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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2020-001595

THE STATE, ... PETITIONER,

v.

CHARLES BRANDON RAMPEY, ... RESPONDENT.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

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.

STATEMENT OF THE CASE

In February of 2014, the Aiken County Grand Jury indicted Rampey for second-degree criminal sexual conduct (CSC) with a minor. On July 19, 2006, the Grand Jury issued a separate indictment for third-degree CSC with a minor. On August 31, 2016, Rampey proceeded to a jury trial before the Honorable Robin B. Stilwell. Thomas Boggs, Esquire, represented Rampey; assistant solicitor Shannon Odom, Esquire, represented the State. The jury acquitted Rampey of second-degree CSC but found him guilty of the third-degree charge. The trial judge sentenced Rampey to thirteen years' incarceration.

On appeal, the Court of Appeals issued an unpublished opinion reversing Rampey's conviction. State v. Rampey, 2020-UP-245 (S.C. Ct. App. Filed August 19, 2020) (App.pp.324–25). The State timely filed a petition for rehearing on September 3, 2020. Thereafter, on September 16, 2020, the Court of Appeals denied the State's petition, but the State was not properly served[3] with notice of the denial. On November 5, 2020, the State was properly served with order denying rehearing and the time period for sending remittitur was recalculated from that date. The State petitioned for certiorari on December 7, 2020, and this Court granted the petition on October 12, 2021. This Brief of Petitioner follows.

[3] Notice of the denial was not sent to the undersigned attorney's primary e-mail address as required by *RE: Operation of the Appellate Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order dated March 20, 2020, amended May 29, 2020), subsection (i) ("[C]orrespondence to a lawyer admitted to practice in this state will only be sent to that lawyer's primary e-mail address in AIS.")

STATEMENT OF FACTS

Trial Testimony

On January 2, 2014, Deputy Van Massingill of the Pickens County Sheriff's Office went to Easley Baptist Hospital to investigate a report claiming Victim had been sexually abused by Rampey, her stepfather. Deputy Massingill met with Victim and her grandmother, at which time the former complained of multiple instances of abuse occurring within the previous year at two separate locations in Pickens County. (App.p.46, line 18–App.p.48, lines 10).

Kathryn Hinton, Victim's maternal grandmother, recalled Rampey began dating Victim's mother (Mother) sometime between 2008 and 2009, after which Victim, Mother, and her younger siblings moved in with Rampey and his two children. Victim and her sister often stayed with Hinton while Mother worked, but often Rampey would call Hinton and arrange to pick the children up for the day. On January 2, 2014, Rampey made one such call and arranged with Hinton to pick the children up shortly thereafter. When Hinton informed Victim of the arrangement, Victim started crying and revealed she had been abused by Rampey. (App.p.50, line 25–App.p.55, line 9).

After Victim reported the abuse, she moved in with Hinton and her husband. Victim lived with the couple for "a year or two" before moving in with her sister's grandmother and later a family friend. Hinton had a close relationship with Victim, claiming she "raised" her, and recalled Victim had started asking to move in with her sometime during the fall of 2013. However, Mother refused to agree with such an arrangement. (App.p.55, line 18–App.p.58, line 24).

When Mother and Rampey first started dating, Victim was excited to have him in her life. Victim had never known her biological father and hoped Rampey could fulfill that role for her. Within a few years, that dynamic changed. Victim testified she was 11 or 12 when the Rampey

began abusing her, sometime around her birthday in June of 2013. At that time, she spent most of her days either with Rampey and her siblings at home or with Hinton at her house. The first incident involved Rampey summoning Victim into a room and forcing her to touch his penis. In another incident, Rampey forced her into a bathroom and forced her to touch his penis with her hands, perform oral sex, and then anally raped her in the bedroom. When Victim told him to stop or tried to scream, Rampey covered her mouth and threatened to isolate her from her grandmother, take her possessions, and insert his penis deeper into her anus. This assault lasted approximately two hours. On another occasion, Rampey pulled down her pants and performed oral sex. (App.p.60, line 14–App.p.69, line 4).

Around autumn of 2013, the family moved to a new home. However, the abuse continued. Victim recalled two specific incidents of abuse around Christmas. During the first instance, the family had just purchased a Christmas tree and Rampey and Victim brought it into the house. When Victim went outside, Rampey followed her to the screened-in porch and forced her to engage in both oral and anal sex. The second assault occurred on Christmas day when Rampey took Victim into the bathroom, put lotion on her hands, and forced her to manually stimulate his penis until he ejaculated. On both occasions, Mother and the other children were elsewhere in or around the home. (App.p.69, line 5–App.p.72, line 2).

Victim recalled reaching her breaking point with the abuse on January 2, 2014, after realizing Rampey would likely abuse her later that day. She remembered speaking to police officers that day and in the following weeks, detailing many of the incidents of abuse which occurred. (App.p.72, line 3–App.p.74, line 18).

On cross-examination, trial counsel questioned Victim about: (1) her smiling in pictures taken around Christmas of 2013; (2) her desire to live with Hinton; (3) Victim's disagreements

with Mother; (4) Mother's divided attention among the children living with her; and (5) Victim's friendship with Rampey's young niece (Niece), Victim's best friend at the time she reported the abuse. Trial counsel's questions implied: (1) Victim fabricated the abuse she reported to police to live with Hinton, a less-restrictive parental figure who could provide her with more attention; (2) Victim told Niece she wished to fabricate the charges to live with Hinton; (3) each time Victim met with investigators, she recalled additional instances of abuse; (4) the details of the assaults differed in Victim's trial testimony from what she reported to police, namely that Victim reported penetration of her "privates" (vagina) instead of her anus; (5) Victim's medical exam, performed at the end of January 2014, did not uncover physical evidence of abuse; and (6) Rampey dyed her hair, wore different clothes, and stopped interacting with Niece after moving in with Hinton. Victim conceded she may have said "private" instead of "butt" due to her young age and confusion, but definitely intended to communicate she had anal sex, not vaginal sex, with Rampey. Trial counsel also questioned Victim about her meeting with Sarah Davis, a counselor at the Julie Valentine Center. (App.p.75, line 15–App.p.98, line 19).

Dr. Mary Crosswell, the child abuse pediatrician who evaluated Victim for physical indicators of abuse also testified. She failed to find any physical evidence of sexual assault in either Victim's vagina or anus but noted such findings were not uncommon: less than three percent of exams performed on child sexual abuse victims uncover physical evidence of such sexual assault due to the physical resilience and quick healing possessed by children. (App.p.101, line 17–App.p.117, line 13).

Dr. Shauna Galloway-Williams, executive director of the Julie Valentine Center, testified as an expert in child sexual abuse dynamics and disclosure. She explained the Julie Valentine Center is a nonprofit organization providing prevention, education, crisis intervention, advocacy,

and therapeutic services for abused children. She clarified she never talked to Victim or reviewed any of the police reports associated with her case: her sole purpose at the trial was to "provide education and information about the dynamics of child sexual abuse . . . as a blind expert witness." (App.p.118, line 8–App.p.126, line 16).

Dr. Galloway-Williams testified various factors differentiate cases of child sexual abuse from those of adults. She explained the concept of "delayed disclosure," which means children often will not disclose abuse right away, waiting hours, days, weeks, years, or sometimes never disclosing received abuse. Abused children fear the consequences of reporting, often believing they are somehow at fault and will be punished for the abuse. Additionally, reporting is complicated when the abuser often has a close relationship with the abused, because children may have parts of a relationship with the abuser they actually appreciate and enjoy, so they do not want to lose those parts of the relationship or act in a way they feel might hurt the abuser. Abusers are often the individuals who give abused children the most attention and affection they receive from anyone, so loss of such a relationship is a source of great anxiety for those children. If the abuser is a member of the family, the prospect of destroying the family only deepens such anxiety. Finally, children often lack the vocabulary or conceptual understanding of what happened to them or communicate these events to others because they have not been educated about abuse or their reproductive organs. (App.p.127, line 9–App.p.140, line 23).

Dr. Galloway-Williams also explained the potential impacts of abuse on victims. Abused children may act out, or drastically change their appearance and behavior. They may cut ties with friends and family, or become promiscuous because sexual behavior was introduced and normalized at a young age. (App.p.143, line 13–App.p.144, line 9).

On cross-examination, Dr. Galloway-Williams reiterated she never met with Victim or reviewed any reports associated with her case and that her testimony was limited to the general dynamics and behaviors of abused children. (App.p.144, line 14–App.p.145, line 3).

Captain Marvin Nix was an investigator with the special victims unit of the Pickens County Sheriff's Office at the time Victim reported her abuse. During their initial meeting, Victim appeared shy and told him the abuse started when she was 11 years old. The abuse occurred at both homes in which the family resided during that period. Based on this information, Captain Nix referred Victim to the Julie Valentine Center so she could meet with specialists trained to interview and provide services for child victims of sexual abuse. Captain Nix testified he met with Victim on several occasions, but during all their interviews Victim provided information which was fairly consistent throughout. However, Captain Nix did recall that Victim provided some additional information in their subsequent meetings and admitted he may have written in his notes that Victim's recollection was "different" than what she initially provided.[4] (App.p.160, line 24–App.p.171, line 22).

At the conclusion of the State's case, trial counsel moved for a directed verdict based on the State's alleged failure to provide sufficient evidence of guilt. The trial judge denied the motion, finding the State had presented enough evidence of guilt to justify his ruling. (App.p.174, line 13–App.p.175, line 13).

Niece, the sole defense witness, testified she and Victim were very close before the latter reported Rampey's sexual abuse, viewing Victim like a sister. During the fall of 2013, Victim

[4] On cross-examination, trial counsel claimed Captain Nix wrote in his notes that Victim's initial recollections of the abuse "differ[ed]" from when told him in later meetings. However, trial counsel failed to submit these notes into evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

told Niece she wanted to live with Hinton because she believed Hinton would have more lax rules and she "got everything she wanted" when visiting Hinton. Victim asked Mother whether she could move in with Hinton and Mother rejected the idea. On December 26, 2013, Victim and Niece were playing in the latter's room when Victim stated she "was thinking" of telling a lie about Rampey in order to convince Mother to allow her to move in with Hinton. She believed Victim would go through with the plan because Victim usually did the things she claimed she would but was too scared to tell anyone. Niece did not tell anyone about the conversation until after Rampey was arrested and released on bond. (App.p.178, line 15–App.p.186, line 9).

On cross-examination, Niece stated she was 12 years old and was 9 or 10 at the time Victim reported the crime. She had not seen Victim since the latter reported the abuse, but losing contact with her "sister" did not bother or affect her. She claimed she first told her mother about Victim's December 26, 2013, statements in the summer of 2013. When the State informed Niece summer of 2013 was inconsistent with the date Niece claimed Victim made the statements, she claimed she did not "know when this happened" and did not know when Rampey was released on bond, which the State pointed out was February 26, 2014. Niece never spoke with law enforcement about this information and was unaware her mother spoke with law enforcement numerous times and never informed them of the alleged conversation between Victim and Niece. (App.p.186, line 17–App.p.190, line 16).

Closing Statements

During its closing, the State explained the difference between the second- and third-degree CSC with a minor charges, stating the latter charge applied to the "touching, groping, [and] fondling" occurring between Rampey and Victim, while the former applied to Rampey's

sexual battery of Victim's body, including the anal intercourse and cunnilingus. (App.p.193, line 16–App.p.196, line 10).

Jury Instructions

Following closing arguments, the trial judge instructed the jury on the law applicable to the case. Neither party objected to the charges as given. Approximately one hour later, the jury returned and submitted three questions: (1) whether they could review a transcript of Victim's testimony; (2) whether they could review a transcript of Dr. Crosswell's testimony and her reports; and (3) the possibility of submitting Victim to a lie detector test.[5] The trial judge informed the jury transcripts of the testimony were unavailable, but they could listen to the audio recordings of the testimony if they so desired. He also rejected the request for a lie detector test, noting they are "notoriously unreliable" and inadmissible. They jurors returned to the jury room and continued deliberating. Approximately an hour and a half later, the trial judge received a note stating the jurors were deadlocked. The jury returned to the courtroom, where the trial judge provided the following Allen charge:

> All right. Ladies and gentlemen, I've received your note and I sympathize with you. I recognize 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 a 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'[ve] been brought to bear this week to bring this case to trial. The State of South Carolina, the County of Pickens, 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

[5] The question regarding the lie detector test appeared to be a response to trial counsel's attack on Victim's credibility throughout his closing.

> 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 room and *attempt to come to a verdict*. Thank you very much.

(App.p.223, line 20–App.p.240, line 11) (emphasis added).

Following the Allen charge and the jurors returning to their deliberations, trial counsel requested additional language for the charge clarifying jurors were not required to "compromise their position[s]." The trial judge acknowledged trial counsel's concern, admitting the Allen charge "may have been somewhat coercive," but some coerciveness is inherent in every such charge. He believed the charge did not give "any suggestion that anybody had to change their opinion" because it only asked the jurors to consider opposing positions. He further felt that giving the additional instruction would communicate to the jury they did not really have to put effort into reaching a verdict, a message he sought to avoid. Approximately an hour and twenty minutes later, the jury returned with their verdict of guilt for third-degree CSC with a minor. Before releasing the jury, the trial judge, seeking to confirm the Allen charge did not unduly coerce the jurors into reaching a verdict, asked them to raise their hands if any of them felt they "compromised a firmly-held position and simply agreed to go along with the remaining [jurors]" in reaching they verdict. None of the jurors raised their hands. (App.p.240, line 12–App.p.244, line 11).

STANDARD OF REVIEW

Decisions regarding the conduct of a criminal trial are left largely to the sound discretion of trial judges, and a trial judge's ruling on the conduct of a trial will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

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.

In an unpublished opinion, without reference to specific language upon which the Court of Appeals based its reversal, the court found the trial judge erred in charging the jury pursuant to Allen v. United States. Due to the limited information within the opinion itself, and the fact that the court issued its opinion without oral argument, the State is somewhat unsure of the exact basis upon which the opinion was issued. However, the Court of Appeals' opinion does not appear to utilize the factors set forth in Lowenfield in its analysis, a critical misstep given those factors are the standard for determining the propriety of Allen charges. Had the Court of Appeals engaged in a traditional Lowenfield analysis, the record in this case demonstrates the only possible conclusion for the court to have reached was that the Allen charge given was not improperly coercive.

ANALYSIS

In order for the judicial process to properly function, it is important for cases to reach a final resolution at some point. See Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1910) ("It is important that the trial of causes should be ended."). As a result, trial judges have a duty to urge juries to agree upon a verdict. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). However, trial judges are not permitted to coerce juries into doing so. See State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974) ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); State v.

Ayers, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct. App. 1985) ("The trial judge has a duty to urge the jury to agree on a verdict, so long as he is not coercive.").

"An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments." State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), aff'd 387 S.C. 310, 692 S.E.2d 895 (2010). "Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)).

"In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel." Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). "Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views." Id. "A trial judge has a duty to urge, but not coerce, a jury to reach a verdict." Id. In Tucker, this Court adopted the standard established by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. Those factors are:

> (1) Whether the charge spoke specifically to the minority juror(s);
> (2) The language of the charge, including statements such as "You have [] to reach a decision in this case";
> (3) Whether the trial judge inquired into the jury's numerical division, a question generally considered coercive; and
> (4) Weighing the length of time between the issuance of the Allen charge and the jury's return of a verdict (with verdicts returned "shortly after" the supplemental charge suggesting a possibility of coercion) against trial counsel's failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Pursuant to the Tucker, two of the Lowenfield factors immediately favor the State: the trial judge's charge neither spoke specifically to the minority jurors, nor did he inquire into the jury's numerical breakdown. Rampey did not contest these factors in his brief to the Court of Appeals.

The fourth factor, the length of time between the issuance of the Allen charge and the jury's verdict, also supports the charge's constitutionality. While it is true the jury only deliberated from 2:11 p.m. to 3:28 p.m. after receiving the charge, such a period was very reasonable in that situation. The pre-Allen deliberations occurred from 11:45 a.m. to 12:40 a.m., and 12:43 p.m. to 2:07 p.m., totaling 2 hours, 19 minutes; over a third of the jury's deliberations occurred after the trial judge issued the charge. In Tucker, the Supreme Court of South Carolina stated the post-Allen deliberation period, approximately an hour and a half, was a "relatively short period of time" in that case because deliberations in that case began at 1:33 p.m. on the first day of deliberations, the jury became deadlocked around 5:00 p.m. that day, and the jury received an Allen charge around 11:00 a.m. on the second day, returning with a verdict around 12:27 pm. In total, the jury deliberated for approximately eight and a half hours, over half of that deadlocked before receiving the Allen charge. Id. at 485–88, 494, 552 S.E.2d at 713–14, 718. Here, unlike Tucker, the post-Allen discussions constituted a significant portion of the jury's deliberations. Moreover, unlike Tucker, the jurors here spent a minority of the deliberations "deadlocked."

As to the second factor, the instructions, overall, conveyed the appropriate, constitutional charge to the jury. The trial judge never told the jury they were required to reach a decision in the case: while he did state the parties "deserve[d] finality," he clearly asserted that he was only asking the jurors to return to the jury room and "attempt" to reach a verdict also informed the

jurors that if they failed to reach a verdict, the case would simply be retried. This is a drastic difference from the Allen charge presented in the Taylor case, cited by this Court in its opinion. In State v. Taylor, 427 S.C. 208, 829 S.E.2d 723 (Ct. App. 2019), the trial judge repeatedly told the jurors they "should come to a decision" in that matter. Id. at 211–12, 829 S.E.2d at 725. In fact, the Taylor court itself explained, "[t]here is a glaring difference between the trial court's obligation to tell jurors they have a duty to attempt to reach a unanimous verdict and telling them they 'should come to a decision.'" Id. at 215, 829 S.E.2d at 727. Notably, the Taylor court found that the trial judge's instructions "skirt[ed] close" to prohibited language; thus, the trial judge's instruction, which utilized the "attempt" language also found in Taylor, were safely within the realm of acceptable, non-coercive instructions which did not violate the second Lowenfield factor. See id.; also State v. Logan, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) ("A jury charge is correct if, when read as a whole, the charge adequately covers the law.") (citing State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)).

Accordingly, the traditional Tucker/Lowenfield factors all weigh against the court's reversal of Rampey's conviction.

Taylor and its Expansion of Tucker

The State believes, based on the limited information available in the Court of Appeals' unpublished opinion, this decision to reverse Rampey's conviction is based primarily upon its consideration of an additional factor to the four stated in Tucker: the absence of language instructing the jurors they "should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict." See Taylor, 427 S.C. at 218, 829 S.E.2d at 729. However, the court's creation of this new factor and application of it to both the instant case and Taylor is problematic for several reasons.

First, it is worth emphasizing that Taylor appears to create a "new" fifth factor which, without consideration of the other Lowenfield factors, is a basis for reversing a verdict. This interpretation of Taylor appears to be confirmed in the Court of Appeals' opinion in the instant case, in which it fails to perform any analysis of the traditional Lowenfield factors and skips directly to portions of Taylor from which the State draws this conclusion:

> The Tucker Criteria have never been deemed comprehensive. . . . The most troubling thing about the charge . . . is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion."

See Taylor, 427 S.C. at 218–19, 829 S.E.2d at 729.

The addition of this factor, which ignores and/or trumps the other factors, is problematic for two main reasons. First, Allen and its progeny consistently emphasize that the constitutionality of an Allen charge must be considered "in its context and under all the circumstances." See, e.g., Lowenfield at 237. Second, the consideration of language instructing jurors to not surrender their conscientiously held beliefs simply for the sake of reaching a verdict is already a part of the Lowenfield test. For example, the Tucker court, when determining whether the Allen charge spoke specifically to the minority jurors, explained that the trial court's instruction that jurors "should not do 'violence to his or her own conscience' in order to reach a verdict" was language weighing against a finding of coercion. See Tucker at 492–93.

Notably, the cases upon which Taylor relies are distinguishable from it and do not support its addition of the fifth factor. In fact, these cases are entirely consistent with the traditional treatment of "conscience" instructions within the Tucker framework. In Buff v. S.C. Dep't of Transp., 342 S.C. 416, 537 S.E.2d 279 (2000), the Supreme Court considered instructions related to S.C. Code Ann. § 14-7-1130, which provides that if a jury reports

deadlock to the trial court *a second time*, "it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law." 342 S.C. at 419-20, 537 S.E.2d at 281. The significant fact for the issue on appeal was whether the jury expressed consent to further deliberations. 342 S.C. at 423, 537 S.E.2d at 283. The referenced statute has the dual purpose of "prevent[ing] forced verdicts, *and* to prevent undue severity of jury service." 342 S.C. at 402, 537 S.E.2d at 281 (quoting State v. Freely, 105 S.C. 243, 247, 89 S.E.643, 644 (1916)) (emphasis added). The inquiry for error does not share the same focus as that of review of an Allen charge. Id.; see also State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (finding relief due under the statute where jury did not consent to being sent out again). At any rate, the court did not pass on the propriety of an Allen charge. Thus, the case lends no direct and necessary support to the Court's reasoning.

Further, in Blake by Adams v. Spartanburg Gen. Hosp., 307 S.C. 14, 413 S.E.2d 816 (1992), the Supreme Court considered the effect of bailiff comments to the juror that "urg[ed] the jury to reach a verdict," including "the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. at 16, 413 S.E.2d at 817. In distinguishing bailiff comments from a judge's charge, the court noted "a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." 307 S.C. at 18, 413 S.E.2d at 818. The court also found "the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement," consequently, "under the facts of this case," it found no abuse of discretion in granting a new trial. Id. The Supreme Court did not pass on the propriety of an Allen charge, or even accept the bailiff comments would not be error if the additional language was included. Blake

does not support the necessity of the language in an actual Allen charge. As with Buff, the Blake opinion does not lend direct and necessary support to the Court's reasoning.

Polling the Jury: Proof of Harmless Error

The last, and perhaps most significant, problem with Taylor and its application to the instant case is that by ignoring the totality of the circumstances surrounding the charge, the Court of Appeals also ignored the most important evidence that jurors were not unconstitutionally coerced: confirmation by the jurors themselves. After the jury rendered its verdict, the trial judge, seeking to confirm the Allen charge did not unduly coerce the jurors into reaching a verdict, asked them to raise their hands if any of them felt they "compromised a firmly-held position and simply agreed to go along with the remaining [jurors]" in reaching their verdict. None of the jurors raised their hands. (App.p.240, line 12–App.p.244, line 11). This action by the trial judge actually sets this case apart from Tucker and other South Carolina cases involving the Allen charge because none of the other cases involved confirmation from jurors themselves that they were not coerced. The Court of Appeals' opinion overlooks this critical piece of evidence which shows, even without the language requested by Rampey, the jury's verdict was unaffected by the trial judge's instructions.

CONCLUSION

Based on the foregoing reasons, Petitioner submits this Court should reverse the Court of Appeals and affirm Rampey's conviction or, in the alternative, remand the matter to the Court of Appeals and instruct it to properly apply the Lowenfield framework in its analysis of the case.

Respectfully submitted,

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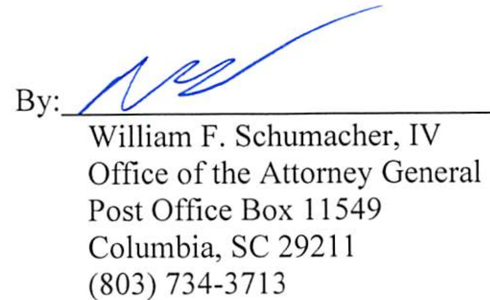

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October 29, 2021