Nos. 17-7970 and 17-7989

IN THE SUPREME COURT OF THE UNITED STATES

CARL L. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

CHRISTOPHER D. MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

FRANCESCO VALENTINI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not plainly err, in the circumstances of this case, in issuing multiple supplemental jury instructions patterned after language approved by this Court in Allen v. United States, 164 U.S. 492 (1896), that encouraged the jury to conduct further respectful deliberations.

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OPINIONS BELOW

The opinion of the court of appeals (Robinson Pet. App. 4-43; Martin Pet. App. 2-41) is reported at 872 F.3d 760. The opinion and order of the district court denying the motion for a new trial filed by petitioners' co-defendant (Robinson Pet. App. 44-55; Martin Pet. App. 46-57) is not published in the Federal Supplement but is available at 2015 WL 5680390.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017. Petitions for rehearing were denied on December 5, 2017

(Robinson Pet. App. 328; Martin Pet. App. 43). The petitions for writs of certiorari were filed, respectively, on March 1 and March 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners Robinson and Martin were convicted of conspiracy to commit federal programs bribery, in violation of 18 U.S.C. 371 and 666, and federal programs bribery, in violation of 18 U.S.C. 666. Martin was also convicted of making false statements, in violation of 18 U.S.C. 1001(a)(2). Robinson Judgment 1; Martin Judgment 1. Robinson was sentenced to a total of 78 months of imprisonment and Martin was sentenced to a total of 60 months of imprisonment, both to be followed by three years of supervised release. Robinson Judgment 2-3; Martin Judgment 2-3. The court of appeals affirmed. Robinson Pet. App. 4-43; Martin Pet. App. 2-41.

1. Arise! Academy was a public charter school in Dayton, Ohio, that received federal funds. Robinson Pet. App. 5, 29; Gov't C.A. Br. 3. In the summer of 2008, the school's sponsor installed Shane Floyd as superintendent. Robinson Pet. App. 5-6. Floyd was given broad discretion to select members of the school board, to which he appointed several friends and individuals who lacked relevant experience. Gov't C.A. Br. 3-4. One of Floyd's

appointees was petitioner Martin, who was a member of Floyd's fraternity. Id. at 4.

Floyd agreed with two former business partners -- petitioner Robinson and Michael Ward -- to rig the award of a school contract and to split the contract's proceeds. Robinson Pet. App. 6. Under the scheme, Floyd would cause the school to secure a consulting contract with Global Educational Consultants (Global), a newly formed company that was owned by Robinson and in which Ward acted as "silent partner." Ibid. In exchange, Robinson and Ward would divide any contract proceeds in excess of $200,000 equally with Floyd. Ibid. Shortly after becoming superintendent, Floyd presented to the school board a proposed contract with Global worth $264,000, which the board approved. Ibid.

During the next two years, Global received over $420,000 from the school, far exceeding the original contract value. Robinson Pet. App. 8; see Gov't C.A. Br. 5-6. Global received payments approximately once a month, typically by check. Robinson Pet. App. 6. Upon receiving a payment, Robinson would usually go to a local bank with Floyd and Ward, where he would deposit the check and withdraw a large amount of cash. Ibid. The three would then divide the cash. Ibid.

Over time, additional bribe recipients, including petitioner Martin, joined the scheme. Robinson Pet. App. 7. Martin agreed to serve as school board president after being promised a $1000

kickback from Global each month. Ibid. During the five months that Martin served as board president, Global did no work for the school but nonetheless received payments in excess of $200,000, see Gov't C.A. Br. 10, and it paid Martin multiple cash kickbacks, id. at 10-11. Ward also paid for Martin's airfare, lodging, and entertainment in connection with a trip to Las Vegas. Robinson Pet. App. 7.

Within months after it began making payments to Global, the school experienced severe financial difficulties. Gov't C.A. Br. 11. The school first delayed salary payments to its teachers, then canceled health insurance benefits, and ultimately lowered teacher salaries. Id. at 11-12. By 2010, the school ran out of money and ceased all operations. Robinson Pet. App. 8.

2. a. A federal grand jury charged Robinson, Martin, and Floyd with conspiracy to commit federal programs bribery, in violation of 18 U.S.C. 371, and federal programs bribery, in violation of 18 U.S.C. 666. Superseding Indictment 4-12. It also charged Martin and Floyd with making false statements to federal officials, in violation of 18 U.S.C. 1001(a)(2). Superseding Indictment 13, 15.[1]

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[1] A fourth co-conspirator, Kristal Screven, was also indicted and pleaded guilty to one count of conspiracy to commit federal programs bribery. D. Ct. Doc. 180, at 1 (Oct. 6, 2015).

b. A two-week trial was held. Robinson Pet. App. 8. On its second day of deliberations, the jury submitted a note asking whether, if the jury could not reach agreement on the conspiracy count, it could still render a verdict on other counts. Id. at 293. The district court responded affirmatively and further instructed the jury that "there is a certain logic in taking up the issues in the order in which I read them to you in my instructions, but I will not tell you the order in which you have to take up consideration of these issues." Id. at 302. The court added that "I would encourage you to resolve the conspiracy issue because ultimately all of these issues have to be resolved." Ibid. Each petitioner's counsel disclaimed any objection to those instructions. Id. at 303.

Later the same day, the jury sent another set of notes asking, inter alia, how it should proceed "if one or more juror members feel like the jury is intentionally being hung?" Robinson Pet. App. 305. The district court responded by reading the Sixth Circuit's pattern "Allen charge," which is designed to encourage further deliberation in the face of jury disagreement. Id. at 312; see id. at 309-311; cf. Allen v. United States, 164 U.S. 492, 501-502 (1896). That instruction, inter alia, "remind[s]" jurors of their "duty to make every reasonable effort * * * to reach unanimous agreement," but admonishes them to "not ever change your mind just because other jurors see things differently or just to

get this case over with," and disavows any intent to "pressure [the jurors] into agreeing on a verdict." Robinson Pet. App. 310-311. The court delivered that instruction over the objection of Martin's counsel, who had argued that an Allen charge would be appropriate only if "jurors are deliberating in good faith." Id. at 306. Robinson's counsel disclaimed any objection. Id. at 307.

The next day, the jury submitted a note stating that "[w]e, the jury, feel we will not be able to come to agreement" on the conspiracy count. Robinson Pet. App. 317. After consulting with counsel for both the government and the defendants, none of whom objected, see id. at 317-318, the district court repeated the Sixth Circuit's pattern Allen instruction, see id. at 318-320. After repeating that instruction, the court added:

> But I can't emphasize enough, ladies and gentlemen, how important it is for you to listen to one another both respectfully and carefully and to weigh the evidence and hear what your fellow jurors have to say.
>
> Ladies and gentlemen, it is not unusual for me to give an Allen charge. That's what this is called. And it is not unusual for juries to be deadlocked and then to work through their disagreements and ultimately reach unanimity. Read the instructions, consider all of the instructions in context, and listen to each other as you deliberate, because everyone is trying to do justice here and people have legitimate disagreements. But as mature adults, every one of you has had a disagreement with someone and has been able to work through it at some point in your lives.
>
> So this is important enough for you to return to the jury room and resume your deliberations in earnest by listening to one another, talking to and with one another, and considering this case in context with all of the instructions that the Court has given you.

Id. at 320-321. Each petitioner's counsel then disclaimed any objection to the court's instructions as given. Id. at 321.

Approximately three hours later, the jury returned a verdict finding both petitioners, as well as Floyd, guilty on all counts. Robinson Pet. App. 321-322. A poll of the jury confirmed that the verdict was unanimous. Id. at 323-324. The district court accepted the verdict and, consistent with local rules, directed the parties not to contact any of the jurors. Id. at 325-326.[2]

c. Following trial, Floyd's counsel hired a private investigator to search for possible evidence of racial bias by the jury against the trial defendants, each of whom was African-American. Robinson Pet. App. 9. Notwithstanding the district court's directive, and without seeking permission from the court, the private investigator contacted and interviewed two of the jurors. Ibid. The two jurors, who were both African-American, told the investigator that, after they had expressed doubts about the defendants' guilt early in the deliberations, the jury's foreperson -- who was white -- said that "she believed [the two jurors] were reluctant to convict because they felt they 'owed something' to their 'black brothers.'" Id. at 9-10. The two jurors stated that the foreperson's remark prompted a

[2] See S.D. Ohio Civ. R. 47.1 (prohibiting juror contact "regarding the verdict or deliberations of the jury in the action except with leave of the Court"); S.D. Ohio Crim. R. 1.2 (providing that local civil rules generally apply in criminal cases).

confrontation in the jury room, which required the marshal and the deputy clerk to intervene to restore calm. Id. at 10.

Citing the two jurors' statements, Floyd then filed a motion for a new trial, arguing that the foreperson's comments had amounted to race-based jury misconduct and that the court staff's intervention had constituted improper outside influence. D. Ct. Doc. 152, at 13-18 (Sept. 16, 2015). Notwithstanding his prior disclaimer of any objection, Floyd also argued that the district court had unconstitutionally coerced a verdict when it gave the second Allen charge. Id. at 31-34. Separately, petitioners Robinson and Martin moved for leave to file their own motions for a new trial based upon the two jurors' post-trial statements. D. Ct. Doc. 159, at 1-2 (Sept. 17, 2015); D. Ct. Doc. 162, at 1-2 (Sept. 18, 2015).

The district court denied Floyd's motion. Robinson Pet. App. 44-55. As relevant here, the court found that the "second Allen charge was not unduly coercive or prejudicial" but rather had "instructed the jury to continue their deliberations in an open-minded fashion." Id. at 54. The court also denied Robinson's and Martin's motions as moot, explaining that it had just "considered and rejected the very arguments that Martin and Robinson hope to make in support of their inevitable motion for new trial should the Court grant them leave to contact individual jurors." Id. at 57; see id. at 56-57.

d. The district court sentenced Robinson to 78 months of imprisonment on the federal programs bribery count and a concurrent term of 60 months of imprisonment on the conspiracy count, to be followed by three years of supervised release. Robinson Judgment 1-3. The court sentenced Martin to concurrent terms of 60 months of imprisonment on each of his three counts of conviction, to be followed by three years of supervised release. Martin Judgment 1-3.

3. The court of appeals affirmed. Robinson Pet. App. 4-43.

a. Petitioners argued on appeal that the district court's repetition of the pattern Allen instruction, in combination with the court's surrounding statements, had impermissibly coerced the jury's verdict and constituted "reversible plain error." Martin C.A. Br. 8; see id. at 10-16; Robinson C.A. Br. 15, 49-60. The court of appeals rejected those arguments. Robinson Pet. App. 17-20.

The court of appeals explained that "[m]ultiple Allen charges are not per se coercive" and that "each case must be evaluated under the totality of the circumstances." Robinson Pet. App. 18. Reviewing the record of this case, the court found that "[h]ere, several factors mitigated any coercion from the multiple charges." Ibid. The court observed that the trial had been "lengthy and complex, such that additional jury instruction may have been

necessary." Ibid. It also noted that the initial Allen charge had been given "in response to the jury's question about how to proceed in the face of disagreement," meaning that "only the second" Allen charge was given "in response to the jury's report that it was deadlocked." Id. at 18-19. The court further observed that both of the Allen charges "followed the Sixth Circuit pattern jury instructions, which have been held to be non-coercive." Id. at 19 (citing United States v. Clinton, 338 F.3d 483, 489-490 (6th Cir.), cert. denied, 540 U.S. 1084 (2003)) (citation omitted). And the court stated that "[e]ven outside of the pattern language," the district court had "emphasized dissenting jurors' freedom to disagree." Ibid. The court of appeals accordingly found "no plain error" warranting reversal. Ibid.

The court of appeals also rejected petitioners' claims that other remarks made by the district court had constituted reversible "plain error." Robinson Pet. App. 19-20. First, the court of appeals observed that the statement that "'I would encourage you to resolve the conspiracy issue because ultimately all of these issues have to be resolved'" had been made in the context of responding to the jury's question about "the order in which the issues should be resolved," not in response to a reported deadlock. Id. at 19. The court also noted that the statement had preceded the two pattern Allen charges "emphasizing dissenting jurors' freedom to continue to dissent," which the court found "cur[ed]

any coercive effect." Id. at 20. Second, with respect to the district court's remark that "'as mature adults, every one of you has had a disagreement with someone and has been able to work through it at some point in your lives,'" the court of appeals explained that "[i]n context, [the remark] can reasonably be interpreted as a plea for civility and respect, and not as pressure on dissenting jurors to agree with the majority." Ibid.

Petitioners also raised several other arguments, including claims that the jury foreperson's comments during deliberations and the court staff's intervention to restore calm had violated their Sixth Amendment rights. The court of appeals correctly rejected those claims, see Robinson Pet. App. 10-17, 20-30, and petitioners do not renew them here.

b. Judge Donald concurred in part and dissented in part. Robinson Pet. App. 31-43. She took the view that the district court's statement that "ultimately all [of] these issues have to be resolved" was impermissibly coercive. Id. at 42 (emphasis omitted). She further suggested that the coercive effect that she perceived was "very likely compounded" by the district court's subsequent delivery of two Allen charges "in * * * close proximity to each other," ibid., and by the court's additional statements admonishing the jury to listen to one another carefully and respectfully in an attempt to work through their disagreements, ibid.

Judge Donald also dissented from the court of appeals' disposition of petitioners' Sixth Amendment juror-misconduct and outside-influence claims. See Robinson Pet. App. 37-41. As noted, petitioners do not renew those claims here.

ARGUMENT

Petitioners contend (Robinson Pet. 5-17; Martin Pet. 5-19) that the district court plainly erred by giving the Sixth Circuit's pattern Allen instruction more than once and by making other statements that encouraged the jury to pursue further respectful deliberations. The court of appeals correctly denied relief on plain-error review, and its decision does not implicate any conflict in the lower courts that warrants this Court's review. The petitions should be denied.

1. a. In Allen v. United States, 164 U.S. 492 (1896), this Court held that district courts may give supplemental instructions to deadlocked juries that encourage jurors to be open-minded and to reconsider their views so that a verdict might be reached. Id. at 501-502. Observing that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves," the Court explained that "[i]t certainly 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. at 501.

The Court reaffirmed those principles in Lowenfield v. Phelps, 484 U.S. 231 (1988), stating that "[t]he continuing validity of this Court's observations in Allen are beyond dispute." Id. at 237. The Court further observed that the rationale supporting the validity of the Allen instruction applies "with even greater force" where the "charge given * * * does not speak specifically to the minority jurors," but instead encourages all members of the jury (whether among the majority or the minority) to reconsider their views. Id. at 237-238.

This Court has cautioned, however, that district courts may not use supplemental instructions in order to coerce jurors into surrendering their conscientiously held views. See Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam). Whether an Allen instruction is impermissibly coercive depends upon the terms of the charge, taken "in its context and under all the circumstances." Lowenfield, 484 U.S. at 237 (quoting Jenkins, 380 U.S. at 446).

b. In this case, the court of appeals, considering the "totality of the circumstances," correctly found that the "two full Allen charges and other Allen-charge-like statements" made by the district court did not amount to plain error. Robinson Pet. App. 18. To prevail under the plain-error standard, petitioners

must show, inter alia, that the district court committed an "error or defect * * * that has not been intentionally relinquished or abandoned" and that is "clear or obvious, rather than subject to reasonable dispute." Puckett v. United States, 556 U.S. 129, 135 (2009); cf. Martin Pet. 17 (acknowledging applicability of "plain error standard").

The court of appeals correctly rejected petitioners' challenge to the repetition of the Allen charge. Robinson Pet. App. 18-19. The court observed that the trial had been "lengthy and complex," which suggested that additional instruction and further deliberation would not be unreasonable. Id. at 18. The court also correctly noted that the first Allen charge had not been issued in response to a clear deadlock, but rather "in response to the jury's question about how to proceed in the face of disagreement." Ibid. Moreover, the "two full Allen charges followed the Sixth Circuit pattern jury instructions," id. at 19, which specifically affirm that jurors should "[n]ever change your mind just because other jurors see things differently or just to get this case over with"; that jurors should not feel "pressure[d] * * * into agreeing on a verdict"; and that "[a]s important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience." Id. at 310-311; see also id. at 320. And the court noted that none of the trial defendants had opposed the district court's proposal to repeat the

pattern Allen charge, even though the court specifically asked the parties whether they objected to that course of action. Id. at 19; see id. at 317.

The court of appeals also properly rejected petitioners' plain-error challenges to the wording of the district court's surrounding statements. Robinson Pet. App. 19-20. The court of appeals correctly noted that, although the passing statement that "'ultimately all of these issues have to be resolved'" did "bear a resemblance" to an instruction the court had previously "deemed 'coercive,'" id. at 19 (citing United States v. Harris, 391 F.2d 348, 351, 354 (6th Cir.), cert. denied, 393 U.S. 874 (1968)), in context, the statement was best understood as responding to a question "about the order in which the issues should be resolved" during deliberations, ibid. Similarly, the court correctly explained that the remark that "'every one of you has had a disagreement with someone and has been able to work through it at some point in your lives'" was properly "interpreted as a plea for civility and respect, and not as pressure on dissenting jurors to agree with the majority." Id. at 20. That those instructions were non-coercive in context is underscored by the fact that "there were no objections to any of the[se] remarks," even though the district court specifically inquired of counsel whether they had any objections. Id. at 19; see id. at 303, 321. Moreover, the challenged statements either followed or were immediately preceded

by the "two pattern Allen charges," which "emphasiz[ed] dissenting jurors' freedom to continue to dissent." Id. at 20; cf., e.g., Jones v. United States, 527 U.S. 373, 391 (1999) ("Our decisions repeatedly have cautioned that [jury] instructions must be evaluated not in isolation but in the context of the entire charge.").

c. Petitioners' challenges to the court of appeals' decision amount to factbound claims of error that do not warrant this Court's review. See Sup. Ct. R. 10.

Contrary to Robinson's contention (Pet. 12-15), the court of appeals' decision adheres "in form and in substance" to this Court's decision in Jenkins v. United States, supra. In Jenkins, the jury "sent a note to the trial judge advising that it had been unable to agree upon a verdict 'on both counts because of insufficient evidence,'" after which the court instructed the jury that "'[y]ou have got to reach a decision in this case.'" 380 U.S. at 446. This Court analyzed that instruction "in its context and under all the circumstances of th[e] case" and found it to have a "coercive effect" on the jury. Ibid. Consistent with Jenkins, the court of appeals here similarly considered the "totality of the circumstances." Robinson Pet. App. 18. Applying that fact-dependent approach, it correctly found that the particular statements challenged in this case, viewed in context

and in light of surrounding instructions, were not improperly coercive under the plain-error standard. See id. at 18-20.

Petitioners' case-specific challenges to the court of appeals' analysis lack merit. Robinson contends (Pet. 14) that the court of appeals misapplied the Jenkins standard by "cherry-picking circumstances and neglecting to account for their totality," but fails to identify any relevant dispositive factors that the court of appeals did not consider. And petitioners' arguments that the court of appeals erred in failing to find coercion based upon "racial bullying within the jury room" (Martin Pet. 5; see id. at 18; Robinson Pet. 15-17) both are meritless and fall outside the scope of the question presented in the respective petitions, which "seek[] certiorari" only "on the Allen issue." Martin Pet. 4; see id. at i; Robinson Pet. i; cf. Sup. Ct. R. 14.1(a).[3]

[3] Robinson also repeatedly asserts (e.g., Pet. 5) that the district court plainly erred by not "probing into the jury's deadlock." He does not explain what this "prob[e]" would have entailed, but if he envisions a judicial inquiry into the nature of or reasons for the jury's disagreement, that inquiry would itself be subject to challenge as impermissibly coercive. See Brasfield v. United States, 272 U.S. 448, 450 (1926) (holding that a trial court acted improperly in "requiring the jury to reveal the nature or extent of its division"); United States v. Reed, 167 F.3d 984, 991 (6th Cir.) ("[I]t is coercive for the court to inquire into the numerical split in the jury."), cert. denied, 528 U.S. 897 (1999).

2. The decision below does not squarely conflict with the decision of any other court of appeals or state court of last resort.

a. Petitioners assert (Robinson Pet. 8-9; Martin Pet. 7) that the court of appeals' decision in this case conflicts with the Ninth Circuit's decision in United States v. Seawell, 550 F.2d 1159 (1977). In Seawell, a divided panel announced a novel "per se * * * rule of practice" that "it is reversible error to repeat an Allen charge * * * in this circuit after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction." Id. at 1163; see, e.g., United States v. Evanston, 651 F.3d 1080, 1085 (9th Cir. 2011) (describing Seawell in dicta as holding "that it is per se error to give a second Allen charge where the jury has not requested one"). For several reasons, however, that alleged conflict affords no basis for this Court's review.

First, it is not clear that the Ninth Circuit would find any reversible error on the facts of this case. Although described as a per se rule, the court in practice has examined the facts and circumstances to determine whether the rule should apply and has not invariably reversed convictions that follow multiple Allen charges. See United States v. Nickell, 883 F.2d 824, 828-829 (9th Cir. 1989); United States v. Armstrong, 654 F.2d 1328, 1334-1335 (9th Cir. 1981), cert. denied, 454 U.S. 1157, and 455 U.S.

926 (1982). In so doing, the court has indicated that one factor counseling against reversal is whether the charge was administered the second time in circumstances where it would be interpreted as judicial disapproval of failure to overcome a prior deadlock. See Nickell, 883 F.2d at 829 (declining to reverse where "there could have been no suggestion of criticism of intervening behavior by the jury in the second supplemental instruction, since the judge addressed the jury the second time only as a reminder of the instructions given before the break"); Armstrong, 654 F.2d at 1334 (declining to reverse where "[t]he content and timing of the[] charges render them significantly less coercive than those encountered in Seawell"). Here, however, the jury effectively requested the first Allen instruction by asking "how to proceed in the face of disagreement," Robinson Pet. App. 18, and only the second instruction followed a report of deadlock. Moreover, in Seawell, unlike here, "[t]imely objections were made by defense counsel." 550 F.2d at 1162. Petitioners identify no basis for concluding that a Ninth Circuit panel would be bound to treat Seawell as mandating reversal in these circumstances.

Second, the Ninth Circuit's "per se rule" derives from the court's discretionary supervisory powers, not from its interpretation of constitutional requirements. Seawell, 550 F.2d at 1163; see United States v. Rubio-Villareal, 967 F.2d 294, 297 (9th Cir. 1992) (en banc) (confirming that Seawell "did not rely

on the Constitution but on 'a sound rule of practice.'") (citation omitted). Courts of appeals have supervisory authority to adopt additional prophylactic rules governing proceedings within their own circuits, and this Court has never suggested that such rules need to be uniform. See Cupp v. Naughten, 414 U.S. 141, 146 (1973) (recognizing, in context of jury instructions, that courts of appeals may "require [the district courts] to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution"); cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (observing in another context that courts of appeals may "vary considerably" in their exercise of supervisory authority). Petitioners did not request a new supervisory rule below; it is far from clear that plain-error review provides the appropriate context for creating one in the first instance; and no court of appeals has accepted Martin's argument (Pet. 13-15) that a "per se ban" against multiple Allen charges is compelled by the Constitution itself.[4]

Third, the Ninth Circuit's approach is a well-recognized outlier. As Martin acknowledges, all other federal courts of appeals to have confronted the issue have chosen to "apply a

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[4] Robinson does not argue for a per se rule, but instead correctly states that the court of appeals should "assess the constitutionality of multiple Allen charges in [the] context of all the circumstances." Robinson Pet. 16 n.5 (citing Jenkins, 380 U.S. at 446).

totality of the circumstances test to evaluate whether a second Allen charge is coercive." Martin Pet. 9; see, e.g., United States v. Barone, 114 F.3d 1284, 1304 (1st Cir.) ("declin[ing] to adopt a per se rule" and "adher[ing] to the majority view that each case must be judged on its own facts"), cert. denied, 522 U.S. 1021 (1997); United States v. Robinson, 560 F.2d 507, 517 (2d Cir. 1977) (en banc) ("[W]e are unwilling to hold that a second Allen-type charge is error per se."), cert. denied, 435 U.S. 905 (1978); United States v. Cornell, 780 F.3d 616, 626 (4th Cir.) ("Our circuit has never adopted a flat ban on multiple Allen charges and we decline to do so now."), cert. denied, 136 S. Ct. 127 (2015); United States v. Fossler, 597 F.2d 478, 485 (5th Cir. 1979) ("We do not elect to adopt such a per se rule."); United States v. Reed, 686 F.2d 651, 653 (8th Cir. 1982) (per curiam) ("[G]iving these two charges to a jury is not per se coercive."); United States v. Ailsworth, 138 F.3d 843, 852 (10th Cir.) (stating that an Allen instruction "is not per se coercive," and affirming conviction where multiple Allen instructions had been given), cert. denied, 525 U.S. 896 (1998); United States v. Davis, 779 F.3d 1305, 1313 (11th Cir.) ("We have never adopted a per se rule against successive Allen charges."), cert. denied, 136 S. Ct. 97 (2015).[5]

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[5] Robinson incorrectly suggests that the Fifth and Tenth Circuits have prohibited "multiple Allen charges." Pet. 8 (citing Green v. United States, 309 F.2d 852, 856 (5th Cir. 1962) and United States v. Blandin, 784 F.2d 1048, 1050 (10th Cir. 1986)). Neither Green nor Blandin involved multiple Allen charges, and as

That approach is consistent with the totality-of-the-circumstances analysis employed in Jenkins, 380 U.S. at 446, and reaffirmed in Lowenfield, 484 U.S. at 237. The Ninth Circuit's unique, and somewhat amorphous, decision in Seawell accordingly does not warrant this Court's review, particularly given that the Ninth Circuit could yet reevaluate its per se rule in light of Lowenfield and the uniform approach since adopted by other circuits.

b. Martin also contends (Pet. 7-9) that several state courts have imposed a per se ban against multiple Allen charges. But he does not cite to a single post-Lowenfield decision purporting to adopt such a ban under the federal Constitution or any other provision of federal law relevant to this Court's review. See Martin Pet. 7-9 (citing Tomlinson v. State, 584 So. 2d 43, 45 (Fla. Dist. Ct. App. 1991) (relying on Seawell's "'sound rule of practice'"); Thomas v. State, 748 So. 2d 970, 979 (Fla. 1999) (per curiam) (citing Tomlinson in dicta but applying totality-of-the-circumstances test); In re Standard Jury Instructions--Contract & Bus. Cases, 116 So. 3d 284, 346-347 (Fla. 2013) (citing Tomlinson); Epperson v. United States, 495 A.2d 1170, 1171-1172 & n.2, 1175-1176 & n.10 (D.C. 1985) (pre-Lowenfield, and cautioning that its prohibition on further "anti-deadlock" charges applies only when the first charge was given to a "genuinely 'hung jury'"); Lewis v.

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noted above, subsequent decisions in both circuits have endorsed a totality-of-the-circumstances approach. See Ailsworth, 138 F.3d at 852; Fossler, 597 F.2d at 485.

State, 424 N.E.2d 107, 111 (Ind. 1981) (establishing "proper procedure" under state law pre-Lowenfield); State v. Watkins, 660 P.2d 1117, 1121 (Wash. 1983) (discussing, pre-Lowenfield, state rule of criminal procedure)).

c. Finally, petitioners contend (Martin Pet. 9-13; Robinson Pet. 6-12) that the decision below conflicts with decisions of other appellate courts that have found repetition of an Allen charge to be coercive. Martin asserts that the court of appeals in this case "suggest[ed] that repeating an Allen charge may decrease coercion," Martin Pet. 12, while other courts allegedly view successive Allen charges as either "tending to increase coercion" or as having no marginal effect, id. at 11.

That argument misapprehends the court of appeals' decision. The court did not hold that "the act of repeating an Allen charge" invariably "lessens juror coercion." Martin Pet. 12. Rather, the court of appeals found, on the facts of this case, that "any coercive effect" arising from one of the district court's early remarks -- specifically, the district court's statement that "'I would encourage you to resolve the conspiracy issue because ultimately all of these issues will have to be resolved,'" Robinson Pet. App. 19 -- was "cur[ed]" by the court's "emphasi[s]" in its later instructions upon the "dissenting jurors' freedom to continue to dissent." Id. at 20. The court of appeals properly rested its decision upon its "evaluat[ion] under the totality of

the circumstances," id. at 18, not upon any inflexible rule about the perceived marginal effect of issuing a successive Allen charge.

Moreover, far from revealing any conflict, the various federal and state decisions cited by Martin (Pet. 9-13) and Robinson (Pet. 6-12) simply illustrate that, under a factually intensive totality-of-the-circumstances approach, different facts lead to different outcomes.[6] Petitioners have failed to show that

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[6] See United States v. Haynes, 729 F.3d 178, 193–194 (2d Cir. 2013) (finding coerciveness where the district court repeated a modified Allen charge that under the circumstances "could reasonably be perceived * * * as the [c]ourt communicating its insistence on the jury reaching a unanimous verdict"); Spears v. Greiner, 459 F.3d 200, 206-207 (2d Cir. 2006) (finding no coercion based on multiple considerations, including that the jury ultimately failed to reach any verdict as to a co-defendant), cert. denied, 549 U.S. 1124 (2007); Barone, 114 F.3d at 1304-1305 (emphasizing that "each case must be judged on its own facts" and finding no error where a second Allen charge was given several hours after the first and the case was "length[y] and complex[]"); Fossler, 597 F.2d at 485 (finding that a second Allen charge was an abuse of discretion after "assessing the impact of the judge's statements in light of his language and the facts and circumstances which formed their context"); Robinson, 560 F.2d at 517 (affirming that an "individualized determination of coercion is required" and ultimately finding that the district court's "second charge was far short of being coercive"); United States v. Angiulo, 485 F.2d 37, 39 (1st Cir. 1973) (finding coercion where the district court issued two modified Allen instructions that omitted critical "balancing" features and announced that "[t]his is not a very difficult case"); State v. Feliciano, 778 A.2d 812, 821 (Conn. 2001) (finding no coercion where the repeated pattern charge "stresse[d] that each juror's vote must be his [or her] own conclusion and not a mere acquiescence") (brackets in original); State v. Kaiser, 504 N.W.2d 96, 100-101 (S.D. 1993) (finding coercion where, inter alia, "the jury had informed the court on four occasions that it was deadlocked or losing ground"; the court knew "the jury stood eleven to convict and one to acquit"; and the court "advised that [the jury] would not be leaving their

any other court would reach a different outcome on plain-error review of the facts presented here.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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windowless, stuffy room until a unanimous verdict * * * was reached"); Ex parte Morris, 465 So. 2d 1180, 1183 (Ala. 1985) (reviewing the "whole context" and finding coercion where, inter alia, the judge "clearly put within the minds of the jurors a deadline for returning with a unanimous verdict"); Fensterer v. State, 493 A.2d 959, 967 (Del.) ("Upon consideration of all the circumstances in this case, we do not believe the giving of two 'Allen-type' charges was coercive."), rev'd on other grounds, 474 U.S. 15 (1985).