946 (D.C. 1987) (no way to tell if jury has resolved its confusion correctly).

2. Court's discretion re: whether and how to respond to jury notes bounded by duty to give jury adequate guidance about applicable law.

Notwithstanding a court's broad discretion in deciding whether and how to respond to jury notes, a court may not refuse to respond to a jury note where the jury demonstrates that it needs more information about key legal principles. See Zeledon v. United States, 770 A.2d 972 (D.C. 2001) (reversible error where jury asked for legal definition of key element of

crime charged and court refused to give definition, but instead told jury that it was up to them to decide); Potter v. United States, 534 A.2d 943, 946 (D.C. 1987) (where “jury shows confusion about a central aspect of applicable law, and the general instruction did not provide the legal information needed, reversible error occurs where the court does not respond to the jury’s note”).

Of course, where the court provides the jury with supplemental instruction to clarify the jury’s confusion about the law, the court must correctly articulate the applicable legal principles. See Bollenbach v. United States, 326 U.S. 607, 613-14 (1946) (noting that “it is the judge’s special business to guide the jury through the maze of facts before it,” and rejecting the argument that a “lay jury will know enough to disregard the judge’s bad law if in fact he misguides them”); Thomas v. United States, 806 A.2d 626 (D.C. 2002) (reversible error where, in response to jury note, court instructed jury that it could find defendant guilty on theory unsupported by the evidence).

3. Duty to respond so as to remedy confusion

Where the jury “explicit[ly]” reveals its confusion on an issue, the court must clarify its instruction “with concrete accuracy.” Bollenbach v. United States, 326 U.S. 607, 612-13 (1946) (emphasis added); see also Alcindore v. United States, 818 A.2d 152, 155 (D.C. 2003) (“When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist; it must respond appropriately”); Whitaker v. United States, 617 A.2d 499, 501 (D.C. 1992) (“Where a jury has demonstrated confusion, the trial judge may not allow that confusion to continue, but must make an appropriate and effective response.”).

[Note: The court’s duty to clarify the jury’s confusion is not contingent on the jurors acknowledging their confusion. The jury “may not realize that they are lost, and they may still be lost. They will continue to be lost until they realize their situation or until someone informs them of it.” Whitaker v. United States, 617 A.2d 499, 502 (D.C. 1992).]

The court may ask the jury to clarify its inquiry. See Potter v. United States, 534 A.2d 943, 946 (D.C. 1987) (“where jury’s note is ambiguous, the court is not required to answer it without seeking clarification”); Murchison v. United States, 486 A.2d 77 (D.C. 1984) (prudent for court to return note to jury and request clarification).

The court may go beyond the limits of the jury’s request to avoid giving misleading or one-sided answer. See United States v. Laing, 889 F.2d 281, 290 (D.C. Cir. 1989); Wright & Miller, 2A Federal Practice and Procedure § 502 (3d ed.) (court is not bound to format of jury’s inquiry).

The court is not bound by the standard instruction in crafting response. See United States v. Bolden, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975) (standard instruction sufficient in first instance, but “jury’s request called for further explanation of the law on this point”); Roberts v. United States, 402 A.2d 441 (1979) (court erred when, in response to jury note, it

essentially repeated its initial instruction; although the instruction was technically correct, under the circumstances it was “confusing, and it fell short of adequately meeting the jury's request”); Coreas v. United States, 565 A.2d 594 (D.C. 1989) (court erroneously believed that it could not modify its initial instruction when re-instructing the jury) see also McDowell v. Calderon, 130 F.3d 833, 839-40 & n.3 (9th Cir. 1997) (en banc) (jury instructions “do not come down from any mountain or up from any sea,” but rather may be elaborated upon where necessary; here, referring jurors to original instructions inappropriate under the circumstances); United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989) (“When a jury indicates confusion about an important legal issue, it is not sufficient for the court to rely on more general statements in its prior charge.”).

The fact that initial instruction was clear, does not obviate duty to re-instruct where jury demonstrates confusion. See, e.g., Alcindore v. United States, 818 A.2d 152, 157-158 (D.C. 2003) (where, as counsel conceded, court’s original instructions were clear, trial court still obligated to re-instruct the jury after note revealed confusion).

4. Duty to respond in balanced fashion

The Court’s response to a jury note must be neutral and balanced. See Bates v. United States, 2003 WL 22410645, at *6 (D.C. Oct. 23, 2003) (in responding to jury note, court should “strive to achieve the ideal of a neutral, balanced instruction”) (internal quotations and citation omitted); Hill v. United States, 627 A.2d 975, 980 (D.C. 1993) (“We have reminded trial judges that they must be ‘especially alert not to send the jury back to resume deliberations having most recently heard supplemental instructions which are unbalanced.’”) (quoting Davis v. United States, 510 A.2d 1051, 1053 (D.C. 1986); cf. Bouknight v. United States, 641 A.2d 857, 860 (D.C. 1994) (no error where supplemental instruction in response to jury note was “balanced on its face”).

A jury may place special emphasis on a supplemental charge, among other reasons, because of its recency and because it is delivered apart from the other instructions. See Bollenbach v. United States, 326 U.S. 607, 612 (acknowledging that “in a criminal trial, the judge’s last word is apt to be the decisive word”). Accordingly, “the better practice” in re-instructing the jury “is for the trial judge to remind the jury during reinstruction that what they are hearing is but a part of the total charge.” Davis, 510 A.2d at 1053.

[NOTE: The question of whether an instruction is balanced often arises where the jury asks for reinstruction on the elements of the offense and counsel requests reinstruction on self-defense as well. D.C. law concerning a court’s obligation under such circumstances is unclear. On the one hand, the Court of Appeals has held in a number of cases that a court’s refusal to reinstruct on self-defense in the context of reinstructing on the substantive offense is not an abuse of discretion. See, e.g., Robinson v. United States, 642 A.2d 1306, 1311-12 (D.C. 1994); Swanson v. United States, 602 A.2d 1102, 1106 (1992); Davis v. United States, 510 A.2d 1051, 1053 (1986). On the other hand, the Court has also stated that there is a “preference” for reinstructing the jury on self-defense when reinstructing on the substantive defense. Swanson, 602 A.2d at 1107 n.11; see also Coreas v. United States, 565 A.2d 594, 599

(1989) (reversing on another issue but noting that court’s failure to reinstruct on self-defense was suspect because “[w]hen the reinstructions refer only to the elements that compose the offense or offenses charged, the jury may be unduly persuaded by what it has heard the trial judge instruct upon last”).

C. Preservation

1. Counsel must specifically preserve errors regarding jury notes.

Rule 30 of the Superior Court criminal rules applies to reinstructions given by the trial court after the jury has begun deliberations. See Robinson v. United States, 649 A.2d 584, 586 (D.C. 1994). Counsel must object to reinstructions before the jury resumes deliberations. Id. Counsel must also

state ‘distinctly the matter to which [he] objects and the grounds of the objection. Super. Ct. Crim. R. 30. In other words, objections to jury instructions must be specific enough to direct the judge’s attention to the correct rule of law; a party’s request for jury instructions must be made with sufficient precision to indicate distinctly the party’s thesis.

Russell v. United States, 698 A.2d 1007, 1011 (D.C. 1997); see also Zeledon v. United States, 770 A.2d 972, 974 (D.C. 2001) (quoting Russell). This is not to say that counsel must perfectly articulate the correct instruction in order to preserve the error for review. See Whitaker v. United States, 617 A.2d 499, 507-08 (D.C. 1992) (explaining that even an “arguably inaccurate” proposed charge may be sufficient to direct the judge’s attention the controlling legal principles at issue). To the contrary, “to deny all relief unless counsel, on the spur of the moment, has dotted all of his i’s and crossed all of his t’s would be to allow the tail to wag the dog.” Id. at 508.

2. Focus is on instruction as a whole:

Where the error is in the content of instruction, Counsel should specify how the error was prejudicial to the defendant when the instructions are examined as a whole. See United States v. Murchison, 486 A.2d 77, 82 (1984) (Court of Appeals looks to jury instructions as a whole to determine prejudicial error). But counsel may nonetheless argue that a court’s erroneous response to a jury note is especially problematic because it was delivered apart from the jury’s other instructions and because it constitutes the court’s “last word” on the law. See Bollenbach v. United States, 326 U.S. 607, 612 (acknowledging that “in a criminal trial, the judge’s last word is apt to be the decisive word” and that where the court makes “a specific ruling on a vital issue [that is] misleading, the error is not cured by a prior unexceptional and unilluminating, abstract charge.”).

D. Other Concerns when Communicating with the jury

1. Secrecy of deliberations:

The Court must take care to preserve secrecy of deliberations when communicating with the jury. See Brown v. United States, 818 A.2d 179, 185 (D.C. 2003); United States v. Shotikare, 779 A.2d 335, 345 (D.C. 2001).

2. Oral Communications:

It is not improper for the court to respond to oral questions from individual jurors in open court, however, “trial courts should be cognizant of the potential risks presented by an individual colloquy and by responding to questions other than those formally propounded in writing through the foreperson, such as the risk that permitting and responding to individual jurors could lead to the disclosure of numerical jury division and later allegations of a coerced verdict.” Barnes v. United States, 822 A.2d 1090, 1092 n.5 (D.C. 2003); see also United States v. United States Gypsum Co., 438 U.S. 422, 460 (1978) (disapproving of oral communications between the court and jurors because “[u]nexpected questions or comments can generate unintended and misleading impressions of the judge’s subjective personal views which have no place in his instruction to the jury”).

II. JURY NOTES RAISING SPECIFIC ISSUES:

A. Reasonable Doubt

A trial court should not deviate from the standard reasonable doubt instruction found in the Criminal Jury Instructions for the District of Columbia, Instruction 2.09, which was adopted by the en banc Court of Appeals in Smith v. United States, 709 A.2d 78, 82 (D.C. 1998) (en banc). Having gone to the effort of approving a standard instruction, the en banc court in Smith admonished trial courts “in the strongest terms” to “resist the temptation to stray from, or embellish upon, that instruction”; id.:

Given the great risks to the integrity of the trial which attend a deficient reasonable doubt instruction, the uncertainties and controversies generated by varying definitions, and the importance of fairness and the appearance of fairness in our justice system, the greater part of wisdom would dictate that the trial court give the standard instruction approved here, which has been determined to be faithful to the constitutional meaning of reasonable doubt.

Id. at 82-83; see also Butler v. United States, 646 A.2d 331, 337 (D.C. 1994) (emphatically urging trial courts not to “tinker” with the previous version of the reasonable doubt instruction and declaring that “for purposes of analysis in the future we shall consider trial court deviations from that instruction, over defense objection, to be improper – indeed, presumptively erroneous To repeat, this instructional area is not one where trial courts

are likely to find this Court receptive to experiment. The consequences of doing so are likely to be prejudicial to the administration of justice.”).

B. Possibility of non-unanimous, composite or “patchwork” verdict

The Sixth Amendment requirement of unanimous verdict requires that jury be in “substantial agreement as to just what defendant did as a step preliminary to determining whether that defendant is guilty of the crime charged.” Murchison v. United States, 486 A.2d 77, 83 (D.C. 1984). Thus, where the jury indicates confusion about the factual basis for the crime charged, the court should provide adequate clarification. See United States v. Duncan, 850 F.2d 1104, 1113-14 (6th Cir. 1988) (reversible error where trial court failed to give special unanimity instruction: Where it appears that a conviction “may occur as the result of different jurors concluding that the defendant committed different acts,” the court “must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts.”); cf. Simms v. United States, 634 A.2d 442, 446 (D.C. 1993) (special unanimity instruction not warranted where there was no “indication of jury confusion, such as a note from the jury during deliberations”).

C. Possibility of Inconsistent Verdict or Verdict Contrary to the law

1. Note suggesting inconsistent verdict on multiple counts

Where a jury indicates in a note that it is ready to return a verdict on the counts charged that would be logically inconsistent, the court must clarify the jury’s apparent confusion. Whitaker v. United States, 617 A.2d 499, 502 (D.C. 1992) (clarification required where court had instructed jury that it could only find defendant guilty of PFCV if it found the defendant guilty of ADW, and jury later indicated in note that it had reached a verdict on PFCV but was unable to reach a verdict on ADW). The fact that inconsistency alone is not a basis for reversal on appeal does not relieve the court of its duty to clarify the jurors’ confusion when presented with the opportunity. Id. at 502-503. Rather, courts must still take “reasonable measures to avert such inconsistency” when it appears that the jurors are contemplating an inconsistent verdict. Id. at 503; but see Smith v. United States, 684 A.2d 307, 310-12 (D.C. 1996) (distinguishing Whitaker).

2. Note suggesting verdict inconsistent with jury’s factual findings

The defense is entitled to re-instruction where the jury indicates through a note that its factual findings and its legal conclusions are logically inconsistent. See Alcindore v. United States, 818 A.2d 152, 158 (D.C. 2003) (where jury indicated it had determined that the defendant believed he was acting in self-defense but that it still had to find the defendant guilty of the crimes charged, re-instruction required to prevent jury from rendering a verdict that was inconsistent with the court’s instructions and the law).

3. Note suggesting verdict based on legally insufficient evidence

The defense is entitled to re-instruction where the jury indicates that it is contemplating a verdict based on a theory of the case that is not supported by legally sufficient evidence. See Thomas v. United States, 806 A.2d 626, 629-30 (D.C. 2002) (reversal required where jury note indicated that jury was contemplating a verdict based on a theory of joint constructive possession of a weapon, the prosecution had not presented sufficient evidence to support this theory, and the court did not re-instruct the jury that it could not base its verdict on this theory).

4. Note giving rise to the possibility of compromise verdict

A court should not respond to a jury note in a way that encourages a compromise verdict. See United States v. Patrick, 494 F.2d 1150 (D.C. Cir. 1974) (error for court to instruct jury in response to jury note that it could recommend psychiatric treatment in verdict, where it appeared jury was attempting to reach a compromise verdict in light of prior note indicating that jury was divided ten to two); Jones v. United States, 544 A.2d 1250 (D.C. 1988) (reversible error where jury indicated it was deadlocked on greater offense and asked if it could render a verdict on lesser included, and court instructed jury had to acquit on greater offense before it considered lesser included; court's instruction created too great a risk of a compromise verdict).

D. Lack of Evidence

If a jury questions whether it may consider the lack of evidence of defendant's guilt, the court should clarify that the absence of evidence is a legitimate consideration in rendering a verdict. Cf. Greer v. United States, 697 A.2d 1207, 1212 (D.C. 1997) (error for court to instruct the jury that it could not base its verdict "on the evidence that has not been presented" because "[a] defendant is entitled to have the jury consider the lack of corroborating evidence in the judge's case."); Smith v. United States, 709 A.2d 78, 82 (D.C. 1998) (en banc) (endorsing standard reasonable doubt instruction which provides that a reasonable doubt may be based on a "lack of evidence").

E. Requests to review testimony

"A trial judge has broad discretion in deciding whether to have testimony reread to the jury." Harris v. United States, 489 A.2d 464, 467 (1985) (no error where court granted jury's request for read back of testimony of two police officers, but denied defense counsel's request to include in read back testimony of third police officer who arguably contradicted the other two). The court may instruct the jury to rely on own recollection. See Kleinbart v. United States, 426 A.2d 343, 355-56 (D.C. 1981).

F. Requests for new/supplemental evidence

Whenever a jury's request for new or supplemental evidence is granted, the court must reopen the case to allow counsel to make argument about the significance of the newly admitted

evidence: [T]o allow the jury to view a significant piece of evidence without granting the parties an opportunity to dispute the significance of the evidence is an unfair infringement on the right of the parties to present arguments regarding all of the evidence in the case.” Barron v. United States, 818 A.2d 987 (D.C. 2003); *see also* United States v. Santana, 175 F.3d 57 (1st Cir. 1999) (reversible error where court granted jury’s request to view defendant’s ears, which had been covered by headphones used for translation during the trial; ears were extrinsic information not properly admitted at trial); Washington v. United States, 379 F.2d 166, 168 (D.C. Cir. 1967) (reversible error where, in response to deliberating jury’s request, court provided jury with a weather report on the date of the crime and “defendant had no practical opportunity to refute the implications of the report or to set it in perspective”).

G. Requests for Clarification of Facts

The court should avoid answering the jury’s questions about the facts presented at trial. *See* United States v. White Horse, 316 F.3d 769, 776 (8th Cir. 2003) (“it is especially important that a trial court not instruct a jury on the facts, even if they are not disputed”); *cf.* Prezzi v. United States, 62 A.2d 196 (D.C. 1948) (reversible error “where it appears probable that a trial court has by comment invaded the fact-finding function of the jury”)

And the court should on no account answer any fact questions as to which no evidence has been adduced at trial. *See* Washington v. United States, 379 F.2d 166 (D.C. Cir. 1967) (reversible error where, in response to deliberating jury’s request, court provided jury with a weather report on the date of the crime)

H. Requests to view the scene/evidence outside of the courtroom

“A jury view is proper when an ‘object in question cannot be produced in court because it is immovable or inconvenient’ and therefore, it is necessary for the fact-finder ‘to go to the object in its place and there observe it.’” Barron v. United States, 818 A.2d 987, 990 (D.C. 2003) (quoting Dailey v. District of Columbia, 554 A.2d 339, 340-41 (D.C. 1989) (quoting Wigmore).

Jury views constitute evidence. *See* Barron, 818 A.2d at 991-92 (rejecting traditional argument that jury views are merely a tool to evaluate evidence, and do not constitute evidence themselves). As such, where a view is granted during deliberations, the court must reopen the case and permit counsel the opportunity to argue about the significance of the jury view. *Id.* at 992.

I. Problem juror/juror misconduct

The court has duty to inquire into problems with deliberations that are revealed in jury notes. *See e.g.*, Brown v. United States, 818 A.2d 179, 185-87 (D.C. 2003) (inquiry warranted where court learned that juror was refusing to deliberate and was using trial as a forum to protest the treatment of the District of Columbia at the hands of the federal government); Shotikare v. United States, 779 A.2d 335, 344-45 (D.C. 2001) (inquiry required where court learned that a juror had threatened to assault another juror, and had paralyzed deliberations because the other jurors were afraid of her). If such an inquiry reveals that a juror is refusing to follow the

applicable law, the court has both the “authority and responsibility” to dismiss that juror. Brown, 818 A.2d at 185.

In investigating juror misconduct during deliberations, court must make every effort not to disturb the secrecy of deliberations, which is the “corner-stone” of our jury system. Brown, 818 A.2d at 185; see also Shotikare, 779 A.2d at 344 (the court must respect the presumptive secrecy of jury deliberations when investigating alleged juror misconduct). Specifically, the “jurors’ views of the case, the back and forth among them concerning the evidence or the application of the law to the facts, their numerical division on the merits – all such things are off limits.” Shotikare, 779 A.2d at 345. Moreover, the court must ensure that its inquiry does not itself “foment discord among the jurors or subtly influence the work of the jury.” Id. (internal citations and quotations omitted).

The “distinction between juror misconduct and a juror merely defending her position can be elusive”; accordingly, a court should not dismiss a juror if “the record evidence discloses any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case.” Brown, 818 A.2d at 186 & n.3 (emphasis in original; internal citation and quotations omitted). Excusing a juror for the purpose of breaking a deadlock or because of her views on the merits violates both a defendant’s right to a unanimous verdict and his right to have his guilt or innocence determined by the jury, not the court. See Shotikare, 779 A.2d at 344 (“if consensus is not achievable and the jury hangs, that is a price that must be paid in order to keep the judicial thumb off the scales of a judgment that is constitutionally entrusted to the jury to make”); Williams v. United States, 338 F.2d 530, 533 (D.C. Cir. 1964) (“a mistrial is as much a part of the jury system as a unanimous verdict.”).

J. Jury nullification

A court has both the “authority and responsibility to dismiss a juror whose refusal to follow the applicable law becomes known to the judge . . . during trial.” Brown v. United States, 818 A.2d 179, 185 (D.C. 2003) (quoting United States v. Thomas, 116 F.3d 606, 617 (2d Cir. 1997)). Thus, where a court learns via a jury note that a sitting juror may be refusing to deliberate, the court has a duty to inquire to determine if it is, in fact, confronted with a juror who is purposefully disregarding the court’s instructions on the law or with a juror who is simply unpersuaded by the Government’s evidence. Id. The Court’s inquiry need not end with an assertion from a “juror . . . that he or she is deliberating in good faith,” if the court has received conflicting information from other jurors. Id. at 186-87.

The court’s duty to inquire must be exercised with care so as to preserve as best as possible the secrecy of deliberations, which is the “corner-stone” of our jury system. Brown, 818 A.2d at 185; see also United States v. Shotikare, 779 A.2d 335, 345 (D.C. 2001) (The court must proceed with “caution, tact and respect for the prerogatives of the jury”).

If the court confirms that one or some of the jurors intend to nullify, it may take “all reasonable steps” to eliminate that possibility. Ford v. United States, 759 A.2d 643, 648 (D.C. 2000) (in response to note indicating some jurors intended to nullify, proper for the court “to remind the jury to abide by the oath that they had sworn at the beginning of the trial”). But before

dismissing a juror, the court should be very careful to determine that the juror is, in fact, trying to nullify and not “merely defending her position.” Brown, 818 A.2d at 186 n.3 (acknowledging the difficulty in telling the difference). Thus, as noted above, a court should not dismiss a juror if “the record evidence discloses any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case.” Id. at 186 (emphasis in original; internal citation and quotations omitted). Excusing a juror for the purpose of breaking a deadlock or because of her views on the merits violates both a defendant’s right to a unanimous verdict and his right to have his guilt or innocence determined by the jury, not the court. See Shotikare, 779 A.2d at 344 (“if consensus is not achievable and the jury hangs, that is a price that must be paid in order to keep the judicial thumb off the scales of a judgment that is constitutionally entrusted to the jury to make”).

K. Deadlocks

“When a jury reports that it is deadlocked, the trial judge must decide whether to instruct the jurors to make further efforts to reach a verdict (and, if so, how to instruct them) or to declare a mistrial.” Shotikare v. United States, 779 A.2d 335, 343 (D.C. 2001). In considering whether a jury is genuinely deadlocked a trial court should look at the totality of the circumstances. See Epperson v. United States, 495 A.2d 1170, 1172 (D.C. 1985) (court should look to “the nature and complexity of the trial issues, the duration of the trial and the length or the jury deliberations, as well as the representations of the jury to the court about the state of deliberations”); Jackson v. United States, 683 A.2d 1379 (D.C. 1996) (“Trial courts need not accept at face value a jury’s assertion of deadlock.”)

1. Court may not give coercive response to note indicating deadlock.

Although a court has discretion in deciding how to respond to note in which a jury communicates that it is having difficulties reaching a unanimous decision, it may not coerce the jury into rendering a verdict. See Jackson v. United States, 368 A.2d 1140, 1142 (1977) (reversible error for court to read jury members their oaths and suggest that holdout was guilty “guilty of either perjury or negligence in her response to questions on voir dire and that she was not complying with her oath as a juror”); Jenkins v. United States, 380 U.S. 445 (1965) (reversible error for court to instruct the jury, “[y]ou have got to reach a decision in this case” in response to note concerning the jury’s difficulty reaching a verdict).

“Any inquiry into jury verdict coercion is made from the perspective of the jurors.” Harris, 622 A.2d 697, 701 (D.C. 1993); see also Benlamine v. United States, 692 A.2d 1359, 1363 (D.C. 1997) (quoting Harris); Davis v United States, 669 A.2d 680, 683 (D.C. 1995) (same). Any inquiry should look both to the “inherent coercive potential of the situation” and to the actions of the trial court (to determine if they exacerbated, alleviated or had no effect on the situation). Harris, 622 A.2d at 701. Relevant factors in assessing the possibility of coercion include:

the degree of isolation of a dissenting juror (or jurors), whether the identity of the juror (or jurors) has been revealed in open court as opposed to in a note, whether the exact numerical division of the jury is revealed, whether the judge knows the identity of the dissenting juror or jurors and

whether the juror (or jurors) is aware of the judge’s knowledge or reasonably believes that the court knows how they are divided, whether other jurors may feel ‘bound’ by a vote they have announced, and whether an ‘anti-deadlock’ instruction has been given and, if so, whether this has occurred under circumstances where the potential for coercion is high. Harris, 622 A.2d at 705; Davis, 669 A.2d at 684 (quoting Harris).

2. Anti-deadlock Charge

Where the court is confronted with a deadlocked jury, it may deliver a “Winters” Charge. See Winters v. United States, 317 A.2d 530 (1974) (en banc); Criminal Jury Instructions for the District of Columbia, Instruction 2.9, Alternative B.

The Winters charge sets the “highwater mark for an anti-deadlock charge,” and need not be used every time a jury informs the court that it is unable to reach a verdict. See Winters, 317 A.2d at 534; Jackson, 368 A.2d 1140, 1142-43 (D.C. 1977) (reversible error where anti-deadlock charge “transgressed the limits” of the approved Winters charge). Alternatives A and C in the Criminal Jury Instructions for the District of Columbia (also known as a “Thomas” instruction, see United States v. Thomas, 449 F.2d 1177, 1184 n.46 (1971) and a “Gallagher” instruction, see Winters, 317 A.2d at 539 (Gallagher, J. conc.), respectively provide “less emphatic” alternatives to the Winters Charge. See Criminal Jury Instructions for the District of Columbia, Comment to Instruction 2.91. What type of anti-deadlock charge to deliver is committed to the sound discretion of the trial court. See Epperson v. United States, 495 A.2d 1170, 1173 (D.C. 1985).

The court should not use a Winters charge precipitously: “The Winters instruction, like the predecessor Allen charge, should be in the nature of an ultimate judicial attempt, not a preliminary attempt, to secure a verdict.” Thompson v. United States, 354 A.2d 848, 851 (D.C. 1976); see also Smith v. United States, 542 A.2d 823, 825 (1988) (“a Winters instruction should not be given routinely, but only after careful consideration by the trial judge of the nature of the case and the length of the deliberations.”); Winters, 317 A.2d at 533 (charge should not be used “prematurely or without evident cause”) (internal quotations and citation omitted).

Even the approved anti-deadlock instructions “can become impermissibly coercive in certain factual situations.” Davis, 669 A.2d at 683. For example:

a. *When jury reveals numerical split*: There is a great potential for jury coercion where a court gives an anti-deadlock charge after learning of the jury’s numerical split. “Any effort by the court to persuade the jury to reach an agreement after reporting its numerical split, such as giving a Winters instruction, may be interpreted by the minority as an implied command to agree with the majority.” Smith v. United States, 542 A.2d 823, 824 (D.C. 1988) (error for court to deliver Winters charge after learning in two notes of narrowing numerical split); see also Benlamine v. United States 692 A.2d 1359 (D.C. 1997) (coercive to deliver Winters charge after court polled jury on partial verdict and one juror announced that he disagreed with the

verdict); Davis, 669 A.2d at 684 (“[W]hen a numerical minority is made known to the court, be it one, three or five, the use of a Winters instruction is reversible error because of the substantial risk of a coerced verdict.”).

Even if a court has insulated itself from learning of the numerical split, a Winters instruction may be coercive if jury reasonably believes that the court knows how the jurors are divided. See Davis, 669 A.2d at 684; Smith, 542 A.2d at 825. Likewise, if the exact division of the jury has not been revealed, but the logical inference is that the minority of the jurors do not favor conviction, a Winters instruction may be unduly coercive. See Davis, 669 A.2d at 684-85.

b. *When jury has issued multiple notes indicating its inability to reach a unanimous verdict:* a court should “ordinarily” give an anti-deadlock instruction only once. Epperson v. United States, 495 A.2d 1170, 1172 (D.C. 1985) (“It is elementary that a defendant is entitled to a jury in disagreement,” and repeated anti-deadlock instructions create a risk of a coerced unanimous verdict). Id. at 1174. “Repetition of the charge, together with rejection of the jury’s second report of deadlock, is almost certain to convey the thought that by failing to come to an agreement . . . the jurors have acted contrary to the earlier instruction as that instruction was properly understood.” Id. (internal quotations and citation omitted); see also Thompson v. United States, 354 A.2d 848, 850 (D.C. 1976) (“[O]nce a court gives a Winters instruction after receiving a report from the jury that it is hung, it may well be skating on thin ice if the court sends the jury out still another time when it receives the report that no verdict has been reached after a reasonable period of deliberation.”); Jones v. United States, 544 A.2d 1250, 1254 n.7 (D.C. 1988) (quoting Thompson).

Exceptions may be permitted in “extenuating circumstances, e.g., if there is confusion and there is a request by the ‘hung jury’ for a repetition of the anti-deadlock instruction, as previously related, or there is some exceptional circumstance which makes it evident it is not likely to be coercive to reinstruct the ‘hung jury’ with another ‘anti-deadlock’ instruction.” Epperson, 495 A.2d at 1175-76.

c. *When note reveals that external factors are impinging on decision-making process:* See, e.g., Morton v. United States, 415 A.2d 800, 802 (D.C. 1980) (error for court to give deadlocked jury Winters charge after declining to excuse juror whose brother had just died; keeping juror against his wishes created a substantial likelihood of coerced verdict).

3. “Acquittal First” & “Reasonable Efforts” charges when jury is considering greater and lesser included offenses.

Where a jury communicates that it is unable to reach a unanimous verdict on a greater charged offense, the court may deliver one of two charges: an “acquittal first” charge or a “reasonable efforts” charge. In an acquittal first instruction, the jury is charged that it must acquit the defendant of the greater offense before it may consider the lesser offense. In a “reasonable efforts instruction,” the jury is charged that it may consider the lesser included offense if it is unable to reach a verdict on the greater offense after making all reasonable efforts to do so. There are strategic advantages to each instruction – with the acquittal first

instruction, if the jury fails to convict on the higher count, it cannot compromise on the lesser; but given the choice of reasonable efforts instruction, the jury ultimately leaning toward conviction may opt to convict of a lesser charge. See (Robert) Jones v. United States, 620 A.2d 249, 252 (1993) (detailing the advantages and disadvantages of each charge).

a. *Counsel's Choice*: It is counsel's choice whether to request an "acquittal first" or a "reasonable efforts" instruction. See (Robert) Jones v. United States, 620 A.2d 249, 252 (1993) (which of these two charges is preferable "must be left to the defendant"). Cosby v. United States, 614 A.2d 1291, 1296 n.6 (1992) (counsel may request that court give "reasonable efforts" instruction to deadlocked jury, even if counsel agreed to "acquittal first" instruction in initial charge). Accordingly, it is reversible error for the court to deliver an "acquittal first" instruction to a deadlocked jury over defense objection. See Parker v. United States, 601 A.2d 45, 46 (D.C. 1991); (Nathan) Jones v. United States, 544 A.2d 1250, 1254 (1988); cf. (Robert) Jones, 620 A.2d at 252 (acquittal first instruction to deadlocked jury not plain error where counsel did not object); but see, Powell v. United States, 684 A.2d 373, 380-81 (D.C.1996) (no error where court initially delivered "acquittal first" instruction but then, after jury indicated it was deadlocked, delivered "reasonable efforts instruction" over defense objection).

b. *Double Jeopardy*: In making his/her choice of instruction, counsel should take note of the double jeopardy consequences. If counsel opts for an "acquittal first" instruction, obviously, re-prosecution of the client on the charges is not possible. But if counsel opts for "a reasonable efforts" instruction, counsel should be aware that the government can seek to retry the client on the charges on which the jury deadlocked. See United States v. Allen, 755 A.2d 402, 410-11 (D.C. 2000). Moreover, even where an "acquittal first" instruction is given, there is no implied acquittal (and thus double jeopardy bar) where the jury convicts on the lesser but explicitly indicates that they were unable to reach a verdict on the greater. See Holt v. United States, 805 A.2d 949, 955 (D.C. 2002).

c. *Coercive Winters Instructions*: Where the defense has requested that the court, as part of preliminary instruction, deliver "reasonable efforts" charge to the jury, and jury subsequently communicates that it is unable to reach a unanimous verdict on greater offense, it may be error for the court to deliver Winters charge and instruct jury to continue deliberating on greater offense. As the Court of Appeals noted in Jackson v. United States, 683 A. 2d 1379, 1384-85 (D.C. 1996), in such a situation, "a danger exists that, from the jury's perspective, the trial court may appear to be withdrawing the reasonable efforts instruction." The Court suggested that where the court sends the jury back to continue deliberations, the better course is for the court to explain to the jury that it has "an obligation to ensure the that the jury has exhausted all reasonable efforts and that the court believe[s] that further efforts [are] warranted in this case." Id. (The Court refused to reverse on this ground in Jackson, however, because counsel had not requested such an instruction, nor was counsel arguing for such an instruction on appeal.)