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Civil Rights Update

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Plaintiffs' Section 1983 Right to Poll the Jury: Recent Seventh Circuit Jurisprudence

For those who defend federal civil rights actions against incarcerated or civilly committed litigants, the court's practices regarding the movement of the plaintiff in and out of the courtroom during trial can have important appellate consequences. In its recent opinion in *Smego v. Payne*, 854 F.3d 387 (7th Cir. 2017), the United States Court of Appeals for the Seventh Circuit analyzed an important question: whether a district court's decision to exclude the plaintiff from a civil jury's reading of its verdict was an impermissible abuse of discretion, where the plaintiff was represented in open court by appointed law students who declined to poll the jury after it announced its verdict. Under the circumstances of this case, no reversible error occurred; however, the court's opinion reminds us of the potential significance of seemingly innocuous decisions made toward the end of trial.

Background

Richard M. Smego, a civilly committed sex offender residing at the Rushville, Illinois detention facility, has a long history of litigating *pro se* civil rights actions. In this particular case, he sued members of his treatment team, claiming that they forced him to continue participating in group therapy sessions with another offender who, Smego claimed, sexually assaulted him at the facility. *Smego*, 854 F.3d at 389. In a prior ruling, the Seventh Circuit found that Smego was entitled to a jury trial on his claims. *Id.* (citing *Smego v. Payne*, 469 F. App'x 470 (7th Cir. 2012)). On remand, the district court appointed clinical students from University of Illinois College of Law to represent Smego. *Smego*, 854 F.3d at 389-90.

Although Smego typically appeared for court hearings via video conference or telephone, he was present in the courtroom for the three-day civil trial pursuant to a writ of habeas corpus *ad testificandum*. *Id.* at 390. On the trial's final day, the court conducted an off-the-record discussion with the parties following closing arguments. At that time, the judge ordered Smego returned to Rushville. This order was not repeated on the record, and no cautionary instruction was issued to the jury regarding Smego's absence from the proceedings. *Id.*

The jury was released for its deliberations and notified the court it had reached a verdict approximately an hour and a half later. Upon the jury's return to the courtroom, Smego was no longer there. The law students appointed to represent him were present, however. The verdict—signed by all ten jurors—found in favor of the defendants as to all claims. *Id.* Immediately after the jury's verdict was announced, the trial judge asked the law students whether they wanted the jurors polled. One law student, without consulting Smego, answered in the negative. The students were then granted leave to end their representation of Smego. *Id.*

Acting on his own behalf, Smego timely filed a notice of appeal and, separately, a motion to correct the record under Federal Rule of Appellate Procedure 10. Subsequently, the district court entered a text order regarding the timing of Smego's transportation back to Rushville. It stated, in pertinent part, that Smego was transported back to Rushville "after

the closing arguments and the jury was sent to deliberate." *Id.* at 390-91. The order further stated that this "was the court's standard practice before *Verser v. Barfield*, 741 F.3d 734 (7th Cir. 2013)." *Smego,* 854 F.3d at 391.

The *Verser* Decision

The Seventh Circuit's *Verser* opinion was issued shortly after Smego's trial. In *Verser*, a *pro se* inmate proceeded to trial on Eighth Amendment excessive force claims against correctional officers at Western Illinois Correctional Center. *Verser*, 741 F.3d at 737. Following closing arguments and jury instructions, the district judge in *Verser* ordered the plaintiff back to prison while the court and defense counsel awaited the jury's verdict. This was performed on the record. *Id.* Over the next few hours—and with the plaintiff no longer present—the jury sent three notes to the court. The final note asked the judge whether a juror could "ask a question to the judge after the verdict is read." *Id.* The court answered, "First, I have to have a verdict." *Id.* The *Verser* jury rendered its verdict in favor of the defendants. In light of the final note, the district judge inquired as to the juror's question. One member of the jury responded that the case "was very hard for us" and that "the majority feel that the defendants all had a part to play in what happened . . . but, because there was a lack of evidence, we could not find the defendants guilty." *Id.*

Verser received notice of the verdict by mail. He then filed an appeal, arguing, among other things, that his removal from the courtroom prevented him from exercising his right to poll the jury under Federal Rule of Civil Procedure 48(c). *Id.* at 737-38.

In its 2013 opinion, the Seventh Circuit examined the purpose and extent of Federal Rule of Civil Procedure 48(c). It observed that polling a jury is intended to "ensure jurors' accountability for the verdict, 'creating individual responsibility' and ferreting out any dissent that, for whatever reason, was not reflected in the verdict as announced." *Verser,* 741 F.3d at 738 (quoting *United States v. Shepherd*, 576 F.2d 719, 725 (7th Cir. 1978)) (internal quotations omitted). The court noted that the right to poll a jury, although not of a constitutional magnitude, is "substantial" and "that a district court's refusal, or even neglect, to conduct a jury poll upon a timely request is ground for a new trial." *Verser*, 741 F.3d at 738 (citing *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1522 (7th Cir. 1993)).

The question facing the *Verser* court was whether Rule 48(c) requires courts to ensure that a party is somehow afforded the *opportunity* to make a polling request following the reading of a jury verdict. *Verser*, 741 F.3d at 739. The court answered in the affirmative, stressing that the plaintiff was not only unable to poll the jury, but that he "was left incommunicado, unable to contribute to questions that arose while the jury was deliberating and unable to respond to the verdict with a request for a poll." *Id.* at 740. In light of the circumstances and the reservations expressed by one or more jurors, it found reversible error and remanded the matter for a new trial. *Id.* at 742-43.

Smego's Holdings

The Seventh Circuit's consideration of Smego's appeal took place in the shadow of the *Verser* decision. An unrelated threshold question, however, involved the timing of his removal from the courtroom. Smego argued that he was removed before the jury received the case, thus alerting the jurors to his absence and potentially resulting in prejudice against him. *Smego*, 854 F.3d at 390, 392. This stood in sharp contrast to the court's text order claiming that Smego was transported to Rushville only after the jury was sent to deliberate, consistent with the court's standard pre-*Verser* practice. *Id.* at 390-91, 394. The Seventh Circuit noted that the timing in *Verser* (which involved the same district court judge) was identical,

which seemed to confirm the existence of a "standard practice" by the court prior to *Verser*. With the evidence as to timing "inconclusive," the court found nothing warranting a finding that the timeline set forth in the district judge's text order was clearly erroneous. *Id*. at 394. Consequently, no evidence suggested that the jury was aware of Smego's absence prior to—or during—its deliberations. Smego's absence thus could not have affected its verdict. *Id.*

Remaining for the court's consideration was whether, in light of *Verser*, Smego's unavailability to poll the jury constituted error mandating a new trial. The court initially reiterated the importance of the right to poll jurors pursuant to Rule 48(c). *Id.* at 395. It then found many important distinctions between Smego's experience and Verser's. Unlike Verser, Smego was at all relevant times represented by counsel, and his legal representatives remained in the courtroom after he was gone. *Id.* Smego urged that, regardless of the law students' presence on his behalf, he was nevertheless left "incommunicado" like Verser. *Smego,* 854 F.3d at 396. The court rejected this comparison, noting that "[l]awyers often act on their clients' behalf outside their clients' presence" and finding "no reason why this should not extend to counsel's ability to waive polling the jury." *Id.*

The court went further, stating that even if Smego's law student representatives could not waive his right to poll the jury, he "would likely still be out of luck" in light of the quick and unanimous verdict by a jury that did not show "any signs of doubt or dissent." *Id.* at 397. There was, in the court's view, significantly less risk of harm to Smego than to Verser.

Conclusion

Although the Seventh Circuit found no reversible error in *Smego*, its opinion reminds us of the importance of the right to poll jurors after they render their verdict. If Smego was *pro se*, like Verser, a new trial would likely have resulted. As defense counsel, it is not often our responsibility to remind the court to protect the rights of our opponents. In *pro se* cases, however, remain vigilant after closing arguments and make sure the plaintiff is not incommunicado during the jury's deliberations. It may serve to protect a hard-earned verdict on behalf of your client.

About the Author

John P. Heil, Jr. is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's drone law practice group and is vice-chair of the business and commercial litigation practice group. He also regularly defends complex civil rights cases, *qui tam* actions and catastrophic tort suits in state and federal court. Prior to joining *Heyl Royster* in 2007, Mr. Heil was an Assistant State's Attorney in Cook County for eleven years. He received his undergraduate degree from Bradley University in 1993 and his law degree from Chicago-Kent College of Law, with honors, in 1996. He is a member of the Illinois Association of Defense Trial Counsel, the Federal Bar Association, the Illinois State Bar Association, the Peoria County Bar Association, and the Abraham Lincoln American Inn of Court.

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