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# Federal Defender Newsletter
## July 2017

### CJA PANEL TRAINING

CJA Panel Training is on summer break. See you all in September!

### 16TH ANNUAL GOLF TOURNAMENT

The annual golf tournament will take place on **October 6, 2017** at **1:00 p.m.** with a modified shotgun start. All skill levels are welcome. Cost for the tournament is $80.00 per person and includes 18 holes, range balls, cart, dinner, and prizes! Please join us at Woodcreek Golf Course, 5880 Woodcreek Oaks Blvd., in Roseville. Contact Melvin or Henry for more information at (916) 498-5700 melvin_buford@fd.org or henry_hawkins@fd.org.

### PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at http://wvs.fd.org. The podcast may be downloaded using iTunes.

### CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

The Federal Defender Training Division also provides a **telephone hotline** with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

### IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

## TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso, peggy_sasso@fd.org, or Karen Mosher, karen_mosher@fd.org.

Sacramento: Lexi Negin, lexi_negin@fd.org or Ben Galloway, ben_galloway@fd.org.

## PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the Client Clothes Closet.

### CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or dtorres@lawtorres.com, is the Backup CJA Representative.

## SUPREME COURT OPINIONS

Sessions v. Morales-Santana, No. 15-1911. The Court held that the different treatment of unwed fathers and mothers for purposes of derivative citizenship violates the guarantee of equal protection. In an opinion by Justice Ginsburg, the Court held that the gender line Congress drew between unwed mothers and fathers is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." What this means is that until Congress changes the law, the current five-year rule for unwed fathers applies to everyone, rather than the one-year rule for unwed mothers. Importantly, this new rule applies only to children of unwed mothers that are born AFTER the date of the opinion, since citizenship cannot be stripped from existing children.

Those who have closely followed this issue believe there is a good argument that footnote 24 means that for purposes of criminal prosecutions under 1325/1326, a client born out of wedlock to a U.S. citizen father would only have to prove one year of physical presence. Keep this in mind when screening clients for citizenship.

Packingham v. North Carolina, No. 15-1194. North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." Packingham challenged his conviction under this statute on First Amendment grounds. He had posted a message on Facebook about a positive traffic court experience. Court held the statute impermissibly restricts lawful speech in violation of the First Amendment. Packingham was not on any supervision so his First Amendment rights were more protected.

McWilliams v. Dunn, No. 16-5294 (5-4). McWilliams sought evidence regarding his mental health. His counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed. The evaluating doctor filed a report two days before the judicial sentencing hearing. He concluded that McWilliams appeared to have some genuine

neuropsychological problems. Just before the hearing, counsel also received additional records regarding mental health. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel's requests. This was error.

Hicks v. United States, No. 16-7806. The Court granted the petition, vacated the judgment, and remanded the case for further consideration in the Fifth Circuit based on the government's confession of error that the defendant, sentenced after the FSA, had been wrongly subject to the pre-FSA mandatory minimum of 20 years. Mr. Hicks had found himself at every stage turned away by the courts despite that he was facing an illegally imposed mandatory minimum. He tried to withdraw his guilty plea and was denied. He tried to benefit from Drugs -2 in a § 3582(c)(2) proceeding, but because he was sentenced to the 20-year mandatory minimum, he was denied. After a harrowing procedural twist in his § 2255, he will finally get a real chance to undo the wrong. The government agrees that Mr. Hicks meets the first two prongs of plain error standard (error, plain). Now it is up to the Fifth Circuit to decide whether he meets the third and fourth prongs (affects the defendant's substantial rights, and implicate the fairness, integrity, or public reputation of judicial proceedings).

Lee v. United States, No. 16-327. The Court holds that a claim of ineffective assistance of counsel regarding acceptance of a guilty plea need not show that if the defendant had gone to trial the result would have been different. Based on bad advice from his retained attorney, Jae Lee — a non-citizen who had lived in the United States since age 13 — pled guilty to possession with intent to distribute ecstasy, which led to his permanent and mandatory deportation. He had no defense to the ecstasy charge, but pled guilty because his attorney assured him that the government would not deport him as a result of the conviction.

In an opinion written by Chief Justice Roberts, the Court held that Lee was prejudiced by his attorney's bad advice. The question is not whether, had he gone to trial, the result of the trial would have been different than the result of the plea bargain. Rather, the question is whether Lee could show a reasonable probability that, but for counsel's bad advice, he would have insisted on going to trial rather than give up that right. Here, Lee was prejudiced under the proper standard despite that he "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that."

## IMPORTANT CERT. GRANT

Marinello v. United States, No. 16-1144. The Court granted certiorari to decide whether the so-called "residual clause" of 26 U.S.C. § 7212(a), a criminal provision of the Internal Revenue Code, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

## NINTH CIRCUIT OPINONS

US v. Brown, No. 15-30148 (6-12-17)(Tigar w/Paz). The ability to present a defense, by making an argument that the government has not proven the essential elements, is fundamental to the Sixth Amendment. The Ninth Circuit reverses a

conviction and remands because the district court precluded the defendant from arguing that he had not posted a "notice" or an "advertisement" seeking or offering illegal images on a "closed" restricted computer bulletin board. The government prosecuted the defendant under 18 USC 2251(d)(1) for advertising illegal images. The defense argument was that any notice on the computer bulletin board was not advertisement because of the closed and restricted nature of the board. The court held that as a matter of law, posing on closed bulletin boards was advertisement and precluded the argument. Although it followed US v Grovo, 826 F.3d 1207 (9h Cir. 2016), which held, on appeal, that posting on a closed bulletin board could be considered advertisement, the preclusion of the argument to the jury was error. The determination that a fact is legally sufficient to support a verdict does not preclude the defense argument that the government failed to prove that element. This is a jury question. The preclusion prevented he defendant from presenting a case.

US v. Hernandez, No. 14-50214 (6-15-17)(Per Curiam by Schroeder, Bybee & Smith). Interesting opinion reversing a conviction, but not for the usual reasons. The introduction of evidence of other crimes made it likely that the jury convicted on other acts rather than the one at issue, thus the conviction was vacated. The government, in its zeal to prove state of mind, and knowledge of illegality, introduced all sorts of evidence about other crimes. The jury instruction given about knowledge was broad about knowledge of illegal acts. The Ninth Circuit held that "the broad jury instruction, combined with the evidence of the commission of later crimes and the government's argument to the jury, resulted in significant prejudice to [the defendant]."

US v. Kleinman, No. 14-50585 (6-16-17)(M. Smith w/Ebel & N. Smith). The Ninth Circuit found an instruction related to jury nullification to be non-prejudicial error. The district court instructed the jury that there is no such thing as "valid jury nullification." The jury instruction was error because it implied that the jury would be punished if it nullified in this marijuana case. The jury can be told to follow the law; it cannot be chastised for nullification.

US v. Strickland, No. 14-30168 (6-26-17)(Kozinski w/Fisher & Watford). This is another "categorical" decision. The Ninth Circuit holds that a conviction for third degree robbery under Oregon law is not a violent felony for ACCA purposes. That Oregon conviction does not require physical force for third degree robbery.

Godoy v. Spearman, No. 13-56024 (6-30-17)(en banc: Fisher). Sitting en banc, the Ninth Circuit reversed the district court's denial of a habeas petition alleging juror misconduct during a California murder trial. The petitioner was convicted of second degree murder. At sentencing, the petitioner presented a declaration from an alternate juror that one juror, during trial, was in continuous contact with a friend who was a "Judge up north." The juror would ask the friend questions, and gave the responses to the jurors. The state courts denied relief, or even a hearing, as did the district court, because the petitioner failed to show prejudice. The Ninth Circuit reversed the denial, holding that the state court's refusal to hold a hearing and to require the state to rebut the presumption of prejudice violated clearly established Supreme Court precedent. The State and the court all agree that juror misconduct was raised. A presumption of prejudice attached and the State had to rebut it.

US v. Ochoa, No. 15-10354 (7-3-17)(Per curiam w/Graber, McKeown, and Lynn). The Ninth Circuit remands an illegal reentry conviction with instructions to dismiss the indictment. The court held that the underlying removal order, based on a conviction for conspiracy to export defense articles without a license, was invalid. The conviction for conspiring was not a categorical match to the INA's aggravated felony or firearms categories. The statute was overbroad and indivisible. As such, the defendant should not have been removed, and hence, cannot be convicted of illegal reentry. Keep an eye on this one for possible en banc consideration.

Hall v. Haws, No. 14-56159 (7-3-17)(Pregerson w/Bastian). The Ninth Circuit affirms the district court's order reopening a habeas under Fed R Crim P 60(b). The affirmance did not run counter to AEDPA. In this "extraordinary case," the order grants the same relief to this petitioner as to his co-defendant based on the same claim for the same error at the same trial. The petitioner, proceeding pro se, had acted diligently. The error arises from California's Jury Instruction 2.15, which allows an inference of guilt of murder from possession of stolen property with slight corroborating evidence. The Ninth Circuit agreed with the district court, finding constitutional error and prejudice in that instruction.

## LETTER FROM THE DEFENDER

When I first wrote about Alexander Allen and the *Allen* Charge, I did not know what happened to Alex after President Cleveland commuted his death sentence to life imprisonment. The story drew Dr. Caroline Light's attention, as she was researching a book on self-defense, *Stand Your Ground*, published last February. She let me know Alex's prison records were available through the National Archives. The following is rewritten to include Alex's more complete story.

### ***ALLEN* CHARGE a.k.a. the Hammer Charge**

The African-American boy's leather shoes sometimes got stuck in the mud created by the spring rains or melting snow. Fifteen year old Alexander Allen hopped from rut to rut as he walked from what had been his home in Oswego, towards Coffeyville, just 20 miles away, both in Kansas Territory. To entertain himself, and keep at bay the fear of being on his own for the first time, he counted the Osage orange and redbud trees, in full white and pink bloom in the fields by the road. April, with a choir of frogs emerging from hibernation along that Kansas-Oklahoma border, brings the promise of life.

Alexander was born March 1877 and considered "mulatto" in subsequent censuses. By age 8, his mother, Elendena, was dead before age 30, along with two of his three older sisters. In April 1892, he thought about how his father had sold the family farm to move to Oklahoma. Thought about how there was room for everything - and everyone, his father Juron and sister Josephine, 5 years older than him - in that wagon, except him. No, no, he forced those thoughts away - he remembered how his father said Alexander was a man. Why else would he trust Alexander with that pistol with its fancy holster? Why else would he trust Alexander to go alone to Coffeyville, find his parents' friend Albert Marks to stay with until his father came for him? Until then, Alexander would work for Mr. Marks. He hoped a wagon would come by soon and let him hitch a ride. A cold wind blew the redbud petals across his feet. He grabbed a few and chewed on them.

### In Coffeyville

Albert Marks, an African-American Cherokee Indian, owned a restaurant by the railroad tracks in Coffeyville and had a farm on Cherokee Nation land in Oklahoma, 3 to 4

miles south of Coffeyville.[1] He agreed to let Alexander work for him at the farm, while letting him stay in the back room at the restaurant. Marks later said Alexander did well, except he seemed fascinated with a gun he kept in a satchel.

On Thursday, May 12, Marks' son, twelve year old James, and Alexander were riding near Marks' farm. They had been told to look for some escaped horses belonging to their neighbor Morgan. Their search crossed paths with Philip Henson, a white teen about 17 or 18 years old, and his two cousins, George, age 14, and Willie Erne, age 13. (George later recalled this happened May 4.)

Henson took an immediate dislike to Alexander. Maybe the young man was showing off before his cousins or maybe he was just mad that his family left Missouri, then his father's stable burned down, so his father ended up training horses for - working for - for the Indian Morgan, a black Indian, to boot. Maybe it was that Alexander and James were on horseback and had shoes, and Henson and his cousins were barefoot and walking.

Henson threatened and cursed at Alexander. He followed them, throwing sticks at them. Henson promised, "We'll be over Saturday to settle with you!" James later remembered the three shouting "they would kill 'that nigger' the first chance they got."

When asked by Morgan, on whose land the Ernes and Hensons were living, what had happened to his horses, George claimed Alexander was a liar. Willie told Morgan they only told Alex where he could find the horses.

**Saturday May 14, 1892**

Once the sun was up Saturday morning, May 14, Marks asked his 11 year old son Harvey and Alexander to take a horse and carriage to the farm to make sure the hog pen was in good repair. Alexander, chilled by the memory of Henson's and the Ernes' threats, wedged his daddy's pistol and holster in his waistband before they left.

Henson, George, and Willie had forgotten all about their braggadocio two days earlier. Saturday was the day to go fishing and they wanted to catch frogs as bait. Each pulled a thin willow branch from a tree and stripped bark off to make switches. Thin, strong, and flexible, one could snap the switch like a whip on the frog's head and knock it unconscious to grab it. (When interviewed by the local newspaper years later, Willie recalled that, as a teenager, he and Will Rogers rode herd together in Oklahoma - one of their favorite pastimes was hunting frogs.) The boys laughed and jostled each other as they went through Morgan's germinating wheat field to the pond at the bottom of the hill, the pond feeding the hog pen on neighbor Marks' land next door.

As they passed the fence to Marks' land, the three recognized Alexander working the hog pen on the other side. Alex and Harvey later said that Henson and the Erne boys came through the fence, said they came to kill Alex. Henson hit Alex on the head with his willow switch and the two wrestled. Henson threw Alex to the muddy ground and held him down. While Alex was unable to move, George hit him on the arm with another stick. Wriggling around, Alex managed to loose the pistol from its holster and shot at Henson, who ran through the fence and collapsed just the other side. Or you could believe George and Willie, as the jurors later did, that Alex took that gun out of his hip pocket holster, climbed through that fence towards them, saying George had told people Alex lied. That Alex hit Henson with his left hand and pulled out the pistol, but

[1] This meant Marks was likely a freed black slave of the Cherokee. After the Civil War, in which the Cherokee fought for the South, the tribe offered their freed slaves citizenship in the Cherokee Nation. Many of these former slaves traveled as part of the Tribe on the Trail of Tears to Oklahoma. Only a Cherokee Indian could own land on the Reservation.

Members of the infamous Dalton Gang were captured or killed 5 months later in Coffeyville, Kansas Territory.

Henson grabbed the gun and shot it into the ground, then dropped the gun. That Alex, humiliated, then lunged for it, aimed angrily and shot Henson two times, then shot George once or twice in the arm.

The shot ringing in his ears, Alex ran off. He and Harvey took the cart they came in, galloping through town to the restaurant. Alex ran to his cot, grabbed his bag, told Marks to tell his father he loved him, and ran off.

The Marshals' investigation found Henson's body 30 to 35 steps from the fence, following a single set of shod footprints from the fence to Henson's body and blood. They saw Henson was barefoot, and learned the Ernes were also. Henson's face was bruised.

U.S. Marshals arrested adolescent Alex a few days later. He wore the same shoes he wore walking from Oswego to Coffeyville. He had a noticeable bruise on his left arm and the gun had 3 empty cartridges; Alex said he fired once towards Henson - the other two were fired hunting rabbits for food as he fled.

**Allen on trial**

U.S. Marshals held Alex at Fort Smith, Arkansas. Since the killing, charged as First Degree Murder, happened in Indian Territory, the United States District Court, Western District of Arkansas, had jurisdiction. The sole judge there was Judge Isaac Parker, the "Hanging Judge."

Alexander Allen was not tried as a juvenile. His jury trial began February 13, 1893, and it was said "he snarled and sulked, cursed and fought, rejected kindness, and answered punishment with more defiance." Judge Parker gave long, rambling jury instructions and advised the jury on the lesser included offense of manslaughter and of self-defense. The jury found 15 year old Alex "guilty" and Judge Parker sentenced him to hang.

Because the trial was in Indian Territory, the appeal went directly to the United States Supreme Court. His lawyer was the well-known Supreme Court lawyer Augustus Hill Garland.

Garland was born in Tennessee in 1832. His family moved to Arkansas when he was just 1 year old, and he considered that "home" for the rest of his life. Seeking more education, he attended first St. Mary's College, then graduated from St. Joseph's College in Kentucky in 1849, at age 18. He studied law and was admitted to the Arkansas bar in 1853. He was first admitted to practice before the United States Supreme Court in 1860. Then came the Civil War.

A Union delegate to the Arkansas State Convention, Garland voted against the Ordinance of Succession passed in 1861. He served as Arkansas' representative in the Confederate Congress from 1861 to 1865. At the close of the Civil War, he reapplied to practice before the Supreme Court. However, Congress, in 1862 and 1865, had passed an Act requiring attorneys applying to practice before the Supreme Court take a loyalty oath, that the applicant had "never voluntarily borne arms against the United States [or] given . . . aid, countenance, counsel, or encouragement to persons engaged in armed hostility" against the interests of the United States. Garland could not take that oath.

So he petitioned, along with two others similarly situated, to be permitted to practice before the Supreme Court. "These three cases – *Milligan, Garland,* and *Cummings* – are the first batch of decisions from the Supreme Court upholding claims of 'civil liberties' under the Constitution," but only narrowly so, by a 5 to 4 decision.

Thereafter, Garland was elected Arkansas' United States Senator in 1867, and its governor from 1874 to1876. Reelected to the U.S. Senate in 1876, he served until being offered, and accepting, the Cabinet post of Attorney General offered by newly-elected President Grover Cleveland in 1885. As Attorney General, Garland argued before the Supreme Court many times during Cleveland's first term.

Once Cleveland lost reelection, Garland

returned to Arkansas and private practice. It was from here he took up Alexander Allen's appeal to the Supreme Court.

On December 4, 1893, the Supreme Court reversed Alex's conviction, choosing not to rule on the issue of his youth and instead, after discussion of "the philosophy of the mental operations," "the substitution of abstract conceptions," and "metaphysical considerations proceeding from the court," the Court found the jury instructions for self-defense and "heat of passion" (necessary for finding manslaughter) were in error.

In 1894, Alex was tried a second time. This time, Judge Parker gave a different, yet still rambling self-defense jury instruction, commenting on various interpretations of the testimony. Again, Alex was convicted of First Degree Murder and, again, Judge Parker sentenced him to die.

On his second direct appeal to the United States Supreme Court, in April 1895, his conviction was again remanded for a new trial due to an error in the jury instruction.

Alex, finally an adult in 1896, was retried a third time. Despite all the death sentences "Hanging Judge" Parker imposed, he was something of an innovative jurist. He was the first judge in the country to pay for jury service, $3 a day. While it is not much less than jurors get most places today (plus gas mileage), at the time it was more than many made at whatever they did - or did not do - for work. Bailiffs would find Parker's jurors playing cards or just talking about anything other than the trial, to stretch the deliberations into days. Then, eventually, they would report they could not reach a unanimous decision. That is what Alex's third jury did – they said they required "further instruction."

Judge Parker was frustrated with his juries continually doing this. So Judge Parker gave "quite lengthy" instruction to Alex's jury, borrowing from Massachusetts and Connecticut cases:

> The conclusions reached by eleven men are to be relied on rather than the conclusions of the twelfth man, whose means and opportunities for reaching a right judgment are the same as those of his fellows; that each member of a jury should always convince himself that twelve wiser, more intelligent, and impartial men than he and his fellows can not be found in the country; that any conclusion to be reached by them is very apt to be a right conclusion; and that, therefore, they should be very careful to agree, if possible, in the conclusion reached, and that one juror should not consider that the eleven associated with him are pig-headed, obstinate, and impracticable because they are not of his opinion.

Alex was again found "guilty" of First Degree Murder and Judge Parker again sentenced him to hang.

This time, the United States Supreme Court upheld the conviction, finding the jury instruction directing the jury to return to its deliberations was lawful. And they affirmed Alex's death sentence on December 7, 1896.

Some suspected, after Alex was sentenced three times to hang and once his final conviction was affirmed, some thought it was the Supreme Court and Alex's prosecuting District Attorney James Read who petitioned then-President Grover Cleveland to commute Alex's sentence to life. More likely, however, it was Garland, Alex's first appellate counsel and Cleveland's former Attorney General, who persuaded Cleveland, then in his second presidential term, to grant commutation. It issued the last day of Cleveland's presidency in March 1897.

**Death, Then Life**

Alexander Allen was first sentenced to serve his time at the Ohio State Penitentiary (Columbus) – he was near his mother's family there. Alex, when first arrested and imprisoned, got into trouble, venting his anger, with charges of larceny, disobedience, fighting, and "carelessness." For "refusing to work," he received 3 days solitary confinement. Fighting

earned him 11 days solitary confinement with bread and water only, cuffed to a metal grate 12 hours a day.

In 1905, he was transferred to Atlanta, Georgia, to help build the penitentiary which would be his home for the next 14 years. The man supervising the stone masons building Atlanta's Federal Penitentiary was a Scotsman, a union man: Andrew P. McElroy, Sr.

McElroy came to Atlanta two years before, gathering inmates to train as stonecutters like him, to carve the large thick blocks which became the prison's walls. Most of those he supervised and taught were the black inmates. He created for them a baseball team and Atlanta Penitentiary's baseball team became renowned for its wins. Alex asked to be part of it - a request denied. After 1911, Alex's prison behavior was "absolutely clean." Life proceeds in prison much as it does outside the high stone walls. Alex eventually needed eyeglasses, and he played harmonica. He had his appendix removed in 1912, and later, in 1914, passed a kidney stone. His family sent him fruit and candy.

As soon as he was eligible for parole in 1912, he applied (he ordered a pocket dictionary in 1913 to help with his writing). Now-Judge James Read, his former prosecutor, encouraged Alex's parole in 1916. On December 29, 1919, the Western Union telegram to the prison warden announced Alexander Allen was being paroled. Though Alex's father died while he was in prison, his sister Josie married and was living in Vinita, Oklahoma. That is where Alex headed.

Judge Parker died 20 days before the last Supreme Court decision in Alex's case. By time of his death, he had sentenced 160 defendants to hang – more than half had their convictions reversed, with 16 being acquitted after a new trial. Most of the others were convicted instead of manslaughter or their sentences also commuted to life in prison.

Garland eventually published a book in 1898 entitled *Experience in the Supreme Court of the United States with Some Reflections and Suggestions as to that Tribunal*. Nothing is mentioned of his Civil War years. He continued to practice law until he died in January 1899, the only person to die arguing in the well before the Supreme Court.

As a black man and convicted felon in Oklahoma, newly released from prison after 17 years, Alex worked packing and moving sacks of cement, dirt, lime, and plaster, as he wrote his parole officer (spelling kept), "about 11 and 12 howers & Sunday also & dont get payed a cent for my extra work & all the other men there get payed for extrey & they get from 20 to 28 a week & I Do all the Diurtey Hard work besides." Alex looked for other, less demanding work for better pay on the railroad or nearby farms, but continued to work for years at H.E. Ketcham Lumber in Muskogee, Oklahoma.

Alex married. On September 21, 1923, his wife, Mattie Allen, and his sister, Josephine, wrote the Atlanta U.S. Prison to notify them of his death – "he departed this life on the 19 at one 45 in the Baptist Hospitle [sic]." Seeking verification, they wrote Mr. Ketcham. On October 8, 1923, Mr. Ketcham wrote back, ". . . I do not know the nature of his death and therefore could not explain same. The Home Undertaking Co. buried him Sept 21st 1923 in Old Agency Cemetery so I guess there is no doubt but that he is dead."

**Law**

When a jury indicates to the court it cannot reach a unanimous verdict (hung jury), courts will sometimes read an instruction to encourage (compel?) the jury to try again to reach an agreement. Defense lawyers should **always** object to this. If the instruction is given, counsel should (for appeal purposes) make note on the record (a) when the jury initially began deliberations, (b) how long they had been deliberating when the court received the note, (c) what time the jury continued its deliberations after the instruction was given, and (d) what time they indicated they reached a verdict.

***9th Cir. Crim. Jury Instruction 7.7.***

**DEADLOCKED JURY**

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

*Also 1st Cir. Crim. Jury Instr. 6.06; 5th Cir. Crim. Jury Instr. 1.45; 6th Cir. Crim. Jury Instr.9.04; 7th Cir. Crim. Jury Instr. 7.07 & 7.06; 8th Cir. Crim. Jury Instr. 10.02; 11th Cir. Crim. Jury Instr. Trial Instruction 7.*

**Resources**

Case History

*Allen v. United States*, 150 U.S. 551, 14 S.Ct. 196, 37 L.Ed. 1179 (1893).

*Allen v. United States*, 157 U.S. 675, 15 S.Ct. 720, 39 L.Ed. 854 (1895).

*Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

*In re Garland*, 71 U.S. 333, 32 How.Pr. 241, 18 L.Ed. 366, 4 Wall. 333 (1866).

Government's *Response Brief*, Case No. 317, Oct. Term 1896, 1896 WL 13987.

Plaintiff in Error Brief, Case No. 969, October Term 1893.

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Fred Harvey Harrington, *Hanging Judge*, p.128-129, fn.1 (University of Oklahoma Press, originally published 1912).

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