STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2016-000549

THE STATE,

RESPONDENT,

v.

BILLY LEMURCES TAYLOR,

APPELLANT.

PETITION FOR REHEARING

On June 12, 2019, this Court issued an opinion in the captioned case that reversed appellant's convictions for murder, two counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime. *State v. Taylor,* Opinion No. 5655 (S.C.Ct.App. filed June 12, 2019). Pursuant to South Carolina Appellate Court Rules 221 and 240, Respondent, the State of South Carolina, petitions for rehearing and asks the Court to consider the following points that may have been misapprehended or overlooked:

The Issue Decided Was Procedurally Barred

The Court reviewed the *Allen*[1] charge but did not find any a particular part of the charge given was in itself coercive; rather, the Court found the charge lacked additional language which was not included:

> ... 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 consciously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion.

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

(Opinion, [unnumbered] p. 8).

The issue of whether additional language should have been included was not before the Court. The language was never requested by appellant, nor was similar language requested. Appellant did not object to the omission of the language or similar language. Consequently, the issue this Court decided, and granted relief on, was not available for review on the merits. The procedural bar was raised by respondent in its final brief, (see FBOR, p. 24), but not addressed in this Court's opinion. The record supports the issue was not preserved for this Court's review, and this Court should reconsider its opinion in light of those facts, which Respondent sets out below.

Just before the jury came in the following day after reporting an impasse, defense counsel requested to "review" the *Allen* charge before it was given; however, the judge indicated he did have a "written charge" for counsel to review, but that he would give "the standard *Allen* charge." (R. p. 502). Counsel responded, "Okay," and made no further requests. (R. p. 502).

After the charge, the trial judge asked if there were any exceptions. (R. p. 504). Defense counsel first noted that he objected "to the *request for an Allen charge*" in chambers the previous evening, which the court denied. (R. p. 504) (emphasis added). He then "move[d] for a mistrial trial right now *rather than Allen charge instruction.*" (R. p. 504) (emphasis added). He also requested the court bring the jury back "and tell them that a hung jury is a legitimate end of a criminal trial and is the occasionally inevitable result that requires a unanimous verdict beyond a reasonable doubt." (R. p. 504). In short, defense counsel repeatedly stated that he did not want *any Allen* charge given.

In his ruling, the trial judge likewise treated the general objection as just that – an objection to any *Allen* charge in general:

> Okay. All right. I appreciate your motions in that regard. I think I recited the appropriate standard of law to be applied in the Allen charge. I also think that it is well accepted in juris prudence not only in the State of South Carolina, but in the United States for the Allen charge to be administered when a jury has indicated that they have reached an impasse. Now, certainly, public policy can change if the Supreme Court of the United States and the Supreme Court of South Carolina decides that's an inappropriate charge, I certainly would defer to them. But as it stands, it's allowable. And I think in terms of -- simply in terms of judicial economy, it's appropriate. So, respectfully, I understand your position, but I'll deny your motions.

(R. pp. 504 -505).

Defense counsel immediately asked to add to his objection: "It is my belief that the Allen charge is unduly coercive and that is another basis for my objection and request for a mistrial." (R. p. 505). The trial judge noted his objection. (R. p. 505).

Before the jury returned at approximately 11:43 a.m, defense counsel stated: "I would note for the record that about 11:08, I had the court reporter write it down that I requested that you declare a mistrial and you denied my motion at that time." (R. p. 506). Defense counsel also renewed [his] objection to [the] Allen charge...." (R. p. 506). Further, he placed an additional argument on the record: "...because of the delay after the Allen charge and the jury reaching a verdict" mistrial was appropriate. (R. p. 506).

Appellant's general objection to the giving of an *Allen* charge is again found when defense counsel renewed his objection after the jury verdict: "I want to renew my objection to both the Allen charge and the continuation of the trial and, again, request a mistrial." (R. p. 517).[2] There was no objection to any particular language, or, critically for this Court, any request for additional language.

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[2] This Court found: "The trial court was well within its discretion in refusing to declare a mistrial simply because the jury, after some seven hours of deliberations, announced an impasse," and that "the trial judge has a duty to urge the jury – without pressuring or coercing them – to reach a verdict." (Opinion, [unnumbered] pp. 3-4). That answered the question that

As noted above, in its brief, Respondent submitted the argument was not preserved for appellate review:

> At no point did Taylor present this argument as an objection on the record to the Allen charge that was given. The only request Taylor did make was to ask the judge to instruct the jury that a hung jury is a legitimate end of the trial. Since Taylor did not present this argument at trial, it is not preserved for appellate review.

(FBOR, p. 24).

Yet, this Court failed to address the procedural bar.

The issue the Court reached to grant relief was not preserved by a specific objection or request for additional language. Consequently, the issue was not preserved for appellate review on merits. *State v. Hale,* 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985) ("Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge," an appellant cannot challenge charge "for the first time on appeal."); *State v. Tucker,* 319 S.C. 425, 427, 462 S.E.2d 263, 264 (1995) (general objection that "*Allen* charge is coercive in nature" resulted in procedural bar of specific claims on appeal).[3] *See also State v. Sheppard,* 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("plain error rule does not apply in South Carolina state courts"); *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (preservation requirements "meant to

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was raised by the objection. *See also Johnson v. Sam English Grading, Inc.,* 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) ("The Company takes issue with the concept of the *Allen* charge in general and argues that many states do not allow them. However, South Carolina does allow them. Accordingly, the trial court did not err in giving a version of an *Allen* charge.").

[3] The Supreme Court of South Carolina had an opportunity to affirm this procedural bar in the subsequent 2001 opinion: "The procedural bar ruling was a routine application of state," noting its disagreeing with a federal court's reasoning the procedural default – based on state law – was incorrect. *Tucker v. Catoe,* 346 S.C. 483, 488, 552 S.E.2d 712, 715 n. 5 (2001).

enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"); *State v. Varvil,* 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) ("A general objection is ordinarily insufficient to preserve an issue for appeal."); *State v. New,* 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999) ("It is well settled that an objection must be on a specific ground.").

Respondent respectfully requests the Court reconsider, and address the procedural deficiency. The record supports appellant failed to give the trial judge an opportunity to consider the language this Court finds was critically omitted. The issue is barred from review and cannot support the relief granted.

The Charge Given Was Not Coercive for Want of the Language Cited by the Court

As noted, this Court did not clearly hold any portion of the charge was coercive, but rested its decision on what the charge "did not say." (Opinion, [unnumbered] p. 8). Apart from the procedural bar as discussed above, the Court erred in finding this jurisdiction accepts that the absence of the particular language cited is fatal to the charge. In support of the necessity of the language, this Court references *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 537 S.E.2d 279 (2000), and *Blake by Adams v. Spartanburg Gen. Hosp.,* 307 S.C. 14, 413 S.E.2d 816 (1992). (Opinion [unnumbered] p. 8). However, these cases do not support the necessity of the language in an *Allen* charge in this jurisdiction.

In *Buff*, the Court considered adherence to S.C. Code § 14-7-1130, which provides that if a jury reports deadlock to the trial court *a second time*, "it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law." 342 S.C. at 419-20, 537 S.E.2d at 281. The significant fact for the issue on appeal was whether the jury expressed consent to further deliberations. 342 S.C. at 423, 537 S.E.2d at 283. The referenced

statute has the dual purpose of "prevent[ing] forced verdicts, *and* to prevent undue severity of jury service." 342 S.C. at 402, 537 S.E.2d at 281 (quoting *State v. Freely*, 105 S.C. 243, 247, 89 S.E.643, 644 (1916)) (emphasis added). The inquiry for error does not share the same focus as that of review of an *Allen* charge. *Id. See also State v. Barnes,* 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013) (finding relief due under the statute where jury did not consent to being sent out again). At any rate, the Court did not pass on the propriety of an *Allen* charge. Thus, the case lends no direct and necessary support to the Court's reasoning.

In *Blake*, the Court considered the effect of bailiff comments to the juror that "urg[ed] the jury to reach a verdict," including "the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. at 16, 413 S.E.2d at 817. In distinguishing bailiff comments from a judge's charge, the Court noted "a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." 307 S.C. at 18, 413 S.E.2d at 818. The Court found "the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement," consequently, "under the facts of this case," the Court found no abuse of discretion in granting a new trial. *Id.* The Court did not pass on the propriety of an *Allen* charge, or even accept the bailiff comments would not be error if the additional language was included. *Blake* does not support the necessity of the language in an actual *Allen* charge. As with *Buff*, the *Blake* opinion similarly does not lend direct and necessary support to the Court's reasoning.

Lastly, the Court also references a 1967 Virginia law review article, and a series of federal cases from various circuit appellate courts. (See Opinion [unnumbered], pp. 8-9). This proves the point that South Carolina has not set out – nor given notice to the bench and bar – that this jurisdiction requires the language to ensure an *Allen* charge will not be considered coercive.

This Court's conclusion "courts have routinely held its absence reversible error," again, does not rely on courts in this jurisdiction. (See Opinion, [unnumbered] p. 8). Respondent respectfully requests the Court reconsider its opinion regarding the acceptance and necessity of the additional language in this jurisdiction. When the additional language discussion is set out, the opinion correctly finds the charge given is not coercive. However, additional facts exist that strengthens that finding.

Other Evidence in the Tucker Factors Analysis

As to this Court's consideration of the charge given, again, though this Court does not reverse on any finding under the factors as found in *Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001), there are several prominent facts that appear to be overlooked that further strengthen the finding that nothing in the charge given requires reversal. For instance, this Court fails to critically consider the multiple divisions on differing charges as further support for the lack of coercion. The note from the jury volunteered the differing and various numerical divisions on each charge apparently after a series of votes:

	NG	G
Murder	3	9
	4	8
	3	9
	2	10
[scratched out]		
Pos[s]ession	4	8
	1	11
Brittany	4	8
	5	7
Ashley	4	8
[scratched out]	4	[scratched out] 8

(R. p. 528).

In contrast to the facts here, in *Dawson v. State,* 352 S.C. 15, 18, 572 S.E.2d 445, 446 (2002), the trial judge confirmed there was *one juror* who did not agree with the majority, then went on to tailor the charge to single out "the juror" who could holdout against the rest. The Supreme Court of South Carolina (unsurprising) found that particular language aimed specifically toward one juror was coercive. *Id.* There was no "one" juror to single out in these circumstances.[4]

The Court also failed to consider the care the trial judge took to assure the jury they would not be kept sequestered until consensus was found. When first reported, the trial judge solicitously advised the jury he would release them jury for the evening and bring them back for additional deliberations the next morning: "I don't necessarily blame you and I don't envy your decision in this case because I know it's a hard decision." (R. p. 499). He indicated they would "break" for the evening and would avoid making they stay into the wee hours of the morning. Id. He asked the jurors to "just go home, get some sleep, come back refreshed tomorrow and come to the courtroom and we'll resume deliberations." (R. p. 500). These facts, too, should be considered when critically considering the totality of the circumstances. This Court considered the fact the instruction came from the trial judge to be crucial in its analysis. (Opinion, [unnumbered] pp. 6-7). The care taken to assure the jury they would not be unreasonably kept for deliberations is also a factor to consider. *State v. Williams,* 344 S.C. 260, 265, 543 S.E.2d

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[4] Though appellant candidly admitted the vote was split in different ways for different charges, he argued "the revelation of the vote increases the coercive effect...." (FBOA, p. 6). He discussed, however, only the murder charge division, reasoning "comments about the 'waste of time' could be directed at no persons other than the two not guilty jurors and would certainly have (and did have) an effect on them." (FBOA, p. 7). He does not explain why the same comments in the instruction – which did not change between charges – were only coercive for murder when the record shows various splits on different charges.

260, 263 (Ct. App. 2001) ("We also find the trial judge did not coerce a verdict by implying the jury would have to deliberate indefinitely.").

And, as this Court noted, the actual charge given addressed both the majority and minority. (Opinion [unnumbered] p. 6). *See Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("charge should be even-handed, directing both the majority and the minority to consider the other's views"); *State v. Robinson,* 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) (in giving an *Allen* charge, trial judge instructs, "among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors"). Specifically, the charge given requested the jurors in the majority to consider the views of the jurors in the minority and vice versa. The trial court instructed, "[b]ut 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." (R. pp. 503-04). Again, here, there was a mix of divisions over four charges, and no language identified with "any one person" like the charge in *Tucker. See* 346 S.C. at 493, 552 S.E.2d at 71.

Additionally, while this Court further found that cost of other proceedings was "overemphasized," (Opinion, [unnumbered], p. 9), "[i]t is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a new trial at additional expense." *State v. Singleton,* 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995). There was no particular detail as to the cost, and, in fact, the charge as a whole was very limited and broadly fashioned. In context of the entirety of the charge, there is no reversible error.

Lastly, as to the Court's observation that telling the jury the matter would have to be retried would be "misleading," (Opinion, [unnumbered], p. 9), that observation rests on

speculation that something is weak in the evidence when that may not be the case at all. It could just as well be a misunderstanding of the law, disagreement with the law, or even a personal bias of one or more jurors that was latent or undiscovered. It is correct that additional proceedings will have to be held, but it likely would not be a welcome charge to indicate those additional proceedings may result in a guilty plea. Referencing retrial is a more neutral expression of the proceedings expected to follow.

The timing of the jury verdict in relation to the instruction – a part of the actual objection made *after* the jury reached a verdict, (R. p. 506) – was not suggestive of coercion in light of the timing of the jury deliberations. As this Court found, "[t]his factor is notoriously difficult to apply...." (Opinion, [unnumbered] p. 8). However, in light of all circumstances here, the record tends to support there was no coercive effect. The jury started its deliberations at approximately 12:00 p.m. on March 3rd. (R. p. 495). The jury received additional instructions in response to a question at 1:43 p.m., and the jury resumed its deliberations shortly after 1:50 p.m. (R. pp. 496-98). The jury's deliberations ended that day at approximately 7:20 p.m. (R. pp. 498-99). The next morning, the jury received the *Allen* charge beginning at 9:05 a.m. and ending at 9:10 a.m. (R. pp. 502-04). Defense counsel placed an objection on the record at approximately 11:08 a.m. (R. p. 506). The jury rendered its verdict at 11:43 a.m. (R. p. 507). The amount of time the jury spent deliberating after the charge is indicative that the jury did not find the charge coercive in these circumstances; rather, the evidence supports the jury renewed their deliberations with careful consideration.

Since the instruction was not unconstitutionally coercive, and there appeared to be no coercive effect from the timing, the trial court did not err in denying the motion for a mistrial and giving the instruction, nor in denying the mistrial during deliberations after instruction, nor

denying the mistrial after the verdict. Respondent respectfully submits for all these reasons, and those argued in the brief of respondent, the Court is correct that the record does not support coercion in the charge given in light of the *Tucker* factors. However, Respondent would request the Court reconsider its opinion in light of the foregoing which further strengthens the finding but is not included in the Court's opinion.

Conclusion

For the foregoing reasons, the Respondent respectfully requests this Court reconsider its opinion based on the foregoing.

Respectfully submitted,

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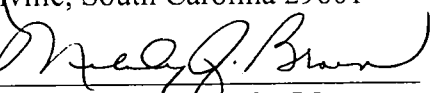
By: 
MELODY J. BROWN
ATTORNEYS FOR RESPONDENT

June 27, 2019
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 27 2019
SC Court of Appeals

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2016-000549

THE STATE, RESPONDENT,

vs.

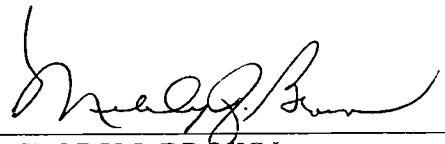
BILLY LEMURCES TAYLOR, APPELLANT.

PROOF OF SERVICE

I, Melody J. Brown, counsel for the Petitioner, certify that I have served the within Petition for Rehearing on the Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, David Alexander, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201,

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

This 27th day of June, 2019.



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June 27, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: *The State v. Billy Lemurces Taylor*
Appeal from Greenville County
Appellate Case No. 2016-000549
Opinion No. 5655 (Filed June 12, 2019)

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and six (6) copies of the Petition for Rehearing in the above-referenced case, together with Proof of Service.

Thank you for your assistance in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB:dmd
Enclosures
cc: David Alexander, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor, Thirteenth Judicial Circuit (w/copy of encl.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)