No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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WILLIAM PRUITT,

PETITIONER,

vs.

UNITED STATES.

RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI TO**
**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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KEVIN GOUGH
Georgia Bar No. 303210

501 Gloucester Street, Suite 121
Post Office Box 898
Brunswick, Georgia 31521
(912) 242-5114
kevingough.firm@gmail.com

ATTORNEY FOR PETITIONER
WILLIAM PRUITT

## QUESTION PRESENTED

**I. WHETHER THE APPEALS COURT ERRED IN AFFIRMING THE USE OF ITS PATTERN MODIFIED "ALLEN" CHARGE WITH A DEADLOCKED JURY, EXPRESSLY REFERENCING THE TIME, EXPENSE AND BURDEN OF A RE-TRIAL, ESPECIALLY AFTER THE DISTRICT COURT FURTHER MODIFIED SAID CHARGE TO INFORM THE JURORS THAT THEY WOULD BE 'QUITTERS" IF THEY WERE UNABLE TO REACH A VERDICT.**

## LIST OF PARTIES

William Pruitt,
Petitioner

United States,
Respondent

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## CITATION OF OPINION BELOW

On February 24, 2021, in an unpublished decision under Docket No. 19-12237-JJ, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's appeal of the judgment of conviction. A copy of the opinion is included in the Appendix.

On April 26, 2021, in an unpublished decision under Docket No. 19-12237-JJ, the United States Court of Appeals for the Eleventh Circuit denied the petition for panel rehearing and rehearing en banc were denied. A copy of the opinion is included in the Appendix.

## STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254.

**STATEMENT OF CASE, AND FACTS, AND COURSE OF PROCEEDINGS**

Petitioner was indicted on November 13, 2018 on one count of attempted sexual exploitation of children in violation of 18 U.S.C. § 2251 (a) and (e), a second count of attempted coercion and enticement of a minor in violation of O.C.G.A. § 16-6-4 (child molestation), and U.S.C. § 18 U.S.C. § 2422(b) and 2427, following an undercover sting operation. [Dkt 1]. Petitioner was arraigned on November 29, 2017. [Dkt - 10]. A jury trial was conducted March 4-7, 2019. [Dkt. ]. That evidence showed as follows:

Law enforcement agencies conducted a sting operation known as "Hidden Guardian." Agents placed an advertisement online through Craiglist, a site that required users to verify that they were over eighteen years of age. Mr. Pruitt, a custodian and school bus driver at an elementary school, responded to an advertisement purporting to be an adult woman, "Brianna" seeking a man. Early in the conversation, however, Brianna texts that she is actually only fourteen years old. Although sharing this information, Brianna's cleverly posed picture is clearly that of an older person – the older female agent who provided the picture, essentially a discreet "head shot", for use in the investigation. The person texting back and forth, moreover, is actually a male agent (which is why there is never any telephonic contact between them). Moreover, in various ways the texts sent by the undercover agent suggest that the sender is older and more mature than Brianna's stated age. There is no actual minor involved in this sting operation. After texting back and forth for several days, Mr. Pruitt drove approximately four hours from North Carolina to Columbus, Georgia to meet her.

Petitioner is arrested when he arrives. Pantyhose (that he texted that he wanted her to wear with her mon's dress) and condoms (that she insisted upon) are seized. Following his arrest, and without benefit of counsel, Mr. Pruitt gave an arguably incriminating recorded statement to law enforcement officers that was played to the jury. Mr. Pruitt gave sympathetic but admittedly less than credible testimony at trial.

The totality of circumstances, however, gave the jury ample reason to question whether Mr. Pruitt was merely participating in role play. Mr. Pruitt had no criminal history. Petitioner worked at a school but had never been accused or suspected of seeking or engaging in sexual or other misconduct involving a child. Mr. Pruitt did not possess any child pornography at the time of his arrest, nor had he searched for any online. Mr. Pruitt did not have sexual thoughts about having sex with children nor masturbate or otherwise act out on any desires towards children. Mr. Pruitt had limited intellect, and low emotional development, due to the manner in which he was raised. The government, therefore, faced the daunting task of convicting a sympathetic individual charged with inchoate, victimless crimes manufactured by a controversial law enforcement sting operation in which the government appeared to have taken advantage of Petitioner.

On the third day of deliberations, unable to reach a verdict, the jury informed the trial court that they were at an impasse. The note stated: "We are at a hung jury and have voted seven times on Count 2 and are not unanimous decision." The court denied trial counsel's motion for mistrial. [Trial Transcript, Volume 4, at 26-28]. Over objection, and with important alterations (emphasis added below), the district court then proceeded

to give the modified Allen charge from the pattern charge book for the Eleventh Circuit. The most relevant – and apparently spontaneous alteration to the charge – was as follows:

> **Okay,** members of the Jury: **Welcome back. And I do want to again express my appreciation to you for your attention and your hard work during this process. When we encounter different situations, we can either quit or we can see whether there is a way forward. And I want to give you some instructions that I know that you will conscientiously listen to and apply and see whether there is a way forward in this case. I'm going to ask that you continue your deliberations in an effort to agree on a verdict and dispose of this case.**
>
> **(Trial Transcript, Volume 4, at 31- 32).**

Approximately three hours later, the jury returned a verdict of guilty as to count two. [Vol 4 - 31 & 35]. It is from this conviction that Petitioner appeals.

On June 10, 2029, Petitioner was sentenced to 120 months imprisonment by the Honorable Clay D. Land, United States District Judge for the Middle District of Georgia,

on June 10, 2019. [Dkt - 70]. Petitioner filed his notice of appeal on June 11, 2019. [Dkt - 76]. A panel of the U.S. Court of Appeals for the Eleventh Circuit denied his appeal on February 24, 2021. [Appendix A]. Pruitt's petitions for panel rehearing and rehearing en banc were denied on April 26, 2021. [Appendix B].

## REASONS FOR GRANTING THE WRIT

### I. THE APPEALS COURT ERRED IN AFFIRMING THE USE OF ITS PATTERN MODIFIED "ALLEN" CHARGE WITH A DEADLOCKED JURY, EXPRESSLY REFERENCING THE TIME, EXPENSE AND BURDEN OF A RE-TRIAL, ESPECIALLY AFTER THE DISTRICT COURT FURTHER MODIFIED SAID CHARGE TO INFORM THE JURORS THAT THEY WOULD BE 'QUITTERS" IF THEY WERE UNABLE TO REACH A VERDICT.

In Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), the Supreme Court approved the use of a jury instruction intended to prevent a hung jury by encouraging jurors in the minority to reconsider.[1] 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

[1]Undersigned counsel has borrowed liberally, and without further attribution, from the petition for certiorari filed on behalf of Philip Antico last year.

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), the Supreme 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. 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, the Supreme Court re-affirmed use of an Allen charge. In doing so, noted 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, the Supreme 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, ___ S. Ct. ___, ___ L.E.2d ___ (1999). However, the reference to the time, burden and expense of a retrial in the "modified" Allen charge is unconstitutionally coercive *per se*, and especially given the language added in Mr. Pruitt's case.

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, 13191320 (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).

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 modified Allen charge is inherently coercive because 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 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 the Supreme 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.

Petitioner was found not guilty as to Count One, and the jury was initially deadlocked on Count Two. Only after they received the "dynamite" charge did the jury reach a hasty 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 much more than an hour or so. The note from the jury was clear that they had already voted seven times. The note did not reflect any movement

whatsoever nor did the jury did not seek any further instruction from the court. For the jury to have gone from deadlock to verdict in less than three hours, when all that had changed was the giving of the Allen charge, it is reasonable to infer that the district court's coercive Allen charge convinced the holdout jurors that a verdict was required.

The use of the modified pattern Allen charge is especially egregious in the instant case as the district court, apparently without giving the matter any serious thought, added troubling language at the beginning of the already coercive "pattern" Allen charge:

> **Okay,** members of the Jury: **Welcome back. And I do want to again express my appreciation to you for your attention and your hard work during this process. When we encounter different situations, we can either quit or we can see whether there is a way forward. And I want to give you some instructions that I know that you will conscientiously listen to and apply and see whether there is a way forward in this case.**
>
> **(Trial Transcript, Volume IV, at 31).**

There can be no question but that the inclusion of this additional unfortunate language made the already coercive pattern charge even more coercive. The above case

is readily distinguished from others, such as Posey v. United States, 416 F.2d 545, 552 (5th Cir. 1969), in which the added commentary was not erroneous because it did not "imply a personal attack on the jury members for failing to reach a verdict." In fact, Posey held that the Allen charge must avoid "creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to create a mistrial." Id. In suggesting that jurors would be "quitters" if they were unable to reach a verdict, the district court did exactly what Posey instructs is impermissible.

## CONCLUSION

For the foregoing reasons, Petitioner William Pruitt respectfully submits that his Petition for Writ of Certiorari should be granted, that the decision of the Court of Appeals should be reversed, that the judgment of conviction vacated, and that Petitioner be granted a new trial. RESPECTFULLY SUBMITTED this 26rd day of July, 2021.

/s/ Kevin Gough
Kevin Gough
Georgia Bar No. 303210
ATTORNEY FOR PETITIONER

Kevin Gough
Kevin Gough Firm, LLC
501 Gloucester Street, Suite 121
Post Office Box 898
Brunswick, GA 31521
(912) 242-5114
kevingough.firm@gmail.com

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A. Unpublished decision of the United States Court of Appeals for the Eleventh Circuit.

B. Unpublished decision of the United States Court of Appeals for the Eleventh Circuit, denying petition for panel rehearing and rehearing en banc.