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INSTRUCTING THE DEADLOCKED JURY: SOME PRACTICAL CONSIDERATIONS

Historically, few aspects of a criminal proceeding have so perplexed jurists as a jury which is unable to reach a verdict. In the latter part of the eighteenth century Blackstone noted that in order to avert the pitfalls of this dilemma, jurors should be "kept without meat, drink, fire or candle . . . till they are all unanimously agreed." Furthermore, the deadlocked jurors were to be loaded into an oxcart and carried about with the judge while he rode circuit, being permitted to leave only when they had agreed upon a verdict.[1] Progressive jurists in this country disdained such abusive practices and contrived more subtle techniques for exhorting recalcitrant jurors. Thus a request by a deadlocked jury for a dismissal was denied by the trial court and the jury informed that it would be kept together for the remaining three weeks of the term unless it could agree on a verdict.[2] Other juries have been admonished that there would be no food or water until a verdict is returned,[3] that the meals of the jurors would be furnished at their own expense[4] and, on one occasion, that they would be kept together several days with only one meal a day unless agreement was reached.[5] Error has been found in informing the jury that the trial court would take the jury to another county where the judge was going to hold a term of court,[6] as well as threatening in mid-winter to deny the jury of water and heat while they continued to deliberate.[7] In *Lively v. Sexton*[8] an Illinois jury which stood eleven to one was instructed in the following manner:

> Gentlemen, you will retire and further consider this case, and . . . if I find that any juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court.[9]

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1. 3 W. BLACKSTONE, COMMENTARIES 375. *See* State v. Jeffors, 64 Mo. 376, 381 (1877).
2. Chesapeake & O. R.R. v. Barlow, 86 Tenn. 537, 8 S.W. 147 (1888).
3. Pope v. State, 36 Miss. 121 (1858).
4. Henderson v. Reynolds, 85 Ga. 159, 10 S.E. 734 (1889).
5. Hancock v. Elam, 62 Tenn. (3 Baxt.) 33 (1873); Fairbanks, Morse & Co. v. Weeler, 15 Colo. App. 268, 62 P. 368 (1900).
6. Spearman v. Wilson, 44 Ga. 473 (1871).
7. Mead v. City of Richland Center, 237 Wis. 537, 297 N.W. 419 (1941).
8. 35 Ill. App. 417 (1890).
9. *Id.* at 419. In addition to instructions which chastise the jury for intransigence, trial courts have been found to have informed jurors that a hung jury is the product of such factors as the jurors' perversity, egotism, lack of intelligence as well as unfitness for jury service. *See* Annot., 41 A.L.R.3d 1154, 1160 (1972) and cases cited therein.

Admittedly these are old cases and few courts today would favor the use of similar instructions, nevertheless these and other similar instances aptly attest to the proposition that it has not been uncommon for a frustrated trial judge to employ a few choice words as a pragmatic device to prod a verdict out of an apparently deadlocked jury. In many criminal prosecutions a deadlocked jury is the inevitable result of the requirement of a unanimous verdict beyond a reasonable doubt; it is, however, the ardent desire of the trial judge, the prosecution and the defense that the proceeding reach a definitive conclusion. If indeed the "fruit of every litigated cause rests in the result",[10] the consequence of a mistrial springing from a deadlocked jury should be avoided if such an objective can be realized without prejudicing the rights of an accused. It is difficult to state with certainty the number of criminal jury trials occurring each term, much less the frequency of hung jury mistrials which result. However, in 1966 it was reliably estimated that as few as fifteen percent of all felony prosecutions involved a jury and no more than five percent of all jury trials, roughly three thousand a year, ended in a mistrial from a hung jury.[11] Echoing the results of research conducted by the Chicago Jury Project, the AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE has estimated that of all the felony cases which reach the stage of formal prosecution three-fourths are disposed of without trial and only three out of five of those which do go to trial are tried before a jury. Consequently, only approximately one-seventh of all felony prosecutions result in a trial by jury.[12] Early in 1974, the Office of State's Attorney in Cook County asserted in its annual report that of 6,136 felony prosecutions disposed of in the preceeding year only 255, or about one twenty-fourth, involved a trial by jury. Assuming *arguendo* the reliability of these data, it would appear that the deadlocked jury situation—though certainly an *important* phenomenon in terms of sheer numbers—is not one of particularly large proportion viewed within the context of all criminal proceedings. The occasional deadlocked jury should not intolerably burden the administration of justice. Furthermore, there are compelling arguments that a hung jury, though evidence of an infirmity of our system of justice in one respect, is a vital safeguard to the rights of an accused.

> I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public senti-

10. Chicago City Ry. v. Shreve, 128 Ill. App. 462, 478 (1906).
11. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 18, 453 (1966).
12. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY 1, 2 (Approved Draft 1968).

ment. Nothing should interfere with its exercise.[13]

In a similar vein, it has been urged that a mistrial is "as much a part of the jury system as a unanimous verdict"[14] and that a defendant has a right to rely on the possibility of disagreement by the jury selected to determine his fate.[15] These arguments, however, have not been well received in recent years by those courts of review which have had occasion to review the permissibility of instructions given to a deadlocked jury. None of the federal courts of appeal has prohibited supplemental instructions for the purposes of inducing further deliberations, and although the state courts have not been in agreement on the form and content of a permissible supplemental charge, not one prohibits the giving of such an instruction.

Since a genuinely deadlocked jury will ultimately lead to a mistrial, there are compelling reasons why such a mistrial should be avoided. Where the jury in a federal criminal prosecution has been discharged because of its inability to agree on a verdict, it has been uniformly held that a retrial of the accused for the same offense will not violate the federal double jeopardy prohibition of the Fifth Amendment.[16] The Illinois courts have reached a similar result under the state constitution.[17] Thus once a deadlocked jury is discharged and a mistrial is declared, both the prosecution and the defense must undergo the financial and emotional burden of preparing for retrial. This burden would be particularly oppressive on a defendant with limited resources although in most instances the retrial would be equally burdensome on the prosecution. An evidentiary consideration—that some evidence may be of such a type as never to be presented again so well,[18] the expense to the taxpayer upon whom the bulk of the cost of retrial will ultimately fall and the public interest in the prompt administration of justice demand that a deadlocked jury not be required to grope without the benefit of permissible

13. Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting); *cf.* United States v. Kahaner, 317 F.2d 459, 484 (2d Cir. 1963).

14. Williams v. United States, 338 F.2d 530, 533 (D.C. Cir. 1964); *cf.* Orr v. State, 40 Ala. App. 45, 52, 111 S.2d 627, 633 (1958) ("A jury is not a mere committee to explore and bring in majority and minority reports.").

15. United States v. Harris, 391 F.2d 348, 355 (6th Cir. 1968).

16. Logan v. United States, 144 U.S. 263 (1892); Keerl v. Montana, 213 U.S. 135 (1909). For a recent statement of when mistrial will not preclude retrial in a criminal proceeding for the same offense *see* Illinois v. Somerville, 410 U.S. 458 (1973).

17. People v. Mays, 23 Ill. 2d 520, 179 N.E.2d 654 (1962). The significance of this holding has been overshadowed by the subsequent application of the Fifth Amendment to the states through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784 (1969).

18. Note, *Supplemental Jury Charges Urging a Verdict—the Answer Yet to be Found*, 56 MINN. L. REV. 1199, 1230 (1972) and cases cited therein.

guidance from the trial court. Though courts are in agreement that some type of supplemental instruction is proper, the cases in recent years have done little to elucidate the proper form such an instruction should take or under what circumstances such an instruction will be improper and should not be given.

As a practical matter, the decision whether to instruct a deadlocked jury in the hope of initiating further productive deliberations, to discharge the jury without more, or to simply require that the jury return to its chambers and continue its deliberations (or non-deliberations) is one which rests ultimately within the sound discretion of the trial judge.[19] Review courts often use the word "ultimately" when describing this discretion of the trial judge, intimating that the trial court will frequently desire to weigh the relative merits of the alternatives before it. Consequently, at this time, it is probable that counsel for either side may find himself in a position to express an opinion on the advisability of a supplemental instruction and, in so doing, may seize the opportunity to submit to the trial court alternative courses of action for its consideration.

At this juncture, both the defense and prosecution must evaluate the alternatives available and the prospects for a favorable determination. These considerations will not always be the same. For instance, a mistrial arising from a deadlocked jury would place a great financial burden on the accused yet the expense of retrial may not be significant when compared to the criminal liability that may be imposed in the event the defendant is convicted. Similarly, if the original trial has been a long one, the prospects of retrial may sufficiently diminish the litigious

19. In several states the manner in which the trial court may dispose of jury requests for additional instructions is governed by statute. *See, e.g.*, N.Y. CODE CRIM. PRO. § 427 (1958); IOWA CODE § 784.2 (1962); CAL. PENAL CODE § 1138 (1956). Illinois cases hold that although additional instructions may be given in a criminal proceeding after the jury has retired, the state's attorney and defense counsel must be present and given an opportunity to submit additional instructions. *See, e.g.*, People v. Harmon, 104 Ill. App. 2d 294, 244 N.E.2d 358 (1968). The length of time that a jury in a criminal case may be kept together after its failure to reach a verdict is also within the trial court's discretion. *See, e.g.*, People v. DeFrates, 395 Ill. 439, 70 N.E.2d 591 (1946) (jury dismissed after a 3-day trial when it had deliberated only 45 minutes). To guide the trial judge in such circumstances the American Bar Association recommends the following:

> When considering whether to declare a mistrial after the jury reports its inability to reach a verdict, the judge should consider not only the report of the jury, but also the complexity of the issues, the quantum of testimony and other evidence, the number of defendants involved, any requests of the jury for clarification of instructions and the amount of time involved in the deliberation of the jury to that point.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE 77 (Approved Draft 1972).

zeal of the prosecutor which may enhance the prospects of favorable plea-bargaining. However, the reverse is also true for if the preparation and ordeal of trial has been long and arduous, a mistrial and the attendant retrial may likely make the accused amenable to settlement. Conceivably, the prosecution and the defense may each view a supplemental instruction as a device likely to end the litigation in favor of its client. Even where counsel acknowledges the merits of a supplemental instruction, further consideration must be given to the proper timing of its delivery to the jury. Not unlikely is a situation where counsel, recognizing the usefulness of a supplemental instruction as an effective tool for initiating productive deliberations, desires that no instruction be given *at that moment*, preferring instead that the jury be allowed to continue its deliberation for a short time. In short, prosecution and defense alike may find their position *vis-a-vis* instructing the jury not a consistent one, fluctuating as the circumstances of the case unfold.

THE DYNAMITE CHARGE: ALLEN AND ITS PROGENY

Eighty years ago in *Allis v. United States*[20] the Supreme Court of the United States approved the "familiar practice" of giving supplemental instructions to a jury unable to arrive at a verdict. Shortly thereafter, in *Allen v. United States*[21] the Supreme Court was called upon to approve the use of such a device where the jury in a murder trial had been unable to reach a verdict. Defendant Allen, having obtained reversals of his two previous convictions based on instruction errors, was tried a third time and convicted. Appealing to the Supreme Court, Allen urged that the trial court erred in giving further instructions to the jury when it had returned to the court for additional instructions. The Supreme Court affirmed the conviction, approved the additional instruction, and paraphrased the language of the trial court as follows:

> [I]n a large proportion of cases absolute certainty could not be expected; that although 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 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

20. 155 U.S. 117, 123 (1894).
21. 164 U.S. 492 (1896).

> other hand the majority was for acquittal, *the minority ought to ask themselves whether they might reasonably doubt the the correctness of the judgment which was not concurred in by the majority.*[22]

This paraphrase, which has since come to be known as the *Allen* charge, has been variously referred to as the "dynamite charge," the "shotgun charge," the "nitroglycerin charge," and on one occasion, the "third degree instruction,"[23] all of which aptly surmise the import of the instruction—to thrust a verdict out of a jury otherwise unable to agree. Cases and commentary criticizing the *Allen* charge are numerous, and the trend among those who have grappled with the instruction favors adopting some other alternative. Among the recurring themes criticizing the dynamite charge is that the instruction is given *after* an impasse has arisen i.e., when the deliberations have taken a majority-minority quality and that the *Allen* instruction directs the minority to reconsider the correctness of its judgment in view of the opinion of the majority. The instruction contains no counterpart admonition to the majority and it is likely that a frustrated jury will perceive the import of the court's charge to be the return of a unanimous verdict—not upon voting one's conscience based upon the evidence.[24] A likely interpretation of the minority jurors is that the court is adopting the majority view as the correct view and that it is permissible for the minority to surrender its own thinking and adopt that of the majority. Instructing a criminal jury to doubt the correctness of the judgment which was not concurred in by the majority, to listen with deference to the majority, and to reconsider its position accordingly dilutes the standard of proof beyond a reasonable doubt. The thrust of the charge admonishes the dissenting jurors that the return of a

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22. *Id.* at 501 (emphasis added). The *Allen* charge is restated in W. LABUY, *Manual on Jury Instructions in Federal Criminal Cases,* 33 F.R.D. 523, 611 (1963) [hereinafter cited as the *LaBuy* Instruction]. In addition to the original *Allen* charge language quoted in the accompanying text, the *LaBuy* Instruction appends this additional provision:

> If you should fail to agree on a verdict the case must be retried. Any future jury must be selected in the same manner and from the same source as you have been chosen, and there is no reason to believe that the case would ever be submitted to twelve men and women more competent to decide it, or that the case can be tried any better or more exhaustively than it has been here, or that more or clearer evidence could be produced on behalf of either side.

23. United States v. Sawyer, 423 F.2d 1335, 1347 (4th Cir. 1970) (Sobeloff, J., dissenting) *citing* Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962); Leech v. People, 112 Colo. 120, 123, 146 P.2d 346, 347 (1944); State v. Nelson, 63 N.M. 428, 431, 321 P.2d 202, 204 (1958). A West Virginia court of review has viewed the *Allen* charge as the "hanging instruction" in Levine v. Headlee, 148 W. Va. 323, 134 S.E.2d 892 (1964).

24. Note, *Due Process, Judicial Economy and the Hung Jury: A Re-examination of the Allen Charge,* 53 VA. L. REV. 123, 143 (1967); Thaggard v. United States, 354 F.2d 735, 739-41 (5th Cir. 1966) (Coleman, J., dissenting).

unanimous verdict depends upon their assent to the majority position—a consideration having no evidentiary basis and absent an instruction that a genuinely deadlocked verdict is permissible, intimates that the trial will not end until either a verdict of guilty or not guilty is returned.

DEFUSING THE DYNAMITE CHARGE: RECENT DEVOPMENTS IN THE SEVENTH CIRCUIT

Although the *Allen* charge has enjoyed wide acceptance in state as well as federal courts, the cases in recent years indicate a growing disenchantment with the instruction, and the courts are not as enthusiastic toward the *Allen* language as they had been. In 1968, the AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, impressed by the growing body of opinion that the charge is in most instances coercive, disapproved the use of the *Allen* instruction.[25] Urging the abandonment of the dynamite charge, the ABA STANDARDS submit that it be replaced by a statement of the jurors' duties in the charge-in-chief, and provide for its repetition in the event of a deadlock as a supplemental instruction. Without requiring the use of any particular language, the STANDARDS identify five points on which the jury might be properly advised:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.[26]

25. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY 145 (Approved Draft 1968) [hereinafter cited as the ABA STANDARDS].

26. *Id.* Section 5.4 continues at 146:

> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate

In the federal courts, only three circuits have entirely rejected *Allen*—the District of Columbia,[27] the Third Circuit,[28] and the Seventh Circuit.[29] Elsewhere the *Allen* charge has either been modified to include the use of balancing elements or upheld only in those circumstances where the trial court has strictly confined itself to the language of *Allen*.[30]

Within the Seventh Circuit, the proscription of the *Allen* charge did not commence until as recently as 1969. In *United States v. Brown*[31] the appellant, convicted of certain narcotic offenses, urged on appeal that the *Allen* charge given by the trial court *sua sponte* over the objection of defense counsel had violated his constitutional guarantee of a fair and impartial jury trial under the Fifth and Sixth Amendments. The jury, having heard evidence for one full day, retired at 11:45 a.m. following instructions by the court. The jury had deliberated almost five hours when the judge ordered them back into open court, reread the original instructions and then gave the jury an instruction containing the *Allen* language which was substantially in accord with the federal *LaBuy* Instruction.[32] Without reversing the conviction the *Brown* court rejected the contention that the supplemental charge had violated the Fifth and Sixth Amendments saying, "No court has held that the *Allen* instruction itself is unconstitutional. That is what the defendant has asked us to do. We are unwilling to take this step."[33] Nevertheless, the court concluded,

> [i]t would serve the interests of justice to require under our supervisory power that, in the future, district courts within this Circuit when faced with deadlocked juries comply with the standards suggested by the American Bar Association's Trial By Jury publication . . . In order to avoid the potential for prejudice and coercion to which we have referred, district courts in this Circuit are required henceforth to charge deadlocked juries in both criminal and civil cases in a *manner consistent with the recommended standards*.[34]

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for an unreasonable length of time or for unreasonable intervals.
(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

27. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971). The court *en banc* held that the charge was coercive and required that the ABA STANDARDS be complied with in future deadlocked jury situations.

28. United States v. Fioravanti, 412 F.2d 407 (3rd Cir.), *cert. denied*, 396 U.S. 837 (1969).

29. *See* note 31 *infra* and the accompanying text.

30. *See, e.g.*, United States v. Angiulo, 485 F.2d 37, 40 (1st Cir. 1973) and cases cited therein; United States v. Sawyers, 423 F.2d 1335, 1340 (4th Cir. 1970).

31. 411 F.2d 930 (7th Cir.), *cert. denied*, 396 U.S. 1017 (1970).

32. *Id.* at 931. *See* note 22 *supra* and the accompanying text.

33. 411 F.2d at 933.

34. *Id.* at 933-34 (footnotes omitted) (emphasis added). For a statement of the ABA STANDARD *see* note 25 *supra* and the corresponding text.

The use by the *Brown* court of the words "in a manner consistent with" the ABA STANDARDS was unfortunate. Although the intent of the *Brown* court was undoubtedly to avert continued use of the much criticized *Allen* charge, the opinion neglected to set forth a permissible instruction or to provide guidelines within which a trial judge might formulate a "consistent" jury charge.

Thus in *United States v. Bambulas*[35] the court of appeals was called upon to determine whether the language employed by the district court in its supplemental instruction was consonant with the standards required in *Brown*. Although the court of appeals affirmed the appellant's conviction finding the supplemental charge proper and "well within the perimeters of *Brown*"[36], the opinion offered no language to guide other trial courts in a similar dilemma.

Shortly thereafter, in *United States v. DeStefano*[37] the court of appeals was again confronted with determining whether a district court's supplemental charge was "consistent" with the ABA STANDARDS. In *DeStefano*, jury deliberations had commenced at almost 6 p.m. and ended at 10 p.m. that evening. The next morning one juror was taken to a health unit shortly after 8 a.m. to receive medication for an upset stomach. The condition subsided and the juror returned to continue the deliberations at 10:30 a.m. Thirty minutes later, a supplemental charge said to be in conformity with the *Brown* decision, was given to the jury. Though the instruction contained the elements enumerated in the ABA STANDARDS, the trial court embellished the charge with several additional phrases including language that the case "must be disposed of sometime," that the minority reconsider its opinion in light of the majority view, and that the majority should similarly reexamine its thinking.[38] Holding that the instruction had not violated the "spirit" of the *Brown* decision, the appellant's conviction was affirmed.

A review of post-*Brown* decisions reveals that *Brown* had not succeeded in alleviating the proliferation of appeals which the use of an *Allen*-type instruction had promoted. Despite the proscription of *Allen* charge instructions, the Seventh Circuit Court of Appeals continued to be called upon to ascertain whether the jury has been instructed by the trial court in a manner consistent with the ABA STANDARDS. Thus, scarcely surprising was the result in *United States v. Silvern*[39] wherein the court of appeals

35. 471 F.2d 501 (7th Cir. 1972).
36. *Id.* at 506.
37. 476 F.2d 324 (7th Cir. 1973).
38. *Id.* at 332, 333.
39. 484 F.2d 879 (7th Cir. 1973).

was once again called upon to approve a supplemental instruction which was, the court admitted, "exceedingly lengthy" and "far beyond the ABA STANDARDS."[40] Though affirming the appellant's conviction, the *Silvern* court, acting under its supervisory power, declared that district courts within the Seventh Circuit would thereafter be *required* to instruct both civil and criminal juries as follows:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of facts. Your sole interest is to ascertain the truth from the evidence in this case.[41]

The *Silvern* holding provided that this supplemental instruction was to be given *if* the trial court deemed one necessary and *only* in those instances where the instruction had been given *prior* to the time the jury had initially retired and in a footnote cautioned that the instruction quoted was the *only* deadlock instruction to be given. If any supplemental instruction relating to a deadlocked jury was given which deviated from the *Silvern* language, the court concluded, *a resulting conviction would be reversed and a new trial ordered.*[42]

THE UNCERTAIN DEMISE OF ALLEN: RECENT DEVELOPMENTS IN ILLINOIS

Proscription of the *Allen* charge is not endemic to the federal courts. Several state courts have prohibited the use of the dynamite instruction. Arizona led the way as early as 1959, forbidding the use of the *Allen* language entirely.[43] One year later the Montana courts reached a similar result holding in *State v. Randall*[44] that the giving of the *Allen* instruction was reversible

40. *Id.* at 882.
41. *Id.* at 883. This instruction is identical to Instruction 8.11, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961).
42. 484 F.2d at 883.
43. State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959).
44. 137 Mont. 534, 353 P.2d 1054 (1960).

error even where the counsel for the defense had failed to object. Alaska,[45] Pennsylvania[46] and Minnesota[47] have recently followed suit requiring an instruction consistent with the ABA STANDARDS; and it appears that Kansas, Idaho and Iowa strongly disapprove of and discourage any use of the *Allen* charge.[48]

As recently as 1968, the Illinois courts began to challenge the use of the *Allen* instruction in criminal cases. In *People v. Richards*[49] one appellate court held that the giving of a deadlock instruction in a criminal case where the jury had informed the court that it was hopelessly deadlocked constituted prejudicial error. While refusing to hold that the *Allen* instruction would be reversible error in any instance, the *Richards* court intimated that the only benefit of such instruction would inure at the risk of potential prejudice to the accused. It was this reasoning which prompted the court to conclude that, insofar as *criminal* proceedings were involved, the use of such an instruction ought not to be encouraged.

Following the lead of *Richards*, the Illinois Appellate Court for the third district, in *People v. Mills*[50] held that *any* supplemental instruction given to a deadlocked jury in a criminal proceeding would amount to reversible error. In *Mills*, the appellant had been convicted of obstructing a police officer following a two day trial. The jury began deliberations at 11:50 a.m. and reported itself "pretty well hung up on a couple of issues"[51] at 3:50 p.m. the same day, whereupon the trial court gave the jury *Illinois Patterned Jury Instruction—Civil* 1.05.[52] Reversing the appellant's conviction, the *Mills* court interpreted the failure of the drafters of the *Illinois Patterned Jury Instructions—Criminal* to include a deadlocked jury instruction as deliberate—indicative of their intent that no such instruction be given in a criminal setting.[53] The burden of proof beyond a reasonable doubt in a criminal case, the court reasoned, compelled the conclusion that a supplemental instruction, though proper in a civil case, is not warranted in a criminal prosecution.[54]

The Illinois Supreme Court was not moved by the reasoning

45. Fields v. State, 487 P.2d 831 (1971).
46. Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971).
47. State v. Martin, — Minn. —, 211 N.W.2d 765 (1974).
48. *See* United States v. Bailey, 468 F.2d 652, 668 (5th Cir. 1972) and cases cited therein.
49. 95 Ill. App. 2d 430, 237 N.E.2d 848 (1968).
50. 131 Ill. App. 2d 693, 268 N.E.2d 571 (1971).
51. *Id.* at 693, 268 N.E.2d at 571.
52. ILLINOIS JUDICIAL CONFERENCE COMMITTEE ON PATTERN JURY INSTRUCTIONS, ILLINOIS PATTERNED JURY INSTRUCTIONS—CIVIL (1961) [hereinafter cited as IPI]. The IPI-CRIMINAL have no counterpart instruction for deadlocked juries.
53. 131 Ill. App. 2d at 695, 268 N.E.2d at 573.
54. *Id.*

of the *Mills* court when in *People v. Prim*[55] the court was confronted with an *Allen* instruction as set forth in the federal *LaBuy* Instructions.[56] Holding that the instructions given by the trial court did not require reversal, the supreme court stated that "[w]hile acknowledging the possible coercive dangers inherent in a supplemental instruction given to a deadlocked jury, we do not feel that a jury should be left to grope in such circumstances without some guidance from the court."[57] Acting under its supervisory authority, the *Prim* court directed that trial courts faced with a deadlocked jury situation should comply with the instruction prescribed in the ABA STANDARDS and by implication overruled the *Mills* holding that *no* instruction be given to a deadlocked jury in a criminal prosecution. The *Prim* opinion, unlike the *Brown* court's decision in the Seventh Circuit, proceeded to set forth an illustrative instruction which the *Prim* court deemed consistent with the ABA STANDARDS.[58] It is noteworthy that the *Prim* instruction consists of the same mandatory language required within the Seventh Circuit as set forth in the *Silvern* decision. An obvious shortcoming of the *Prim* opinion, however, is that the court refused to hold that *only* this *Prim* instruction be given to a deadlocked jury, increasing the likelihood that the Illinois review courts will continue to be called upon to determine whether an aberrant instruction is consonant with the *Prim* holding. Thus the *Prim* decision, though making clear that Illinois trial courts are to comply with the ABA STANDARDS whenever instructions are given to a deadlocked jury in a criminal case, merely sets forth a permissible instruction leaving unanswered the propriety of an embellished *Prim* instruction or whether the *Allen* language may still be used as part of the *initial* jury charge.[59]

SOME PRACTICAL CONSIDERATIONS

The substantive or formal aspects of deadlocked jury instructions given in criminal prosecutions in the state and federal courts within Illinois have received considerable attention by the courts of review in recent months, and the parameters of permissible instructions are reasonably clear—at least with regard to

55. 53 Ill. 2d 62, 289 N.E.2d 601 (1972).
56. Id. at 71. For a statement of the *LaBuy* Instruction *see* note 24 *supra* and the corresponding text.
57. 53 Ill. 2d at 74, 289 N.E.2d at 608.
58. *Id.* at 75, 289 N.E.2d at 608-9.
59. With regard to this latter point, *see* People v. Iverson, 9 Ill. App. 3d 706, 292 N.E.2d 908 (1973) where the giving of the *Allen* charge with the initial instructions to the jury did not constitute reversible error. In People v. Casner, 20 Ill. App. 3d 107, 312 N.E.2d 709 (1974) the Appellate Court for the Second District held that the use of *Allen* language during *voir dire* did not constitute reversible error.

the *minimum* content of the supplemental instruction. Less clear, however, is the result in Illinois review courts where the trial court has not employed the permissible instruction found in the dicta of *Prim*, has departed from the ABA guidelines, or has embellished an otherwise permissible instruction with additional matters for the jury's consideration. In these instances it cannot be stated with certainty at what point the language of the trial court will cease to be "consistent" with the ABA STANDARDS and amount to reversible error on appeal. Consequently, there are a number of considerations warranting the attention of the practitioner which should not be overlooked.

Among the most significant considerations is the availability of an appealable error in the event the supplemental instruction given does not produce a favorable verdict. Should the trial court determine that the circumstances require a supplemental instruction, counsel disapproving such an instruction must make a timely objection. In the federal courts, objection to any supplemental instruction appears to be a prerequisite to any successful appeal by a defendant who seeks to question the propriety of the instruction. For example, in *Wegman v. United States*[60] it was held that since no objection had been taken at trial, the defendant was precluded from assigning as error on appeal the trial court's supplemental charge. Failure to make a timely objection was also noted by the review court in *Sikes v. United States*[61] where the trial court's use of the *Allen* charge was affirmed. The District of Columbia Court of Appeals reached the same result in *United States v. Johnson*.[62] Most instances where no objection was made to the court's instruction would fall within the Federal **Rule 30:**

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.[63]

There are instances where the failure to make objection to the instruction will not preclude raising the issue on appeal. Though Federal Rule 52[64] provides that any error, defect, or irregularity which does not affect substantial rights of the defendant will be disregarded on appeal, 52(b) states that errors or defects which do affect substantial rights may be noticed by the reviewing court though counsel did not bring them to the atten-

60. 272 F.2d 31 (8th Cir. 1959).
61. 279 F.2d 561 (5th Cir. 1960).
62. 432 F.2d 626 (D.C. Cir.), *cert. denied*, 400 U.S. 949 (1970).
63. FED. R. CRIM. P. 30.
64. FED. R. CRIM. P. 52.

tion of the trial court. The plain error rule of 52(b) would undoubtedly provide a basis for appealing the supplemental instruction where no objection had been taken, provided counsel was prepared to show that the instruction had substantially affected the rights of the appellant. Generally, federal courts of appeal have not been receptive to this approach and are reluctant to find plain error in instructions where no objection was made by counsel.[65] Nevertheless, there are instances where courts of review have considered the trial court's instruction absent an objection by counsel. For example, no objection was made by defense counsel to the supplemental instruction which the court of appeal considered in *Jenkins v. United States.*[66] The same was true in *United States v. Smith.*[67]

The result in an Illinois state court would be much the same. Illinois review courts require that an objection be taken to the supplemental instruction as a prerequisite to raising the objection on appeal.[68] It is noteworthy, however, that in Illinois state courts counsel is not limited to objecting to the instructions prepared by his adversary. Supreme Court Rule 451(b) permits objection to an instruction without regard to whether the objecting party had prepared the instruction. This provision will be of particular importance where counsel has prepared a permissible instruction, yet believes that the court should not give the jury a supplemental instruction at that time. (Where, for instance, it is believed by counsel that any supplemental instruction, regardless of its form, would coerce the jury.) The Supreme Court of Illinois has also adopted a plain error rule[69] identical to Federal Rule 52(b) providing that errors, though not objected to in the trial court, may be noticed by the reviewing court where substantial rights have been affected. However, like its federal counterpart, Rule 615(a) is directory—not mandatory, and review courts will rely upon it only in their discretion.

Assuming that objection has been made prior to the reading of the supplemental charge, thus removing any question of its usefulness as a basis for appeal, counsel must evaluate the manner in which the supplemental instruction may be attacked. Among the bases for attacking a supplemental instruction, the most recurring theme and one to which review courts are most receptive, is that the instruction was *coercive.* The grounds for such an attack may take several forms.

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65. *See* Huffman v. United States, 297 F.2d 754 (5th Cir.), *cert. denied,* 370 U.S. 955 (1962); Andrews v. United States, 309 F.2d 127 (5th Cir.), *cert. denied,* 372 U.S. 946 (1963).
66. 330 F.2d 220 (D.C. Cir.), *rev'd per curiam,* 380 U.S. 445 (1965).
67. 353 F.2d 166 (4th Cir. 1965).
68. ILL. S. CT. R. 451(b)(c).
69. ILL. S. CT. R. 615(a).

On appeal it may be argued that the *language* of the instruction itself was coercive. While this type of objection maintains its vitality in those jurisdictions where *Allen* charge instructions are utilized, this ground of attack will not be particularly useful in state and federal courts within Illinois where the permissible language which the court may use is greatly restricted and the content of the supplemental instruction is to a large extent prescribed. The *Silvern* decision[70] has particularly emasculated this ground of attack in the Seventh Circuit as it prescribed the precise language to be used by the trial court. Within the limits of the *Prim* decision, however, inasmuch as the content of the instruction was not prescribed, the likelihood that the trial court may insert coercive language persists. *Prim,* it will be recalled, requires an instruction consistent with the ABA STANDARDS. Since the ABA STANDARDS do not require the use of any specific language, merely earmarking five points on which a jury might be properly advised, one cannot be certain that the trial court's instruction will not contain coercive language. Just as *Allen* charge instructions have often been embellished with allusions to the expense attendant to retrial, the delay caused by a mistrial, etc., it is likely that some courts may similarly wish to append such language to the ABA guidelines. In such instances, it may be urged on appeal that the surplus verbage was coercive or that the appended language and the ABA STANDARDS, taken as a whole, so operated as to have a coercive import.

Assuming that the language of the instruction cannot be shown to have been coercive, an argument may still be made on the ground that the instruction, though not coercive in itself, was given under such circumstances as to have had a *coercive effect* on the jury. This argument is particularly viable in Illinois state courts as well as other jurisdictions which require instructions consistent with the ABA STANDARDS. The ABA STANDARDS approve the repetition of the instruction in a hung jury situation after the jury has reported itself deadlocked.[71] Although the coercive language of the *Allen* charge may have been eliminated, the ABA STANDARDS perpetuate the type of coercion inherent in *any* supplemental instruction. One commentator has observed that a supplemental charge given to a jury after its deliberations have commenced will be given at a psychological low point in the proceeding[72]—a time when the jurors have endeav-

70. *See* note 41 *supra* and the corresponding text. It should be recalled that this language is mandatory and that in any proceeding in which the district court departs from this instruction an appeal will bring reversal.

71. *See* note 26 *supra* and the corresponding text.

72. Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. CHI. L. REV. 386, 388-89 (1964).

ored without success to reach an agreement based upon the evidence. Under these circumstances any statement by the court calculated to bring agreement is apt to meet with something less than critical evaluation by the members of the jury.[73] No instruction, regardless of its form, can overcome the psychological pressure which it will exert on the dissenting jurors to reach a verdict. Judge Stouder, writing for the majority in *Mills* recognized the inherently coercive nature of instructions given to juries unable to agree:

> Its message is by necessary implication directed primarily to the minority juror or jurors or to that group less adamant in its convictions . . . . [T]*he benefits to be gained from the giving of such an instruction are not apparent unless it has some coercive effect.*[74]

The *length of time* following the reading of the instruction to the deadlocked jury and the return of its verdict may also be cited to underscore the coercive effect of the supplemental instruction. Where a jury has been unable to agree on a verdict for a length of time and a verdict is returned shortly after the supplemental instruction is given, the circumstances may be said to sustain the inference that the instruction had a coercive effect —that the jury misinterpreted the instruction as an order by the court to come to an agreement. Cases dealing with coercion as evidenced by the prompt return of a verdict do not reveal any minimum time period within which the return of a verdict will be deemed, on review, to have been coerced. Nevertheless, in those situations where a verdict is returned shortly after the supplemental instruction was delivered and the deliberations prior to the deadlock were lengthy, review courts will be more likely to find that the trial court's instruction had the effect of coercing the verdict.[75]

It may also be urged on appeal that the supplemental instruction, though not containing offensive language, had a coercive effect in that the charge was given *too soon* after the jury had commenced its deliberations or, as frequently occurs that the

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73. *Id.*

74. 131 Ill. App. 2d at 695, 268 N.E.2d at 572 (emphasis added).

75. In United States v. Rogers, 289 F.2d 433 (4th Cir. 1961) the jury reported itself deadlocked after a four hour deliberation. An *Allen* charge was given and a verdict returned a few minutes later. Reversing the defendant's conviction, the court of appeals stated:

> The time interval was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority held steadfastly until the charge was given.

Id. at 436. *See also* United States v. Smith, 353 F.2d 166 (4th Cir. 1965) (verdict returned after 40 minutes); Williams v. United States, 338 F.2d 530, 533 (D.C. Cir. 1964) and Wissell v. United States, 22 F.2d 468, 470 (2d Cir. 1927); *but see* Moore v. United States, 345 F.2d 97, 98 (D.C. Cir. 1965).

instruction was given *sua sponte* by the trial court before the jury had reported its inability to agree. Where the instruction is determined to have been given too soon after the jury has commenced its deliberations, the court has interfered with the independent deliberation of the jury. The action by the trial court may be perceived by the jurors as a cue by the judge that their verdict is overdue. Such error, of course, will be difficult to substantiate on appeal. Whatever coercive impact the instruction may have had on the jurors, such evidence will not be found within the record. Furthermore, the majority of courts which have dealt with the issue have held that once a verdict has been returned the affidavits of an individual juror indicating that the verdict had been coerced are not admissible to overturn the verdict.[76] Polling the jurors[77] when the verdict is returned will provide an opportunity for any juror to indicate that he cannot in good conscience concur with the verdict of the majority; however, the obvious shortcoming of this device is that few jurors will admit that they have been coerced into agreeing with the majority. Furthermore, the failure of the record to show that any juror wished to change his vote when polled would be a substantial burden to overcome when arguing, on appeal, that the verdict of the jury had been coerced.

A Final Consideration

In a recent study,[78] former jurors were polled regarding the extent to which the jurors felt a supplemental instruction had aided the jury in reaching its verdict. Of those jurors who had participated in a criminal trial wherein additional instructions had been given, slightly more than 45 percent of the former jurors reported that they felt the supplemental instruction had not aided them in returning the verdict. In one county as many as 47.8 percent of the jurors responded that they believed the supplemental instruction had not aided them in reaching the verdict.[79] These figures cast some doubt on the assertion that supplemental jury instructions are justified as a viable device for initiating productive deliberations. Furthermore, it has been observed that the average juror approaches his duty with a sense of responsibility and fairness.[80] Though mistrials do involve ex-

76. 53 Am. Jur. *Trial* 1109-1116; Annot., 97 A.L.R. 1038 (1935).

77. Fed. R. Crim. P. 31(d) provides:
When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

78. Note, *Jurors Judge Justice: A Survey of Criminal Jurors,* 3 N. Mex. L. Rev. 352 (1973).

79. *Id.* at 359.

80. Note, note 24 *supra* at 146.

pense, create delay, and must contribute to the congestion of court calendars—considerations not to be cavalierly dismissed, there is little reason to criticize a hung jury where it is the consequence of the conscientious deliberation of responsible, fair-minded jurors unable to agree that the evidence proves the accused guilty beyond a reasonable doubt. Moreover, available data suggest that a deadlocked jury resulting in mistrial—though an important phenomenon—is not of sufficient magnitude to impair the efficient administration of justice. Recalling that only about one-seventh of all felony prosecutions result in a trial by jury and that as few as five percent of those jury trials are likely to end in a mistrial from a hung jury, the instances where a deadlock is not the result of genuine disagreement based upon the evidence seems particularly remote. Less remote is the likelihood that the otherwise deadlocked proceeding will be infected with error from the delivery of an improper instruction necessitating the expense and delay of an appeal which if the proponent is successful will result in a new trial. On the other hand, where no supplemental instruction is given, the mistrial which would ultimately follow the deadlock would also in most instances lead to a retrial. Such a procedure would obviate the necessity of an appeal which might otherwise burden an accused and, more importantly, would underscore the integrity of our system of justice by preserving the high regard which the law has always accorded the dissent of a minority. Viewing the infrequency of the deadlocked jury situation, recognizing that most jurors will endeavor to perform their duties fairly and conscientiously, and noting that the responses of a substantial number of jurors interviewed have cast serious doubt on the assistance supplemental instructions provide in aiding the jury reach its verdict, it is submitted that the trial court as well as the prosecution and defense counsel seriously consider whether *any* supplemental instruction is warranted when the jury indicates its inability to reach a verdict. In spite of the effort by many courts and the proponents of the ABA STANDARDS to eliminate much of the coercive *substance* of supplemental instructions, no language addressed to a deadlocked jury can eliminate the inherent coercion which even a balanced instruction must place upon a dissenting minority. The very act of delivering one of the numerous palliatives to a deadlocked jury is itself an invasion into the province of the jury since it rejects the conclusion of the jurors that they cannot come to a unanimous verdict based upon the evidence. Moreover, assuming an instance may unfold where one stubborn juror refusing to cooperate or to participate in honest deliberations stands in the way of a unanimous verdict, it is

not likely that such a juror will yield to the blandishments of a supplemental instruction.[81]

CONCLUSION

Though the United States Supreme Court has consistently declined to overrule the *Allen* case[82] the courts of review, acting under their supervisory power, have emasculated this ancient precedent. Today in both the federal and state courts in Illinois the language of *Allen* is no longer recognized as a permissible supplemental instruction. Whether or not the mandatory language of *Silvern* will provide a viable alternative in the Seventh Circuit is uncertain. Similarly, one may only speculate as to the ultimate parameters of a permissible instruction within the state courts—for the Illinois courts of review, in the wake of *Prim*, must determine on a case by case basis whether a particular trial judge's language can be said to be consistent with the ABA STANDARDS. It is probable that review courts will continue to focus upon the *language* of the instruction, reversing where it is felt the wording is coercive, declining to reverse where the language does not suggest a coercive import. Apart from their sensitivity to coercive language within the supplemental charge, it is likely that the review courts within Illinois will continue to overlook the inherent coercion of a supplemental instruction; that subtle pressure on the jurors to return a verdict which no rephrasing or balancing can overcome. This type of coercion is a very real phenomenon and should not be ignored merely because it cannot be discerned from a review of either the record or the evidence. While vast inroads have been made since the days when deadlocked juries were carried about in oxcarts, a painstaking re-examination of the nature of the supplemental instruction and its effect on the independent deliberation of the jury may be justified.

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81. *Id.*

82. C. WRIGHT, 2 FEDERAL PRACTICE AND PROCEDURE § 502 (1969). The Supreme Court has declined to grant certiorari on numerous occasions when *Allen* was at issue. *See, e.g.*, Sanders v. United States, 415 F.2d 621 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970); United States v. Johnson, 432 F.2d 626 (D.C. Cir.), *cert. denied*, 400 U.S. 949 (1970); Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963).