No. 11-2091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Glenn Verser,

Plaintiff-Appellant,

v.

Jeffrey Barfield, Douglas Gooding,
Ryan Robinson, and Chris W. Davis,

Defendants-Appellees.

Appeal From the United States District Court
For the Central District of Illinois,
Case Number 07-3293
The Honorable Judge Harold A. Baker

REPLY BRIEF
OF PLAINTIFF-APPELLANT GLENN VERSER

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

ARGUMENT

I. Contrary to the Defendant's Argument, the District Court's denial of Mr. Verser's right to poll is *per se* error requiring reversal.

The defendants argue that the District Court did not deprive Mr. Verser of his right to poll the jury, because Mr. Verser did not request a poll before the Court dismissed him. Def. Supp. Response Br. 11 – 15. According to the defendants, this means that there was no *per se* error. Def. Supp. Response Br. 16 – 18.

But in so arguing, the defendants misconstrue the plain language of Rule 48(c), Def. Supp. Response Br. 12 – 13, and misread this Court's precedents. Def. Supp. Response Br. 14 – 15. In fact, the plain text of Rule 48(c) allows a party *to request* a poll *only after* the jury returns its verdict. This Court's cases support that proper and natural reading. Therefore, as we argued in our opening supplemental brief, because the District Court excluded Mr. Verser, a *pro se* litigant, during the only time when he could have requested a poll, it absolutely deprived him of his right to poll the jury. Verser Supp. Br. 12 – 14. This constitutes "*per se* error requiring reversal." Verser Supp. Br. 15 (quoting *United States v. F.J. Vollmer & Co, Inc.*, 1 F.3d 1511, 1522 (7th Cir. 1993)).

A. The plain text of Rule 48(c) says that a party may request a poll only after the jury returns its verdict.

Rule 48(c) reads, in relevant part:

> After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually.

The most natural reading of the rule is that a party may request, and a court may grant, a poll only *after* the jury returns its verdict. That is because the clause prescribing the appropriate time—"[a]fter a verdict is returned but before the jury is discharged"—applies to the entire rest of the sentence, including the clause "on a party's request." Stated only slightly differently, the clause "on a party's request" modifies the clause "the court must," which, in turn, is modified by the clause prescribing the appropriate time. In short, the first clause prescribing the appropriate time for *the poll* also prescribes the time for *the request*.

Moreover, the defendants have offered no good reason why *only a portion* of the first clause prescribing the appropriate time applies to *the request*, while *the entire* first clause applies to *the poll*. By the defendants' reckoning, only the sub-clause "before the jury is discharged" applies to the clause "on a party's request," but the entire clause "[a]fter a verdict is returned but before the jury is discharged" applies to "the court must . . . poll the jurors individually." There is no good reason for this fractured reading of the text. The more natural reading would apply the entire first clause to the entire rest of the sentence, so that the clause prescribing the time "[a]fter a verdict is returned but before the jury is discharged" would apply to both the poll and the request for the poll.

Were it otherwise, the rule would read differently. In particular, if the defendants were correct that the rule distinguishes between the time *to request* a poll and the time *to poll*, Def. Supp. Response Br. 13, the clauses would be sequenced to better reflect that distinction. It might read, for example, "Upon a party's request, the

court must, or the court may on its own, poll the jury after a verdict is returned but before the jury is discharged." This simple rewrite would clarify that the clause prescribing the time applies only to the poll, not to the request—as the defendants would have it. But of course the rule does not read that way.

According to the most natural reading of Rule 48(c), both *the request* and *the poll* must occur only "[a]fter a verdict is returned but before the jury is discharged."

B. This Court's precedents support this plain reading.

Contrary to the defendants' argument, Def. Supp. Response Br. 15, *United States v. Randle* precisely supports this plain reading of Rule 48(c). *United States v. Randle*, 966 F.2d 1209 (7th Cir. 1992). That is because the parties, the trial court, and this Court in *Randle* all *took it for granted* that the defendant's attorney could only request a poll only after the jury returned its verdict. This Court's entire analysis of the question whether defense counsel waived the right to poll focused only on the one-and-a-half second lapse between the jury's return of its verdict and the trial judge's comments—a period *after* the jury returned its verdict. *Randle*, 966 F.2d at 1214. Apparently neither the parties, nor the trial court, nor this Court ever even considered that the defendant's attorney waived the right to poll by not raising it *before* the jury returned its verdict—as the defendants argue here. Instead, the parties, the trial court, and this Court all seemed to treat the fact that a party could request a poll only *after* the jury returned its verdict as so fundamental that it required neither argument nor analysis.

This understanding of the timing of the poll was not unique to *Randle*. Thus, in *United States v. Billingsley*, the trial court also assumed that a request to poll must come only *after* the jury returned its verdict. *United States v. Billingsley*, 766 F.2d 1015, 1019 n.5 (7th Cir. 1985). The court told counsel in that case that counsel's voluntary absence during the reading of the verdict would waive counsel's right to poll the jury:

> Mr. Burke: Is it necessary that I be present for the reading of the verdict?
> The Court: It is not. If you wish to waive your presence, that would mean you would waive the polling of the jury.

Billingsley, 766 F.2d at 1019 n.5. If counsel could have requested a poll *before* the jury returned its verdict, the court would not have considered counsel's voluntary absence during the reading of the verdict as a waiver of the right to poll. Instead, the court could have accepted a request to poll right then—even before the jury returned its verdict. But apparently that option did not occur either to the attorney or to the court. That is because it was not a real option. Thus, just like this Court in *Randle*, the trial court in *Billingsley* analyzed waiver assuming that the request to poll can only come after the jury returned its verdict.

The courts' analysis in *Randle* and *Billingsley* is perfectly consistent with the language that we cite in our opening supplemental brief from *United States v. Marr*, 428 F.2d 614, 615 (7th Cir. 1970) and *Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958). Verser Supp. Br. 12 – 13 ("the right to poll a jury cannot be exercised intelligently until after the verdict has been announced, and a request prior thereto would be premature"). The defendants argue that this language was

"dicta" and that those cases did not hold that "it would be error . . . for a trial court to allow a litigant's early request to poll should the jury's decision go against him." Def. Supp. Response Br. 14. But, as we argue more fully in our opening supplemental brief, Verser Supp. Br. At 15 – 19, these cases, taken together with this Court's unequivocal and consistent approach that a denial of the right to poll, upon request after the jury returns the verdict, is *per se* error, Mr. Verser's dismissal—and his consequent denial of the right to request and to poll the jury—"is *per se* error requiring reversal." *United States v. F.J. Vollmer & Co, Inc.*, 1 F.3d 1511, 1522 (7th Cir. 1993).

II. Mr. Verser did not waive, forfeit, or otherwise relinquish his right to poll the jury.

Contrary to the defendants' argument, Def. Supp. Response 19 – 23, and as we explain more fully in our opening supplemental brief, Mr. Verser could not have waived, forfeited, or otherwise relinquished his right to poll the jury for this very simple reason: it was not yet ripe. Verser Supp. Br. 22 – 25. Our argument applies equally to waiver, forfeiture, or any other form of relinquishment.

But more importantly, Mr. Verser could not have forfeited his right to poll the jury, because the right to poll does not seem to be subject to forfeiture. Neither this Court, nor any other federal court that we can find, analyzes a lost right to poll as a *forfeited* right. Instead, as we explained, this Court and others analyze it as a *waived* right. *See* Verser Supp. Br. 22 – 25 and cases discussed therein. That is so, even when the relinquishment might look as much like a *forfeiture*—that is, an accident, neglect, or inadvertent failure, *see United States v. Cooper*, 243 F.3d 411,

415-16 (7th Cir. 2001)—as a *waiver*. *See, e.g., United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994) (holding that the defendant's counsel did not waive the right to poll, after "he had assumed that the court (apparently on its own motion) would poll the jury after the verdict was read, and when it did not, he did not wish to interrupt the court's closing comments."); *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984) (holding that counsel waived the right to poll after he failed to make a request at a conference in the judge's chambers after the jury had been discharged).

Finally—and most importantly—this Court could not have been clearer when it wrote that "defendants enjoy an absolute 'right to poll the jury . . . *unless it has been expressly waived* . . . ." *United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1523 (7th Cir. 1993) (emphasis in original) (quoting *Mackett v. United States*, 90 F.2d 462, 465 (7th Cir. 1937)). Notably, this Court wrote this sentence, with emphasis, just three months after the Supreme Court clarified the distinction between waiver and forfeiture in *United States v. Olano*. 507 U.S. 725, 733-35 (1993). In other words, this Court was well aware of the distinction between waiver and forfeiture, *see id.*, when it wrote, with emphasis, that the right to poll is absolute "*unless it has been expressly waived*." *F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1523 (emphasis in original). (As we previously explained, Mr. Verser did not expressly waive his right here. Verser Supp. Br. 20 – 21.) This Court was thus clear when it held that the right to poll is subject only to express waiver, not forfeiture,

and the defendants' attempts to shoehorn forfeiture into this case fall flat. Def. Supp. Response Br. 20 – 21.

Because Mr. Verser's right to request a poll was not yet ripe, because the right to poll does not seem to be subject to forfeiture, and because this Court stated quite clearly that the right to poll exists "*unless it has been expressly waived*," *id.*, Mr. Verser could not have waived, forfeited, or otherwise relinquished his right to poll.

III. Mr. Verser was denied his chance to ensure unanimity by forcing the jurors to voice their accountability.

Contrary to the defendants' argument, Def. Supp. Response 22, the District Court's denial of Mr. Verser's right to poll denied Mr. Verser an opportunity to know that "no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899); *see also United States v. Sturman*, 49 F.3d 1275, 1282 (7th Cir. 1995) (explaining that "[t]he purpose of the jury poll is to ensure unanimity by forcing the jurors to voice their accountability."). That is because a jury poll would have served its purpose here, especially after a juror expressed some struggle on behalf of "the majority" of the jury after delivering the verdict. Verser Supp. Br. 6.

Indeed, a jury poll in this case would have served its purpose far more than it would have in either *Marinari* or *Randle*. In both cases, the jury returned a verdict with no unusual statements or any other sign of struggle, uncertainty, or equivocation whatsoever. *United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994); *United States v. Randle*, 966 F.2d 1209, 1213 (7th Cir. 1992). Yet still this Court in both cases summarily granted a new trial, with no consideration of

prejudice or plain error. *Marinari*, 32 F.3d at 1215 ("Given the defendant's absolute right to a poll of the jury at the time it was requested, it was error *per se* for the district court not to recall the jury and conduct an oral poll."); *Randle*, 966 F.2d at 1214 (treating the denial of the right to poll the jury as *per se* error).

Mr. Verser's case is even clearer. His jury did express (at least) a struggle with the verdict, suggesting that a poll would have even better served its purpose here. More to the point: even if this Court used a "prejudice" or "plain error" analysis, as the defendants seem to argue, Def. Supp. Response Br. 16 – 17, 19 – 23, but which as explained above it does not, Mr. Verser suffered greater prejudice or plain error than either Marinari or Randle, because the juror statement in Mr. Verser's case more clearly called for a jury poll. A jury poll in Mr. Verser's case would have therefore even more clearly served its purposes than in *Marinari* or *Randle*. Because Marinari and Randle were granted a new trial in those cases—whatever standard it used, *per se* error, prejudice, or even plain error—Mr. Verser should be granted a new trial, too.

CONCLUSION

For the foregoing reasons and the reasons stated in his opening brief, Mr. Verser respectfully requests that this Court reverse the District Court's denial of Mr. Verser's motion for a new trial and order a new trial. Moreover, Mr. Verser respectfully requests that this Court instruct the District Court to permit Mr. Verser to poll the jury in his new trial, or, if the District Court excludes Mr. Verser, to advise Mr. Verser of his right to poll the jury and to poll the jury itself, or to employ other procedures to ensure that it protects Mr. Verser's right to poll the jury.

Respectfully Submitted,

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March 27, 2013

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellant, Glenn Verser, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with proportionally spaced font. The length of this brief is 2,904 words.

s/ Steven D. Schwinn
Steven D. Schwinn

Dated: March 27, 2013

PROOF OF SERVICE

I hereby certify that on March 27, 2013, I electronically filed the foregoing Brief and Required Short Appendix of Plaintiff-Appellant Glenn Verser with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Steven D. Schwinn
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Dated: March 27, 2013