No. 10-554

In the Supreme Court of the United States

BRADLEY J. STINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NORTHERN CALIFORNIA INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Northern California Innocence Project (NCIP) is a nonprofit legal clinic and criminal justice resource center affiliated with the law school at Santa Clara University. As a member of the Innocence Network, it works to exonerate innocent prisoners and pursue legal reforms that address the causes and consequences of wrongful convictions. Recent research validates the NCIP's experience in post-conviction DNA exonerations that judicial measures that intentionally or unintentionally target holdout jurors to arrive at a verdict can and often do generate wrongful convictions. The NCIP respectfully submits that the Court should grant certiorari to review the propriety of "dynamite" instructions and the other potentially coercive judicial conduct at issue here and to ensure that the Fifth and Sixth Amendment rights of criminal defendants are fully protected in future proceedings.

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[1] In accordance with Supreme Court Rules 37.2 and 37.6, counsel for the *amicus* represent as follows: None of the parties or their counsel, nor any other person or entity other than the *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief was authored in its entirety by counsel for the *amicus*. The parties received timely notice of the *amicus*'s intent to file this brief and gave their consent. Letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

It has been more than two decades since this Court last addressed the propriety of jury instructions modeled on the charge it first approved in *Allen v. United States*, 164 U.S. 492 (1896). Reexamination of those so-called "dynamite" instructions is necessary for at least two reasons. First, recent research demonstrates that such instructions imperil a criminal defendant's constitutional rights because they tend to exert strong pressure on holdout jurors to abandon their beliefs and side with the majority. Second, recent research shows that when jurors do hold out against the majority, it is typically not out of pique or obduracy, but due to an honest and reasonable disagreement with their fellow jurors as to the probative value of the evidence. Those new developments, along with the sheer number of federal-court appeals engendered by the lack of clear rules in this area, make clear that the time has come for the Court to evaluate when, if ever, an *Allen* instruction is appropriate.

Although this Court has not addressed the coercive effect of the *Allen* charge in more than twenty years, it never has addressed the circumstances under which a trial court may remove a deliberating juror without the consent of the parties or the standard under which such a decision is reviewed by an appellate court. Those issues are similarly fraught with serious implications for the constitutional rights of criminal defendants and therefore are ripe for review by the Court.

ARGUMENT

This case presents two critical questions: First, when a juror is the lone holdout in favor of acquittal and has stated as much in open court, can the trial judge issue a "dynamite" instruction urging the jury to continue deliberating and return a verdict? Second, what degree of scrutiny is warranted when a trial judge removes that lone holdout from the jury? The petitioner has set forth in detail the clear circuit splits on both issues. *See* Pet. 16-24; 26-29. Those splits provide a sufficient ground for the grant of certiorari in this case and will not be revisited here. Instead, this brief highlights the broader implications that these issues have for innocent criminal defendants and demonstrates why those implications warrant a grant of certiorari.

I. The Issues Implicated By Petitioner's Claims With Respect To The Use Of The "Dynamite" Charge Are Ripe For Examination.

A. There Is A Dearth Of Precedent From The Court With Respect To The Coercive Effect Of "Dynamite" Instructions.

More than a century ago, in *Allen v. United States*, 164 U.S. 492 (1896), the Court declined to reverse a defendant's conviction based on the delivery of a jury instruction encouraging the jury to reach a verdict. The instruction at issue, which was read to the jury after it had begun deliberating and then requested further direction from the court, stated, among other things, that it was the jurors' "duty to decide the case if they could conscientiously do so."

Id. at 501. The instruction also addressed the jurors in the minority, advising "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men, equally honest, equally intelligent with himself." *Id.* In approving the instruction, the Court noted that "[i]t certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself." *Id.*

Subsequent decisions have grappled with the inherent potential such instructions possess to coerce a jury's verdict. In *Jenkins v. United States*, 380 U.S. 445, 446 (1965), this Court held that a trial judge's instruction to the jury that "'[y]ou have got to reach a decision in this case,'" was impermissibly coercive, reversed the defendant's conviction, and remanded for a new trial. Following *Jenkins*, this Court did not revisit the propriety of *Allen*-type instructions until *Lowenfield v. Phelps*, 484 U.S. 231 (1988). There, the Court concluded that a jury instruction that directed jurors to "'not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong,'" was permissible. *Id.* at 235, 241. Notably, however, the instruction in *Lowenfield* did not invite the minority to reevaluate its position and it further directed the jurors to "'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 mere purpose of returning a verdict.'" *Id.* at 235.

In the more than twenty years that have passed since *Lowenfield*, the Court has not taken up the question of the coercive effect of *Allen*-type jury instructions. However, the fact that the Court has not addressed the issue in recent times does not mean that the law is now well settled. Different circuits apply different rules of law in this area, as demonstrated most prominently by the circuit split identified by the petitioner. *See* Pet. 16-24. *See also* George C. Thomas III and Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill Rts. J. 893, 913 (2007) ("The wildly varying approaches of the federal courts of appeal suggest that there is simply no federal law about how to charge deadlocked juries."). Moreover, the law when applied has confusing and unpredictable results. The Fourth Circuit considers no fewer than nine separate factors in connection with determining whether a "dynamite" instruction has an impermissibly coercive effect on the jury. *See Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000) (identifying as "some of the relevant considerations in reviewing an *Allen* charge for coerciveness" the following: "the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion"). The Court should grant certiorari to supply some necessary clarity to this area of the law.

B. Research After *Lowenfield* Demonstrates An Additional Need For Action By This Court To Safeguard The Rights Of Criminal Defendants.

The time is ripe to clarify the law on the issue of "dynamite" instructions for another reason – because we now know much more about the *Allen* charge than we did in 1988. Since *Lowenfield*, three relevant lines of empirical research have emerged, demonstrating: (1) the powerful coercive effects that "dynamite" instructions have on holdout jurors; (2) the dubious nature of the benefits purportedly gained by the use of such instructions; and (3) the proliferation of appeals that undermines any argument from efficiency in favor of *Allen* charges. These concerns, taken together, have prompted a growing chorus of voices to underscore the need for the Court to reconsider the propriety of the *Allen* charge.

1. Recent research has demonstrated that delivery of an *Allen* charge can have a severe coercive effect that subverts the willingness of a holdout juror to stand firm against a majority of his or her colleagues. One study, published in 1990, reported the results of an experiment in which participants, led to believe that they were a part of a mock jury, passed and received notes with individuals they believed to be their fellow jurors with the goal of arriving at a verdict. *See* Saul M. Kassin, et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 Law & Hum. Behav. 537 (1990). At the outset of the experiment, each participant read a four-page summary of a criminal case and recorded his or her preliminary views with re-

spect to the guilt or innocence of the hypothetical defendant. *Id.* at 540. The participants were then randomly classified as "majority" or "minority" jurors. *Id.* at 539-40. Jurors assigned to the "majority" received two notes in the early phase of deliberations that agreed with their position and one that did not. *Id.* at 540. Jurors assigned to the "minority" received three notes disagreeing with their position. *Id.* After a set number of notes had been passed, some jurors were read the *Allen* instruction and a control group was not. *Id.* at 541. The jurors were then evaluated on the basis of whether they changed their votes and surveyed as to their perceptions of the process. *Id.* at 541-42. The jurors' explanations for their ultimate votes were also analyzed. *Id.* at 542. The study found that "[a]mong subjects who were subjected to the dynamite charge, . . . those in the minority were more likely to capitulate than those in the majority." *Id.* at 543. Ultimately, the study concluded that "the dynamite charge causes jurors in the minority to feel pressured and change their votes and that it encourages those in the majority to exert increasing amounts of normative influence." *Id.* at 547.

A follow-up study in 1993 reached similar conclusions. *See* Vicki L. Smith and Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 Law & Hum. Behav. 625 (1993). There, six- to twelve-person mock juries were asked to deliberate with respect to a hypothetical criminal law fact pattern. *Id.* at 629. Again, the participants' preliminary views as to guilt or innocence were solicited and the mock juries were structured based on those initial responses such that each mock jury was "stacked 4-to-2 in favor of conviction or ac-

quittal." *Id.* As with the note-passing experiment, certain groups of participants were read the *Allen* charge after deliberating for some time, while certain control groups received no such instruction. *Id.* Deliberations then continued until a unanimous verdict was reached or until 50 minutes had elapsed. *Id.* at 630. Video of the deliberation sessions and questionnaires filled out by the participants were then analyzed by the researchers. *Id.* Observing that "[t]here was a sharp increase in vote changes among minority jurors who received the dynamite charge, but not among those in the majority," the researchers concluded that "the dynamite charge moved deadlocked juries toward unanimity, selectively causing minority jurors to change their votes." *Id.* at 640. The researchers also found some suggestion that a dynamite charge "may hasten the deliberation process in juries favoring conviction, but not in those favoring acquittal." *Id.* at 634.

Others have weighed in with similar observations. *See, e.g.*, Monica K. Miller and Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?* Monitor on Psychol., Mar. 2008, at 18, *available at* http://www.apa.org/monitor/2008/03/jn.aspx (noting that "[a] judge's dynamite charge could make jurors feel coerced into changing their votes" and "also leads those in the majority to exert more pressure on jurors in the minority"). Importantly, "this research suggests that minority jurors are not conforming based on *informational influence* (i.e., because they are actually persuaded), but because of *normative influence* (i.e., because of social pressure)." *Id.* Indeed, the Court itself has recognized that "if [the trial judge] fails to discharge a jury which is unable

to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

The results of this research underscore the serious constitutional questions implicating a criminal defendant's Fifth and Sixth Amendment rights raised by the Petitioner. *See* Pet. 10-15. As the Court has recognized, "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" *Quercia v. United States*, 289 U.S. 466, 470 (1933) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). Viewed through this prism, several portions of the jury instructions given in this case raise serious constitutional concerns, most notably the trial judge's observations that "it is not uncommon how much strain it is on each person to be here for a long period of time," that "it is s [sic] desirable that a verdict be reached," and that it is jurors' "sworn duty to consult with one another and to consider each other's views." Pet. App. 48a. As the research demonstrates, those instructions likely would have a powerful coercive impact on any lone juror holding out for acquittal.

2. A separate line of research calls *Allen*'s social utility into question. According to this research, holdout jurors generally adhere to their positions not because they misunderstand the facts or the law or are simply being obstinate, but because they have

good-faith disagreements with their fellow jurors about the evidence. In many cases, then, *Allen* charges presumably cause holdout jurors to abandon good-faith, well-reasoned and well-supported positions that favor the acquittal of criminal defendants. In an article reporting on a recent comprehensive study of hung juries by the National Center for State Courts, a reporter noted that "the biggest surprise to researchers was that juries deadlock when they ought to deadlock – when the evidence is evenly split between both sides." Kate Marquess, *Juries Hang Up on Close Calls, Study Says: Data Shows That Evidence, not Diversity, Is the Main Factor*, A.B.A. J. E-Report, Oct. 18, 2002, *available at* WL 1 No. 40 ABAJREP 3. As the study itself, a four-year effort funded by the National Institute of Justice, observed: "By far, the most frequent primary cause of hung juries was weak evidence." Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?* Nat'l Ctr. for St. Cts. 76 (Sept. 22, 2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

A recent study of jury deliberations in Arizona state court corroborates those conclusions. *See* Shari Seidman, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006). The Arizona Supreme Court permitted the researchers to videotape fifty civil trials and jury deliberations between 1998 and 2001. *Id.* at 204. Of the fifty cases, sixteen ended deliberations with at least one holdout on at least one claim. *Id.* at 212. Upon reviewing the sixteen holdout cases, the researchers "found no evidence that the jurors who were outvoted by the ma-

jority were advocating indefensible positions." *Id.* at 220. Instead, "[i]n each case, the holdout jurors articulated reasons for their positions based on judgments about appropriate behavior, the credibility of the witnesses, the nature of appropriate compensation, or some combination of these three factors." *Id.* One final noteworthy aspect of the study was its survey of the trial judges for their opinions on the merits of their respective cases. Remarkably, the researchers found that for six of 16 holdout cases, the trial judge "would have sided with the holdouts." *Id.* at 221-22. These findings are consistent with the experiences of the NCIP and other Innocence Network member organizations in post-conviction DNA analysis exonerations and counsel a reevaluation by the Court as to whether "dynamite" instructions achieve any worthwhile purpose, or whether they instead simply tend to generate convictions where at least one juror may have a genuine and reasonable doubt as to guilt.

3. Recent research also has illuminated a third consideration that supports certiorari – uncertainty with respect to the law of *Allen* charges is clogging the lower courts' dockets and offsetting any perceived gain in efficiency that accompanies the use of the charge. *See* Mark M. Lanier and Cloud Miller III, *The* Allen *Charge: Expedient Justice or Coercion?* 25 Am. J. Crim. Just. 31, 36 (2000) (identifying 566 cases from January 1964 through March 1999, "in which a judge actually issued the *Allen* Charge, a guilty verdict was rendered, and a Federal Circuit Court reviewed the case on appeal"). Counsel for *amicus* found 165 decisions by the federal circuit courts of appeal from January 2000 to present that

cite to the Court's decision in *Allen*. So, *Allen* instructions erode a criminal defendant's constitutional rights to a fair trial and unanimous verdict without producing any real offsetting gain in the efficiency of the justice system. As the commentators who conducted the study referenced above observed, "[w]hile the lower courts may view the *Allen* Charge as an expedient practice, it ultimately delays and increases the psychological, physical, and monetary burdens associated with the legal process." *Id.* at 39. Certiorari is warranted for that reason as well.

II. The Court Should Use This Opportunity To Provide Guidance With Respect To The Circumstances Under Which Removal Of A Holdout Juror Is Appropriate And The Appropriate Standard Of Review On Appeal.

Two provisions of the Federal Rules of Criminal Procedure confer on the trial court the authority to remove a juror following the commencement of deliberations without the consent of the parties. The first is Rule 23, which was amended in 1983 to provide in part: "After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b)(3). The other provision is Rule 24, which was amended in 1999 to provide in part: "The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after delibe-

rations have begun, the court must instruct the jury to begin its deliberations anew." Fed. R. Crim. P. 24(c)(3). The Court never has addressed the standard to be applied by the trial court when it elects to remove a deliberating juror pursuant to either of those provisions. Nor has it considered the appropriate standard to be used on appeal when evaluating such a decision by the trial court – the same issue that is the subject of the second circuit split identified by petitioner. *See* Pet. 26-29.

As petitioner's brief makes clear, these issues raise serious constitutional concerns, particularly in the context of the removal of a known holdout juror. As one commentator has noted, "dismissing a juror when the judge knows the juror is the lone holdout for acquittal – and the remaining jurors are aware that the judge acted with this knowledge – may send a message to the remaining jurors that the judge endorses their position." Diane E. Coursell, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. Rev. 203, 241 (citing *Perez v. Marshall*, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting)). Moreover, the substitution of an alternate under Rule 24(c) does not correct the problem. *See id.* at 253 ("The judge's decision to discharge a dissenting juror and replace her with an alternate, however, may steel the remaining jurors as to the correctness of their opinions. This judicial reinforcement can make it particularly hard for the newly substituted alternate to disagree.") Because these issues never have been addressed by the Court and because they raise significant concerns over the conviction of innocent defendants, the Court should grant certiorari to address them as well.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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