

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TYREE MARQUEZ BURT,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION TWO

Siri Shetty
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101
Tel: (619) 696-0282
Email: sds@adi-sandiego.com
Counsel for Petitioner

QUESTION PRESENTED

1. Under longstanding precedent from this Court, although a trial judge may instruct a deadlocked jury about its duty to deliberate, it cannot coerce a guilty verdict. Here, the trial court advised a deadlocked jury that it would not accept a hung jury and directed the panel to resume deliberations. But it did not remind the jury of their right to an individual opinion even if such position conflicted with the majority view. Under these circumstances, was the admonition coercive, implicating petitioner's due process rights to a fair trial?

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PRAYER FOR RELIEF

Petitioner, Tyree Marquez Burt, respectfully prays for a writ of certiorari to review the judgment of the Fourth Appellate District of the Court of Appeal for the State of California, No. E067642.

JURISDICTION

Petitioner was convicted by jury of residential burglary, in violation of California Penal Code sections 459, 460. In an unpublished disposition, the Fourth Appellate District Court of Appeal for the State of California affirmed the conviction on May 31, 2018. A timely petition for review to the California Supreme Court was denied on September 12, 2018.

The Court has jurisdiction to review the judgment under 28 U.S.C. §1257 (a).

OPINION BELOW

A copy of the unpublished opinion of the Fourth Appellate District Court of Appeal for the State of California is reproduced in Appendix A.

A copy of the order from the California Supreme Court denying review is reproduced at Appendix B.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mr. Burt was arrested and charged with one count of residential burglary under California law (Cal. Pen. Code, §§459, 460) as well as several prior conviction enhancements. (1 CT 7-10.)

The trial was short. The taking of evidence at the jury trial began at 1:51 p.m. on November 2, 2016 (1 CT 54) and continued to 3:49 p.m. that day. (1 CT 55.) Evidence resumed at 9:16 a.m. on November 3, 2016(1 CT 57), and continued until 11:04 a.m. on that day. (1 CT 58.) The court read the jury instructions, there was a recess for lunch, and the parties conducted closing argument. (1 CT 58.)

On November 3, 2016, the jury began deliberations at 2:13 p.m. (1 CT 58.) At 2:30 p.m., the panel reported that they had chosen a foreperson. (1 CT 58; Appendix "A," Op. at p. 5.) At 2:58 p.m., the jury sent a note to the court stating that they were hung. (1 CT 59 ; Appendix "A," Op. at p. 5.)

After advising the jury that it was a "bottom-line guy," the trial court stated:

So I've been told that you claim you're hung. Folks, jury service is important. You were back there for 30 minutes. Unless you memorized each and every word of every jury instruction that I read to you, you absolutely did not review the jury instructions. You did not have time to deliberate. You have not deliberated in good faith in 30 minutes.

What that reflects to me, and I could be wrong, are people who went back immediately and announced how they're planning to vote, 'we're hung,' and that's it. That's not what jurors do. So I'm not accepting there's a hung jury in this case. Simply not accepting it. This is the first time in all 250 trials I've ever said anything like this, but I read to you jury instructions that are the guidepost for your duties. You need to read those. You need to use them. You need to incorporate your facts and then fold them into those jury instructions, and you can't do that in 30 minutes.

So I'm ordering you to go back and deliberate, please. That's what you raised your right hands to do. You swore to do that. This is very serious work that we do. This isn't TV.

So I'm sorry to be so direct, but that's me, folks, could sugarcoat this and pat everybody on the head and say I really appreciate the hard work, but there is no hard work, very cursory examination of what happened, no review of the jury instructions. So I'm going to ask you to please go back and do what you swore to do. Please do that.

I'm ordering you to go back and deliberate. Thank you. And please read the jury instructions.

(1 RT 215-216; Appendix "A," Op. at pp. 5-6.)

When asked if there was anything counsel wished to put on

record or if they disagreed with the court's comments, to make a record at that point, trial counsel stated that she had nothing to add, but "would just say if they're hung again, maybe do the *Moore* instruction."

(1 RT 216.)¹

After the court told the jury that he did not accept the report of deadlock, the panel resumed deliberations at 3:15 p.m. on November 3, 2016. (1 CT 59.) At 3:45 p.m., the jury requested a read back of Mr. Burt's testimony. (1 CT 59; Appendix "A," Op. at p. 10.) At 4:00 p.m., the jury requested clarification of whether removing a screen fit the definition of a building's outer boundary. (1 CT 59; 2 RT 218; Appendix "A," Op. At p. 10.) At that time, the jury adjourned for the day. (1 CT 59.)

At 9:00 a.m. on November 4, 2016, the jury resumed deliberations. At 9:13, the jury requested a read back of other testimony. (1 CT 61; 1 RT 219; Appendix "A," Op. at pp. 10-11.)

At 9:40 p.m., the jury sent a note indicating that Juror number 4 was refusing to deliberate. (1 CT 61; 1 RT 219; Appendix "A," Op. at p. 11.) After several rounds of questioning all jurors except for Juror

¹In *People v. Moore* (2002) 96 CalApp.4th 1105, 1118-1119, a California Court of Appeal approved an instruction advising a deadlocked jury that their goal "should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so" and "It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment."

number 4, the court excused the juror. (1 RT 245; Appendix "A," Op. at p. 16.)

After Juror no. 4 was discharged and replaced, the jury returned a guilty verdict within 49 minutes. (1 CT 62.)

Petitioner appealed, asserting that the judgment should be reversed, *inter alia*, because the trial court's remarks to the deadlocked jury were impermissibly coercive, in violation of California law and due process.

The California Court of Appeal affirmed the judgment. The appellate court held that the trial court's comments to the deadlocked jury were appropriate because it "said nothing that could be construed as advising the jurors that they had to reach a verdict." (Appendix "A," Op. at p. 8.) And the court further rejected petitioner's claim of constitutional error. (Appendix "A," Op. at p. 9.)

On September 12, 2018, the California Supreme Court denied review.

REASONS FOR GRANTING THE WRIT

The case presents an important question regarding the constitutional rule against coercive instructions to a deadlocked jury: under what circumstances does an admonition cross the line from neutral instruction to coercive directive to reach a verdict.

As this Court has recognized, consistent with Due Process "any criminal defendant, . . . , being tried by a jury is entitled to a

uncoerced verdict of that body.” *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). Thus, although it may be appropriate to provide a supplemental admonition advising jurors to reconsider a minority view, see *Allen v. United States* 164 U.S. 492 (1896), a court may not instruct a deadlocked jury that it “has to reach a decision.” *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam).

But that is what occurred in petitioner’s case. After the jury initially reported a deadlock within 30 minutes of reporting they had chosen a foreperson, the trial court berated the panel, asserting that this period of time was insufficient to reach any conclusions and noting that it would not accept a hung jury. But the court did not ask the panel whether additional deliberations would be fruitful, or encourage them to deliberate further to reach a verdict if they could do so without violence to their individual judgment. Under this circumstances, the admonition was impermissibly coercive within the meaning of *Lowenfield* and *Jenkins*.

Although *Lowenfield* concluded that the instruction at issue in that case was not impermissibly coercive, it noted that “other combinations of supplemental charges and polling” might transgress the constitutional boundary between instruction and coercion. *Lowenfield v. Phelps*, 484 U.S. at p. 241.

Petitioner presents such a case. Accordingly, certiorari is appropriate to provide guidance to the lower courts on a recurring and

important question of constitutional law.

I. The trial court provided a coercive admonition when the jury reported an impasse, in violation of the due process guarantee secured by the Fifth and Fourteenth Amendments to the United States Constitution.

Coercive instructions to a divided jury may violate a defendant's right to due process and a fair trial under the Fourteenth Amendment to the United States Constitution. See *Lowenfield v. Phelps*, 484 U.S. at p. 241. Whether a trial court's comments have infringed upon a defendant's due process right to an impartial jury and fair trial "turns upon whether the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 979, citations and quotations omitted.) And reviewing courts consider "whether the court's actions and statements were coercive in the totality of the circumstances." (*Id.* at p. 980.)

Here, the totality of circumstances demonstrated that the court's admonition was coercive. Specifically, about 45 minutes after they began deliberations and 28 minutes after they reported the name of the foreperson to the court, the jury announced that it could not reach a unanimous verdict.² Although the trial involved a simple issue

²That the jury reported they had picked a foreperson about 17 minutes after they began deliberations does not necessarily establish that deliberations only began after such report, because there could have been a delay in reporting that decision.

and included less than four hours of testimony, the court berated the panel, asserting that 30 minutes of deliberation was not a sufficient amount of time to review the jury instructions and stating it was “not accepting there’s a hung jury in this case [,] [s]imply not accepting it[.]” (1 RT 215.)

Although the court directed the panel to review the jury instructions they had heard earlier that day, it made no inquiry into whether additional deliberations would be fruitful. Nor did it remind jurors of their right to an individual opinion. Rather, the court asserted: “You were back there for 30 minutes. Unless you memorized each and every word of every jury instruction that I read to you, you absolutely did not review the jury instructions. You did not have time to deliberate. You have not deliberated in good faith for 30 minutes.” (1 RT 215.) The court reiterated, “[a] very cursory examination of what happened, no review of the jury instructions.” (1 RT 216.)

That the court focused on the jury’s alleged inability to review jury instructions and meaningfully deliberate within 30 minutes is inconsistent with its later acceptance of a guilty verdict from the second jury within 49 minutes. If it was acceptable for the second jury to pick a foreperson, review jury instructions and reach a verdict within 49 minutes of deliberations, it cannot be said it was unreasonable for a jury to pick a foreperson, review jury instructions, and determine they would be unable to reach an unanimous verdict

within 45 minutes.

While there may be a distinction between whether 28 minutes is a sufficient amount of time to determine there is no reasonable probability of reaching an agreement versus whether 28 minutes is a sufficient amount of time to reach an individual conclusion, the tenor and content of the court's directive did not convey the former. Rather, the court told the jury it would not accept a hung jury, they had not deliberated in good faith, and 30 minutes was not sufficient to time to review the jury instructions and reach any conclusion about the case.

(1 RT 215-216.)

Under these circumstances, where the court did not provide any other guidance in ordering the jury to resume deliberations, there was a substantial risk the court's comments would have been perceived as a direction that a verdict was mandatory even at the expense of each individual juror's conscientious judgment.

Although "a jury, any number of juries, have a right to fail to agree" *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971), the instruction likely led the panel to believe that they would be required to continue deliberations until any holdouts were convinced to accede to the majority view. The court's comments created a substantial risk the jurors would forego their individual judgment and reach a compromise so as to satisfy the perceived desire of the court for a unanimous verdict.

Accordingly, the instruction was impermissibly coercive, in violation of the Due Process Clause. See *Jenkins v. United States*, 380 U.S. at p. 446 (reversing based on coercive jury instruction).

In failing to so recognize and affirming the judgment, the disposition of the California Court of Appeal is inconsistent with this Court's precedent recognizing a constitutional rule against coercive instructions to a deadlocked jury.

Accordingly, certiorari is warranted to provide guidance to the lower courts on an important question of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 10, 2018 Respectfully submitted,


Siri Shetty
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101
Bus: (619) 696-0282

Counsel for petitioner