IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–0089

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DREW ALAN BLAHNIK, AKA JOHNNY BLAHNIK CHURCH,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE CHRISTOPHER L. BURNS, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: February 8, 2023)

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QUESTION PRESENTED FOR FURTHER REVIEW

Jurors reported an impasse in deliberations. In three notes, they told the trial court that one juror was refusing to follow the instructions, in the opinion of the other eleven jurors. The court gave a verdict-urging instruction. It used the same instruction that *State v. Davis* described as a non-coercive "sparkler." Jurors deliberated for about three hours after that, before they returned unanimous verdicts.

The Iowa Court of Appeals ruled that the instruction was coercive and that giving it was an abuse of discretion, so it reversed and remanded.

Did the trial court abuse its broad discretion in submitting the same non-coercive instruction from *Davis*?

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STATEMENT SUPPORTING FURTHER REVIEW

On February 8, 2023, the Iowa Court of Appeals reversed Church's convictions for second-degree murder, defacing a corpse, and obstructing prosecution. The panel held that the trial court erred in giving the same non-coercive verdict-urging instruction that was submitted in *State v. Davis*, 975 N.W.2d 1, 17–22 (Iowa 2022). *See State v. Church*, No. 22–0089, 2023 WL 1812785 (Iowa Ct. App. Feb. 8, 2023). It said that "the circumstances here left the minority juror particularly vulnerable to the coercive effect of the *Allen* charge." *Id.* That holding is incompatible with *Davis*, which explained why the careful wording of this verdict-urging instruction tends to *preclude* any coercive effect. *See Davis*, 975 N.W.2d at 17–18 & 21. That is why the panel was unable to identify any particular part of the instruction that "may well have been viewed . . . as directing the minority to join the majority." *See Church*, 2023 WL 1812785, at *6. This instruction specifically warned jurors *against* "mere acquiescence," and repeatedly advised that they "only have to reach a unanimous verdict 'if possible' or 'if you can conscientiously do so.'" *See Davis*, 975 N.W.2d at 18–19 (quoting *Burton v. Neill*, 118 N.W. 302, 303 (Iowa 1908)). No amount of vulnerability to coercion could make this "sparkler" at all coercive.

The panel opinion also conflicts with *Davis* in its analysis of the timing of the verdict and the post-verdict polling in open court. Both factors, under *Davis*, weigh against finding that the instruction in this case had any coercive effect. But the panel chose to elevate a different timing-related factor—a ratio—that *Davis* said was "less relevant" than the actual duration of time spent in post-instruction deliberation. And the panel discounted jury polling because it believed "lack of hesitation may not be a reliable indicator that no coercion occurred." *See Church*, 2023 WL 1812785, at *5. But *Davis* recognized that Iowa caselaw "has mainly focused" on the three factors which it explained and analyzed: the instruction's content, the length of post-instruction deliberations, and post-verdict polling in open court. *See Davis*, 975 N.W.2d at 18. The panel opinion misapplied *Davis* in discussing those three factors, and then compounded the error by turning its main focus elsewhere.

This Court should grant review because the panel opinion is in conflict with *Davis*, for those reasons and for other reasons that will be developed in argument. *See* Iowa R. App. P. 6.1103(1)(b)(1). This is an important matter: a difficult murder prosecution where Church has already won a partial acquittal. Moreover, this panel opinion illustrates a pressing need for more guidance on how courts should apply *Davis*.

STATEMENT OF THE CASE

Nature of the Case

This is Church's direct appeal. Neither party sought retention. The case was transferred to the Iowa Court of Appeals, where a panel found that the trial court abused its discretion by responding to reports of deadlock by submitting the same verdict-urging instruction that was used in *Parmer* and subsequently found to be non-coercive in *Davis*. *See Church*, 2023 WL 1812785. The State seeks further review.

Statement of Facts

Church was charged with first-degree murder, defacing a corpse, and obstructing prosecution. During deliberations, the jury reported a problem: one juror was not following two specific jury instructions, in the view of the other eleven jurors. After a few notes back and forth, over the course of about two hours, the trial court decided to give a verdict-urging instruction—the same one given in *Davis*. After that, the jury deliberated (and took a lunch break). Three and a half hours later, the jury returned unanimous verdicts. It found Church not guilty of first-degree murder, but it convicted him on the lesser-included charge of second-degree murder and on the other two counts, as charged. The jury was polled in open court; nobody noted any apparent hesitation.

Church had objected to that verdict-urging instruction, and he re-raised that challenge in a motion for new trial. The trial court noted "it appears the jury engaged in a significant amount of deliberation after the charge was given," and that was "a strong indication that the charge itself did not cause the one juror to change his/her stance." *See* Ruling (12/8/21) at 16. And it noted that the instruction's content was "almost identical to one already approved" by the Court of Appeals in *Parmer* and *Davis* (which was later affirmed on further review). *See id*. So it overruled the motion for new trial, and Church was sentenced.

Church appealed. Neither party requested retention, and the appeal was transferred to the Iowa Court of Appeals. A panel found that the trial court abused its discretion in giving that instruction, so it reversed and remanded for retrial. *See Church*, 2023 WL 1812785. That opinion will be the focus of the argument, and additional facts will be discussed when relevant.

ARGUMENT

I. Under *Davis*, the facts of this case establish the absence of any coercive effect from this "sparkler" verdict-urging instruction, so the trial court did not abuse its broad discretion in giving it.

The panel opinion identified the three factors that *Davis* held were the main focus of this analysis. But it misapplied them. Those three factors, properly applied, establish an absence of coercion or prejudice. The panel focused on two other "salient circumstances." But those circumstances could not establish coercion or prejudice, given the total absence of coercive language in this instruction and the lack of evidence of coercive impact in verdict timing or polling.

A. No portion of this instruction could have coerced any juror into mere acquiescence in a verdict.

The content of this instruction was identical to the content of the instruction in *Davis*, which "simply refocused the jurors on their responsibilities to go back to the jury room and consider the evidence and each other's opinions fairly and properly." *See Davis*, 975 N.W.2d at 21. It is an anti-coercive instruction. It specifically recognizes that unanimity may be impossible, and it cautions jurors against reaching agreement by "mere acquiescence." It is addressed to *all* of the jurors (not just those in the minority). And it does not suggest any reason for any juror to join a verdict that does not reflect their view of the truth.

Davis analyzed the language of this verdict-urging instruction at length, and found that it lacked "problematic content." *See Davis*, 975 N.W.2d at 18–19. *Davis* explained that this instruction "does not express any requirement that the jury reaches a verdict"—and it guards against jurors inferring that such a requirement exists with "repetitive 'if possible' or 'if you can conscientiously do so' reminders attached to the desirability of agreement and duty to reach a verdict." *See id.* And it rejected the argument that this instruction "is coercive because it implies that the failure to reach an agreement arose from the jurors' personal failings or intentional obstruction of proper deliberations." *See id.* at 19. It held this language "'merely encourages the thoughtful consideration of all viewpoints before forming individual judgments' rather than putting blame on the jurors for failing to agree." *See id.* (quoting *State v. Campbell*, 294 N.W.2d 803, 812 (Iowa 1980)).

Unlike *Davis*, the panel opinion did not analyze the content of the instruction. Nor did it cite *Davis*'s analysis. Instead, it only said:

> Church does not challenge the content of this instruction, conceding that its language tracks versions approved by our court. *See State v. Parmer*, No. 13–2033, 2015 WL 2393652, at *6 (Iowa Ct. App. May 20, 2015); *State v. Power*, No. 13–0052, 2014 WL 2600214, at *5 (Iowa Ct. App. June 11, 2014). But "the content of this type of instruction is only one factor to consider in determining whether the jury was improperly coerced."

Church, 2023 WL 1812785, at *4 (quoting *State v. Piper*, 663 N.W.2d 894, 911 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545 (Iowa 2010)). No part of the panel opinion identifies any segment of this instruction that could be even potentially coercive. Nor does any portion of the panel opinion acknowledge or reckon with *Davis*'s explanation of how the *actual content* of this jury instruction "simply refocuse[s] the jurors on their responsibilities to go back to the jury room and consider the evidence and each other's opinions fairly and properly." *See Davis*, 975 N.W.2d at 19–21.[1]

The panel treated the language of the instruction as though it was a non-essential factor in this analysis—as though Church could concede that the instruction was non-coercive, then prove coercion with arguments about other circumstances surrounding the verdict. There are two conceptual problems with this. First, the entire claim is that jurors were coerced into false unanimity *by this jury instruction*.

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[1] Nor did the panel address the reasons for similar holdings in the unpublished cases that it cited in the segment quoted above. *See Power*, 2014 WL 2600214, at *5 (explaining that this instruction only "encouraged thoughtful consideration of all viewpoints before forming individual judgments," which is "a basic attribute of the jury process"); *Parmer*, 2015 WL 2393652, at *6 (listing various problems that courts had identified with other verdict-urging instructions, and finding that this instruction "avoids those pitfalls").

If there is no part of this instruction that could have done that, then the *sine qua non* of the claim is missing. *See Campbell*, 294 N.W.2d at 808 (explaining that "[t]he ultimate test is whether the instruction improperly coerced or helped coerce a verdict"). And second, as *Davis* explained, the instruction is not just devoid of coercion. It affirmatively *guards against* coercion. *See Davis*, 975 N.W.2d at 18–19 (noting that the instruction "warns against acquiescence and implores all jurors to fully consider each other's opinions," and that jurors were "repeatedly made aware they only have to reach a unanimous verdict 'if possible' or 'if [they] can conscientiously do so"). This is not just the absence of coercive language—this is language that tends to *prevent* any coercion that might otherwise arise (or be inferred) from other circumstances.

Later in the opinion, the panel criticized the trial court for "decid[ing] to give a supplemental instruction rather than refer the jury back to its original instruction on deliberation," and it said that "diverging from the *Piper* process contributed to the coercive nature of the instruction." *See Church*, 2023 WL 1812785, at *7. But the panel could not identify any portion of this instruction that was coercive, or even potentially coercive. *Campbell* did advise trial courts to consider "giving this instruction as part of the main charge to the jury" because

that "lessens the possibility of any coercive impact the instruction might have." *See Campbell*, 294 N.W.2d at 813. But "*Campbell* did not announce that [this] approach was mandatory." *See Davis*, 975 N.W.2d at 21–22. And if the instruction is *anti*-coercive, then it does not matter that the deadlocked jury may be "particularly vulnerable to suggestions as to how it should proceed." *See Campbell*, 294 N.W.2d at 813. This instruction expressly disclaims any improper suggestion that any juror should forfeit their own view of "the truth as it appears from the evidence" to reach unanimity. Its language is not coercive—and that fact does not change, no matter when it is given.

The panel quoted *Piper* for the proposition that "the content of this type of instruction is only one factor to consider in determining whether the jury was improperly coerced." *See Church*, 2023 WL 1812785, at *4 (quoting *Piper*, 663 N.W.2d at 911). Fair enough—but the claim fails without *some* coercion. The panel opinion does not cite any case where a court found a lack of *any* problematic content in a verdict-urging instruction (or other coercive action by the trial court), but then ordered a retrial anyway.[2] Nor can the State find one.

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[2] In *Peirce*, the instruction told jurors "that being strongly in the minority should incline one to re-examine the ground of his opinion," and it also stated "that retrials were burdensome and expensive" and

This instruction contained anti-coercive cautionary language. *Davis* recognized that. The panel did not. It said that circumstances of this specific case "left the minority juror particularly vulnerable to the coercive effect of the *Allen* charge." *See Church*, 2023 WL 1812785, at *7. But this instruction, because of its wording, could not have any such coercive effect. *Davis* held an instruction with identical wording was not coercive in any way, and that it "simply refocused the jurors on their responsibilities to go back to the jury room and consider the evidence and each other's opinions fairly and properly." *See Davis*,

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"that some jury must decide the case." *See State v. Peirce*, 159 N.W. 1050, 1053 (Iowa 1916); *accord Davis*, 975 N.W.2d at 20 (describing the instruction in *Peirce* as containing "suspect content"). In *Brewster v. Hazel*, the trial court ordered "the removal of all reading material from the jury room in direct response to a report that the holdout juror was using that material to keep holding out." *See Brewster v. Hazel*, 913 F.3d 1042, 1054 (11th Cir. 2019). In *Sae-Chua*, the court polled jurors individually about the reported 11-1 deadlock, which amounted to judicial inquiry into "the identity of the lone dissenter." *See United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984). In *Smalls v. Batista*, the trial court gave a "thrice repeated direction that the jurors convince each other," and it also failed to include "cautionary instructions" that would tell jurors "not to abandon their conscientiously held views"—and those errors together "render[ed] the charge coercive." *See Smalls v. Batista*, 191 F.3d 272, 279–80 (2d Cir. 1999). And in the capital case of *Hooks v. Workman*, the trial court improperly gave a *guilt-phase* deadlock instruction that stated that a verdict had to be unanimous, when it should have given a sentencing-phase deadlock instruction that would have told jurors that "in the event of deadlock, the court would impose a life sentence." *See Hooks v. Workman*, 606 F.3d 715, 748–49 (10th Cir. 2010).

975 N.W.2d at 19–21. No amount of vulnerability to coercion could make this instruction coercive. The panel erred in holding otherwise.

B. The amount of time that jurors spent deliberating after this instruction shows that it reinitiated real deliberations and did not have a coercive effect.

The panel opinion also conflicts with *Davis* in its analysis of the timing of the verdict. *Davis* explained that reviewing courts should be "primarily concerned with whether the jury spent enough time [after receiving an instruction] engaging in 'further worthwhile consideration before a verdict was agreed to'"—and other timing-related factors are "less relevant" by comparison. *See id.* at 19–20 (quoting *Campbell*, 294 N.W.2d at 811). The panel applied a different, conflicting approach—it said there are "dual measures of time," and it gave more weight to "the time-of-deliberation ratio." *See Church*, 2023 WL 1812785, at *4–5. This conflicts with *Davis*, which expressly said that the ratio factor was "less relevant" in determining whether the timing of the verdict indicates that the verdict-urging instruction had a coercive effect. *Davis* held that if there was "ample time for the jurors to engage in meaningful conversation on the evidence presented and thoroughly evaluate each other's opinions" in post-instruction deliberation, then that "is enough to show the jury adequately reconsidered the case" and

was not coerced into agreement as a reaction to the instruction. *See Davis*, 975 N.W.2d at 20. The panel opinion's conclusion on factors relating to verdict timing is in conflict with *Davis* and the Iowa cases that it cited, which held that post-instruction deliberation timeframes of meaningful length could stand alone as "sufficient indicia that the jury engaged in real deliberation of the case." *See id.* at 19–20.

Of course, even if the ratio were independently significant, it would weigh against finding coercion here. In *State v. Kelley*, the jury deliberated for 22 hours before receiving a verdict-urging instruction. "Some two and a half hours later the jury returned a verdict of guilty." *See State v. Kelley*, 161 N.W.2d 123, 126 (Iowa 1968). The *Kelley* court noted "[t]here is nothing here to suggest coercion," and then it added:

> Although the jury deliberation was quite long, there is no suggestion its physical needs and comfort were not adequately provided for. The length of deliberation after the additional instruction indicates further worthwhile consideration before a verdict was agreed to.

Id. Here, the initial deliberation period was shorter (13 hours), and the post-instruction deliberation period was longer (about 3 hours). And as in *Kelley* (and *Piper*), there is no suggestion that the jury was subject to any special hardship for the duration of its deliberations. *See id.*; *see also Piper*, 663 N.W.2d at 912–13.

The panel did not cite or mention *Kelley*. Nor did it recognize that *Davis* had specifically said that the duration of post-instruction deliberations is more relevant than that ratio. Instead, it cited *Peirce* for the premise that "where the jury's disagreement 'is of more than ordinary and usual duration' and the *Allen* charge dislodges a verdict 'in a time short in comparison with the duration of the disagreement, a presumption arises that the instruction was prejudicial.'" *See Church*, 2023 WL 1812785, at *4 (quoting *Peirce*, 159 N.W. at 1055). But there are two problems with that. First, a critical ingredient of the holding in *Peirce* was the fact that jurors were led to expect "longer confinement in the event they failed to agree." *See Peirce*, 159 N.W. at 1055 (quoting *Clemens v. Chicago, R.I. & P. Ry. Co.*, 144 N.W. 354, 357 (Iowa 1913)). Note *Peirce*'s use of the word "confinement." Jury service in that era was qualitatively different, in ways that tended to coerce unanimity:

> [T]he physical discomfort of long confinement to men accustomed to outdoor living creates a dangerous atmosphere in which to receive an instruction urging the yielding of the minority and the desirability of verdicts, . . .

See id. (citing *Clemens*, 144 N.W.2d at 357). That is why the court highlighted the coercive effect of *extremely* long deliberations that preceded a verdict-urging instruction, together with the "suggestion of longer confinement in the event they failed to agree." *Id.* (quoting

Clemens, 144 N.W. 357). And that is why *Kelley* noted "there is no suggestion [juror] physical needs and comfort were not adequately provided for"—that fact distinguished *Peirce* (and other early cases). *See Kelley*, 161 N.W.2d at 126; *accord Piper*, 663 N.W.2d at 912–13.

Second, the *Peirce* instruction said "difference of opinion should induce the minority to doubt the correctness of their own judgment." *See Peirce*, 159 N.W. at 1053. *Peirce* suggested that courts should use "language less likely to have a coercive effect upon the mind of the average juror." *See id.* at 1055. Just four years later, in *Bogardus*, the Iowa Supreme Court found no coercion where a jury deliberated for 30 hours, then received a verdict-urging instruction, then deliberated for just 90 minutes more, then returned a verdict. The key difference was the content of the instruction—it did not contain "the language which was thought to be objectionable" from *Peirce* (or *Clemens*). *See State v. Bogardus*, 176 N.W. 327, 329 (Iowa 1920). Also, unlike *Peirce*, there were no "circumstances [that] fairly conveyed to the jury that failure to agree meant confinement" for any additional period of time. *See id.* (citing *Peirce*, 159 N.W. at 1054–55). So the ratio from *Peirce* did not matter, nor was there any reason to apply *Peirce*'s presumption of prejudice or coercion. Without some identifiable *source* of coercion,

"the fact that [jurors] deliberated an hour and a half" after receiving that verdict-urging instruction "shows that they were not coerced by the giving of it." *See id.* No such presumption of coercion or prejudice could arise from that non-coercive language in *Bogardus*, so there was no reason to compare the length of post-instruction deliberations to the length of the prior deliberations—the *Peirce* ratio was irrelevant.

The instruction from *Bogardus* should look strikingly familiar. It is almost identical to the instruction in *Davis* and the instruction used in this case.[3] So *Bogardus* and *Davis* control here—not *Peirce*.

If the *Peirce* ratio could still create a presumption of prejudice, then *Davis* would not categorize it as "less relevant." *See Davis*, 975 N.W.2d at 20. It makes sense that the ratio is less relevant than the amount of time spent in deliberations, after receiving the instruction. The whole point of the analysis is to determine whether the instruction coerced the jury into unanimity, or if it "merely initiated a new train of real deliberation which terminated the disagreement." *Id.* at 18 (quoting *Campbell*, 294 N.W.2d at 808). If jurors were coerced into

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[3] At some point, the *Bogardus* instruction was further improved by deleting a statement that the case was tried "at considerable expense" and a sentence that said: "This case must be decided by some jury, selected in the same manner this jury was selected, and there is no reason to think a jury better qualified would ever be chosen." *See id.*

agreement by the instruction, there would be no reason for them to spend three more hours in deliberations—they could just vote once, then take the afternoon off. They did not do that, which suggests they engaged in "real deliberation of the case." *See id.* at 19–20. That may be irrelevant under *Peirce*, but it is determinative under *Davis*.

The panel erred by giving diminished weight to the length of post-instruction deliberations and by giving elevated weight to the "less relevant" *Peirce* ratio. *Compare Davis*, 975 N.W.2d at 20, *with Church*, 2023 WL 1812785, at *4–5. It should have recognized that the fact that jurors deliberated for about three hours after receiving this instruction was highly probative of a lack of coercive impact. *See Davis*, 975 N.W.2d at 19–20 (collecting cases). The panel also erred by inferring *any* coercive effect from this particular *Peirce* ratio, which is well within bounds for cases where the content of the instruction was not coercive or otherwise problematic. *See Kelley*, 161 N.W.2d at 126; *Bogardus*, 176 N.W. at 329; *Parmer*, 2015 WL 2393652, at *6.

C. The jury was polled in open court, and there was no indication of any hesitation. This is important because it helps establish a lack of coercion.

The panel also discounted the relevance of post-verdict polling. It asserted that "lack of hesitation may not be a reliable indicator that

no coercion occurred." *See Church*, 2023 WL 1812785, at *5. This is in direct conflict with *Davis*, which explained that a lack of any indication of hesitation during polling in open court "supports a lack of coercion." *See Davis*, 975 N.W.2d at 18 & 20–21. The panel said it would still treat this factor as "tipping away" from coercion, as *Davis* required—but its discussion showed that it did not recognize the probative value of this factor under *Davis*. *See Church*, 2023 WL 1812785, at *5.

The panel misunderstood *Davis* to imply that this factor only helps establish coercion when a juror makes an overt statement of hesitation during polling, with willingness to "spotlight themselves." *See id.* at *5. That can happen, and it is relevant whenever it does. *See Davis*, 975 N.W.2d at 20–21 (citing *Middle States Utils. Co. v. Inc. Tel. Co.*, 271 N.W. 180, 184 (Iowa 1937)). But *Davis* recognized that this is not the only way to find indicia of coercion during jury polling. Parties (and the trial court) could have made a record that "identified any hesitation . . . or body language from the jurors during polling that would indicate coercion"—if there was any. *See id.* As the panel noted, Church's counsel had repeatedly stated his belief that this instruction was coercive, earlier in the day. *See Church*, 2023 WL 1812785, at *2 (quoting TrialTr.V8 15:2–16:11). But even with that challenge fresh in

his mind as he watched and listened to the jurors being polled (at his request), he made no record of any observations of non-verbal indicia of hesitation or coercion. Nor did the trial court. *See* TrialTr.V8 22:16–25:9. This factor does not rely on jurors to "spotlight themselves." *See Church*, 2023 WL 1812785, at *5. It is relevant that "neither party nor the trial court judge" noticed anything "that would indicate coercion" when jurors were polled in open court. *See Davis*, 975 N.W.2d at 21.

The panel also stated that jurors were "asked to confirm their verdict in front of the media." *See Church*, 2023 WL 1812785, at *5. But jurors knew they were not being recorded, and their identities were not being reported. *See* TrialTr.V8 23:21–24:4. All jury polling happens in open court, and jurors are always aware of high stakes—the gravity of the situation is what causes jurors with reservations about the verdict to express them (or struggle noticeably). That did not happen here, which is valuable evidence that this "[was] actually the verdict of each individual [juror]." *See Davis*, 975 N.W.2d at 20 (quoting *State v. Morelock*, 164 N.W.2d 819, 823 (Iowa 1969)).

The panel discounted this factor. *See Church*, 2023 WL 1812785, at *5. But under *Davis*, this is important evidence that the instruction did not have a coercive effect. By disregarding that, the panel erred.

D. The two "salient circumstances" identified in the panel opinion do not support its finding that this anti-coercive sparkler instruction was coercive, or that the trial court abused its broad discretion.

The panel mentioned those three factors that *Davis* identified as the main focus of the analysis. But they were not the real basis for its holding. Rather, it found coercion from the fact that the jury told the court that it was an "eleven-one split," and from indications that "the jury had turned its ire on the lone holdout." *See Church*, 2023 WL 1812785, at *6–7. It held that the holdout juror "may well have viewed the supplemental instruction—in response to the third note—as directing the minority to join the majority." *See id.* at *6. Again, this disregards the actual language of this anti-coercive instruction. It never suggested that. To the contrary, it repeatedly warned *against* it.

The panel cited *Smalls v. Batista* in its discussion of the importance of the fact that the jurors knew that the trial court knew that they were split eleven-to-one. *See id.* (citing *Smalls*, 191 F.3d at 280). But in *Smalls*, the court's knowledge of the numerical split was only part of the problem—insufficient, on its own, to indicate coercion. The real snag was that the instruction lacked cautionary language, so "the juror in the minority was not made aware of the possibility that, if he or she was not convinced by the views of the majority, he or she

should hold on to his or her own conscientiously held beliefs." *See Smalls*, 191 F.3d at 280–81. That, combined with its references to the need for jurors to convince each other of their view of the facts, meant that the instruction could lead the minority juror to believe "that he or she had no other choice but to convince [other jurors] or surrender." *See id.* But here, all jurors—including the lone juror—were cautioned that the verdict "must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach an agreement." And jurors would know they were not *required* to reach a verdict; they were told to reach a verdict "if possible" and "if [they] can conscientiously do so." *See* Jury Note 5. Even if a lone holdout assumed this instruction was directed at them alone, it would *still* be anti-coercive in its effect.

It is critical that the jury *volunteered* information about the numerical division—and the trial court did not inquire about it. That means there was no reason for the lone holdout to assume that any instruction *from the court* was directed at them, specifically. Nor did jurors have any reason to think that the split mattered to the court. In *Piper*, jurors volunteered the fact that they were split ten to two—but that did not give rise to coercion when the court never asked about that, nor gave any indication that jurors were "required to reach a verdict."

See Piper, 663 N.W.2d at 912. So despite the trial court's knowledge of a lopsided split, a lack of judicial inquiry into the split and an absence of any coercive language in the instruction shows jurors were not "coerced into returning a verdict." *Id.*; *accord United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992) (distinguishing *Sae-Chua*, 725 F.2d at 532).

The panel dismissed arguments that *Piper* controls, because the trial court in *Piper* "received no information that the majority jurors negatively viewed the minority jurors as not 'following the rules.'" *See Church*, 2023 WL 1812785, at *7. This is the real beating heart of the panel opinion: that the three jury notes reporting an impasse were an "open expression of animosity" towards one juror, made even worse by "[t]he rapidity of these exchanges" over the course of two hours. *See id.* at *6–7 & n.11. The panel also said that these notes indicated "vehemence" and "hostility"—or (likely more accurately) "frustration."

In any event, whatever this was, it was a temporary flare-up—and this instruction seemed to resolve it. Apparently, jurors heeded that call to "listen to the arguments of other jurors" and to "lay aside all mere pride of opinion." *See* Jury Note 5. They deliberated for about three more hours, *without any further complaints* about the lone juror or about their deliberations. *Accord Piper*, 663 N.W.2d at 912 (noting

"[t]he jury never informed the court after receiving the supplemental instruction that it was having trouble reviewing the evidence or reaching a verdict," which suggested they were truly deliberating). Iowa courts recognize that "heated expression of opinion . . . sometimes occurs in argument among jurors"—and that alone does not suggest that jurors acquiesced to a verdict "against their honest convictions." *See State v. Bading*, 17 N.W.2d 804, 809 (Iowa 1945). The panel opinion says the opposite: that when jurors voice frustration and report an impasse in their deliberations, then *any* verdict they render after *any* instruction that encouraged productive and respectful deliberations is "coerced"—no matter what anti-coercive language was used, and no matter how smoothly deliberations went after that. That cannot be correct.

A trial court has "considerable discretion" in deciding whether to give a verdict-urging instruction, and that decision is reviewed for abuse of discretion. *See Davis*, 975 N.W.2d at 18 (quoting *Campbell*, at 808–09). The trial court is in a unique position to feel out the room. What looks like "vehemence" or "animosity" in a cold record may be isolated moments of frustration from otherwise amicable jurors. The panel opinion deprives a trial court of discretionary latitude to decide how to respond, based on its firsthand experience with those jurors in

that specific case. *Cf. State v. McNeal*, 897 N.W.2d 697, 709–10 (Iowa 2017) (Cady, C.J., specially concurring). Here, this trial court carefully selected anti-coercive wording and gave this instruction as a last resort. *See* Ruling (12/8/21) at 15. Nothing it did was an abuse of discretion.

The panel highlighted the fact that the trial court reasoned that, if it later turned out that it was a mistake to give this instruction, then "either [it] or the Appellate Court . . . can take the verdict away." *See Church*, 2023 WL 1812785, at *2 (quoting TrialTr.V8 18:1–11). That made sense. If the jury had returned a verdict within ten minutes, or if jurors had sent a series of additional complaints about the lone juror before suddenly reaching a purportedly unanimous verdict, then the trial court would know that it should throw it out and order a new trial. But that did not happen. There were no more notes reporting deadlock or airing similar complaints, which suggested that jurors were listening to each other in a way that enabled them to resolve their disagreement. And they deliberated in that manner for about three hours—ample time for meaningful discussion. That offered "a strong indication that the charge itself did not cause the one juror to change his/her stance." *See* Ruling (12/8/21) at 15–16. Giving this instruction was a careful attempt to prompt a new phase of meaningful deliberations—and it *worked*.

Under *Davis*, the trial court was correct: there was no coercion. It used an anti-coercive sparkler instruction that could not have been the source of any coercion. Nor did verdict timing, jury polling, or any other circumstance suggest that this instruction had a coercive effect—all of it tended to indicate a *lack* of any coercion. So the panel opinion directly conflicts with *Davis* (and with *Piper*, *Kelley*, and *Bogardus*). This Court should grant further review and correct the error.

CONCLUSION

The State respectfully requests this Court grant further review, vacate the panel opinion, and affirm Church's convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

1. This application has been prepared in a proportionally spaced typeface using Georgia in size 14, and contains **5,943** words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

Dated: February 22, 2023

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