
ON THE SUBJECT OF PARTIAL VERDICTS:
A SERIES OF PRACTICAL QUESTIONS ANSWERED
FOR DISTRICT COURT JUDGES*

INTRODUCTION

*United States v. Griggs*¹ was a complex federal mail fraud case.² It involved a corporation’s policy—spearheaded by the owner of the firm and its chief executive officer—of falsifying information submitted to insurance companies over a two-year period.³ For *five weeks* the parties laboriously presented evidence. For four full days, the jury deliberated. On that fourth day, the jury presented Judge Krieger with a note that must have made her heart sink.⁴ It read: “Under careful consideration in our deliberations, we, the jury, are unable to return a verdict.”⁵ Apparently, the jury had agreed to some counts but could not reach consensus as to others. Upon learning of the deadlock, counsel for one of the defendants immediately requested that the court declare a mistrial.⁶ What was Judge Krieger to do?

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1. No. CRIM.A. 08-CR-00365M, 2009 WL 1456735, at *1 (D. Colo. May 22, 2009). When Charles Sharp and Michael Griggs (property restoration company executives) appealed their convictions, the Tenth Circuit affirmed the lower court’s decision under the name *United States v. Sharp*, 749 F.3d 1267 (10th Cir. 2014).

2. *United States v. Sharp*, 749 F.3d 1267, 1271–74 (10th Cir. 2014) (explaining how Sharp and Griggs—two executive officers of the firm—instructed employees to mark up the prices submitted to insurance companies by twenty to thirty percent).

3. *Id.*

4. *Id.* at 1275, 1282.

5. *Id.* at 1282.

6. *Id.*

Because the U.S. Constitution requires unanimous criminal jury verdicts in federal criminal trials,⁷ the above scenario is fairly common.⁸ If a jury cannot return a unanimous verdict, a trial judge must declare a mistrial or encourage the jury to try to come to a verdict.⁹ Mistrials can be costly and troublesome for courts and counsel.¹⁰ The situation Judge Krieger faced in *Griggs*, however, allowed for a less severe option. Since the case involved multiple defendants and counts, the court could receive a partial verdict per Rule 31(b) of the Federal Rules of Criminal Procedure.¹¹ Judge Krieger elected to instruct the jury accordingly:

A verdict in this case is not necessarily a singular verdict. You may render a verdict on any count upon which you can agree. There may be some counts upon which you cannot agree; and in that event, you may not be able to render a verdict.

Your reference here to being able to return a verdict suggests to me that you are thinking that you cannot return a verdict because you cannot agree on all of the counts. I urge you to go back and reconsider and see if there are any of the counts that you can agree on. And if there are counts that you can agree on, to render a verdict on those counts.¹²

In the end, the jury returned a partial verdict convicting two of the four defendants.¹³ The convicted defendants appealed, arguing, among other things, that the partial verdict instruction “improperly interfered with the structure and course of the jury’s deliberations by admonishing the jury to return a partial

7. See JOHN M. SCHEB & JOHN M. SCHEB II, *CRIMINAL PROCEDURE* 186 (4th ed. 2006) (explaining that the “Sixth Amendment to the United States Constitution requires a unanimous verdict in federal cases”).

8. See, e.g., William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT’L REV. L. & ECON. 1, 1–2 (2005) (discussing the frequency of hung juries in federal criminal trials).

9. See SCHEB & SCHEB II, *supra* note 7, at 185.

10. See Joseph J. Ward, *The Danger of Deadlock: Coercion in the Courtroom*, FLA. B. J., May 2000, at 10, 10 (explaining that “[d]eadlocked juries present a discouraging dilemma to trial judges and counsel hoping to avert costly retrials and avoid bogging down in a quagmire of drawn-out deliberations”).

11. FED. R. CRIM. P. 31(b); see also *United States v. Foster*, 711 F.2d 871, 885 (9th Cir. 1983) (receiving a partial verdict).

12. *United States v. Sharp*, 749 F.3d 1267, 1282–83 (10th Cir. 2014) (noting the district court “stated that it was ‘not inclined to grant the motion for mistrial . . .’ because ‘[t]he jurors ha[d] not been instructed that they [could] reach a verdict on some but not all counts’ (first alteration in original)). The district court’s instruction differed from the model charge suggested by the Tenth Circuit. For example, the court did not instruct the jury as to the finality of a partial verdict. *Id.*; see CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, *CRIMINAL PATTERN JURY INSTRUCTIONS* § 1.43(2) (2011) (“If you do choose to return a partial verdict, that verdict will be final. YOU WILL NOT BE ABLE TO CHANGE YOUR MINDS ABOUT IT LATER ON.”).

13. See *Sharp*, 749 F.3d at 1275 (explaining that the jury convicted two of the defendants on several counts, found the other two defendants not guilty on certain counts, and could not reach a verdict on other counts).

verdict if at all possible.”¹⁴ The Tenth Circuit found this argument meritless and affirmed the appellants’ convictions.¹⁵

Appeals contesting the appropriateness of partial verdict instructions are common—as are appellate decisions affirming convictions rendered pursuant to such instructions.¹⁶ But not all partial verdict convictions are affirmed on appeal.¹⁷ When a court vacates a conviction due to an improper partial verdict instruction or the improper receipt of a partial verdict, the prosecution’s only option to secure another conviction is to retry the case.¹⁸ Rule 31(b) states that a jury may return a partial verdict in a criminal trial as long as there are either multiple defendants or multiple counts.¹⁹ The issue of *when* it is appropriate to give a partial verdict instruction or receive a partial verdict, though, is subject to much dispute.²⁰ Case-specific circumstances dictate the appropriate timing, and there is no fixed rule either requiring or prohibiting the issuance of partial verdict instructions or the receipt of partial verdicts.²¹

As a practical matter, the issue of whether or not to give a partial verdict instruction or receive a partial verdict arises at a difficult time for district court judges—after a case has already been tried and while the jury is in the midst of deliberations.²² Practically speaking, this means that a district judge, like Judge

14. *Id.* at 1285.

15. *Id.* (finding that the “district court’s reference to the possibility of a partial verdict was clearly intended to alleviate any concerns on the part of the jury ‘that [they could not] return a verdict because [they could not] agree on all counts’” (alterations in original)).

16. *See, e.g.*, *United States v. Sharp*, 749 F.3d 1267, 1285 (10th Cir. 2014) (affirming the appellants’ convictions and finding their argument that the district court’s partial verdict instruction “improperly interfered with the structure and course of the jury’s deliberations” without merit); *United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994) (affirming the appellants’ convictions because the district court did not give the partial verdict instruction “hastily”); *United States v. Black*, 843 F.2d 1456, 1463–64 (D.C. Cir. 1988) (affirming the appellant’s conviction because the partial verdict instruction included a qualification “that the jury [c]ould continue to deliberate after returning a partial verdict”); *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (affirming the appellant’s conviction and finding the district court did not “abuse its discretion by receiving a partial verdict”).

17. *See, e.g.*, *United States v. Moore*, 763 F.3d 900, 908 (7th Cir. 2014) (vacating the verdicts as to two of the counts after concluding that the district court “erred in inviting a partial verdict before the jury indicated that further deliberations would be fruitless as to any unresolved counts”); *United States v. Araiza*, 449 F. App’x 671, 672 (11th Cir. 2011) (vacating the appellant’s conviction because “there was insufficient justification to take a partial verdict”); *United States v. Benedict*, 95 F.3d 17, 20 (8th Cir. 1996) (vacating the appellant’s conviction upon finding that the district court “abused its discretion by instructing the jury to announce verdicts on three counts before it had ended its deliberations on one closely-related count”).

18. *See, e.g.*, *Moore*, 763 F.3d at 908.

19. FED. R. CRIM. P. 31(b).

20. Thomas Lundy, *Jury Instruction Corner: Partial Verdicts Issues and Instructions*, CHAMPION, Mar. 2004, at 48, 49–50 (2004).

21. *See id.* (arguing that a fixed rule would “threaten to ‘disrupt the fine line which a trial judge must tread with respect to partial verdicts’” (quoting *Speaks v. United States*, 617 A.2d 942, 952 (D.C. 1992))); *see also Moore*, 763 F.3d at 910 (“Whether and when to advise the jury that it may return a partial verdict as the rule permits, and at what point during deliberations it is appropriate for the court to accept a partial verdict, are necessarily discretionary and fact-dependent decisions.”).

22. *See, e.g.*, *United States v. Sharp*, 749 F.3d 1267, 1282 (10th Cir. 2014).

Krieger, could have less than a day to decide the appropriateness of providing a partial verdict instruction or receiving a partial verdict.²³ Such quick decision making can be difficult—particularly if either party objects.²⁴

By summarizing existing case law and offering a practical guide of best practices—in the form of *A Series of Practical Questions Answered*—this Comment seeks to advise district court judges on the appropriateness of issuing partial verdict instructions and receiving partial verdicts.²⁵ This Comment in no way suggests that district court judges should not exercise discretion when determining whether to issue partial verdict instructions or receive partial verdicts; it merely strives to serve as a potential resource. The hope is that this guide will assist judges in making decisions—quickly—about whether to give a partial verdict instruction or receive a partial verdict in a particular case. Specifically, this guide assists a district court judge in (1) making fast, informed decisions; (2) avoiding a reversal on appeal, despite its unlikelihood;²⁶ and (3) avoiding having their decision, although affirmed, labeled erroneous by a federal court of appeals. Although there is no concrete evidence that Judge Krieger had trouble making a quick decision in the Griggs case, it is very possible that she may have. And if she did have trouble, perhaps this guide would have assisted her in making her decision.

This Comment proceeds in two sections. Section I discusses the role and purpose of juries in federal criminal trials, Rule 31(b), and the advantages and disadvantages of allowing juries to return partial verdicts, as well as appellate reviews of convictions involving partial verdicts. Section II, based on an analysis of existing case law, aims to guide district court judges as to when a partial verdict instruction is appropriate and how, if appropriate, the instruction should

23. See, e.g., *United States v. Black*, 843 F.2d 1456, 1463 (D.C. Cir. 1988) (district judge issued a partial verdict instruction on the first day that the jury indicated it was deadlocked).

24. Compare *United States v. Wheeler*, 802 F.2d 778, 780–81 (5th Cir. 1986) (district judge delivered a partial verdict instruction with no objection from either party), with *United States v. Patterson*, 472 F.3d 767, 774 (10th Cir. 2006) (district judge “proposed a supplemental instruction stating that the jury had the option of returning a partial verdict” over the objection of defense counsel), *judgment vacated on other grounds in Patterson v. United States*, 555 U.S. 1131 (2009).

25. This Comment acknowledges that the phrase “best practices” is both elusive and criticized but nonetheless adopts it as a general concept. In doing so, it does not purport to know the “best” course of action for district court judges. See generally Ira P. Robbins, *Best Practices on “Best Practices”*: *Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 269 (2009) (arguing that “[a]s the term [‘best practices’] has grown in popularity . . . so too has room for its abuse,” due to the fact that “the term has been invoked to claim unsupported superiority in a given field”); Anand Sanwal, *The Myth of Best Practices*, 19 J. CORP. ACCT. & FIN. 51, 51 (2008) (arguing that “[b]est practices are not all bad, and some may actually exist, but when best practices become a crutch that replaces independent critical thought and innovation, it can have deleterious impacts”).

26. See, e.g., *Patterson*, 472 F.3d at 780 (explaining that it would review the district court’s decision to provide a partial verdict instruction according to an abuse of discretion standard); see U.S. COURTS FOR THE NINTH CIRCUIT, STANDARDS OF REVIEW: DEFINITIONS I-6 (2012), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/I_Definitions.pdf [hereinafter NINTH CIRCUIT STANDARDS OF REVIEW] (“Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors.”).

be issued. Section II additionally advises on when it is appropriate to receive a partial verdict. It predicts seven questions that district court judges are likely to have and answers each of them in turn.

I. BACKGROUND INFORMATION ON JURY DELIBERATIONS AND PARTIAL VERDICTS

This Section provides background information on jury deliberations and partial verdicts. Part I.A explains the purpose of a jury in a federal criminal trial, the protections afforded to jury deliberations, and the rationale behind such protections. It also discusses a jury's right to return a partial verdict. Part I.B provides a brief history of Rule 31(b), and points out some of the questions left unanswered by the plain text of the rule. Part I.C compares the advantages and disadvantages of partial verdicts. And lastly, Part I.D discusses the treatment of partial verdicts on review and explains why convictions are so rarely overturned despite appellate declarations of error.

A. *The Purpose of a Jury in a Federal Criminal Trial*

Juries play an extremely important role in federal criminal trials and the justice system therefore affords them considerable protections. Their task is to reach a complete and unanimous verdict.²⁷ Their deliberations are a private affair.²⁸ Courts explicitly shield juries from outside influence,²⁹ and occasionally go so far as sequestering them.³⁰ These protections help ensure that the ultimate decision is that of the jury—and the jury alone.

Jurors may return logically inconsistent verdicts.³¹ This allowance recognizes that “jury deliberations necessarily involve negotiation and compromise,” and reflects the belief that “[j]ury unanimity, not consistency of theory, is the touchstone of a valid verdict.”³² An inconsistent verdict constitutes reversible error only when it is both “extremely contradictory and irreconcilable.”³³ The following hypothetical is an example of an inconsistent verdict: a defendant is charged with possession of marijuana with intent to

27. See FED. R. CRIM. P. 31(a); see also SCHEB & SCHEB II, *supra* note 7, at 186 (explaining that the “Sixth Amendment to the United States Constitution requires a unanimous verdict in federal cases”).

28. See SCHEB & SCHEB II, *supra* note 7, at 184.

29. *Jury Deliberations*, AM. BAR ASS'N, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jurydeliberate.html (last visited Apr. 1, 2016).

30. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.9, at 1186 (5th ed. 2009) (explaining that a court may choose to sequester a jury and defining sequestration as “keep[ing] the jury together and in seclusion, because of the risk of outside influence on the decisionmaking process”).

31. *Id.* at 1193 (“In the federal courts it is not necessary that the verdict returned by a jury be logically consistent in all respects.”).

32. 75B AM. JUR. 2D *Trial* § 1556, Westlaw (database updated Feb. 2016).

33. *Id.*

distribute, and with using a phone to commit that offense.³⁴ The jury finds the defendant guilty of using a phone to commit the offense but acquits the defendant of possession of marijuana with intent to distribute.³⁵ Although this finding is logically inconsistent, an appellate court would likely characterize it as mere “jury error” and affirm the conviction.³⁶

Courts charge juries with the task of reaching unanimous verdicts, but there are procedures in place if a jury cannot do so. If a jury cannot reach a complete and unanimous verdict, the jury is considered “hung” or “deadlocked.”³⁷ Hung juries are common in federal criminal trials.³⁸ If a jury reports that it is deadlocked, a district judge typically has the following options: (1) declare a mistrial, or (2) “urge the jury to make further attempts to arrive at a verdict.”³⁹ If the judge declares a mistrial, a new jury hears the case.⁴⁰ But a district judge should not declare a mistrial in haste.⁴¹ Instead, she should make “an adequate effort to ensure that the jury is incapable of reaching a verdict.”⁴² If a district judge fails to make such an effort and declares a mistrial in haste, “the mistrial may not be justified by ‘manifest necessity,’ and double jeopardy may bar a retrial.”⁴³ In some instances, a district judge may be permitted to explicitly ask members of the jury to “reconsider their initial conclusions” so as to arrive at a verdict.⁴⁴ This type of supplemental instruction is commonly referred to as an *Allen* charge.⁴⁵

Finally, as the subject of this Comment indicates, in a case with multiple defendants, multiple charges, or both, a district judge has a third option. She can inform a deadlocked jury of its right to return a partial verdict.⁴⁶ A partial verdict is the return of a verdict “as to less than all defendants or less than all

34. See Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 772 (1998).

35. *Id.*

36. *Id.*

37. *Jury Deliberations*, *supra* note 29.

38. See Neilson & Winter, *supra* note 8, at 1–2.

39. See SCHEB & SCHEB II, *supra* note 7, at 185.

40. *Jury Deliberations*, *supra* note 29.

41. LAFAVE ET AL., *supra* note 30, § 24.9(d), at 1187.

42. *Id.*

43. *Id.*

44. See Ward, *supra* note 10, at 10 (2000) (explaining that the Supreme Court, in *Allen v. United States*, “held that a jury instruction asking the members of the jury to reconsider their initial conclusions was not unduly coercive such that a mistrial was required”).

45. See SCHEB & SCHEB II, *supra* note 7, at 185. This Comment will not address when it is appropriate to give an *Allen* charge, however, there are instances where either an *Allen* charge is given in conjunction with a partial verdict instruction or an appellant incorrectly characterizes a partial verdict instruction as an *Allen* charge. See, e.g., *United States v. Patterson*, 472 F.3d 767, 780 (10th Cir. 2006) (rejecting the appellant’s characterization of the partial verdict instruction as an *Allen* charge since it “did not urge deadlocked jurors to re-examine their views so as to avoid a mistrial”), *judgment vacated on other grounds in Patterson v. United States*, 555 U.S. 1131 (2009); *United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994) (affirming the district court’s decision to give an *Allen* charge in conjunction with a partial verdict instruction).

46. LAFAVE ET AL., *supra* note 30, § 26.10(d), at 1197.

counts.”⁴⁷ This option is utilized only in cases with multiple defendants, or in cases where there are multiple counts.⁴⁸ After accepting a partial verdict, a district judge can either declare a mistrial on the remaining matters, or “require the jury to resume deliberations on matters still to be decided.”⁴⁹

B. Rule 31(b) and Its History

Rule 31(b) governs the receipt of partial verdicts in federal criminal trials.⁵⁰ It states that a jury can return a partial verdict in a criminal trial as long as there are either multiple defendants or multiple counts.⁵¹ It further explains that “[i]f there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.”⁵² And “[i]f the jury cannot agree on all counts as to any [one] defendant, the jury may return a verdict on those counts on which it has agreed.”⁵³ Like a complete verdict, a jury must return a partial verdict to the presiding judge in open court, and it must be unanimous.⁵⁴ A partial verdict is as final as a complete verdict,⁵⁵ yet it allows a jury to leave some charges undecided.⁵⁶ For, as the rule states, “If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.”⁵⁷

Unfortunately, Rule 31(b) leaves some questions unanswered. Although it allows the return of partial verdicts, Rule 31(b) is silent as to how, when, and if a jury should be instructed about its option to do so.⁵⁸ Since most jurors are entirely unaware that they are even allowed to return a partial verdict,⁵⁹ they remain unaware until informed otherwise.⁶⁰

47. *Id.*

48. *See, e.g.,* United States v. Stansfield, 101 F.3d 909, 911 (3d Cir. 1996) (partial verdict rendered against a single defendant convicted of multiple counts).

49. LAFAVE ET AL., *supra* note 30, § 26.10(d), at 1197; *see, e.g.,* United States v. Haren, 952 F.2d 190, 196–97 (8th Cir. 1991) (accepting a partial verdict as to four of the defendants but allowing the jury to continue its deliberations as to the fifth defendant).

50. FED. R. CRIM. P. 31(b).

51. *Id.*

52. *Id.* 31(b)(1).

53. *Id.* 31(b)(2).

54. *Id.* 31(a); *see also* 5 ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 31:10 (database updated June 2014) (stating that “in order for any partial verdict to be accepted, there must unanimity among the jurors”).

55. LAFAVE ET AL., *supra* note 30, § 26.10(d), at 1197 (“Once a partial verdict has been accepted . . . it may not be reconsidered by the jury or impeached, even while the jury deliberates remaining charges.”).

56. *See, e.g.,* United States v. Sharp, 749 F.3d 1267, 1283 (10th Cir. 2014) (jury reached a partial verdict and left the remaining counts undecided).

57. FED. R. CRIM. P. 31(b)(3).

58. *Id.* 31(b).

59. Missy Mordy, Comment, *Dodging Mistrials with a Mandatory Jury Inquiry Rule*, 32 SEATTLE U. L. REV. 971, 974–75 (2009).

60. *See, e.g.,* Sharp, 749 F.3d at 1282–83 (informing jurors of the permissibility of returning a

The history of the rule is limited and uncontroversial. The Supreme Court adopted the rule in 1944⁶¹ and then adopted an amendment to it in 2002 to clarify the fact that “a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both.”⁶² The amendment did not intend to change prevailing practice.⁶³ Although the original version of the rule provided solely for the return of partial verdicts in cases involving multiple defendants (not multiple counts), judges had long permitted the return of partial verdicts in cases involving multiple defendants *and* single defendants accused of multiple counts prior to the 2002 amendment.⁶⁴

C. *Advantages and Disadvantages to Partial Verdicts*

There are both advantages and disadvantages to partial verdicts.⁶⁵ An advantage of a partial verdict is that it allows a “hopelessly deadlocked” jury the opportunity to return a decision for the defendants and/or counts it *can* agree on.⁶⁶ Partial verdicts also act as a form of insurance.⁶⁷ As noted by one court:

The reason for taking a partial verdict is apparent in cases where there has been a long trial and there exists the prospect of long deliberations. By taking a partial verdict, the court is able to hedge against the possibility of juror illness or death or prejudice by publicity.⁶⁸

Partial verdicts can save an entire case from needing to be tried for a second time.

There are also disadvantages to partial verdicts. Scholars caution that partial verdicts can prove dangerous.⁶⁹ More specifically, if a judge fails to make a jury aware of a partial verdict’s finality, “a provisional decision [might be transformed] into a final verdict.”⁷⁰ Alternatively, a jury might view a partial verdict as a way of getting out of deliberations.⁷¹ For example, a jury might view a partial verdict as “the best way to escape what had apparently become a frustrating and unpleasant process.”⁷² A premature partial verdict instruction

partial verdict).

61. FED. R. CRIM. P. 31 advisory committee’s note.

62. *Id.*

63. *Id.*

64. *See, e.g.*, United States v. Cunningham, 145 F.3d 1385, 1388–90 (D.C. Cir. 1998) (noting that the trial court accepted the partial verdicts rendered for multiple defendants convicted of multiple counts).

65. Daniel J. Kornstein, *Impeachment of Partial Verdicts*, 54 ST. JOHN’S L. REV. 663, 686 (1980) (discussing the advantages of partial verdicts); 75B AM. JUR. 2D *Trial* § 1521, Westlaw (database updated Feb. 2016) (discussing the dangers of partial verdicts).

66. Kornstein, *supra* note 65, at 686.

67. *Id.* at 686–87.

68. *Id.* (quoting United States v. Hockridge, 573 F.2d 752, 759 (2d Cir. 1978)).

69. 75B AM. JUR. 2D *Trial* § 1521.

70. *Id.*; *see also* United States v. Moore, 763 F.3d 900, 911 (7th Cir. 2014) (“Jurors may not realize that in delivering a partial verdict, they are foreclosing to themselves any further consideration of the charges included in that verdict.”).

71. Lundy, *supra* note 20, at 48.

72. *Id.* (quoting Speaks v. United States, 617 A.2d 942, 952 (D.C. 1992)).

could also signal to a jury that its deliberations are taking too long.⁷³

D. The Review of Partial Verdicts on Appeal

A district court's decision to issue a partial verdict instruction or accept a partial verdict is unlikely to be overturned on review because circuit courts review such decisions according to an abuse of discretion standard.⁷⁴ An appellate court, under an abuse of discretion standard, will overturn a district court's decision if, inter alia, the court "[did] not apply the correct law or rest[ed] its decision on a clearly erroneous finding of a material fact," "rule[d] in an irrational manner," "[made] an error of law," or if the "[r]ecord contains no evidence to support [the] . . . decision."⁷⁵ The vast majority of convictions appealed on the grounds of an erroneous partial verdict instruction are affirmed;⁷⁶ very few are vacated.⁷⁷ However, appellate courts affirming these district court decisions frequently criticize the manner in which the partial verdict instruction was given.⁷⁸ In such cases, appellate courts may label a partial verdict instruction "erroneous" but nonetheless affirm the conviction(s) because the error did not amount to an abuse of discretion.⁷⁹

73. See *Moore*, 763 F.3d at 911 ("Absent the jury's declaration that it is deadlocked as to one or more charges, asking the jury whether it has reached agreement as to any charge or giving the jury a supplemental instruction that it can return a partial verdict, might be construed by the jury as a hint from the court that it is taking too long to render a verdict.").

74. E.g., *United States v. Patterson*, 472 F.3d 767, 780 (10th Cir. 2006), *judgment vacated on other grounds in Patterson v. United States*, 555 U.S. 1131 (2009). See NINTH CIRCUIT STANDARDS OF REVIEW, *supra* note 26, at I-6, for a delineation of this standard.

75. NINTH CIRCUIT STANDARDS OF REVIEW, *supra* note 26, at I-6.

76. See, e.g., *United States v. Sharp*, 749 F.3d 1267, 1285 (10th Cir. 2014) (affirming the appellants' convictions and finding their argument that the district court's partial verdict instruction "improperly interfered with the structure and course of the jury's deliberations" without merit); *United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994) (affirming the appellants' convictions because the district court did not give the partial verdict instruction "hastily"); *United States v. Black*, 843 F.2d 1456, 1463-64 (D.C. Cir. 1988) (affirming the appellant's conviction because the partial verdict instruction included a qualification "that the jury [c]ould continue to deliberate after returning a partial verdict"); *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (affirming the appellant's conviction and finding the district court did not "abuse its discretion by receiving a partial verdict").

77. See, e.g., *Moore*, 763 F.3d at 908; *United States v. Araiza*, 449 F. App'x 671, 672 (11th Cir. 2011); *United States v. Benedict*, 95 F.3d 17, 20 (8th Cir. 1996).

78. See, e.g., *United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007) (finding that although the partial verdict instruction "may have curbed the . . . proceedings," the district court did not abuse its discretion by "following th[at] course of action"); *United States v. LaVallee*, 439 F.3d 670, 691 (10th Cir. 2006) (concluding that despite the erroneous partial verdict instruction, "the error proved harmless beyond a reasonable doubt"); *United States v. Dolah*, 245 F.3d 98, 108 (2d Cir. 2001) ("Although it would have been preferable for the Court to advise the jury explicitly that it had the option either to report partial verdicts or to wait until deliberations were concluded, and to caution that any partial verdicts reported could not be reconsidered, the omission of such guidance was harmless in this case."), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Peak*, 856 F.2d 825, 828 (7th Cir. 1988) (characterizing the partial verdict instruction as "probably inadvisable," but ultimately concluding that the trial court had not "intended to explode the deadlocked jury into rendering a hurried verdict").

79. E.g., *Heriot*, 496 F.3d at 608.

II. BEST PRACTICES FOR GIVING A PARTIAL VERDICT INSTRUCTION TO A JURY
AND RECEIVING PARTIAL VERDICTS: A SERIES OF PRACTICAL QUESTIONS
ANSWERED FOR DISTRICT COURT JUDGES⁸⁰

This Section addresses seven questions that district judges may have about partial verdicts.⁸¹ It is by no means an exhaustive list but aims to address expected issues surrounding the issuance of partial verdict instructions and the receipt of partial verdicts.

A. *Are District Courts Under an Obligation to Instruct on, and Consequently Accept, Partial Verdicts?*

Unless a jury expressly asks to return a partial verdict, the answer is no.⁸² Thus, a request from counsel to accept a partial verdict or to give a partial verdict instruction does not obligate a district court judge to do so.⁸³ For the request to be obligatory, it must come directly from a jury, and it must be explicit.⁸⁴ For example, courts have found the following jury communications to not constitute requests to return a partial verdict: (1) an indication from a jury that it was deadlocked,⁸⁵ (2) a request from a jury for further instruction,⁸⁶ or (3)

80. Throughout this Section, I refer to instructions, circumstances, and verdicts rendered at the district court level, but cite to appellate discussions of those district court decisions.

81. An extensive review of case law, which will be discussed throughout Section II, reveals that these seven questions are likely to be the most common.

82. See *United States v. Caro*, 454 Fed. App'x 817, 869–70 (11th Cir. 2012) (finding that the district court did not err in shredding a partial verdict because the jury did not expressly request a partial verdict and defense counsel for one of the four defendants specifically asked the court “not to accept the partial verdict”); *United States v. Strothers*, 77 F.3d 1389, 1391 (D.C. Cir. 1996) (finding the district court’s “coercive anti-deadlock” instruction improper, and noting the lower court’s rejection of the “defendants’ suggestion that [it] take a partial verdict”); *In re Ford*, 987 F.2d 334, 340 (6th Cir. 1992) (finding that the district court did not err by declining to give a partial verdict instruction to the deadlocked jury because the “verdict forms showed that the jury had not “reached a unanimous verdict as to any of the defendants or as to any of the charges”); *United States v. Burke*, 700 F.2d 70, 78–80 (2d Cir. 1983) (finding that the district court did not violate Rule 31(b) by refusing to give a partial verdict instruction since the jury had not expressly asked to return a partial verdict); *United States v. DiLapi*, 651 F.2d 140, 146–47 (2d Cir. 1981) (finding that, because the jury had not expressly requested to report a partial verdict, the appellants had not been denied “any protected right” by the judge not giving a partial verdict instruction).

83. Failure to receive a partial verdict will also not expose a district court to automatic reversal. See, e.g., *United States v. Fermin*, 32 F.3d 674, 680 n.2 (2d Cir. 1994) (declining to create a “*per se* rule finding error whenever a trial court gives a partial-verdict instruction over a defendant’s objection,” or “a rule that would allow a defendant to preclude a trial court from instructing a jury on its partial-verdict option” since “such a rule would create a troublesome bind for courts in multi-defendant trials when one defendant requests a partial-verdict instruction while another defendant objects to such an instruction”); *DiLapi*, 651 F.2d at 146 (holding that, despite a direct request from counsel, the district court’s failure to instruct the jury about partial verdicts did not constitute reversible error because the jury “did not indicate any preference for reporting a partial verdict”).

84. *Burke*, 700 F.2d at 78–80 (finding the request for instruction to be ambiguous and not a request to return a partial verdict).

85. See *Ford*, 987 F.2d at 340 (finding that a jury announcing it was deadlocked, without evidence that it had “reached any unanimous verdict as to any charge,” was not a request to return a partial verdict); see also Kornstein, *supra* note 65, at 685 n.144 (“A court is not *required* to ask a jury

a report from a jury that it had reached verdicts as to some defendants.⁸⁷

In *United States v. DiLapi*,⁸⁸ the jury, on its second day of deliberations, sent a note to the court stating: “We have reached a verdict on four of the defendants. We are sharply and evenly split on the remaining two. We await further instructions from the [c]ourt.”⁸⁹ Subsequently, defense counsel asked that a partial verdict be received, but the court refused.⁹⁰ Instead, the court instructed the jury to continue its deliberations “with a view to reaching a decision on the remaining defendants.”⁹¹ On the third day of its deliberations, the jury sent another note to the court: “We have reached a unanimous decision on seven counts, but remain hopelessly deadlocked on the remaining five counts.”⁹² In response, defense counsel made a second request for the receipt of a partial verdict, but the court again refused and instead issued an *Allen* charge.⁹³

On appeal, the Second Circuit, sua sponte, indicated it was “troubled” by the “[d]istrict [c]ourt’s response to counsel’s suggestion that a partial verdict be received as to some of the defendants.”⁹⁴ The appellate court cited Rule 31(b) and stated, “In a multi-defendant trial, the jury is entitled to return a verdict ‘at any time in its deliberations’ as to one or more defendants.”⁹⁵ The court explained that “Rule 31(b) would be violated if a trial judge were to tell a jury it may not return a partial verdict or were to refuse a jury’s request to return a partial verdict.”⁹⁶ Though in the situation presented, defense counsel—not the jury—had requested the return of a partial verdict,⁹⁷ the court took the time to explain that

juries should have considerable latitude in determining for themselves the structure of the deliberative process that will best assure individual consideration of each defendant. The jury’s discretion should extend to the timing of reporting its verdicts. If jurors are prohibited from returning a partial verdict as to some defendants, they might mistakenly infer that the individual consideration they had already given to some of the defendants is expected to be reassessed in light of

that reports itself deadlocked whether there is agreement on any count of a multicount indictment.”).

86. See *Burke*, 700 F.2d at 78–80 (finding that an ambiguous request for further instruction is not a request to return a partial verdict).

87. See *Caro*, 454 Fed. App’x at 869 (concluding that the jury’s report that it had “reached a verdict on two [d]efendants on all counts” did not constitute a request to return a partial verdict); *DiLapi*, 651 F.2d at 146 (“Though the jury reported that it had reached verdicts as to some of the defendants, it did not indicate any preference for reporting a partial verdict.”).

88. 651 F.2d 140 (2d Cir. 1981).

89. *DiLapi*, 651 F.2d at 144.

90. *Id.* at 145.

91. *Id.* at 144.

92. *Id.* at 145.

93. *Id.*

94. *Id.* at 146. The Second Circuit did not discuss the precise language that it found upsetting.

Id.

95. *Id.*

96. *Id.*

97. *Id.*

their subsequent deliberations. On the other hand, if they are required to return a partial verdict, there is a risk that some jurors might mistakenly permit a tentative vote to become an irrevocable final vote and forgo the opportunity to gain new insights concerning the evidence in one defendant's case from consideration of the same evidence as it bears upon other defendants.

We think that juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants. In this case, the jury reported that it had reached a decision as to four of the defendants, was divided on the remaining two defendants, and awaited further instructions. At that point, particularly in view of counsel's request, an appropriate response from the trial judge should have included a neutral explanation of the jury's options either to report the verdicts reached, or to defer reporting of all verdicts until the conclusion of deliberations. Such an instruction should advise the jurors that any verdicts they choose to report will not be subject to later revision. However, the absence of such an explanation did not deny the appellants any protected right in a case such as this where the jury neither attempted to return a partial verdict nor even asked if it could do so. Moreover, the jury's ultimate decision to convict the two appellants and acquit four co-defendants adequately indicates that individual consideration was given to the case against each defendant.⁹⁸

Courts both within and outside the Second Circuit often cite *DiLapi's* analysis,⁹⁹ which underscores that a district court is under no obligation to either accept a partial verdict or issue a partial verdict instruction absent an express request from a jury.¹⁰⁰

In *United States v. Burke*,¹⁰¹ the Second Circuit clarified just how explicit the request from a jury must be to necessitate either the receipt of a partial verdict or the issuance of a partial verdict instruction.¹⁰² At trial, the deliberating jury asked the court the following question: "Do we have to reach a verdict for all five defendants; that is, can some be guilty of one or more counts, and the others be undecided?"¹⁰³ The court responded by encouraging the jury to reach a decision on all five defendants if possible, and did not mention the possibility

98. *Id.* at 146–47.

99. *See, e.g.*, *United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014); *United States v. LaVallee*, 439 F.3d 670, 691 (10th Cir. 2006); *United States v. Dolah*, 245 F.3d 98, 108 (2d Cir. 2001), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996); *United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994); *United States v. Dakins*, 872 F.2d 1061, 1064 (D.C. Cir. 1989); *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987); *United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 79–80 (2d Cir. 1983).

100. *DiLapi*, 651 F.2d at 146–47.

101. 700 F.2d 70 (2d Cir. 1983).

102. *Burke*, 700 F.2d at 79–80.

103. *Id.* at 78.

of returning a partial verdict.¹⁰⁴ On appeal, the appellants argued that this was reversible error.¹⁰⁵ They contended there was only one reasonable interpretation of the jury's question: "[T]he jury was considering the possibility of rendering a partial verdict and was unsure whether it was permitted to return such a verdict during the course of its deliberations."¹⁰⁶

The Second Circuit disagreed.¹⁰⁷ The court concluded that "Rule 31(b) requires only that the district judge accept a partial verdict upon request, and refrain from instructing the jury that [it] may not return a partial verdict."¹⁰⁸ As such, a reversal of the district court's decision would be appropriate only if there had been "a specific showing that the court refused to accept a partial verdict or specifically instructed the jury that it would not be permitted to return a partial verdict."¹⁰⁹ The Second Circuit acknowledged that the jury's request "may have . . . reflect[ed] . . . the jury's wish to render a partial verdict," but determined that additional plausible interpretations existed.¹¹⁰ Declaring the district court judge better positioned to "make informed judgments" on the meaning behind the jury's ambiguous request, the Second Circuit ultimately resisted second-guessing the district court and affirmed the conviction.¹¹¹

Multiple circuit courts continue to uphold the precedent established by *DiLapi* and *Burke*. For example, in *United States v. Caro*,¹¹² the Eleventh Circuit confirmed that a jury's request must be explicit in order for a circuit court to justify a finding of reversible error.¹¹³ In *Caro*, on the fourth day of deliberations, the jury issued a note to the court: "We have reached a verdict on two [d]efendants on all counts. We have been unable to reach a verdict on the other two [d]efendants. We are at an impasse. No unanimous decision on Count 1 or any of the substantive charges related to these [d]efendants."¹¹⁴ The court then consulted with counsel, noting that Rule 31(b) allows a jury to return a partial verdict.¹¹⁵ Defense counsel objected to the receipt of a partial verdict.¹¹⁶ The

104. *Id.* ("Well, it's the desire of the Court and of all parties that if possible you return verdict [sic] on all five defendants if you can do so without violating your individual conscience." (quoting Brief for Defendant-Appellant James Burke at 44, *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (No. 82-1028), 1982 WL 611854)).

105. *Id.* at 78–79 (appellants argued that "the district judge committed reversible error when he failed to instruct the jury under [Rule 31(b)] that it could return a partial verdict at any time and reserve judgment on any remaining defendants or counts").

106. *Id.* at 78.

107. *Id.* at 80.

108. *Id.*

109. *Id.*

110. *Id.* at 79–80 (finding that the jury "might have been inquiring whether it would ultimately be required to reach a verdict as to each defendant," or that its "request for instruction may have been intended as a preliminary inquiry to determine the various options available to the jury during deliberations").

111. *Id.* at 80.

112. 454 Fed. App'x 817 (11th Cir. 2012).

113. *Caro*, 454 Fed. App'x at 869–70.

114. *Id.*

115. *Id.*

court instructed the jury to continue its deliberations, shredding the completed verdict forms.¹¹⁷ Neither party objected to the court's response.¹¹⁸

The convicted appellants argued this constituted reversible error since "the [d]istrict [c]ourt improperly destroyed a partial verdict."¹¹⁹ The Eleventh Circuit disagreed and affirmed the district court's decision to destroy the completed verdict forms, underscoring the appellants' acquiescence at the time of the shredding.¹²⁰ *Caro* illustrates that even if it appears the jury is *trying* to return a partial verdict, absent an *explicit* request from a jury to do so, a district court judge still has the discretion to refuse it.

In summary, while a district court may not outright refuse a partial verdict, it is under no obligation to receive one absent a *very* explicit request from the jury.¹²¹

B. Are There Limits to the Receipt of a Partial Verdict? In Other Words, Must a Jury Expressly Indicate that it Wants to Return One in Order for One to Be Received?

Though courts should refrain from soliciting partial verdicts, a jury need not expressly indicate its wish to return a partial verdict for a court to appropriately receive one.¹²² As stated, a court's refusal to accept a partial verdict is proper as long as there is no explicit request from the jury to return a partial verdict. Conversely, a court's receipt of a partial verdict is proper even when the jury's signal is not explicit.¹²³ However, there should be a signal from the jury of some kind, such as an indication of deadlock, rather than an outright solicitation by the court in the absence of a signal from the jury, rather than an outright solicitation

116. *Id.* at 870.

117. *Id.*

118. *Id.*

119. *Id.* at 823.

120. *Id.* at 870 (finding that defense counsel had ample opportunity to object to the shredding of the sealed verdicts but did not).

121. *See also* 9A FED. PROC., L. ED. § 22:1505, Westlaw (database updated Dec. 2015) ("The court may not refuse a partial verdict."); 5 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 31:9, Westlaw (database updated June 2015) ("It is clear that the court may accept a partial verdict as to some defendants and the court may not instruct the jury that a partial verdict will not be accepted."); Kornstein, *supra* note 65, at 685 n.144 (explaining that "[a] court is not *required* to ask a jury that reports itself deadlocked whether there is agreement on any count of a multicount indictment"); Lundy, *supra* note 20, at 48 (arguing against a per se rule requiring the receipt of partial verdict instructions).

122. *Compare* United States v. Moore, 763 F.3d 900, 914 (7th Cir. 2014) (vacating the appellant's conviction due to an erroneous solicitation of a partial verdict by the district court before the jury indicated it was deadlocked), *with* United States v. Dolah, 245 F.3d 98, 107–08 (2d Cir. 2001) (finding that the district court did not prompt the jury to return a partial verdict even though the jury did not expressly ask to return a partial verdict), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

123. *See, e.g., Dolah*, 245 F.3d at 108 (characterizing "[w]e have completed part of our deliberations," as a sufficient signal to prompt the receipt of a partial verdict).

by the court in the absence of a signal from the jury.¹²⁴

In *United States v. Wheeler*,¹²⁵ three defendants convicted of running a fraudulent money order scheme from prison appealed their partial verdict convictions.¹²⁶ The district court accepted the partial verdict after the jury deliberated for four hours and delivered the following note: “We can not [sic] agree on 23 counts on two of the defendants (21 on 1, 2 on the other) after much discussion. If the vote is not unanimous, is this automatically a ‘not guilty?’”¹²⁷ The court subsequently received a partial verdict, declared a mistrial on the remaining counts, and dismissed the jury.¹²⁸

Although the defendant-appellants primarily contested what they characterized as a prematurely declared mistrial,¹²⁹ the Fifth Circuit’s analysis of a district court’s discretion regarding partial verdicts is instructive. The Fifth Circuit first acknowledged that “the trial judge treads a fine line in deciding whether to accept a partial verdict: he must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a tentative decision into a final one.”¹³⁰ The court explained, however, that “[p]recisely because the decision is delicate, it is left to the discretion of the trial court.”¹³¹ The court ultimately concluded that

the jury note implied that agreement had been reached on most counts. It also stated that agreement was impossible on the remaining counts. The note inquired only into the consequences of that lack of agreement. The trial court clearly did not abuse its discretion in determining that further deliberation would prove fruitless.¹³²

The court highlighted that neither party objected to the receipt of the partial verdict at the time.¹³³

In *United States v. Dolah*,¹³⁴ the Second Circuit affirmed the receipt of a partial verdict, prompted by an even more elusive signal of jury deadlock.¹³⁵ Two defendants appealed their securities fraud and conspiracy convictions, arguing the district court erroneously encouraged the return of a partial verdict on the

124. See *Moore*, 763 F.3d at 912 (finding the solicitation of the partial verdict to be erroneous due to the fact that there had been no indication from the jury that further deliberations would be pointless); *United States v. Benedict*, 95 F.3d 17, 19–20 (8th Cir. 1996) (finding the receipt of a partial verdict to be improper since the jury had not signaled deadlock).

125. 802 F.2d 778 (5th Cir. 1986).

126. *Wheeler*, 802 F.2d at 779–81.

127. *Id.* at 780.

128. *Id.* at 781.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* (“A decision of the trial court, not objected to below, may be reversed only ‘to prevent a miscarriage of justice.’” (quoting *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973))).

134. 245 F.3d 98 (2001), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

135. *Dolah*, 245 F.3d at 107–08.

first day of deliberations.¹³⁶ The following discussion prompted the court's receipt of the partial verdict:

THE COURT: I called you in. Mr. [foreperson], have you, the jury, been able to complete any of its deliberations?

FOREPERSON: We have completed part of our deliberations.

THE COURT: Are you ready—

FOREPERSON: Can we report one charge or is that permitted?

THE COURT: If you have completed any deliberation, you may report it.¹³⁷

The Second Circuit found the defendants' argument that the district court erroneously prompted the partial verdict unfounded.¹³⁸ The court characterized the district judge's inquiry as neutral and concluded that the foreperson—not the district court judge—inquired about the possibility of returning a partial verdict.¹³⁹ Additionally, the Second Circuit noted that “the verdicts had *already* been voted upon”—that is, “the foreperson retrieved the partially completed verdict form from the jury room while the other jurors remained in the courtroom.”¹⁴⁰ Thus, both convictions were affirmed.¹⁴¹

Although the signal does not have to be an express statement that the jury is deadlocked—as illustrated by *Wheeler* and *Dolah*—there should be some sort of signal from the jury that further deliberation would be fruitless.¹⁴² In *United States v. Benedict*,¹⁴³ the Eighth Circuit declared the district court's receipt of the partial verdict erroneous because the jury had not indicated that it was deadlocked.¹⁴⁴ The defendant, convicted of aiding and abetting a theft of post office property, argued the district court erred in inviting the jury to return a partial verdict on three counts before it had finished deliberations on a closely related fourth count.¹⁴⁵ On the second day of deliberations the jury sent the following note: “We have come to verdicts on 3 of the indictments. We have been undecided on 1 indictment for about 1 [and a half] hours. What do you suggest we do? (We are split 11 to 1.) . . . Also, on this indictment we were at 10 to 2 about [a half] hour ago.”¹⁴⁶

The district court decided to take the partial verdict. After the court instructed the jury to announce its partial verdict, however, the jury indicated its

136. *Id.* Although the jury ultimately returned a complete verdict, they returned a partial verdict on the first day of deliberations. *Id.*

137. *Id.* (alteration in original).

138. *Id.* at 108.

139. *Id.*

140. *Id.* (emphasis added).

141. *Id.*

142. *See, e.g.,* *United States v. Benedict*, 95 F.3d 17, 19–20 (8th Cir. 1996) (concluding that the trial court abused its discretion in taking a partial verdict because nothing in the district court record indicated that the jury was deadlocked).

143. 95 F.3d 17 (8th Cir. 1996).

144. *Id.*

145. *Id.* at 18.

146. *Id.*

desire to continue deliberating.¹⁴⁷ Twenty minutes later, the jury stated it was in the same position as before, and the court repeated its instruction to announce the partial verdict. The jury returned a partial verdict on three counts.¹⁴⁸ After the third day of deliberations, the court dismissed the fourth count.¹⁴⁹

On appeal, the defendant first argued that the district court had no authority to receive a partial verdict in a case involving “multiple charges against a single defendant.”¹⁵⁰ In the alternative, the defendant contended, the court had abused its discretion by doing so.¹⁵¹ The Eighth Circuit rejected the defendant’s first contention but agreed with his alternative argument.¹⁵² In announcing its holding, the court noted that “[t]he danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one.”¹⁵³ The court stressed the impropriety associated with a trial court’s intrusion on the jury’s deliberative process, especially when doing so “cut[s] short its opportunity to fully consider the evidence.”¹⁵⁴ Accordingly it found “error in the manner in which the district court conducted the jury deliberations”:

When the jury first indicated that it was split on one remaining count, deliberations had been in progress for approximately seven hours; only two hours had passed since the jury received its requested clarification between two of the counts. The jury had reached tentative agreement on three of the four counts in the indictment and all implications were that the jury was making progress towards unanimity on the undecided charge. The vote had moved from 10-to-2 to 11-to-1 just half an hour before the jury asked the court for guidance. Nothing in the record suggests that the jury had reported a deadlock. To the contrary, after taking verdicts on the three counts, the court instructed the jury to continue deliberating on the remaining charge. Moreover, the government subsequently opposed Benedict’s motion for a mistrial on Count II on the theory that the jury was not yet deadlocked.¹⁵⁵

Though the court found the close relationship between the outstanding count and one of the counts determined in the partial verdict “particularly troubling,” its decision rested upon evidence suggesting that continued deliberation could be fruitful.¹⁵⁶ This situation is distinguishable from *Wheeler* and *Dolah*, where the juries indicated they were finished deliberating before the courts received the partial verdicts.

In *United States v. Araiza*¹⁵⁷ and *United States v. Moore*,¹⁵⁸ the Ninth and

147. *Id.*

148. *Id.* at 19.

149. *Id.*

150. *Id.*

151. *Id.* at 19–20.

152. *Id.*

153. *Id.* at 19.

154. *Id.*

155. *Id.* at 19–20.

156. *Id.* at 20.

157. 449 Fed. App’x 671 (9th Cir. 2011).

Seventh Circuits respectively reviewed a district court's solicitation of a partial verdict prior to receiving a signal from the jury.¹⁵⁹ Thus, as opposed to the Eighth Circuit's analysis of the jury signal's sufficiency in *Benedict*, the Ninth and Seventh Circuits assessed the permissibility of receiving partial verdicts when no signal exists at all.¹⁶⁰ In *Moore*, after deliberating for about nine hours, the jury wrote a note to the court: "We would like to end for the day. Everyone is tired and we are not making progress. If possible we would like to begin deliberations [at] 11:30 a.m. [tomorrow]. Some people will not get home tonight until after midnight."¹⁶¹ As a result of this note, the court—despite objections from both parties—decided to inquire as to whether the jury had reached a unanimous decision as to any counts against the defendant.¹⁶² The jury indicated that it had reached a consensus on some of the counts, but in no way indicated that further deliberation on the remaining charges would be fruitless.¹⁶³ Nonetheless, the district court decided to take a partial verdict on two of the three counts.¹⁶⁴ Despite additional objections from defense counsel, the court accepted the partial verdict that concerned two of the counts and instructed the jury to continue its deliberations on the third count the next day.¹⁶⁵ The jury could not reach a unanimous verdict as to the third count, and the court ultimately dismissed the charge.¹⁶⁶

On appeal, the Seventh Circuit found it problematic that (1) the court invited the partial verdict, and (2) it did so despite the fact that the counts were interrelated.¹⁶⁷ The Seventh Circuit held that while it would typically uphold an inconsistent verdict on appeal, "even if [like here] conviction on the latter offense [were] a predicate to conviction on the former," the fact that the jury rendered the inconsistent verdict after the district court's solicitation of a partial verdict persuaded it to rule otherwise.¹⁶⁸ More specifically, the Seventh Circuit found the district court improperly "invited a partial verdict while deliberations remained ongoing and before the jury indicated that it was truly deadlocked as to any count."¹⁶⁹ The court based its conclusion on the fact that the note did not indicate the jury "was at an impasse as to any charge," but rather suggested it

158. 763 F.3d 900 (7th Cir. 2014).

159. *Moore*, 763 F.3d at 912–14; *Araiza*, 449 Fed. App'x at 672.

160. *Moore*, 763 F.3d at 912–14 (declaring a partial verdict solicitation without any signal from the jury erroneous); *Araiza*, 449 Fed. App'x at 672 (finding insufficient justification to take a partial verdict since there was no signal from the jury indicating a deadlock).

161. *Moore*, 763 F.3d at 904. (first alteration in original). The district court had asked the jury if it wanted to retire for the night after about seven hours of deliberating, but the jury stated that it preferred to continue its deliberations. *Id.*

162. *Id.* at 904–05.

163. *Id.* at 905 (noting that although the foreman indicated that further deliberations would be pointless, another juror disagreed).

164. *Id.* at 905–07.

165. *Id.* at 907.

166. *Id.* at 907–08 (the government motioned to dismiss the third count without prejudice).

167. *Id.* at 909–10.

168. *Id.* at 910.

169. *Id.*

“wished to resume its deliberations late the following morning.”¹⁷⁰ Though “the foreman . . . indicated that the jury had reached agreement as to certain counts, and the jurors confirmed their unanimity when they completed the verdict form and rendered verdicts as to [the others],” the Seventh Circuit stated that it could not ensure “the jury appreciated . . . [or] realized the inconsistency,” or whether the jurors would have “acted differently” if not for the district court’s invitation of a partial verdict.¹⁷¹ The Seventh Circuit criticized that “[t]he court’s decision to ask for a partial verdict, when the jury had not yet finished its deliberations as to the undecided count nor indicated that it was deadlocked, needlessly injected uncertainty into the verdict on [the other count].”¹⁷² It therefore vacated the defendant’s conviction of the closely related offense.¹⁷³

Araiza, a much shorter opinion, mirrors *Moore* in that the district court received a partial verdict without a single indication of jury deadlock.¹⁷⁴ In its brief analysis, the Ninth Circuit concluded the district court abused its discretion by receiving a partial verdict because (1) the jury had deliberated for less than two hours, (2) the jury had not sent any signal suggesting deadlock, and (3) neither party requested the partial verdict.¹⁷⁵ Because “insufficient justification [existed] to take a partial verdict,” the Ninth Circuit vacated the defendant’s conviction.¹⁷⁶ In sum, while a jury does not have to expressly signal deadlock, it must provide some sort of signal that further deliberation would prove pointless for a court to receive a partial verdict without abusing its discretion.

C. *Is It Appropriate to Give a Partial Verdict Instruction as Part of a Jury’s Initial Instructions? What Does This Instruction Have to Look Like? And If an Initial Partial Verdict Instruction Is Given, Will an Additional Instruction Be Required During Deliberations?*

It is appropriate to give a partial verdict instruction as part of the initial jury instructions prior to the start of deliberations.¹⁷⁷ In fact, doing so eliminates the

170. *Id.*

171. *Id.*

172. *Id.* at 912.

173. *Id.*

174. *United States v. Araiza*, 449 Fed. App’x 671, 672 (9th Cir. 2011).

175. *Id.*

176. *Id.*

177. *See, e.g., In re Ford*, 987 F.2d 334, 340 (6th Cir. 1992) (noting that the district court’s “initial instructions to the jury did include an instruction that the jury could return a partial verdict”); *United States v. Dakins*, 872 F.2d 1061, 1063–64 (D.C. Cir. 1989) (affirming the district court’s receipt of a partial verdict despite the fact that the jury was given an initial instruction about partial verdicts without describing the finality of partial verdicts). *But see* COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS § 9.08 cmt. (2015) (directing that a partial verdict instruction should “not be included in the final charge to the jury”); SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 9.03 comm. cmt. (2015) (noting that while “partial verdicts can be included in the general instructions given before the jury retires to deliberate,” it is preferable for the instruction to be given “only after the jury has indicated that it wants to return a partial verdict or after the jury has deliberated for an extensive period of time”).

issue identified in Part I.B: many jurors are unaware of the option of returning a partial verdict.¹⁷⁸ For example, in *United States v. Dakins*,¹⁷⁹ a defendant appealed his conviction of conspiracy to possess with the intent to distribute cocaine.¹⁸⁰ At the trial, which involved three defendants, the court instructed the jury, as part of its initial instructions, that “at any time during its deliberations, it could return a verdict of guilty or not guilty with respect to any defendant or any count.”¹⁸¹ On the third day of deliberations the jury sent a note to the court stating: “We are stalemated on discussion and vote[d]. We have reached one verdict. Should we still continue?”¹⁸² The judge brought the jury into the courtroom and received the partial verdicts that convicted one of the defendants on all three counts.¹⁸³ Upon polling the jurors, the court learned that each had assented to the verdict.¹⁸⁴ The court subsequently instructed the jury to continue its deliberations as to the remaining two defendants.¹⁸⁵ The jury remained unable to reach a unanimous decision for either defendant, and the charges against them were dismissed.¹⁸⁶

On appeal, the defense argued that the “court erred in accepting the jury’s partial verdict without first having specially instructed the jury as to a partial verdict’s finality.”¹⁸⁷ The D.C. Circuit disagreed.¹⁸⁸ Relying on Rule 31(b), the court held that a district court does not have to provide a special instruction as to the finality of a partial verdict.¹⁸⁹ The court noted that “it is not even required that the jury be instructed about its right to return a partial verdict at all.”¹⁹⁰ The court found the way in which the district judge received the partial verdict—with “the same solemn formalities that attend a verdict which ends an entire case”—and each juror’s oral confirmation of the partial verdict demonstrative of the jury’s awareness of the finality of its partial verdict.¹⁹¹ Accordingly, it affirmed the appellant’s conviction.

In *In re Ford*,¹⁹² the Sixth Circuit echoed *Dakins* by affirming a partial verdict instruction provided during initial jury instructions without an explicit instruction regarding finality.¹⁹³ Yet, the *Ford* court took the D.C. Circuit’s

178. This assumes that a jury will remember initial instructions during its deliberations. See Mordy, *supra* note 59, at 974–75.

179. 872 F.2d 1061 (D.C. Cir. 1989).

180. *Dakins*, 872 F.2d at 1061.

181. *Id.* at 1063.

182. *Id.* at 1063–64.

183. *Id.* at 1064.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 987 F.2d 334 (6th Cir. 1992).

193. *Ford*, 987 F.2d at 340.

decision a step further, confirming that a district judge does not need to issue an additional instruction during deliberations if an initial instruction has been given.¹⁹⁴

In *Ford*, four defendants were charged with conspiracy, bank fraud, and mail fraud.¹⁹⁵ The trial lasted approximately twenty days before it was submitted to the jury,¹⁹⁶ and the court issued a partial verdict instruction as part of its initial jury instructions.¹⁹⁷ The jury first indicated deadlock on the second day of deliberations, but the court instructed the jury to continue its deliberations.¹⁹⁸ On the fourth day of deliberations, the jury submitted a note to the court: “The majority of the jury has voted by secret ballot (9–3) that it cannot reach a guilty or not guilty verdict without violence to individual judgment.”¹⁹⁹ The foreman, as well as each individual juror, confirmed the “hopeless deadlock.”²⁰⁰ Defense counsel requested that the judge send the jury back for further deliberation and that a modified *Allen* charge be issued.²⁰¹ The court denied this request, holding that “the jury deadlock made it manifestly necessary for it to declare a mistrial.”²⁰²

On appeal, the defendants argued, among other things, that the mistrial had been erroneously granted, entitling them to a dismissal of the criminal charges on grounds of double jeopardy.²⁰³ They contended the court should have considered alternatives before declaring a mistrial, such as instructing “the jury that it could bring a partial verdict as to any of the defendants.”²⁰⁴

The Sixth Circuit disagreed, finding “the district court [had] not abuse[d] its sound discretion in refusing to give [a] supplemental instruction under [Rule] 31(b).”²⁰⁵ The circuit court recognized that prior to declaring a mistrial and dismissing a hung jury, “a trial judge may inquire whether the jury has reached a partial verdict with respect to any of the defendants or any of the charges, but such an inquiry is not required where the trial judge has already given clear instructions on the point.”²⁰⁶ The court based its decision on the fact that “[a] trial judge is not obligated to repeat adequate instructions.”²⁰⁷ And, in this case, the judge’s “initial instructions to the jury did include an instruction that the jury could return a partial verdict.”²⁰⁸ This decision demonstrates that (1) a district

194. *Id.*

195. *Id.* at 336–37. One of the defendants was Congressman Harold E. Ford. *Id.*

218. *Id.* at 337.

197. *Id.* at 340.

198. *Id.* at 337.

199. *Id.* at 338.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 338.

204. *Id.* at 339–40.

205. *Id.* at 340.

206. *Id.* (citing *United States v. MacQueen*, 596 F.2d 76, 82 (2d Cir. 1979)).

207. *Id.* (quoting *MacQueen*, 596 F.2d at 82).

208. *Id.*

judge does not abuse her discretion by providing a partial verdict instruction before the jury starts deliberating, and (2) once such an instruction has been given, a judge does not have to repeat it.²⁰⁹

D. If No Initial Partial Verdict Instruction Is Given, Does There Need to Be a Signal from a Jury in Order for a Court to Give the Instruction During Deliberations?

A partial verdict instruction should be prompted by a signal from the jury, however, a sua sponte instruction from the court does not necessarily constitute reversible error on appeal.²¹⁰ The danger in a sua sponte instruction—as compared to an instruction in response to a jury signal—is that it could impermissibly intrude upon the deliberative process.²¹¹ Such an intrusion could result in a premature, coerced verdict,²¹² and an appellate court can vacate a coerced verdict on appeal.²¹³ A district court that waits for a signal from a jury is less likely to be seen as intruding upon the deliberative process, and thus, an appellate court is less likely to reverse its decision.²¹⁴

A jury can either signal that it is deadlocked or explicitly state it has reached a partial verdict—both are equally sufficient to render a partial verdict instruction appropriate.²¹⁵ Though a single signal will suffice, a court may

209. *Id.*

210. *Compare* United States v. McKinney, 822 F.2d 946, 950–51 (10th Cir. 1987) (finding the trial court's sua sponte partial verdict instruction neither coercive nor erroneous), *with* United States v. Moore, 763 F.3d 900, 902 (7th Cir. 2014) (vacating appellant's conviction upon finding the sua sponte partial verdict instruction erroneous because it had "improperly solicited a partial verdict from the jury before jurors indicated that no further deliberations would be useful"). *See also* SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 177, § 9.03 comm. cmt. (2015) (noting that a sua sponte partial verdict instruction may be appropriate if "the jury has deliberated for an extensive period of time," which, the committee explained, "will depend on the nature and complexity of the particular case").

211. *See Moore*, 763 F.3d at 911 ("A premature inquiry into whether the jury has reached a verdict as to at least some charges, or an unprompted, mid-deliberations instruction informing the jury that it has the option to return a partial verdict, may impermissibly intrude upon the jury's deliberative process.").

212. *Id.* at 911–12.

213. *Id.* at 912–14.

214. *See, e.g.,* United States v. Fermin, 32 F.3d 674, 680 (2d Cir. 1994) (finding the trial court did not give the partial verdict instruction "hastily," but rather, "[o]nly after the jury had indicated repeatedly that it was deadlocked and had explicitly sought the [c]ourts guidance," and that the instruction neither encouraged nor discouraged the jury to return a partial verdict).

215. It is somewhat more common for a jury to report that it is deadlocked. *See* United States v. Sharp, 749 F.3d 1267, 1282 (10th Cir. 2014); United States v. Ruffin, 129 F.3d 114, 1997 WL 701364, at *1 (2d Cir. 1997) (unpublished table decision); *Fermin*, 32 F.3d at 679–80; United States v. Black, 843 F.2d 1456, 1463 (D.C. Cir. 1988); United States v. Wheeler, 802 F.2d 778, 780 (5th Cir. 1986); United States v. Ross, 626 F.2d 77, 80 (9th Cir. 1980). *But see* United States v. Patterson, 472 F.3d 767, 774 (10th Cir. 2006) (jury indicated that it had reached a partial verdict), *judgment vacated on other grounds in* Patterson v. United States, 555 U.S. 1131 (2009); United States v. Haren, 952 F.2d 190, 196–97 (8th Cir. 1991) (jury indicated that it had reached a complete verdict for four of the five defendants); United States v. Levasseur, 816 F.2d 37, 43 (2d Cir. 1987) (jury indicated it had reached a partial verdict).

require more than one signal²¹⁶ and may instruct a jury to continue deliberating.²¹⁷ However, an instruction to continue deliberations is proper only if a district court believes that continued deliberation would prove constructive.²¹⁸ As the Sixth Circuit explained, “A trial judge’s decision to declare a mistrial when he considers the jury to be deadlocked is accorded great deference by a reviewing court since the trial court is in the best position to assess whether the jury can reach a just verdict if it continues to deliberate.”²¹⁹

1. Examples of Sua Sponte Partial Verdict Instructions

As long as a sua sponte partial verdict instruction is noncoercive, it will be affirmed on appeal. In *United States v. McKinney*,²²⁰ prior to the jury’s second day of deliberations, the court issued a partial verdict instruction sua sponte.²²¹ Over defense counsel’s objection, the judge instructed the jury that “if it had not unanimously agreed on a verdict on all counts by 2:30 p.m., he proposed to receive any unanimous verdict it might have reached on any one, or possibly more, of the counts, and that the jury would then resume deliberation on the remaining counts.”²²² The jury returned a partial guilty verdict as to two of thirty-two counts at 2:30 p.m. that day.²²³ The jury returned guilty verdicts for the remaining counts on its third day of deliberations.²²⁴

On appeal, defense counsel argued that the initial sua sponte partial verdict instruction was coercive.²²⁵ The Tenth Circuit disagreed.²²⁶ Upon finding the effect of the instruction neutral, it affirmed the appellant’s convictions.²²⁷ The court noted that the district court explicitly advised the jury “that no individual juror was ever required to yield a conscientious conviction.”²²⁸ The Tenth Circuit

216. Compare *United States v. Lloyd*, 515 F.3d 1297, 1299–300 (D.C. Cir. 2008) (trial court provided a partial verdict instruction after jury’s first signal indicating a deadlock on three of the counts), and *Black*, 843 F.2d at 1463 (partial verdict instruction provided after jury’s first signal indicating a deadlock), with *United States v. Colombo*, No. 04 Cr. 273(NRB), 2007 WL 2438391, at *1 (S.D.N.Y. Aug. 27, 2007) (partial verdict instruction given only after the jury had deliberated for nine days and had given the court its second note indicating its inability “to reach a unanimous decision on some counts”), *aff’d sub nom.* *United States v. Altieri*, 278 Fed. App’x 53 (2d Cir. 2008), and *Fermin*, 32 F.3d at 679–80 (a partial verdict instruction was not given until the jury signaled that it was deadlocked for the third time).

217. *Fermin*, 32 F.3d at 679 (responding to a jury signal indicating a potential deadlock by re-reading parts of its initial jury instructions and encouraging continued deliberation).

218. See, e.g., *id.* at 679–80 (instructing the jury to continue its deliberations despite two signals suggesting a potential deadlock since the jury indicated that they were still deliberating).

219. *In re Ford*, 987 F.2d 334, 339 (6th Cir. 1992).

220. 822 F.2d 946 (10th Cir. 1987).

221. *Id.* at 950.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

interpreted this qualification to mean that “a juror may adhere to his or her personal conviction, if he or she believes it to be right, whatever that conviction might be, i.e., guilty or not guilty.”²²⁹

The Tenth and Seventh Circuits’ analyses in *United States v. LaVallee*²³⁰ and *United States v. Peak*²³¹ are distinguishable from *McKinney* in that both courts criticized the sua sponte instructions contested on appeal.²³² However, the fate of the defendants in all three cases proved the same—the instructions were found to be noncoercive and their convictions were affirmed.²³³ In *LaVallee*, three former prison guards appealed their convictions of conspiracy and deprivation of inmates’ constitutional rights.²³⁴ On the tenth day of jury deliberations, the district court issued a sua sponte partial verdict instruction that expanded on the instruction given as part of the initial jury charge.²³⁵ The initial instruction stated:

A separate crime is alleged in each count of the indictment. Under these instructions, you may find that [sic] one or more of the defendants guilty or not guilty as charged. At any time during deliberations, you may return into court with your verdict of guilty or not guilty as to any defendant concerning whom you have unanimously agreed.²³⁶

The expanded instruction explained:

What I’m ordering you to do is . . . , if you have reached a verdict of either guilty or not guilty as to the defendant, . . . put that verdict . . . into an envelope, and we will seal that envelope and . . . write the words [“]this is the verdict for defendant blank[”] . . .

And so that’s what I’m directing you to do. And I want to reiterate, I want you to do that only if . . . you have reached a verdict of guilty or not guilty as to any defendant concerning whom you have unanimously agreed.

If you have not reached a unanimous agreement, then you don’t have to do anything. And if you have reached a unanimous agreement, then I’m instructing you to do what I just said.²³⁷

On appeal, the defendants argued that “the [d]istrict [c]ourt abused its discretion by instructing the jury to return partial verdicts as it improperly invaded the province of the jury regarding how it conducted deliberations.”²³⁸ Because “the supplemental [partial verdict] instruction clearly had the potential to infringe on

229. *Id.*

230. 439 F.3d 670 (10th Cir. 2006).

231. 856 F.2d 825 (7th Cir. 1988).

232. *LaVallee*, 439 F.3d at 691 (characterizing the district court’s decision as error); *Peak*, 856 F.2d at 828 (describing the instruction as “inadvisable”).

233. *LaVallee*, 439 F.3d at 691; *Peak*, 856 F.2d at 828.

234. *LaVallee*, 439 F.3d at 677 (noting that ten former officers were charged at trial).

235. *Id.* at 688.

236. *Id.* (alteration in original).

237. *Id.* at 688–89 (alterations in original) (fourth and sixth ellipses in original).

238. *Id.* at 689.

the jury's discretion to decide for itself what deliberative process to utilize and undoubtedly infringed on the jury's discretion to decide when, if at all, to report a partial verdict," the Tenth Circuit declared it erroneous.²³⁹ However, the court ultimately found the error "harmless beyond a reasonable doubt"—more specifically, it concluded that the instruction did not "coerce" the jury to return a partial verdict.²⁴⁰

In *Peak*, two brothers appealed their convictions of conspiracy to possess with intent to distribute marijuana and cocaine.²⁴¹ The defendants' trial lasted a week, and the court gave a supplemental, sua sponte, instruction after the jury had deliberated for "several hours."²⁴² The supplemental instruction stated:

Members of the jury, as previously stated to you in these instructions, you are to return separate verdicts as to each defendant in each count. However, if you reach unanimous agreement as to any defendant on a count or counts, you may return your verdict or verdicts as to such defendant, defendants, count, or counts when you see fit, and continue your deliberations as to the remainder. You are not required to report all of your verdicts at the same time, although you may do so if you prefer.

If you are unable to reach agreement as to guilt or innocence of a defendant as to a count or counts, you may so state in open court.²⁴³

The jury reached a complete verdict as to both defendants nineteen minutes after the court issued this instruction.²⁴⁴

On appeal, the appellants argued the district court committed reversible error by providing the jury with a partial verdict instruction while it was deliberating and that the instruction had a "coercive effect."²⁴⁵ Because the jury had deliberated for several hours without reaching a verdict, but returned a verdict almost immediately after the court gave the supplemental instruction, the appellants argued the supplemental instruction "improperly induced the verdicts."²⁴⁶ The Seventh Circuit disagreed, though it noted the supplemental instruction was "probably inadvisable."²⁴⁷ It criticized the district court's decision to provide the partial verdict instruction because, not only had all parties objected to the instruction, but also, after only four hours of deliberations the jury had not indicated "it was deadlocked or that it needed further guidance."²⁴⁸

Nonetheless, despite its admonishment of the instruction, the Seventh

239. *Id.* at 691.

240. *Id.* Nonetheless, the court never explained *why* the instruction did not coerce the jury's verdict.

241. *United States v. Peak*, 856 F.2d 825, 827 (7th Cir. 1988).

242. *Id.* at 828.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

Circuit ultimately found it noncoercive.²⁴⁹ It concluded the instruction did not hurry the jury into rendering a verdict, but rather cautioned the jury against doing so.²⁵⁰ Because the instruction did not request the jury “to return verdicts individually as to each defendant and each count,” the court determined that the instruction might have actually encouraged the jury “to organize its deliberations and take its time with each verdict.”²⁵¹ As stated by the court, “Instead of pressuring the jurors, the instruction permitted them to acknowledge their inability to reach verdicts as to any defendant or any count.”²⁵²

As illustrated by the three cases discussed above, sua sponte partial verdict instructions—even if inadvisable—are generally affirmed on appeal as long as they are noncoercive.

2. Examples of Partial Verdict Instructions Prompted by Jury Signals

A single jury signal indicating a potential deadlock is sufficient to prompt a partial verdict instruction.²⁵³ In *United States v. Lloyd*,²⁵⁴ the jury relayed it was “having difficulty determining some of the evidence.”²⁵⁵ More specifically, the jury expressed: “We are hung on Counts 1, 2, + 4. We are close but need some encouragement and instructions from the bench.”²⁵⁶ Immediately thereafter, the district court gave a partial verdict instruction.²⁵⁷ Similarly, in *United States v. Griggs*²⁵⁸ and *United States v. Ruffin*,²⁵⁹ (1) the juries signaled exactly one time before the district courts issued a partial verdict instruction, and (2) the signals indicated deadlock.²⁶⁰ In *Griggs*, on the fourth day of deliberations, the jury sent a note: “Under careful consideration in our deliberations, we, the jury, are unable to return a verdict.”²⁶¹ In *Ruffin*, the jury wrote the court after seven hours of deliberations to say it was “irreconcilably dead-locked.”²⁶² In both *Griggs* and *Ruffin*, the partial verdict instruction was given immediately after the jury’s initial signal.²⁶³

249. *Id.* at 828–29.

250. *Id.*

251. *Id.* at 829.

252. *Id.*

253. *See, e.g.*, *United States v. Lloyd*, 515 F.3d 1297, 1299–300 (D.C. Cir. 2008) (noting the jury had expressly indicated that it was hung as to certain counts).

254. 515 F.3d 1297 (D.C. Cir. 2008).

255. *Lloyd*, 515 F.3d at 1299.

256. *Id.* at 1299–300.

257. *Id.* at 1300.

258. No. CRIM.A. 08-CR-00365M, 2009 WL 1456735 (D. Colo. May 22, 2009). When Charles Sharp and Michael Griggs appealed their convictions, the Tenth Circuit affirmed the lower court’s decision under the name *United States v. Sharp*, 749 F.3d 1267 (10th Cir. 2014). The Article employs the Tenth Circuit’s discussion of *Griggs* and accordingly cites to the appellate opinion.

259. 129 F.3d 114, *1, 1997 WL 701364 (2d Cir. 1997) (unpublished table decision).

260. *United States v. Sharp*, 749 F.3d 1267, 1282–83 (10th Cir. 2014); *Ruffin*, 129 F.3d at *1.

261. *Sharp*, 749 F.3d at 1282.

262. *Ruffin*, 129 F.3d at *1.

263. *Sharp*, 749 F.3d at 1282; *Ruffin*, 129 F.3d at *1.

A district court is, however, under no obligation to give a partial verdict instruction after receiving a single jury signal indicating deadlock.²⁶⁴ In *United States v. Colombo*,²⁶⁵ the district court did not give a partial verdict instruction until the second signal indicating deadlock.²⁶⁶ On the sixth day of deliberations the jury sent a note that read, “Judge Buchwald, we have been unable to reach a majority decision on some of the counts. We need to know how to proceed.”²⁶⁷ The district court declined to issue a partial verdict instruction and instead instructed the jury to continue its deliberations.²⁶⁸ On the ninth day of deliberations the jury wrote again:

Judge Buchwald, you stated [that] if we had any further questions we should address [them] to you. After going over all recordings and evidence and “deliberating” for all of these days, we are still unable to reach a unanimous decision on some counts and none of us feel there is any hope of changing our minds since they are made up. So, here is the silly question: What do we do now?²⁶⁹

After this second signal, the district court issued a partial verdict instruction.²⁷⁰ The convictions rendered in *Lloyd*, *Griggs*, *Ruffin*, and *Colombo* were all affirmed on appeal.

In *United States v. Fermin*,²⁷¹ the district court, similar to the district court in *Colombo*, did not give a partial verdict instruction after the first jury signal, however, unlike *Colombo*, the district court waited until the *third* signal.²⁷² On the second day of deliberations, a single juror indicated that “his decision [would] become a deadlock issue.”²⁷³ On the fourth day of deliberations, “the jury sent a note stating it was deadlocked on one of the counts of the indictment.”²⁷⁴ The court instructed the jury to continue its deliberation without giving any additional instructions.²⁷⁵ On the fifth day of deliberations, the jury sent its final note: “[T]he jury is deadlocked in two places. We have gone around this for the last two days. We don’t see the situation changing. What should we

264. See, e.g., *United States v. Fermin*, 32 F.3d 674, 679–80 (2d Cir. 1994) (partial verdict instruction not provided until after the third jury signal indicating a deadlock); *United States v. Colombo*, No. 04 Cr. 273(NRB), 2007 WL 2438391, at *1 (S.D.N.Y. 2007), *aff’d*, 278 Fed App’x 53 (2d Cir. 2008) (partial verdict instruction not provided until after the second jury signal indicating deadlock).

265. No. 04 Cr. 273(NRB), 2007 WL 2438391, at *1 (S.D.N.Y. Aug. 27, 2007), *aff’d sub nom. United States v. Altieri*, 278 Fed. App’x 53 (2d Cir. 2008).

266. *Colombo*, 2007 WL 2438391, at *1.

267. *Id.*

268. *Id.*

269. *Id.* (alterations in original).

270. *Id.*

271. 32 F.3d 674 (2d Cir. 1994).

272. *Fermin*, 32 F.3d at 679.

273. *Id.*

274. *Id.*

275. *Id.* at 679–80 (mentioning that the jury also indicated that it was still deliberating after sending its second note).

do?”²⁷⁶ It was at this point that the district court notified the jury that “it was permitted to return a partial verdict.”²⁷⁷

On appeal, the defendant argued that the partial verdict instruction was improper and “had a coercive effect upon deliberations.”²⁷⁸ The Second Circuit disagreed, particularly because the district court “did not give the . . . partial-verdict instruction hastily,” but only “after the jury had indicated repeatedly that it was deadlocked and had explicitly sought the [c]ourt’s guidance.”²⁷⁹

In lieu of waiting for an additional signal, a district court can also inquire as to how deadlocked the jury is after its initial signal.²⁸⁰ In *United States v. Black*,²⁸¹ the jury indicated it was deadlocked on the fourth day of deliberations: “[W]e are unable to reach a unanimous verdict. We are hopelessly deadlocked.”²⁸² Instead of immediately issuing a partial verdict instruction, the judge “inquired . . . by note . . . whether [the jurors] were deadlocked with respect to both defendants and on every count of the indictment.”²⁸³ Upon learning that the jury was not deadlocked on all defendants and counts, the judge issued a partial verdict instruction.²⁸⁴ On appeal, the defendant argued this instruction was inadequate, but the D.C. Circuit held that “[a] trial judge may take reasonable steps to ensure that a jury is in fact deadlocked when informed that this is a possibility.”²⁸⁵

In *United States v. Ross*,²⁸⁶ the district court inquired into the degree of deadlock prior to giving a partial verdict instruction.²⁸⁷ When the *Ross* jury notified the court that it had “come to an impasse in [its] deliberations,” the judge “met with the jurors and asked the foreman whether he was ‘satisfied that it would serve no useful purpose to continue any further deliberations.’”²⁸⁸ When the foreman responded that he was unsure, the judge “reminded the jury that they could return a partial verdict.”²⁸⁹ On appeal, not only did the Ninth Circuit find no error “in the manner in which the district court conducted the jury deliberations,” but it also found the district judge’s inquiry into the extent of jury deadlock proper.²⁹⁰

In sum, a district court can do one of three things when confronted with a

276. *Id.* at 680.

277. *Id.*

278. *Id.* at 679.

279. *Id.*

280. *E.g.*, *United States v. Black*, 843 F.2d 1456, 1463 (D.C. Cir. 1988); *United States v. Ross*, 626 F.2d 77, 80–81 (9th Cir. 1980).

281. 843 F.2d 1456 (D.C. Cir. 1988).

282. *Black*, 843 F.2d at 1463.

283. *Id.*

284. *Id.*

285. *Id.* at 1462–63.

286. 626 F.2d 77 (9th Cir. 1980).

287. *Ross*, 626 F.2d at 80.

288. *Id.* (alterations in original).

289. *Id.*

290. *Id.* at 81.

jury signal indicating a deadlock: (1) immediately give a partial verdict instruction, (2) wait for another signal indicating a deadlock, or (3) inquire as to how deadlocked the jury is before giving a partial verdict instruction.

A signal from a jury indicating it has reached a partial verdict is also sufficient to prompt a partial verdict instruction from the court,²⁹¹ even if it has not explicitly asked to render such a verdict.²⁹² In *United States v. Heriot*,²⁹³ the jury signal came in the form of a question.²⁹⁴ The jury asked: “If we cannot reach a unanimous verdict on one of the five counts, what is the effect on the overall outcome of the trial?”²⁹⁵ The court gave a partial verdict instruction immediately after the jury asked this question, despite noting to counsel that “it was ‘disinclined to accept partial verdicts.’”²⁹⁶ In *United States v. Patterson*²⁹⁷ the partial verdict instruction came after the jury indicated that it had reached a partial verdict, but, unlike in *Heriot*, the court did not give the instruction immediately.²⁹⁸ When the jury stated that “it had agreed on verdicts for two of the three counts,” the court initially responded by instructing the jury to continue deliberating.²⁹⁹ Later, the court, unprompted by the jury, issued a partial verdict instruction.³⁰⁰ On appeal, the defendant argued that “the partial verdict instruction given sua sponte several hours later pressured the jurors to abandon further deliberations.”³⁰¹ The Tenth Circuit disagreed.³⁰² Acknowledging that “[w]hen issuing a supplemental sua sponte instruction, the court must be especially careful that the jury does not interpret the very issuance of the instruction as an indication that its deliberations are taking too long,” the court ultimately held that there was no undue pressure placed on the jury.³⁰³ The court observed that “the instruction came shortly after a question asking whether deliberations should continue.”³⁰⁴ *Patterson* and *Heriot* demonstrate a district court judge’s wide discretion when determining whether to provide partial verdict instructions—at least in situations where the court has received some signal of jury deadlock.

291. *E.g.*, *United States v. Heriot*, 496 F.3d 601, 606 (6th Cir. 2007); *United States v. Patterson*, 472 F.3d 767, 774 (10th Cir. 2006), *judgment vacated on other grounds in Patterson v. United States*, 555 U.S. 1131 (2009); *United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir. 1987).

292. *See, e.g.*, *Heriot*, 496 F.3d at 606.

293. 496 F.3d 601 (6th Cir. 2007).

294. *Heriot*, 496 F.3d at 606.

295. *Id.*

296. *Id.*

297. 472 F.3d 767 (10th Cir. 2006).

298. *Patterson*, 472 F.3d at 774.

299. *Id.*

300. *Id.* (district court provided partial jury instruction after jury sent a note merely “informing the court that it was taking a break but would resume deliberating”).

301. *Id.* at 780.

302. *Id.* at 780–81.

303. *Id.*

304. *Id.*

E. *Should a District Court Judge Consult Counsel Prior to the Receipt of a Partial Verdict or Prior to the Issuance of a Partial Verdict Instruction?*

Although a district court can issue a partial verdict instruction or receive a partial verdict over the objection of counsel, it should nonetheless consult counsel.³⁰⁵ There are no substantive adverse consequences accompanying such consultation, and there are significant benefits.³⁰⁶ Specifically, discussions with counsel can help prevent reversal on appeal.³⁰⁷

A judge has nothing to lose and everything to gain by consulting with counsel because partial verdict convictions are regularly affirmed on appeal despite specific objections from counsel.³⁰⁸ The fact that counsel objected to the partial verdict instruction or a partial verdict receipt is not a dispositive factor in the reviewing court's analysis of whether the district court abused its discretion.³⁰⁹ For example, in *Ruffin*, the Second Circuit did not consider defense counsel's objection to the partial verdict instruction in its abuse of discretion analysis.³¹⁰ The court stated that it is "within the trial court's power to receive a partial verdict over the defendant's objection and to inform the jury of its options."³¹¹

Conversely, if there is *no* objection to a partial verdict instruction, or *no* objection to the receipt of a partial verdict by counsel after consulted, an appellate court is even more likely to affirm the receipt of the partial verdict.³¹² In *Wheeler*, the jury signaled deadlock after just four hours of deliberations.³¹³ The court consulted with counsel before responding to the jury and neither side objected; the court then asked the jury to return a partial verdict.³¹⁴ On appeal,

305. See *United States v. Araiza*, 449 Fed. App'x 671, 672 (9th Cir. 2011) (finding the taking of a partial verdict in error because, inter alia, "neither party requested a partial verdict" and "defense counsel objected to the taking of the partial verdict"). *But see United States v. Ruffin*, 129 F.3d 114, 1997 WL 701364, at *3 (2d Cir. 1997) (unpublished table decision) (indicating that it is "within the trial court's power to receive a partial verdict over the defendant's objection and to inform the jury of its options").

306. An objection from counsel does not bar a court from issuing a partial verdict instruction or receiving a partial verdict. See, e.g., *Patterson*, 472 F.3d at 783 (affirming defendant's conviction despite the fact that the trial court judge gave a partial verdict instruction over defense counsel's objection); *Ruffin*, 1997 WL 701364, at *3 ("It was within the trial court's power to receive a partial verdict over the defendant's objection and to inform the jury of its options.").

307. See, e.g., *United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986) (affirming the trial court's decision to accept a partial verdict on the charges to which there had been agreement and declare a mistrial on the remaining counts because, among other reasons, "neither party objected to the partial verdicts at the time").

308. See *United States v. Sharp*, 749 F.3d 1267, 1282 (10th Cir. 2014); *Patterson*, 472 F.3d at 774, 783; *United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994).

309. See *Sharp*, 749 F.3d at 1283–85; *Patterson*, 472 F.3d at 780–81; *Fermin*, 32 F.3d at 679–81.

310. See *Ruffin*, 129 F.3d at *3.

311. *Id.*

312. See, e.g., *United States v. Heriot*, 496 F.3d 601, 606–608 (6th Cir. 2007); *United States v. Wheeler*, 802 F.2d 778, 780–81 (5th Cir. 1986).

313. *Wheeler*, 802 F.2d at 780.

314. *Id.* 780–81.

the Fifth Circuit held the district court did not abuse its discretion in accepting the partial verdict.³¹⁵ The court emphasized that “no party objected to the partial verdicts at the time.”³¹⁶ It further stated that “[a] decision of the trial court, not objected to below, may be reversed only ‘to prevent a miscarriage of justice.’”³¹⁷ The application of a heightened standard of review, as illustrated in *Wheeler*, only increases the probability of an already likely outcome—that an appellate court will affirm a district court’s decision to accept a partial verdict.

In *Heriot*, the Sixth Circuit, as compared to the Fifth Circuit in its review of *Wheeler*, placed more emphasis on the defense counsel’s support of the district court’s receipt of the partial verdict. At trial, the district court judge issued a partial verdict instruction both after the jury signaled and after it consulted with counsel.³¹⁸ Following another hour of deliberations, the jury indicated it had reached a unanimous decision on some of the counts.³¹⁹ Both parties agreed with the court that the jury should be dismissed for the weekend, however, defense counsel specifically requested that the court seal the jury’s completed partial verdict.³²⁰ The court complied and then, when the jury reconvened, accepted the partial verdict it had previously sealed without any additional deliberation.³²¹ On appeal, the defendant argued the sealed verdicts should have been returned to the jury for further deliberations.³²² The Sixth Circuit, while noting that a different approach “would have been preferable,” affirmed the district court’s receipt of the sealed partial verdict. In its holding, the court underscored that “not only did [the defendant] fail to object to the sealing of the verdicts . . . , he suggested it.”³²³ Additionally, defense counsel never expressly asked that the jury be given an opportunity to reexamine its sealed verdicts.³²⁴ Instead, it merely asked the court to poll the jurors to ensure unanimity.³²⁵ The extent of analysis dedicated to defense counsel’s conduct at trial, in the Sixth Circuit’s opinion, suggests that the actions of defense counsel *may* have influenced the court’s decision to affirm the partial verdict conviction.³²⁶ In sum, although an appellate court is unlikely to overturn a ruling based on an objection from either the government or the defense, it is nonetheless good practice for a court to consult counsel.

315. *Id.* at 781.

316. *Id.*

317. *Id.* (quoting *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973)).

318. *Id.* at 606.

319. *Id.*

320. *Id.* at 607.

321. *Id.* at 607–08. The jury resumed deliberations on the remaining charges, but could not reach unanimity on any of them. *Id.* at 608.

322. *Id.* (noting that the defendant “now complains about the district court’s handling of the verdicts”).

323. *Id.*

324. *See id.*

325. *Id.*

326. *Id.* at 609.

F. *What Does an Appropriate Partial Verdict Instruction Entail?*

A partial verdict instruction should be both neutral³²⁷ and noncoercive³²⁸ to ensure that a jury retains autonomy in its deliberative process.³²⁹ A noncoercive, neutral partial verdict instruction informs a jury of its option to return a partial verdict without suggesting that the jury should in fact do so.³³⁰ In its assessment of the instruction provided in *Griggs*, the Tenth Circuit, under the name *United States v. Sharp*,³³¹ found the partial verdict instruction noncoercive because it informed the jury of its option to return a partial verdict without explicitly suggesting how or when the jury should do so.³³² More specifically, the court instructed:

A verdict in this case is not necessarily a singular verdict. You may render a verdict on any count upon which you can agree. There may be some counts upon which you cannot agree; and in that event, you may not be able to render a verdict.

Your reference here to being able to return a verdict suggests to me that you are thinking that you cannot return a verdict because you cannot agree on all of the counts. I urge you to go back and reconsider and see if there are any of the counts that you can agree on. And if there are counts that you can agree on, to render a verdict on those counts.³³³

327. See *United States v. DiLapi*, 651 F.2d 140, 147 (2d Cir. 1981) (finding that “juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants”).

328. See, e.g., *United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014) (declaring that a partial verdict instruction should be neutral); *United States v. Ruffin*, 129 F.3d 114, 1997 WL 701364, at *3 (2d Cir. 1997) (unpublished table decision) (characterizing the lower court’s partial verdict instruction as neutral rather than coercive); *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987) (rejecting the defendant’s argument that the partial verdict was obtained coercively); *United States v. McKinney*, 822 F.2d 946, 950 (10th Cir. 1987) (declaring the partial verdict instruction neutral); *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (affirming the giving of a partial verdict instruction because it was not coercive).

329. See *Moore*, 763 F.3d at 911 (“The jury should be permitted to structure its deliberations as it wishes; and whether to return a partial verdict, and if so at what point during its deliberations, are questions that in the first instance are for the jury itself to answer.”); *DiLapi*, 651 F.2d at 146 (finding that “juries should have considerable latitude in determining for themselves the structure of the deliberative process that will best assure individual consideration of each defendant”).

330. See, e.g., *United States v. Sharp*, 749 F.3d 1267, 1285 (10th Cir. 2014) (rejecting the defendant’s argument that the court’s partial verdict instruction “improperly interfered with the structure and course of the jury’s deliberations” and alternatively concluding that the “district court’s reference to the possibility of a partial verdict . . . intended to alleviate any concerns on the part of the jury that “[they could not] return a verdict because [they could not] agree on all counts” (alterations in original) (quoting the record).

331. 749 F.3d 1267 (10th Cir. 2014).

332. *Id.* (finding that the partial verdict instruction was merely informative and “did not suggest . . . that the jury could or should seal or return partial verdicts as they were reached or prior to the conclusion of the deliberative process”).

333. *Id.* at 1283.

Although the district court urged the jury to continue its deliberations and to return any agreed upon count, it did not specify when or how those partial verdicts should be returned.³³⁴

In *Ruffin*, the Second Circuit, echoing the Tenth Circuit's assessment in *Sharp*, found the district court's partial verdict instruction noncoercive.³³⁵ However, unlike in *Sharp*, where the defendant argued the partial verdict instruction interfered with the jury's deliberative process, the defendant in *Ruffin* contended the partial verdict instruction invited the jury to convict the defendant.³³⁶ In *Ruffin*, the district court advised the jury that "[i]t is possible for juries to render a partial verdict, that is if the jury has reached a verdict on one count, it is permissible in the law for the [c]ourt to accept that verdict and ask the jury to continue to deliberate about other counts."³³⁷ The Second Circuit found the defendant's argument meritless because the partial verdict instruction merely *informed* the jury of its options in a neutral, noncoercive manner.³³⁸

In addition, a neutral, noncoercive partial verdict instruction does not pressure individual jurors to reconsider their views.³³⁹ For example, in *McKinney*, the district judge's partial verdict instruction "advised the jury that if it had not unanimously agreed on a verdict on all counts by 2:30 p.m., he proposed to receive any unanimous verdict it might have reached on any . . . of the counts."³⁴⁰ The court also notified the jury that it "would then resume deliberation on the remaining counts."³⁴¹ Unlike the instructions contested in *Sharp* and *Ruffin*, the *McKinney* court suggested *when* the jury should return its partial verdict.³⁴² The Tenth Circuit, nonetheless, found the district court's instruction both neutral and noncoercive because the instruction did not pressure the jurors to reconsider their previously held views.³⁴³ The *Fermin* court found a partial verdict instruction noncoercive for the same reason.³⁴⁴

Sharp and *Ruffin*, in light of *McKinney* and *Fermin*, suggest that a neutral, noncoercive partial verdict instruction must not pressure jurors to reconsider previously held views and should not instruct jurors to return a partial verdict at

334. *Id.*

335. *See* United States v. Ruffin, 129 F.3d 114, 1997 WL 701364, at *3 (2d Cir. 1997) (unpublished table decision).

336. *Id.*

337. *Id.*

338. *Id.*

339. *See* United States v. Fermin, 32 F.3d 674, 680 (2d Cir. 1994); United States v. McKinney, 822 F.2d 946, 950 (10th Cir. 1987).

340. *McKinney*, 822 F.2d at 950.

341. *Id.*

342. *See id.* at 950–51 (explaining "that it is generally preferable that any Allen instruction be given at the time the general instructions are given a jury").

343. *See id.* (noting that the lower court had advised each juror that "he may adhere to his . . . personal conviction, if he . . . believes it to be right, whatever that conviction might be, i.e., guilty or not guilty").

344. *See Fermin*, 32 F.3d at 680 (finding that the district court, in issuing the partial verdict instruction, "specifically stressed that the jurors should not surrender any conscientiously held views").

a specific time. A neutral, noncoercive partial verdict instruction simply informs a jury of its options, allowing it to deliberate autonomously, and decide for itself whether a partial verdict is appropriate.³⁴⁵

G. Does a Jury Have to Be Explicitly Instructed that a Partial Verdict Is a Final Verdict?

Although not expressly required by Rule 31(b), a district court should instruct a jury about the finality of a partial verdict.³⁴⁶ Doing so mitigates the danger of an inadvertent transformation of a tentative jury decision into a final, irreversible one.³⁴⁷ In *Ruffin*, the Second Circuit found the following instruction sufficient: “[O]nce you announce your verdict in open court on a particular count, . . . the verdict . . . remains in place forever, and so you can’t take it back, as it were, if you continue to deliberate about other counts.”³⁴⁸

The failure to inform a jury of the finality of returning a partial verdict, without more, is unlikely to amount to reversible error.³⁴⁹ In *Dolah*, the

345. For examples of neutral, noncoercive partial verdict instructions, the model criminal jury charges, see SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 177, § 9.03; COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, THIRD CIRCUIT, *supra* note 177, § 9.08; JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 10.04 (2013); CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, *supra* note 12, § 1.43.

346. See *United States v. Dolah*, 245 F.3d 98, 108 (2d Cir. 2001) (stating that a partial verdict instruction should preferably mention the finality of returning a partial verdict), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Ruffin*, 129 F.3d 114, 1997 WL 701364, at *3 (2d Cir. 1997) (unpublished table decision) (finding that the district court’s partial verdict instruction helped prevent the jury from inadvertently returning a tentative vote by instructing the jury as to a partial verdict’s finality); *United States v. Benedict*, 95 F.3d 17, 20 (8th Cir. 1996) (finding the district court’s receipt of a partial verdict erroneous because, inter alia, the court did not explain the finality of partial verdicts in its instruction to the jury); see also COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, THIRD CIRCUIT, *supra* note 177, § 9.08 (“You should understand that if you choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.”); SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 177, § 9.03(2) (“If you do choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.”); JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, *supra* note 345, § 10.04 (“If you do choose to return a verdict as to [some of the defendants] [and/or] [some of the counts] now, that verdict will be final. You will not be able to change your minds about it later on.” (alterations in original)); CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, *supra* note 12, § 1.43(2) (“If you do choose to return a partial verdict, that verdict will be final. YOU WILL NOT BE ABLE TO CHANGE YOUR MINDS ABOUT IT LATER ON.”). *But see United States v. Dakins*, 872 F.2d 1061, 1064 (D.C. Cir. 1989) (finding that the district judge could accept a partial verdict despite not instructing the jury about the finality of returning a partial verdict).

347. *Ruffin*, 129 F.3d at *3 (holding that instructing the jury as to the finality of a partial verdict decision “tended to inoculate the instruction against the danger . . . that a partial verdict instruction might pressure the jury into permitting a tentative vote to become irrevocable”).

348. *Id.*

349. Compare *Dolah*, 245 F.3d at 107 (affirming the defendant’s conviction although the jury returned a partial verdict without being informed as to its finality), with *Benedict*, 95 F.3d at 20

defendant argued the district court erred by not “caution[ing] the jury that any partial verdicts announced in open court could not later be revised.”³⁵⁰ The Second Circuit noted that the district court should have instructed the jury as to the finality of returning any partial verdict, but affirmed the conviction because “the omission of such guidance” proved “harmless.”³⁵¹ The Second Circuit reached that conclusion because the jury had clearly expressed its desire to return a partial verdict, and it “gave no subsequent indication that they wished to reconsider their partial verdicts.”³⁵²

Similarly, in *Dakins*, the D.C. Circuit affirmed the defendant’s conviction despite the district court’s failure to instruct the jury as to the finality of returning a partial verdict. In doing so, the *Dakins* court expressly rejected the notion that a district court *must* instruct a jury as to finality of rendering a partial verdict.³⁵³ The D.C. Circuit highlighted that there was “no reason for the jury to have thought its partial verdict any less final than it would have been had the jury been rendering a verdict as to all of the defendants.”³⁵⁴ Thus, although the D.C. Circuit seems to suggest that a judge never needs to communicate the finality of a partial verdict to a jury, its expanded analysis of the jury’s thought process suggests otherwise.

Upon closer assessment, the *Dakins* and *Dolah* holdings leave open the possibility that the failure to instruct a jury as to the finality of a partial verdict could constitute reversible error when evidence suggests jury confusion regarding a partial verdict’s finality.

While lacking in *Dolah* and *Dakins*, *Benedict* included such evidence of jury confusion.³⁵⁵ In *Benedict*, the Eighth Circuit reversed the defendant’s conviction because, inter alia, the lower court, rather than informing the jury of the finality of its partial verdict, “simply instructed the jury to announce its partial decision.”³⁵⁶ The Eighth Circuit found the district court’s failure to inform the jury of a partial verdict’s finality, coupled with additional criticisms, sufficient to reverse the conviction. Reading *Benedict*, in conjunction with *Dolah* and *Dakins*, reveals that—absent other indicia of error—a failure to instruct a jury about a partial verdict’s finality will not alone result in reversal. When paired with supplemental errors, however, the likelihood of reversal increases. Accordingly, a court should instruct a jury as to the finality of a partial verdict.

(reversing the defendant’s conviction for a number of reasons concerning the manner in which the jury deliberations were conducted, one of which being the failure of the district court to explain the finality of returning a partial verdict).

350. *Dolah*, 245 F.3d at 108.

351. *Id.*

352. *Id.*

353. *United States v. Dakins*, 872 F.2d 1061, 1064 (D.C. Cir. 1989) (finding no existing precedent suggesting that a special finality instruction is required prior to a district court’s receipt of a partial verdict).

354. *Id.*

355. *See United States v. Benedict*, 95 F.3d 17, 20 (8th Cir. 1996).

356. *Id.* at 20.

CONCLUSION

A district court has a tremendous amount of discretion when it comes to partial verdicts. As such, it is extremely rare that an appellate court will reverse a conviction obtained as a result of a partial verdict. Nevertheless, it can happen. And because it *can* happen, a district court judge may want to act cautiously. Though Rule 31(b) states that partial verdicts can be received, it does not say much more. As it stands, specific guidance lies in case law. But case law research takes time, which is something a district judge—especially one who needs to make a quick decision—does not have. This Comment aims to alleviate this problem by providing a ready-made guide for a district judge faced with the question of whether it is appropriate to either receive a partial verdict or instruct a jury that it can return one.