STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County
Honorable D. Craig Brown, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

MARK ANOTHONY BAYNE,

Appellant.

Appellate Case No. 2016-000809

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**INITIAL BRIEF OF RESPONDENT**

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# TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS ..... 2

ARGUMENTS

I. Appellant's only argument against the Allen instruction was he always objects to Allen instructions, and Appellant never objected to the specific language of the instruction. Therefore, the issue is not preserved for review. Further, the trial court did not abuse its discretion and the language of the Allen instruction was not coercive ..... 6

II. The trial court did not err in declining to grant a mistrial and the issue is not preserved for review since Appellant declined an offer for a curative instruction ..... 12

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Cases:**


Allen v. United States, 164 U.S. 492 (1896) .......... passim

Brasfield v. United States, 272 U.S. 448 (1926) .......... 9

Chapman v. California, 386 U.S. 18 (1967) .......... 14

Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) .......... 10

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) .......... 8

Lowenfield v. Phelps, 484 U.S. 231 (1988) .......... 9

Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 54 S.E. 255 (1906) .......... 8

State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013) .......... 8

State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) .......... 14

State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) .......... 13

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) .......... 7

State v. Kelly, 372 S.C. 167, 641 S.E.2d 468 (Ct. App. 2007) .......... 8

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) .......... 8

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) .......... 13

State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) .......... 7

State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995) .......... 9, 11

State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985) .......... 8

State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) .......... 13

State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) .......... 13-14

State v. White, 410 S.C. 56, 762 S.E.2d 726 (Ct. App. 2014) .......... 14

Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) ........ 9, 10

United States v. Burgos, 55 F.3d 933 (4th Cir.1995) ........ 9

## STATEMENT OF ISSUES ON APPEAL

I.

Appellant's only argument against the Allen instruction was he always objects to Allen instructions, and Appellant never objected to the specific language of the instruction. Therefore, the issue is not preserved for review. Further, the trial court did not abuse its discretion and the language of the Allen instruction was not coercive.

II.

The trial court did not err in declining to grant a mistrial and the issue is not preserved for review since Appellant declined an offer for a curative instruction.

## STATEMENT OF THE CASE

The Greenville County grand jury indicted Appellant Bayne for two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime, two counts of conspiracy, one count of kidnapping, and one count of carjacking in connection with the nearly contemporaneous robberies of two drug dealers. The jury convicted Bayne of one count of armed robbery, one count of the weapons charge, and the single counts of kidnapping, and carjacking, following trial on April 6-8, 2015. The presiding judge, the Honorable D. Craig Brown, sentenced Bayne to concurrent terms of twenty years imprisonment for kidnapping, twenty years imprisonment for armed robbery, ten years imprisonment for carjacking, and five years imprisonment for the weapons charge.

## STATEMENT OF FACTS

Appellant Bayne, Donald Trammell, and Bayne's girlfriend, Corrie Morgan, robbed a drug dealer, David Ennis. While they were waiting for Ennis to arrive, another drug dealer, Aaron Shunk, showed up so they accosted him and stole his truck. The jury convicted Bayne for all the charges related to Ennis, except conspiracy. The jury acquitted Bayne for the robbery (and the corresponding conspiracy and weapons charges) for the unplanned victim, Shunk, but the jury convicted Bayne for carjacking and kidnapping Shunk.

Vickie Trammell and Nikki Gardner, Vickie's daughter, drove from their residence to purchase pain pills from Aaron Shunk. Vickie admitted to a history of addiction and noted Xanax was her controlled substance of choice. Tr. p. 113. At the time of trial, her son, Donald Trammell, was serving a prison term for armed robbery as part of this crime. Tr. p. 115. She testified she went with her daughter to Shunk's house to get a Roxy, a kind of controlled substance. Tr. pp. 116-19.

Shunk did not have any pills. However, he knew where he could get some in Greenville. Shunk was drunk and stoned, as was Vickie, so Nikki agreed to drive Shunk's truck. The three left together in Shunk's truck. However, Vickie and Shunk got in an argument after Shunk started saying "vulgar" things to Nikki. Tr. pp. 118-21. Vickie testified they argued until Vickie demanded they drive back. She was also on her cell phone with her son Donald, who overheard the argument. Tr. pp. 121-23.

Nikki likewise was addicted to pain medication. She lived at her grandfather's house with Vickie. She also testified she bought drugs from the other victim in this case, David Ennis, in the past. Tr. p. 158-59.

Nikki explained to the jury what happened on the trip in Shunk's truck. Shunk made sexual comments to Nikki and grabbed her breasts. Vickie got mad and started yelling at Shunk. Shunk, in reply, told them to get out. Rather than end up stranded with her mother far away from home, Nikki managed to be allowed to drive back to her grandfather's residence, believing that would be the safest thing to do. Tr. pp. 161-164.

Shunk testified that Nikki and Vickie came over to his house. He knew Vickie, but had not met Nikki before. He knew Vickie's son Donald. Tr. pp. 73-74. The three left the house together. Shunk let Nikki drive his 4-door, gold Dodge Ram truck. Shunk was in the passenger seat and Vickie sat in the back seat. Tr. pp. 82-83.

Shunk testified that when they arrived at Vickie's house, Donald made him get out of the truck at gunpoint and handed the gun off to another man who he did not know. He testified he could not identify the man because he did not know him and it was too dark. Tr. p. 84. Shunk was punched in the eye, taken to the back porch, and told not to move or do anything stupid. Donald, the

man, and a woman, who seemed to be acting as a lookout, went back to the front of the house. Tr. pp. 84-85. Shunk heard the vehicles drive away and then ran through the woods and down the road until he made it home. He called the police. Tr. pp. 84-86. The truck was later returned to Shunk. Tr. p. 92.

Vickie confirmed that when they arrived at their house, "all four doors opened" and they were directed out of the truck. Tr. p. 123-24. She saw Bayne hit Shunk. The men told her and Nikki to go inside the house. Vickie knew Bayne because they are related – she is married to Bayne's first cousin. Tr. p. 124-25.

Donald explained what happened while Nikki and Vickie were away. After Nikki and Vickie left the grandfather's house and went to Shunk's residence, Donald, Bayne, and Bayne's girlfriend, Corrie Morgan, arrived at the house. Donald admitted he was on methamphetamine at the time of the robberies. He testified he was currently serving a five year sentence for armed robbery, but did not have any deals or promises in this case. Tr. pp. 215-16. Donald admitted he sold drugs, he started selling cocaine to co-workers, and then later methamphetamine and heroin. Tr. p. 218. At the time of the robberies, he was staying with Tina Bayne, who is Bayne's wife, and Bayne's adult children.

They called Ennis to arrange a drug transaction at the grandfather's house. He claimed they initially did not plan to steal Ennis's drugs or money. They were waiting for Ennis when they were surprised by Nikki, Vickie, and Shunk. They wanted to get Shunk out of the way, so they took him behind the house. Donald claimed he did not hit Shunk, although he acknowledged the black eye in the photograph of Shunk put into evidence. Tr. pp. 236-40.

Donald returned to the front of the house. Five to eight minutes after Shunk's truck arrived,

Ennis, the next victim, showed up. Donald was surprised by the amount of drugs Ennis showed up with – it was more than he was supposed to be purchasing. Donald snatched the bag of drugs. Then he told Ennis he wanted the money too. Ennis said no, but Donald grabbed a wad of money out of Ennis' pocket, $1,200. Bayne approached while pointing a shotgun at Ennis as Donald stole Ennis' money. Tr. pp. 244-246. Donald later drove to 3 Meadow Ford and saw Bayne washing the stolen gold Dodge truck. Tr. p. 249. Bayne gave Donald the keys to the truck. Tr. p. 264.

The State subpoenaed Ennis for trial, but he failed to show. Detective Tim Brochin testified that Ennis called 911. When Detective Brochin responded and spoke to him, Ennis seemed upset and talked fast. He testified that another officer responded to another robbery at the same address. He was advised to be looking for a stolen tan Dodge Ram truck. Tr. pp. 101-04.

## ARGUMENT

I.

**Appellant's only argument against the Allen instruction was he always objects to Allen instructions, and Appellant never objected to the specific language of the instruction. Therefore, the issue is not preserved for review. Further, the trial court did not abuse its discretion and the language of the Allen instruction was not coercive.**

The trial court did not abuse its discretion by providing an Allen instruction, after the jury deliberated only two hours. Further, the language of the Allen instruction was appropriate and not coercive. The issue is not remotely preserved for review as counsel made no legal arguments and did not object to the specific language of the trial court's instruction.

**How the issue arose.**

The jury began deliberations at 3:19 p.m. and sent a note asking for an explanation of the hand of one, hand of all instruction at 4:18 p.m. Tr. p. 382. The trial court reinstructed the jury on accomplice liability and the jury returned to the jury room for further deliberations at 4:23 p.m. Tr. pp. 383-386. The jury sent a note sometime thereafter asking, "If we can't come to a verdict on a charge, what do we do?" Tr. p. 386, lines 19-24.

The trial court suggested an Allen instruction. Allen v. United States, 164 U.S. 492 (1896). Bayne's counsel responded he preferred the trial court not give an Allen instruction and to simply find out the verdict on the other charges "because it may be a moot point there are so many charges." Tr. p. 386, line 19-p. 387, line 3. Bayne's counsel commented he always objects to an Allen charge. Tr. p. 387. The prosecution told the trial court that the State would defer to the trial court's judgment. Tr. p. 388, lines 6-16.

The trial court gave an extensive Allen instruction. Tr. p. 389, line 24 – p. 392, line 13. The jury returned to the jury room for further delberations at 5:39 p.m. **Afterwards, the trial court asked the parties if there was an exception to the instruction. Bayne's counsel responded, "Other than the fact that I object to an Allen charge, no." Tr. p. 392, lines 16-21.**

The jury sent a third note advising, "We're still having issues with hand over hand [sic]." Tr. p. 393, lines 3-4. The trial court noted the jury did not indicate that could not reach a verdict and decided to provide written instructions to the jury. Tr. p. 393. The trial court brought the jury in at 6:31 p.m. and announced the court would release them for the evening. Tr. pp. 395-96.

The next morning, the trial court gave the jurors each a written copy of his instructions in their entirety and sent the jury to continue its deliberations at 9:28 a.m. The jury returned with its verdicts at 10:30 a.m. The jury found four guilty verdicts and four not guilty verdicts. Tr. pp. 400-02.

**Because Bayne's counsel did not make an argument, no issue is preserved for review.**

First, the issue is not preserved for review. Bayne's trial counsel objected to the instruction for no other reason than he always objects to Allen instructions. However, Bayne did not state the grounds for his objection which is too general to preserve any issue. In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). A "general objection that does not specify the particular ground on which the objection is based is

insufficient to preserve a question for review." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). Because trial counsel failed to provide any argument about why an Allen instruction should not be provided in this instance and failed to provide any legal argument challenging the efficacy of an Allen instruction in general, this Court should refrain from reviewing this issue.

Additionally, because Bayne's counsel did not object to any portion of the Allen instruction provided by the trial court when given the opportunity, Bayne's complaint for the first time on appeal about the specific language in the instruction is not preserved for review. State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding that Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge that he had no objection to the instruction). "[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal." State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.").

**The trial court's supplemental instruction was not coercive.**

Further, the trial court's instruction was not an abuse of discretion. In order for the judicial process to properly function, it is important for cases to reach a final resolution at some point. See Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1906) ("It is important that the trial of causes should be ended."). As a result, trial judges have a duty to urge juries to agree upon a verdict. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). There is no doubt that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled

to the uncoerced verdict of that body." Lowenfield v. Phelps, 484 U.S. 231, 241 (1988). Yet, the Supreme Court in Allen specifically approved the use of supplemental jury instructions. Allen, 164 U.S. at 501-02. A court provides an Allen charge when the jury has reached an impasse in its deliberations and is unable to reach a consensus. Id.; United States v. Burgos, 55 F.3d 933, 935-36 (4th Cir.1995). The decision to give such a charge is within the discretion of the trial or sentencing court. Burgos, 55 F.3d at 935. A supplemental instruction advising every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict strongly reduces any risk of coercion. State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-76 (1995) ("It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense, or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement.").

The most frequent setting in which the risk of juror coercion arises is when a court inquires into the numerical division of a deadlocked jury. See Brasfield v. United States, 272 U.S. 448, 450 (1926) (finding the practice of the trial court to inquire of the jury as to the numerical division was "harmful" and "not to be sanctioned"). However, the trial court did not enquire into the numerical division in this case and was not made aware of what the division might be.

The Supreme Court in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) analyzed Lowenfield to determine the constitutionality of an Allen instruction in the penalty phase of a capital trial. This Court noted the United States Supreme Court considered the following factors: (1) whether the instruction spoke specifically to the minority jurors; (2) whether the instruction contained any language to the effect of "You have got to reach a decision in this case"; (3) whether there was an inquiry into the jury's numerical division; and (4) whether the jury reached a verdict

shortly after the instruction. Catoe, 346 S.C. at 491-92, 552 S.E.2d at 716.

In the instant case: (1) the instructions did not speak specifically to minority jurors; instead, the instruction implored both the majority and minority to consider the other's position; (2) no language suggested a verdict was mandatory; (3) the trial court refrained from investigation into the numerical division or, for that matter, which charges the jury was unable to reach a verdict on; and (4) the jury did not reach a verdict right away – the jury deliberated for roughly an hour after the Allen instruction, then inquired again about the law regarding accomplice liability, then deliberated another hour the following morning. The jury deliberated only a couple of hours before the trial court provided the Allen instruction.

The trial court's instruction was not coercive because the trial court's instruction did not single out the minority jurors and did not contain mandatory language compelling a verdict. Instead, the trial court's instruction advised the jurors that the verdict must be their verdict, that each juror had a right to their own opinion, and that jurors "should not give up [their] firmly held beliefs merely to be in agreement" with the other jurors. Tr. pp. 389-92. See Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 323-324 (2002) ("The entire charge shows the trial judge adequately and correctly told the jurors they should listen to what the other side had to say; to be open to change one's mind; and to not change one's mind if it would do violence to one's conscience. The charge was neutral in its direction, not impermissibly aimed at the minority, instead suggesting members of each side examine their own position in light of the other view's position.").

Further, the trial court refrained from investigation into the numerical division between the jurors, and the jurors likewise never advised the trial court of what the division might be. The jury continued deliberating for an hour before returning with a question, and deliberated another hour the

following morning. Bayne's counsel waived polling the jury. Accordingly, the verdict was not coerced.

Finally, the trial court did not comment on the facts during the instruction. The trial court did not mention any specific evidence or testimony, or even any class of evidence or testimony. The trial court merely recited the obvious that a new trial may be required if a verdict was not reached, which is permissible. In State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-76 (1995), the Supreme Court held, "It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense . . . ." The trial court's instruction was in keeping with Singleton.

The trial court did not abuse its discretion because the circumstances and the trial court's instruction was not coercive. Accordingly, the conviction and sentence should be affirmed.

II.

**The trial court did not err in declining to grant a mistrial and the issue is not preserved for review since Appellant declined an offer for a curative instruction.**

Bayne argues the trial court should have granted a mistrial for an offhand comment by Nikki Gardner during her testimony. However, because Bayne declined a curative instruction, the issue is not preserved for review. Further, the trial court did not abuse its discretion in declining to grant a mistrial.

The issue arose when the prosecutor asked Nikki Gardner when she met Bayne's wife, Tina. Nikki answered, "When I was younger, as a child. But from when I can remember her was back in – I when I can actually remember her is when he had – he hadn't been released from prison long." Tr. p. 149, lines 14-17.

Bayne's counsel asked to approach the bench and the jury was sent to the jury room. The prosecutor agreed the testimony was improper, but noted the reference was brief and suggested that a curative instruction was all that was necessary. Tr. pp. 149-51. The prosecutor admonished the witness "to really think about her responses beforehand." Tr. p. 151, lines 5-7. The prosecutor advised the trial court that he spoke with the witnesses beforehand about mentioning prior crimes and Nikki agreed that he spoke to her about that. Tr. p. 151, line 19 – p. 152, line 6.

The trial court ruled that "in this particular situation, I believe that the curative instruction certainly cures any misstatement by this witness." Tr. p. 153, lines 15-17. The trial court offered to provide the jury with a curative instruction. Defense counsel asked to think about it "because it almost draws more attention to it." Tr. p. 155, lines 6-8. The trial court later supplemented his ruling and noted he would let Bayne's counsel consider overnight whether he wanted a curative

instruction. Tr. pp. 198-99. The next day, Bayne's counsel renewed the motion for mistrial, the trial court denied the motion, but again gave Bayne's counsel the option of a curative instruction. Tr. p. 204, lines 13-25. The trial court advised Bayne's counsel "I'll do it whenever you'd like me to do it. I mean, I can do it when I charge them on the law." Tr. p. 205, lines 4-6. Bayne's counsel wanted to wait until then to make a decision. Tr. p. 205, lines 7-9. Ultimately, Bayne's counsel declined the instruction. Tr. pp. 304-05.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial).

"The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). The defendant waives any right to complain about the challenged testimony if he waives the trial judge's offer of a curative instruction. State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) (finding defense counsel waived the motion for mistrial by declining an offer for a curative instruction, defense counsel opined it would only call attention to the alleged error).

Watts is on point with the present case. In Watts, a law enforcement officer made an offhand remark that she overheard that Watts made prior drug purchases. Defense counsel objected, arguing the State put Watts' character in issue. The trial court did not believe a mistrial was warranted, but offered to strike the testimony from the record or provide a curative instruction. Watt's counsel declined because he did not want to bring the matter to the jury's attention again. This Court found,

"In rejecting the trial court's offer to strike the testimony or give a curative instruction, Watts waived any complaint he had to the challenged testimony." Id. at 164, 467 S.E.2d at 276.

Like the judge in Watts, the trial court offered to give a curative instruction immediately after the objection. The trial court again offered to provide a curative instruction during the charge conference, which Bayne also declined. Accordingly, Bayne waived his complaint about the testimony. Further, since the trial court was willing to cure the error, the trial court did not abuse its discretion in declining to grant a mistrial. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (An appropriate curative instruction is generally considered to cure any error).

Finally, any error was harmless beyond a reasonable doubt. The reference about which Bayne complains was brief and counsel implicitly recognized it was not prejudicial by not wanting to call attention to it with a curative instruction. No defense was presented, and the State's evidence was uncontroverted. The record indicates the jury carefully considered each charge, finding Bayne guilty of some charges and not guilty on others. "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). It is simply implausible that the jury based is guilty verdicts on the brief, unsolicited reference to some non-specific incarceration rather than the properly admitted evidence presented to the jury. Accordingly, the conviction and sentence should be affirmed.

## CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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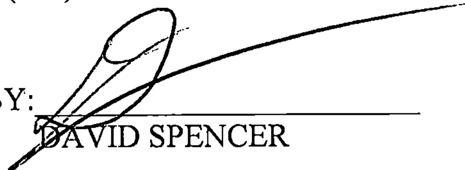

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ATTORNEYS FOR RESPONDENT

June 28, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No: 2016-000809

THE STATE,

Respondent,

v.

MARK ANTHONY BAYNE,

Appellant.

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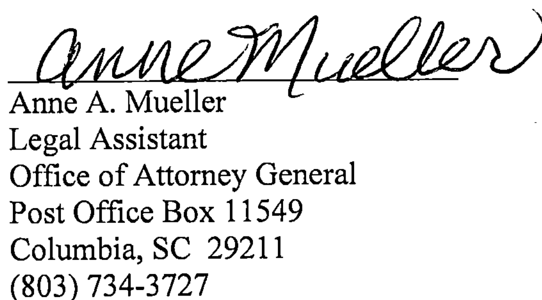
**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the Intial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record John H. Strom, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 28th day of June, 2017.



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June 28, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
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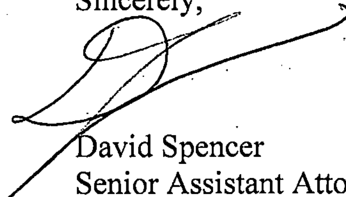
**Re: The State v. Mark Anthony Bayne**
**Appellate Case No: 2016-000809**

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,



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DS/aam
Enclosures

cc: John H. Strom (with two copies)
Ms. Trisha Allen

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