

RETRACTED

DISTRICT COURT, ARAPAHOE COUNTY  
STATE OF COLORADO  
Arapahoe County Justice Center  
7325 S. Potomac Street  
Centennial, Colorado 80112

Filed

AUG 16 2013

THE PEOPLE OF THE STATE OF COLORADO vs.  
Defendant(s):

CLERK OF THE COMBINED COURTS  
ARAPAHOE COUNTY, COLORADO

**JAMES EAGAN HOLMES**

COURT USE ONLY

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Case Number: **12CR1522**  
Division: **201**

**PEOPLE'S MOTION REGARDING JURY INSTRUCTION CONCERNING  
DUTY TO DELIBERATE [P -050]**

**CERTIFICATE OF CONFERRAL**

The prosecution conferred with the defense counsel prior to the filing of this motion, and the defense counsel has indicated that they will file a response to this motion.

GEORGE H. BRAUCHLER, District Attorney in and for the Eighteenth Judicial District, County of Arapahoe, State of Colorado, by and through his duly appointed Chief or Senior Deputy District Attorney, respectfully submits this motion.

1. The Defendant may suggest during voir dire that a juror does not have a duty to deliberate during the sentencing phase of trial. This position is incorrect as a matter of law. The People move that the defendant be ordered not to argue or imply to jurors that they have no duty to deliberate, during both voir dire and the remainder of the trial. The People will also be requesting that the court provide a duty to deliberate instruction during the penalty phase of the trial, and will provide the proposed instruction at the appropriate juncture.

**I. The Supreme Court Has Held There is a Duty to Deliberate in Death Penalty Cases**

2. The United States Supreme Court in *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (a death penalty case) cited approvingly of *Allen v. United States*, 164 U.S. 492 (1896) (a death penalty case). In *Allen* the Court stated:

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the Jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It 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. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.

164 U.S. at 501-02. This *Allen* case was the fountainhead of the "Allen instruction." The *Lowenfield* Court cited this language approvingly. 484 U.S. at 237-38.

3. The *Lowenfield* Court went on to state:

The State has in a capital sentencing proceeding a strong interest in having the jury "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775 (1968). Surely if the jury had returned from its deliberations after only one hour and informed the court that it had failed to achieve unanimity on the first ballot, the court would incontestably have had the authority to insist that they deliberate further. This is true even in capital cases such as this one and *Allen*, even though we are naturally mindful in such cases that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964 (1978).

484 U.S. at 238-39. The Supreme Court is thus stating that the "conscience of the community" is expressed in a unanimous decision after deliberations. The conscience of the community is not expressed by a single juror with a single mindset who shuts out all discussions concerning the case. The reliability of death penalty sentencing is impaired, if not defeated, by a juror who chooses to refuse to deliberate.

## II. The Colorado Statute Requires that the Jury Deliberate

4. The Colorado capital sentencing statute provides that the jury must deliberate. The statute provides: "After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury **shall deliberate ...**" C.R.S. § 18-1.3-1201(2)(a). Further, "if the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment." C.R.S. § 18-1.3-1201(2)(d). The statute, therefore, requires that the jurors deliberate toward reaching a unanimous verdict.

5. In similar language, the North Carolina statute provides that "after hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate ..." N.C.G.S.A. § 15A-2000 (b)(1). The North Carolina Supreme Court found that similar language in its statutes required that the jury "properly fulfill its duty to deliberate genuinely for a reasonable period of time in its effort to exercise guided discretion in reaching a unanimous sentencing recommendation..." *State v. McCarver*, 462 S.E.2d 25, 41 (N.C. 1995).

6. The Texas statute provides that "the court shall charge the jury that (1) in deliberating on the issues..." TEX. CODE ANN. § 37.071(2)(d)(1). The Texas Court of Criminal Appeals has made the same finding, that the language of the statute requires that the jury deliberate. *Patrick v. State*, 906 S.W.2d 481, (Tex. Crim. App. 1995) (holding that the trial court should not inform the jury of the life sentence result of a hung jury stating "to inform the jury of the effect of its answers to the special issues is to invite the jury to avoid its statutory duty" to deliberate. "This interferes with the jury's fact finding function."); *Howard v. State*, 941 S.W.2d 102, 124-25 (Tex. Crim. App. 1996) (holding "the law places upon the jury a statutory duty to deliberate and answer the special punishment issues.").

### III. Colorado Has Adopted and Modified the Allen Instruction

7. While the issue has not been addressed specifically concerning sentencing deliberations in a death penalty case in Colorado, the Colorado Supreme Court has long adopted a modified Allen instructions informing jurors of their duty to deliberate in deadlock situations. In *Allen v. People*, 660 P.2d 896, 898 (Colo. 1983) the Supreme Court set forth the requirements of a modified *Allen* instruction:

(a.) 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;

(b.) Each juror must decide the case for himself, but only after impartial consideration with his fellow jurors;

(c.) In the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and

(d.) No juror should surrender his honest conviction as to the weight and effect of the facts solely because of the opinion of the fellow jurors or for the mere purpose of returning a verdict.

8. The original Supreme Court directive concerning these procedures was issued September 22, 1971. *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984). The giving of the modified *Allen* instruction has been upheld in numerous Colorado appellate cases. See, e.g., *People v. Grace*, 55 P.3d 165, 170 (Colo. App. 2001); *People v. Watson*, 53 P.3d 707, 713-14

(Colo. App. 2001); *People v. Raglin*, 21 P.3d 419, 423-24 (Colo. App. 2000); *People v. Saltray*, 969 P.2d 729, 732-33 (Colo. App. 1998); *People v. Harris*, 914 P.2d 425, 431 (Colo. App. 1995). Further, the Colorado Jury Instructions Criminal, 38:14, provides a pattern modified Allen instruction. That pattern instruction is:

### **38: 14 Supplemental Instruction -When Jurors Fail to Agree**

Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts which you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching a verdict, 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 the facts. Your sole interest is to ascertain the truth from the evidence in the case.

9. The Colorado Supreme Court has stated that a jury verdict "requires a free and untrammelled deliberative process that expresses the conscientious conviction of each individual juror." *People v. Lewis*, 676 P.2d 682, 686 (Colo. 1984).

### **IV. Federal Pattern Instructions and Case Law Support the Duty to Deliberate**

10. The Federal Jury Practice and Instructions, Pattern Criminal Jury Instructions, Federal Judicial Center, Part 1, C. The Charge, 10 places the modified *Allen* instruction in the general charge to the jury. The instruction reads, in part:

It is your duty, as jurors, to talk with one another and to deliberate in the jury room. You should try to reach an agreement if you can. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you are wrong. But do not give your honest beliefs solely because the others think differently, or merely to get the case over with.

The commentary to the instruction reads: "in the discretion of the trial judge, this instruction can be given either as part of the charge or in response to a report of deadlock by a jury."

11. Also, from the Federal Jury Practice and Instructions, is the following pattern instruction for criminal cases, Part II, 20:01, in part, as the charge to the jury:

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if convinced it is erroneous. Do not surrender your honest convictions, however, solely because of the opinion of your fellow jurors or for the mere purpose of thereby being able to return a unanimous verdict.

12. The Tenth Circuit has moved the Allen instruction from the situation of a deadlocked jury to a charge in the final instructions to the jury. See *United States v. Arrowgarp*, 235 Fed. Appx. 790, 793 (10th Cir. 2007) (sexual assault); *Darks v. Mullin*, 327 F.3d 1001, 1013-16 (10th Cir. 2003) (death penalty); *United States v. McElhiney*, 275 F.3d 928, 942 (10th Cir. 2001) (conspiracy to distribute) (holding that in order to temper the potential coercive effect of an Allen charge, the Tenth Circuit recommended that the instruction be incorporated with the other jury instructions, that it be given as part of the original final jury instructions packet-finding that the specific language used in the second of two *Allen* instructions was impermissibly coercive). The Tenth Circuit Pattern Instruction reads:

### **1.23 DUTY TO DELIBERATE--VERDICT FORM**

In a moment the bailiff will escort you to the jury room and provide each of you with a copy of the instructions that I have just read. Any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the Indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

You must consult with one another and deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

13. In a habeas corpus proceeding, the Fourth Circuit, a defendant argued that it was improper to have given a modified *Allen* instruction in a death penalty case. *Booth-El v. Nuth*, 288 F.3d 571, 580-82 (4th Cir. 2002). The instruction given by the trial court, in pertinent part, read:

In arriving at your decision, you must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but you must do so only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as the weight or effect of the evidence only because of opinions of your fellow jurors, or for the mere purpose of reaching a verdict.

288 F.3d at 581, n. 6. The Maryland Court of Appeals had held that an *Allen* charge was not coercive simply because it was used in a capital sentencing proceeding. *Booth v. State*, 608 A.2d 162, 170 (Md. 1992). The Fourth Circuit held that it was not an abuse of discretion for the sentencing court to issue the *Allen* charge. *Booth-El*, 288 F.3d at 582.

14. In *Coleman v. Quarterman*, 456 F.3d 537, 547-49 (5th Cir. 2006), a habeas proceeding from a death verdict, the defendant argued that giving of an *Allen* instruction was coercive and error. The Court of Appeals held that: "A judge may encourage jurors who are having difficulty reaching a verdict to deliberate longer, and to give due consideration and respect to the views of their peers." 456 F.3d at 547. "It is not only permissible but proper for a trial judge to ask a jury to continue deliberating if it appears that further deliberations might be fruitful in helping the jury reach a unanimous verdict." 456 F.3d at 548.

#### **V. Case Law from Other Jurisdictions Support the Duty to Deliberate**

15. In *State v. Andriano*, 161 P.3d 540 (Ariz. 2007), the defendant argued that the jurors did not have a duty to deliberate. The Arizona Supreme Court rejected this argument. The Court stated:

*Lowenfield* thus makes clear that jurors in capital cases have a duty to deliberate in sentencing proceedings. Arizona's death penalty sentencing scheme does not alter this duty. While jurors individually determine whether a mitigating circumstance exists, A.R.S. § 13-703(C), the jury must still be unanimous in its decision to impose a death sentence or a life sentence. § 13-703.01(H). Therefore, the jurors may be instructed that they have a duty to deliberate in the penalty phase of a capital case.

161 P.3d at 553.

16. In California, the jury is not informed at all of the result of a jury that is unable to reach a unanimous decision.

An instruction setting forth the consequences of a hung jury 'would have the potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes.'

*People v. Belmontes*, 755 P.3d 310 (Cal. 1988);

see also *People v. Gurule*, 51 P.3d 224, 286 (2002) *certiorari denied*, 538 U.S. 964 (2003) ("[D]efendant complains about the rejection of his proposed instruction that the jurors need not reach a verdict if they are not unanimous. We agree with respondent that such an instruction could have improperly diminished the jury's duty to deliberate and reach a verdict if possible.") 51 P.3d at 293. Thus, in California the jury is never informed of the effect of one juror deciding differently than the other jurors. The jury sent out a note asking about the consequences of a deadlocked jury, to which the trial court responded that "the jury was not to consider possible consequences of a deadlocked jury as a factor in its decision making process." 51 P.3d at 285-86. The California Supreme Court found no error in the trial court's response. Thus, in California, jurors have a duty to deliberate and to attempt to reach a unanimous decision. California law in fact permits the removal of a juror who refuses to deliberate. *People v. Watson*, 182 P.3d 543 (Cal. 2008) (death penalty case) (holding that "proper grounds for removing a deliberating juror include refusal to deliberate . . . examples of refusal to deliberate include, but are not limited to, expressing fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.").

17. The North Carolina Supreme Court has found a duty to deliberate. In *State v. McCarver*, 462 S.E.2d 25, 41 (N.C. 1995), the Court held that "the jury properly fulfills its duty to deliberate genuinely for a reasonable period of time in its effort to exercise guided discretion in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute itself." Where, in another case, there was argument by defense counsel that they could disregard a jurors' duty to deliberate with entire jury toward the end of reaching a unanimous verdict, the Court held that the trial court properly sustained the prosecution's objection. *State v. Holden*, 362 S.E.2d 513, 536-37 (N.C. 1987).

18. The Texas Court of Criminal Appeals in *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996) (death penalty case) also approved of the *Allen* language. 941 S.W.2d at 123. The trial court in *Howard* instructed the jury:

When you arrive in the jury room it is your duty to consult with one another, to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself but only after discussion and impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your own views and to change your opinion if 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 mere purpose of returning a verdict.

*Id.*

The Court went on to state:

Appellant misconstrues the law in this circumstance and would frustrate the very purpose behind a constitutionally permissive *Allen* charge. The law places upon the jury a statutory duty to deliberate and answer the special punishment issues. *Patrick v. State*. 906 S.W.2d 481, 494 (Tex. Crim. App. 1995). An *Allen* charge is designed to foster or "coerce" this debate and to *circumvent a mistrial*. Texas law should not be construed to *favor* a mistrial by informing the jury, via an *Allen* charge, that the trial court will "take over" and impose a life sentence as soon as deliberations become difficult. Such an instruction would effectively negate the "coercive" nature of an *Allen* charge and encourage jurors to discontinue deliberation, contradicting the thrust of the supplemental charge. Appellant's argument is akin to expounding that any procedure which does not favor the imposition of a life sentence is coercive. Such a one-sided interpretation of the law is insupportable. In this regard, we hold that the *Allen* charge was not coercive. Point of error thirty is overruled.

*Id.* at 125.

The People request that a "duty to deliberate" instruction be given to the jury in the general final charge to them for the foregoing reasons, and the defendant be precluded from arguing that the jury has no duty to deliberate..

Dated this 16 day of August, 2013.

Respectfully submitted,  
GEORGE H. BRAUCHLER,  
District Attorney

By: 

Deputy District Attorney

Registration No. 20935



**CERTIFICATE OF MAILING**

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender's Mailbox located at 6450 S. Revere Pkwy., Centennial, CO 80111, addressed to:

TAMARA BRADY, ESQ.  
DANIEL KING, ESQ.  
OFFICE OF THE PUBLIC DEFENDER

Dated: \_\_\_\_\_

8/16/13

By: \_\_\_\_\_

*Amy Jorgens*

DISTRICT COURT  
ARAPAHOE COUNTY, COLORADO  
Court Address: Arapahoe County Justice Center  
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**JAMES EAGAN HOLMES**

COURT USE ONLY

Case Number:  
**12CR1522**  
Division/Ctrm:  
**201**

**COURT ORDER  
PEOPLE'S MOTION REGARDING JURY INSTRUCTION CONCERNING DUTY TO  
DELIBERATE [P - 050]**

THE COURT, being fully advised, and being duly apprised of the relevant facts and law,  
hereby GRANTS the PEOPLE'S MOTION REGARDING JURY INSTRUCTION  
CONCERNING DUTY TO DELIBERATE [P - 050].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2013

BY THE COURT

\_\_\_\_\_  
District Court Judge Carlos A. Samour