

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	CASE NO.: CR-2012-07-1887(B)
	)	
Plaintiff,	)	
	)	JUDGE AMY CORRIGALL JONES
vs.	)	
	)	
ERICA STEFANKO,	)	<u>MOTION</u>
	)	(MISTRIAL AND NEW TRIAL)
Defendant.	)	

Now comes the Defendant, ERICA STEFANKO, by and through counsel, Kerry M. O'Brien, who moves this Court for an Order of Mistrial and New Trial. The reasons are set forth more fully below.

MEMORANDUM

After approximately seven days of Trial, the Jury in the above captioned case retired to begin their deliberations. Toward the end of the morning session on Wednesday, November 25, 2020, after approximately three partial days of deliberations, the Court notified counsel and the Defendant to return to the courtroom.

Without any prior notice to counsel, no side bar consultation, nor any in-chambers review, the Court began what is commonly referred to as the Allen/Howard Charge to the Jury. The Court did not enter into any meaningful discussions with the members of the Jury as to their status of deliberations. Counsel was not consulted. No note or other indicator was produced for counsel to inspect.

Counsel was not consulted prior to the reading of the Charge or given the opportunity to object or ask for a Mistrial. (See Attached Partial Transcript.)

Immediately after concluding its Charge, the Court departed the bench without inquiring of counsel.

Several hours later, the Jury returned two guilty verdicts of the original six charges and not guilty on the other four counts.

### ARGUMENT

The defense contends that the Court failed to make an inquiry into the nature of the unspecified “difficulty” communicated by to Court staff when the jury foreman rang the buzzer twice during deliberations. The Court failed to establish a substantive basis for determining jury deadlock, which is (arguably) a condition precedent of issuing a Howard Charge: Particularly when no note is provided.

In the case of State v. McClellan, 93 Ohio App. 3d 315, 325-326; 638 N.E.2d 593 (Ohio App. 1994): “Generally, [the Howard charge] is attacked on the ground that a jury was not, in fact, deadlocked and so giving the charge was premature and resulted in having a coercive effect on the jury.”

Furthermore, the defense cites the Court to the following decisions:

1. State v. Price, 2013 Ohio 3912, 99058, ¶ 49 “Here, after deliberating for a day, the jury sent a communication to the trial court indicating they could not reach a verdict. ...The trial court discussed this question with counsel for appellant and the state.”
2. State v. Rhines, 2012 Ohio 3393 (Ohio App. 2012) ¶ 49: “The record indicates that prior to giving the dynamite charge to the jury, the trial court asked both parties if they agreed with the court's decision to provide the supplemental Howard instruction to the jury. Both parties agreed on the record, and the trial court subsequently gave the dynamite charge to the jury in open court. Neither the State nor the defense objected to the instruction as provided by the trial court to the jury.”

3. State v. Bullucks, 2018 Ohio 2159 ¶25-26: “Shortly after 4:00 p.m., the jury informed the trial court that it was deadlocked. After conferring with counsel by phone, the court adjourned the jury at 4:15 PM. The jury resumed deliberations at 10:00 a.m. the following date, April 11, 2018. At that time, the court conferred with counsel, and neither party objected to the court’s instruction that the jury continue its deliberations.”
4. NINTH DISTRICT: State v. Villa, 2006 Ohio 4529 (Ohio App. 9/5/2006), 2006 Ohio 4529 (Ohio App. 2006) ¶9: Trial court spoke with counsel for both defendant and state once it received a note indicating deadlock, parties agreed a Howard charge was appropriate, defense counsel had an opportunity to object to trial court’s decision to move forward with Howard charge despite court not disclosing all information provided by jury with respect to deadlock.
5. State v. King, 2013 Ohio 4791 (Ohio App. 2013) ¶ 37: appellate court noted that the record indicated prosecutor and defense counsel agreed to modified Howard charge as initially given, defense counsel did have opportunity to confer and object.

When a jury has become deadlocked, “[t]he use of a supplemental [jury] charge has long been sanctioned.” *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988). (discussing on *Allen v. United States*, 164 U.S. 492 (1896)); *see also State v. Howard*, 42 Ohio St.3d 18, \* 23-26 (1989) (declining to adopt the traditional *Allen* charge as the proper supplemental charge but recognizing that a supplemental charge may be warranted in instances where a jury has become deadlocked and providing the lower courts with a supplemental instruction that the Supreme Court of Ohio deemed appropriate). **However, a criminal defendant remains entitled to an uncoerced jury verdict.** *Lowenfield*, 484 U.S. at 241. Whether a supplemental charge

improperly coerces a jury is viewed in light of “all the circumstances.” *Lowenfield*, 484 U.S. at 237.

In the instant case, other factors created undue pressure:

TIMING: Before trial started, the Court indicated to the jury that its commitment for service would likely extend until the Wednesday before the Thanksgiving holiday. This set an expectation of when jury service should or would be completed. After the Howard instruction on Wednesday afternoon, the jury came back with a unanimous verdict in less than 2 hours, just before the start of the holiday weekend. It would be reasonable and expected for jurors placed in this situation to feel unduly pressured to deliver a verdict quickly--especially if anticipating a request to stay into the evening prior to Thanksgiving or come back on Friday over the holiday weekend.

MEDIA: Given pervasive national media attention throughout the course of this case and the ever-constant presence of Court TV staff (who were conspicuously positioned outside the Courtroom during jury deliberations) it is reasonable to assume jurors feared being sequestered (even if unfounded) should they not come to a quick vote.

COVID-19 CONCERNS: Throughout the course of trial, COVID-19 cases continued to rise in unprecedented numbers in Akron and in Summit County, especially as noted by the Court to the jury on November 20 in a cautionary statement to stay safe. Both the court and the jurors were motivated to close out this trial as soon as possible, given the high incidence of community spread:

INFLUENCE ON THE COURT IN ISSUING THE CHARGE: The court prioritized its effort to protect public health and avoid a mistrial due to potential COVID-19 exposure and/or

spread. In fact, there were at least two discussions on the record where potential COVID exposure threatened to derail the trial.

*One example of the Court's exercise of urgency (among many examples you can mention) was its decision to decline defense counsel's request for Defendant testimony to occur on Monday, November 23--despite prosecution finishing their case-in-chief a day earlier than estimated.*

INFLUENCE ON THE JURY: Although the jury was carefully vetted with respect to exposure to COVID-19 and screened on a daily basis, the jury was aware that every additional day spent in deliberation posed increased health risks. Given the extensive and pervasive COVID news coverage and the Governor's briefings, the jury would have been especially mindful of breaking for holidays (when family gatherings and community spread would be likely) and then returning to closed-door deliberations with the risk of encountering a higher risk of exposure.

STATS: On November 25, 2020, COVID cases in the state jumped to a new daily high of 10,835 cases and 154 deaths--up from 8,604 cases and 98 deaths the prior day [*Ohio Coronavirus Map and Case Count, New York Times Infographic*]. Like most of the state, Summit County was experiencing sustained increase in case numbers and reported deaths, with 15,222 total cases and 369 deaths occurring the week of 11/22-11/28. [*Summit County Communicable Disease Unit, MMWR Week 48 Activity Summary, Prepared 12/3/2020*].

The Court did not communicate clear updates to counsel regarding the nature and purposes of calling the jury back from deliberations, including notification to counsel it was going to issue a Howard Charge. Because of this, counsel did not have an opportunity to confer or object to the issuance of the Howard Charge out of the jury's presence.

The Court did not give a meaningful opportunity to either counsel to object or ask for a mistrial on the record before issuing the Howard Charge to the jury.

SUPPORTING FACT: After the jury left the Courtroom, the prosecutor asked the Court if there was a note, indicating confusion at the Court's decision to issue a Howard instruction.

It may be tempting to dismiss the above-outlined factors as pure conjecture. However, **because the Court made no effort to make an inquiry into the jury's concerns** before issuing the Howard Charge, the Court not only fostered fertile ground for the instruction to have a coercive influence on the verdict, the Court guaranteed there was no possibility for it to address or mitigate such an influence.

As a result of the Court's structural errors, the Howard Charge given to the jury on Wednesday afternoon had an **unconstitutionally coercive effect**-- especially examined under a totality of the circumstances at trial.

Accordingly, the defense would ask for a Mistrial and request that a new Trial be Ordered.

/s/ Kerry M. O'Brien  
KERRY M. O'BRIEN - No. 0025304  
Attorney for Defendant  
159 South Main Street, Suite 423  
Akron, Ohio 44308  
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#### CERTIFICATION

I certify that a copy of the foregoing was sent to the Office of the Prosecutor, 53 University Ave., Akron, OH 44308 this 29<sup>th</sup> day of December 2020, by electronic case filing.

/s/ Kerry M. O'Brien  
KERRY M. O'BRIEN - No. 0025304

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

- - -

THE STATE OF OHIO,	)	CASE NO. 2012-07-1887B
	)	
vs.	)	PARTIAL TRANSCRIPT
	)	OF PROCEEDINGS
ERICA STEFANKO,	)	
	)	
Defendant.	)	Volume 1 of 1

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**APPEARANCES :**

BRIAN V. LOPRINZI, Assistant Prosecuting Attorney,  
FELICIA EASTER, Assistant Prosecuting Attorney,  
On behalf of the State of Ohio.

KERRY O'BRIEN, Attorney at Law,  
On behalf of the Defendant.

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BE IT REMEMBERED that upon the hearing of the  
above-entitled matter in the Court of Common Pleas,  
Summit County, Ohio, before the Honorable Amy  
Corrigall Jones, Judge Presiding, and a duly  
impaneled jury, and commencing on November 13, 2020,  
the following proceedings were had, being a Partial  
Transcript of Proceedings: **(HOWARD CHARGE)**

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KRISTIE L. GOWENS, RPR  
OFFICIAL COURT REPORTER  
SUMMIT COUNTY COURTHOUSE  
209 SOUTH HIGH STREET  
AKRON, OH 44308

1 MORNING SESSION, WEDNESDAY, NOVEMBER 25, 2020

2 P-R-O-C-E-E-D-I-N-G-S

3 - - -

4 THE COURT: We took the opportunity again  
5 to sanitize and disinfect the courtroom while  
6 we were on the brief recess.

7 Now, ladies and gentlemen, the Court has  
8 been advised that you have indicated difficulty  
9 in reaching a verdict.

10 The Court requests that you make every  
11 reasonable effort to agree on a verdict. There  
12 is no reason to support that the case will ever  
13 be submitted to 12 individuals more  
14 intelligent, more impartial, or more competent  
15 to decide it, or that additional evidence will  
16 be produced by either side. It is your duty to  
17 make every reasonable effort to decide the case  
18 if you can conscientiously do so.

19 The Court instructs you to return to the  
20 jury room and continue your deliberations.  
21 Consult with each other. Consider each other's  
22 views and deliberate with the objective of  
23 reaching an agreement if you can do so without  
24 disturbing your individual judgment. Each of  
25 you must decide this case for yourself, but you

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1           should do so only after a discussion and  
2           consideration of the case with your fellow  
3           jurors. Do not hesitate to change your opinion  
4           if you are convinced it is wrong. However, you  
5           should not surrender honest conviction in order  
6           be congenial or to reach a verdict solely  
7           because of the opinion of other jurors.

8                     If after a reasonable time you still  
9           can't reach a verdict, you are to notify the  
10          Court.

11                    With that, you will return to  
12          deliberations. It's 11:50 p.m.

13                    And we will -- I am sorry -- a.m., excuse  
14          me.

15                    And we will disinfect and sanitize the  
16          courtroom.

17                    With that, my staff will -- first, just  
18          so that you know -- take you back to Judge  
19          McLaughlin's courtroom. We will disinfect the  
20          courtroom again.

21                    And then if you decide you'd like to take  
22          a lunch recess, we will address it at that  
23          time.

24                    Again, it is 11:50 a.m.

25                    Thank you.

KRISTIE L. GOWENS, OFFICIAL COURT REPORTER

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(The jury retired to the jury room  
to resume deliberations at 11:50 a.m.)

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KRISTIE L. GOWENS, OFFICIAL COURT REPORTER

C E R T I F I C A T E

I, Kristie L. Gowens, Official Shorthand Reporter for the Court of Common Pleas, Summit County, Ohio, duly appointed therein, do hereby certify that I reported in Stenotypy the proceedings had and testimony taken in the foregoing-entitled matter consisting of 5 pages, and I do further certify that the foregoing-entitled PARTIAL TRANSCRIPT OF PROCEEDINGS, conducted before the Honorable Amy Corrigan Jones, Judge of said court, is a complete, true, and accurate record of said matter and PARTIAL TRANSCRIPT OF PROCEEDINGS.  
(HOWARD CHARGE - NOVEMBER 25, 2020)

  
KRISTIE L. GOWENS, RPR

Dated: December 14, 2020  
AKRON, OHIO

KRISTIE L. GOWENS, OFFICIAL COURT REPORTER