NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP ANTICO,
Petitioner,

v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

NICOLE NICOLETTE MACE, ESQ.
Attorney for Petitioner
THE LAW OFFICES OF CURT SANCHEZ P.A.
330 CLEMATIS STREET SUITE 209
WEST PALM BEACH, FL 33401
PH (561)758-5407
Email: nicole@nicolenicolettelaw.com

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QUESTION PRESENTED

The Eleventh Circuit's *Allen* charge is the only pattern jury instruction in all Federal Circuit Courts that directly references the cost of a retrial.

The question presented is:

Is a criminal defendant's fundamental constitutional rights violated by an *Allen* charge that instructs a deadlocked jury to consider the expense of a retrial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioner Philip Antico, and Respondent United States of America.

There is no parent or publicly held company owning 10% or more of the corporation's stock.

- United States v. Antico, No. 9:17-cr-80102, U.S. District Court for the Southern District of Florida. Judgment entered on February 28, 2018.

- United States v. Antico, No. 18-10972, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on August 14, 2019.

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PETITION FOR WRIT OF CERTIORARI

Philip Antico petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported as *United States v. Brown*, 934 F.3d 1278 (11th Cir. 2019) and reproduced at App. 3a. The Eleventh Circuit's denial of petitioner's motion for rehearing and rehearing en banc is reproduced at App. 1a. The order of the District Court for the Southern District of Florida is reproduced at App. 58a.

JURISDICTION

The Court of Appeals entered judgment on August 14, 2019. App. 3a. The court denied a timely petition for rehearing and rehearing en banc on October 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor 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. VI
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.

INTRODUCTION

The Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Trial Instruction 5, at 685-86 (2016) is the only Federal Circuit Court instruction that directly references the cost of a retrial in its *Allen* charge. App. 80a. Federal courts have long struggled with what instruction to give to a deadlocked jury as a criminal defendant's right to due process, right to an impartial jury trial, and the right to a unanimous verdict is violated by a charge that coerces a jury to reach a verdict. The majority of Federal Circuit Courts have developed a set of Pattern Jury Instructions in Criminal Cases. Only the Eleventh Circuit's Pattern Jury Instruction stresses the fact that the "trial has been expensive in time, effort, money, and emotional strain to both the defense and prosecution…Another trial would increase the cost to both sides." App. 80a. In fact, the Third, Seventh, and District of Columbia Circuits have abolished the use of the traditional *Allen* charge, favoring a more neutral version that does not explicitly mention the cost of a retrial.[1] Other Circuit Courts, including the Fourth, Sixth, and Tenth, disfavor referring to the cost of a retrial in an *Allen* charge but have not found

[1] *See United States v. Brown*, 411 F.2d 930, 933-34 (7th Cir. 1969), cert. denied, 396 U.S. 1017, 90 S.Ct. 578, 24 L.Ed.2d 508 (1970); App. 74a;*United States v. Fioravanti,* 412 F.2d 407, 419-20 (3d Cir.), *cert. denied*, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969); App. 68a; *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C.Cir. 1971 (en banc)

the language to be per se coercive[2]. The contrasting methods of the Federal Circuit Courts and conflicting body of case law indicate there is a need for this Court to review the contents of a supplemental charge to a deadlocked jury. While the *Allen* charge is constitutional, courts have held certain variations to be coercive and grounds for reversal which has resulted in conflict among the circuits as addressed herein.

STATEMENT OF THE CASE

On August 20, 2014, officers of the Boynton Beach Police Department attempted to perform a traffic stop of a vehicle, however, the vehicle did not stop and led the officers on a high-speed chase. After the vehicle was stopped, several officers used force against the occupants of the vehicle and the incident was recorded. The Petitioner, Sergeant Philip Antico was not present at the scene but was the supervisor on duty on the night of the incident. Antico later met with the FBI to discuss the incident and as a result of this interview, the government alleged that he mislead the FBI by vouching for the credibility of the officers and by not disclosing that he rejected some of their reports so that the officers could include additional information. In a Superseding Indictment, Antico was charged with obstruction of justice and two counts of falsification of records.

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[2] *United States v. Clinton*, 338 F.3d 483 (6th Cir. 2003); *United States v. McElhiney*, 275 F.3d 928, 945 (10th Cir.2001). *United States v. West*, 877 F.2d 281, 291 (4th Cir. 1989).

During deliberations at trial, the jury indicated it was deadlocked and sent a note to the court that read: "Your Honor, we as a jury have reached a verdict on two counts, on the third we cannot agree. We sincerely request your insight on this matter." App. 20a. The next morning the jury returned and continued to deliberate. The jury then sent out a second note stating, "Your Honor, we, the jury, are not able to agree on one count. No amount of time, talk, contemplation or discussion of the facts provided shall result in a unanimous decision." App. 21a. The court gave the modified *Allen* charge in T-5 in which the pertinent section states, "*Another trial will increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you".* App. 80a. (*emphasis added*). After a brief recess, approximately one hour, the jury sent another note to the court which stated, "Your Honor, your comments were/are material, and as a result, we, the jury, have reached our verdict. App. 22a. The jury reached a verdict on November 17, 2017, finding Antico not guilty of two counts of Falsification of Records but found him guilty of Obstruction of Justice. *Id.* Defense Counsel filed a Motion for New Trial, arguing that the *Allen* charge contained in the Pattern Jury Instructions of the Eleventh Circuit was unconstitutional because it highlighted the cost of a retrial. *Id.* The District Court denied Antico's motion. Antico was sentenced to three years' probation. App.25a.

Antico appealed his conviction to the Eleventh Circuit. The Circuit Court concluded, "the district court committed no error, plain or otherwise, in giving the modified *Allen* charge." App. 43a. The court also held that it was bound by prior precedent to uphold the language of the *Allen* charge found in the 2016 Pattern Jury Instructions, finding the language is not impermissibly coercive. *Id.* Antico subsequently filed a Motion for Rehearing and Rehearing En Banc, which was denied by the court on October 23, 2019. App. 2a. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This case presents the ideal opportunity for this Court to resolve a conflict among the circuits regarding the content of a supplemental charge given to deadlocked juries. In *Allen v. United States*, 164 U.S. 492 (1896), this Court approved the use of a jury instruction intended to prevent a hung jury by encouraging jurors in the minority to reconsider. The Court found the charge compatible with the jury's need to deliberate openly to achieve unanimity, explaining that "[i]t cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself." *Id.*

This instruction became known as the *Allen* charge and is given when a jury reports that it is deadlocked and unable to reach a verdict. However,

courts throughout the country have recognized the potential for prejudice, as the *Allen* charge or 'dynamite charge' is meant to blast loose a deadlocked jury. *Green v. United States*, 309 F.2d 854 (5th Cir. 1962) (Wisdom, J.). "The charge is subject to close scrutiny, since the potential for coercion is present in even the most mild supplemental instructions, considering jury members' zeal to get the job done." *United States v. Blevinal*, 607 F.2d 1124, 1126 (5th Cir. 1979).

In *Jenkins v. United States,* 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965 (per curiam), this Court granted the defendant a new trial based on the coercive effect of a supplemental instruction given by the district court. *See id.* at 446, 85 S.Ct. 1059. The jury had declared itself unable to reach a verdict after slightly more than two hours of deliberation, and in the course of speaking to the jury, the district court stated: "You have got to reach a decision in this case." *See id.* This Court held that "[u]pon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Id.*

In 1988, this Court reaffirmed the use of an *Allen* charge, noting that "all of the Federal Courts of Appeals have upheld some form of a supplemental jury charge.") *see Lowenfield v. Phelps*, 484 U.S. 231, 238 n. 1, 108 S.Ct. 546, 551, 98 L.Ed.2d 568 (1988). In fact, this Court again approved the use of a supplemental charge to encourage a deadlocked jury

to continue to deliberate in *Jones v. United States*, 527 U.S. 373, 382 n. 5 (1999).

I. THE MODERN TREND IN THE JUDICIARY IS AGAINST HIGHLIGHTING THE COSTS OF A RETRIAL TO A JURY IN AN *ALLEN* CHARGE, AND AS A RESULT, THERE IS A CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS.

Several courts have criticized *Allen* charges that include language referencing the expense of retrial. *See United States v. Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981)("This court has long recognized that injection of fiscal concerns into jury deliberations has potential for abuse."). The Ninth Circuit has made it clear that *Allen* instructions should not even refer to the possibility of a retrial, not just the cost. *see United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir. 1997). *See also United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985)("The expense of trial should not play any part in the jury's important function of determining the guilt or innocence of a criminal defendant...the use of this element of instruction may require reversal").

In *United States v. Thomas*, 449 F.2d 1177, ((D.C. Cir 1971) (en banc) the District Court of Columbia Circuit replaced the traditional *Allen* charge with the American Bar Associations ("ABA") suggested instructions that do not reference the cost of a retrial. Since *Thomas*, the District of Columbia Court of Appeals has consistently held that trial

judges must comply with the ABA standard when giving an *Allen* charge. "When each judge freely devises his or her own variations on the same theme, this causes a 'drain on appellate resources' as the 'inevitable aberrations' inevitability precipitate more and more appeals." *United States v. Berroa*, 46 F.3d 1195, 1198 (D.C. Cir. 1995)(*quoting Thomas*, 449 F.2d at 1184, 1185). "We therefore flatly refuse to crack open Pandora's box *Thomas* nailed shut." *Berroa*, 46 F.3d at 1197. The District of Columbia Circuit has made it clear that any "substantial departure" from the language of the *Allen* charge approved in *Thomas* is "presumptively coercive." *Id.* at 1998; *see also United States v. Yarborough*, 400 F.3d 17, 365 U.S. App. D.C. 137 (D.C. Cir. 2005). It follows that any reference to the cost of a retrial in that circuit, like the Third Circuit, would be per se coercive.

The Third Circuit has found that a supplemental charge in which a dissenting juror is told to consider the expense of a new trial is incorrect, prejudicial and constitutes reversible error. The Third Circuit reasoned that "a juror's responsibility is to evaluate the evidence and the credibility of witnesses, and if a reasonable doubt as proven persists, to vote for acquittal. The possibility of a hung jury and a retrial is not relevant to that determination". *United States v. Burley,* 460 F.2d 998 (3rd Cir. 1972); *see also United States v. Jackson*, 443 F.3d 293, 298 (3rd Cir. 2006)("we have generally concluded that a charge is unduly coercive when the trial court not only states that a new trial will result, but goes further and unduly emphasizes the

consequences, *i.e.* time, toll, or expense, that will accompany a failure to arrive at an unanimous verdict"). Therefore, the Third Circuit has determined that a charge is unduly coercive if the trial court stresses the time, burden, or cost of a retrial, directly conflicting with the pattern jury instruction and case law addressing the *Allen* charge in the Eleventh Circuit.

Similar to the Third Circuit, the First Circuit has expressly disproved a court's statements to the jury about the expense of a trial. Additionally, the First Circuit requires an *Allen* charge to include the following three instructions (1) to place the onus of reexamination on the majority as well as the minority, (2) to remind the jury of the burden of proof, and (3) to inform the jury of their right to fail to agree. In *United States v. Paniagua- Ramos*, 135 F.3d 193, 198 (1st Cir. 1998), the First Circuit expressly disapproved of statements that 'directly imply that it would be reasonable for the jury to reach a decision on the evidence before them.' [and has] disapprov[ed] of court's statements to the jury (1) about the expense of trial, (2) that court did not want to try case again, and (3) that case was not very difficult."

Other Circuits, including the Fourth Circuit, the Sixth Circuit and Tenth Circuit, disfavor a trial court giving an *Allen* charge that references the cost of a retrial. The Sixth Circuit has cautioned that a reference to the expense of a trial could taint an *Allen* charge and "counsel strongly against its inclusion" but found that a reference to the expense of a retrial

"did not render the charge coercive per se." *United States v. Clinton*, 338 F.3d 483 (6th Cir. 2003); *see also United States v. Harris,* 391 F.2d 348, 354 (6th Cir. 1968) ("the judge's statement in regard to the expense and burden of conducting a trial" is a "questionable extension of the *Allen* charge", especially when emphasized by the court). The Tenth Circuit agrees with the Ninth Circuit's conclusion "that the addition of a comment on expense does not "necessarily" make a charge more coercive but that it can." *see United States v. McElhiney*, 275 F.3d 928, 945 (10th Cir.2001). *United States v. West*, 877 F.2d 281, 291 (4th Cir. 1989)("Although one of the purposes served by the *Allen* charge is "the avoidance of the societal costs of a retrial,' *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 551, 98 L.Ed.2d 568 (1988), its purpose do not necessarily determine its content. The length and expense of a trial may justify use of the *Allen* charge if the jury is having difficulty reaching a verdict, but it does not follow that the jury should be instructed to overcome its difficulties by considering a factor which it could not appropriately consider in the first instance.").

There is simply no case law holding that it is favored or appropriate to highlight the expense of a retrial to jurors in order to resolve the issue of a defendant's guilt or innocence.

Nevertheless, the Eleventh Circuit continues to include the language, "another trial will serve to increase the cost to both sides…" in its pattern jury instructions and in 2019, is the only Federal Circuit

Court to include this language. In fact, as recently as 2017, the Eleventh Circuit has held that is pattern jury instruction "is appropriate and not coercive." *United States v. Oscar*, 877 F.3d 1270, 1286 (11th Cir. 2017); *United States v. Bush*, 727 F.3d 1308, 1319-1320 (11th Cir. 2013), cert. denied, 571 U.S. 1152 (2014), *United States v. Woodard*, 531 F.3d 1352 (11th Cir. 2008), *United States v. Dickerson*, 248 F.3d 1036, 1050 (11th Cir. 2001), cert. denied 536 U.S. 957 (2002). There is a clear conflict among the Circuit Courts regarding referencing the costs of a retrial in an *Allen* charge. This Court can now resolve this conflict by granting this petition for a writ of certiorari and address this compelling issue.

II. THIS CASE PRESENTS A QUESTION OF SUBSTANTIAL IMPORTANCE AS THE *ALLEN* CHARGE WILL CONTINUE TO BE SCRUTINIZED AND APPEALED IN COURTS ACROSS THE COUNTRY.

This Court should grant the petition for a writ of certiorari because the Modified Allen Charge contained in the Pattern Jury Instructions of the Eleventh Circuit is at odds with established constitutional principles. Pursuant to the Sixth Amendment, "[e]very defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of a jury of his peers." *Thomas*, 449 F.2d at 1181. (internal quotation marks omitted).

The constitutionality of permitting a trial court to inform a deadlocked jury that a retrial will increase costs has the potential to impact thousands of people and merits this Court's review. In fact, this issue has already been scrutinized in courts across the country and will continue to generate appeals until it is resolved. This case is ideal to resolve the conflict of the circuit courts, as the Eleventh Circuit continues to uphold the validity of the language of its *Allen* charge despite its criticism.

This Court has the opportunity to review whether an *Allen* charge is inherently coercive when it invites jurors to reach a verdict not in response to the guilt or innocence of the defendant, but in response to the feasibility of saving expenses. By stating that the effect of a new trial "will increase costs," a court is informing minority jurors that holding out for their position is pointless and will simply cost the government more money, which infringes on a defendant's right to due process and the Sixth Amendment right to an impartial jury trial and a unanimous verdict.

"Any criminal defendant…being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. at 241, 108 S.Ct. at 552. An *Allen* charge given by a trial court referencing the cost of a retrial highlights the cost of justice rather than the right to a fair and impartial jury trial and verdict. As argued *supra*, it is clear that other circuit courts have recognized that the expense of a trial should not be emphasized to a deadlocked

jury, as the price of a trial should never influence the jury's crucial role as fact-finders and should in no way effect their decision as to whether a defendant innocent or guilty. This issue will continue to be raised by defendants across the country until it is addressed by this Court. In fact, when the Seventh and District of Columbia Circuits abolished the "Allen" charge, the goal was to reduce the number of appeals and the "drain on appellate resources" by promoting uniformity among the district court judges[3].

This is an ideal case to grant certiorari because the Petitioner was found not guilty of Counts One and Two, and the jury was initially deadlocked on Count Three. Only after they received the "dynamite" charge did they reach a hasty verdict. The jury also sent a note to the court that the *Allen* instruction was "material" to the verdict. Considering the time it would take the jury to return to the jury room, the time it would take the jury to notify the court it reached a verdict, and the time it would take the court to return to the bench and reconvene the parties, the jury could not have actually deliberated for more than an hour. App. 22a. The note from the jury was clear that no amount of time or discussion would result in a unanimous decision, and the jury did not seek any further instruction from the court. *Id.* For the jury to have gone in a matter of approximately an hour or less from a situation in which "no amount of time,

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[3] *Thomas*, 449 F.2d at 1184; *United States v. Silvern*, 484 F.2d 879, 882-83 (7th Cir. 1973).

talk, contemplation, or discussion of the facts" would result in an unanimous decision to a guilty verdict on one count, when all that has changed in the interim is that the jury had been informed that a second trial would serve to increase the litigations costs on both, one thing must have occurred: the court's coercive *Allen* charge convinced the holdout jurors that a verdict was required.

The jury could not have engaged in meaningful deliberations for an hour or less. The jury was specifically told to consider the cost of a prosecution rather than focusing on the evidence presented. Federal Appellate Courts will continue to grapple with whether referencing the cost of a retrial to a deadlocked jury is unduly coercive until this issue is addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

NICOLE NICOLETTE MACE, ESQ.
Counsel of Record for the Petitioner
The Law Offices of Curt Sanchez, P.A.
330 CLEMATIS STREET SUITE 209
WEST PALM BEACH, FL 33401
PH (561) 758-5407
Email: nicole@nicolenicolettelaw.com