No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2025-2026

DEAN ALAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: November 17, 2025

QUESTION PRESENTED

WHETHER THE APPELLATE COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION TO PROFFER NOT ONE BUT TWO DISTINCT *ALLEN* INSTRUCTIONS WHERE THE JURY WAS ALREADY HELPLESSLY DEADLOCKS THEREBY VIOLATING PETITIONER'S FIFTH AMENDMENT RIGHT TO PROPER DUE PROCESS UNDER THE LAW AS WELL AS HIS SIXTH AMENDMENT RIGHT TO BE TRIED BEFORE AN IMPARTIAL JURY?

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Dean Alan Smith petitions for a Writ of Certiorari to review the United States Court of Appeals for the Ninth Circuit's memorandum affirming the District Court's decision to allow not one but two distinct *Allen* instructions thereby violating both Mr. Smith's Fifth and Sixth Amendment Rights under the United States Constitution.

OPINION BELOW

United States Court of Appeals for the Ninth Circuit issued its memorandum affirming the District Court's decision to provide not one but two distinct *Allen*

instructions during jury deliberations. The memorandum is attached as Appendix A.

JURISDICTION

The court of appeals issued its memorandum of Mr. Smith's appeal on August 18, 2025. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States. Appendix B.

STATEMENT OF THE CASE

The petitioner, Mr. Dean Alan Smith, is a 68-year-old male with a high school diploma and a career in the ministry. He was born in Indianapolis, Indiana, and moved to Homestead, Florida at approximately 10 years old before finally settling in Pompano Beach, Florida. In 1975, petitioner joined the United States Coast Guard and was in the Coast Guard for six (6) months before he was medically discharged with a diagnosis of bronchial asthma. Petitioner initially fought the discharge because he had always been an avid runner; nevertheless, the Coast Guard ultimately discharged him.

At the age of 19 years, petitioner met his first wife and moved to St. Louis, Missouri until he was approximately 25 years old. At that time, he also divorced his first wife and returned to Florida. He ended up settling in Lehigh Acres, Florida, where his mother lived, and lived there until moving to Montana on or about 2001-2002.

Later, petitioner met his current wife, Keli Smith. Ms. Smith had three (3) children from another relationship, and both she and Mr. Smith raised the three children. Currently, these children are now adults. They are Marlo Pegram, Megan Reed, and Molly Orlowski.

As a married couple, both Mr. and Mrs. Smith lived in Florida for many years prior to settling in Montana. During this time, they were heavily involved as church leaders at the local Baptist church in Lehigh Acres, Florida. Petitioner was a Vacation Bible School director where he was involved in the curricula for youths, middle schoolers, high schoolers, adults, and senior adults. And both he and Mrs. Smith were involved in many facets of the church as well as helping the pastor.

When the pastor retired, the Smiths felt a calling into the mission field. While not knowing much about mission work, both felt they were needed to spread the Gospel to other communities. Therefore, in 2001-2002, the Smiths with their children in tow, travelled across the United States visiting churches and conducting mission activities. Their goal was to travel for about one year. Their other goal was

to get to Montana to serve in the ministry at churches in either Northern Cheyenne, Helena, or Hungry Horse, Montana. Yet doing their loop around the country for a year was short lived due to engine trouble in one of the two vehicles they were travelling in. The engine trouble on one of the vehicles occurred around South Dakota. And once they got it fixed, they decided to visit the closest of the three destinations, Morning Star Baptist Church on the Northern Cheyenne Reservation.

Things moved rather quickly and within a month the former pastor was leaving and the Smiths moved into the parsonage. By the end of 2002, petitioner gave his first sermon at Morning Star. All of this proved fortuitous, and the Smiths saw it as a positive sign to continue their ministry to Native Americans on the reservation. But there was no plan to minister to Native Americans nor was there any plan to become a part of the church. And for 20 years, the Smiths enveloped themselves within the reservation as well as Morning Star. In fact, they became leaders within the community.

Petitioner became a member of the area's volunteer fire department as well as being the chaplain of the department. He became a volunteer counselor to local law enforcement when they went through a difficult homicide or suicide. Petitioner spoke to many assemblies and groups. He even coached the high school boys and middle school girls in cross country running. He and Mrs. Smith took over from the prior pastor a local private school called Liberty Christian Academy and re-

organized to become a beacon of light for native parents seeking out educational opportunities in the community. While Mrs. Smith taught the children, petitioner became the physical education teacher as well as the school's superintendent. He even drove school buses for children needing to be bussed from outside of the Lame Deer community who did not have another way to get to school.

During the 20 years living with the Northern Cheyenne community, the Smiths made many lifelong friends – both native and non-native peoples. This was because Mr. Smith was such an integral part of their lives. As a man of faith, petitioner conducted hundreds of baptisms over the years. Petitioner conducted marriage counseling for troubled couples and would not marry someone who had not be counseled with pre-marriage counseling. At Morning Star, petitioner organized many activities not just for members but for non-members as well. These activities encompassed Family Night on Monday nights as well as a Men's Group on Wednesday. Finally, the Smiths also took care of many of the children whether it was building a playground, babysitting, or spending the night.

Overall, petitioner has been a model citizen, husband, pastor, and father to many, many people in his life. He has very little criminal history in which none of it scores due to being so old. When Mrs. Smith lost part of her leg, petitioner was always there for her as a support system. Finally, petitioner helped raise with Mrs. Smith three amazing children who are now successful adults.

During the trial, petitioner fought hard for his innocence during a six (6) day jury trial. In fact, the jury deliberated over 12 hours from Friday to Monday before coming to its verdict of guilty on all counts except count III. Late Friday afternoon, after deliberating for approximately five (5) plus hours, the jury stated that it was most certainly deadlocked. At that time, petitioner moved for the district court to declare a hung jury and mistrial. The district court denied this motion.

After the weekend, on Monday, the jury returned to deliberate. In the morning of Monday, the district court surprised petitioner by declaring *sua sponte* that it was going to provide a modified form of the *Allen* instruction. Once the jury was seated in court, over petitioner's objection, the district court read this second *Allen* instruction. The jury deliberated for another seven (7) hours before returning a verdict of guilty in the afternoon on all counts except count III. Petitioner argues in this brief that the district court erred in first denying his motion for mistrial after the jury informed the court of being deadlocked on Friday. It then further exacerbated its error on Monday by giving the *Allen* instruction to the jury again over petitioner's objection.

Thus petitioner's Constitutional Rights were violated under the Fifth and Sixth Amendments because the district court gave two separate *Allen* instructions, and the Appellate Court erred when it affirmed the district court's decision.

SUMMARY OF ARGUMENT

The appellate court by the abuse of discretion standard affirmed the lower court's giving of two distinct *Allen* instructions on Friday and Monday which violated petitioner's constitutional rights of Due Process and being judged by an impartial jury. In so ruling, the appellate court erred.

First, the jury was hopelessly relayed to the district court on late Friday that it was hopelessly deadlocked after deliberating for almost seven (7) hours and reviewing each count. When the district court sent them home for the weekend, rather than telling them this, the court went into a rather long monologue which was similar to an *Allen* instruction. Then on Monday morning, the court, *sua sponte,* declared that it was giving the jury another *Allen* instruction, this one from the Ninth Circuit. At both occasions of the court's error on Friday and Monday, petitioner strongly objected and requested a mistrial.

ARGUMENT

THE APPELLATE COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION TO GIVE THE JURY NOT ONE, BUT TWO, *ALLEN* INSTRUCTIONS THEREBY VIOLATING PETITIONERS FIFTH AND SIXTH AMENDMENT RIGHTS.

An *Allen* instruction or *Allen* charge is a supplemental jury instruction a court gives to encourage a jury to reach a verdict after the jury has been unable to agree for some period of deliberation. Such an instruction has long been sanctioned. *See*

Allen v. United States, 164 U.S. 492, 501-02 (1896). The primary reason for judicial disfavor of an *Allen* charge such as that delivered in the present case is its potentially coercive effect upon those members of a jury holding to a minority position at the time of the instruction. *United States v. Floravanti,* 412 F.2d 407, 416-17 (3rd Cir. 1969). It is contended that the *Allen* charge persuades minority jury members to alter their individually held views not on the basis of evidence and law, but on the basis of majority opinion. *See also Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge,* 53 Va.L.Rev. 123, 126 (1967).

The Ninth Circuit's approach to the *Allen* charge, which differs from other circuits with a *per se* rule, is to determine if the instruction improperly affected the jury verdict. Thus, to determine the propriety of the trial court's use of an *Allen* charge, it is imperative for this Court to examine the instruction "in its context and under all the circumstances" to see if it had a coercive effect upon the jury. *Jenkins v. United States,* 380 U.S. 445, 446 (1965); *United States v. Seawell,* 583 F.2d 416, 418 (9th Cir. 1978); ("This court concluded that permitting the *Allen* charge to be given twice in a federal prosecution would be an unwarranted expansion of its use, and is error *per se.*"); *Marsh v. Cupp,* 536 F.2d 1287, 1290 (9th Cir. 1976).

Additionally, there are several cases which this Court has utilized as a path toward interpreting the *Allen* charge and its possible coercive effect on the jury. Two (2) of these cases are: *United States v. Contreras,* 463 F.2d 773 (9th Cir. 1972) and

United States v. Beattie, 613 F.2d 762 (9th Cir. 1980). In fact these cases are distinguishable from the present case yet also assist in further interpreting the charge's potentially coercive effect. Nevertheless, these cases are distinguishable on its face because the jury was only given the *Allen* instruction once, not twice as in the present case.

In *Conteras,* the trial court gave the jury an A*llen* charge after eight (8) hours of deliberation and prior to any specific indication in the record that they were unable to reach a verdict. The *Contreras* Court held that the charge was premature and coercive. *Id.* at 774.

Moreover, in *Beattie,* the jury like in *Contreras* had already deliberated for eight (8) hours before receiving the charge. And while the *Beattie* court affirmed the mail fraud conviction, its focus was on whether the charge was given coercively or whether any of the circumstances could be viewed as coercive. In addition, somewhat importantly, in *dicta,* the *Beattie* court opined that "the time elapsed between the charge and the final verdict is significant. . . . It is but one of the total circumstances.

Clearly in the present case, the jury was clearly deadlocked according to the foreperson. This was after deliberating for at least seven (7) hours. Then the court gives its first *Allen* charge and sends them home for the weekend. The following Monday, the court again gives a more acceptable form of the charge – but gives it a

second time before telling the jury to continue deliberating. And after only several hours, but around 2:00 in the afternoon, the jury returns unanimous for guilty on four (4) of the five (5) counts.

The bottom line is that the charge itself must be coercive in addition to being deadlocked. In the present case, it was both. *United States v. Scruggs,* 583 F.2d 238, 241 (5th Cir. 1978); *United States v. Smith,* 521 F.2d 374, 376-77 (10th Cir. 1975); *United States v. Martinez,* 446 F.2d 118, 119-20 (2nd Cir. 1971).

The *Smith* panel on appeal, using the standard of abuse of discretion, erroneously affirmed the lower court decision to read two distinct *Allen* instructions to the jury on Friday evening and then again on Monday morning. In affirming, the panel opined the following:

> The district court did not abuse its discretion by denying Smith's request for a mistrial after the jury initially deadlocked. *See United States v. Hernandez-Guardado,* 228 F.3d 1017, 1029 (9th Cir. 2000) (setting forth relevant factors). The court noted that the jury had deliberated for only about seven hours in a "complex" case with over three days of testimony, five counts, four alleged victims, and more than forty jury instructions. *See id.* The foreperson's statements that additional deliberations would not be fruitful did not, standing alone, require the district court to declare a mistrial. *See id.*

Id. at *2-3.

The *Smith* panel also discussed the issue of the form of the instructions given on both days and held that neither was coercive. "And giving two instructions was not reversible error because there was 'no suggestion of criticism of intervening

behavior by the jury' between the instructions on Friday evening and Monday morning." *United States v. Nickell,* 883 F.2d 824, 829 (9th Cir. 1989). This was also erroneous.

Finally, the *Smith* panel opined on the "timing of the [second] *Allen* instruction" not being coercive because the jury deliberated an additional five more hours after the second instruction on Monday morning. *Id.* at *4. Yet this remark fails to take into consideration that first, giving the second instruction should be considered *de facto* coercive; and second, but for the weekend, the two instructions were given back to back without any intervening deliberations in between. Ironically, the weekend not only gave the jury more time to consider the court's admonishment on Friday evening, it also created the troubling fact that the instructions were essentially given by the court back to back without any intervening deliberations in between.

A review of the caselaw regarding the *Allen* instruction, its form and its timing, must be reviewed by this august Court. Between the existing circuit split and the age of most of the current seminal opinions on the issue, this august body should grant this petition for certiorari and schedule it for oral argument in the coming term.

CONCLUSION

FOR THESE REASONS, Petitioner asks this Honorable Court to grant a writ of certiorari and review the judgement of the Ninth Circuit Court of Appeals.

Dated this 17th day of November, 2025.

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