

No. 21-_____

In The
Supreme Court of the United States

CARLTON NEBERGALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**On Petition For A Writ Of Certiorari To
The Florida Fourth District Court Of Appeal**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the trial court violate Petitioner's constitutional right to a fair and impartial jury by creating a substantial risk that one or more jurors felt pressured or coerced into abandoning their position by ordering Petitioner's deadlocked jury to continue deliberations after the jury, in spite of the court's instructions to the contrary, disclosed a numerical split, at the same time as the World Health Organization announced Covid-19 as a Global Pandemic and Florida's Governor issued a State Health Emergency; without the court ever inquiring whether the jury had concerns with continuing to deliberate?

Is a prosecutor's comments in closing arguments, inferring to the jury that it was improper for a defendant to view pretrial discovery with his attorney, as a basis for the jury to discredit the defendant's testimony, sufficiently egregious to result in denying Petitioner's due process rights to a fair trial?

STATEMENT OF RELATED CASES

On March 16, 2020 Petitioner was convicted of Manslaughter with a Firearm in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida in case number 2018CF001621AXXX. On September 29, 2020, Petitioner was sentenced to 156 months in the Florida Department of corrections.

The Florida Fourth District Court of Appeal denied Petitioner's direct appeal on December 22, 2021. (4D20-2171) (Appendix) On January 5, 2022, Petitioner filed a Motion for Rehearing and a Motion seeking a Written Opinion. On January 11, 2022, the Fourth District Court denied Petitioner's motion for a written opinion.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlton Nebergall, an inmate currently serving a thirteen year sentence, by and through his undersigned counsel, respectfully petitions this court for a writ of certiorari to review the judgement and sentence of the trial court of the Fifteenth Judicial Circuit, as well as, the Florida Fourth District Court of Appeal in Palm Beach County, Florida.

OPINION BELOW

The opinion of the Fourth District Court of Appeal for Florida filed on December 22, 2021 is unpublished and is reproduced as App. 1. The judgement of the 15th Judicial Circuit in and for Palm Beach County filed on September 29, 2020 is unpublished and is reproduced in the Appendix as App. 2.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1257, having timely filed this petition for writ of certiorari within ninety days of the judgment by Florida's Fourth District Court of Appeal.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment 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.

United State Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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

This case presents the question of a prosecutor's argument that the trial jury should discredit a defendant's

testimony due to the fact that the defendant reviewed discovery with his attorney.

This case presents a question of whether the trial court created a substantial risk that one or more of the jurors felt they must abandon their position by ordering the jury to continue to deliberate after the jury rendered its verdict and disclosed their numerical split to the court, notwithstanding the courts instructions to the contrary.

This case presents a case of first impression: Did the trial court create a substantial risk that one or more of the jurors felt pressured or coerced to when the trial court ordered the jury to continue to deliberate during the height of the 2020 corona virus global pandemic where the jury already indicated they were deadlocked and split.

PROSECUTOR'S COMMENT

On March 8, 2018 a Grand Jury indicted Petitioner for First-Degree Murder with a Firearm based on a shooting which took place at Petitioner's home on February 18, 2018. At the time of the shooting, Petitioner lived with his daughter, Katrina and his two grandchildren. Jacob Lodge, was the estranged husband of Petitioner's daughter. On the night of February 18, 2018, Jacob Lodge drove his truck to Petitioner's home. At that time Jacob Lodge was on probation for charges relating to Petitioner. A condition of Jacob Lodge's probation was that he was to have no contact with Petitioner. Katrina went outside to speak with

Mr. Lodge. A short time later, Petitioner, a retired law enforcement officer, came outside with his firearm. Petitioner and Jacob Lodge exchanged words. Jacob Lodge got back inside his truck and began to leave. Petitioner fired a warning shot into the air. Jacob Lodge then stopped his truck, exited the vehicle and began to head in Petitioner's direction. Petitioner then fired one shot which struck Mr. Lodge. Mr. Lodge later died. The State presented witnesses who heard the arguing and the shot but no one actually witnessed the shooting.

Petitioner elected to take the stand in his own defense. Petitioner testified that he observed Mr. Lodge's vehicle abruptly slam its brakes, turn the lights off and open the driver's side door. (T:1522) Petitioner observed Mr. Lodge rummaging between the seats as if he was looking for something and Petitioner began yelling for help. (T:1522). Petitioner thought Mr. Lodge was looking for or possibly found a firearm. Petitioner testified he was previously informed by Mr. Lodge himself that he owned a firearm. Petitioner started screaming; "help, help, I am in fear for my life." (T:1522). Petitioner testified that he saw something in Mr. Lodge's hand and he was coming towards him. (T:1524). It was at that point Petitioner fired a shot at him in self-defense. (T:1524).

In closing argument the State argued to the jury that in weighing Petitioner's testimony and credibility they needed to take into account that Petitioner read all the reports and depositions in the case with his attorney and knew what everyone was going to say. (T:1846). Petitioner asked to approach the bench and

argued to the court it was improper for the State to make the suggestion that it was improper for the defendant to read the content of his file. (T:1860). It is entirely proper for lawyers to confer with their clients and the defense requested the court to instruct the jury as such. (T:1860: R:1117). Petitioner requested the court to read the following special instruction to the jury: *"It is entirely proper for an accused charged with a criminal offense to read reports and the contents of their file with their attorney."*

The State defended its remarks by arguing that they were not commenting on the fact that Petitioner spoke with his attorney but rather that Petitioner formulated his testimony based on discovery provided. The State's comment specifically referred to depositions and discovery; not the testimony presented at the trial. Petitioner argued that this is criminal court and there are certain rules and ways things are procedurally done and that the State's argument to the jury infers that Petitioner did something wrong. The trial court overruled the objection and denied Petitioner's request for a special instruction.

In rebuttal the State again argued to the jury in weighing the credibility of Petitioner that they need to consider that Petitioner has worked with his lawyers, therefore before he gave his testimony he was aware of what people were going to say and the pictures to be shown. (T:1935). Petitioner again objected to this as improper argument and requested the court read a curative instruction to the jury. (T:1935, R:1117). The court advised the State that it had made its point and

to move on. (T:1937). The State continued to address the court when the court finally stated:

“You’re raising the possibility of an inference to the jury that he did something improper by meeting with his lawyers. Moving on farther away, you’re saying other things that could be taken as a—you know, wink, wink. Do you understand?”

(T:1937). Despite the court agreeing that the State was in fact making that inference to the jury, the court denied Petitioner’s request for a special instruction and overruled Petitioner’s objection to the prosecutor’s remarks.

THE ALLEN CHARGE

The jury began their deliberations On March 11, 2018. (T:1965). During deliberations, the jury requested to hear testimony of two witnesses. (T:1971). Due to the late hour, the court then gave the jury the option of staying late that evening to hear the testimony or coming back in the morning. (T:1985). The foreperson advised the court that the jury wanted to continue their deliberations but wanted to hear the requested testimony in the morning. (T:1989). The court eventually recessed for the evening and instructed the jury to return at 8:00 a.m. (T:2001-2002).

The parties reconvened on March 12, 2020, at 8:09 a.m. and the requested portions of the testimony was read back. (T:2014). The jury continued their deliberations until 10:51 a.m. when they sent a note to the

court. (T:2019). The parties reconvened in the court room and the court stated:

“So I’ve been given a note from the jury. And despite the crystal clear second and last sentence in the third paragraph of jury instruction 3—standard jury instruction 3.13, it says—the note says.”

“We are unable to come to a unanimous decision. The current count is 8 to 4.”

(T:2020-2021). Petitioner moved for a mistrial based upon the jury revealing the numerical split. (T:2020). Petitioner argued against the court to reading the Allen charge with the knowledge of the 8 to 4 vote the court as that was telling them what to do with their vote. *Allen v. U.S.*, 17 S.Ct. 154 (1896). The State requested the court read the Allen charge. (T:2022). Petitioner stated that due to the vote there was no choice but to declare a mistrial. (T:2022).

The court then requested case law dealing with the issue of giving the jury the Allen charge under these circumstances. (T:2022). The court gave each side 20 minutes to research the issue. (T:2027-2028).

Petitioner objected to the court giving the *Allen* charge. (T:2030). Petitioner cited the Florida Supreme court case of *Scoggins v. State*, 726 So.2d 762 (Fla. 1999) arguing that disclosure of the jury’s numerical division, regardless of how or why it was disclosed, created a problem, and that then giving the *Allen* charge created an inherently coercive environment. (T:2034). *Allen v. U.S.*, 17 S.Ct. 154 (1896). Petitioner also argued

that a defendant has the right to a hung jury and nothing should be done that would tend to influence a juror's decision or require a juror to abandon their belief. (T:2037). *Monforte v. State*, 28 So.3d 65 (Fla. 2nd DCA 2009). The State requested the court read the *Allen* charge relying on *Bass v. State*, 611 So.2d 611 (Fla. 2nd DCA 1993). In *Bass* the Second District Court of Appeal reversed the conviction due the court giving the jury a modified *Allen* charge. (T:2039). The court denied the defense motion for mistrial.(T:2046). Petitioner objected to the court reading the jury the *Allen* charge. (T:2048). The court overruled the objection and read the *Allen* charge. (T:2051). Appellant then renewed his objection which was again overruled. (T:2053).

The court recessed at the noon hour due to an obligation of one of the jurors. The jury was ordered to return on Monday at 10:00 a.m. (T:2057).

THE CORONA VIRUS

On March 15, 2020, Petitioner filed a written Renewed Motion to Declare Mistrial Based On Jury Deadlock and Additionally Due to Coronavirus Outbreak. (R:1129). Petitioner argued that since the court had last recessed, the United States of America had declared a national emergency due to the Coronavirus outbreak. (R:1130). On March 11, 2020, the World Health Organization officially classified the Coronavirus as a pandemic. (R:1130). The motion emphasized that what occurred was unprecedented and given the current state of the world, asking the jurors to return

to deliberate after they advised the court they were unequivocally deadlocked created a toxic environment and forced them to render a verdict. A mistrial was the only just solution. (R:1131).

Court reconvened on Monday March 16, 2020. The State objected to the Renewed Motion for Mistrial. (T:2064). Petitioner argued that due to the national emergency with orders to socially distance, close businesses, schools and courts, there was no way to know what the jury was feeling or what additional pressures those circumstances placed on them. (T:2071).

The trial court acknowledged that on Friday the Florida Supreme Court issued an administrative order suspending speedy trial and intended to suspend all criminal and civil jury trials. (T:2070). The court advised that presiding judges had the ability to continue any trial already underway in the interest of justice. (T:2074). The court then stated that “*it’s a—you know, it’s a—I hate to say it’s an organic ever-changing situation.*” (T:2070). The trial judge stated on the record that the Court had “*no idea*” if the jury felt comfortable or undue pressure to deliberate under the circumstances. The prosecutors objected to the court inquiring of a juror if they had concerns about the situation. (T:2075-2076). The court denied Petitioner’s motion for mistrial without ever inquiring if the jury had concerns. At 11:52 a.m. the jury returned with a verdict finding Appellant guilty of Manslaughter with a firearm. (T:2081-2083).

DIRECT APPEAL

On direct appeal Petitioner argued nine grounds including the improper comments by the prosecutor, the court's reading of the Allen charge and the jury deliberating during the National Health Emergency without any inquiry from the court. Petitioner argued the Corona Virus issue raised a case of first impression. The declaration of a State of Emergency while the jury deliberated creates a legal dilemma for which there was no precedence. Petitioner argued that under the facts of his particular case it was error for the court to order the jury to continue to deliberate without inquiring whether the jurors felt comfortable given the State of Emergency issued during the course of their deliberation. On the record the trial court voiced concerns over that fact that the court had no idea if the jury felt comfortable and the court never inquired if any of the jurors had concerns.

As to the reading of the Allen charge, the court asked the parties if they had case law dealing with scenarios when after being instructed by the court not to disclose any numerical split, the jury sends a note to the judge that they are deadlocked revealing the numerical split. The case law provided deals with cases in which the court requests the numerical split or when a court give a modified Allen charge. None of those facts are present in Petitioner's case. After approximately six hours of deliberation the jury rendered their verdict by advising the court they were deadlocked at an 8-4 split. Under the facts of this case, when

the court ordered the jury to continue to deliberate the court ordered jurors to change their verdict.

Petitioner also argued that the State's comments regarding Petitioner meeting with his attorney was an improper comment on Petitioner's constitutional right to due process and therefore the court should declare a mistrial.

Due to the unique facts surrounding Petitioner's case, Petitioner filed a Motion for Written Opinion to give some guidance as to the Fourth District's Courts reasoning for the affirmance. That motion was denied on January 11, 2022. Since the Fourth District Court denied Petitioner's Motion for Written Opinion, Petitioner was unable to seek relief in the Florida Supreme Court.

REASONS FOR GRANTING RELIEF

A. The State's use of a defendant's constitutionally protected right as argument for a jury to discredit a defendant's testimony should shock the conscious of any court. The right to testify is a fundamental right that should be protected and never pierced. In denying Petitioner relief on this issue, the Fourth District Court of Appeal has given the State a rubber stamp to trample on the constitutionally protected rights of any defendant electing to take the stand in their defense. This sets a dangerous precedence. To safeguard that a defendant's constitutional right to counsel never conflict with a defendant's constitutional right

to testify, this court should grant Petitioner's Writ of Certiorari.

B. In order to preserve a defendant's right to fair trial and the right to an impartial jury, this court should rule on whether a trial court can read an Allen charge once a jury has disclosed a numerical verdict notwithstanding the court's instructions to the contrary.

A coerced verdict in a criminal case infringes upon two rights guaranteed by the constitution; the right to a fair trial and the right to an impartial jury. Any issue involving the reading of the *Allen* charge must be decided upon the particular facts and circumstances surrounding an individual case. *Thomas v. State*, 748 So.2d 970 (Fla. 1999). In "assessing whether the trial court's decision to give an *Allen* charge was error, 'other prevailing circumstances, including the length of the deliberations, the lateness of the hour, the condition of the jurors, and the jury's disclosure of their numerical split.'" *Lebron v. State*, 799 So.2d 997, 1013 (Fla. 2001). The Florida Supreme Court considers prevailing circumstances and identification of a jury's vote of "critical concern." Appellant's case involved both. In *U.S. v. Therive*, 764 F.3d 1293 (11th Cir. 2014), the United States Court of Appeals stated that when a jury has advised the court of a numerical split, the court should not disclose any information regarding the division other than the fact that the jury considers itself deadlocked.

C: The Corona Virus creates a case of first impression.

Petitioner's case falls under a line of cases now referred to as pandemic-era cases. The Corona Virus Pandemic was unexpected and unprecedented. Neither the court, the State nor the defense had legal authority to submit to the court in support of allowing the jury to continue to deliberate under the State of Emergency. The courts have tried to deal with the Corona Virus by using modified techniques such as remote video testimony. However, these techniques should only be utilized with a defendant's consent. In Missouri, a rape conviction was recently overturned due to the State having a witness testify remotely over the objection of the defense. *Missouri v. Rodney Smith* (Missouri Supreme Court SC99086, January 11, 2022). In *Smith*, the defendant objected to the witness testifying via remote and the Missouri Supreme Court found the remote testimony violated the defendant's right to confrontation and the conviction was reversed. Petitioner had the right to a jury free from undue pressure. Petitioner objected to the court allowing the jury to continue to deliberate without first inquiring that the jury felt comfortable in doing so. Since this creates a case of first impression Petitioner requests this court to grant certiorari review in this matter.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgement of the Florida Fourth District Court of Appeal.

Respectfully submitted,

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