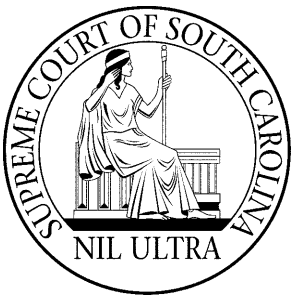

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 12, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In re: Mt. Hawley Insurance Company, Petitioner,

In Which Contravest, Inc., Contravest Construction Company and Plantation Point Horizontal Property Regime Owners Association, Inc., as assignees, are Respondents.

Appellate Case No. 2018-001170

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 27892
Heard April 17, 2019 – Filed June 12, 2019

CERTIFIED QUESTION ANSWERED

C. Mitchell Brown, William C. Wood Jr., and Blake T. Williams, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Andrew K. Epting Jr., of Andrew K. Epting Jr., LLC, of Charleston, all for Petitioner.

Jesse A. Kirchner, Michael A. Timbes and Thomas J. Rode, all of Thurmond Kirchner & Timbes, P.A., of Charleston, for Respondents.

Gray T. Culbreath and Janice Holmes, both of Gallivan, White, & Boyd, PA, of Columbia, for amici curiae The American Property Casualty Insurance Association and The South Carolina Insurance Association.

Bert G. Utsey III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Charleston, and J. Ashley Twombley, of Twenge & Twombley Law Firm, of Beaufort, for amicus curiae the South Carolina Association for Justice.

JUSTICE KITTREDGE: We are presented with a certified question from the United States Court of Appeals for the Fourth Circuit. The underlying case is an insurance bad faith action against an insurance company for its failure to defend its insured in a construction defect action. The insured settled the construction defect action and brought a bad faith tort action. When the insurer asserted it acted in good faith in denying coverage, the insured sought to discover the reasons why the insurer denied coverage. According to the insurer, the discovery requests included communications protected by the attorney-client relationship. The federal district court reviewed the parties' respective positions, determined the insured had established a prima facie case of bad faith, and ordered the questioned documents to be submitted to the court for an *in camera* inspection. The insurer then sought a writ of mandamus from the Fourth Circuit to vacate the district court's order regarding the discovery dispute. In turn, the Fourth Circuit certified the following question to this Court:

> Does South Carolina law support application of the "at issue" exception to attorney-client privilege such that a party may waive the privilege by denying liability in its answer?

The parties, especially the insured, assert the certified question does not accurately represent the correct posture of the case. In fact, the insured concedes the narrow question presented requires an answer in the negative. We agree, for we find little authority for the untenable proposition that the mere denial of liability in a pleading constitutes a waiver of the attorney-client privilege. For the reasons set forth below, we elect to analyze the issue narrowly in the limited context of a bad faith action against an insurer. We are constrained to answer the certified question as follows: "No, denying liability and/or asserting good faith in the answer does

not, standing alone, place the privileged communications 'at issue' in the case."[1]

I.

In its Certification Order, the Fourth Circuit summarized the relevant facts as follows:

> Mount Hawley [Insurance Company ("Mount Hawley")] provided ContraVest Construction Company ("Contravest") with excess commercial liability insurance from July 21, 2003, to July 21, 2007. During that period, Contravest constructed the Plantation Point development in Beaufort County, South Carolina. In 2011 the Plantation Point Horizontal Property Regime Owners Association ("the Owners Association") sued Contravest for alleged defective construction of Plantation Point. Mount Hawley refused Contravest's demands to defend or indemnify Contravest in the suit, as Contravest contended was required by its insurance policies, and Contravest ultimately settled the case.
>
> Contravest and the Owners Association subsequently sued Mount Hawley in South Carolina court, alleging bad faith failure to defend or indemnify, breach of contract, and unjust enrichment. Mount Hawley removed the case to the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 1441 (2012), and federal subject matter jurisdiction exists under 28 U.S.C. § 1332 (2012) based upon complete diversity of citizenship between the parties and

---

[1] The plaintiffs (the insured and the plaintiff/condominium owners' association in the construction defect action) contend the federal district court decided to conduct an *in camera* review of the questioned documents based on more than a mere denial of liability in the insurer's answer. We agree. *See ContraVest Inc. v. Mt. Hawley Ins. Co.*, 273 F. Supp. 3d 607, 617–23 (D.S.C. 2017) (including the district court's discussion of the need for the insured to make a prima facie showing of bad faith—in addition to the insurer's denial of liability in its answer—under the test set forth in *City of Myrtle Beach v. United National Insurance Co.*, C/A No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010), and finding the plaintiffs had made such a showing there).

damages alleged to be greater than $75,000.

During discovery, the plaintiffs sought production of, first, Mount Hawley's file on Contravest's claim for excess coverage relating to the Plantation Point suit, and later, Mount Hawley's files relating to all of Contravest's claims under its excess liability policies. *See* Fed. R. Civ. P. 26(b)(1), 34(a)(1)(A). Mount Hawley contended that these files contained material protected by the attorney-client privilege, and produced files in redacted form with accompanying privilege logs. *See* Fed. R. Civ. P. 26(b)(5)(A). The plaintiffs filed multiple motions to compel, arguing that Mount Hawley waived the attorney-client privilege as to these files. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv). The district court adopted the recommendation of the magistrate judge, granted the motions to compel, and ordered Mount Hawley to produce the files for in camera inspection. *ContraVest Inc. v. Mt. Hawley Ins. Co.*, 273 F. Supp. 3d 607, 622–23 (D.S.C. 2017). The district court subsequently denied Mount Hawley's motion for reconsideration [in which it asked the district court to certify four questions of law to the Supreme Court of South Carolina]. Mount Hawley then sought a writ of mandamus from [the Fourth Circuit] to vacate the district court's order granting the motions to compel.

[]

In its petition for a writ of mandamus, Mount Hawley challenges the district court's holding that the relevant files were not protected by the attorney-client privilege because Mount Hawley put them "at issue" in the case by denying liability for bad faith failure to defend or indemnify. Because this is a diversity action involving claims for which South Carolina law provides the rule of decision, South Carolina's law of attorney-client privilege applies. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 285 n.5 (4th Cir. 2000); Fed. R. Evid. 501. In South Carolina the attorney-client privilege is defined as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance

> permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010). "In general, the burden of establishing the privilege rests upon the party asserting it." *Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008).

In finding that the relevant files were not protected by South Carolina's attorney-client privilege, the district court relied on *City of Myrtle Beach v. United Nat[ional] Ins[urance] Co.*, No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010) (unpublished). *City of Myrtle Beach* also involved a bad faith insurance suit under South Carolina law in which the insured sought to compel the insurer to produce the relevant claim files, and the insurer argued that the files contained material protected by the attorney-client privilege. *Id.* at *1–2. The district court adopted the approach articulated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), as "consistent with established South Carolina law." *Id.* at *5. Applying *Hearn*, the district court found that

> there is no per se waiver of the attorney client privilege simply by a plaintiff making allegations of bad faith. However, if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntarily waives, explicitly or impliedly, the attorney-client privilege. Thus, "voluntarily injecting" the issue is not limited to asserting the advice of counsel as an affirmative defense. A party's assertion of a new position of law or fact may be the basis of waiver.

Id. (citation omitted).

Applying this definition of waiver, the court in *City of Myrtle Beach* found that "for the purposes of the motion to compel, the insured has presented a prima facie case of bad faith," and the insurer failed to meet its burden of establishing the absence of waiver of the attorney client privilege on account of the defenses asserted in its answer, including that the insurer acted reasonably and in good faith. *Id.* at

*7. The court noted that "while this ruling amounts to a virtual per se waiver of the privilege in this case, this result is based on the facts and issues presented by the insurer in its Answer and its failure to meet its burden as to the applicability of the privilege with this in mind." *Id.*

In the present case, the district court rejected Mount Hawley's argument that *City of Myrtle Beach* was inconsistent with South Carolina law in light of the fact that one member of the Supreme Court of South Carolina criticized the *Hearn* decision in a separate opinion concurring in part and dissenting in part. *See Davis v. Parkview Apartments*, 409 S.C. 266, 291–96, 762 S.E.2d 535, 549–51 (2014) (Pleicones, J., concurring in part and dissenting in part). The district court found "that the numerous decisions that have applied *City of Myrtle Beach* in this district provide stronger evidence than the separate opinion in *Davis* that the Supreme Court of South Carolina would adopt such an approach." *ContraVest*, 273 F. Supp. 3d at 616. The district court also concluded that this approach strikes the best balance between "the important policy goals of the attorney-client privilege against the substantive interests underlying an insured bad faith claim." *Id.* (citation omitted).

Following the approach articulated in *City of Myrtle Beach*, the district court concluded that because the plaintiffs had established a prima facie case of bad faith failure to insure, and Mount Hawley in its answer denied bad faith liability, Mount Hawley waived the attorney-client privilege with respect to the attorney-client communications in the claim files, to the extent such communications are relevant under [Rule 26 of the Federal Rules of Civil Procedure]. *Id.* at 611–23.[2] The court thus ordered Mount Hawley to produce the files for an in camera review. *Id.* at 623.

Order of Certification at 2–6 (footnotes omitted) (internal alteration marks omitted).

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[2] The district court also noted the *in camera* review would focus on whether the documents in the claim files were protected by the work-product doctrine. *ContraVest*, 273 F. Supp. 3d at 623 n.13.

II.

There are three broad approaches that jurisdictions use to determine the presence or absence of a waiver of the attorney-client privilege. *See Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 702 n.6 (S.D. 2011) (describing the three approaches and collecting cases); Restatement (Third) of the Law Governing Lawyers § 80 Reporter's Note cmt. b (2000) (same); *infra* Part II.B (discussing the three approaches in more detail). However, regardless of what test is employed by the Court, the answer to the certified question must be "no," as stated above. Because the certified question necessarily involves a determination of the circumstances under which a communication otherwise protected by the attorney-client privilege is discoverable under South Carolina law, we will examine the law generally and set forth the proper framework to be applied in South Carolina in a tort action by an insured against the insurer for bad faith refusal to provide coverage.

A. Existing South Carolina Law

i. *Discovery and Privilege*

The scope of discovery in South Carolina is generally broad. *Oncology & Hematology Assocs. of S.C., L.L.C. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 385, 692 S.E.2d 920, 923 (2010); *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 252–53, 195 S.E.2d 615, 619 (1973) ("Since dockets must be kept current largely by settlements, litigants and attorneys should be allowed liberal discovery. Such would, of course, increase the likelihood of fair trial." (alteration in original) (quoting *Hodge v. Myers*, 255 S.C. 542, 548, 180 S.E.2d 203, 206 (1971))). As a result, parties may obtain discovery regarding any matter that is not privileged so long as it is relevant to the subject matter involved in the pending claim. Rule 26(b)(1), SCRCP.

South Carolina's sole evidentiary rule regarding privileges is found in Rule 501, SCRE, which states:

> Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina statute, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in light of reason and experience.

Rule 501, SCRE.

The attorney-client privilege has long been recognized in this State and protects against disclosure of confidential communications by a client to his attorney regarding a legal matter. *Tobaccoville USA*, 387 S.C. at 293, 692 S.E.2d at 529; *State v. Doster*, 276 S.C. 647, 650, 284 S.E.2d 218, 219 (1981). The privilege is based upon a "wise public policy" that determines the best interest of society is served by "inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications." *Booker*, 260 S.C. at 254, 195 S.E.2d at 619–20; *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." (citation omitted)); *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 647 n.1, 813 S.E.2d 696, 699 n.1 (2018) (describing the privilege as "rooted in the imperative need for confidence and trust" (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996))). South Carolina courts strictly construe the attorney-client privilege. *Doster*, 276 S.C. at 651, 284 S.E.2d at 219.

Despite the importance of confidential communications between an attorney and his client, we, like other jurisdictions, must understand and examine the tension that is created by competing policy goals. *See Doster*, 276 S.C. at 651, 284 S.E.2d at 220 ("The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice."). Thus, while South Carolina bestows significant weight to the attorney-client privilege, the privilege is not absolute. *See Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 384, 453 S.E.2d 880, 884 (1994). For example, the attorney-client privilege does not extend to communications made in furtherance of criminal, tortious, or fraudulent conduct. *Doster*, 276 S.C. at 651, 284 S.E.2d at 220. Likewise, information—in and of itself—does not become privileged merely because it was communicated to an attorney. *Booker*, 260 S.C. at 256, 195 S.E.2d at 621.

Similarly, the client, as the sole owner of the attorney-client privilege, can waive the privilege. *State v. Thompson*, 329 S.C. 72, 76–77, 495 S.E.2d 437, 439 (1998). Such waiver must be "distinct and unequivocal." *Id.* As a result, when a party asserts an implied waiver of privilege, "caution must be exercised, for waiver will not be implied from doubtful acts." *Id.* at 77, 495 S.E.2d at 439.

Generally, the party claiming the privilege has the burden of establishing the confidential nature of the communication, including the absence of waiver. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). There is, however, considerable authority for a burden-shifting analysis.[3] We hold that the party asserting the privilege has the initial burden to make a prima facie showing that the communications in question are privileged; if the initial burden is met, the party challenging the privilege must establish the communications are otherwise discoverable under an exception or waiver.

ii. *Insurance and Bad Faith Claims*

"In this jurisdiction it has long been recognized that insurance is a business affected with a public interest." *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285,

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[3] *Compare, e.g.*, *James v. Harris Cty.*, 237 F.R.D. 606, 609 (S.D. Tex. 2006) ("The party asserting a privilege has the burden to demonstrate that the privilege exists under the circumstances presented. Courts typically hold that waiver is a negative burden that the privilege proponent must satisfy." (citations omitted)), *and Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644, 648–49 (Tex. 1985) ("The burden of proof to establish the existence of a privilege rests on the one asserting it. If the matter for which a privilege is sought has been disclosed to a third party, thus raising the question of waiver of the privilege, the party asserting the privilege has the burden of proving that no waiver has occurred." (citations omitted)), *with Shumaker, Loop & Kendrick, L.L.P. v. Zaremba*, 403 B.R. 480, 483 (N.D. Ohio 2009) ("The general rule is that the burden of establishing the existence of the privilege rests with the party claiming it. Case law is clear that it is the burden of the proponent of the privilege to establish that the privilege has not been waived, for example, by disclosure to a third party. . . . There is also general agreement among many courts and circuits that once a prima facie case of privilege is established by a proponent, the party challenging the privilege then has the burden to establish that the communications in question are otherwise discoverable under an exception or waiver." (internal citations omitted)), *and Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014) ("The confusion regarding who bears the burden of proving waiver of a privilege is understandable. Absence of waiver is one of the elements required to establish the privilege. However, when waiver is the focus of a dispute, the burden is shifted to the party asserting waiver." (footnote omitted) (citations omitted)).

291, 149 S.E.2d 771, 774–75 (1966). In furtherance of this policy, this Court has recognized, in addition to a breach of contract action, a separate tort action for an insurer's bad-faith refusal to pay benefits under an insurance policy, whether for a first-party claim or a third-party claim. *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500–01, 473 S.E.2d 52, 53–54 (1996) (rejecting an insurer's argument that bad faith must be premised on breach of an express contractual provision); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). As the *Nichols* Court explained:

> Absent the threat of tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not. During the ensuing period of litigation following such a denial, the insurance company has the benefit of profiting on the use of the insured's money. Heretofore, the only compensation a successful insured could expect through litigation was the belated payment of his claim and the possibility of recovering attorney fees up to [$2,500, as set by statute].
>
> We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.

Nichols, 279 S.C. at 340, 306 S.E.2d at 619 (internal citations omitted) (internal quotation and alteration marks omitted).

The Court has oft expressed similar concerns regarding an insurer denying coverage with impunity. *See, e.g.*, *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 158, 345 S.E.2d 711, 713 (1986) (rejecting an insurer's argument that it was entitled to a directed verdict because, based on its own investigation, it believed there was a reasonable basis to deny the claim, and stating, "This position is not tenable. *First, it binds the insured to the findings and conclusions of the insurer's own independent investigation; next, it effectually insulates the insurer from liability; and finally, it forecloses a jury consideration of the insured's evidence of bad faith*." (emphasis added)).

These decisions promoted "this State's long held philosophy that those in the insurance industry who fail to deal in good faith should be penalized." *Duncan v. Provident Mut. Life Ins. Co. of Phila.*, 310 S.C. 465, 468, 427 S.E.2d 657, 659 (1993). Of course, however, "[i]f there is a reasonable ground for contesting a claim, there is no bad faith." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992). The bad faith determination must be judged by the evidence before the insurance company at the time it denied the claim. *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) (per curiam). Thus, evidence arising after the denial of the claim is not relevant to the propriety of the insurer's conduct at the time of its refusal. *Id.*

The Court has often observed that the relationship between an insurer and its insured is "special," more so than parties in a mere contractual relationship. *See, e.g.*, *Tadlock Painting*, 322 S.C. at 503 n.5, 473 S.E.2d at 55 n.5; *Williams v. Riedman*, 339 S.C. 251, 268–74, 529 S.E.2d 28, 36–40 (Ct. App. 2000) (discussing the "special relationship" between an insurance company and its insured, and distinguishing other types of relationships from that "special" one). The basis of this special relationship between the insurer and the insured derives from an extension of the implied covenant of good faith and fair dealing that exists in all contracts. *Tadlock*, 322 S.C. at 501–03 & nn.4–5, 473 S.E.2d at 54–55 & nn.4–5 (quoting *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265, 1269 (Ariz. 1992) (en banc); *Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co.*, 279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983)).

With this general background, we turn to the three approaches to the waiver of the attorney-client privilege.

B. Various Approaches

This Court has not previously been tasked with harmonizing attorney-client privilege and insurance bad faith law. As the Supreme Court of Washington noted, insurance bad faith claims place in tension three valued principles: on the one side, the attorney-client privilege; and on the other side, the importance of broad discovery and holding insurance companies accountable for their bad acts. *See Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 245–46 (Wash. 2013) (en banc). As mentioned previously, there are three broad approaches jurisdictions take to resolve this tension. *Bertelsen*, 796 N.W.2d at 702 n.6; Restatement (Third) of the Law Governing Lawyers § 80 Reporter's Note cmt. b. We acknowledge that none of the various approaches is without legitimate criticisms.

First, a "substantial minority" of jurisdictions have broadened the crime-fraud exception to the attorney-client privilege and found the privilege does not extend to any communications in furtherance of any crime *or* tort, including bad faith insurance claims.[4] These jurisdictions have typically found the entire pre-denial claim file discoverable.[5] While this approach would certainly promote South Carolina's policies in favor of promoting broad discovery and holding insurers accountable when they act in bad faith, we reject it, as the approach places only nominal value on the importance of the attorney-client privilege.

Second, and on the other extreme, other jurisdictions have upheld the attorney-client privilege absent direct, express reliance on a privileged communication by a client in making out his claim or defense. Such jurisdictions reject the suggestion of an *implied* waiver of the attorney-client privilege.[6] We reject this approach as well, as it fails to balance the attorney-client privilege with any competing policy considerations. *See Doster*, 276 S.C. at 651, 284 S.E.2d at 220 ("The public policy protecting confidential communications *must* be balanced against the public interest in the proper administration of justice." (emphasis added)).

Third, some jurisdictions take a middle-ground approach and find the answer depends on a case-by-case analysis of the facts.[7] This is the general approach we adopt when determining if the attorney-client privilege has been waived in a tort action against an insurer for bad faith refusal to deny coverage.

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[4] *Cedell*, 295 P.3d at 251 (Alexander, J., dissenting) (citing 2 Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges* § 6.13.2(d)(1), at 1174 (2d ed. 2010)).

[5] *See, e.g.*, *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699, 699 (D. Mont. 1986); *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 157 (Ohio 2001).

[6] *See, e.g.*, *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863–64 (3d Cir. 1994); *Palmer ex rel. Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 907 (Mont. 1993).

[7] *See, e.g.*, *Hearn*, 68 F.R.D. at 581; *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1183–84 (Ariz. 2000) (en banc); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 262–63 (Del. 1995).

We find the case of *State Farm Mutual Automobile Insurance Co. v. Lee* from the Supreme Court of Arizona instructive. *See* 13 P.3d 1169 (Ariz. 2000) (en banc). In *Lee*, a class of insureds brought claims for insurance fraud and bad faith and sought discovery of their insurer's files and documents related to the insurer's pattern of rejecting their underinsured and uninsured claims. *Id.* at 1170. The insurer resisted discovery, arguing the documents were protected by the attorney-client privilege because it had sought and received advice of counsel about whether to pay or reject the insureds' claims. *Id.* at 1170, 1172. However, the insurer "denied it intended to show good faith by advancing a defense of reliance on advice of counsel." *Id.* at 1172. The trial court granted the insureds' motion to compel, finding the insurer had waived the privilege:

> [The insurer has] claimed that its managers held a good faith belief in their interpretation that stacking was not permitted under its insurance policies. *While not expressly setting forth the advice of counsel defense*, the facts in this case demonstrate that the [insurer's] position on stacking was made after having its counsel review the applicable statutes and developing cases and advise the corporate decision makers. Thus, the *advice of counsel was a part of the basis for [the insurer's] position* that was taken. *The advice of counsel defense is impliedly one of the bases for the defense [the insurer] maintain[s] in this action*. [The insurer has], therefore, impliedly waived the attorney-client privilege.

Id. at 1172–73 (internal alteration marks omitted).

The Arizona Supreme Court ultimately upheld the trial court's decision granting the insureds' motion to compel. *Id.* at 1173, 1184. The court rested its decision on the fact that the insurer defended its denial of coverage based on its agents' subjective understanding of the law—*as informed by counsel*—rather than defending exclusively on an objective reading of the disputed policy exclusions. *See, e.g.*, *id.* at 1173, 1174 ("What [the insurer] knew about the law obviously included what it learned from its lawyers."). In reaching its holding, the court concluded that in cases "in which the litigant claiming the privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law—but an evaluation that necessarily incorporates what the litigant learned from its lawyer—the communication is discoverable and admissible." *Id.* at 1175. As the court explained:

> "A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. *It is not to be both a sword and a shield*." [8 Wigmore, § 2388, at 855].
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> . . . .
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> [Thus], a litigant's affirmative disavowal of express reliance on the privileged communication is not enough to prevent a finding of waiver. When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions. A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when the investigation and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew. . . .

Id. at 1176–78 & n.4 (emphasis added) (citations omitted) (internal quotation and alteration marks omitted) (discussing with approval the holding in *Tackett*, 653 A.2d at 259–60).

The *Lee* court addressed the question certified by the Fourth Circuit here, recognizing its approach would prohibit a finding of waiver based solely on "the mere filing of a bad faith action, the denial of bad faith [in the answer to the complaint], or the affirmative claim of good faith." *Id.* at 1179 (applying the approach set forth in Restatement (Third) of the Law Governing Lawyers § 80(1)(a)).[8] Under the Arizona Supreme Court's interpretation of the Restatement,

[8] Section 80(1)(a) of the Restatement (Third) of the Law Governing Lawyers

> The party that would assert the privilege has not waived unless it has *asserted some claim or defense*, such as the reasonableness of its evaluation of the law, *which necessarily includes the information received from counsel*. In that situation, the party claiming the privilege has interjected the issue of advice of counsel into the litigation to the extent that recognition of the privilege would deny the opposing party access to proof without which it would be impossible for the factfinder to fairly determine the very issue raised by that party. We believe such a point is reached when, as in the present case, the party asserting the privilege claims its conduct was proper and permitted by law and based in whole or in part on its evaluation of the state of the law. In that situation, the party's knowledge about the law is vital, and the advice of counsel is highly relevant to the legal significance of the client's conduct. Add to that *the fact that the truth cannot be found absent exploration of that issue*, and the conditions of RESTATEMENT § 80 are met.

Id. (emphasis added).

Lee was not unanimous. The *Lee* majority noted the dissent and the insurer (like Mount Hawley) argued the insureds, and not the insurer, raised the subjective good faith of the insurer's claims people; however, the majority rejected the argument because it was not the insurer's mere denial of that allegation that waived the privilege, but instead was the insurer's "affirmative assertion that its actions were reasonable because of its [subjective] evaluation of the law, based on its interpretations of the policies, statutes, and case law, and because of what its personnel actually knew or did." *Id.* at 1180–81 & n.7, 1182 ("It is not enough that plaintiff brings the privilege holder's mental state in issue. The waiver exists only

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provides:

> The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that *the advice was otherwise relevant to the legal significance of the client's conduct* . . . .

(Emphasis added.)

when the privilege holder raises and defends on the theory that its mental state was based on its evaluation of the law and the facts show that evaluation included and was informed by advice from legal counsel."). The court noted it would be "difficult" for the insurer to respond to the insureds' allegations of subjective bad faith "without affirmatively alleging that it investigated and evaluated the law." *Id.* at 1182. However, the court stated it was not impossible, and that the insurer "could do so simply by denying that it knew it was acting unlawfully and relying [solely] on a defense of objective reasonableness." *Id.* at 1182–83 (acknowledging that whichever strategy the insurer chose, it was "faced with serious problems about the advice of counsel" to the extent it was, in some ways, "between Scylla and Charybdis").

The court also noted the criticisms of its approach from decisions such as *Rhone-Poulenc*, and in return pointed out the problems inherent in the *Rhone-Poulenc* approach advanced by Mount Hawley here:

> It simply makes a mockery of the law to allow a litigant to claim on the one hand that it acted reasonably because it made a legal evaluation from which it concluded that the law permitted it to act in a certain manner, while at the same time allowing that litigant to withhold from its adversary and the factfinder information it received from counsel on that very subject and that therefore was included in its evaluation. The sword and shield metaphor would truly apply were we to allow a party to raise the privilege in that situation.

Id. at 1182.[9]

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[9] Mount Hawley additionally contends that anything less than adopting the *Rhone-Poulenc* approach would chill attorney-client communications due to the destabilization of the privilege. We agree with the Supreme Court of Ohio's dismissal of this argument:

> This argument is not well taken because it assumes that insurers will violate their duty to conduct a thorough investigation by failing, when necessary, to seek legal counsel regarding whether an insured's claim is covered under the policy of insurance, in order to avoid the [mere possibility of the] insured later having access to such communications,

Lee made plain the importance of the attorney-client privilege and reiterated that a waiver would not be lightly found:

> We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege. We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses. This does not waive the privilege. All of this occurred in the present case, and none of it, separately or together, created an implied waiver. But the present case has one more factor—[the insurer] claims its actions were the result of its reasonable and good-faith belief that its conduct was permitted by law ***and*** its subjective belief based on its claims agents' investigation into and evaluation of the law. It turns out that the investigation and evaluation included information and advice received from a number of lawyers. It is the last element, combined with the others, that impliedly waives the privilege. State Farm claims that its actions were prompted by what its employees knew and believed, not by what its lawyers told them. *But a litigant cannot with one hand wield the sword—asserting as a defense that, as the law requires, it made a reasonable investigation into the state of the law and in good faith drew conclusions from that investigation—and with the other hand raise the shield—using the privilege to keep the jury from finding out what its employees actually did, learned in, and gained from that investigation*.
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> . . . .
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> [A party] is not permitted to thrust his knowledge into the litigation as a foundation to sustain his claim while simultaneously retaining the lawyer-client privilege to frustrate proof negating the claim asserted. Such a tactic would repudiate the sword-shield maxim.

Id. at 1183–84 (second emphasis added) (citation omitted) (internal quotation and

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through discovery.

Boone, 744 N.E.2d at 157. Such an assumption would be speculative, at best.

alteration marks omitted).

In finding the *Lee* framework instructive, we emphasize the sanctity of the attorney-client privilege. In this regard, a client does not waive the privilege simply by bringing or defending a lawsuit. We adopt the *Lee* framework in a tort action against an insurer for bad faith refusal to provide coverage, and we impose the additional requirement that the party seeking waiver of the attorney-client privilege make a prima facie showing of bad faith.

III.

Insurance bad faith actions necessarily bring into conflict the competing policy considerations of protecting the attorney-client privilege and promoting broad discovery to facilitate the truth-seeking function of our justice system. In balancing these considerations, we find the *Lee* framework is the most consistent with South Carolina's policy of strictly construing the attorney-client privilege and requiring waiver to be "distinct and unequivocal." *See Thompson*, 329 S.C. at 76–77, 495 S.E.2d at 439; *Doster*, 276 S.C. at 651, 284 S.E.2d at 219. This case-by-case approach accounts for and fairly distributes the risks and benefits of the various competing public policies. We therefore answer the certified question from the United States Court of Appeals for the Fourth Circuit by holding that a denial of bad faith and/or the assertion of good faith in the answer does not, standing alone, place a privileged communication "at issue" in a case such that the attorney-client privilege is waived.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gerald Rudell Williams, Petitioner.

Appellate Case No. 2018-000994

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Saluda County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27893
Heard March 26, 2019 – Filed June 12, 2019

AFFIRMED AS MODIFIED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William F. Schumacher IV, both of Columbia, and Solicitor S.R. Hubbard III, of Lexington, all for Respondent.

JUSTICE KITTREDGE: In this case, the Court is asked whether and to what extent the common law doctrine of transferred intent applies to the newly-

codified crime of attempted murder. Petitioner Gerald Williams was convicted of three counts of attempted murder related to his alleged shooting into an occupied mobile home where he knew his intended victim was present, but did not realize two other individuals were also present.

Under the common law, transferred intent makes a whole crime out of two halves by joining the intent to harm one victim with the actual harm caused to another. Normally, transferred intent applies to general-intent crimes. However, attempted murder is a specific-intent crime in South Carolina, and we have not yet addressed whether transferred intent may supply the requisite *mens rea* for such a crime.

Because this case was tried without objection as a general-intent crime, we find the doctrine of transferred intent applies in this instance. We therefore decline to address the applicability of transferred intent to a specific-intent crime such as attempted murder and vacate the portion of the court of appeals' opinion dealing with this issue. Additionally, looking specifically at the facts of this case, we find no error in failing to charge the jury on the lesser-included offense of assault and battery in the first degree (AB-1st). We therefore affirm the court of appeals as modified.

I.

This case arose after one drug dealer, Al Young, stole $32,000 from another drug dealer, O.J. Charley. The night of the shooting, police were tipped off that Charley and others planned to retaliate against Young that night and would be armed and dangerous. The Saluda County Sheriff's Office issued a "be on the lookout" (BOLO) alert for a teal-green Ford Windstar minivan registered to Charley's wife and coming from Barnwell County to Saluda County. It also informed local law enforcement officers of the address of Young's mobile home as the possible location of the retaliatory act.

According to the State's witnesses, shortly after midnight, Young and two of his roommates—a married couple named Ycedra Williams[1] and Joseph Wrighton—saw two men walking down the driveway. Young told Williams to turn off the lights while Wrighton went to the door and tried to identify the men. The door

[1] Ycedra Williams is Petitioner's (Gerald Williams) second cousin. For clarity's sake, we will refer to Ycedra Williams as "Williams," and Gerald Williams as "Petitioner."

contained a large glass panel through which at least the silhouette of an individual would be visible from the outside. As soon as Wrighton appeared in the door, the men began shooting, both directly at him and all along the side of the mobile home. Williams called 911, but before the police arrived, the shooters fled the scene, abandoning their firearms and two sets of latex gloves (a blue pair and a purple pair) nearby. The purple latex gloves were torn and missing the portions that would cover the thumb and index finger.

Two sheriff's officers responded to the 911 call. On their way to the mobile home, the officers noticed a minivan matching the BOLO description parked on the side of the road approximately a block or two away from the mobile home. The officers stopped for around twenty seconds, during which they asked the dispatcher to check the license plate number of the van; checked the van for occupants, including pulling on the door handles to confirm they were locked; and verified the van did not have a flat tire or other obvious signs of being disabled. The dispatcher confirmed the van belonged to Charley's wife. Concerned the van would be used as "the get-away vehicle," the officers notified a nearby Saluda Police Department officer of the van's presence and requested the town officer watch the vehicle so the two sheriff's officers could continue responding to the 911 call.

A minute or two later, upon arriving at the van, the town officer saw Charley lying in a ditch beside the van. When the officer turned on his blue lights and high beams, Charley stood up and got into the passenger side of the van, and the van immediately drove off. After a short chase, the officer was able to force the van to stop and arrested the driver (Petitioner) and Charley. After Petitioner and Charley were transported to the jail, two finger-pieces from a purple latex glove were pulled off of Petitioner's thumb and index fingers.

At trial, the State presented testimony from various law enforcement officers about the events surrounding the night of the shooting and the investigation following the incident. Those officers testified there were additional pieces of a purple latex glove found in the van following Petitioner's arrest, and all of the pieces of purple latex glove—those lying next to the firearms, those found in the van, and those found on his fingers at jail—tested positive for Petitioner's DNA. The law enforcement officers also testified that after receiving Williams's 911 call, they organized a search using bloodhounds to ascertain whether there was a third, unidentified shooter that remained at large; however, the bloodhound search uncovered no trace of anyone besides Charley and Petitioner. The State presented no evidence Petitioner was aware Williams or Wrighton (or anyone else other than

Young) was in the mobile home at the time of the shooting.

During his own case-in-chief, Petitioner called Charley to testify. Charley's testimony varied wildly between direct and cross-examination, setting out three distinct stories.[2] In the first version of events, Charley testified he did not have a driver's license, so he paid Petitioner to drive him to Saluda in order to "see some girls." Charley stated Petitioner did not know anything about the shooting and did not participate in it.

In the second version of events—after the State reminded Charley he had pled guilty to attempted murder for the shooting but had not been sentenced pending his cooperation with the investigation and Petitioner's trial—Charley testified Petitioner had driven Charley to Saluda and accompanied him to Young's mobile home. However, Charley claimed Petitioner was unarmed and did not participate in the shooting. Charley asserted that, rather than Petitioner, a third man (Charley's co-worker) had been the other shooter.

In the third version of events—after the State reminded Charley of the potential for a perjury charge—Charley testified Petitioner agreed to assist Charley the night of the shooting in exchange for either money or drugs. Charley stated he and Petitioner were both armed and wearing latex gloves when they approached the mobile home, but claimed Young started the gunfight by coming outside and firing his gun twice into the air. Charley maintained that in return, he shot one time in the air, but his weapon malfunctioned, and he therefore ran away.[3] Charley asserted Petitioner nonetheless shot at Young and/or the mobile home repeatedly, agreeing with the State that, given the number of bullet holes in the mobile home's door and siding, Petitioner "tore that house up from one end to the other with his [gun] and emptied" the magazine. Charley stated that, after his arrest, he decided to cooperate with law enforcement against Petitioner because the fact that Petitioner was discovered in jail still wearing pieces of the gloves they had worn and discarded with the guns was impossible to explain or overcome.

During closing arguments, the State discussed the doctrine of transferred intent

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[2] After the trial, the trial judge described Charley as "probably the most noncredible witness I think I've ever seen in 14 years of this job."

[3] Law enforcement officers confirmed that one of the weapons found near the latex gloves had malfunctioned and was inoperable.

extensively. Petitioner did not object to any of the State's references to the applicability of transferred intent or argue transferred intent did not apply to attempted murder and/or a specific-intent crime.

The trial court then charged the jury on the law, stating in relevant part:

> [Criminal] intent may be transferred in the commission of a crime. Stated differently and using the charge of robbery as an example, if an individual intends to rob a particular person, but somehow by mistake actually robs a different person, the defendant still has the intent to commit robbery. The criminal intent is merely transferred from the original person the defendant desired to rob to the individual the defendant actually robbed. In other words, it is not a defense to the crime that the wrong person was robbed.
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> . . . .
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> . . . In order to prove [attempted murder], the State must first prove the defendant attempted to kill another person with malice aforethought, either expressed or implied.
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> . . . .
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> Malice may be inferred . . . from conduct that shows a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. . . .
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> . . . .
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> *A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury*.[4] Intent means intending the result that actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conducts of the defendant and other circumstances from which you may naturally and

[4] *But see State v. King*, 422 S.C. 47, 55–56, 810 S.E.2d 18, 22 (2017) (holding the statutory crime of attempted murder, newly codified in 2010, required a specific intent to kill). Petitioner's case was tried before we issued our decision in *King*, but after the 2010 codification.

> reasonably infer intent.
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> . . . Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life.

(Emphasis added.)

Petitioner raised a brief objection to the transferred intent charge, arguing, in its entirety:

> Generally speaking, transferred intent is . . . shooting at a specific person and missing and hitting another. I don't believe that the facts of this case support that charge. You know, here I think it's stated that the theory of malice [is met] just because there is a shooting. And we would respectfully object to the transfer[red] intent charge.

However, Petitioner made no mention of the trial court's instruction that attempted murder was a general-intent crime, or that transferred intent did not apply to specific-intent crimes like attempted murder.[5] The trial court overruled the objection, finding this was "a situation where the defendant is accused of shooting into a house where individuals may have been, that he did not know were there, that is giving him the benefit of the facts of the case." The trial court explained that, absent the transferred intent charge, the jury might be confused as to whether Petitioner needed to specifically intend to harm the specific victims, so it felt the charge was appropriate.

Petitioner also objected to the trial court's refusal to give instructions as to the lesser-included offense of AB-1st, asserting the charge was appropriate because none of the victims was injured.[6] The State opposed the charge, arguing the two theories of the case were that Petitioner either was not present (because he was solely Charley's driver) or he "was completely involved in it." According to the

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[5] To be fair to counsel, at the time of Petitioner's trial, we had not yet handed down our decision in *King*, in which a majority of this Court held attempted murder was a specific-intent crime.

[6] *Compare* S.C. Code Ann. § 16-3-29 (2015) (describing the offense of attempted murder), *with* S.C. Code Ann. § 16-3-600(C) (2015) (describing the offense of AB-1st).

State, there was no middle ground: either Petitioner was guilty of attempted murder, or not guilty of anything. The trial court agreed with the State, explaining,

> All the evidence in this case, both direct and circumstantial, goes to the alleged crime where the defendant . . . shot up a mobile home with the intent to kill an individual who was within the home and there happened to be other individuals there as well.
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> . . . .
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> The evidence is devoid of any lesser included offense indicia.

Ultimately, after deliberating for less than an hour, the jury convicted Petitioner of three counts of attempted murder, and the trial court sentenced him to three concurrent terms of twenty years' imprisonment.

Petitioner appealed, arguing the trial court erred in refusing to charge the jury on AB-1st, as a lesser-included offense to attempted murder; and the trial court further erred in charging the jury on the doctrine of transferred intent. Notably, Petitioner did not argue the trial court erred in instructing the jury that attempted murder was a general-intent crime to which transferred intent applied, or that he (Petitioner) was entitled to a new trial based on that error of law alone. *See King*, 422 S.C. at 53–56, 70, 810 S.E.2d at 21–22, 30 (holding attempted murder is a specific-intent crime, and affirming the court of appeals' reversal of the defendant's attempted murder conviction after the trial court instructed the jury that (1) attempted murder was a general-intent crime, and specific intent to kill was not an element of attempted murder; (2) inferred malice may arise when the act is done with a deadly weapon; and (3) malice may be inferred from conduct showing a total disregard for human life).

The court of appeals affirmed Petitioner's convictions. *State v. Williams*, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018). In particular, the court of appeals found any error in failing to charge the jury on AB-1st was harmless because the evidence presented at trial yielded only the conclusion that Petitioner committed the greater, not the lesser, offense. *Id.* at 535–37, 812 S.E.2d at 922–23. Without addressing the trial court's charge to the jury that attempted murder was a general-intent crime, the court of appeals held attempted murder was a specific-intent crime, but "the requisite specific intent for attempted murder is the specific intent to commit murder," not the specific intent to murder a specific person, as Petitioner argued. *Id.* at 541–42, 812 S.E.2d at 925–26. Thus, the court of appeals concluded the

doctrine of transferred intent was appropriate and applicable in that instance. *Id.* at 541–43, 812 S.E.2d at 925–26.

We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision.

II.

Petitioner first contends the court of appeals erred in finding harmless error in the trial court's failure to charge the jury on AB-1st, as a lesser-included offense to attempted murder. We disagree.

In reviewing jury charges for error, we examine the trial court's charge as a whole in light of the evidence and issues presented at trial. *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citation omitted). "The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007) (citation omitted) (internal quotation marks omitted). In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

Here, there were three distinct theories of Petitioner's involvement in the shooting.[7] However, regardless of which version of events a jury believed, it could not have found Petitioner guilty of the lesser, rather than the greater, offense. *See, e.g.*, *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (holding the trial court did not err in failing to charge the lesser-included offense because, under the State's version of the facts, the defendant was guilty of the greater offense, and under the defendant's version of the facts, he was innocent of any charge). Accordingly, we find the trial court did not err in failing to charge the jury on the

[7] Charley later recanted two of the three versions of events surrounding Petitioner's involvement. However, given that we must view the evidence in the light most favorable to Petitioner, we cannot discount these versions despite Charley's credibility issues. *See Suber*, 371 S.C. at 559, 640 S.E.2d at 886; *Byrd*, 323 S.C. at 321, 474 S.E.2d at 431. Rather, it is solely for the factfinder to weigh the evidence, including making credibility determinations.

lesser-included offense.

III.

Petitioner next argues the court of appeals erred in finding the doctrine of transferred intent applied to a specific-intent crime such as attempted murder. However, Petitioner has never challenged the trial court's instruction to the jury that "*[a] specific intent to kill is not an element of attempted murder*, but there must be a general intent to commit serious bodily injury." (Emphasis added.)[8] As a result, this instruction has become the law of this case. *See Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (explaining an unappealed ruling, whether right or wrong, is the law of the case (quoting *Atl. Coast Builders & Contractors, L.L.C. v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes. *See, e.g.*, *State v. Fennell*, 340 S.C. 266, 271–73, 275–76, 531 S.E.2d 512, 515–16, 517 (2000); *State v. Heyward*, 197 S.C. 371, 376–77, 15 S.E.2d 669, 672 (1941). We therefore find no error in the trial court instructing the jury regarding the applicability of transferred intent to a "general-intent" crime.[9]

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[8] Similarly, Petitioner never contested the trial court's instructions that implied malice would satisfy the *mens rea* requirement for attempted murder, or that malice could be inferred from the use of a deadly weapon. *See King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 (explaining implied malice is "arguably inconsistent with a specific-intent crime. *See Keys v. State*, . . . 766 P.2d 270, 273 ([Nev.] 1988) (stating 'one cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result' (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of assault and battery offenses codified in section 16-3-600.").

[9] Moreover, we find the doctrine of transferred intent unnecessary to sustain the convictions for the attempted murders of Young and Wrighton. Petitioner was alleged to have specifically intended to kill Young the night of the shooting, and to have shot at the door where Wrighton stood, intending to kill the figure in the doorway. It matters not that Petitioner may have been unaware it was Wrighton in the door, rather than Young. Simply put, Petitioner *intended* to shoot the person (Wrighton) who appeared in the doorway. As a result, we alternatively sustain Petitioner's convictions for the attempted murders of Young and Wrighton without

Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred intent and leave for another day the determination of whether the doctrine applies to attempted murder.

IV.

Petitioner's attempted murder case was tried, without objection, as a general-intent crime, and that unappealed ruling has become the law of the case. Because it is well-established in our state that transferred intent applies to general-intent crimes, we find no error in the trial court's decision to charge the jury on the doctrine of transferred intent. We further find no error in the trial court's refusal to charge the jury on AB-1st, as a lesser-included offense to attempted murder. We therefore affirm the court of appeals decision as modified and vacate the portion of its decision dealing with the issue of transferred intent.

AFFIRMED AS MODIFIED.

HEARN, FEW and JAMES, JJ., concur. BEATTY, C.J., concurring in result only.

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resort to the doctrine of transferred intent. Because Petitioner was sentenced to three concurrent twenty-year sentences, reversing his conviction for the attempted murder of Williams would have no effect on the length of Petitioner's term of imprisonment, and we decline to do so, particularly given that the case was tried as if attempted murder was a general-intent crime.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shawn Alan Mitchell, Appellant.

Appellate Case No. 2016-000560

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5654
Heard April 2, 2019 – Filed June 12, 2019

REVERSED AND REMANDED

Appellate Defender LaNelle Cantey DuRant and Appellate Defender Joanna Katherine Delany, both of Columbia, for Appellant.

Octavia Yvonne Wright, of the S.C. Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

HILL, J.: This case reaches us by a circuitous route. Shawn Alan Mitchell was convicted in 1999 of lewd act upon a child, an offense now codified in section 16-3-655(C) of the South Carolina Code (2015) as criminal sexual conduct (CSC) with a minor in the third degree. *See State v. Baker*, 411 S.C. 583, 585 n.1, 769 S.E.2d 860, 862 n.1 (2015) (citing to S.C. Code Ann. § 16-15-140 (2003), the code section in effect at the time of Mitchell's offense). He was sentenced to five years in prison and ordered to register as a sex offender upon release. In 2001, Mitchell

was convicted of failure to register and sentenced to ninety days' imprisonment. In 2005, South Carolina enacted Jesse's Law, which provides criteria for when a person on the sex offender registry can be placed under electronic monitoring. S.C. Code Ann. § 23-3-540 (Supp. 2018). The portion of Jesse's Law applicable to Mitchell is section 23-3-540(E), which states electronic monitoring "must be ordered by the court" if a defendant with a prior CSC first degree or third degree conviction is later convicted of failure to register. On May 17, 2012, Mitchell was convicted of failure to register, second offense, and sentenced to one year in prison. No part of the sentence was suspended nor did it include any period of probation. On the same day, he pled guilty to grand larceny and received a sentence suspended upon two years' probation for that offense. In August 2014, his probation was extended two years.

On November 17, 2014, Mitchell appeared pro se before the trial court for a hearing on his alleged violation of his grand larceny probation. At the hearing, the Department of Probation, Parole, and Pardon Services (DPPPS), through counsel, alerted the court that Mitchell's 2012 failure to register conviction triggered Jesse's Law and required him to be subject to lifetime electronic monitoring, which due to oversight had not been ordered by the sentencing court in 2012. Recognizing the gravity of the issue, the circuit court ordered from the bench that the hearing be continued so Mitchell could obtain counsel. However, the next day the circuit court, no doubt working its way through a stack of dozens of proposed orders submitted by DPPPS arising from the previous day's hearings, signed an order placing Mitchell on electronic monitoring.

It appears Mitchell soon absconded. From the record we have been provided it is impossible to determine when Mitchell was served with or received the November 18, 2014 order, but in May 2015, his counsel moved to quash the November 18, 2014 order, noting it must have been signed inadvertently given the trial court's earlier ruling from the bench continuing the case. Mitchell further claimed the trial court lacked jurisdiction to alter his 2012 sentence to add electronic monitoring, and the monitoring violated his due process rights. The circuit court denied the motion, and Mitchell now appeals.

I.

Some of the questions raised by this appeal were answered in *State v. Ross*, 423 S.C. 504, 815 S.E.2d 754 (2018). Mr. Ross was imprisoned for lewd act in 1979 and received a six year sentence suspended on probation. In 2011, Ross was convicted in magistrate court of failing to register. Consequently, he was subject to lifetime

electronic monitoring pursuant to section 23-3-540(E). When DPPPS sought an order from the circuit court to place Ross on monitoring, Ross claimed the monitoring amounted to a search that violated his Fourth Amendment rights. *Id*. at 506–08, 815 S.E.2d at 755. The trial court rejected Ross' argument, but our supreme court, relying on *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), held the Fourth Amendment requires that before monitoring under section 23-3-540(E) may be imposed, there must be "an individualized inquiry into the reasonableness of the search in every case." *Ross*, 423 S.C. at 508, 513–15, 815 S.E.2d at 755, 758–59.

The resourceful trial court of course did not have the benefit of *Ross*, but we must nevertheless reverse the electronic monitoring order and remand so the Fourth Amendment inquiry can occur. What remains, though, is the issue of the fundamental legitimacy of the circuit court's ability to order electronic monitoring pursuant to section 23-3-540(E) on a defendant for the failure to register offense when the defendant has served his sentence and is not on probation or parole related to that offense. Mr. Ross was not on probation and therefore was "no longer under the jurisdiction of the sentencing court when he was ordered to be placed on electronic monitoring[,]" *id*. at 511, 815 S.E.2d at 757, but the circuit court's jurisdiction and authority over the defendant were not questioned in that appeal. And perhaps relevant to these issues is our supreme court's conclusion that the electronic monitoring mandated by section 23-3-540 is a civil mechanism, not a criminal punishment, *see In re Justin B.*, 405 S.C. 391, 409, 747 S.E.2d 774, 783 (2013), as well as the observation in *Ross* that section 23-3-540(E)'s electronic monitoring requirement is "automatic and mandatory," *Ross*, 423 S.C. at 509, 815 S.E.2d at 756. Because of the sparse record at hand, the parties may raise any objections or arguments related to these fundamental issues at the remand hearing. This will ensure the issues can be addressed head on, and not nipped at on the heels as they have been so far. We express no opinion on whether the circuit court's inherent power or other authority empowers it to exercise jurisdiction over the defendant and order monitoring under these circumstances.

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Billy Lemurces Taylor, Appellant.

Appellate Case No. 2016-000549

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5655
Submitted February 1, 2019 – Filed June 12, 2019

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Alphonso Simon, Jr., Assistant Attorney General Samuel Marion Bailey, all of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

HILL, J.: Seven hours and twenty minutes into their deliberations following four days of trial, the jury in Billy L. Taylor's criminal trial informed the trial court they were at an impasse. The trial court sent the jury home for the night. The next morning, the trial court gave the jury a charge derived from *Allen v. United States*, 164 U.S. 492 (1896). Taylor objected to the charge and moved for a mistrial. Two-and-a-half hours later the jury returned with a guilty verdict. Taylor now appeals, contending his motion for a mistrial should have been granted, and the *Allen* charge was unconstitutionally coercive. We agree the *Allen* charge was coercive and reverse.

I.

Taylor was tried for the attempted murders of Brittany Jeeter and Ashley Hiott, the murder of Rodney Nesbit, and the possession of a weapon during the commission of a violent crime. The jury began deliberating at noon on the fourth day of trial, and soon the jury asked a question about the "hand of one, hand of all" charge. After further instruction, the jury resumed deliberations at 1:50 p.m. They returned to the courtroom at 7:20 p.m. after sending a note advising they were at an impasse. The note also contained an apparent tally of successive votes the jury had taken, indicating the latest vote was 10-2 in favor of conviction on the murder charge, 8-4 for conviction on the attempted murder charges, and 11-1 for conviction on the weapon charge. The trial court sent the jury home for the night. The next morning, the trial court gave the following charge:

> Ladies and gentlemen, I recognize that last night you sent me a note that indicated that you were at an impasse and you told me the division that you had in that note as well.
>
> Now, I understand that the decision that you have to make is very difficult. And when you get 12 people together, it's difficult to have 12 people agree. Particularly, when you come from different walks of life and you're just thrown together on a jury, it's difficult to make that decision. I know that, oftentimes, it's difficult for two people, just two people to make a decision. It's hard for my wife and I to figure out what we're going to eat for supper sometimes. So, this decision, I recognize is hard.

> But understand that it's important that you come to a decision in this case. Understand that both the State and the Defense have extended significant resources and time and effort to get to this point. Also, know that the State and the County has extended resources to get to this point as well. And if you're unable to come to a verdict in this matter, then, essentially, we'd be left with having to do it all over again, extending additional resources, time and effort. Now, ladies and gentlemen, I will tell you that there are no 12 other people in the County of Greenville who are more capable or competent to come to a decision in this matter than the 12 of you are.
>
> Now, again, I understand it's hard to come to a decision. But those of you who are in the majority should listen to the people in the minority. Those of you who are in the minority should listen to the people in the majority. You should take into consideration your respective positions and you should come to a decision in this matter. Again, it really would be a waste of time, effort and resources for us to have to do all of those over again. So, I'm going to ask you to go back to your jury room and resume your deliberations. . . .

After the jury left the courtroom at 9:10 a.m., Taylor moved for a mistrial and also objected to the *Allen* charge on the ground that it was unduly coercive. He asked the court to instruct the jurors that a hung jury was "a legitimate end of a criminal trial" and sometimes the result of the State's burden to prove its case beyond a reasonable doubt. The trial court denied Taylor's motions. The jury returned a guilty verdict at 11:43 a.m.

II.

A. Mistrial

We first address Taylor's argument that the trial judge abused its discretion by giving an *Allen* charge rather than declaring a mistrial. A trial court should declare a

mistrial as a last resort, when all other alternatives have been exhausted. A mistrial is a drastic step, "an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009).

The trial court was well within its discretion in refusing to declare a mistrial simply because the jury, after some seven hours of deliberation, announced an impasse. We review the decision with deference to the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial.

The trial court has several ways to respond to a deadlocked jury, including delivering an *Allen* charge. In fact, the trial judge has a duty to urge the jury—without pressuring or coercing them—to reach a verdict. *State v. Williams*, 344 S.C. 260, 263, 543 S.E.2d 260, 262 (Ct. App. 2001). We find no error in the trial court's choice to deny Taylor's mistrial motion.

B. *Allen* Charge

According to Taylor, the trial court's *Allen* charge was coercive because it did not tell the jurors not to give up their honestly held beliefs simply to reach a verdict, it targeted the minority "holdout" jurors, and pressured them by stating a mistrial would be a waste of time and resources. He further complains the charge did not inform the jurors they have a right not to reach a verdict.

Because a criminal defendant's right to due process is violated by a charge that coerces a jury to reach a verdict, courts have long struggled with what to tell a deadlocked jury. The substance of the original *Allen* charge was described as instructing the jury that:

> in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the

> larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, [on] the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by
> the majority.

Allen, 164 U.S. at 501. The original *Allen* charge was upheld, but with time and experience courts questioned its latent coercive force, particularly when trial judges tinkered with the original version. *See United States v. McElhiney*, 275 F.3d 928, 937–38 (10th Cir. 2001) (canvassing the history and evolution of *Allen* charge); *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (Haynsworth, J.) (noting original *Allen* charge "approaches ultimate permissible limits"), *abrogated on other grounds by Bell v. United States*, 462 U.S. 356 (1983).

The United States Supreme Court continues to approve *Allen*-type charges, *see Jones v. United States*, 527 U.S. 373, 382 n.5 (1999), but many states have banned the original *Allen* charge, with some embracing a charge developed by the American Bar Association (ABA) that must be given to juries before deliberation begins. Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions,* 15 Wm. & Mary Bill of Rts. J. 893, 914–16 (2007). Versions of the charge vary in the federal circuits, but all circuits allow them, though several recommend the ABA version. *See Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1 (1988) ("All of the Federal Courts of Appeals have upheld some form of a supplemental jury charge.").

Although labelled the "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree," *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972), the label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care.

South Carolina approves the use of a modified *Allen* charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority. *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015)*; Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion. *See Tucker v. Catoe*, 346 S.C. 483, 492–95, 552 S.E.2d 712, 717–18 (2001) (per curiam).

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. *Id.* at 491, 552 S.E.2d at 716 (emphasizing the coercion inquiry "is very fact intensive"); *Workman*, 412 S.C. at 130, 771 S.E.2d at 638 (stating coerciveness must be gauged by context and circumstances).

As to the first *Tucker* factor, the charge did not in the abstract single out the minority jurors. We cannot rest on the abstract, however, and must examine the charge in the context and setting it was given. Under the circumstances here, analysis of this first factor is shaded by considerations related to the third factor's concern with knowledge of the jury's numerical split, which we will soon take up.

As to the second factor, the charge instructed the jurors "it's important that you come to a decision in this case," and "you should come to a decision in this matter." This skirts close to the language found coercive in *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (reversing and remanding case for a new trial because the charge told the jury "[y]ou have got to reach a decision in this case"). There 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." Our supreme court has even cautioned trial judges "against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could

potentially be construed as being coercive." *State v. Williams*, 386 S.C. 503, 515 n.7, 690 S.E.2d 62, 68 n.7 (2010).

Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls. Recognizing the enormous power such influence can wield and its capacity to compromise impartiality, our constitution forbids the trial judge from commenting on the facts. *See* S.C. Const., art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is precisely because jurors scrutinize the trial judge's statements and instructions—a scrutiny that becomes more acute amidst heated deliberations—that the trial judge should couch them in as neutral and dispassionate terms as language and context permit. Even an otherwise benign remark, such as "you should come to a decision," could be interpreted by a rational juror that the trial judge believes the result is obvious, or at least capable of unanimous agreement. *See Quercia v. United States*, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'").

The third *Tucker* factor asks whether there has been inquiry into the numerical division of the jury. A trial court cannot, of course, ask the jury to reveal its division. *State v. Middleton*, 218 S.C. 452, 457–58, 63 S.E.2d 163, 165–66 (1951). Here the trial judge wisely did not inquire further into the specifics of the split when the jury volunteered its vote tally. The trial judge prefaced his *Allen* charge by acknowledging "you told me the division you had." So the jury knew the trial judge knew they stood 10-2 in favor of conviction on the murder charge and how they were divided on the others. This bears on our coercion analysis, for a jury laboring under such knowledge might interpret the trial judge's comments as aimed at the minority. *See, e.g.*, *Brewster v. Hetzel*, 913 F.3d 1042, 1054–55 (11th Cir. 2019) ("Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction. . . . The problem exists whether the judge asked for the information or the jury disclosed it without any prompting. If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to join the majority in order to placate the judge."). It is not coercive to give an *Allen* charge

simply because the jury volunteers how it is split, *see Williams*, 344 S.C. at 264–65, 543 S.E. 2d at 263, but the trial court's knowledge of the split is relevant. In *Tucker*, the jury twice informed the trial court of its numerical split before the *Allen* charge. 346 S.C. at 485–87, 552 S.E.2d at 713–14. The supreme court noted while the trial court did not actively inquire into the jury's division, it "failed to instruct the jurors not to disclose their division in the future." *Id.* at 494, 552 S.E.2d at 717. The court concluded "knowledge of the jury's numerical division combined with knowledge of its decisional disagreement, followed by an *Allen* charge directed, at least in part, to minority jurors, is impermissibly coercive." *Id.* at 494, 552 S.E.2d at 717–18.

During its instruction on the law after closing arguments, the trial court can instruct the jury that if it encounters division it should not disclose its numerical split. *Williams*, 386 S.C. at 515 n.7, 690 S.E.2d at 68 n.7 ("[T]o alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division."). Should the jury later report a deadlock and disclose its split, the trial court should tell the jury not to reveal its numerical division again and craft any *Allen* charge mindful of how it may be interpreted given the division. This makes an already subtle task even more delicate. *See United States v. Vanvliet*, 542 F.3d 259, 268 (1st Cir. 2008) (refusing to hold jury's volunteering of division reversible error; "Instead, the district court's knowledge of the numerical division of jurors . . . might create a coercive situation if circumstances suggest that minority or 'holdout' jurors likely would infer that the court is directing the *Allen* charge specifically at them, and implying that they should vote with the majority to get the case settled expeditiously").

The fourth *Tucker* factor in determining whether an *Allen* charge is unconstitutionally coercive is whether the time between the charge and the verdict demonstrates coercion. This factor is notoriously difficult to apply without indulging in speculation given the secrecy of jury deliberations. Here, the jury returned its guilty verdict two-and-a-half hours later, which does not dispel the likelihood of coercion. We have no way of knowing what went on in the jury room, but we do know that less than three hours after the *Allen* charge, the jury transformed from a body significantly divided on five serious felony charges involving multiple victims into one united by complete unanimity. *Tucker* found a one-and-a-half hour interval suggested coercion when there was only one juror holding out, and (as here) the jury had been hung since late the previous afternoon. 346 S.C. at 494, 552 S.E.2d at 718.

The *Tucker* criteria have never been deemed comprehensive. The most troubling thing about the charge here 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 Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 423, 537 S.E.2d 279, 283 (2000) (finding trial court properly instructed a deadlocked jury by "inform[ing] the jury of the desirability of reaching a verdict . . . yet remind[ing] the jury no juror should surrender his or her conscientious conviction simply to reach a unanimous verdict"); *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992) ("[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."). Nor did the trial judge's initial charge at the end of the trial remind the jurors not to surrender their conscientious beliefs during deliberations. The original *Allen* charge included such a statement, and courts have routinely held its absence reversible error. *See* Note, *Due Process, Judicial Economy & the Hung Jury: A Reexamination of the Allen Charge,* 53 Va. L. Rev. 123, 128 (1967) ("Almost without exception the courts have required that the charge contain the statement that 'no juror should yield his conscientious conviction' or words to that effect."). The Fourth Circuit has observed that if the original *Allen* charge were "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, it might readily be construed by the minority of the jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." *Rogers*, 289 F.2d at 435; *see also Smalls v. Batista*, 191 F.3d 272, 279 (2d Cir.1999) ("[A] necessary component of any *Allen*-type charge requires the trial judge to admonish the jurors not to surrender their own conscientiously held beliefs."); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) ("The reminder that no juror should merely acquiesce in the majority opinion is . . . one of the most important parts of the Allen charge."); *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.").

The charge here also overemphasized the cost and expense of a retrial. While it is not error to tell the jury that a retrial will be costly, *see State v. Singleton*, 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995), the Fourth Circuit has warned such statements are disfavored and should not be overbearing. *United States v. Hylton*,

349 F.3d 781, 788 (4th Cir. 2003); *see also McElhiney*, 275 F.3d at 945 (holding comments on cost of retrial can be coercive if overstressed). Also, telling the jury the case will "have" to be retried is misleading. A hung jury often acts as an alarm bell to all but the unthinking, awakening one side (sometimes both) to weaknesses in their case, which can lead to a plea deal rather than a retrial.

A trial court is not, however, required to advise the jury they have a right to not reach a verdict. *See, e.g., United States v. Arpan*, 887 F.2d 873, 876 (8th Cir. 1989); *but see United States v. Manning*, 79 F.3d 212, 222 (1st Cir. 1996) (requiring *Allen* charge to include instruction that jury has the right to fail to agree).

All of this adds up to the conclusion that the charge unduly pressured the jury. We are certain the trial court had the best intentions, but from our perspective the *Allen* charge was unconstitutionally coercive. We therefore reverse and remand this case for a new trial.

REVERSED AND REMANDED.[1]

WILLIAMS and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.