

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 5:14-00244

DONALD L. BLANKENSHIP

**UNITED STATES' MOTION FOR ADDITIONAL *ALLEN*
CHARGE BEFORE CONSIDERING MISTRIAL**

The United States moves that, in the event the jury again states it is deadlocked, the Court give a second *Allen* charge before considering a mistrial. At the moment, of course, the jury continues to deliberate, and it may well reach a verdict that renders this motion superfluous. The United States nonetheless submits the motion now to give the Court sufficient time to consider it should it ripen.

A trial court has discretion to give a second *Allen* charge if circumstances warrant. *United States v. Cornell*, 780 F.3d 616, 625-27 (4th Cir. 2015); *United States v. Seeright*, 978 F.2d 842, 850 (4th Cir. 1992). The Fourth Circuit affirmed this principle earlier this year. *Cornell*, 780 F.3d at 625-27. In exercising that discretion here, the Court must consider whether, under all the circumstances of this case, the giving of a second charge would be coercive. *Id.* at 626-27. It would not be, for several reasons.

First, the jury's behavior these past two months shows coercion is unlikely. As the Court observed, the jury has demonstrated exemplary patience, attentiveness, and seriousness of mind. It is evident that the jury regards its duty soberly, and a properly balanced *Allen* charge would not sway it either way.

Second, the jury has not yet said it cannot make further progress. There have been two notes about the jury's lack of agreement thus far, and both have asked the Court for direction on how to go forward. Early on, the November 19 note asked, "How long do we deliberate?" The December 1 note sought further direction more expressly, asking, "Do you have any further instructions as to what we should do?" Even after several days of deliberation, the jury thus holds open the prospect of progress and invites the Court to assist it in reaching a verdict. A second *Allen* charge will not coerce a jury that has taken such a responsible and deliberate approach to its work.

Third, the length of deliberations, even after a second *Allen* charge, will not be disproportionate to the amount of evidence the jury has seen and heard or the length of that evidence's presentation. If the case had lasted only a day or two, a second *Allen* charge after more than seven days' deliberations might be taken as an order to reach a verdict no matter what. The situation here differs greatly. Even if another deadlock note is received after further deliberation, directing the jury to continue deliberating would not be a disproportionate step in light of the evidence presented. This maintenance of proportionality further minimizes any possibility of coercion.

Accordingly, the United States moves the Court, in the event of another statement of deadlock, to give the instruction attached as an exhibit hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing “United States’ Motion for Additional *Allen* Charge Before Considering Mistrial,” has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 2nd day of December, 2015 to:

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EXHIBIT

PROPOSED ADDITIONAL *ALLEN* CHARGE¹

Ladies and gentlemen of the jury, I have received your note. I instruct you that in a case of this nature it is not unusual for your deliberations to take a considerable amount of time. I am going to ask you to continue your deliberations. Before you return to the jury room, however, I want to encourage you to reach a unanimous verdict in this case if possible.

I remind you that if, after conscientious deliberations, you are only able to reach a unanimous verdict concerning some of the counts, you may return a verdict concerning those counts.

If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the Court to declare a mistrial. It is reasonable to expect that a new trial will be required. There is no reason to believe that any future trial will produce clearer or better evidence, and certainly no reason to believe that a better or more decisive jury could or would be chosen. Specifically, it is unlikely that a jury of twelve men and women could be assembled who are more conscientious, more impartial, or more competent than the twelve of you.

This trial, like all criminal trials, has required a certain amount of time, money, and other resources. Obviously, a new trial will require additional time, money, and resources.

¹ An *Allen* charge, based on the Supreme Court's decision in *Allen v. United States*, 164 U.S. 492 (1896), is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument. Traditionally, the standard *Allen* charge informed the jury: (1) that a new trial would be expensive for both sides; (2) that there is no reason to believe that another jury would do a better job; (3) that it is important that a unanimous verdict be reached; and (4) that jurors in the minority should consider whether the majority's position is correct. *United States v. Burgos*, 55 F.3d 933, 935-36 (4th Cir. 1995) (citing *United States v. Seeright*, 978 F.2d 842, 845 n. * (4th Cir. 1992); and *United States v. Russell*, 971 F.2d 1098, 1107 n. 18 (4th Cir. 1992) (internal quotations omitted)).

By encouraging you to reach a unanimous verdict if possible, I do not intend to force any of you to abandon clearly held views or convictions. Nor should you conclude that I care or have any opinion about what that verdict should be.

I do encourage you, however, to keep an open mind about what the evidence in this case has or has not proven.

Although the verdict must be based upon proof beyond a reasonable doubt, and although the verdict must be the individual verdict of each juror, and not a mere acquiescence in the conclusion of other jurors, each juror should show a proper regard to the opinion of the other jurors. In a large portion of cases absolute certainty cannot be expected.

If at this point you find yourself in the minority, please listen and carefully consider the views of the majority. If you find yourself in the majority, please listen and carefully consider the views of the minority.²

Whether you are in the majority or minority—and whether the jury is leaning toward acquittal or toward conviction—you should all keep in mind the value of a unanimous verdict in this case.

Remember at all times that no juror is expected to give up a conscientious conviction he or she may have regarding a defendant's guilt or innocence. But remember also that it is your duty to agree upon a unanimous verdict if you can do so without surrendering any such conviction.

² In *Burgos*, the Fourth Circuit reversed a conviction based on an unbalanced *Allen charge*, holding, for the first time, that an *Allen charge* must do more than encourage the minority on a deadlocked jury to consider the views of the majority. Instead, an *Allen charge* must admonish both the majority and the minority to take each other's views into account in trying to reach a unanimous verdict.

“What began as a recommendation in *Sawyers* and evolved into an admonition in *Stollings* now becomes a mandate: regardless of what other specifics are included in an *Allen charge* to a deadlocked jury, a district court must incorporate a specific reminder both to jurors in the minority and to those in the majority that they consider their positions in light of the other side's views. . . . Failure to provide a sufficiently balanced charge will result in reversal.” *Burgos*, 55 F.3d at 941.

Of course, these comments are not to be considered in isolation; they are to be applied in conjunction with all the instructions you have received. If you have questions about these comments or about any other instruction you have been given, you should have your foreperson write a note and communicate with me in the usual manner.

I will now ask that you return to the jury room to resume your deliberations.