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CRIMINAL PROCEDURE: ANTIDEADLOCK JURY INSTRUCTIONS IN THE DISTRICT OF COLUMBIA

The sixth amendment provides that in all criminal prosecutions, the defendant is entitled to the right of a trial by an impartial jury.[1] Furthermore, criminal trials in the District of Columbia and in most other jurisdictions require the jury to reach a unanimous decision that can result in one of four possible verdicts: a finding of guilty, not guilty, not guilty due to insanity, or no verdict due to lack of unanimity.[2] The fourth outcome, that of a hung jury, often results in the undesired effect of the trial judge coercing the jury.[3]

The hung jury is the antithesis of the trial judge's desire for judicial efficiency.[4] Thus, to combat the potential of a hung jury, trial judges have resorted to crude methods in the form of jury instructions aimed at forcing the jury to reach a verdict.[5] Coercive instructions often have the effect of induc-

1. The sixth amendment states that:

> 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.

U.S. CONST. amend. VI (emphasis added).

2. United States v. Fioravanti, 412 F.2d 407, 416 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969); Note, *Deadlocked Juries and the* Allen *Charge,* 37 ME. L. REV. 167 (1985) [hereinafter cited as Note, *Deadlocked Juries and the* Allen *Charge*]; Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the* Allen *Charge,* 53 VA. L. REV. 123 (1967) [hereinafter cited as Note, *Due Process, Judicial Economy and the Hung Jury*]; The Supreme Court in Burch v. Louisiana, 441 U.S. 130, 138 (1979), held that a conviction by a nonunanimous jury by five of six jurors in a state criminal trial, violates the sixth and fourteenth amendments. *Id.* at 135. Moreover, in Apodaca v. Oregon, 406 U.S. 404 (1972), the Court held that unanimity was not required in state criminal trials when the verdict is supported by a substantial majority of the jury. *Id.* at 411. Hence, a verdict must be unanimous whenever a state uses a six-person jury. *Apodaca* also suggests that since unanimity was a part of the jury trial right which was not incorporated by the due process clause, its ruling has no significance in federal criminal trials. *Id.* at 411-12. Rule 31(a) of the Federal Rules of Criminal Procedure requires a unanimous verdict in federal prosecutions. FED. R. CRIM. P. 31(a).

3. *Fioravanti,* 412 F.2d at 416.

4. *See* Note, *Due Process, Judicial Economy and the Hung Jury, supra* note 2, at 123.

5. *See, e.g.,* Twiss v. Lehigh Valley Ry., 61 A.D. 286, 70 N.Y.S. 241 (1901) (judge threatened the jury that had deliberated through the night that they would be subjected to another night of confinement and physical discomfort); De Jarnette v. Cox, 128 Ala. 518, 29 So. 618 (1900) (jury was told it had two months to deliberate); Mead v. Richland Center, 237 Wis. 537, 297 N.W. 419 (1941) (judge threatened not to provide the jury with heat in the midst

ing a juror to disregard his conscientious convictions for the sake of reaching a verdict.[6] Trial judges today still employ coercive devices although modified and disguised in the form of supplemental instructions.

The first recorded attempt by a trial judge to break a deadlocked jury via a supplemental instruction occurred in the 1851 case, *Commonwealth v. Tuey.*[7] Forty years later, the Supreme Court approved the use of this type of jury instruction that is still in use today in various jurisdictions.[8] This instruction has come to be called the "Allen charge,"[9] and exists in many variations.[10] While courts have in the past upheld such instructions,[11] there

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of winter); Pope v. State, 36 Miss. 121 (1858) (jury was told it would not receive any food or drink). However, an ABA Special Committee on Minimum Standards for the Administration of Criminal Justice has prohibited threats or requirements that the jury deliberate for an unreasonable amount of time. *See* STANDARDS RELATING TO TRIAL BY JURY § 5.4(b) (1968) (amended 1980).

6. *See supra* note 5.

7. 62 Mass. (8 Cush.) 1 (1851).

8. Allen v. United States, 164 U.S. 492 (1896).

Two circuit courts of appeal have rejected the use of the *Allen* charge and adopted the ABA standard. United States v. Thomas, 449 F.2d 1177, 1187 (D.C. Cir. 1971); United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970).

Three circuit courts of appeals have not rejected the *Allen* charge, but have recommended the use of the ABA standard for the future. United States v. Davis, 481 F.2d 425, 429 (4th Cir.), *cert. denied,* 414 U.S. 977 (1973); United States v. Skillman, 442 F.2d 542 (8th Cir.), *cert. denied,* 404 U.S. 833 (1971); Munroe v. United States, 424 F.2d 243, 247 (10th Cir. 1970).

One circuit court of appeals has abandoned the *Allen* charge but has not expressly recommended the ABA standard. United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969).

One other circuit court of appeals has rejected some parts of the *Allen* charge but has not recommended the ABA standard. United States v. Flannery, 451 F.2d 880, 883-84 (1st Cir. 1971).

For a further look at both federal and state jurisdictions that have abandoned the *Allen* charge, see Note, *Deadlocked Juries and the* Allen *Charge, supra* note 2, at 171-72 & n.35; *see also* Winters v. United States, 317 A.2d 530, 534-38 (D.C. 1974) (Gallagher, J., concurring).

9. The *Allen* charge is derived from Allen v. United States, 164 U.S. 492, 501 (1896), although the instruction first appeared in *Commonwealth v. Tuey,* and subsequently was approved by the Supreme Court in *Allen*. The *Allen* charge states:

> [A]lthough the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much [of] the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority [was] for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501.

10. *See* Note, *Deadlocked Juries and the* Allen *Charge, supra* note 2, at 167-68. The *Allen*

is a growing trend toward using less coercive measures in accordance with the recognized doctrine that jurors should not be coerced into making a decision.[12] Thus, the likelihood of a successful appeal arises when the judge crosses the acceptable line of jury persuasion into the forbidden area of coercion.

In the recent case of *Epperson v. United States*,[13] the District of Columbia Court of Appeals faced the related issue of the propriety of repeatedly giving an antideadlock instruction to a hung jury. The *Epperson* court decided that twice confronting a genuinely hung jury with instructions constituted coercion and consequently reversed the trial court's findings.[14]

This Note will first examine the history of hung jury instructions in the District of Columbia Court of Appeals. It will then analyze the *Epperson* court's holding in light of those prior decisions. Finally, this Note will focus on the benefits of adopting a virtual per se finding of coercion any time a trial judge gives two antideadlock instructions.

I. Evolution of the Hung Jury Instruction in the District of Columbia Court of Appeals

Over the last fifteen years the District of Columbia Court of Appeals has gradually placed more stringent controls on coercive deadlocked jury instructions imposed by the trial judge.[15] In 1974, the District of Columbia

charge, because it is so coercive, has acquired such names as "dynamite," "purgative," and "nitroglycerine." *See also* Mendelson, *Beyond* Allen: *From Dynamite to Nukes*, 54 N.Y. ST. B.A.J. 91, 92 (1982).

11. *See, e.g.*, Thaggard v. United States, 354 F.2d 735 (5th Cir. 1966) (court did not find that the *Allen* charge went "beyond the bounds of the permissible scope of such a charge."); United States v. Barnhill, 305 F.2d 164 (6th Cir. 1962) (court found that the instruction complied with the standards approved in *Allen v. United States*); United States v. Upchurch, 286 F.2d 516 (4th Cir. 1961) (court found the *Allen* charge as given to be "complete, fair, and based upon the evidence" and an instruction that the court has "repeatedly upheld and approved"); Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455 (4th Cir. 1960) (court found no error in *Allen* charge given by trial judge that repeated almost exactly the original charge from Allen v. United States); Webb v. United States, 266 F.2d 32 (6th Cir. 1959) (court found no error in the giving of the *Allen* charge).

12. *Fioravanti*, 412 F.2d at 416. The court recognized that "[a]lthough dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict." *Id.*

13. 495 A.2d 1170 (D.C. 1985).

14. *Id.* at 1174.

15. *See infra* notes 16-31 and accompanying text; Simms v. United States, 276 A.2d 434 (D.C. 1971), was the last case to approve of the *Allen* charge. The *Simms* court realized that the trial court's version of the *Allen* charge was read with accompanying questionable elaborations. However, since no evidence indicated that the trial court knew whether the majority of

Court of Appeals in *Winters v. United States,*[16] after examining how other jurisdictions have handled the issue, decided to adopt a new instruction, known today as the *Winters* charge.[17] In *Winters*, which marked the end of the *Allen* charge, the court stated that "the new instruction has the needed

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jurors was in favor of conviction or acquittal, nor the verdict the court favored, the court of appeals was able to conclude that the instructions were not coercive. *Id.* at 436-37.

16. 317 A.2d 530 (D.C. 1974). The *Winters* court found that, in the circumstances of that particular case, the instruction given was not per se coercive so as to require reversal of the lower court's conviction. In reaching that conclusion, the court considered such factors as the relatively short trial length, the narrowly defined factual dispute, the fact that deliberations lasted one half the trial length, and the fact that the jury had not been sequestered. *Id.* at 532.

17. *Id.* at 532-33. The *Winters* court relied on the reasoning of the court in Commonwealth v. Rodriquez, 364 Mass. 87, 300 N.E.2d 192 (1973), the same court that had created the *Allen* charge, or *Tuey* charge. *See supra* notes 7-9. In *Rodriquez,* the court adopted a future variation of the *Tuey* charge eliminating the majority-minority phrasing. The *Rodriquez* court realized that the *Tuey* charge only asks "members of the tentative minority to reconsider their position in the light of the views of the tentative majority, but does not invite the majority members to reciprocate toward the minority (except as it asks each juror to listen to the others)." 364 Mass. at 95, 300 N.E.2d at 201. Such a charge contains "an inherently faulty major premise" that the "majority is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality." *Winters,* 317 A.2d at 533 (quoting United States v. Fioravanti, 412 F.2d 407, 416 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). The *Winters* court was consequently persuaded to exercise its superintendent power to adopt for future use in the Superior Court of the District of Columbia an instruction resembling the *Rodriquez* variation. 317 A.2d at 532-33. The new charge, reflecting changes from the previous *Allen* charge, was revised as follows:

> In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of your fellows, yet you should examine the questions submitted *to you* with candor and with proper regard and deference to the opinions of each other. [It is your duty to decide the case if you can conscientiously do so.] *You should consider that it is desirable that the case be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so.* You should listen to each other's arguments with a disposition to be convinced. [If much the larger number of jurors are for conviction, a dissenting juror] *Thus, where there is disagreement, jurors for acquittal* should consider whether [his] *their* doubt is a reasonable one which makes no impression upon the minds of [so many jurors,] *others,* equally honest, equally intelligent with [himself] *themselves, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.* [If, upon] *And on* the other hand, [the majority are for acquittal, the minority] *jurors for conviction* ought *seriously* to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by [the majority] *others with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.*

Id. at 533-34 (deletions in brackets; additions in italics).

attribute of sufficient suasion for decision while preserving juror independence"[18] and hoped that the "frequency of attacks questioning the presence of undue coercion for jury decision"[19] would consequently be reduced.

In 1976, in *Thompson v. United States,*[20] and *Johnson v. United States,*[21] two factually similar cases, the District of Columbia Court of Appeals warned that a court "may be skating on thin ice"[22] to send a jury back for further deliberations if a second deadlock is announced after a reasonable period of time.[23] Yet, in neither case did the court, based on its analysis of

18. 317 A.2d at 533.

19. *Id.* The *Winters* court further demonstrated its unwillingness to succumb to a trial judge's overly coercive instructions by stating that the *Winters* charge is only "the highwater mark for an antideadlock charge." *Id.* at 533-34. Thus, the discretion of trial judges is not threatened so long as the potency of the new charge is not exceeded.

20. 354 A.2d 848, 850 (D.C. 1976). In *Thompson,* the trial lasted approximately three days. After deliberating approximately three and one half hours, the jury announced deadlock. Consequently, the judge gave the *Winters* charge and sent the jury back for further deliberations. A little over an hour later, the jury sent the judge another note inquiring whether the two codefendants could be found guilty of separate offenses. The court proceeded to give the "Multiple Defendants-Multiple Counts" instruction and sent the jury back again to deliberate. One half hour later the jury found one defendant guilty and was excused for the day. *Id.* at 850. After further deliberations the following morning, the jury was still unable to reach a verdict on the codefendant, prompting the court to state: "Well, I think I am going to *send you to lunch and, then, let you deliberate a short time after lunch* to see if you can resolve this matter." After lunch, the jury found the codefendant guilty in about an hour. *Id.* (emphasis added by court).

21. 360 A.2d 503-04 (D.C. 1976). In *Johnson,* the jury started deliberations on the third day of trial. Two hours later, deadlock was announced. The judge decided to give a deadlock instruction although both counsels recommended that the jury should first be given an opportunity to deliberate further. *Id.* at 503. The judge then gave the jury the *Winters* instruction prefaced with the following remarks:

> Ladies and Gentlemen of the Jury, I received a note from the Foreman saying that you were hopelessly deadlocked, which is premature. Some 200 years ago there was a Navy man who was hanged for his remarks: "We are [sic] not just begun to fight." That means the carrying out of his duty and responsibility. This case was given to you approximately a little over an hour . . . .

Id.

After a full morning of deliberation the next day, the jury found the defendant guilty on the lesser included offenses. The jury remained deadlocked with respect to the other counts at this point. Both the government and defense counsel believed that deliberation should continue after lunch. However, after lunch, defense counsel moved for a mistrial arguing that further deliberation would be too coercive. The motion was denied and within one hour, the jury found the defendant guilty. *Id.* at 503-04.

22. *Thompson,* 354 A.2d at 850. This concept was reiterated in *Johnson,* 360 A.2d at 504.

23. The issue in *Thompson* was whether the court virtually coerced a verdict after having delivered the *Winters* instruction followed by a subsequent report that the jury was still deadlocked, and after sending the jury back for still further deliberation. *Thompson,* 354 A.2d at 850. In *Johnson,* the jury was sent back for further deliberations after reporting a second deadlock. 360 A.2d at 503-04.

the particular circumstances of each individual case, find reversible error.[24]

One year later, in 1977, the District of Columbia Court of Appeals, in two similar cases,[25] continued to demonstrate its willingness to examine each case on an ad hoc basis and with regard to the totality of circumstances.[26] In the first case, *Jackson v. United States,*[27] the court, concerned that the instruction given to the jury by the court was directed to a particular juror, concluded that the variation transgressed the limits of the *Winters* instruction necessitating reversal.[28] In the subsequent case, *United States v. Garrett,*[29] the court of appeals invoked similar reasoning but reached a different result. In *Garrett,* the court held that because the instruction was not directed to any particular juror and was not coercive " 'in its context and under all circumstances,' "[30] it did not rise to a level of plain error.[31] In

24. Both the *Thompson,* 354 A.2d at 850, and *Johnson,* 360 A.2d at 504, courts relied on the fact that the jury was given quite short deliberation periods before reporting deadlock. Moreover, in *Thompson,* the court did not find the time spent in deliberation to be prolonged, especially at the time the jury first started to announce it was unable to reach a verdict. 354 A.2d at 850-51.

25. Jackson v. United States, 368 A.2d 1140 (D.C. 1977). The trial judge stressed an anti-deadlock instruction to a particular juror who would not give in and intimated that the juror either committed perjury or negligence in responding to questions on voir dire and thus was not in compliance with her duty as a juror. *Id.* at 1142; Garrett v. United States, 378 A.2d 657 (D.C. 1977). In *Garrett,* the jury deliberated for 26 hours covering a four day period. Due to a heated exchange between jurors, one juror separated herself from the jury for about one and a half hours. *Id.* at 659. Upon returning, the juror was questioned individually as to her absence. The judge then delivered the following instruction to the jury as a whole:

> This is a very serious matter with us, ladies and gentlemen. This is a very serious matter, and I don't know of any reason under the sun why you cannot come to a unanimous verdict in this case, and at this moment I remain convinced that you can . . . . The evidence was heard and seen in this courtroom, and I gave you the law, and there is where your answer is, and I am convinced that you are capable of doing that, and I shall insist upon it.

Id. at 659-60. The next morning, the jury continued deliberations before reaching its verdict. *Id.* at 660.

26. *Johnson,* 360 A.2d at 504 (citing Jenkins v. United States, 380 U.S. 445, 446 (1965)).

27. 368 A.2d 1140 (D.C. 1977).

28. *Id.* at 1141-42. The court stated that "[t]he thinly veiled directive that the jury must come to a unanimous verdict transgressed the limits of the *Winters* charge and therefore was coercive." *Id.* at 1142. More specifically the court believed that "[n]o juror should be induced to agree to a verdict by fear that a failure so to agree will be regarded as reflecting upon either his intelligence or his integrity." *Id. See also* Kesley v. United States, 47 F.2d 453 (5th Cir. 1931).

29. 378 A.2d 657 (D.C. 1977).

30. *Id.* at 661 (quoting Jenkins v. United States, 380 U.S. 445, 446 (1965)).

31. *Id.* at 661 (citing Jenkins v. United States, 380 U.S. at 446). The court indicated that the trial court may have intended to declare a mistrial and that the trial court only gave the stronger antideadlock charge at the defense counsel's insistence. *Id.* The court presumed that defense counsel believed the jury intended to acquit the defendant. *Id.*

1984, the court of appeals was confronted with the related but expanded issue of the propriety of administering two antideadlock jury instructions.

II. *EPPERSON V. UNITED STATES*: TWO ANTIDEADLOCK JURY INSTRUCTIONS ARE NOT BETTER THAN ONE

In the 1984 case, *Epperson v. United States,*[32] the District of Columbia Court of Appeals once again addressed the issue of coercive jury instructions, but this time two antideadlock instructions were involved. *Epperson* involved a defendant who was charged with two counts of larceny after trust and one count of larceny by trick.[33] On the second day of the trial in the District of Columbia Superior Court, the jury began its deliberations and after approximately one hour, was excused for the day by the court.[34] The next day the jury continued its deliberations, and after one hour the court received a note from the jury indicating it was deadlocked on one of the three counts.[35] The defense counsel then requested a mistrial and the prosecution asked for the deliberations to proceed unless the jury was "hopelessly deadlocked."[36] The court stated it was not willing to grant a mistrial and asked defense counsel whether the *Winters* charge would be suitable.[37] Defense counsel did not approve and requested a more moderate instruction.[38] The court then proposed and administered the ABA/federal instruction without objection by the defense counsel.[39]

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32. 495 A.2d 1170 (D.C. 1985).

33. *Id.* at 1176 (Ferren, J., dissenting).

34. Epperson v. United States, 471 A.2d 1016-17 (D.C. 1984) (per curiam), *aff'd on rehearing,* 495 A.2d 1170 (D.C. 1985). Although the primary discussion in this paper deals with reheard cases, a better recitation of the facts was given in the original case before the court of appeals.

35. *Epperson,* 495 A.2d at 1176 (Ferren, J., dissenting).

36. *Id.* at 1176-77 (Ferren, J., dissenting).

37. *Id.* at 1177 (Ferren, J., dissenting) (citing Winters v. United States, 317 A.2d 530, 534 (D.C. 1974)). *See supra* note 16.

38. 495 A.2d at 1177 (Ferren, J., dissenting).

39. *Id.* at 1179 (Ferren, J., dissenting). The following is the ABA/federal instruction given without variation by the trial judge.

> Now, of course, the verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree on that verdict. Remember you have three verdicts. It takes three separate votes. You have to vote on each count. So that's three verdicts, not just one, three verdicts. And your verdict must be unanimous as to each of those three. You consider them separately and you vote on the three of them. All right? You have indicated—the reason I'm saying that is because you told me that only about one case, you said the Sullivan case, you cannot reach a unanimous verdict, of course. And I want you to continue your deliberations and vote on the other two as well separately.
>
> Now in connection with your note, it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you cannot

After one and a half hours of further deliberation, the jury sent another note stating that it was undecided on all three counts.[40] Once again, defense counsel asked for a mistrial, while the prosecution recommended a *Winters* charge.[41] Defense counsel disapproved of such an instruction because it would be too coercive for a "very straight-forward misdemeanor"[42] case, and requested the more moderate instruction offered by the concurring opinion in *Winters*.[43] Instead, the court delivered the *Winters* charge.[44] After two hours of further deliberation, the jury found Epperson guilty on the first two counts and not guilty on the third count.[45]

On appeal, the District of Columbia Court of Appeals ruled that two jury instructions, calculated to yield a verdict, exceeded the acceptable degree of verdict coercion.[46] The government, believing that the court's opinion would have undesirable ramifications on the administration of justice, petitioned for a rehearing.[47] Upon rehearing, the court of appeals once again reversed the lower court's decision by firmly stating that a trial judge should attempt "to prod a verdict from a 'hung jury,' but should do so with a certain moderation to avoid going over the boundary into coercion."[48] More specifically, the court concluded that, notwithstanding unusual circumstances, trial judges should not give two antideadlock instructions to a hung

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> do this without violence to your own individual judgment, each of you must decide the case for yourselves. But do so only after an impartial consideration of the evidence in this case with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if you become convinced that your opinion is erroneous, but do not surrender your honest convictions as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times you are not partisans to this case, you are judges, judges of the facts, and your sole interest is to seek the truth from the evidence in this case. And so, ladies and gentlemen, I want to resume your deliberations in connection with the Sullivan case and also in connection with the Smithwick case, as well as the Daye charge, because you have three verdicts to return in this case for three separate offenses, not just the Sullivan case. I want you to go back and consider all three of those. See if you can reach a verdict on any of them.

Id.

40. *Epperson*, 495 A.2d at 1177 (Ferren, J., dissenting).

41. *Id.* (Ferren, J., dissenting).

42. *Id.* (Ferren, J., dissenting).

43. *Id.* (Ferren, J., dissenting). See *Winters*, 317 A.2d at 539, for the concurring opinion's recommended instruction.

44. *Epperson*, 495 A.2d at 1177 (Ferren, J., dissenting). The *Winters* charge derived its name from the case, Winters v. United States, in which it was first created by the court. *See supra* note 16-19 and accompanying text.

45. *Epperson*, 495 A.2d at 1177 (Ferren, J., dissenting).

46. *Epperson*, 471 A.2d at 1017.

47. *Epperson*, 495 A.2d at 1172.

48. *Id.* at 1176.

jury for fear that the integrity of a jury verdict will be endangered and coercion will result.[49]

The court emphasized that the holding of this case applies only to "genuinely" hung juries.[50] With this qualification the court rejected the government's contentions that, henceforth, a trial judge will try to take the safest course possible.[51] In other words, the government is concerned that because only one antideadlock instruction may be given, the judge will wait until the last possible moment, and then issue the strongest permissible charge.[52] The government further claimed that a judge will "refrain from giving any guidance to a jury that announces itself deadlocked,"[53] and will simply permit deliberations to proceed "no matter how premature or ambiguous the announcement of deadlock may be."[54] In actuality, only in instances when a jury is *genuinely deadlocked* might a judge be apprehensive about offering guidance.[55] The court explained that the government's reference to a premature announcement of deadlock concerns a jury that is not genuinely deadlocked and, therefore, is removed from the ambit of the court's decision.[56]

Two District of Columbia federal circuit cases, refuted by the District of Columbia Court of Appeals, illustrate how two antideadlock instructions do not always fall within the purview of the *Epperson* decision. The federal circuit courts in both *United States v. Washington,*[57] and in *Fulwood v. United States*[58] instructed the jury twice. However, the first instruction in each case was given prior to the jury beginning deliberations.[59] Because the first instructions were given to the jury when it was not actually hung, a

49. *Id.*

50. *Id.* at 1172. The court noted that a jury which deliberates for an hour and then prematurely sends a message to the court that they are unable to reach a verdict is not within the definition of a genuinely "hung jury." *Id.* at 1172 n.2.

51. *Id.* at 1172.

52. *Id.* The *Epperson* court defines a hung jury as one that "the trial judge has concluded is deadlocked, giving due consideration to such things as the nature and complexity of the trial issues, the duration of the trial and the length of the jury deliberations, as well as the representations of the jury to the court about the state of its deliberations." *Id.* (quoting *Thompson,* 354 A.2d at 851 n.8).

53. 495 A.2d at 1172.

54. *Id.* at 1172-73.

55. A judge may be apprehensive because when a jury actually is deadlocked, only one instruction will be allowed. On the other hand, if the jury is not actually deadlocked, then the judge is free to offer more than just one instruction. *Id.*

56. *Id.* at 1173.

57. *Id.* (citing United States v. Washington, 447 F.2d 308, 310-11 (D.C. Cir. 1970)).

58. *Id.* (citing Fulwood v. United States, 369 F.2d 960 (D.C. Cir. 1966), *cert. denied,* 387 U.S. 934 (1967)).

59. *Id.*

second instruction was permissible after the jury legitimately became deadlocked.[60]

The *Epperson* court also compared its disapproval of allowing an antideadlock instruction to be repeated to a hung jury with the abolition of the *Allen* charge.[61] The court feared that acceptance of two antideadlock instructions would taint the integrity of jury verdicts, similar to the effect of the "unwise coercive elements of the *Allen* charge."[62] In support of its position, the *Epperson* court relied on a Ninth Circuit case, *United States v. Seawell,*[63] that had disallowed the use of two antideadlock instructions.[64] Quoting from *Seawell,* the *Epperson* court concluded that "given a second time, *not at the request of the jury but at the instance of the judge,* the charge no longer serves as an instruction; no matter how it may be softened it becomes a lecture sounding in reproof."[65]

The *Epperson* majority was, therefore, not only interested in the coerciveness of the language of a particular charge, but expanded its focus to the coercive nature of any *two* antideadlock instructions simply because there are two. The fact that the ABA/federal instruction, which was delivered first, does not contain the "dynamite" of the *Allen* charge did not influence the court to permit two antideadlock instructions.

The dissent in *Epperson* criticized the majority's reliance on *Seawell* because that case involved two coercive *Allen* charges.[66] The dissent contended that even the Ninth Circuit does not hold two antideadlock instructions per se reversible unless both are of the *Allen* genre.[67] Evidently, the dissent did not realize that the majority knew of the Ninth Circuit's position.[68] The majority was more concerned with the potential effect two antideadlock charges would have than with the potency of the individual charge.[69]

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60. *Id. See supra* note 55.

61. 495 A.2d at 1173-74.

62. *Id.* at 1174.

63. *Id.* (citing United States v. Seawell, 550 F.2d at 1159, 1163 (9th Cir. 1977)).

64. *Id.*

65. *Id.* (emphasis in original) (quoting *Seawell,* 550 F.2d at 1163). *See also* United States v. Fossler, 597 F.2d 478 (5th Cir. 1979) (court of appeals reversed on the ground that the trial judge erred by twice giving antideadlock instructions to a hung jury).

66. *Id.* at 1178 (Ferren, J., dissenting).

67. *Id.* (Ferren, J., dissenting).

68. *Id.* at 1175. The *Epperson* court emphasized that "[i]t must be remembered that *in this jurisdiction* the trial judges have been enjoined not to give the *Allen* charge to a 'hung jury' *even once,* let alone repeatedly." *Id.* at 1174. Thus, the *Epperson* court stressed its firm opposition to two antideadlock instructions whether or not one of the charges was of the *Allen* variety. *Id.*

69. *Id.* at 1174.

It can be inferred from the majority, however, that occasions arise when it is appropriate for the court to consider the coerciveness of the language within an instruction.[70] An analysis of the coerciveness of a single antideadlock charge can be instrumental in revealing the unacceptability of two such instructions. For example, the court of appeals in *Winters* made clear that the *Winters* charge was "the high water mark for an antideadlock charge."[71] Thus, the dissent's assertion in *Epperson* that the ABA/federal instruction was just a "light bump," and not a "shove" is of no avail.[72] Because one of the antideadlock instructions delivered in *Epperson* was of the *Winters* variety, any additional charge automatically elevated the coerciveness of the situation to an unacceptable level. The dissent in *Epperson* went so far as to conclude that the ABA/federal instruction the court delivered is better "characterized as a supplementary original charge,"[73] and "not as an anti-deadlock instruction."[74] The majority correctly refuted this assertion and noted that the ABA instruction is nationally recognized by both courts and scholars as a hung jury instruction.[75]

Similarly, the *Epperson* dissent disagreed with the virtual per se coercive approach adopted by the majority.[76] The dissent asserted that trial courts should instead be allowed to evaluate the context and the circumstances of a particular case in determining coerciveness.[77] However, this per se approach is limited only to instances where two *antideadlock* instructions are

70. *Id.*

71. *See supra* note 19.

72. *Epperson,* 495 A.2d at 1177 (Ferren, J., dissenting).

73. *Id.* at 1178 (Ferren, J., dissenting).

74. *Id.* (Ferren, J., dissenting).

75. *Id.* at 1175. The Seventh Circuit accepted the ABA/federal instruction in United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970). For the Seventh Circuit's more recent opinion, see United States v. Silvern, 484 F.2d 879 (7th Cir. 1973) (en banc). *See also* United States v. Angiulo, 485 F.2d 37, 40 n.3 (1st Cir. 1973) (offering a modified instruction based on the ABA model); United States v. Thomas, 449 F.2d 1177, 1186 (D.C. Cir. 1971) (en banc) (adopting the ABA standard); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969) (abandoning *Allen* charge without adopting ABA instruction); State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973) (adopting the ABA standard); State v. Garza, 185 Neb. 445, 176 N.W.2d 664 (1970) (adopting the ABA standard). *But see* State v. Champagne, 198 N.W.2d 218 (N.D. 1972) (expressly approving the *Allen* type charge and rejecting the ABA instruction).

76. 495 A.2d at 1178 (Ferren, J., dissenting). The *Epperson* court does not follow a virtual per se approach where there are extenuating circumstances. In these situations, the majority will allow an antideadlock instruction to be repeated. Two examples include instances where the hung jury is confused and asks for a repetition of the instruction, or where there is an exceptional circumstance that makes it obvious that to administer another antideadlock instruction would not be coercive. *Id.* at 1176-77.

77. *Id.* at 1177 (Ferren, J., dissenting) (quoting Jenkins v. United States, 380 U.S. 445-46 (1965)).

given. Thus, if the dissent had been correct in not regarding the first charge as being an antideadlock charge, then this situation would not fall within the ambit of the *Epperson* decision.

Although the *Epperson* dissent was dissatisfied with the adoption of a virtual per se approach, this approach can prove quite practical. By drawing an analogy to the abandonment of the *Allen* charge, the advantages appear more pronounced. In 1971, the court of appeals in *Simms v. United States*[78] recognized the tremendous burden created by examining instructions on an ad hoc basis. The court in *Simms* quoted Chief Justice Warren Burger, then a member of the United States Court of Appeals of the District of Columbia, who stated that "considerable work for this court would be eliminated if District Judges would consistently use a form of instruction plainly within *Allen.*"[79] Undoubtedly, similar burdens would be imposed on the District of Columbia Court of Appeals if it attempted to analyze the specific impact that two charges had in a particular case.[80]

Interpreting the coerciveness of the charges and the combined effect of two antideadlock instructions would be a burdensome task and contrary to the tenets of judicial economy. Consequently, the *Epperson* court's inability to weigh, in any meaningful sense, the effects of antideadlock instructions is an important reason to formulate the per se rule. Although the *Epperson* court's per se approach does not appear consistent with the line of cases in the 1970's that analyzed the antideadlock instruction in regard to its context and circumstances,[81] the decision does reflect the court's increasing intolerance of verdict coercion. Moreover, the court's new policy is also consistent with its previous abandonment of *Allen* in a similar per se manner.[82]

III. CONCLUSION

In *Epperson v. United States,* the District of Columbia Court of Appeals held that it was per se reversible error for a trial judge to repeat an antideadlock instruction to a hung jury. Although a judge should try to prod a jury to reach a verdict, he should exercise care so as not to exceed the allowable degree of coercion. The *Epperson* court's establishment of a per se rule was a sound decision. The majority persuasively refuted the dissent's major concern that a per se rule would prevent trial judges from offering appropri-

78. Simms v. United States, 276 A.2d 434 (D.C. 1971). *See also supra* note 15.

79. *Simms,* 276 A.2d at 436 n.2 (quoting Fulwood v. United States, 369 F.2d 960, 963 (1966)).

80. As recognized in *Simms,* the court had enough difficulty trying to analyze the coerciveness of the *Allen* charge and all of its variations.

81. *See supra* notes 19-31 and accompanying text.

82. *See supra* notes 15-18 and accompanying text.

ate and timely guidance. The court made clear that the per se rule would only apply when the jury was genuinely hung; thus, a jury instruction given to a jury not actually hung would not count as an antideadlock instruction.

Case law in other jurisdictions demonstrates the necessity of a per se rule based on a trial or appeals courts' previous encounters deciphering the coercive impact of the variations of the *Allen* charge. The court asserted that evaluating the effects of two antideadlock instructions without a per se rule would prove too time consuming, difficult, and inefficient. More importantly, the court held that two antideadlock instructions are simply too coercive, without the need to evaluate the coercive nature of the particular language charged.

Thus, the court established a per se rule that denies the benefit of judging each case based on the "totality of circumstances," but, at the same time, avoids the detriment of burdening the appellate court system with claims of coercion in jury charges. The District of Columbia Court of Appeals concluded that ensuring jurors maintain their conscientious convictions is far superior to having jurors change their opinions. An individual on trial has too much at stake for the courts to risk the coercive impact that any two antideadlock charges could impart.

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