

## Alabama Rules of Criminal Procedure

### Rule 23. Verdict

#### *Rule 23.5. Poll of jurors.*

After the verdict is returned and before the jury is discharged, the jury shall be polled at the request of any party or may be polled upon the court's own initiative. The poll shall be conducted by the court or by the clerk of the court, each juror being asked individually whether the verdict announced is that juror's verdict. If upon the poll there is not unanimous concurrence, the court shall direct the jury to retire for further deliberation.

### Committee Comments

Rule 23.5 recognizes the right of the parties and the court to have the jury polled.

Polling the jury is a procedure of common law origin whereby after returning a verdict, each juror is separately asked whether it is his verdict. The purpose of the poll is to determine "before it is too late, whether the jury's verdict reflects the conscience of each of the jurors or whether it was brought about through the coercion or domination of one of them by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror." *Commonwealth v. Martin*, 379 Pa. 587, 593, 109 A.2d 325, 328 (1954).

The rule provides that the jury must be polled upon the timely request of any party. Alabama law previously provided in Ala.Code 1975, § 12-16-15, that "...the jury may be polled, on the requirement of either party."

In *Allen v. State*, 260 Ala. 324, 70 So.2d 644 (1954), the defendant was indicted for the offense of murder in the first degree. He pleaded not guilty, and the jury returned a verdict of guilty of murder in the first degree and fixed punishment at death. The defendant's counsel was not in the courtroom when the jury returned its verdict. No one from the court summoned counsel. The defendant was brought into court to hear the sentence, but the lawyer was absent, and the jury was not polled. The court held that, as a practical matter, the defendant was deprived of his right given under Ala.Code 1975, § 12-16-15, to poll the jury, and therefore a reversal of judgment was required and the case remanded.

It has been held that the right to poll the jury, when given by statute, is one that may be waived. *Brown v. State*, 63 Ala. 97, 102 (1897). In *Brown*, the court held that, in the case of a misdemeanor, where defendant, through his counsel,

deliberately consents that in his absence the jury may return a verdict and be discharged, he waives his right of polling the jury.

However, in *Waller v. State*, 40 Ala. 325 (1867), in a felony conviction, the court held, without reference to the statute, that it was erroneous to allow the jury to return their verdict to the clerk during a recess of the court, in the absence of the prisoner, even though his counsel had assented to the procedure in open court. In *Brown*, the court distinguished *Waller*, stating that whereas *Waller* was a conviction for a felony, *Brown* involved only conviction for a misdemeanor. No mention was made in *Waller*, however, of the ability to waive the right to poll the jury in a felony case, the court simply stating that counsel could not assent to the verdict's being returned without the defendant present.

Rule 23.5 also permits the court to have the jury polled on its own initiative. Ala.Code 1975, § 12-16-15, does not include such a provision. The phrase "may be polled" is included in the rule to avoid a possible interpretation that the court is required to poll the jury in the absence of a request from one of the parties.

The second sentence of Rule 23.5, which describes the polling procedure, has been taken from ABA, Standards for Criminal Justice, *Trial by Jury* 15-4.5 (2d ed. 1986). The poll may be conducted by the trial judge or by the clerk of the court. The jurors are to be questioned individually. Under the rule, each juror is to be asked whether the announced verdict is his verdict. The rules do not prescribe the specific form of the question. The poll should be conducted so as to obtain an unequivocal expression from each juror. According to case law in Alabama, it is not necessary for a juror to answer by word of mouth when being polled. In *Brown v. State*, 141 Ala. 80, 37 So. 408, 409 (1904), the Alabama Supreme Court held that "[t]he answer may be made as intelligibly and affirmatively by a movement of the head as by words." 141 Ala. at 83.

The last sentence of Rule 23.5 provides that if there is not "unanimous concurrence," then the Court must direct the jury to retire for further deliberations. In not permitting the Court to discharge the jury, the rule conforms to Ala.Code 1975, § 12-16-15, which provides that if there is not concurrence among all the jurors, then "the jury must be sent out for further deliberation." The Advisory Committee disagreed with the reasoning of the Commentary to ABA, Standards for Criminal Justice. *Trial by Jury* 15-4.5 (2d ed. 1986), which would give the judge discretion to grant a mistrial rather than send the jury out for further deliberations.