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certain parts of Allen vs. United States, 164
US 492, and it appears to me in reading these
cases on the substance of the charge appearing
from Ortson vs. United States, in 221 Federal
Second 632 for the Fourth Circuit, Your Honor
in the brief research that I had the opportunity
to make mention whatsoever in the Allen case about
time and expense , in the Jenkins case vs.
United States 380 U. S. 445, expense was mentioned
Your Honor in that case, but, however, after it
was mentioned, the Court went further and explained
that it had nothing to do whatsoever with the
jury reaching a verdict, now, in Wolin vs. United
States expense was mentioned there, and an
explanation was made. Your Honor, we respectfully
submit that the policy of the Court giving the
Allen charge doesn't necessarily mean that you
have to follow the exact wording of the Allen
charge, certainly that is a policy procedure more
than it is an exact terminology or giving of
certain words, but the time that it is given is
certainly important as to whether or not it is
impressive or coercive or amounts to pressuring
the jury into believing that they must come back
with a verdict.

BY THE COURT:

2 I don't believe you will find in the book any more
3 watered down charge than Allen vs. the United
4 States because that has a lot of intercultation
5 of my own, that was taken from no decision, as
6 a matter of fact, I took the first part of that
7 Allen charge that looks like it deals exclusively
8 with the government's side of the case and says
9 so many things about the government's side of the
10 case and then it sorta kinda pinches off when it
11 talks about the defendant's part of the case and
12 doesn't make it clear that that same consideration
13 is being indulged for the defendants and I spell
14 it out in that case, but not only that, I've never
15 seen a charge as I did the fact that both parties
16 were entitled to a mistrial if they couldn't agree.

17 BY MR. WATKINS:

18 Your Honor is correct about that. If I had to
19 suffer the consequences through the Allen charge
20 in any event I had rather have it just like Your
21 Honor gave it than any other way, but we do
22 respectfully submit that this matter of time and
23 expense may have mislead the thinking of the jury
24 and also, Your Honor please-

25 BY THE COURT:

1 Well, a juror wouldn't be very smart if he didn't
2 know a trial like that would be very expensive,
3 would he?

4 BY MR. WATKINS:

5 That's true.

6 BY THE COURT:

7 He probably wouldn't even measure up to a cross
8 section juror.

9 BY MR. WATKINS:

10 Correct, Your Honor. Your Honor please it
11 specified a partial verdict and that had to do
12 with one of the instructions that Your Honor had
13 already given the jury, we feel like that
14 singling out that partial verdict instruction was
15 a matter also that had its prejudicial influence
16 on the jury. We also call to the Court's attention
17 in the other cases that I referred to that the
18 Allen charge was given in the early deliberation
19 by the jury. Your Honor, in this particular
20 instance, I don't know how many hours they
21 deliberated-----

22 BY THE COURT:

23 Nine hours and forty minutes before I gave the
24 Allen charge, you can't give it under six hours,
25 and I gave it nine hours and forty minutes.

1 BY MR. WATKINS:

2 Yes sir, at any rate Your Honor, we respectfully
3 submit that because of this the jury would think
4 that they should go back in there and come up
5 with a verdict regardless, and it was highly
6 prejudicial.

7 BY THE COURT:

8 Well, they didn't come out with a verdict with
9 respect to some of them.

10 BY MR. WATKINS:

11 That's true, and that's my position Your Honor,
12 I think that it is a plain question of law
13 involved as to----

14 BY THE COURT:

15 You can't ever tell what the Jury is going to
16 think about the Allen charge, I recall that the
17 last time that I gave that instruction was right
18 here in this courtroom, and the jury went out
19 and promptly turn the defendants loose, three
20 of them, and I thought they were as guilty as^h sin.
21 But the jury didn't think so.

22 BY MR. WATKINS:

23 That's correct, Your Honor you never know what
24 a jury will do and of course having them decide
25 against us Your Honor its counsel's duty to

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urge upon the Court everything possible to grant us a new trial.

BY THE COURT:

I understand.

BY MR. ALFORD:

May it please the Court, we have assigned some twenty-four grounds for the defendant Cecil Ray Price and also twenty-four grounds for Billy Wayne Posey, and they are approximately the same. They are a little different in the wording in grounds number 11 in the terminology for the motion of Price, I believe.

BY THE COURT:

Did the same Counsel draw both of them?

BY MR. ALFORD:

Same Counsel drew both of them, to change the wordking to fit the ground and I'll call that to the Court' attention when I get there.

BY THE COURT:

All right.

BY MR. ALFORD:

Now, if Your Honor please we do have one ground assigned here that we, of course, ask the Court to grant us permission to put on some testimony or ask the government to stipulate, and that is

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with regards to clearing the courthouse on Thursday evening around 5:30 or 6:00 o'clock before the jury went to supper and then that night around 8 or 8:30.

BY THE COURT:

Clearing the courthouse, what do you mean?

BY MR. ALFORD:

Well they had all of the defendants, their attorneys and their families to leave the courthouse building before the jury went to supper on Thursday afternoon, and then that night about 8:30 o'clock they did the same thing.

BY THE COURT:

I don't get your point. What's that got to do with this?

BY MR. ALFORD:

Well sir, we raise that point, we earnestly say that we had the right to be there as long as the jury was deliberating.

BY THE COURT:

I wasn't in the building during the time you mentioned.

BY MR. ALFORD:

But we wanted to be there.

1 BY THE COURT:

2 Well---

3 BY MR. ALFORD:

4 Therefore, I would like to ask the government
5 if they would stipulate that was the facts?

6 BY MR. HAUBERG:

7 We won't stipulate to any such thing. It was
8 a matter of crowd control, and the Court had
9 ordered that the jury file out separately from
10 any of the defendants or any of the crowd outside
11 and the Marshal asked some of them to leave the
12 court building because the jurors were ready to
13 go out to eat supper, that was a normal procedure
14 in any kind of a trial.

15 BY THE COURT:

16 We did have some crowd control.

17 BY MR. ALFORD:

18 We were up on the third floor and they told us
19 to leave too, and the jury was on second floor.
20 That's what we would like to make a record on.

21 BY MR. HAUBERG:

22 I don't know anything about what happened on the
23 third floor, Your Honor.

24 BY THE COURT:

25 I don't either but I'll let him make his record

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though.

BY MR. ALFORD:

Would you like for us to make our record first?

BY THE COURT:

I'll hear you out and I'll let you file some affidavits and then counter-affidavits may be filed and if you need oral testimony, I'll let you put that on.

BY MR. ALFORD:

Your Honor please, in assigning our grounds for a motion for a new trial we submit that the Court erred in denying the defendants' motion for acquittal at the conclusion of the evidence and at other times shown by the record. The verdict of the jury reported is contrary to the weight of the law and evidence, and is not supported by the law and evidence, and the Court erred in sustaining the objection made by the attorneys for the defendants and overruled the objections made by the United States of America as shown by the record. The Court erred in all of the charges-----

BY THE COURT:

Any particular questions or just all of them?

BY MR. ALFORD:

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All of them. The Court erred in charging the jury in refusing the charges to the jury requested by this defendant and the defendant Posey. I'm reading from Price's motion and it is also the same for Posey's motion also as whown by the record.

BY THE COURT:

I didn't get that one.

BY MR. ALFORD:

Its on the instruction, if Your Honor please. The ones we excepted to and the ones that were denied to us that we filed with the Court. And the question that we rasiie under ground 6 for both of these defendant is the fact of the matter of polling the jury after the jury had returned in the courtroom to announce their verdict. We would respectfully show that when the verdict was returned before it was reported and this is from Rule 31, when the verdict is returned the jury shall be polled upon the Court's own motion or any party. Upon the polling of the unanimous verdict of the polling of the jury the jury may be directed to retire fuz further deliberation or may be discharged. We respectfully submit that when the verdict was first read in this case the

1 Deputy Clerk first read in open Court that Cecil
2 Price was found not guilty, and that he was then
3 advised that this was a mistake and he was found
4 guilty.

5 BY THE COURT:

6 You are making it sound that it was a little
7 delay---

8 BY MR. ALFORD:

9 Immediately after that.

10 BY THE COURT:

11 But the Clerk immediately corrected it and read
12 it right and the jury was asked in accordance
13 with invariable instructions of this Court as to
14 whether that was the verdict of this jury and
15 they said yes, so say each of you, and each one
16 of them said yes, and then you asked that you
17 have them further polled and I wouldn't allow it.

18 BY MR. ALFORD:

19 Your Honor, we did ask to have them polled, we
20 did ask that the jury be polled, and then it was
21 denied.

22 BY THE COURT:

23 That's right.

24 BY MR. ALFORD:

25 We submit that this was a valuable right for these

1 defendants, especially in view of the facts and
 2 circumstances involved and it was submitted that
 3 the verdict of the jury was not unwarranted in
 4 that these defendants were guilty, or were found
 5 guilty as charged, and in support of that we would
 6 like to call to the Court's attention the state-
 7 ment in Corpus Juris Secundum V. 23 a, section
 8 1392 c. The manner in which a jury is polled
 9 has been a matter of discretion in the trial
 10 Court and no particular method to be followed,
 11 and etc. Now there was a case decided in the
 12 first Circuit of the United States Court of Appeals
 13 in 1958 and styled Amanda A. Miranda vs. United
 14 States of America, and Your Honor please, in this
 15 case the Court held very positively in regard to
 16 the polling of the jury that you had a right for
 17 the jury to be polled and in this as we turn
 18 to the defendant's contention that the District
 19 Court erred in not granting him a new trial. One
 20 of the grounds it assert is a reversible error
 21 we submit when the request to poll the jury was
 22 denied by the trial Judge. They relied on Rule
 23 31 d of the Federal Rules of Criminal Procedure
 24 which I have referred to in the motion.

25 BY THE COURT:

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Well I don't think its any use to waste any time about that because this jury was polled, and you don't have to poll them in any particular way, if the Court can be perfectly satisfied as I was that they were polled and they gave individual expressions to the question, and the Clerk asked them if this was the verdict of this jury and they said yes, and they all nodded, and then she said, so say each of ye, and they nodded their heads again and a Corpus Juris or no other kind of jury can change me on that.

BY MR. ALFORD:

Your Honor, this Fifth Circuit case has quoted verbatim what was done. May I read it to the Court?

BY THE COURT:

Yes sir.

BY MR. ALFORD:

The government conceding the right in this case to demand a polling of the jury came too late and the trial Judge refused to permit the poling of the jury was improper. What happened here reached a Mr. Foreman, have you/verdict? Mr. Foreman: We have, is this a unanimous verdict of all your jurors, so say ye all, the Court asked that

1 question. I order that the verdict be read and
 2 entered and the Clerk of the United States of
 3 America vs. Miranda number 7299 Criminal, we
 4 the Jury find the defendant/^{guilty as}Charged in the first
 5 count of the indictment, guilty as charged in
 6 the second count of the indictment, guilty as
 7 charged in the third count of the indictment,
 8 signed J. E. Caronda, foreman. He asked that
 9 the jury be polled in this case , the case says
 10 in the body of it that we have the right to call
 11 on for a motion for the jury to be polled and as
 12 a right under that rule and that is what we
 13 relay on. There is another case here that I would
 14 like to call the Court's attention to and that's
 15 the Macket vs. United States of America which
 16 is recorded in 90 Federal Reporter S_econd Series
 17 and that case is referred to the old landmark
 18 case that was decided many years ago in the
 19 District of Columbia vs. Humphrey which is 11th
 20 appeal, page 68 and 174 US page 190, it refers
 21 to the fundamental right of polling the jury.
 22 We respectfully submit that that was a violation
 23 of these defendant's rights to have the jury
 24 each individually polled as to his so saying
 25 where they guilty or innocence, especially in

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view of the fact that in this case Price was first read not guilty, and then that he was then read guilty. Other cases along this same line that I would like to call the Court's attention to is Keys vs. United States where it says a jury poll is obviously a part or an inquiry where they did in fact vote the result as announced and as the Court had a form verdict for them to mark their decision we respectfully submit that this was a constitutional right and a valuable right in the duty or system of our Court because a poll of the jury, as to individuals.

BY THE COURT:

I don't question that, you have the right to have the jury polled but you've got to consider what Corpus Juris says there that the Court has a discretion about polling, that's a sound discretion and its a discretion to call upon to be exercised in connection with a ballot which is marked very plainly, no mistake about what the jury did, and everyone of the jurors signed that ballot, so that's not the practice all of the country because a lot of places permits just the Foreman to sign the verdict and that is the verdict of the jury. Apparently the case you read there is a case of

~~that kind where the foreman had signed it and they~~

1 asked him if that was the verdict of the jury
2 but nobody asked the foreman he was seated with
3 the rest of the jury, and the entire jury signed
4 the ballot and they were asked if that was their
5 verdict and everyone nodded their heads yes,
6 so say ye all, and everyone of them again nodded
7 their heads and if that wasn't a polling there
8 never will be a polling in this court.

9 BY MR. ALFORD:

10 Your Honor, we respectfully submit that we
11 should have had that right to poll each one of
12 them.

13 BY THE COURT:

14 Well-

15 BY MR. ALFORD:

16 I would like also to point out that one of our
17 grounds is that the United States of America failed
18 to prove venue in this case. Nowhere in the record
19 do they say this case of conspiracy occurred
20 specifically in the Southern District, United
21 States Court for the Southern District of
22 Mississippi.

23 BY THE COURT:

24 Can the Court take judicial notice that the county
25 of Neshoba is in the Southern District of

1 Mississippi?

2 BY MR. ALFORD:

3 Well we submit that that is the question that
4 they should have proved that it was, that
5 or
6 Neshoba County ~~or~~ Lauderdale County or wherever
7 they say this conspiracy occurred was part of
8 Southern District of Mississippi, and no where
9 in the record we say was that specific proof put
on.

10 BY THE COURT:

11 I don't remember that. Are there any cases about
12 that having to be proved or can the Court take
13 judicial notice of something that is as clear as
14 that?

15 BY MR. ALFORD:

16 No sir, Your Honor, I don't have any cases.

17 BY THE COURT:

18 I've seen a lot of cases where that had to be
19 proved.

20 BY MR. ALFORD:

21 Its a fundamental thing in our State courts where
22 it must be proved, the Supreme Court passed on that
23 in the state court. Now, ground number 8 we sub-
24 mit that the United States of America failed
25 to prove that the alleged victims were citizens

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at the time the alleged offense was said to have occurred.

BY THE COURT:

Let's talk about that just a minute. Didn't they prove that one of them was, this colored fellow Chaney, I believe was his name, didn't they prove that he was born and reared there in Meridian? That's my recollection on that.

BY MR. ALFORD:

There was no testimony about Chaney living in Meridian. The Preacher testified there about knowing him there in Meridian, but the preacher wasn't a native of Meridian himself, as I recall it, he was from Florida.

BY THE COURT:

I thought some testimony showed that this fellow Chaney was born and reared at Meridian, Mississippi.

BY MR. ALFORD:

I believe they introduced a birth certificate or something that we objected to, I believe that is what the Court's thinking about.

BY THE COURT:

Yes, I think that's right.

BY THE COUNSEL, ALFORD:

1 I don't want to mislead the Court if I can help
2 it but I think that's where you got it as we
3 objected to that being introduced as it was.

4 BY THE COURT:

5 Yes, I remember that. You don't think that will
6 sufficient?

7 BY MR. ALFORD:

8 No, I do not.

9 BY THE COURT:

10 A native born American citizen? Without a birth
11 certificate, I don't think so.

12 BY THE COURT:

13 I know a lot of people that doesn't think
14 Mississippi is in the Union but I've never heard
15 this theory before.

16 BY MR. ALFORD:

17 Your Honor please, we submit the Court erred in
18 not granting a severance to this defendant, Orice
19 and the defendant Posey from the other defendants.
20 At the time the request was made diligence was
21 shown in requesting the severance, and we submit
22 that much prejudicial evidence was introduced dur-
23 ing the trial of the case that actually led to the
24 conviction of these two defendants, which could
25 not have been produced and could not have led to

1 their convictions had they been granted a separate
2 trial. For example, the Highway Patrol testified
3 that Billy Wayne Posey came down Highway 19
4 on the night of the alleged offense and asked
5 where was Price. This statement could only be
6 used against the defendant, Posey, but since
7 this defendant Price was being tried along with
8 the defendant Posey it was permitted to be intro-
9 duced into evidence, and the jury could not
10 disregard this, even though it was instructed to
11 do so.

12 BY THE COURT:

13 Now, what statement was that sir?

14 BY MR. ALFORD:

15 Where Mr. Poe testified that the defendant,
16 Billy Wayne Posey came down Highway 19 on the
17 night of the alleged offense and asked where was
18 Price. We submit that this was prejudicial
19 against Price and was inadmissible against him
20 but yet the jury couldn;t disassociate that fact
21 eventhough the Court had instructed them not to
22 that would be inadmissible as against Price but
23 not against Posey.

24 BY THE COURT:

25 The witness was named Poe?

1 BY MR. ALFORD:

2 Poe, Earl Poe, the Highway Patrolman.

3 BY THE COURT:

4 Poe. I remember.

5 BY MR. ALFORD:

6 And we submit that was prejudicial against
7 Price.

8 BY THE COURT:

9 Was that objected to?

10 BY MR. ALFORD:

11 Yes sir. It sure was.

12 BY THE COURT:

13 What was the ruling on it?

14 BY MR. ALFORD:

15 It was overruled, the Court held that it was
16 admissible against Posey but not against Price,
17 I believe I'm correct in that statement.

18 BY THE COURT:

19 Was the Jury told to disregard it?

20 BY MR. ALFORD:

21 I don't recall, I kinda think it was. At the
22 same time we submit very earnestly and sincerely
23 that you can't have a jury get something out of
24 their mind something that is there once its
25 there. Another thing was the introduction of

1 the confession of Horace Doyle Barnett, this
2 alleged confession implicated several of the
3 defendants even though some of the names and
4 certain places were struck out of the alleged
5 confession; however, this only gave rise to the
6 jury to surmise and conjecture as to whose names
7 were intended to be in that place. The alleged
8 confession could not be introduced against this
9 defendant but it had the same effect as being
10 used against this defendant as far as the jury
11 was concerned. Now many instances are shown
12 throughout the record made a part of this motion
13 by reference showing that Price and Posey were
14 convicted because of evidence that was incompetent.

15 BY THE COURT:

16 Excuse me just a minute Mr. Alford. Go ahead Mr.
17 Alford.

18 BY MR. ALFORD:

19 It was permitted to be used because the defendants
20 were not granted a separate and different trial.
21 Now that, if Your Honor please, goes to what Mr.
22 Watkins was talking about that when you try
23 eighteen defendants and evidence is admissible as
24 to one and none of the others, its highly pre-
25 judicial to permit that testimony to be introduced

1 and the jury has a tremendous job for this
2 long a period of time as to what he can hold as
3 to one defendant and what he can't hold against
4 a defendant in a trial of this kind, therefore,
5 we submit that we should be granted a new trial
6 at this time because we were not granted a severance
7 as to Posey and Price. We further submit that
8 the Court should grant us a new trial in letting
9 evidence be introduced concerning the alleged
10 meeting at Bloomo Schoolhouse and the alleged
11 burning of the church, which are both unrelated
12 and unconnected of the alleged offense charged in
13 the indictment. This inflamed and prejudiced the
14 jury against these defendants and led to their
15 conviction and was wholly improper in this case.
16 There was an alleged meeting of some kind in the
17 Blloomo School which was wholly disassaciated
18 with this case and the conspiracy and yet it
19 inflamed and prejudiced the jury, and we submit
20 that's one of the grounds for a new trial, and
21 then if Your Honor please, another serious ground
22 that I want to call the Court's attention to is
23 that during the trial of this case the alleged
24 confession of Horace Doyle Barnett was let to
25 be introduced into evidence with the names of

1 these defendants in the confession and then it
2 was introduced over the objection of Posey and
3 Price, with this further instruction of the Court
4 that the names be deleted and that it would be
5 not be referred to. The jury, at the time of
6 the reading of this the Department of Justice
7 Attorney, Mr. Doar, read in their through, uh
8 name and incident in first reading it before
9 the jury during the introduction of it, and if
10 I remember correctly one of them was something
11 about a bulldozer operator, and the other was the
12 Philadelphia car, where Philadelphia had been de-
13 leted and bulldozer had been deleted, and we ob-
14 jected and the Court admonished the Counsel who
15 was reading it to read it correctly or the Court
16 would take further action or have somebody else
17 read it, I don't recall the exact words of the
18 Court.

19 BY THE COURT:

20 The bulldozer man was let out of the case wasn't
21 he?

22 BY MR. ALFORD:

23 Yes sir.

24 BY THE COURT:

25 Of course, I noticed that and I'm sure it was

1 an advertence on the part of Mr. Doar, he wasn't
2 as careful in reading it as he should have been
3 but he did read the town of Philadelphia and I
4 didn't think that gave anybody any clue, I didn't
5 think that was an unfair revelation simply that
6 it was a Philadelphia car, I didn't think that
7 said anything particular.

8 BY MR. ALFORD:

9 Your Honor please, I'm leading up to something
10 else, since it was an indication that there was
11 some Philadelphia people there it led the jury
12 to believe and to speculate who was it in that
13 car, and then another serious matter right along
14 this line, during the arguments, Mr. John Doar,
15 Assistant United States Attorney General was reading
16 from the alleged confession and said during this
17 instance or read during this instance the name of
18 Price instead of reading it blank. An objection
19 to this was made and a motion for a mistrial was
20 made by the defendants and overruled by the Court.

21 BY THE COURT:

22 The name of Mr. Price was read?

23 BY MR. ALFORD:

24 Yes sir.

25 BY THE COURT:

Out of the statement?

1
2 BY MR. ALFORD:

3 Yes sir.

4 BY THE COURT:

5 I don't remember that.

6 BY MR. ALFORD:

7 During the closing argument?

8 BY THE COURT:

9 Do you have a copy of the transcript on that,

10 ---

11 BY MR. ALFORD:

12 No sir, but I remember going back and calling the
13 Court's attention to that during the recess.

14 BY THE COURT:

15 I don't remember that.

16 BY MR. ALFORD:

17 And we made a motion for a mistrial and objection
18 and it was overruled by the Court and we say this
19 highly prejudiced this defendant Price before the
20 jury, and led to his conviction and if the Court
21 please there was quite a number of occasion
22 involving argument of Counsel and the conduct of
23 Counsel in the argument to hold that these pre-
24 judicial things are definitely grounds for a new
25 trial. Now, I would like to call the Court's

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attention to the case of Kitchell vs. the
United States 354, Fd. 2nd, 714.

BY THE COURT:

What Circuit is that from?

BY MR. ALFORD:

That is from the First Circuit, decided in 1965
and they had a statement in there where they had
made some blanks and the Court held that when
Court began to review the evidence and discuss
this thing they said that the confession of the
guilt was uncontradicted and not refuted as comment-
ed by the statement with the blanks in there and
we submit that was a prejudicial error in this
case especially for the name Price to be used as
coming from that statement when it was supposed
to be blank there at this time, and the case
of DeLuter against the United States is a Fifth
Circuit Case where argument of Counsel was such
that it was prejudicial to the defendants and
the Court had to grant a new trial on the grounds
of it, or the Fifth Circuit reversed it I believe
in that case, and another case, Handford vs. the
United States is a Fifth Circuit case, decided in
1957 in regard to a comment in the argument of
Counsel, and in the case of Kraft vs. the United

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2/29

1 States and that is an Eighth Circuit Case decided
2 in 1956, calling---

3 BY THE COURT:

4 Give Counsel your references, you don't give them
5 your book and page number.

6 BY MR. ALFORD:

7 In Craft vs. United States, 238, F. 2d, 794;
8 Hanford vs. United States 245, F wd, 225; Duluter
9 vs. United States, 308, F 2d, 140; Kitchell vs.
10 United States, 384, F2d, 715; and United Staes
11 vs Bujeuo, which is a Second Circuit Case, 304,
12 F. 2d, 177. In this case it says its the prose-
13 cution's obligation to avoid argument on matters
14 which may serve only to prejudice the jury. It is
15 his duty of all depth to be fair and objective and
16 to argue within the issues of the case and to re-
17 peat references which the Judge had admonished him
18 not to do is more highly prejudice, and the reason
19 I'm saying that the Court did admonish Mr. Doar
20 in the reading of that purported confession and
21 corrected him and instructed him to read it correctly
22 and then in the argument he undertook to reread
23 this matter and read the name Price in it which
24 we say is most highly prejudicial. Now, in Reshirt
vs. United States in 359 F. 2d, 278, that is a

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Circuit Court of Appeals case from the District of Columbia in 1966, in regard to closing arguments of statements from witnesses which were never received in evidence was prejudicial even when it might have been set forth in the statement but never made to appear in the record. Now that is something that I want to call to the Court's attention that even though the name of Price might have been in this original confession the Court ordered it deleted and the Court had already called to the attention of Mr. Doar to read the thing correctly before the jury and then after that admonition to do that, then in his argument for him to read the name of Price in it, I say it is wholly prejudicial in telling the jury that Price was there as a participant and since it was in there the Court had ordered Mr. Doar not so to do, to read it in there was the most prejudicial thing during this entire trial so far as Price and we submit the Court should grant him a new trial on that. Now, also in the argument of Counsel, Mr. Hauberg, in his closing statement, said to the effect that the jury should consider the conduct of the defendants around the rail of the bar, and that they could gain the im-

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1 pression of guilt or innocence from seeing and
2 observing them. If the Court please we say that
3 is an unfair argument to these defendants, Price
4 and Posey; at this time because they hadn't
5 testified and that was a reference to their
6 demeanor there which under the Fifth Amendment
7 of the Constitution of the United States a person
8 has the right to remain silent and the jury is
9 not to gain any inference as to their guilt or
10 innocence and that statement there we say was
11 most highly prejudicial as to these defendants.

12 We further submit that after the jury had retired
13 and the, uh, before the jury had retired the
14 Court had given the instructions to the jury and
15 then they retired and then on the second day of
16 their deliberations the jury sent a written note
17 to the Judge of this Court to the effect that they
18 were deadlocked if they stayed for one year, and
19 then during the afternoon of the same day, the
20 jury was brought back into the courtroom and given
21 further instructions by the Court which were
22 objectéd to and excepted to a motion for a mistrial
23 was made by all defendants, including the defen-
24 dants Price and Posey, and especially was this
25 charge objected to because this charge suggested

1 that the minority ought to yeild to the majority
2 opinion of the jurors. It was suggested that
3 because of the time and expense involved the jury
4 ought to try and agree on a verdict and it was of
5 great importance for them to agree in some manner
6 if it did not do violence to themselves personally.
7 These are not the only grounds to this charge which
8 is known as the Allen Charge, but we submit that
9 took the right of free thinking and consideration
10 of this case from these jurors and caused them
11 to lean further away from their personal convictions
12 and compromised then in an effort to reach a
13 verdict which was prejudicial to each of these
14 defendants, Mr. Price and Mr. Posey. In support
15 of that I would like to call to the attention of
16 the Court to the case of Green vs. United States
17 of America in 309 F. 2d, 852, which was a Fifth
18 Circuit Case. Now, we submit to the Court that
19 in this case that charge was given before the
20 jury ever retired but in that case the Court
21 goes to great length to discuss the affect of
22 this type case in the charge on the jury and it
23 goes, uh, we submit to the point of causing the
24 jury to cast aside or go beyond their original
25 convictions and ideas and thoughts of what their

1 personal thoughts are and go over to the side of
 2 the majority and therefore, we submit that this is
 3 grounds for a new trial in this cause, as a result
 4 that the charge given by the Court as a supplemental
 5 charge, which is also known as the Allen Charge
 6 and which is also referred to in this Green
 7 decision as the uh dynamite charge to try and
 8 unlock a deadlocked jury. Several Courts have
 9 criticized and held that this charge is not
 10 applicable in a criminal case nor appropriate and
 11 it invades the province of the jury in deciding
 12 a ~~frww~~ deliberation among themselves and continue
 13 their convictions.

14 BY THE COURT:

15 What was the reason assigned to the reversal of
 16 Green?

17 BY MR. ALFORD:

18 The Green case, Your Honor please, was, as I
 19 have just said, that it was given before the jury
 20 ever retired.

21 BY THE COURT:

22 What was the reason the Fifth Circuit reversed
 23 it, what was the reason for reversal?

24 BY MR. ALFORD:

25 The time was not appropriate nor was the Allen

1 Charge appropriate.

2 BY THE COURT:

3 The timeliness then was the reason.

4 BY MR. ALFORD:

5 Yes sir, and then it goes on to quote these other
6 cases as to what others had said about it.

7 BY THE COURT:

8 Of course, the Fifth Circuit don't have much
9 discussion where they like the Allen Charge or
10 not, that's the Supreme Court of the United States
11 but they have said in the last several cases that
12 they have approved the Allen charge, haven't they?

13 BY MR. ALFORD:

14 In this case they say it is untimely.

15 BY THE COURT:

16 I say though some members of the Fifth Circuit
17 doesn't like the Allen charge but they've approved
18 I believe the last three cases up there that
19 involved the Allen Charge, they said the Allen
20 Charge was correctly given. They reversed Judge
21 Clayton for giving it because he said it was
22 their duty to agree. I told them it was not
23 their duty to agree. I just negatived it on
24 everything that I've known that they have criti-
25 cized it on in my Allen charge.

BY MR. ALFORD:

If the Court will permit me I submit that my criticism of your uh, let's call it supplemental or Allen Charge is this. That this was a long and complicated case that involved several defendants and to give that charge in a case of this type at any time would tend to take away from the jury a feeling that they were independent as individuals who could decide this case independently and come up with a verdict either guilty or innocent of their own individual conviction as to each individual defendants, wherein you have this many and as long a case as it was and as complicated as it was with many factors to it, that charge there tended to overwhelm or persuade them to lay aside their personal convictions and go to the majority to reach a verdict as to the individuals who were so charged, who had their sacred rights in the hands of that jury and that is what I submit under all of the facts and circumstances in this case leads us to ask for a new trial because of the giving of that Allen charge.

BY THE COURT:

Well, the present Chief Justice of the Fifth

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Circuit says that he's against it that it doesn't mean anything, that is the charge don't mean anything.

BY MR. ALFORD:

Well, he might say so but I submit if he was sitting in the jury box and for His Honor on the bench to give that charge it would have a propound effect more as a layman than me as a lawyer sitting there to reevaluate and to reweigh everything there in an effort to go along with the majority.

BY THE COURT:

Well every Federal Judge has the right to comment on the evidence and the only thing that he's got to say is that's just me talking and you just disregard everything I say. That's supposed to clear the record, isn't it?

BY MR. ALFORD:

It is supposed to Your Honor where a word is said and the old saying is once its gone you can never recall it, when it hits its mark or target like an arrow goes into the heart of a person as to the heart of an apple, it can never be called back to be---

BY THE COURT:

Are you familiar with that Fores decision I was

1 asking Counsel about?

2 BY MR. ALFORD:

3 No sir, I'm not.

4 BY THE COURT:

5 I'll give Counsel that opinion, its a slip
6 opinion, its not even in the advance sheet, it
7 deals with the question of admitting a statement
8 of a co-defendant into evidence and then refusing
9 severance, Judge Rives I believe was speaking
10 for the Court and he used some language which
11 I thought Counsel was reading from another case
12 there a while ago, the identical language. Its
13 a delicate question.

14 BY MR. ALFORD:

15 It sure is. There's another ground for a
16 new trial. There were several people in attendance
17 during the trial of this cause and during the
18 time after this second charge was being given
19 it was referred to as the dynamite charge, there
20 was a discussion around and among the spectators
21 and the United States Attorney used the term of
22 it being the "dynamite charge" after the charge
23 was given the United States Marshal in attendance
24 ordered all of the attorneys to leave the court
25 building and premises, also all of the defendants

1 and their friends and families, and they did
2 leave the premises, and there was no Judge left
3 on the premises either as the United States
4 Marshal advised that the Judge had already left
5 too. At that time the attorneys, defendants
6 and people in attendance did not know that these
7 defendants had been accused or that any of these
8 defendants had been accused or suspicioned had
9 made threats about using dynamite or making
10 threats against anyone; however, the jury continued
11 to deliberate for sometime and then when this
12 occurred, it was already past dark, and early
13 the next morning by nine o'clock, the jury returned
14 a verdict into open court, it is by this verdict
15 that these defendants stand before the Court
16 awaiting judgment by the Court. We submit that
17 the attorneys and the defendants not being per-
18 mitted to remain in the courthouse or the premises
19 while the jury deliberated, but were found guilty
20 within a matter of a few hours after the
21 defendants and attorneys were required to leave
22 the premises. We submit that this was a right
23 that these defendants had to be present in the
24 courthouse in the vicinity of the courtroom and
25 they were denied that privilege.

1 BY THE COURT:

2 Would you like the opportunity to put some
3 testimony on?

4 BY MR. ALFORD:

5 We would like to.

6 BY THE COURT:

7 In preference to an affidavit?

8 BY MR. ALFORD:

9 Well, I'm up here and I would like to have
10 an opportunity to ask Counsel that is with me
11 for his decision on that if Your Honor please.

12 BY THE COURT:

13 All right.

14 (Counsel confers)

15 BY MR. ALFORD:

16 Your Honor, Counsel has asked me to ask the
17 Court that if we submit affidavits would that be
18 accepted by the Court as proof?

19 BY THE COURT:

20 Yes sir, and I will afford the other side an
21 opportunity to respond to it and if it looks like
22 it would be impossible to make a determination
23 as to the facts I will then permit you to put
24 on oral testimony.

25 BY MR. ALFORD:

1 Very well, Your Honor, we will submit affidavits.
2 When would the Court like to have these, or what
3 time.

4 BY THE COURT:

5 Do you have any cases first that would show to
6 make any difference?

7 BY MR. ALFORD:

8 I don't have, Your Honor, and I don't know where
9 any of the other Counsel has any or not.

10 BY MR. WEIR:

11 I have one, Your Honor, that I would like to just
12 call to Mr. Alford's attention, its very short
13 and if you will let me show it to him.

14 BY THE COURT:

15 All right. You know the facilities at Meridian
16 are sorta crowded and for some reason we don't
17 have but one means of entrance and exit to the
18 courthouse and I was advised that the jury wanted
19 to go to dinner, and I was at the motel at that
20 time and I told them they could carry the jury
21 to dinner and to keep them together, and I didn't
22 know by what means they accomplished that but they
23 were instructed at the beginning of the trial to
24 keep that jury intact and minimize as much as
25 they could to keep any contacts from any outsiders

1 so if that was their means of doing it I wouldn't
2 see anything wrong with it.

3 BY MR. ALFORD:

4 Your Honor, during the trial days they had every-
5 body just to move down to the end of the hall and
6 actually the lawyers, most of us, I was up on
7 third floor at the time they came to tell us
8 to leave which was way away from the jury.

9 BY THE COURT:

10 Well, they were told to lock the courtroom each
11 time there was so much talking of dynamite around
12 there and they had lost some dynamite the first
13 day of the Court and they were told to clear the
14 courtroom.

15 BY MR. ALFORD:

16 We didn't object to clearing the courtroom, but
17 to clear the courthouse was the question that we
18 raised Your Honor.

19 BY THE COURT:

20 I didn't make any instructions about that, I
21 didn't know where you were.

22 BY MR. ALFORD:

23 Now, I would like to call the Court's attention
24 to a Michigan case, the style of it the People
25 of the State of Michigan vs. Labonne, which is

1 cites in 73 NW 2d, 537.

2 BY THE COURT:

3 Is that from an appellate court?

4 BY MR. ALFORD:

5 The Supreme Court of Michigan, if Your Honor
6 please. It says that we recognize that all that
7 transpired between Judges and Jurors the Court
8 concluded there had been no misconduct as in the
9 record before us, therefore, it was argued that
10 the defendants rights to be present is not
11 determined from the result and the review thereof
12 from the Court's inquiry, but merely from the
13 inquiry the defendants were not given an opportunity
14 to exercise those privileges, it was their rights
15 to be present affords them, with such fundamental
16 rights denied the guilt or innocence of the
17 accused is not concerned and neither party is put
18 to the burden of showing actual injury or prejudice
19 and it goes on then to cite there another Michigan
20 case which is McLizzie, 223 , 581 NW, 540 and
21 14 LRA 809 and it says neither in this case is
22 this an case an authority of what was done in
23 Murray's case, the Court did not order the court-
24 room to be cleared of spectators but the lobby
25 outside; however, no violence is shown no mis-

1 conduct. I can not exceed to the proposition
 2 intimated in that case if a public trial is not
 3 afforded the accused the burden is upon him to
 4 show that actual injury has been suffered by
 5 deprivation of his constitutional rights on the
 6 contrary when he shows that his constitutional
 7 rights have been violated the law conclusively
 8 concludes that he has suffered an actual injury,
 9 and it goes on, and then it says that we think
 10 the record more than justifies and then it says
 11 in accordance we do not discharge the defendant
 12 but we reverse the conviction and order a new
 13 trial.

14 BY THE COURT:

15 An you say some constitutional right was invaded
 16 by not allowing you to stay on the third floor
 17 until the jury went to dinner off of the second
 18 floor?

19 BY MR. ALFORD:

20 Yes sir, we had a right to do that and the
 21 defendants.

22 BY THE COURT:

23 You weren't observing them from the third floor?

24 BY MR. ALFORD:

25 No sir, but we had somebody there that was, some

1 of the lawyers would stay down and some would
2 stay up on third floor, we didn't want to cause
3 any congestion down on the second floor so that
4 was the way we would do it.

5 BY THE COURT:

6 No impropriety ever came to my attention that
7 anybody ever tried to obtain any access to the
8 jury but I think that all of these trials and
9 particularly these heavily attended trials should
10 be conducted far from suspicion and that was what
11 was done in this case.

12 BY MR. ALFORD:

13 We thought that was what was done until they made
14 us move out Your Honor please and we thought that
15 was an invasion of the rights of these defendants,
16 if Your Honor please. We further submit that
17 grounds for a new trial is the Court's instruction
18 on reasonable doubt. That is a question that is
19 hard, we submit for anyone to define and for
20 further grounds we submit that the jury themselves
21 asked the Court for a further instruction on
22 reasonable doubt.

23 BY THE COURT:

24 Yes sir, I took great pride in drawing that in-
25 struction, I thought I had come up with a master-

1 piece and nobody has ever satisfied anybody else
2 with a definition of reasonable doubt, and I
3 thought you were right in objecting to any further
4 confusion of the jury by attempting to clarify
5 something they hadn't been able to clarify by
6 then and that's the reason I didn't give it to
7 them again.

8 BY MR. ALFORD:

9 We further submit that the United States of America
10 failed to prove beyond a reasonable doubt that
11 the three alleged victims were in fact the parties
12 charged in the indictment as being the ones whose
13 rights were alleged to have been violated from
14 the result of this conspiracy charge, and we
15 further assign as grounds that the Court erred in
16 not instructing the jury that the testimony of
17 alleged incompetence or paid informers should
18 be weighed with great care and caution and dis-
19 trust.

20 BY THE COURT:

21 I believe I did.

22 BY MR. ALFORD:

23 If it please the Court, I don't believe the Court
24 went quite far enough in the instruction we
25 asked you to give, you refused ours.

1 BY THE COURT:

2 Well I told them to view it with distrust and
3 it was my recollection that I refused yours be-
4 cause it was exactly the same wording as the one
5 I had given them, I just didn't want to tell them
6 twice the same thing, isn't that correct?

7 BY MR. ALFORD:

8 I believe one of the words was left off that we
9 had, either with great care and caution or
10 distrust, it was one of those three words that
11 was left off as I recall it, if Your Honor
12 please. That's one of the grounds that we assign
13 that one of those words was left off/ We submit
14 that the question of grounds for a new trial for
15 defendant Price is that there was no proof that
16 this defendant was any part of any alleged
17 conspiracy in any way. They had testimony about
18 what Price did about arresting them for speeding,
19 placing them in jail, but if there is any other
20 testimony that puts him where he was in any
21 conspiracy we submit that the record is poor
22 as to that. We further submit that neither
23 the indictment or proof sustains any offense
24 against the United States of America, and we
25 submit also grounds for a new trial that the Court

1 erred in admitting into evidence the group of
 2 evidence that was not necessarily material, such
 3 as the photographs of the alleged victims which
 4 tendered to prejudice the jury against these
 5 defendants and also the Court erred in permitting
 6 the Plaintiff to show an alleged backroad used
 7 by the conspirators on a map that was not supported
 8 by competent evidence, and I would like to call
 9 the Court's attention that during the argument
 10 of Mr. Doar, that he used a pointer and pointed
 11 out the backroutes on that map that had never
 12 been shown by any witness other than Mr. Doar
 13 who was attempting to testify at that time, and
 14 there has been case after case that held that
 15 attorneys can't testify in Court or comment on
 16 evidence that has not been placed of record and
 17 there is no evidence whatsoever to pinpoint the
 18 roads that he pointed to in his argument.

19 BY THE COURT:

20 You're talking about that road where there was
 21 a cut-off in the northeastern corner of the map
 22 weren't you?

23 BY MR. ALFORD:

24 Yes sir. There is another ground that I would
 25 like to assign in this cause on behalf of these

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two defendants and that is we would like to ask the Court to consider under the 24th ground for many other reasons, and that is, Your Honor, that statment, the Jincks Act Statement that the government furnished the defandants, and those statements and reference to them should be made out of the presence of the jury. The case of Reichart vs. United States, 359, F. 2d, page 278 so holds in that case.

BY THE COURT:

It was my recollection that you asked for the Jencks Act statements when you made it appear and you have to make out a prima facie case, you would ask for that and then you would ask for them.

BY MR. ALFORD:

Yes sir, Mr. Bowers' attorney asked for them, but we submit in this case here that the jury should be retired, AT THAT TIME.

BY THE COURT:

When you are asking about it?

BY MR. ALFORD:

Yes sir.

BY THE COURT:

What Circuit is that from?

1 BY MR. ALFORD:

2 That is the United States Circuit Court of Appeals
3 of the District of Columbia. That's Mr. Skelly
4 Wrights' case, I believe.

5 BY THE COURT:

6 What would be the prejudicial about it about
7 asking about the existence or not of it?

8 BY MR. ALFORD:

9 The fact is when you ask for it or not when you
10 are questioning the witness about whether or not
11 it was made, where it is any inconsistencies in
12 his statement, if Your Honor please. They have
13 held that if the reference to that is made and
14 then is not specifically used that that is pre-
15 judicial to the defendants.

16 BY THE COURT:

17 Of course, you have the right to use them.

18 BY MR. ALFORD:

19 If you elect so to do it, if you don't, the
20 Court has held that could be prejudicial to the
21 defendants.

22 BY THE COURT:

23 Let's just talk about this case not about another
24 case, but you had a right to those Jencks Act
25 Statements for the purpose of cross examination

and take and study them----

1
2 BY MR. ALFORD:

3 We took them and studied them and cross examined
4 them.

5 BY THE COURT:

6 Then what does that leave you to talk about what
7 could have happened, we are talking about what did
8 happen?

9 BY MR. ALFORD:

10 The fact is that the Jury wasn't retired before
11 we discuss it.

12 BY THE COURT:

13 We are still talking about what could have
14 happened and not what happened.

15 BY MR. ALFORD:

16 Well, this case, the Reiger case the one that
17 I refer to. And another case in support of this
18 trip that Mr. Doar pointed out on the road I
19 would like to refer to the case of United States
20 vs ----- 258 F 2d, 338 from the Second Circuit
21 decided in 1958 wherein the argument of the
22 Counsel made certain statements that were not in
23 the record, and the Court said that was a preju-
24 dicial error, and another case in support of this
25 misquoting testimony in regard to this statement

1 which I referred to a while ago about the name
2 mentioningis Wallace vs. United States 281 F. 2d
3 656.

4 BY THE COURT:

5 What Circuit is that from?

6 BY MR. ALFORD:

7 Your Honor please I don't have that Circuit listed
8 here.

9 BY THE COURT:

10 Do you have a memoranda on these cases you are
11 reading from?

12 BY MR. ALFORD:

13 I have copies of some of them and some of them
14 I just have a pencil memorandum, if Your Honor
15 please, I have a copy of most of the ones I have
16 quoted. Now, if Your Honor please, we respectfully
17 submit that a serious ground raised in our motion
18 for a new trial for Cecil Wayne Price and Billy
19 Ray Posey will merit a new trial for these two
20 defendants, and if the Court Please, I would like
21 to confer with Associate Counsel for any remarks
22 they might like to have if the Court will indulge
23 me.

24 BY THE COURT:

25 All right.

1 (Counsel conferred)

2 BY MR. WEIR:

3 May if please the Court, I don't want to make
4 any statement or say anything that has already
5 been said, but Your Honor in reference to this
6 statement that Mr. Doar read from this alleged
7 confession, we further submit that the jury did
8 not have this to carry back to the jury room and
9 the read it you see---

10 BY THE COURT:

11 Let's see, did that go?

12 BY THE CLERK:

13 None of the statements went to the jury.

14 BY MR. WEIR:

15 And I didn't want to repeat anything that had
16 already been said.

17 BY THE COURT:

18 All right.

19 BY MR. ALFORD:

20 Your Honor please, I would call to the Court's
21 attention here that was filed on behalf of Mr.
22 E. G. Hop Barnett renewing our motion for a judg-
23 ment of acquittal and I don't want to inject it
24 in the middle of this hearing, but I did want
25 to call it to the Court's attention after the