No. _____

In The

Supreme Court of the United States

DWIGHT CHRISTOPHER BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the case below, the district court, upon motion by one defense counsel, granted a mistrial after a jury had been deadlocked and an Allen charge had been given. After some confusion between defense counsel after one of them requested that the court consider allowing the jury more time to deliberate, the district court reversed course and gave the jury an additional, informal Allen charge and ordered them to resume deliberations, resulting in audible cries from the jury room, a guilty verdict within fifteen minutes, and a juror present who had visibly just been crying. The first question presented is:

Whether the district court erred or abused its discretion in reversing or rescinding its grant of mistrial below.

2. The second question presented is:

Whether the district court's second Allen charge was improper or coercive, necessitating a vacating of the verdict below.

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The order appealed from is the Per Curiam Opinion located at the CM/ECF Docket of the Fourth Circuit Case No. 17-4544, Docket Entry No. 51 entered on March 28, 2019, affirming the Judgment of the Eastern District of North Carolina. The Fourth Circuit Opinion is attached hereto as Exhibit A and the trial court judgment is attached as Exhibit B.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on March 28, 2019, in a direct appeal of a sentence imposed against Petitioner Dwight Christopher Brown in the United States District Court for the Eastern District of North Carolina for a criminal violation of 18 U.S.C. § 922(g). Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend VI.

STATEMENT OF THE CASE

On July 12, 2016, Mr. Brown was charged in a one count indictment with possession of a firearm in violation of 18 U.S.C. § 922(g). [J.A. at 17.][1] On December 13, 2016, the government filed a Superseding Indictment charging Mr. Brown with the same offense, but changing the date to March 4, 2016. [J.A. at 33.]

On February 14, 2017, the trial court held a hearing on the pretrial motions filed in the case prior to voir dire and trial. The trial court denied or withheld ruling on the motions. [J.A. at 168-85.] The trial court then conducted voir dire and began the trial, which lasted until February 17, 2017. [J.A. at 165-905.] On February 17, 2017, the jury returned a guilty verdict. [J.A. at 905.]

On May 3, 2017, the Court entered an order denying Mr. Brown's motion for new trial. [J.A. at 981-99.] On August 18, 2017, Mr. Brown was sentenced to 120 months. Ex. B. Mr. Brown timely appealed to the Fourth Circuit Court of Appeals, which upheld the district court's judgment on March 28, 2019. Ex. A.

Statement of the Facts

At Mr. Brown's trial, the government first called Officer C.M. Hervey, of the Raleigh Police Department. [J.A. at 202-256.] Officer Hervey testified that on March 3, 2018, he was working in a marked patrol vehicle with Officer Santaniello

[1] Unless otherwise indicated, references to the Record are taken from the Joint Appendix filed with the United States Circuit Court for the Fourth Circuit.

in the North District around the intersection of Capital Boulevard and Westinghouse Boulevard. [J.A. at 205-06.]

While driving, the officers noticed that the vehicle in front of them had a temporary sticker, and decided to run the registration because temporary stickers are usually expired. The plate came back as a stolen vehicle. [J.A. at 206-07.] They then radioed for other units, and followed that vehicle into a Waffle House parking lot. Once in the parking lot, they activated their blue lights. [J.A. at 207.] The driver of the vehicle jumped out, and Officer Hervey testified that he saw a silver pistol in his hand. [J.A. at 208-09.] The driver first turned towards him, and then took off running. [J.A. at 209.] Officer Hervey then put his vehicle in park, and pursued the driver. [J.A. at 209.]

Officer Hervey saw the driver run around the corner of the Waffle House building, and then ran further down into a neighboring Taco Bell building parking lot. [J.A. at 210.] When Officer Hervey ran behind the Waffle House building, he ran over a black and purple shoe along the path the driver had run. [J.A. at 211.]

When Officer Hervey got to the corner of the Taco Bell building, he saw that the driver was crossing over Capital Boulevard. When the traffic slowed down, Officer Hervey crossed Capital Boulevard and apprehended the driver at the corner of the Han-Dee Hugo's building. [J.A. at 211.] Officer Hervey held him at gunpoint until other police officers arrived and handcuffed him. [J.A. at 215.] After he was handcuffed, the officers searched him and "didn't find the firearm or anything else illegal on him." [J.A. at 216.] At trial, Officer Hervey identified the driver as Mr. Brown. [J.A. at 231.]

The Government's next witness was Captain Michael Bruce of the Raleigh Police Department. He testified about the reviewing and retrieving of the dash cam video footage exhibits. [J.A. at 256-64.]

The Government's third witness was Officer Santaniello. [J.A. at 264-85, 412-61.] He testified that he was sitting in the passenger seat with Officer Hervey driving the patrol car. He testified that in the Waffle House parking lot, he had his door open ready to exit the vehicle. [J.A. at 270-71.] He stated that he saw the driver open the door quickly and exit out of the vehicle, displaying a grey handgun in his right hand. [J.A. at 271.] The testified that the driver looked at Officer Hervey, looked at him, and then turned and ran away from them. [J.A. at 271.]

Officer Santaniello then testified he noticed the driver run behind the Waffle House, towards the Taco Bell parking lot, towards Capital Boulevard. He testified that he saw the driver throw something from his right, and he saw some dirt and debris fly up on the small median dividing the parking lot of the back of the Waffle House with a building right behind it. [J.A. at 273.]

The Government's fourth witness was Sean Brady, the case agent. He testified about a number of documents and items taken from the back of the vehicle, as well as Mr. Brown's clothing and the firearm recovered from the Waffle House parking lot. [J.A. at 464-468.]

Next, the government called Sergeant Mercer, the supervisor of Officers Hervey and Santaniello. He testified that he was on patrol that evening, and that he had heard officers on the radio stating that a subject was running and that he

had a gun. [R p. 494.] He testified that when he arrived on the scene, he went to where Officer Santaniello was and located the firearm in the median. [R pp 497-98.]

The government then called Angela Madden, the crime scene agent. [R pp. 531-554.] She testified that processed for fingerprints on the car, but did not see any visible fingerprints on the firearm. [J.A. at 551-552.]

The next witness called was Adam Cameron, the interstate nexus expert. [J.A. at 555-73.] He testified that the he had examined the firearm, the firearm was made by Ruger, and it was manufactured in Prescott, Arizona. [J.A. at 564-65.] He testified that the firearm traveled in interstate commerce based upon the fact that it was manufactured in Arizona [J.A. at 565, 571.]

After Mr. Cameron's testimony, the government read into evidence the stipulation that the jury may accept as proven that Mr. Brown was a felon. [J.A. at 574.]

After the Court overruled Mr. Brown's objection to her testimony, Ms. Sandra Simpson, Mr. Brown's ex-girlfriend, testified that in January, 2016 Mr. Brown had dropped her off to work and did not come back to pick her up. [J.A. at 577-78.] She testified that she never heard anything back from him and did not receive the car back until March, 2016. [J.A. at 577-78.] She then went to the Durham County Police Department and reported that her car had been stolen. [J.A. at 579-80.] During the time she was living with him from November to January, she never saw Mr. Brown with a firearm. [J.A. at 582.]

The government next called Tralane Jackson, a deputy at the Durham County Sheriff's Office. [J.A. at 586-595.] Mr. Jackson testified that he recalled supervising Dwight Brown while he was a correctional officer at Durham County Jail. [J.A. at 589.] Deputy Jackson then identified Government's Exhibit 23, the firearm as his. [J.A. at 590.] On cross, he indicated that he never had a problem with Mr. Brown while supervising him. [J.A. at 594.] He stated that in the same burglary where his firearm was stolen, he also lost other items, such as several televisions, some Play Stations, some shoes and a child's piggybank. [J.A. at 594-95.] None of the other items had been recovered, and to the best of Deputy Jackson's knowledge, nobody knew who did the burglary. [J.A. at 595.]

The Government next called Lieutenant Pinner with the Durham County Sheriff's Office. [J.A. at. 596-603.] Lieutenant Pinner testified that he had been involved in a vehicle stop involving Mr. Brown in 2012. Mr. Brown was in the back seat. Once police had him removed from the vehicle, they recovered a silver handgun from the area he was sitting. [J.A. at 599.] Mr. Brown subsequently pled guilty to the charge of felon in possession of that firearm. [J.A. at 600.]

After Lieutenant Pinner's testimony, the government rested. Mr. Brown's trial counsel made a motion under Rule 29, which was denied. [J.A. at 604-05.]

The next day, the defense called Captain Heidi Steinbeck from the Wake County Sheriff's Office. [J.A. at 657-65.] Captain Steinbeck stated that she maintained the Inmate Property Records, which are the items that the Wake County Sheriff's office took from the inmate. [J.A. at 658.] Captain Steinbeck

identified Defense Exhibits 5 and 6 as a readout from the Inmate Property Records, which identified a cell phone taken from Mr. Brown. [J.A. at 659-61.]

The next defense witness was Camile Coley, the unit manager for the Waffle House on Capital Boulevard. [J.A. at 665-95.] She testified about the levels of drug dealing, prostitution, and other criminal activity that occurred in the area of the Waffle House, the Taco Bell, and the Wingate motel. [J.A. at 665-95.] She stated that the area "most certainly is" a high crime area. [J.A. at 676.] During the shifts she was working, the police were often called and there was some kind of incident about 70 to 80% of the time. [J.A. at 673.] She also spoke about homeless individuals in the area. [J.A. at 683.]

After Ms. Coley's testimony, the defense rested its case. [J.A. at 688.]

The Government called two witnesses on rebuttal. The Government called Detective Brady, the case agent to discuss his interview with Ms. Camille Coley. [J.A. at 696-702.]

The next agent, Officer Hervey, reiterated his earlier testimony that he believed the object in Mr. Brown's hand on March 3, 2016 was a firearm. [J.A. at 703-06.] With respect to the cellphone, Officer Hervey testified that he did not remember seeing a cell phone, but for a gun case, it would not be noted whether a cell phone was recovered on the arrestee. [J.A. at 715.]

After Officer Hervey, the government rested its rebuttal case. [J.A. at 718.] The parties made their closing arguments. [J.A. at 723-72.] The Court then gave its jury instructions. [J.A. at 773-95.]

After the Court delivered its jury instruction, the defense renewed for the record its objection that the Court had not given the specific instructions that Mr. Brown's trial attorneys had requested. [J.A. at 795.] Also, the defense objected to the statement that the jury heard evidence that "the defendant fled after he believed he was about to be charged with the crime for which he is now on trial." [J.A. at 796.] The trial court overruled the objections and sent the Jury Instructions back to the jury as originally drafted. [J.A. at 798.]

On Thursday, February 16, 2017, the jury began its deliberations. The jury asked the trial court to define reasonable doubt, and to review directly the gun, ammunition, and magazine. [J.A. at 816.] The jury then recessed for the night to resume deliberations on Friday morning. [J.A. at 828-29.]

On Friday morning, the parties met with the Court at 9:00 a.m. The trial court informed the parties that the jury foreperson and another juror had approached the Court's criminal case manager, following jury deliberations the day prior and inquired about whether "it would be possible to substitute a juror." [J.A. at 832.] The government expressed concern about the basis for the foreperson's request. [J.A. at 833.] The trial court instructed the government to research what its "authority would be to go in and inquire along those lines and take those steps" suggested. [J.A. at 834.]

At 10:29 a.m., the trial court reconvened the parties to discuss a question from the jury about their deadlocked deliberations. [J.A. at 838.] The defense then requested an Allen charge. [J.A. at 839.]

The government requested that further inquiry be made regarding the request from the foreperson the day prior about replacing a juror. The Court allowed the government's request over the defense's objection, and it brought in the jury foreperson for questioning. [J.A. at 840-41.] The Court asked the foreperson about her inquiry to Ms. Tripp the day prior, and the foreperson responded, "[M]y thought, at that point, was that we would need to reflect some more this morning and deliberate some more this morning before that became an option." [J.A. at 842.] She also confirmed that the jury was deadlocked. The trial court then led the jury into the courtroom for an Allen charge. [J.A. at 844-47.]

At 2:31 p.m., the parties returned to the courtroom because the jury had sent another question. "What is the procedure for acquiring an alternate juror if one juror needs to recuse [him- or herself]?" [J.A. at 850-51.] The trial court asked the foreperson to come into the courtroom for further questioning.

When asked for more information regarding the jury's question, the foreperson responded, "We have one juror that is getting very emotional and is very – how frank can I be?" [J.A. at 852.] The trial court asked if the issue with the juror was health-related. The foreperson answered that it was not a health issue, but that there was a juror who was "not going to change their mind." [J.A. at 852.] She explained:

> And one thought that some of the other jurors have brought up is there is an alternate. Is it reasonable, is it proper, is it even possible, you know, we in front of the one person, we asked, you know, is this something that, you know, we know you feel strongly about this, is this something that you would consider? Object to? How would you feel about it? Because we don't want, you know, it's not a hidden thing.

> . . .
> And so the person said, you know, that it wouldn't be on their conscience at that point and they would, you know, that would be fine. So, I don't know if that's a possibility. I don't see us coming to a conclusion amongst the 12 that we have now.

[J.A. at 852-53.]

After this, Mr. Browns' trial counsel moved for a mistrial, and argued that the Court did not have good cause to replace a juror with an alternate juror. [J.A. at 854-55.] The government requested further inquiry into the reasons for wanting to replace a juror. [J.A. at 853-54, 56.] The defense objected that further questions would begin to "interfere with the deliberation process" and intrude the "sacred space" of the deliberation room. [J.A at 857.]

The Court allowed the government's request to ask additional questions of the foreperson, but limited the questions to whether the juror in question had "been participating in the jury room," had "attempted to encourage others to subscribe to that juror's view of the evidence," and had "been looking at the evidence as it becomes the subject of further inquiry in the jury room." [J.A. at 857-58.] The foreperson answered all questions in the affirmative and expressed that with the current twelve jurors, a deadlock would remain. [J.A. at 857-58.]

After the foreperson left the courtroom, the trial court asked the government, "Okay. Does the government consent to the motion for mistrial under the circumstances as they've been developed? Or do you object to it?" [J.A. at 858.] The government stated, "We consent, Your Honor. Thank you for asking those additional questions." [J.A. at 858.]

The court then granted the defense's motion for mistrial, stating, "Yes. Okay. Well, I will call the jury in. I will thank them for their service and send them on their way. [J.A. at 859.] The trial court stated to Mr. Brown: "You will remain in custody and be the subject of such other further orders and notices as are appropriate." [J.A. at 859.]

The trial court asked the parties if they would like to speak with jurors after they were released, and both parties answered in the affirmative. The court security officer then left the courtroom to bring the jurors back into the courtroom so that they could be relieved of their duties. [J.A. at 859.]

While awaiting the jurors to return, one of Mr. Brown's attorneys asked the trial court if it would "be willing to consider one more Allen charge to this jury." [J.A. at 859.]

Mr. Brown was not consulted about the change of strategy and did not consent to it. Mr. Brown wished to pursue the mistrial strategy. [J.A. at 910.] The Court noted disagreement between the two defense counsel, one that had moved for a mistrial and the other who had requested consideration of a second Allen charge. The defense attorney responded, "We're just talking about the best thing to do here. And I think we're not real sure to be honest. I know it's been a lot and a lot of resources --." [J.A. at 860.] The Court responded, "I'm willing to let them go back in and talk and tell me in a note but --- I'll see how it goes." [J.A. at 860.] The Court was then interrupted by the members of the jury actually entering the courtroom.

Because the trial court was interrupted by the jury physically returning, the Court did not officially vacate its order granting the mistrial, nor did it ask the government its position on a subsequent Allen charge. The Court did not confirm the defense's position, nor did it specifically inquire into Mr. Brown's position himself. The trial court gave the jury a more informal charge that did not reiterate the specific prongs of the standard Allen charge. The trial court then said if they remained deadlocked, to send back a note. The Court noted it would "stand here ready to receive [their] note from [their] foreperson." [J.A. at 860-61.]

The jury returned to the jury room at 2:54 p.m. [J.A. at 861.]

Slightly fewer than fifteen minutes passed. The jury re-entered the courtroom at 3:09 p.m. with a verdict of guilty. [J.A. at 863.] In those approximately fifteen minutes, there were hysterical screams from the jury room, as though someone was crying. At the end of this time period, someone also let out a laugh. [J.A. at 911, 969, 973.]

At one point during this time period, the Court noted that it "would have expected to have gotten a note sooner than now," seeming to imply that it thought that the jury would confirm it remained deadlocked. [J.A. at 863.] When the jury returned with a guilty verdict and was polled, there was one juror who had clearly been crying and was tearful during the final interaction with the Court. [J.A. at 911.]

After the Court conducted a hearing on Mr. Brown's motion for a new trial and issued a written order denying it, Mr. Brown's sentencing hearing was scheduled and a Pre-Sentence Report was prepared. [J.A. at 1036-50.]

At sentencing, the trial court upheld Mr. Brown's objection to his base offense level, lowering it to 22. The trial court, however, rejected Mr. Brown's other objections, leaving him with an advisory guideline range of 151 to 188 months. The trial court declined his counsel's request to vary downward, and sentenced him to the statutory maximum of 120 months. [J.A. at 1000-25.]

On appeal, Mr. Brown through the undersigned argued that the trial court erred in allowing the jury to reach a verdict after it declared a mistrial and in refusing to set aside the verdict, improperly admitted extrinsic bad-acts evidence under Fed. R. Evid. 404(b), erred in refusing to give the jury instructions requested by the defense, and imposed an unreasonable sentence. The Fourth Circuit rejected these arguments and upheld Mr. Brown's conviction and sentence. Ex. A. This petition follows with respect to the mistrial and juror coercion issues.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Grant Certiorari To Address The Proper Procedure for Reversing or Rescinding a Grant of a Mistrial in Federal Criminal Proceedings.

In this case, the rocky ending of Mr. Brown's trial raises serious questions as to the quality of justice rendered with respect to his guilty verdict. The Court had granted the defense's motion for mistrial, with the consent of the government. While the jury was in the process of returning to the courtroom to be relieved, Mr. Brown's other attorney asked the Court if it would be willing to consider a second Allen charge, and articulated that the defense was unsure of its position. The Court and the parties did not have time to fully air argument on possibly vacating the mistrial

that had been granted, as the jury returned to the courtroom. Mr. Brown was not consulted about the change of strategy, nor did he consent to it.

The government's repeated efforts to remove a juror and requests to the Court to make inquiries of the jury foreperson intruded into the sacred space of the jury. The jury unabashedly attempted to remove a juror who did not agree with the remaining jurors. The second, unbalanced Allen charge and the screams in the fewer than fifteen minutes that followed between the Court's last interaction with the jury and the return of the verdict raise serious questions as to the procedural propriety of this verdict.

The trial court first granted a mistrial, and then in the confusion of the jury reentering the courtroom, the trial court reacted to a question by the counsel for Mr. Brown who had not moved for the mistrial. When the trial court specifically noted the divergence in approach between the two counsel, the response she received was as follows. "We're just talking about the best thing to do here. And I think we're not real sure to be honest. I know it's been a lot and a lot of resources --." [J.A. at 860.]

"The declaration of a mistrial renders nugatory all trial proceedings with the same result as if there had been no trial at all." United States v. Mischlich, 310 F. Supp. 669, 672 (D.N.J. 1970), aff'd sub nom. United States v. Pappas, 445 F.2d 1194 (3d Cir. 1971) (citing 58 C.J.S. Mistrial at 833-834 ((1948). Thus, the trial court erred in allowing the jury to deliberate further after declaring a mistrial.

There are not many published precedents dealing with the reversal of a mistrial order. Several circuits have held that reversals of a mistrial order are

possible as long as they are made before the jury was dismissed. See, e.g., Camden v. Circuit Court of the Second Judicial Circuit, 892 F.2d 610, 616 n. 7 (7th Cir.1989) ("While the mistrial declaration alone was not a talismanic utterance, the discharge and dispersal of the jury rendered the mistrial a *fait accompli*. Once the jury is discharged and has dispersed, a trial court is unable to reconsider its intention to declare a mistrial."); United States v. Smith, 621 F.2d 350, 352 n. 2 (9th Cir.1980) ("Until the jury was actually excused, the court might have reconsidered its intention to declare a mistrial."); United States v. Razmilovic, 507 F.3d 130, 141 (2d Cir. 2007) ("Borghese's change of position also had legal significance—the decision to declare a mistrial is not irreversible until the jury has been discharged. ")

However, in the only case the undersigned was able to locate where this actually occurred, the trial court engaged in a colloquy with the defendant to ensure that he understood the impact of his change of decision. That did not happen in this case. This prejudiced Mr. Brown, whose stated desire to his attorneys was that a mistrial be proclaimed. [J.A. at 996.]

In United States v. Estremera, the Second Circuit noted that the trial judge had granted a motion for mistrial. 531 F.2d 1103, 1109 (2d Cir. 1976). "Thereupon defense counsel, after consulting with his client, withdrew his motion and the case proceeded to the jury, which convicted." Id. In Estremera, prior to reversing his grant of mistrial, the trial judge carefully reviewed with the defendant the consequences of withdrawing the mistrial in an interrogation of the defendant. Id. at n.4.

In the proceedings below, the trial court relied on United States v. Chapman, 593 F.3d 365, 368-69 (4th Cir. 2010), held that "whether defense counsel talked with defendant before moving for mistrial is of no moment nor is whether defense counsel discussed directly with defendant [a] request made to the court to vacate its decision allowing that motion." [J.A. at 997.] The Fourth Circuit also cited Chapman in upholding the trial court. Ex. A at 4.

The courts below appear to have extended the holding in Chapman, which only refers to moving for mistrial or accepting a mistrial. Chapman, 593 F.3d at 368-69. Nevertheless, for the reasons stated in the concurring opinion of Chapman, id. at 370-72 (Michael, J., concurring), Mr. Brown contends that the Chapman precedent is too sweeping, and asks the Court to grant certiorari and consider curtailing it.

Chapman and related precedent aside, the chain of events in the closing of Mr. Brown's trial violated Fed. R. Crim. P. 26.3, which requires a deliberative process with respect to ordering a mistrial. "Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Fed. R. Crim. P. 26.3. Here, when the defense counsel were divided and did not present a clear position to the trial court, the trial court should have ensured that defense counsel were given time and opportunity to resolve their differences and present a united position.

The Court should grant certiorari to address the circumstances and procedures that trial courts should following in determining whether or not to withdraw a grant of a mistrial. This case and the admittedly unique chain of events that took place at the end of the trial would offer the Court the ability to render a thorough discussion and analysis of when and how a district court should reverse a grant of mistrial.

II. The Court Should Grant Certiorari To Clarify the Standard for Finding A Coercive Effect from A Second Allen Charge.

In this case, the trial court's final instruction failed to meet the elements of a proper Allen charge under Fourth Circuit precedent as explained in United States v. Burgos.

> An Allen charge, based on the Supreme Court's decision in Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), is "[a]n instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument." United States v. Seeright, 978 F.2d 842, 845 (4th Cir.1992) (quoting BLACK'S LAW DICTIONARY 74 (6th ed. 1990)). Traditionally, the standard Allen charge informed the jury (1) that a new trial would be expensive for both sides; (2) that there is no reason to believe that another jury would do a better job; (3) that it is important that a unanimous verdict be reached; and (4) that jurors in the minority should consider whether the majority's position is correct.

United States v. Burgos, 55 F.3d 933, 935–36 (4th Cir. 1995). Ultimately, the case law of the Fourth Circuit Court evolved the fourth prong of the charge into a simple rule, whereby the charge should strongly recommend that the majority and minority on a deadlocked jury be instructed to give equal consideration to each other's views. Id. at 937 (quotations omitted). "The most egregious mistake that

can be made in the context of an Allen charge is for a district court to suggest, in any way, that jurors surrender their conscientious convictions." Id. at 939.

In this case, the trial court first gave a correct Allen instruction under Fourth Circuit. [J.A. at 844-47.] In the second instruction, however, the trial court gave a general reference to the previous instructions given. However, given the context of the charge, it appears from the record that the charge had a coercive effect on a juror who was then screaming and crying while reversing her earlier position. "The crux of our Allen charge analysis is the likelihood of coercion. The district court acts within its discretion when the charge or charges, taken as a whole and in light of all the circumstances, do not coerce the jurors to abandon their view." United States v. Cornell, 780 F.3d 616, 626 (4th Cir. 2015).

"In determining whether an Allen charge has an impermissibly coercive effect on jury deliberations, some of the factors we consider include the language of the instruction, its incorporation with other instructions, the timing of the instruction, and the length of the jury's subsequent deliberations." Id. (citing Jenkins v. United States, 380 U.S. 445, 446 (1965); United States v. Webb, 816 F.2d 1263, 1266 (8th Cir.1987)). "These factors are not exclusive, and in the end, the ultimate question is whether the Allen instruction was impermissibly coercive." United States v. Cornell, 780 F.3d 616, 626–27 (4th Cir. 2015).

Given the context and the immediate coercive effect the last instruction had on the minority juror, the trial court abused its discretion in its second instruction to the jury.

Other circuits have reversed convictions for coercion after an Allen charge under circumstances considerably less egregious than in the case below. For example, in United States v. Fossler, 597 F.2d 478 (5th Cir.1979), the Fifth Circuit found the district court's second *Allen* charge improperly coercive when it was given after "[t]he jury indicated at three separate points in time, over a three day period, that it could not reach a decision." Id. at 485. And, "[o]nly one hour after the second *Allen* charge was sent to the jury, a guilty verdict was returned." Id.

The D.C. Circuit has held that an Allen charge should normally only be given once, if at all.

> Only if there are extenuating circumstances, *e.g.*, if there is confusion and there is a request by the "hung jury" for a repetition of the anti-deadlock instruction, as previously related, or there is some exceptional circumstance which makes evident it is not likely to be coercive to reinstruct the "hung jury" with another "anti-deadlock" instruction (because of the exceptional circumstance), should an "anti-deadlock" instruction be repeatedly given. Otherwise, repeatedly giving "hung jury" instructions to a "hung jury" risks affecting adversely the integrity of a verdict.

Epperson v. United States, 495 A.2d 1170, 1175-76 (D.C. 1985). Similarly, there is precedent in the Ninth Circuit which states that a second Allen charge is impermissible. United States v. Seawell, 550 F.2d 1159 (9 Cir. 1977).

On the other hand, a number of other circuits, including the Fourth Circuit, do not have this bright line rule. The Sixth Circuit has recently held that "[m[ultiple Allen charges are not per se coercive." United States v. Robinson, 872 F.3d 760, 773 (6th Cir. 2017) (citing in support United States v. Barone, 114 F.3d 1284, 1305 (1st Cir. 1997); United States v. Reed, 686 F.2d 651, 653 (8th Cir. 1982);

United States v. Fossler, 597 F.2d 478, 483-85 (5th Cir. 1979); United States v. Robinson, 560 F.2d 507, 517–18 (2d Cir. 1977)(en banc).

In this case, there was a clearly coercive effect, with loud hysterical crying visible through the walls, and a juror who appeared to be in tears during the reading of the verdict which was rendered in approximately fifteen minutes after the last instruction. The Court should grant certiorari in this case in order to clarify whether it is per se coercive to give more than one Allen charge, set out clear guidelines as to what the appropriate and permissible language of such a second charge would be if any are allowed, and further to set a clear precedent that when objective evidence of coercion exists as it did in this case after a second Allen charge, or even a first Allen charge, that coercion has in fact occurred and that the verdict must be overturned.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 25th day of June, 2019.

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