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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Pickens County Court of General Sessions
The Honorable Robin Stillwell., Circuit Court Judge

Appellate Case No. 2020-001595

State of South Carolina,....., Appellant

v.

Charles Rampey,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Respondent for criminal sexual conduct (CSC) with a minor in the second degree in February 2014. On July 19, 2016, the Pickens County Grand Jury indicted Respondent on the charge of CSC with a minor in the third degree. (App. pp. 255 – 256). Assistant Solicitor Shannon Odom prosecuted the case. Represented by the late Thomas Boggs, Esquire, Respondent was tried by jury before the Honorable Robin B. Stillwell on August 31, 2016 through September 1, 2016. Following an *Allen*[1] charge, the jury found Respondent not guilty of CSC with a minor in the second degree but guilty of CSC with a minor in the third degree. (App. p. 242, line 24 — p. 243, line 5). Judge Stillwell sentenced Respondent to thirteen (13) years imprisonment with credit for time served. (App. p. 253, lines 3-8).

Respondent appealed his conviction and sentence. William G. Yarborough, III, Esquire perfected his appeal. The Court of Appeals reversed Respondent's conviction and sentence on August 19, 2020. *State v. Rampey*, No. 2020-UP-245 (Ct. App. filed Aug. 19, 2020) (per curiam).

On September 3, 2020, Assistant Attorney General William F. Schumacher, IV, petitioned for rehearing on behalf of the State. (App. pp. 326 –335). Following the Court of Appeals's order denying the petition for rehearing, Petitioner filed the Petition for Writ of Certiorari pending before this Court, raising the following issue for review:

> The Court of Appeals erred in finding the trial judge's *Allen* charge as a ground for reversal where the charge satisfied the traditional *Lowenfield* factors; the court's finding of error is based upon its addition of a new factor to the traditional test. Further, any alleged error was rendered harmless because, following the verdict, the trial judge polled the jury and confirmed the jurors did not surrender conscientiously held beliefs simply for the sake of reaching a verdict.

This Return follows.

[1] *Allen v. United States*, 164 U.S. 492 (1896).

ARGUMENT

The Court of Appeals did not err in reversing Respondent's conviction and sentence and remanding for a new trial and there is no basis for this Court to grant certiorari to disturb that ruling. Despite acknowledging the inability to discern the specific basis for the Court of Appeals's decision due to the little information provided in the opinion, Petitioner nonetheless argues the Court of Appeals misapplied both *Lowenfield* [2] and *Tucker*.[3] Respondent respectfully urges this Court to deny certiorari because the decision of the Court of Appeals's reflects a proper application of relevant precedent in determining the *Allen* charge was unconstitutionally coercive.

Relevant Facts

The jury began deliberating at 11:49 a.m. (App. p. 235, lines 5-6). At 12:40 p.m., the jury sent a note asking the following questions:

> (1) We would like to see [Minor's] testimony;
> (2) We would like to see the doctor's report [and] testimony;
> (3) Can we see the police reports?;
> (4) Are minors subject to [a] lie detector test?

(App. p. 257). In response, the trial judge informed the jury he was unable to provide Dr. Mary Crosswell's report or the police report because neither were entered into evidence. (App. p. 236, line 5 — p. 237, line 3). The trial judge also instructed the jury that even the mention of a polygraph examination was inadmissible and thus irrelevant, and to excise from their minds the possibility one may or may not have been administered in this case. (App. p. 237, lines 3-16). The trial judge also informed the jury production of a transcript of any witness's testimony was not possible at that point in time, but offered for the jury to listen to the audio of Minor and Dr. Crosswell's

[2] *Lowenfield v. Phelps*, 484 U.S. 231 (1988).
[3] *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001)

testimony. (App. p. 235, line 17 — p. 236, line 4; p. 237, lines 20-23). The Minor's testimony was over an hour long and Dr. Crosswell's testimony was about 30 minutes of audio. (App. p. 236, lines 2-3, lines 8-9). The jury resumed deliberating at 12:43 p.m. and ultimately did not take the trial judge up on his offer to listen to any of the testimony. (App. p. 237, lines 24-25).

At approximately 2:07 p.m., the jury sent another note that stated: "'We are deadlocked.'" (App. p. 238, lines 3-10). The trial judge then brought the jury into the courtroom and gave the following *Allen* charge:

> All right. Ladies and gentlemen, I've received your note and I sympathize with you. I recognized this is a difficult case and it's difficult to come to a resolution. It's hard enough for two people to agree on anything, so it's particularly difficult, oftentimes, for 12 people who have just met each other and have been thrust into a jury room to deliberate to agree on verdict in the case. So, I sympathize with you in that regard. I sympathize with you because I recognize this is a very difficult decision for each of you to make, both collectively and personally.
>
> But I do want to impress upon you that there have been many resources that have been brought to bear this week to bring this case to trial. The State of South Carolina, the County of Pickens, and the parties to this case have expended substantial and significant resources to bring this case to trial. If you were to fail to come to a verdict in this case, then this case would simply have to be tried again. Twelve other people in the County of Pickens would come to trial and would hear the same witnesses, the same evidence, same arguments and would be tasked with deliberating on the case. Now, there are no 12 other people in the County of Pickens who are more capable, who are more able, who are more competent to reach a decision in this case than you are.
>
> Now, I recognize that it's a very difficult decision to make, but these parties deserve finality and they deserve a decision. So I would ask you to return to your jury room and continue deliberations. Those of you who may be in the minority, I would ask you to consider the position of the majority. Those of you who are in the majority, I would ask you as well to consider the position of the minority again and see if you can come to some resolution in this case. I know that's not what you wanted to hear when I brought you back out there, but, again, this is important and a lot of resources have been expended to get to this point in time. And these parties deserve a verdict. So I ask you to return to your jury and attempt to come to a verdict. Thank you very much.

(App. p. 238, line 20 — p. 240, line 9). The jury returned to the jury room to continue deliberations at approximately 2:11 p.m. (App. p. 240, lines 10-11). Counsel for Respondent objected to the

substance of the instruction and requested that the trial judge: "do in addition to that something in the language that they don't have to compromise their position….If the Court would consider just in addition: 'you don't have to compromise your position', something along that language." (App. p. 240, lines 13-15; lines 22-24). Counsel acknowledged that although the trial judge did not suggest to the jury that "they were going to be held hostage until they came to verdict"(App. p. 241, lines 2-7); Counsel was concerned that:

> [s]ome of the jurors may have interpreted [the instruction] as they've got to reach a verdict. And I think the *Allen* charge purpose is just to tell them that nobody is going to be any better than that. I'm afraid a couple of them possibly could say: 'We're supposed to get a verdict. We've got to get a verdict today.'

(App. p. 240, lines 15-20). The trial judge overruled Counsel's objection:

> I stand to be corrected by an appellate level court, but I think that I gave a proper recitation of law related to the *Allen* charge. And I do understand that the *Allen* charge may have been coercive, but I think under the law it's designed to be somewhat coercive to provoke the jury to reconsider everyone's perspective positions. I don't think that I gave any suggestion that anybody had to change their opinion. I only ask that they consider the other person's position…And what I don't want to do is say you don't have to compromise your principles or your position. I didn't suggest that they did and I bring them out and say specifically: "You don't have to compromise your position", then essentially, what they're hearing from me is "You don't really have to come to a verdict in this case." And I don't want to give them that signal either. So, I recognize your objection and your request and I respectfully deny the same. I think if I tell them that, then there's a hundred percent chance they're going to continue to be hung.

(App. p. 241, line 8 — p. 242, line 4).

The jury returned a verdict at approximately 3:28 p.m. (App. p. 242, lines 15-16). The jury found Respondent not guilty of CSC with a minor in the second degree but guilty of CSC with a minor in the third degree. (App. p. 242, line 24 — p. 243, line 5). Immediately following the reading of the verdict, the jury was collectively asked: "Is that your verdict and is it still your verdict, so say you all by raising your right hand." (App. p. 243, lines 6-7). Each juror complied

in response. (App. p. 243, lines 8-9). Neither the State nor Respondent's Counsel requested polling of the jurors. However, before dismissing the jury, the trial judge addressed the jury as follows:

> I know this was a hard verdict to arrive at. I also know that y'all took a lot of time and you were very conscientious about it. I do want to ask you a question just to clear up the record to make sure this was a verdict which you each arrived by a unanimous agreement. I gave you an *Allen* charge. There was a question and there always is a question as to whether or not an *Allen* charge is coercive. So I'm going to ask you now and you can just show me by a show of hands, is there any one of this jury who feels as though you compromised a firmly held position and simply agreed to go along with the remaining jur[ors]?

(App. p. 243, line 20 — p. 244, line 3). No juror raised their hand in response and the trial judge released them from service. (App. p. 244, lines 4 – 11). Counsel's subsequently argued it was "readily apparent this is a compromised verdict." (App. p. 248, lines 3-5).

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE *ALLEN* CHARGE WAS UNCONSTITUTIONALLY COERCIVE.

A criminal defendant tried by a jury is "entitled to the uncoerced verdict of that body." *Lowenfield,* 484 U.S. at 241. An *Allen* charge encouraging deadlocked jurors to resume deliberations becomes unconstitutional and thus reversible error when it coerces the jury to reach a verdict. *E.g., Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." *E.g., Tucker,* 346 S.C. at 490–91, 552 S.E.2d at 716; *see also State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) (noting that review of an *Allen* charge requires the appellate court to consider the charge in light of all accompanying circumstances). The determination is highly "fact-intensive," and the factors potentially relevant to a given case include: (1) Whether the charge speaks specifically to the minority juror(s); (2) Whether the charge includes any "You must return a decision in this case" type language; (3) Whether there is any

inquiry into the jury's numerical division, which is generally regarded as coercive; and (4) Whether the span of time between the charge and the jury's verdict indicates coercion. *Tucker*, 346 S.C. at 491-95, 552 S.E.2d at 716-18 (citing *Lowenfield*).

In Respondent's case, the trial judge did not explicitly single out hold-out jurors, [4] instead addressing the jury in terms that divided the minority from the majority when directing to consider the others' views: "Those of you who may be in the minority, I would ask you to consider the position of the majority. Those of you who are in the majority, I would ask you as well to consider the position minority again and see if you can come to some resolution in this case." (App. p. 239, line 23 — p. 240, line 3). It is also true that the trial judge had neither been informed of the jury's numerical division nor asked. However, the absence of the first and third listed factors in this case is not determinative. *See Tucker,* 346 S.C. at 491, 552 S.E.2d at 716 ("The test for determining whether a given charge is unconstitutionally coercive is very fact intensive."); *Taylor,* 427 S.C. at 218-19, 829 S.E.2d at 729 ("Like most multi-factor constructs, the *Tucker* test does not tell us the relative weight each factor carries, nor is the list of factors exclusive") (citing *Tucke*r, 346 S.C. at 491, 552 S.E.2d at 716).; *Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002) (where this Court held trial counsel was ineffective for failing to object to an *Allen* charge ultimately found to be

[4] However, as further discussed *infra* p. 9 – 15, the other portions of the *Allen* charge, such as the instruction to jurors to return a verdict because the parties "deserved finality" and for the sake of saving of State resources, served to undo any ameliorating effect of the advisement to consider one another's views. Additionally, the instruction could readily be construed as targeting the holdout jurors, especially if considered from the perspective of a minority juror, pursuant to the approach of the Fourth Circuit Court of Appeals. *See Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000) ("Although the state argues that the charge was proper because the judge never singled out either the minority or the majority, it is from the position of a minority juror that a suspect *Allen* charge is analyzed.") (citations omitted); *United States v. Burgos*, 55 F.3d 933, 940 (4th Cir. 1995); *United States v. Sawyer*, 423 F.2d 1335, 1340 (4th Cir. 1970). *See also generally*, *Taylor*, 427 S.C. at 215, 829 S.E.2d at 727 (acknowledging that the analysis of any one factor can be "shaded by considerations relating to" another factor).

coercive despite the absence of the fourth factor). The totality of factual circumstances here, including the other *Tucker* factors, make clear that the *Allen* charge was unconstitutionally coercive.

The timing of the verdict also indicates coercion. The jury deliberated for approximately one (1) hour before sending back a handful of questions that ultimately went unanswered. The jury then deliberated for another 1.5 hours before notifying the trial judge they were deadlocked. The jury returned a verdict a little over an hour after being given the *Allen* charge. Contrary to Petitioner's argument that the constitutionality of the *Allen* charge is demonstrated by the fact that the jury spent one third of its total deliberation time after being given the instruction, South Carolina courts have found similar timing as indicative of coercion. *See Workman v. State,* 412 S.C. 128, 132, 771 S.E.2d 636, 639 (2015) (concluding the fact that the jury returned a verdict two (2) hours after the *Allen* charge tended to prove the charge was coercive where the jury had deliberated for about six (6) hours in total); *Taylor* (reasoning that the nearly three (3) hours between the *Allen* charge and the verdict "[did] not dispel the likelihood of coercion" where the jury had deliberated for nearly ten (10) hours in total); *Garner v. State*, No. 2016-MO-005, 2-3 (S.C. Sup. Ct. filed Mar. 23, 2016) (finding coercion where the jury returned a verdict approximately one (1) hour after the *Allen* charge where the jury had deliberated for approximately two (2) hours prior to the instruction). *See also Burgos*, 55 F.3d at 940, n. 7 ("In this case, jurors met for approximately four [(4)] hours prior to [the] *Allen* charge, received the next day off, and then deliberated for approximately two [(2)] hours before reaching a verdict. In light of our concerns with the…*Allen* charge, we are not prepared to find that the additional two [(2)] hours of deliberation were enough to offset the coercive nature of the charge."). Regardless, Petitioner's argument overlooks the overall context in which the charge was given. *See Tucker,* 221 F.3d at

at 611 (including "the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion" as additional considerations relevant to the *Allen* charge determination). Coercion is evident in the short time the jury spent deliberating before requiring additional explanation and materials in order to make their decision, as demonstrated by their first note. The subject matter of each of the jury's questions related to the credibility of Minor and the absence of any direct or physical evidence of the sexual assaults alleged. In light of the fact that this case hinged on the credibility of Minor, the jury's questions clearly demonstrated the extent of their struggle with the decision and the subject matter of their questions made clear the answers they sought were dispositive to the reconcilability of their dissenting views. Because their questions and requests for testimony went unfulfilled, the jury deadlocked and thus the issues and questions underlying their disagreement about the evidence or doubts likewise went unresolved. The only resolution of their disagreement came in the form of coercion by way of the coercive *Allen* charge. In light of the jury's unresolved questions, the timing of the *Allen* charge and consequent verdict also demonstrate that the jury's verdicts were a compromise between the jurors in the minority and majority, a compromise that the hold-out jurors were coerced to make.

In regard to the second factor, the trial judge used coercive language and primarily focused on impermissible considerations that had no other interpretation or effect but as unduly coercive. The trial judge began and concluded the *Allen* charge with: "I recognize that it's a very difficult decision to make, but these parties *deserve finality* and they *deserve a decision.*…[A]gain, *this is important*…And these parties *deserve a verdict.*" (App. p. 239, lines 20-22; p. 240, lines 5-7) (italics added). These statements are directly averse to a proper *Allen* charge by pressuring the jury to become unanimous on their decision for the sake of returning a verdict. *See Garner*, No. 2016-MO-005 (holding trial counsel was ineffective for failing to object to the substance of a coercive

Allen charge because the language used was similarly coercive to "You have got to reach a decision in this case", including "'(4) the State of South Carolina or the Defendant is 'entitled' to a verdict 'today, not next week, not next year;' and (5) 'we've got today and tomorrow to work through those issues' in reaching a verdict.'"); *Tucker,* 346 S.C. at 494, 552 S.E.2d at 717-18; ("While no such mandatory language [*i.e.*,"You must return a verdict"] was used here, petitioner's jury was told of the importance of a unanimous verdict."); *Workman,* 412 S.C. at 132, 771 S.E.2d at 639 (recognizing as impermissibly coercive the trial judge's language beseeching jurors to resume deliberating "with the hope that you can arrive at a unanimous verdict within a reasonable time"). *See also United State v. Cropp*, 127 F.3d 354, 359-60 (4th Cir. 1997) ("Courts must be extremely careful not to suggest that jurors give up firmly held convictions, although courts may instruct jurors to reconsider the evidence and the views of other jurors. 'The most egregious mistake that can be made…is for a district court to suggest, *in any way*, that jurors surrender their conscientious convictions.'") (citations omitted) (italics added). These statements also exert improper pressure on minority jurors to acquiesce to the majority, *i.e.,* the dissenting beliefs of the minority jurors comprise the very "difficulty" preventing a unanimous decision, and as such, abandonment of their differing beliefs would eliminate this difficulty. The language used here is also improper because it implores jurors to agree on a verdict on an improper basis — because "the parties *deserved* it." This all but neutral choice of phrasing muddies the jury's responsibility and duty to return an impartial verdict based upon the evidence presented at trial and instead directs minority jurors to abandon their dissenting beliefs on such evidence and hastily agree with the majority for this purpose.

Equally commanding in effect and problematic is the trial judge's phrasing the jury's inability to reach an unanimous verdict as "if you *fail* to come to a verdict". (App. 239, lines 11-

12) (italics added). In this context, a connotation that returning a unanimous verdict is mandatory attaches. *See Burton v. United States*, 196 U.S. 283, 291 (1905) ("It is error to instruct so that the instruction implies that the court requires a conviction."). The ordinary everyday connotations that naturally attach to the word "fail" also communicated to the jury they were failing in their capacity as jurors by being deadlocked or that some ramification or consequence would ultimately result from their inability to reach a unanimous verdict in Respondent's case. *See also Sawyer*, 423 F.2d at 1340) (upholding the *Allen* charge because "[t]here was not the slightest *intimation of impatience* with the minority, nor words that could be construed as a threat or *even an expression of displeasure*.") (italics added)

Petitioner's argument essentially shrugs off the trial judge's improper statements because "[t]he trial judge never told the jury they were required to reach a decision" and "clearly asserted that he was only asking the jurors to return to the jury room and 'attempt' to reach a verdict." (Pet. for Writ of Cert., p. 13). Petitioner's argument views the trial judge's request for the jury "to attempt to come to a verdict" in isolation to the other instances of improper, coercive language. Contrary to Petitioner's argument, far less commanding language than used in this case have been held to be coercive under the second factor. *See Taylor,* 427 S.C. at 215, 829 S.E.2d at 727 (holding that the trial judge's statements to the jury: "'[I]t's important that you come to a decision in this case'" and '[Y]ou should come to a decision in this matter'…skirt[] close to the language found coercive in *Jenkins*") (citing *Jenkins v. United States*, 380 U.S. 445, 446 (1965)); *Workman,* 412 S.C. at 130, 771 S.E.2d at 638; *State v. Barnes*, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013)[5] (holding the judge inadvertently coerced the jury by indicating he could order the jury to continue

[5] Although *Barnes* rather addressed whether the trial judge had violated S.C. Code § 14-7-1330, this Court's reasoning in regard to the bolded quoted text from the case demonstrates the subtilties of coercion as relevant to Respondent's case.

to deliberate: "'Sometimes I forget I'm a judge, **so I know I can order it**, but at the same time y'all are the judges of the facts in the case. **I don't want to necessarily dictate that**.'") (emphasis in original); *State v. Williams*, 386 S.C. 503, 515, 690 S.E.2d 62, 68, n. 7 (2010) (cautioning that even language like "with the hope that you can arrive at a verdict" could potentially be construed as coercive given that jurors are not required to reach a verdict after expressing they are deadlocked); *Tucker,* 346, S.C. at 494, 552 S.E.2d at 717-18.

Furthermore, the trial judge's emphasis on the substantial expenditure of State resources in the event of a mistrial served to unduly coerce an unanimous verdict out the jury. Brief references to a mistrial or the costs of a retrial made in passing or in response to a jury question are not prohibited from an *Allen* charge. However, the trial judge here spent a majority of the *Allen* charge on this subject,[6] and very little of the remaining instruction is otherwise proper according to precedent. *See Taylor,* 427 S.C. at 219, 829 S.E.2d 723at 729 (addressing the coercive effect of an *Allen* charge that overstresses this subject and acknowledging the Fourth Circuit's repeated warnings against using this now disfavored language) (internal citations omitted). *See* also *United States v. Hylton*, 349 F.3d 781, 788 (4th Cir. 2003) ("Although we have indicated disfavor when...a[n] *Allen* charge focuses on the costs of a retrial, we have not considered this aspect unduly coercive if it is given in the context of an otherwise unbalanced charge"); *United States v. West,* 877 F.2d 281, 291 (4th Cir. 1989) ("Although one of the purposes served by the *Allen* charge is 'the avoidance of the societal costs of a retrial,'…its purposes do not necessarily determine its content. The length and expense of a trial may justify use of the *Allen* charge…but it does not follow that the jury should be instructed to overcome its difficulties by considering a factor which

[6] This part of the Allen charge is addressed in a single sentence of the Petition: "The trial judge also informed the jurors that if they failed to reach a verdict, the case would simply be retried." (Pet. for Writ of Cert., p. 13). The record definitely refutes Petitioner's characterization.

it could not appropriately consider in the first instance.") (internal citations omitted). This Court, along with the Court of Appeals and the Fourth Circuit Court of Appeals have found instructions similar to that given here as having an unduly coercive effect on the jury in part because of the overemphasis on the consequential mistrial should the jury hang or on the financial burden a retrial places on the State. *See Pauling v. State*, 350 S.C. 278, 565 S.E.2d 769 (2002)[7] (finding trial counsel ineffective for failing to object to instructions[8] that coerced the jury to enter a verdict on one of the charges); *Taylor*, 427 S.C. at 219, 829 S.E.2d 723at 729 (holding the *Allen* charge given was unconstitutionally coercive in part because it "overemphasized the cost and expense of retrial.")[9] Here, the trial judge's paramount focus on the exorbitant amount of State resources already spent bringing the case to trial plus the additional State resources that would be spent on a retrial should the jury "fail" to reach a verdict was unduly coercive because it pressured jurors, also assumedly taxpayers, to hastily come to an unanimous agreement for the sake of preventing further expense to the State. *See West,* 877 F.2d at 291 ("'[T]he expense of trial should not play any part in the jury's important function of determining the guilt or innocence of a criminal defendant.'"). Likewise, the trial judge's subsequent remarks: "[A new jury] would hear the same witnesses, the same evidence [etc.] and would be tasked with deliberating on the case. Now there are no 12 other people…who are more capable…more able, [or] more competent to reach a

[7] Although *Pauling* addresses a slightly different issue, this Court's reasoning in regard to the coerciveness of the trial judge's instruction is nevertheless relevant to Respondent's case.

[8] "'[Y]ou gave me a question. If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over. It's not expected that we can get a more intelligent jury than you 12, and some jury will have to try this. The State and the defense will have to go through the expense, the County and the State. It's not expected that we can get a more intelligent jury. So, I will ask you to continue deliberating. If I can enlighten you on the law, you can ask me what you want me to explain to you. If not, I will ask you to continue your deliberations.'") *Pauling,* 350 S.C. 278 at 283 (emphasis in original).

[9] The portion of the instructions on the expenditure of State resources in *Taylor* is nearly identical to the instructions in Respondent's case.

decision in this case than you are" compounded the coercive effect of the instruction. This portion of the charge improperly suggested to the jury that nothing would change or be gained by holding a retrial because it would merely be a repeat of the very same evidence and witnesses. Taken together, the instruction communicated to jurors, the hold-out jurors in particular, that by causing a mistrial and consequent retrial, they would also be responsible for causing a *needless waste* of State resources. A tone of clear impatience inevitably followed, including the connotation that the jury had already needlessly spent too much of the court[10] and State's time and resources. *See e.g., Cropp, infra* fn. 10; *Sawyer*, 423 F.2d at 1340.

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[10] Note that during introductory instructions to the jury on the first day of trial, the trial judge stated:

> I anticipate this should be a fairly short case. I hope it will be done tomorrow. As a matter of fact, I expect that it will be done tomorrow….[After closing arguments and a charge on the law] I'll send you back to your jury room and you can begin deliberations. I expect that will be some time either late tomorrow morning or early tomorrow afternoon. That's my expectation right now. I don't know that for sure, but that's my expectation.

(App. p. 29, lines 17-19; p. 34, lines 20-25).

The following exchange and instruction also occurred in the presence of the jury:

> The Court: Ms. Odom…how many witnesses do you think you're going to have?
> Ms. Odom: Seven.
> The Court: Fairly short witnesses, most of them?
> Ms. Odom: Some are and some aren't, about half and half.
> The Court: Alright, good enough. And Mr. Boggs, how many witnesses [d]o you anticipate right now that you have?
> Mr. Boggs: Your Honor - -
> The Court: And I won't hold you to it, obviously.
> Mr. Boggs: I don't anticipate more than one.
> The Court: Okay. So you've heard that, ladies and gentlemen. Eight witnesses, okay eight witnesses. And we'll go through those as quickly as we can, as quickly as possible.

(App. p. 37, line 11 — p. 38, line 1). The record makes clear that the trial judge intended for the trial to be finished as quickly as possible. In light of the impact indications of impatience can have on a jury, these remarks contributed to the haste and coercive atmosphere created by the *Allen*

Taken together, these statements are as effectively coercive as the seminal language prohibited from *Allen* charges: "You have got to reach a verdict." *Jenkins,* 380 U.S. at 446. Because the jury was directed to return a verdict because the parties "deserved finality" and for the sake of saving of State resources, the overall instruction was entirely antithetical to a proper *Allen* charge. The absence of any language discouraging jurors from surrendering their own conscientiously held beliefs compounded the *Allen* charge's unduly coercive effect. The totality of the circumstances in this case and the context in which the *Allen* charge was given demonstrate that the instruction was unconstitutionally coercive. Respondent accordingly urges this Court to deny certiorari.

II. THE COURT OF APPEALS NEITHER EXPANDED *TUCKER* NOR MISAPPLIED PRECEDENT BY CONSIDERING THE ABSENCE OF LANGUAGE REMINDING JURORS NOT TO SURRENDER THEIR FIRMLY HELD BELIEFS FOR THE SAKE OF REACHING A VERDICT AS A FACTOR IN DETERMINING THE *ALLEN* CHARGE WAS UNCONSTITUTIONALLY COERCIVE.

Petitioner argues the Court of Appeals wrongfully strayed from the supposed "traditional *Lowenfield* factors" and improperly expanded *Tucker* by considering the absence of language instructing jurors "they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict" as a factor, a consideration thoroughly discussed in the Court of Appeals's

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charge. *See United States v. Cropp,* 127 F.3d 354, 360 (4th Cir. 1997) (acknowledging that instructions that imply or suggest impatience can have a coercive effect); *See also Garner,* No. 2016-MO-005 at 10 (holding the following statements were coercive:"(4) the State…or the Defendant is 'entitled' to a verdict *'today, not next week, not next year*;' and (5) *'we've got today and tomorrow* to work through those issues'") (italics added). The trial judge's expectations about the length of trial in particular cannot be discounted in light of the fact that the *Allen* charge was given near the end of the second day of trial. *See* recording of Oral Argument held in *Taylor,* 427 S.C. 208, 829 S.E.2d 723 (recognizing the potential impact of the trial judge's expression of concern that the trial may conflict with another previously scheduled matter should the trial run longer than expected).

decision in *Taylor*. (Pet. for Writ of Cert., p. 11, 14 – 16, 18). Petitioner goes on to essentially argue that just as in *Taylor*, the Court of Appeals also focused on this factor, which Petitioner disapprovingly refers to as a "'new'" "fifth factor", while "ignor[ing] and/or trump[ing]" all other relevant factors. (Pet. for Writ of Cert., p. 15).[11]

Petitioner's argument is erroneous. The overarching flaw in Petitioner's argument is the invalid notion that the *Allen* charge analysis is restricted to the four factors specifically outlined in *Lowenfield* and adopted by this Court in *Tucker*. (Pet. for Writ of Cert., p. 11,14). Along with other South Carolina precedent in this area, both *Lowenfield* and *Tucker* make clear that whether an *Allen* charge is unconstitutionally coercive is rather "'judged in its context and under all the circumstances.'" *Tucker* 346 S.C. at 491, 552 S.E.2d at 716 (quoting *Lowenfield*, 484 U.S. at 237); *see also Taylor*, 427 S.C. at 218-19, 829 S.E.2d at 729 ("The *Tucker* criteria have never been deemed comprehensive"). Peculiarly, Petitioner relies upon the very same language quoted here to argue the Court of Appeals erred by venturing outside of the "traditional *Lowenfield* factors". (Petition, page 12, 14 – 15). Moreover, Petitioner's acknowledgement of the inability to pinpoint the exact basis for the Court of Appeals's ruling contravenes the argument that the absence of such language was considered to the exclusion of all other relevant factors outlined by *Lowenfield* and *Tucker.* Rather, the Court of Appeals's opinion specifically cited *Tucker* and recited the four factors as a basis for its decision, and as previously discussed, its decision regardless reflects a proper application of relevant precedent, including *Tucker* and its predecessor *Lowenfield.*

[11] Petitioner's position appears to shift to arguing that *Taylor* was incorrectly decided on the very same basis. This Court already rejected Petitioner's argument. *State v. Taylor*, Opinion No. 27985 (S.C. Sup. Ct. filed June 24, 2020) (dismissing the writ as improvidently granted). In Respondent's view, the *Taylor* decision is not based upon an error of law, and thus the Court of Appeals's reliance upon *Taylor* in deciding the present case is not cause for this Court to grant certiorari or reverse Respondent's case.

Further, the Court of Appeals's ruling neither improperly expands *Tucker* nor conflicts with prior decisions of this Court or the Supreme Court of the United States. Rather, there can be no error in considering the absence of language reminding jurors not to surrender their own beliefs for the sake of reaching a verdict as a factor because this language was not only included in the original instruction given by the trial judge in the *Allen* case,[12] but it also embodies what has been called "the bedrock principle" of *Allen* charges. *Tucker,* 221 F.3d at 609 n. 5 ("'[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration.'") (quoting *Jenkins*, 380 U.S. at 446).

Because such language is used to prevent the very result of a coercive *Allen* charge — an arbitrarily decided verdict that fails to reflect each of the jurors' views of the trial evidence and the defendant's guilt or innocence—it naturally follows that an *Allen* charge lacking this reminder may be unduly coercive depending on the remaining content of the instruction and the context in which its given. South Carolina courts and the Fourth Circuit Court of Appeals have regarded very similar, if not the same language as having a neutralizing effect on an otherwise coercive *Allen* charge. For example, in *State v. Jones,* following the jury's note that it was deadlocked 11-1, without mention of its alignment, the trial judge gave an *Allen* charge that improperly "urged dissenting jurors to consider whether their positions were reasonable in light of the judgment of the majority." 320 S.C. 555, 556-57 466 S.E.2d 733, 735 (Ct. App. 1996). The Court of Appeals held that taken as a whole, the *Allen* charge was nevertheless not coercive given that the trial judge also instructed: "[T]he verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or

[12] The charge given at the trial in *Allen* does not appear in the Supreme Court's opinion but has been regarded as identical to the charge that can be found in *Commonwealth v. Tuey,* 62 Mass. 1, 1851 WL 5961 (1851).

her fellow jurors." *Id*. *See also Green,* 351 S.C. 184, 569 S.E.2d 318 (finding trial counsel not ineffective because "[t]he entire [*Allen*] charge shows the trial judge adequately and correctly told the jurors they should listen to what the other side had to say; to be open to change one's mind; and *to not change one's mind if it would do violence to one's conscience*. The charge was neutral in its direction, not impermissibly aimed at the minority…") (italics added); *State v. Tillman*, 304 S.C. 512, 405 S.E.2d 607 (1991) ("A reading of the charge given…reveals no indication [the trial judge] tried to coerce a verdict. [A]ppellant's argument as to the timing of the charge [is] meritless given that the jury had deliberated for almost four hours. Further, the trial judge…specifically instructed that the verdict must be each juror's 'own convictions and not a mere acquiescence in the conclusions of the other jurors'…We therefore find no error."); *Hale*, 284 S.C. 348, 326 S.E.2d 418 ("[T]he judge specifically stated that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement. Taken as a whole, the supplemental charge was not coercive."); *State v. Bennett* 259 S.C. 497, 497-98, 190 S.E.2d 50, 54-55, (1972); *Cf. Tucker*, 346 S.C. at 492, 552 S.E.2d at (weighing the use of this language against the portion of the instruction directed at minority jurors). *See also United States v. Hylton,* 349 F.3d 781 (4th Cir. 2003) (holding the *Allen* charge given was not unduly coercive despite the trial judge's emphasis on the cost and expense of a retrial because the jurors were also instructed that "the verdict has to represent the conscientious judgment of each of you" and "no juror should vote for a verdict unless that's a verdict that ultimately represents his or her conscientious judgment."); *Cropp*, 127 F.3d at 360 (upholding the *Allen* charge despite the trial judge's statements indicating impatience or displeasure with the deadlock and delay because jurors were also instructed not to surrender their firmly held convictions several times); *Burgos,* 55 F.3d at 940, n.7 (concluding after a review of prior case law that there is less likelihood that a jury will be coerced into returning

a verdict where the trial judge specifically instructs jurors not to surrender their conscientious convictions) (citations omitted); *West*, 877 F.2d at 291(upholding the *Allen* charge despite the trial judge's emphasis on the costs and inconveniences of retrial in part because the trial judge also repeatedly cautioned jurors not to surrender their conscientious convictions); *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (commenting the original *Allen* charge "might readily be construed by the minority of the jurors as coercive" if it were to be "stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held.").

A full review of modern South Carolina cases challenging the substance of the *Allen* charge as unconstitutionally coercive is demonstrative to this point. In cases where this Court and the Court of Appeals upheld the *Allen* charge, the instruction included this language. *See State v. Williams*, 690 S.E.2d 62, 386 S.C. 503 (2010); *Green*, 351 S.C. 184, 569 S.E.2d 318; *State v. Williams,* 543 S.E.2d 260, 344 S.C. 260 (Ct. App. 2001); *State v. Hughes,* 521 S.E.2d 500, 336 S.C. 585 (S.C. 1999); *Jones,* 320 S.C. 555, 466 S.E.2d 733; *State v. Singleton,* 319 S.C. 32, 460 S.E.2d 573 (1995); *Tillman,* 304 S.C. 512, 405 S.E.2d 607; *Hale,* 284 S.C. 348, 326 S.E.2d 418;. *Bennett* 259 S.C. 50, 190 S.E.2d 497. In cases where the *Allen* charge was held as unconstitutionally coercive, the instruction lacked this language. *See Taylor*, 427 S.C. 208, 829 S.E.2d 723; *Garner,* No. 2016-MO-005; *Workman*, 412 S.C. 128, 771 S.E.2d 636.

Thus, the Court of Appeals did not err or misconstrue Tucker, Lowenfield, or other precedent by factoring the absence of language reminding jurors not to surrender their conscientious beliefs for the sake of reaching a verdict into its analysis. There is also no indication that the Court of Appeals considered this factor at the exclusion of all other relevant considerations.

Lastly, the Court of Appeals correctly held that the Allen charge was unconstitutionally coercive. Respondent thus respectively urges this Court to deny certiorari.

IV. THE TRIAL JUDGE'S REQUEST FOR ANY JUROR TO INFORM THE COURT "BY A SHOW OF HANDS" THAT THEY "COMPROMISED A FIRMLY HELD POSITION" IN REACHING THEIR VERDICT AND "SIMPLY AGREE[D] TO GO ALONG WITH REMAINING JURORS" DID NOT TRANSFORM THE UNCONSTITUTIONALLY COERCIVE ALLEN CHARGE INTO A CONSTITUTIONALLY SOUND INSTRUCTION.

Petitioner characterizes the lack of response from the jury to the trial judge's inquiry as "confirmation by the jurors themselves" that the *Allen* charge was not unconstitutionally coercive. (Pet. for Writ of Cert., p. 16 – 18). Petitioner argues the failure to appreciate the merit of the trial judge's unusual question is perhaps the "most significant problem" with the Court of Appeals's decision and its application of *Taylor* to this case. Petitioner's argument is meritless as the inquiry performed by the trial judge here has no legal bearing on the determination at hand and failed to rectify the constitutional error in the *Allen* instruction.

First, the trial judge's request to the jury as a whole to make an affirmative showing in response to his question does not constitute as "polling of the jurors", as characterized by Petitioner and is improper and nonoperative in this context. *E.g., State v. Linder,* 276 S.C. 304, 308, 278 S.E.2d 335, 338 (1981) ("Polling is a practice whereby the court determines from the jurors *individually* whether they assented [to] and still assent to the verdict.") (italics added). *See also State v. Wright*, Op. No. 5782, at p. 2 (Ct. App. filed Nov. 18, 2020) (reh'g denied Jan. 31, 2021) ("No other trial moment demands the solemn clarity *individualized* inquiry provides. *Individual* polling promotes finality and accountability of the verdict stage and enhances the integrity of the deliberative process by ensuring no juror was coerced in the jury room.") (italics added) (citing *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899)). Further, this procedure aimed at the jury collectively has also never been sanctioned as a method to ensure the constitutionality of an *Allen* charge after the fact. The trial judge's inquiry to the jury as whole is irrelevant to the validity of the *Allen* charge in this case due to its post-verdict timing as well as in light of the

reluctance and intimidation a juror would naturally feel to raise his or her hand. *See Id.* at p. 4 ("We cannot say the lack of a valid poll contributed to the verdict, as the error occurred after a verdict was announced. It would be an odd end to the matter to deem it harmless, for in effect we would be presuming the unanimity.") *See also Id.* at 3 (recognizing that "'based on common human experience, members of a group may react differently when addressed as a group, and when addressed individually.'") (citations omitted). *See also Taylor*, 427 S.C. at 216-217, 829 S.E.2d at 727-28 (recognizing the influence and potentially intimidating effect a judge can have on jurors).

Therefore, the trial judge's inquiry failed to cure the constitutional error in this case. This Court should accordingly deny certiorari.

CONCLUSION

Based on the foregoing, Respondent urges this Court to deny the State's Petition for Writ of Certiorari.

Respectfully Submitted,

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