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AFTER *LOWENFIELD*: THE *ALLEN* CHARGE IN THE NINTH CIRCUIT

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When a jury becomes deadlocked and cannot reach a verdict for lack of unanimity, federal district courts often attempt to break the jury's deadlock by giving a supplemental instruction, usually called an "*Allen* charge," which urges the jurors to reconsider their views in order to attain a unanimous verdict. This article reviews the use of this type of supplemental instruction in the Ninth Circuit. Principally the article analyzes the approach previously taken by the Ninth Circuit Court of Appeals in upholding *Allen* charges. It then evaluates the impact of *Lowenfield v. Phelps*, the recent Supreme Court case addressing the subject. The article concludes by suggesting how the Ninth Circuit would review an *Allen* charge on appeal in determining whether the charge should be upheld.

I. EVOLUTION OF THE *ALLEN* CHARGE IN THE NINTH CIRCUIT

Juries which fail to reach a verdict because they are deadlocked are often given an "*Allen* charge." The "*Allen* charge" gets its name from a case decided nearly a century ago, *Allen v. United States*,[1] where the Supreme Court upheld a supplemental jury instruction which urged the members of a deadlocked

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1. 164 U.S. 492 (1896).

jury to reconsider their views in order to reach a verdict.[2] In its simplest form, an "*Allen* charge"[3] is a supplemental jury instruction given after jurors have stopped deliberating because they cannot agree on a verdict and further deliberation appears to be superfluous. The *Allen* charge, or a similar supplemental instruction,[4] urges jurors to reconsider their views so that a verdict can be attained. When the instruction is given in a criminal case and the result is a conviction because the deadlock which would have resulted in a hung jury with no verdict has been transformed into a verdict of guilty, the principal contention on appeal is that the verdict was unconstitutionally coerced.[5]

One of the earliest Ninth Circuit cases in which a supplemental instruction was challenged as being too coercive was *Peterson v. United States*,[6] where five co-defendants charged with buying and receiving stolen property. Ironically, *Peterson* was a retrial after the first resulted in a hung jury. On retrial, defendant Peterson was found guilty while the remaining defendants

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2. *Id.* at 501.

3. The "*Allen* charge" gets its name from the Supreme Court decision of Allen v. United States, 164 U.S. 492 (1896). It is also commonly referred to as a "dynamite charge" or "nitroglycerine charge" because it blasts a verdict out of the jury. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, 151 (1968).

4. The terms "supplemental instruction," "*Allen*-type instruction," "*Allen* charge" and "modified *Allen* charge" are used interchangeably. However, such a supplemental instruction may or may not use the identical language approved in *Allen*. In fact, the *Allen* opinion did not reiterate the lengthy language contained in the supplemental instruction. Instead, the opinion simply cited to Commonwealth v. Tuey, 62 Mass. 1 (1851), saying the instruction was taken literally from that case. *Allen* 164 U.S. at 501. Today, in both civil and criminal trials, courts generally refer to an "*Allen* charge" as any type of instruction, given after the jury has had some time to deliberate, which in some way urges the jurors to reach a verdict while cautioning them not to give up an "honest conviction" about the defendant's guilt or innocence. The instruction may be a few short sentences or several pages in length. *See e.g.*, Seawell v. United States, 550 F.2d 1159, 1161 n.2 (9th Cir. 1977)(*Seawell I*)(form of *Allen* instruction used was almost one thousand words in length); *see also* DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 18.14 (3d ed. 1977 & Supp. 1987).

5. While an *Allen*-type instruction may be given in a civil case, this article evaluates the use of this type of instruction only in criminal cases. In a criminal case the instruction would primarily implicate the sixth amendment right to an impartial jury and the fifth amendment right to due process of law. In a civil case the constitutional claims would primarily rest upon the due process clause of the fifth amendment and the seventh amendment right to a trial by jury. However, the Supreme Court has analyzed *Allen* instructions under the same standard without respect to the constitutional basis alleged.

6. 213 F. 920 (9th Cir. 1914).

were acquitted.[7] The trial took three days. When the jury had reached a deadlock after nearly two days of deliberation, the district court took a poll to determine how the jury was divided.[8] It then gave a supplemental instruction which included the admonitions that this was the second trial, justice was expensive to the government and that with their seven-to-five deadlock the five jurors should seriously inquire whether there was a reasonable doubt when the other seven jurors had no doubt.[9] A guilty verdict was announced less than one hour after the supplemental instruction was given.[10] On appeal the Ninth Circuit overturned the conviction. Without considering the Supreme Court's decision in *Allen*, the Ninth Circuit found that the statements included in the supplemental instruction were "plainly coercive."[11] Specifically, the court found the instruction was unduly coercive because it did not caution the jurors against yielding honest conclusions of innocence and incorrectly stated that the government had a "right" to a verdict.[12] The court also considered two other factors in determining that the instruction was too coercive: first, the complexity of the case, with the court finding the crime of buying and receiving stolen property to be easy to understand; and second, the length of deliberations after the supplemental instruction, with less than one hour being very brief.[13]

Peterson must be read in light of *Suslak v. United States*,[14] which was decided just seven days earlier and should be regarded as a companion case. In *Suslak* a supplemental instruction was upheld despite the fact that the district court itself took the initiative to recall the jury to give the charge.[15] The complexity of the case and the length of subsequent deliberations were not considered. Instead, the decision to affirm the guilty verdict was based exclusively on the language used in the supplemental charge. The instruction in *Suslak* cautioned the jurors not to "take an arbitrary stand to acquit or convict a

7. *Id.* at 921.
8. *Id.* at 924.
9. *Id.*
10. *Id.* at 926.
11. *Id.* at 924.
12. *Id.* at 925.
13. *Id.* at 925-26.
14. 213 F. 913 (9th Cir. 1914).
15. *Id.* at 919.

man."[16] This exclusive rationale was inconsistent with *Peterson* which required the complexity of the case and the length of subsequent deliberations to also be considered.

Shea v. United States,[17] which followed *Peterson* and *Suslak*, added even more confusion to the use of supplemental instructions. In upholding a supplemental instruction, *Shea* explicitly relied on *Allen*, reasoning that the authority of the Supreme Court controlled.[18] Shea had argued that the guilty verdict was nevertheless unduly coerced because the instruction was the result of the district court's own initiative rather than the jurors' announcement that they were deadlocked.[19] However, the court found the instruction's content, as opposed to context, was the determinative factor.[20] *Peterson* was distinguished on the ground that there the district court made the fatal mistake of inquiring as to how the jurors were divided.[21] In this, it would appear that if the district court inquired about the jury's numerical division by polling the jury, the jurors in the minority would be singled out and therefore were more susceptible to the coercive effect of a supplemental instruction.

Seven years later, the Supreme Court directly addressed the issue of jury polling in *Brasfield v. United States*.[22] In *Brasfield*, when the jurors reached deadlock, the district court judge asked the jurors how they were divided. When they stated, "nine to three," further deliberation was ordered and a guilty verdict resulted.[23] The Supreme Court reversed the conviction, reasoning that when juror polling was conducted, coercion was much more likely to exist.[24]

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16. *Id.* at 919. *Suslak* should also be read for its portrayal of the early western mining days. Suslak was convicted of transporting a woman to Butte, Montana for immoral purposes. The testimony was colorful, with the prosecutrix stating that she entered a life of open prostitution soon after coming to Butte, and that having gotten the reputation of a harlot, she thought she might as well live the life and make some money. *Id.* at 916.

17. 260 F. 807 (9th Cir. 1919).

18. *Id.* at 809.

19. *Id.*

20. *Id.* at 808-09.

21. *Id.* at 809.

22. 272 U.S. 448 (1926).

23. *Id.* at 455.

24. *Id.* at 455. *See also* United States v. United States Gypsum Co., 438 U.S. 422, 459-62 (1978)(jury foreman referred to the jury's deadlock during an ex parte meeting with the judge, with the strong likelihood that the foreman carried away the impression

Thirty years after *Brasfield* the Ninth Circuit again upheld a modified *Allen* instruction in *Hudson v. United States*,[25] under the exclusive rationale that the supplemental instruction contained a "correct statement of the law."[26] *Hudson* therefore became the cornerstone decision which established that a proper supplemental instruction in effect consisted of one element—advising the jurors to reconsider their views but not to give up their "honest convictions."[27] The court relegated the complexity of the case, the length of deliberations, whether the charge may have been directed at particular jurors, and the additional language which may have been included in the charge, to insignificant considerations.[28] While this analysis was contrary to *Suslak* and *Peterson*, subsequent cases reaffirmed the *Hudson* approach. As long as the supplemental instruction or *Allen* charge contained the "magic words," i.e., the admonition that jurors in the minority should not give up an honest or conscientious position on guilt or innocence, it was upheld.[29]

In short, the Ninth Circuit came to uphold *Allen*-type instructions based on the "magic words" alone. While this was consistent with the narrow holding of *Allen*, it did little to address other factors which clearly indicated coercion of jurors in the minority despite the content of the instruction, such as the complexity of the case in relation to the length of deliberations, use of vociferous language by the jurors in describing the deadlock and the length of deliberations after the supplemental instruction was given.

A change came in *Powell v. United States*,[30] where a conviction was reversed where use of a supplemental instruction caused juror coercion.[31] But, the important aspect of *Powell* is

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that the judge wanted a verdict one way or the other).

25. 238 F.2d 167 (9th Cir. 1956).

26. *Id.* at 173.

27. *Id.*

28. *Id.*

29. *See* Miracle v. United States, 411 F.2d 544 (9th Cir. 1969) (per curiam) (instruction emphasized that each juror should arrive at his own decision); Dearinger v. United States, 378 F.2d 346 (9th Cir.)(instruction told jurors not to surrender a conscientious conviction), *cert. denied*, 389 U.S. 855 (1967); Christy v. United States, 261 F.2d 357 (9th Cir. 1958)(instruction included warning to the jurors not to surrender conscientious conviction), *cert. denied*, 360 U.S. 919 (1959).

30. 347 F.2d 156 (9th Cir. 1965).

31. *Id.* at 158.

that no "additional" supplemental instruction was given. Instead the district court simply reread one of the original instructions which delineated the elements of the crime charged.[32] A guilty verdict was reached five minutes thereafter. The Ninth Circuit reversed the conviction, stating that the test for reviewing a supplemental charge was "whether the charge taken as a whole was such as to confuse or leave an erroneous impression on the minds of the jurors."[33] As a result, *Powell* stands as a case upon which convicted defendants may rely to overturn a guilty verdict, if they can show clear coercion from the factual context despite the content of the language used in the supplemental instruction.

The salient fact showing coercion is of course the time elapsed between when the supplemental instruction is given and the return of the verdict. However, *Powell* was decided shortly before the Supreme Court rendered its two page opinion in *Jenkins v. United States*.[34] In *Jenkins* a conviction was reversed where the district court's response to the jurors sending a note indicating they were unable to agree on a verdict was to tell them, "You have got to reach a decision in this case."[35] Presumably, a "decision" could have been an acquittal. Despite this, the Supreme Court looked at the supplemental instruction "in its context and under all the circumstances" to find that there was a coercive effect.[36] But, the Court did not indicate whether inclusion of the magic words would by themselves cause the supplemental instruction to be upheld.

However, in *Jenkins* the Supreme Court did establish the test for reviewing an *Allen* charge in the Ninth Circuit; whether in its context and under all the circumstances there was a coercive effect. This was a departure from *Hudson* and prior Ninth Circuit cases which appeared to look solely to the "magic words" of admonishing jurors not to forgo honest convictions.[37]

As expected though, the short instruction used in *Jenkins*

32. *Id.* at 157.
33. *Id.* at 158.
34. 380 U.S. 445 (1965)(per curiam).
35. *Id.* 446.
36. *Id.*
37. *Supra* note 29 and accompanying text.

gave rise to the next question: What if no supplemental instructions were given, but upon deadlock the district judge simply sent the jurors back for further deliberation? In *Walsh v. United States*,[38] the Ninth Circuit answered this question by finding that in such a case no juror coercion existed because no jurors were singled out to change their views.[39] *Jenkins* was explicitly distinguished on this ground,[40] albeit over a vociferous dissent which argued that minority jurors were in effect singled out because it was clearly implied that a guilty verdict was required.[41]

This gave rise to the next obvious question of whether the timing alone of the supplemental instruction could be the basis for reversing a guilty verdict. In *Sullivan v. United States*,[42] the question was sidestepped. An *Allen* charge which was given *sua sponte* before any indication by the jurors that a deadlock had been reached was upheld because it contained the magic words.[43] The timing of the charge, with respect to it being given *sua sponte*, was left unaddressed, apparently because the content had once again become the determinative factor in evaluating an *Allen* charge.[44] Yet only three years later, in *Contreras v. United States*,[45] where a *sua sponte Allen* charge was given, a conviction was reversed on the basis that the charge was so premature it clearly coerced the resulting guilty verdict.[46] While the court declined to hold that an *Allen* charge was unduly coercive *per se* and thereby prohibit its use in the Ninth Circuit,[47] the court did hold that where there was no indication of juror deadlock, an *Allen* charge should be used only where "clearly war-

38. 371 F.2d 135 (9th Cir.)(per curiam), *cert. denied*, 388 U.S. 915 (1967).

39. *Id.* at 136.

40. *Id.*

41. *Id.* at 137, (Browning, J., dissenting)(arguing that where it is implied that the jury must reach a verdict, jurors relinquish their personal views in the interest of unanimity).

42. 414 F.2d 714 (9th Cir. 1969).

43. *Id.* at 717.

44. *Id.* at 717-19.

45. 463 F.2d 773 (9th Cir. 1972)(per curiam).

46. *Id.* at 775.

47. The power of the circuit court to prohibit the use of *Allen*-type charges would come under the federal courts' supervisory powers to formulate procedual rules. *See* United States v. Hastings, 461 U.S. 499, 505 (1983)(federal courts may formulate procedural rules not specifically required by the constitution or Congress).

ranted."[48] Arguably "clearly warranted" would mean nothing less than jury notification to the court that they had actually reached a stalemate.

With the inconsistencies rendered by the Court of Appeals and the myriad of different factual nuances that could be confronted in any given case where supplemental instructions were used, by 1976 the district courts of the Ninth Circuit were trying a new approach. This involved including an instruction which encouraged the jurors to reach a verdict as part of the original instructions.[49] The language used was essentially that approved in *Allen*, containing the "magic words" which cautioned all jurors to reconsider their views but not to forgo honest convictions. Also, by giving the instruction initially instead of after a

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48. *Contreras*, 463 F.2d at 774.

49. The Ninth Circuit not only permitted but in fact encouraged district courts to send a copy of the instructions into the jury room for use during deliberations. Although in doing so it was imperative that all proper instructions be included. Leaving out an essential instruction would invite error. *See e.g.*, United States v. Miller, 546 F.2d 320 (9th Cir. 1976). In *Miller*, it was stated:

> Based upon experiences as a trial lawyer in state and federal courts and shared experiences with trial lawyers, judges and jurors, *this author* is firmly of the opinion that sending all instructions to the jury room at the commencement of deliberations is manifestly sound. It would serve to prevent claims of error and reversals of this nature. Jurors would not be left to their own conflicting memories as to the precise and important wording of the instructions. It eliminates the danger of overemphasizing a few instructions or aspects of the case when requests for rereading are received and granted. The danger of the jury seizing upon one instruction as stating the law of the case or of seizing upon an erroneous view of what the instructions as a whole were meant to convey is infinitely greater when jurors are left to their memories. We do (and properly so) rely on jurors to follow instructions on the law of the case and not to select one as stating the law, but to consider them as a whole. The fulfillment of this admonition and objective is greatly enhanced when the jury is afforded "the right" to have the instructions with them during deliberations. Where, as here, there are numerous general rules, complicated conspiracy and substantive count instructions and the jury is in recess for an extended period, the danger of a miscarriage of justice based upon a faulty recollection of the instructions is inherent. That danger is eliminated by giving the jury the 'keys' to a proper result based on the facts they find to exist in a given case.

Id. at 324 n.3. *See also* United States v. Mason, 658 F.2d 1263, 1266 (9th Cir. 1981)("It is the better practice to include a version of [the *Allen* instruction] in the jury's original instructions.").

stalemate was reached, it was thought that jurors would reexamine their positions without being coerced into arriving at a guilty verdict.[50] In this way an *Allen* charge as an original instruction would offer the best of both worlds—causing unanimity without causing coercion upon jurors in the minority.

Problems with this approach soon arose. The most recurrent being how to respond to the jurors' deadlock when they vociferously described it, such as a jury's notice to the court that it was "hopelessly deadlocked," and what to do when a jury became deadlocked despite an *Allen* charge being used as part of the original instructions.

The vociferousness of a particular response by a jury when it had reached deadlock was evaluated in *United States v. Peterson*,[51] where after one-half day of deliberation the jurors reported, "we are deadlocked."[52] The district court returned the jury for further deliberation. After a second day of deliberation the jury again reported it was "hopelessly deadlocked."[53] At this point an *Allen*-type charge was given. That same afternoon a guilty verdict was returned.[54] In affirming the conviction, the Ninth Circuit applied the "general standard" to determine whether the *Allen* charge was coercive considering "all circumstances of the case."[55] Finding no coercion, the circuit court specifically held that a jury's expression of being "hopelessly deadlocked" was not determinative.[56]

This rule appears to be beyond dispute. No matter how emphatic the jury's expression that it is deadlocked[57] and presuma-

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50. *See e.g.*, United States v. Miller, 546 F.2d 320, 324 (9th Cir. 1976)(because the district court on Monday morning reread instructions given Friday afternoon but neglected to reread the instruction cautioning that an accomplice's testimony must be weighed with great care, reversible error resulted).

51. 549 F.2d 654 (9th Cir. 1977).

52. *Id.* at 659.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See e.g.*, United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977)(*Seawell I*). In *Seawell I*, the jury informed the court: "[t]he jury is at a ten-to-two impasse. The two state that nothing we can say will convince them otherwise." *Id.* at 1160. The district court gave an *Allen* charge with the jury returning a second note stating in part:

> No amount of argument has persuaded their convictions, these are the others who do not agree with the majority of the ju-

bly even if it reveals the numerical breakdown of the jurors' votes, this will not in itself require a later guilty verdict to be overturned. However, when a jury's response is particularly emphatic, it could be argued that this is a substantial factor to be evaluated in determining coerciveness.

A restriction on use of the *Allen* charge is the finding of coercion where the charge was given more than once. But multiple use of the charge may or may not include use of the *Allen* charge as part of the original instruction. For example, in *United States v. Seawell*,[58] an *Allen* charge was given when impasse was reached after two and one-half hours of deliberation. When over three more hours of deliberation failed to result in a verdict, the charge was reread to the jury.[59] The result was a guilty verdict one hour later.[60] In reversing the conviction, the appellate court held that using the *Allen* charge twice was an unwarranted expansion of its use.[61] This holding was based on the sixth amendment right to an impartial jury, but review of the charge was still made under the *Jenkins* test of "all the circumstances," which included the content and timing of the charge.[62] However, the court failed to further address the issue of multiple use of the *Allen* charge and analyze whether use of the charge as part of an original instruction would constitute multiple use thereby requiring reversal of a guilty verdict.

> rors. We therefore submit to you that we are at impasse and are not likely to change our minds until fatigue becomes a deciding factor which we believe is neither fair to the defendant or the people.

Id. See also United States v. Bonam, 772 F.2d 1449, 1450 (9th Cir. 1985)(jury note saying, "At this time, we the jury are unable to reach a unanimous verdict" and a second note four hours later saying, "We the jury are at a stalemate and opinion cannot be altered. The situation has not changed since 11:00 a.m. *Nothing* is going to change. Please advise."); United States v. Foster, 711 F.2d 871, 883 (9th Cir. 1983)(after denying dismissal of one juror, a second note from the jury stated, "Another juror wants to be released. We seem to be at a standoff, and she feels that there is no clear end in sight."), *cert. denied*, 465 U.S. 1103 (1984); United States v. Hooton, 662 F.2d 628, 636 (9th Cir. 1981)(juror note to the court stated, "Please send us home. Some of us have family obligations, i.e., children at home alone."), *cert. denied*, 455 U.S. 1004 (1982); United States v. Mason, 658 F.2d 1263, 1265 (9th Cir. 1981)(jury stated it was "having problems"); United States v. Cassasa, 588 F.2d 282, 285 (9th Cir. 1978)(jury reported it was at a "standstill"), *cert. denied*, 441 U.S. 904 (1979).

58. 550 F.2d 1159 (9th Cir. 1977)(*Seawell I*).

59. *Id.* at 1162.

60. *Id.*

61. *Id.* at 1163.

62. *Id.*

When Seawell was retried, an *Allen* charge was again used before a verdict could be reached.[63] The conviction on retrial was allowed to stand.[64] Finding *Jenkins* controlling, use of the *Allen* charge was found not to be error *per se*, and without the "unusual circumstances of coercion," the verdict was upheld.[65] But, an emphatic concurrence called for the demise of the *Allen*-charge circuit-wide.[66]

Subsequent cases followed suit. Without a showing of "unusual circumstances" of coercion, use of the *Allen* charge was upheld.[67] Primary importance was therefore placed on the con-

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63. United States v. Seawell, 583 F.2d 416, 417 (9th Cir.)(*Seawell II*), *cert. denied*, 439 U.S. 991 (1978).

64. *Id.* at 418.

65. *Id.*

66. *Id.* at 419, (Hug, J., concurring)(Judge Hug argued that an *Allen* charge was unduly coercive regardless of its timing, and also that the charge misstated the law insofar as it indicated a second trial would be necessary if a verdict could not be reached. But, feeling constrained by existing case law, Judge Hug felt compelled to concur in the result absent reversal of the established case law by the court sitting en banc).

Other judges have also voiced their regret in upholding *Allen* charges. *See e.g.*, Armstrong v. United States, 654 F.2d 1328, 1337 (9th Cir. 1981)(Merrill, J., concurring)(cautioning that some *Allen* charges sound like a reproof to the jury for ending in a deadlock), *cert. denied*, 454 U.S. 1157 (1982); Beattie v. United States, 613 F.2d 762, 766 (9th Cir.)(Browning, C.J., concurring)(suggesting that the line between admonishing the jury to keep trying and encouraging jurors to surrender their beliefs is extremely fine), *cert. denied*, 446 U.S. 982 (1980). At least three other circuits had disapproved modified *Allen* charges. *See* United States v. Fioravanti, 412 F.2d 407, 417 (3rd Cir.)(*Allen* charge constitutes an unwarranted judicial invasion into the province of the jury), *cert. denied sub nom* Panaccione v. United States, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930, 934 (7th Cir. 1969)(*Allen* charge allowed if it is consistent with the ABA recommended standards), *cert. denied*, 396 U.S. 1017 (1970); United States v. Thomas, 449 F.2d 1177, 1188 (D.C. Cir. 1971)(*Allen* charge must contain the same language as the ABA approved instruction). However, in light of Lowenfield v. Phelps, 108 S.Ct. 546 (1988), use of the *Allen* charge is now authoritatively established. *See infra* note 79 and accompanying text.

67. *See* Bonam v. United States, 772 F.2d 1449 (9th Cir. 1985)(upholding charge which said a juror should not abandon his conscientiously held views); Armstrong v. United States, 654 F.2d 1328 (9th Cir. 1981) (upholding "mild" *Allen* charge), *cert. denied*, 454 U.S. 1157 (1982); Guglielmine v. United States, 598 F.2d 1149 (9th Cir.)(approving ABA Standard Instruction), *cert. denied*, 444 U.S. 943 (1974); Weiner v. United States, 578 F.2d 757 (9th Cir.)(per curiam)(modified *Allen* charge allowed), *cert. denied*, 439 U.S. 981 (1978); Silla v. United States, 555 F.2d 703 (9th Cir. 1977)(use of *Allen* charge upheld under version given in Devitt & Blackmar). Under *Seawell I*, the only "unusual circumstance" sufficient to overturn a conviction in which an *Allen* charge was used, was repeated use of the instruction. However, a question remains on the use of an*Allen*-type charge as part of the original instructions, which is then used again as a supplemental instruction. Original and supplemental use only once would have required reversal under *Seawell I* but presumably not under *Lowenfield*. *See infra* note 87 and accompanying text.

tent as opposed to the context of the charge. The Supreme Court then re-addressed the use of the *Allen* charge and authoritatively established the current standard by which it is to be evaluated.

II. THE *LOWENFIELD v. PHELPS* DECISION

With the circuit courts taking divergent views on the application of *Allen*,[68] the Supreme Court decided to review the continuing validity of the case. In *Lowenfield v. Phelps*,[69] the Court upheld a modified *Allen* instruction and thereby reaffirmed the use of supplemental instructions which urge jurors to arrive at a unanimous decision.[70]

The facts of *Lowenfield* are unique and give rise to questions which will arise in light of the existing Ninth Circuit case law. Lowenfield was charged with five counts of murder.[71] A guilty verdict was reached. The jury then commenced sentencing deliberations, prior to which the district court admonished the jurors to consider the views of others with the objective of reaching a verdict, but that they should not surrender their own honest beliefs in doing so.[72] The following day the jury notified the court that it was unable to reach a decision on the appropriate penalty.[73] The trial court then took an anonymous poll of the jury to determine the usefulness of further deliberations on the sentence. The poll revealed that eight jurors were in favor of further deliberations.[74] Accordingly, the court directed further deliberation to determine the appropriate sentence. Later, the jurors notified the court that they had misunderstood the polling question. The trial court again anonymously polled the jurors to get their views on whether further deliberations would be helpful.[75] Only one juror answered affirmatively. The court then rein-

68. *See, e.g.*, Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984)(variation of the charged used in *Allen* imperils the validity of the verdict), *cert. denied*, 470 U.S. 1029; United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971) (*Allen* charge should be used with great caution and only when absolutely necessary).

69. 108 S. Ct. 546 (1988).

70. *Id.* at 552.

71. *Id.* at 548.

72. *Id.* at 549.

73. *Id.*

74. *Id.*

75. *Id.*

structed the jury with a modified *Allen* charge which stated in part: "Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the purpose of returning a verdict."[76] The jury resumed deliberations and thirty minutes later returned with a death sentence on three of the murder counts.[77]

Lowenfield appealed the sentence on the ground the sentence was coerced out of the jury.[78] The guilt determination itself was not similarly appealed. In reviewing Lowenfield's sentence, the Supreme Court relied on *Jenkins* and *Allen*, stating that the validity of the use of supplemental instructions was "beyond dispute."[79] The test used for evaluating coercion was whether the charge was "coercive in its content and under all the circumstances."[80]

In examining the facts, the Supreme Court found them insufficient to establish coercion. The Court particularly relied on the anonymity of the jury poll, pointing out that the poll was used to determine the usefulness of further deliberations as distinguished from a poll to determine the jurors' positions on the sentence itself.[81] *Brasfield* was specifically distinguished on the ground that it involved a jury poll which had the purpose of determining how the jurors were divided on the merits as opposed the determining whether the jurors thought further deliberations would be helpful.[82] Additionally, *Jenkins* was distinguished on the ground that it involved a supplemental instruction which did not contain the magic words urging the jurors not to surrender an honest belief.[83] With respect to the fact that the sentencing verdict was returned only 30 minutes after the sup-

76. *Id.*
77. *Id.*
78. *Id.* at 550.
79. *Id.* at 550-51.
80. *Id.* at 550.
81. *Id.* at 552.
82. *Id.*
83. *Id.* at 551, citing *Jenkins*. It should be noted that the eighth amendment challenge to the *Allen* charge made in *Lowenfield* would not have arisen in a federal court because the sentences for criminal defendants in federal courts are determined by a judge and not a jury. FED. R. CRIM. P. 32; 18 U.S.C. § 3553.

plemental charge was given, the Supreme Court reasoned that the defense counsel's failure to immediately object to the sentence indicated that coercion was not readily apparent.[84]

III. THE *ALLEN* CHARGE AFTER *LOWENFIELD*

Lowenfield will have significant implications on the supplemental instruction law of the Ninth Circuit. The greatest implication is that it authoritatively reaffirmed *Allen* and reestablished the standard for reviewing supplemental instructions urging that a verdict be reached.

Additionally, *Lowenfield* addressed the coercion issue under the due process clause as well as the eighth amendment. By finding no fifth or eight amendment violations, there is no reason to believe the sixth amendment right to a fair trial would require a different result.[85] However, the Supreme Court limited the *Lowenfield* holding to the facts of the case, pointing out that "other combinations of supplemental charges and polling [may] require a different conclusion."[86] Yet, given the facts involved in *Lowenfield*, it is hard to imagine a more coercive set of circumstances than those involved in *Lowenfield*, other than the failure to use the magic words in the supplemental charge.[87]

The *Lowenfield* decision will also have implications upon the repetitive use of supplemental instructions which urge the jurors to reach a verdict. *Lowenfield* upheld use of supplemental charges both to achieve a verdict and to determine the appropriate sentence. Therefore, using an *Allen* charge more than once would presumably not amount to an unwarranted expansion of

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84. *Lowenfield*, 108 S. Ct. at 552. Failure to object did not waive the issue on appeal. However, for counsel practicing in the Ninth Circuit, objection should be made to preserve the alleged error for appeal. If there is a failure to object, reversal is required only if the error constitutes plain error. United States v. Payseno, 782 F.2d 832, 834 (9th Cir. 1986). Since *Lowenfield* held the supplemental instruction did not rise to a constitutional violation, plain error will not exist.

85. *See supra* note 5 and accompanying text.

86. *Lowenfield*, 108 S. Ct. at 552.

87. *See Lowenfield*, 108 S. Ct. at 555-58, (Marshall, J., dissenting)(reciting a more compelling version of the facts than that recited by the majority; including, *inter alia*, the point that at the jury was instructed four times that failure to reach a verdict on the sentence would automatically result in a life sentence).

its use.[88] This is contrary to *Seawell I* which found that repeating an *Allen* instruction amounted to unconstitutional juror coercion. But, if the charge is repeated more than once during any separate phase of the trial, *Lowenfield* could be substantially distinguishable on this basis and *Seawell I* would arguably require reversal.[89]

With respect to jury polling, *Lowenfield* is consistent with previous Ninth Circuit cases. If polling is done in a manner that maintains anonymity, coercion will not be found. However, if the division in the jury is revealed, particularly because of court inquiry rather than by the jurors' voluntary revelation, this circumstance should be sufficient to demonstrate coercion under the Supreme Court's decision in *Brasfield* and analogous Ninth Circuit decisions.[90]

Other circumstances in which issues may arise in the context of a supplemental instruction were not addressed by the *Lowenfield* court. The time period involved in *Lowenfield* between giving the supplemental instruction and the verdict was thirty minutes. It is therefore possible that where the jury deliberates for an exceptionally short period of time after a supplemental instruction is given, i.e., thirty minutes or less, reversal could result. Given this obtuse time line, future Ninth Circuit cases are likely to focus on the different factors which implicate the time-line drawing; such as the complexity of the case, the total time spent on deliberations, the degree of finality in the jury's communication with the court that it is deadlocked, and whether the supplemental instruction is given *sua sponte* or only after a deadlock is reached and the jury informs the court that it is at stalemate.

While each of these facts can be argued in the course of an *Allen* charge appeal, one thing is clear. With *Lowenfield* reaf-

88. *Id.*

89. *Lowenfield* involved a supplemental instruction used during both the sentencing phase and during the guilt phase, where the trial court stated, "I order you to go back to the jury room and deliberate and arrive at a verdict." *Id.* at 557, (Marshall, J., dissenting). Ironically, previous Ninth Circuit case law would have required that the verdict be invalidated because the instruction did not contain the magic words. However, the majority opinion did not analyze the supplemental instruction used during the guilt phase, but limited its analysis to the instruction used during the sentencing phase of the trial.

90. *See supra* notes 21-24 and accompanying text.

firming the *Jenkins* test for review, when an *Allen* charge does include the magic words of admonishing the jurors not to give up an honest belief, *per se* reversal on the ground of juror coercion will be difficult to attain. If the magic words are used, many separate facts showing juror coercion will have to exist so that their cumulative effects can overcome an otherwise permissible supplemental instruction. In short, content will predominate over context.

The *Allen* charge is used because it is effective. It pushes jurors to reach a verdict. Absent a showing of facts demonstrating that the will of individual jurors was compromised, a guilty verdict in the Ninth Circuit which resulted from the use of a properly worded *Allen* charge will be allowed to stand.