

SC20-1083

In the Supreme Court of Florida

WILEME BAPTISTE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from the
Third District Court of Appeal
DCA No. 3D18-2403

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

1. Whether the trial court erred when, following a jury poll that revealed a lack of unanimity and pursuant to Petitioner's request, it instructed the jury to fill out a new verdict form, if possible, and if not to let the court know.

2. Whether defense counsel's affirmative agreement to the charge waived any error.

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INTRODUCTION AND SUMMARY OF ARGUMENT

During a verbal altercation, Petitioner Wileme Baptiste chased Banave Fleurant, firing his gun at least 16 times. He shot Fleurant in the back, and Fleurant fell. As Petitioner stood over him, Fleurant covered his face with his hands and pleaded for his life. Petitioner fired two more shots into Fleurant's forehead, killing him.

At trial, the judge gave a standard *Allen* charge.¹ The jury then announced a verdict, finding Petitioner guilty of second-degree murder, attempted second-degree murder, and unlawful possession of a firearm. But a poll revealed that one juror did not agree. The trial court, with the agreement of Petitioner's counsel, instructed the jurors to fill out a new verdict form if they could, and if not, to let the court know. The jury then convicted Petitioner of manslaughter, attempted manslaughter, and unlawful possession of a firearm.

Petitioner now objects to the charge sending the jury back to fill out a new verdict form, arguing that it was unduly coercive, and therefore, fundamental error. This Court should reject the argument.

I. At the outset, the charge was not coercive. That is so for

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

five reasons.

First, no party objected to the charge below, showing that the people who could best observe the subtleties of coercion did not perceive its risk. *Second*, the circumstances of the deliberations belie a claim of coercion because the jury was instructed that it could deadlock, and because the jury continued to ask to review evidence and for substantive instruction throughout the deliberations. *Third*, the charge was legally required. Under the Rules of Criminal Procedure, when a poll fails, a judge must send the jury back. That rule reflects a considered view that such a charge is not coercive, and Petitioner has said nothing to challenge that view. *Fourth*, the language of the charge lacked any coercive elements normally associated with an *Allen* charge: it did not (a) ask the jurors to reconsider their views, (b) demand a verdict, or (c) single out minority views. Thus, the charge was neither coercive nor an *Allen* charge. And *fifth*, the jury agreed to lesser charges after the challenged instruction, with five jurors moving from their just-announced prior position. Far from showing that a holdout juror was coerced, the jury's conduct shows the opposite.

Petitioner presses an alternative argument—he urges this Court to rule that giving multiple *Allen* charges is per se coercive. But the charge Petitioner challenges was not an *Allen* charge at all. Regardless, this Court has already recognized that every *Allen* charge must be judged on its own terms. That rule gives trial judges the flexibility to balance the risks of coercion against the costs of a mistrial. Indeed, Petitioner’s proposed rule would make Florida an extreme outlier: at the federal level, only the Ninth Circuit endorses Petitioner’s rule, and many states also reject it.

II. Even if the trial court erred, Petitioner would not be entitled to relief. At the outset, Petitioner’s counsel affirmatively agreed to the charge below. Petitioner thus invited any error and invited error bars appellate review even of fundamental errors.

Regardless, if Petitioner merely failed to object, any error is not fundamental. The State could have obtained the verdict without the error; indeed, without the challenged charge, the jury would have heard the same evidence and received the same substantive instructions. Next, any error was at most a technical one about how the trial court phrased its response to the failed poll. That is not the

type of egregious error that is fundamental, especially because the trial was not close. Finally, any other ruling would encourage gamesmanship—it would allow defendants to sit silently in the face of a deadlock, knowing that they can win on appeal no matter what the trial judge does.

Attempting to sidestep his invited error, Petitioner now says that he should have been colloquied before the trial judge gave the challenged instruction. This new theory cannot be squared with 170 years of courts—including this one—accepting counsel waivers in *Allen* charge cases. Nor does Petitioner’s theory make sense as a matter of first principles. Whether to seek an *Allen* charge is a trial decision left to counsel. And even if the decision concerns one of the rare rights over which counselled defendants retain full autonomy, when those rare rights relate to tactical decisions, counsel waivers are sufficient. That is the case here: seeking an *Allen* charge requires a careful balancing of tactics best left to counsel. On top of that, Petitioner’s new rule is unworkable as it is not at all clear when a colloquy would be needed or what it would say.

Petitioner’s conviction should stand.

STATEMENT OF THE CASE

1. On March 20, 2012, Andrea Lloyd sent a Facebook message to Petitioner's sister, Idlande Jeudi. Lloyd insinuated that Jeudi was sexually involved with Lloyd's boyfriend, Banave Fleurant. T. 1763–64. Jeudi told Lloyd that she should come over to fight. T. 1100, 1764. Lloyd did, along with several of her family members, including Elizabeth Lustin, who brought a knife. T. 1100, 1440–41.

Petitioner, who knew that Lloyd and her family were coming, retrieved his gun. T. 1854. Petitioner explained his need for the gun by saying that he thought he would need to fight Fleurant because of prior incidents between their sisters, T. 1841, and because he suspected Fleurant of previously robbing his house, T. 1844. After getting his gun, Petitioner sent a message to Lustin's brother to tell him that his sisters were causing trouble. T. 760, 1856. The brother responded not to "use the fire," that is, the gun. T. 760–61, 1856. Petitioner responded, "F*** that." T. 763, 1856.

Lloyd and Jeudi fought, T. 1106–07, 1772, as did Petitioner and Fleurant. T. 1860. The fights broke up. T. 1113, 1774. But Fleurant and Lustin followed Petitioner toward his door. T. 772–73, 1420–21,

1869–70. Petitioner claims that Fleurant yelled that he was “going to kill y’all.” T. 1872–73.

Petitioner then walked into his house, grabbed his gun, went outside, and started shooting. T. 777–78, 1169–70, 1875. His victims ran away. T. 1903. He chased Fleurant, ultimately shooting at least 16 times. T. 781, 1876–77. Stray bullets hit Lustin and a minor. T. 771, 1170–71. During the chase, Petitioner shot Fleurant in the back. T. 1904. Petitioner kept chasing and shooting, T. 1904–05, until Fleurant fell down. T. 1879. With Petitioner standing over him, Fleurant put his hands up and pleaded “hey, Willie, I’m good, I’m good. Willie.” T. 1879, 1913, 1922. Petitioner shot Fleurant twice in the head. T. 1879. Petitioner then went home, told his family not to talk to the police T. 1917, cleaned himself of blood, and hid the gun. T. 1882.

2. Petitioner was charged with one count of second-degree murder, two counts of attempted second-degree murder, and one count of unlawful possession of a firearm by a minor. R. 272–75. In the initial jury instructions, the judge told the jurors that it was their “solemn responsibility” to determine whether the State had proved

its case, and that the verdict “must be based, solely, on the evidence . . . and the law.” T. 709. During the jury instructions, the judge reiterated that the jurors should find the defendant not guilty if they harbored any reasonable doubts, T. 2192, and that in doing so, they should not be swayed by their perceptions of the trial judge’s preferences for one verdict over the other. T. 2197.

The jury was then discharged for deliberations. Shortly after, the jury asked, “[c]an we replace a juror in order to come to [a] unanimous verdict.” R. 757; T. 2212. The trial court responded “No.” R. 757; T. 2214. The jury then asked for a copy of Petitioner’s statement from a police interview. R. 898; T. 2252. The trial judge said that a transcript was not available, but that the jury could watch the statement if they wanted. R. 898.

The next day, the jury sent a note saying “[a]t this point we are having a problem coming to a unanimous decision. What are our options?” R. 902; T. 2256. Because the jury had only deliberated for about six hours, the trial court instructed the jury “[a]t this time please continue to deliberate and continue reviewing the evidence so that you can reach a unanimous decision.” R. 902; T. 2259. About

an hour later, the jury sent a note saying: “The jury has reached a unanimous decision with the exception of one juror. Juror agrees to step aside so that the panel can reach a unanimous decision. May a request be granted to replace juror or have a verdict rendered with five jurors?” R. 904; T. 2265–66. Both parties requested an *Allen* charge. T. 2266. The trial court agreed and colloquied Petitioner, who agreed to the charge. T. 2266–69, 2275.

During the colloquy, the jury sent another note, asking for “clarification on second degree murder,” and specifically seeking clarification about whether an act is “done from ill will . . . vs. protecting your family.” R. 906. The judge gave a standard *Allen* charge, reminding the jury that it was “legally permissible” to disagree, T. 2283, and that if they could not reach a verdict, he would declare a mistrial with “sincere appreciation” for the jury’s service. T. 2284. The judge then responded to the jury’s note, informing the jurors to review the instructions on questions of law. R. 906.

The jury continued to deliberate for about two hours, before announcing a verdict. T. 2290–91. The jury announced that it had found the defendant guilty of second-degree murder, two counts of

attempted second-degree murder, and unlawful possession of a firearm by a minor. R. 914; T. 2290-91. The defense requested a poll. T. 2292. During the poll, juror five dissented. T. 2292.

The judge asked the jurors to return to the jury room. T. 2293. He then asked the defense how he should proceed. T. 2293. Defense counsel asked to confer with Petitioner, which he did. T. 2293. Defense counsel then suggested that “[y]ou need to send a note saying please keep deliberating. Send the jury instructions and a new verdict form back there.” T. 2294. The judge “agree[d]” with “most[]” of defense counsel’s instruction, including to send a new verdict form, but not to instruct the jury to keep deliberating. T. 2294. The judge then informed counsel that “[w]hat I am going to do, based on what happened, is send back the new verdict forms. Tell them to please go back and fill out the verdict forms again if there is a unanimous decision. If there is not one to let us know.” T. 2294. Defense counsel responded: “That’s fine.” T. 2294. The trial judge then double checked that defense counsel agreed, asking “[d]o we agree?” T. 2294. Defense counsel replied: “Yes.” T. 2295. As agreed by defense counsel, the judge then instructed the jury:

Again, thank you. I know it's a been long couple of weeks. As I said every time, I want to thank you, again, for your service.

At this time, I'm going to be handing [the bailiff], who is going to hand you a new set of verdict forms. I'm going to ask you to go back in.

Please fill out the verdict form. If you have a unanimous verdict, please fill out the verdict accordingly.

If you do not have a unanimous verdict please knock on the door and let [the bailiff] know and we'll bring you back out here. Okay?

Thank you.

T. 2296. About ten minutes later, the jury returned a guilty verdict on lesser-included charges, convicting Petitioner of manslaughter, two counts of attempted manslaughter, and unlawful possession of a firearm by a minor. R 279-81; T. 2298-99. The court polled the jurors. T. 2300. All agreed that the verdict was theirs. T. 2301.

Petitioner moved for a new trial, arguing that the jury decided by lot and that, accordingly, the judge should have declared a mistrial when the verdict was announced. R. 990-91. The trial judge denied the motion. R. 1329-31, 1334.

3. Petitioner appealed. He made one argument: citing only Fourth District cases, Petitioner claimed that "Florida recognizes that

it is per se reversible error to give a jury two *Allen* charges” and argued that sending the jury back following the failed poll was a second, modified *Allen* charge. Init. Br., *Baptiste v. State*, No. 3D18-2403, at *9–10 (Sept. 17, 2019).

The Third District affirmed. Although the court recognized that there was no “per se” rule against repeated *Allen* charges, it found the charge coercive. App’x 5. The court nonetheless found the error waived because Petitioner “agree[d] to the modified charge.” App’x 6.

Petitioner sought this Court’s review.

STANDARD OF REVIEW

“Abuse of discretion is the standard . . . when reviewing a trial court’s instructions given during jury deliberations.” *Green v. State*, 907 So. 2d 489, 496 (Fla. 2005). “The standard of review in addressing *Allen* charge issues is ‘whether, under the totality of the circumstances, the trial judge’s actions were coercive,’ and whether the facts and circumstances surrounding an individual case “combined to create a serious risk of coercion.” *Lebron v. State*, 799 So. 2d 997, 1012 n.13 (Fla. 2001) (citation omitted). “Whether an error is fundamental . . . is a question of law” subject to “de novo”

review. *State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018). When confronting a claim of juror coercion, an error is fundamental if there is “a likelihood that the jury was actually improperly influenced by [the error] into rendering a verdict.” *Scoggins v. State*, 726 So. 2d 762, 767 (Fla. 1999).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REQUESTING THAT THE JURY FILL OUT A NEW VERDICT FORM.

Petitioner argues that the trial court fundamentally erred when it gave an alleged second *Allen* charge. But before the Court can assess whether that was fundamental error, it must first determine if it was error at all—and it was not. The charge was legally required; was not a second *Allen* charge; and was not coercive, and therefore, the trial judge did not abuse his discretion in giving it.

Determining whether a charge impermissibly coerced the jury is often a difficult task. An appellate court reviewing a cold record can rarely know whether the jury was coerced because what happened in the jury room is not in the record. *See United States v. Felix*, 996 F.2d 203, 209 (8th Cir. 1993) (noting that reviewing court did “not know” what the jury discussed after receiving a charge and

observing that determining whether a charge was actually coercive is “speculation”). Instead, appellate courts must assess the risk of coercion by reviewing “the totality of the circumstances,” *Thomas v. State*, 748 So. 2d 970, 976 (Fla. 1999), such as whether any party noted a risk of coercion by objecting, whether the charge used coercive language, whether the prevailing circumstances suggest coercion, and whether the trial judge knew the breakdown of the vote when she gave the charge. *See id.* at 976–77; *Gahley v. State*, 567 So. 2d 456, 460 (Fla. 1st DCA 1990).

A. The charge was not coercive.

Five factors indicate that the charge here was not coercive: (1) that no party objected to the charge; (2) the circumstances surrounding the charge; (3) the charge was required by the rules of criminal procedure; (4) the charge lacked any coercive features; and (5) following the charge, the majority of jurors moved toward the holdout (and in favor of Petitioner), not the other way around.

First, it is “significant” that no party objected to the charge. *United States v. Hiland*, 909 F.2d 1114, 1137–38 (8th Cir. 1990). “[T]he fact that no objection was raised to the supplemental instruction indicates that the potential for coercion did not appear so

to one on the scene.” *Gahley*, 567 So. 2d at 460; *see also Davis v. State*, 832 So. 2d 239, 241 (Fla. 5th DCA 2002); *Holmes v. State*, 710 So. 2d 188, 190 (Fla. 1st DCA 1998).

This Court should give substantial weight to the trial lawyers’ and judge’s perceptions of coercion. Coercion can be subtle; it is often dependent on tone, body language, or other factors that are not available in a cold record. *See Bruno v. State*, 807 So. 2d 55, 67 (Fla. 2001) (accepting counsel’s explanation that he did not object to judge’s colloquy with the jury because the judge’s “tone was not such as to constitute a de facto *Allen* charge” (footnote omitted)). Trial lawyers and judges can observe the jury for possible signs of coercion. *See Young v. Herring*, 938 F.2d 543, 558 n.8 (5th Cir. 1991) (“The trial judge observes the jury throughout the trial and is . . . therefore, uniquely qualified to appraise the prejudicial effect of a communication on the jury.”); *cf. Clark v. State*, 756 So. 2d 244, 246 (Fla. 5th DCA 2000) (“[T]he trial judge is in a peculiarly good position to observe the jurors.”). For this reason, the “on-the-spot perception of the trial court” or trial lawyers “as to the existence of coercion can provide significant input.” *Harris v. United States*, 622 A.2d 697, 701

n.6 (D.C. 1993).

Here, neither the trial judge nor the lawyers questioned the charge, which indicates that they perceived no risk of coercion. On the contrary, Petitioner's counsel asked for an arguably *more* coercive charge, asking the court to "send a note saying please keep deliberating. Send the jury instructions and a new verdict form back there." T. 2294. No one in the moment—not the trial judge and not the trial lawyers—saw any risk in giving the challenged charge.

Second, the circumstances preceding the challenged charge do not reveal any coercion. Throughout the trial, the judge made clear the jury's role. For example, the judge told the jurors that their verdict "must be based, solely, on the evidence . . . and the law." T. 709. During the jury instructions, the judge reiterated that the jurors should find the defendant not guilty if they harbored any reasonable doubt, T. 2192, and that in doing so, they should not be swayed by their perceptions of the trial judge's preferences for one verdict over the other. T. 2197. The judge also made clear that a verdict was not required: he informed the jury, in accord with the standard *Allen* instructions, that it was "legally permissible" to disagree, T. 2283,

and that if they could not reach a verdict, he would declare a mistrial with “sincere appreciation” for the jury’s service. T. 2284.

This Court presumes that the jury followed these instructions. *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000). And everything indicates that it did. Although the jury indicated that it was having trouble reaching a verdict, T. 2212, 2256, 2265, it simultaneously asked to review evidence, T. 2219–23, 2252–53, and for clarification of the law, T. 2267–73. Even after receiving a full *Allen* charge, the jury deliberated for two more hours. R. 913–14. What this indicates, especially given the presumption that the jury followed its instructions, is that although the jury had trouble reaching a verdict, it resolved the trouble by honestly deliberating.

To be sure, Petitioner reads these circumstances differently. On Petitioner’s theory, the circumstances show a hopelessly deadlocked jury that was coerced into a verdict. Init. Br. 19.

That reading, however, does not flow inexorably from the circumstances. For one thing, Petitioner ignores that interspersed among the jury’s indications of disagreement was evidence of good-faith deliberation—its requests to see evidence and for more

instruction. Even on its own terms, however, Petitioner's theory fails. To begin, Petitioner assumes that the jurors' early failure to agree proves that they continued to be deadlocked later. But that view is wrong. *See United States v. Byrski*, 854 F.2d 955, 962 (7th Cir. 1988) (noting that "the state of jury deliberations is ever-changing, prior evidence of deadlock is not always dispositive of the jury's present inability to reach a unanimous verdict"); *Webster v. State*, 968 So. 2d 125, 127–28 (4th DCA 2007) (cautioning against inferring a deadlock with a single holdout from "vague" juror note). Indeed, the very fact that *Allen* charges are permissible in the first place demonstrates that sometimes a deadlocked jury can legitimately reach a verdict.

Without assuming that the jurors remained deadlocked based on their initial inability to agree, Petitioner is left to argue that the failed poll itself showed that the jury was deadlocked, and that sending the jury back to the jury room broke the deadlock and coerced a verdict. Init. Br. 19. But that too does not follow because a failed poll does not "necessarily" show "a deadlock." *United States v. McDonald*, 825 F. Supp. 2d 472, 480 (S.D.N.Y. 2011). Instead, that the jury announced a verdict could show that the jury was working

dutifully towards a verdict—they did, at a minimum, appear to briefly think they had agreement. *Id.* And that inference is bolstered by the jury asking to review the evidence and for further instructions. In light of all that, this Court should presume that the jury followed its instructions and reached a verdict based on the evidence, knowing that a mistrial was permissible. *Carter*, 778 So. 2d at 942.

Third, the charge was required by rule, which indicates that this Court did not foresee an unconstitutional risk of coercion when adopting the rules. Under Rule 3.450, if a “juror dissents” during a poll, the judge “must direct that the jury be sent back for further consideration.” Fla. R. Crim. P. 3.450. That rule is mandatory: a trial court, confronted with a juror who “indicates that the verdict was not theirs,” is “required to send the jury back for further deliberations.” *Moore v. State*, 277 So. 3d 1153, 1155 (Fla. 1st DCA 2019). That the trial judge’s decision accords with the rules provides evidence that the judge acted constitutionally. *Cf. Ser-Nestler, Inc. v. Gen. Fin. Loan Co. of Miami Nw.*, 167 So. 2d 230, 232 (Fla. 3d DCA 1964) (“The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the

source of authority, they remain inviolate.”).

Fourth, the challenged charge did not use coercive language: it did not ask the jurors to reconsider their views, it was not directed to the holdout juror, it did not demand a verdict, and it did not otherwise cajole a verdict. *See Thomas*, 748 So. 2d at 975 (analyzing language of charge to test coercion).

Start with the most significant fact—the charge did not ask any juror to reconsider her views. That fact not only shows that the charge was unlikely to be coercive, but it also shows that the charge was not an *Allen* charge.

An *Allen* charge is one “designed to aid a deadlocked jury to render a unanimous verdict.” *Colbert v. State*, 569 So. 2d 433, 435 (Fla. 1990). Consistent with that aim, an *Allen* charge is not just a charge that asks the jury to continue deliberation. *E.g.*, *State v. Roberts*, 616 So. 2d 79, 81 (Fla. 2d DCA 1993) (concluding that a charge that asks the jury to keep deliberating “was not an *Allen* charge”); *United States v. Prosperi*, 201 F.3d 1335, 1341 (11th Cir. 2000) (a “judge’s simple request that the jury continue deliberating” was not “an *Allen* charge”). Rather, the “defining characteristic” of an

Allen charge “is that it asks jurors to reexamine their own views and the views of others.” *United States v. McDonald*, 759 F.3d 220, 224 (2d Cir. 2014) (citation omitted); see also Fla. Standard Jury Instr. (Crim). 4.1 (instructing deadlocked jurors to “tell each of the other jurors about any weakness of your own position”). That characteristic is what makes *Allen* charges potentially dangerous. By asking jurors to reconsider their views, jurors might accidentally feel compelled to “abandon their conscientiously held beliefs.” See *Spears v. Greiner*, 459 F.3d 200, 204 n.3 (2d Cir. 2006). And indeed, that risk is why standard *Allen* charges are coupled with protective language to remind the jurors that they are not required to concede their well-founded views and can instead disagree and thereby hang. *Thomas*, 748 So. 2d at 978.

But here, the charge did not ask the jurors to reconsider their views; it asked the jurors to “fill out the verdict form” if they could. T. 2296. That is not an *Allen*-type charge. See *Roberts*, 616 So. 2d at 81. And because the charge lacks the coercive elements of an *Allen* charge, it was substantially less likely to be coercive. See *Nottage v. State*, 15 So. 3d 46, 51 (Fla. 3d DCA 2009) (finding no coercion when,

following the giving of a first *Allen* charge, the trial judge, without giving a second *Allen* charge, asked the jury to keep deliberating); *Alicot v. Dade Cnty.*, 132 So. 2d 302, 303 (Fla. 3d DCA 1961) (no coercion when jury was asked to keep deliberating following failed poll).

The conclusion that the charge here was neither an *Allen* charge nor an unduly coercive one accords with how other jurisdictions have treated similar charges. In *McDonald*, the jury announced, after deliberating for four hours, that it had reached a verdict finding the defendant guilty. 759 F.3d at 222. As here, the defendant requested a poll, and during the poll, one juror revealed that the verdict was not hers. *Id.* In response, the judge “told the jury that he would ‘send you back to continue to deliberate to see whether you can reach a unanimous verdict, in light of all of the instructions that I have given you.’” *Id.* About an hour later, the jury returned a unanimous guilty verdict. *Id.* The defendant challenged the verdict, arguing that sending the jury back to deliberate after the failed poll was an improper *Allen* charge. *Id.* at 223. The Second Circuit disagreed. It first explained that “the district court’s instruction was

not an *Allen* charge at all” because it contained no language imploring the jury to reconsider its views. *Id.* at 225. Next, the court determined that giving the charge was proper; in fact, it was the “prudent” course because in response to the failed poll, the trial judge continued deliberations without the “implication that any juror opposing conviction was obligated to reconsider her views.” *Id.*

So too in *United States v. Dorsey*, 865 F.2d 1275 (D.C. Cir. 1989) (R. Ginsburg, J.). There, the jury poll revealed a lack of unanimity. *Id.* at 1276. In response, the judge requested that the jury keep deliberating, instructing the jury that “[w]henver you have reached a unanimous verdict, you may return it in court. If you are not unanimous, then you should continue your deliberations.” *Id.* The defendant argued that the charge was unduly coercive. *Id.* at 1275. The court disagreed. *Id.* at 1278–79. As it explained, the charge instructing the jury to keep deliberating after the failed poll was “not of the *Allen* type” because it simply directed deliberations to continue, and thus, was not coercive. *Id.*; see also *United States v. Knight*, 58 F.3d 393, 396 (8th Cir. 1995) (charge given after learning identity of holdout was “not of the potentially intimidating *Allen* type” when no

coercive language was used).

Additionally, the trial judge did not direct his statements at the holdout juror. T. 2296. Jury charges are particularly fraught when they target dissenting jurors. *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) (trial judge implied that dissenting juror would be a “stubborn mule or a jackass” who should be given “a bunch of hay” for lunch). But when a charge uses neutral language not directed toward a holdout, the risk of coercion is diminished. For example, in *Nottage*, the trial court gave a standard *Allen* charge when he knew the jury’s numerical division. 15 So. 3d at 47. Nonetheless, because the judge gave the neutral standard charge “without editorializing,” the court found no error. *Id.* at 50–51; *see also State v. Bryan*, 290 So. 2d 482, 484 (Fla. 1974) (“balanced charge” not coercive); *Gardner v. State*, 405 So. 2d 470, 471 (Fla. 3d DCA 1981) (same).

Moreover, the trial judge did not demand a verdict, which would have increased the risk of coercion. In *Thomas*, for example, this Court found the risk of coercion when the judge repeatedly told the jury that he wanted a verdict, saying, for example, “I must do everything that I can to have the matter resolved so that we would

not have to start from the beginning on the case.” 748 So. 2d at 975 (emphasis omitted). But the inverse is also true: When a charge does not “compel[]” the jury “to reach a verdict,” the threat of coercion is lessened. *Colbert*, 569 So. 2d at 435; *see also McElrath v. State*, 516 So. 2d 276, 276–77 (Fla. 2d DCA 1987) (refusing to reverse because charge made clear that the jury did not need to reach a verdict); *Miller v. State*, 403 So. 2d 1014, 1015 (Fla. 5th DCA 1981) (no coercion when judge did not imply “that the jury must reach a verdict”). Here, the judge did not call for a verdict. T. 2296. Quite the opposite: he was clear that not returning a verdict was a permissible choice, which dispelled any substantial risk of coercion. *See Evans v. State*, 303 So. 2d 68, 69 (Fla. 3d DCA 1974) (judge’s instruction that “if after an additional vote the jury appeared to be deadlocked, they should make an announcement” was not coercive).

Nor did the charge otherwise cajole a verdict. None of the actions that courts have characterized as potentially cajoling are present here. The judge did not “place[] [the jury] under time pressure to return a verdict,” “exhort[]” it “to consider extraneous and improper factors, such as the government’s fiscal health,” “isolate[] and

demean[]” a holdout “for being in the minority,” “indicat[e] that the jury was required to reach a unanimous verdict,” threaten “marathon deliberations,” “ask[] the jury what verdict the majority of the jurors favored,” or “single[] out the minority jurors in imploring the jury to come to a decision.” *Rubi v. State*, 952 So. 2d 630, 634 (Fla. 4th DCA 2007). The judge simply asked the jurors to fill out the verdict form if they could, or to report back to the court if they could not. T. 2296. In that way, the judge made it known that “a deadlock was a possibility.” *Portee v. State*, 496 So. 2d 173, 175 (Fla. 3d DCA 1986).

Fifth, the jury’s actual conduct belies any claim of coercion. When the jury first returned a verdict, the announced verdict was for second-degree murder, two counts of attempted second-degree murder, and possession of a firearm by a minor. T. 2289–92. Juror five dissented from the poll. T. 2292. In response, the judge returned the jurors to the jury room, asking them to fill out a verdict form if they could. T. 2296. When they did, the five jurors who had previously voted to convict on second-degree-murder charges moved towards juror five’s position and voted to convict on lesser-included

charges: manslaughter with a deadly weapon, two counts of attempted manslaughter, and possession of a firearm by a minor. T. 2298–2301. Each juror, including juror five, who minutes earlier had no problem dissenting from a poll, agreed to the verdict. T. 2298–2300. The sequence of events, with five jurors moving toward lesser charges, suggests that there was no coercion—either the majority of the panel moved or the entire panel was simply confused when it previously announced a verdict (perhaps because they had actually agreed to the lesser-included charges and made a clerical error). See *Thomas*, 748 So. 2d at 979 (noting concern that lone holdout will be swayed by *Allen* charge); *Bryan*, 290 So. 2d at 484 (concluding that a challenged charge was harmless because the jury convicted of a “lesser offense”).

In the end, the trial judge did not abuse his discretion. Instead, responding to a rare situation when a poll reveals a lack of unanimity, the trial judge followed the advice of Petitioner’s counsel and took the legally required path by returning the jury to the jury room. In doing so, the judge avoided giving an *Allen* charge at all, and instead, gave a limited, carefully worded charge that made clear that a verdict was

not required. That path was not erroneous.

B. Petitioner's theory that the trial court erred because it gave multiple *Allen* charges should be rejected.

Perhaps recognizing that the charge was not coercive under a normal totality of the circumstances test, Petitioner advances a different argument. He contends that trial courts must “avoid giving multiple *Allen* charges.” Init. Br. 17. That theory should be rejected.

At the outset, the charge was not an *Allen* charge, so the Court has no occasion to consider Petitioner's theory in this case.

In any event, Petitioner's per-se-coercion rule is irreconcilable with this Court's instruction that every *Allen* charge must be considered individually based on the totality of the circumstances. *Thomas*, 748 So. 2d at 976. Even were it not, Petitioner's rule cannot be squared with this Court's precedent. For example, in *Gilvin v. State*, this Court held that it was not erroneous for a trial judge to give one *Allen* charge and then later “remind[] the jury” of that *Allen* charge before it recessed. 418 So. 2d 996, 999 (Fla. 1982). Surely, if it is automatic error to give two *Allen* charges, it must have been error for a judge to smuggle a second charge into a reminder about the first one. Thus, *Gilvin* disproves Petitioner's theory.

Worse yet, Petitioner’s per-se rule would deprive trial judges of the flexibility they need to respond to jury deadlock. When considering whether to give a second *Allen* charge, a trial judge must consider both the risk of coercion and the costs of a mistrial. See *United States v. Davis*, 779 F.3d 1305, 1314 (11th Cir. 2015). Making that determination often requires keen observation of the jury—a task best left to the trial judge. *Id.* And, in depriving trial judges of this flexibility, Petitioner’s per-se rule would not necessarily inure to defendants’ benefit because “*Allen* charges sometimes help the defendant.” *Id.*

Perhaps for that reason, Petitioner’s rule would make Florida an outlier. Federally, every circuit except the Ninth that has considered whether multiple *Allen* charges are inevitably coercive has rejected the claim.² So too a number of states.³ And in Florida, although the

² *United States v. Barone*, 114 F.3d 1284, 1305 (1st Cir. 1997); *United States v. Ruggiero*, 928 F.2d 1289, 1299 (2d Cir. 1991); *United States v. Santamaria*, 418 F. App’x 197, 198 (4th Cir. 2011); *United States v. Fossler*, 597 F.2d 478, 485 (5th Cir. 1979); *United States v. Robinson*, 872 F.3d 760, 773 (6th Cir. 2017); *United States v. Reed*, 686 F.2d 651, 652 (8th Cir. 1982); *United States v. Ailsworth*, 138 F.3d 843, 852 (10th Cir. 1998); *Davis*, 779 F.3d at 1313.

³ *Wright v. Commonwealth*, 590 S.W.3d 255, 264 (Ky. 2019);

Fourth District has adopted Petitioner’s per-se-rule, “[n]o other district” has. *Nottage*, 15 So. 3d at 49; *Philip Morris USA Inc. v. Brown*, 243 So. 3d 521, 523 (Fla. 1st DCA 2018) (Winsor, J., dissenting).

In the face of all that, Petitioner does not defend his per-se rule as a matter of first principles. Instead, he points only to a series of Fourth District cases. Init. Br. 17. Those cases are not persuasive because they all ground in *Tomlinson v. State*, 584 So. 2d 43, 44–45 (Fla. 4th DCA 1991), which itself is built on poor foundations. *Tomlinson* relied on one Florida case to derive its per-se rule—*Warren v. State*, 498 So. 2d 472 (Fla. 3rd DCA 1986). But *Warren* stands for the opposite view; it examined the “totality of the circumstances.” *Id.* at 477; *see also Nottage*, 15 So. 3d at 50 (citing *Warren* to disagree with *Tomlinson*’s per-se rule). Without *Warren*, the *Tomlinson* court was left to rely on the Ninth Circuit’s decision in *United States v.*

State v. Feliciano, 778 A.2d 812, 820–21 (Conn. 2001); *People v. Brooks*, 152 A.D.2d 591, 592 (N.Y. 2d Dep’t 1989); *Jones v. State*, 505 S.E.2d 749, 753–54 (Ga. 1998), *overruled on other grounds by Hamm v. State*, 756 S.E.2d 507 (Ga. 2014); *State v. Czachor*, 413 A.2d 593, 600 (N.J. 1980); *Com. v. Connors*, 433 N.E.2d 454, 456 (Mass. App. Ct. 1982); *State v. Pauling*, 470 S.E.2d 106, 109 (S.C. 1996); *Jones v. Boyd*, 820 S.E.2d 130 (N.C. Ct. App. 2018); *Ward v. State*, 447 A.2d 872, 874–75 (Md. Ct. Spec. App. 1982); *Fitzpatrick v. State*, 01-95-00356-CR, 1996 WL 350380, at *3 (Tex. App. June 20, 1996).

Seawell, 550 F.2d 1159, 1162–63 (9th Cir. 1977). *Seawell* is an extreme outlier for a reason—its rule is a needless and “unwarranted intrusion into the area of trial court discretion.” *Id.* at 1164–65 (Wright, J., dissenting). Denying discretion is not without consequences. The “circumstances” surrounding an *Allen* charge can “vary enormously,” and the “trial judge,” who is “closer to the facts,” is better equipped to respond to those varied circumstances. *Barone*, 114 F.3d at 1305. Beyond that, *Seawell*’s unflinching preference for mistrials costs “time and resources” and also diminishes “the quality of justice” because often second trials are worse than their unrehearsed predecessors. *Davis*, 779 F.3d at 1314.

In short, either as a matter of precedent, logic, or national uniformity, Petitioner’s per-se prohibition on multiple *Allen* charges has nothing to recommend it.

II. ANY ERROR WAS INVITED, OR AT A MINIMUM, WAIVED.

Even if the trial court erred in asking the jury to fill out a new verdict form following the failed poll, Petitioner would still not be entitled to relief because, as the Third District recognized, he asked for the instruction to which he now objects. That bars Petitioner’s claim under two related doctrines: invited error and waiver. Nor can

Petitioner resuscitate his forfeited claim by, for the first time, arguing that he needed to agree personally to the challenged charge.

A. Petitioner invited any error by requesting the charge.

1. “A party may not invite error and then be heard to complain of that error on appeal.” *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983). Any other rule “would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be . . . reversed.” *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991). And thus, even in cases involving fundamental error, an invited error vitiates the need for appellate review. *Lowe v. State*, 259 So. 3d 23, 50 (Fla. 2018); *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) (“Fundamental error is waived under the invited error doctrine.”).

In the context of jury instructions, an error is invited when “defense counsel affirmatively agreed to or requested” the instruction. *Lowe*, 259 So. 3d at 50; *accord Warfel*, 82 So. 3d at 65; *State v. Lucas*, 645 So. 2d 425, 427 (Fla. 1994).

2. Petitioner invited the purported error he now complains of by agreeing to the charge. Following the jury’s failed poll, defense

counsel, after conferring with Petitioner, T. 2293, told the judge “I think we need to – You need to send a note saying please keep deliberating. Send the jury instructions and a new verdict form back there.” T. 2294. The judge “agree[d]” with “most[]” of defense counsel’s instruction, agreeing to send a new verdict form, but not to instruct the jury to keep deliberating. T. 2294. The judge then informed counsel that “[w]hat I am going to do, based on what happened, is send back the new verdict forms. Tell them to please go back and fill out the verdict forms again if there is a unanimous decision. If there is not one to let us know.” T. 2294. Defense counsel responded “[t]hat’s fine.” T. 2294. The trial judge then double checked that defense counsel agreed, asking “[d]o we agree.” T. 2294. To which defense counsel replied: “Yes.” T. 2295.

Thus, defense counsel not only suggested that the jury be given new verdict forms, but affirmatively suggested a potentially *more* coercive charge, asking that the jury be sent back to keep deliberating. When the judge rejected that step, defense counsel agreed to the instruction that the jury be told to “fill out the verdict forms again if there is a unanimous decision” and “if there is not one”

to let the court know. T. 2294–95. That affirmative agreement forfeited any appellate rights. *Lowe*, 259 So. 3d at 50; *Warfel*, 82 So. 3d at 65.

B. Regardless, Petitioner waived any error below and any error is not fundamental.

Even if Petitioner cannot be held to his counsel’s invited error, the Court should still approve the decision below because Petitioner failed to object to the challenged charge and the error is not fundamental.

Jury instructions “are subject to the contemporaneous objection rule.” *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991). Accordingly, “absent an objection at trial,” instructional error “can be raised on appeal only if fundamental error occurred.” *Id.* Because Petitioner did not object to the charge at trial, he can succeed here only if the charge constituted fundamental error. It does not.

1. Petitioner does not claim that a unique feature of this case makes the error fundamental. Instead, Petitioner’s argument is “that constitutional error *of this type* resulting in a coerced verdict is both fundamental and per se reversible.” Init. Br. 21 (emphasis added) (citing *Rubi*, 952 So. 2d at 634–35).

But this Court has rejected that view. In *State v. Bryan*, the defendant claimed that the “giving of the ‘*Allen* charge’ was error under the circumstances.” 290 So. 2d at 483. This Court found that even if there was error, the “error was harmless.” *Id.* at 484. So too in *Colbert*. 569 So. 2d at 435. There, the defendant argued that the trial judge gave an impermissible modified *Allen* charge. *Id.* This Court “assum[ed]” that giving the charge was error, but then asked whether the “error was prejudicial.” *Id.* Applying a harmless error test, this Court concluded that any error did not “affect[] the verdict.” *Id.* By subjecting *Allen*-charge error to harmless analysis, *Bryan* and *Colbert* foreclose Petitioner’s per-se-reversible-error argument. They also repudiate Petitioner’s per-se-fundamental-error analysis because once an error is deemed fundamental, it is “not subject to harmless error review.” *Reed v. State*, 837 So. 2d 366, 369–70 (Fla. 2002). It therefore cannot be the case that every alleged error “of this type” (Init. Br. 21) is a fundamental one.

Were there any doubt, the *Bryan* court settled it. There, the Court found that the defendant was “bound” by his trial counsel’s decision not to challenge the *Allen* charge. 290 So. 2d at 484. That

proves that the error was not fundamental because fundamental errors cannot be waived by a failure to object. *See Delva*, 575 So. 2d at 644.

Bryan and *Colbert* do not mean that an *Allen* charge could never rise to the level of fundamental error. But they prove that *Allen* error is not automatically fundamental. Petitioner, however, puts all his eggs in the per-se-fundamental basket; that is, he does not argue that, under the unique facts of this case, the alleged error rose to the level of fundamental error. *See Init. Br.* 20–21. Because Petitioner’s argument is foreclosed, the Court should approve the decision below.

2. In any event, any error was not fundamental. For an error to be fundamental it “must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

a. The State could have achieved a guilty verdict without the challenged instruction. Petitioner does not quibble with the substantive instructions on his offenses of conviction or with the sufficiency of the evidence. But without attacking either of those two

grounds, Petitioner cannot show that the jury could not have returned the same verdict without the error. After all, without the challenged instruction, the jury would have received the exact same instruction on the substantive charges and the exact same evidence. Thus, the jury could have reached the exact same verdict. That is why this Court has made clear that “[p]roperly understood, the fundamental error test for jury instructions cannot be met where . . . there was no error in the jury instruction for the offense of conviction and there is no claim that the evidence at trial was insufficient to support that conviction.” *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019). “In such circumstances, one cannot plausibly claim that the conviction ‘could not have been obtained’ without the erroneous . . . instruction or that the error vitiated the basic validity of the trial.” *Id.*

That is particularly true here because the trial court was not required to declare a mistrial following the failed poll. *See Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997) (trial judge has discretion on when to declare a mistrial). On the contrary, the judge was “required to send the jury back[.]” *Moore*, 277 So. 3d at 1155; see Fla. R. Crim.

P. 3.450. Even without that rule, the trial court had options. It could have read a new full *Allen* charge. *Supra* Part I.B. Or it could have simply excused the jury to the deliberation room without instructing it to take any particular action, and then waited a reasonable amount of time to see if the issue resolved itself. *See McBurrows v. State*, 93 So. 3d 462, 464 (Fla. 4th DCA 2012); *Bouie v. State*, 540 So. 2d 925, 925 (Fla. 3d DCA 1989). Or it could have asked the jury to keep deliberating. *See Johnson v. State*, 572 So. 2d 957, 957–58 (Fla. 1st DCA 1990) (no error when judge told the jury to “continue deliberating after the jury had already been given a[n] . . . *Allen* charge”). Or it could have crafted a charge with additional protective language to guard against coercion. It could, for example, have told jurors that they should deliberate once more and that if there were still undecided after that effort, they would be dismissed and the case mistried. With any of those options, the jury could have returned an identical verdict without the purportedly erroneous charge. As a result, the error was not fundamental. *Knight*, 286 So. 3d at 151.

b. Regardless, the instruction is not the type of “egregious” error that is fundamental. *See Mendoza v. State*, 964 So. 2d 121, 133

(Fla. 2007) (noting that fundamental error is egregious error); *Holmes v. State*, 710 So. 2d 188, 191 (Fla. 1st DCA 1998) (noting that whether an *Allen* charge is fundamental error “will depend on the level of egregiousness” and concluding that technical error in giving *Allen* charge was not fundamental); *Roma v. State*, 785 So. 2d 1269, 1272–73 (Fla. 5th DCA 2001) (same); *McElrath*, 516 So. 2d at 276–77 (same). In this context, an error is egregious if it creates the “likelihood that the jury was actually improperly influenced . . . into rendering a verdict.” *Scoggins*, 726 So. 2d at 767.

Whatever can be said about the coercive effect of the challenged charge, it was not egregious. The trial judge did not demand a verdict, cajole or threaten a minority juror, or ask the jurors to reexamine their views. *Id.* at 768 (inquiry into jury’s numerical division, though error, was not fundamental error because “the judge’s comments were balanced, encouraging neither acquittal nor conviction” and the charge otherwise lacked manifestly coercive features). Absent those kinds of grave errors, the error in this charge was, at most, that it created a “perceived ambiguity” about the jury’s role. *State v. Wilson*, 686 So. 2d 569, 570 (Fla. 1996). But that type of minor error is not

fundamental. *Id.*

Indeed, the charge was at most a technical error. Under Rule 3.450, the trial judge was required to send the jury back to the jury room for further consideration following the failed poll. In doing that, the judge had to tell the jury something—at a minimum, he had to tell them to leave the courtroom and return to the jury room. It was hardly egregious to also ask the jury to fill out a verdict form if it could, or otherwise to let him know. T. 2296.

What is more, the substantial evidence of guilt belies any claim that the challenged charge reached down to the validity of the trial itself. *See Doorbal v. State*, 837 So. 2d 940, 956 (Fla. 2003) (declining to find fundamental error considering “overwhelming amount of un rebutted evidence”). “The only issue for the jury to decide was whether” Petitioner “was acting in self-defense at the time of the shooting.” Init. Br. 2 n.1; T. 2064–65, 2081.

That issue was not close. To create a *prima facie* case of self-defense, Petitioner needed to show that he “reasonably believed it was necessary to use force to prevent death or great bodily harm.” *Williams v. State*, 261 So. 3d 1248, 1252 (Fla. 2019). More than that,

Petitioner needed to show that the danger he perceived was “imminent.” *Linsley v. State*, 101 So. 273, 275 (Fla. 1924); *see also* § 776.012(2), Fla. Stat.; § 776.013(1)(b), Fla. Stat. The evidence showed the opposite. Petitioner chased Fleurant and shot at least 16 times. T. 781, 1876–77. Petitioner testified that he did not think his life was in imminent danger during the chase. T. 1877. During the shooting, Fleurant fell down, tried to shield his face with his hands, and pleaded, saying “Willie I’m good.” T. 1879. Petitioner shot him twice in the head anyway. T. 1879. During all that, stray bullets hit two more people. T. 1170–71. Given that Petitioner shot at least 16 times, including twice at a surrendered, pleading victim, and admitted that he did not think he was in imminent danger, the evidence against self-defense was overwhelming.

Finally, Petitioner’s fundamental-error theory would create untenable results. Petitioner appears to argue that the trial court should have declared a mistrial, although he never requested one. Init. Br. 19. When a defendant does not request a mistrial, double jeopardy generally bars retrial unless the mistrial was manifestly necessary. *See Turner v. State*, 37 So. 3d 212, 221 (Fla. 2010); *State*

ex rel. Williams v. Grayson, 90 So. 2d 710, 713 (Fla. 1956). That is a high hill to climb—the State bears the burden of showing necessity, and doubts are resolved in a defendant’s favor. *Thomason v. State*, 620 So. 2d 1234, 1237 (Fla. 1993). Petitioner’s theory would allow defendants to exploit the manifest-necessity doctrine. When faced with a potentially coercive charge to break a deadlocked jury, defense counsel could sit silently. If the judge gives the charge, Petitioner would say the error is fundamental, so the defendant would win on appeal. If the judge instead declares a mistrial, defendants can claim that the mistrial was unnecessary because the charge should have been given. Petitioner’s fundamental-error theory thereby creates a “heads I go free because my guilty verdict is overturned, tails I go free because of double jeopardy” situation. This possibility of “strategic gamesmanship” is itself reason to decline to find fundamental error. *Gonzalez v. State*, 136 So. 3d 1125, 1148 (Fla. 2014).

In all, Petitioner cannot show fundamental error. His fundamental-error theory is foreclosed by this Court’s cases and, even if he had pressed an alternative theory, any error did not reach down into the validity of the verdict.

C. Petitioner's new theory that he was entitled to a personal colloquy is waived and meritless.

To circumvent these difficulties, Petitioner invents a new constitutional rule, arguing that before a trial court engages in conduct later found to be unduly coercive, the court must get the defendant's personal, on-the-record, agreement. Init. Br. 22–28. This Court should not adopt that rule.

1. To begin, Petitioner never asked for a personal colloquy below. He did not raise the issue in the trial court, T. 2293–94, nor did he claim that the lack of a colloquy was error in the district court. Accordingly, this theory is waived. *Tillman v. State*, 471 So. 2d 32, 35–36 (Fla. 1985).

2. In any event, Petitioner's theory that "[a]ny waiver of the right to an uncoerced verdict must be made personally by the defendant" (Init. Br. 22) fails as a matter of precedent, historical practice, first principles, and workability.

a. First with precedent. In *Bryan*, the trial judge gave an *Allen* charge when he learned that the jury was not close to a verdict. 290 So. 2d at 483. After the jury convicted, the defendant challenged the *Allen* charge. *Id.* This Court rejected the claim on the merits, finding

that the charge was not unduly coercive. *Id.* at 484. The Court then turned to an alternative holding—waiver. As it explained, the defendant had not moved for a mistrial on the *Allen* ground. *Id.* That foreclosed relief because “[c]hoices of ‘tactics’ are for the trial lawyer[,] but [the client] becomes bound by the result of the choice he selects.” *Id.* If the defendant in *Bryan* was bound by his lawyer’s decision not to contest an *Allen* charge, then Petitioner must also be bound to his lawyer’s identical decision.

b. This Court’s precedent is consistent with history. The idea that an anti-deadlock charge could be unduly coercive dates to at least the 1850s. *Allen*, 164 U.S. at 501 (deriving the language of an *Allen* charge from an 1851 case). Yet Petitioner cites not a single opinion applying his personal-waiver rule issued in the roughly 170 years since. On the contrary, since its inception, courts have permitted counsel to waive a coercion objection to an anti-deadlock charge.⁴ And that practice has been mirrored in Florida. *E.g.*, *Tejeda-Bermudez v. State*, 427 So. 2d 1096, 1097 (Fla. 3d DCA 1983);

⁴ *E.g.*, *United States v. Handy*, 454 F.2d 885, 890 (9th Cir. 1971); *United States v. Green*, 429 F.2d 754, 756 n.2 (D.C. Cir. 1970); *United States v. Furlong*, 194 F.2d 1, 3–4 (7th Cir. 1952).

Armstrong v. State, 364 So. 2d 1238, 1238 (Fla. 1st DCA 1977). That apparently no court in over 170 years of practice has endorsed Petitioner's rule suggests that it is incorrect.

c. And true to history, Petitioner's rule fails as a matter of first principles. The "general" rule is "that a client is bound by the acts of his attorney performed within the scope of the latter's authority." *Jones v. State*, 484 So. 2d 577, 579 (Fla. 1986). That rule comes from agency law: a principal ordinarily is bound by the acts of her agent. *E.g., Thomkin Corp. v. Miller*, 24 So. 2d 48, 49 (Fla. 1945). The rule permits efficient case management; "the role of defense counsel necessarily involves a number of tactical decisions and procedural determinations inevitably impacting on a defendant's constitutional rights," and thus, it would simply be impossible to get the client's on-the-record views for each decision. *See Jones*, 484 So. 2d at 579.

To be sure, this Court has instructed that attorney waivers are insufficient for some rights. But often, those personal-waiver rules are grounded in written rules of procedure. Fla. R. Crim. P. 3.260; *State v. Upton*, 658 So. 2d 86, 87 (Fla. 1995). Outside of the

rulemaking context, this Court should refrain from disrupting normal rules of agency law by reading new rights to personal waiver into nebulous conceptions of due process. *See Gonzalez v. United States*, 553 U.S. 242, 256–58 (2008) (Scalia, J., concurring) (concluding that distinguishing between rights that require personal waiver and those that do not “derives from nothing more substantial than this Court’s say-so,” and therefore, arguing that “reasonable limits upon the right of agency in criminal trials” should “be governed by positive law, in statutes and rules of procedure”).⁵

But even if the Court were to indulge the project of identifying new, personal-waiver-only rights, this case would not fit the bill.

For one thing, the decision of whether to seek an *Allen* charge or instead a mistrial is a trial choice reserved for a lawyer, not a personal right reserved to the client. “[T]here is no constitutional right for hybrid representation at trial.” *Mora v. State*, 814 So. 2d 322, 328 (Fla. 2002). Thus, “when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the

⁵ A holding that personal waivers are not required would not insulate counsel waivers from review, but it would instead channel those waivers into ineffective assistance of counsel claims.

counsel the power to make binding decisions of trial strategy in many areas.” *Faretta v. California*, 422 U.S. 806, 820 (1975). Within that allocation, the client maintains the ultimate authority to make “certain fundamental decisions regarding the case, as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Puglisi v. State*, 112 So. 3d 1196, 1204 (Fla. 2013) (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (emphasis omitted)). Outside of those fundamental decisions, “[t]rial management is the lawyer’s province.” *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Thus, for example, whether to present a witness is a lawyer’s choice even in the face of the client’s objections. *Puglisi*, 112 So. 3d at 1205–07. The same is true for an *Allen* charge. Because the decision to pursue an *Allen* charge is a trial-management decision, it is subject to a lawyer’s ultimate discretion. *United States v. Burke*, 257 F.3d 1321, 1323 (11th Cir. 2001) (“Although a represented defendant does retain the absolute right to make limited choices for his case, neither the Supreme Court, nor this Court, has ever expanded the narrow class to include the choice of whether to accept a mistrial or to request an *Allen* charge.”); accord *United States v. Brown*, 765 F.

App'x 902, 906 (4th Cir. 2019); *State v. Medina*, 738 P.2d 1021, 1023 (Utah 1987), *abrogated on other grounds by State v. McNeil*, 365 P.3d 699 (Utah 2016). For these trial decisions entrusted to a lawyer, a personal-waiver rule would make little sense—if a lawyer can override the client, what is the purpose of the client's waiver?

Regardless, counsel waivers are appropriate in this context because “tactical decision[s]” about how to conduct trial are subject to counsel's waiver. *Armstrong*, 579 So. 2d at 735 n.1. Indeed, this Court has accepted counsel waivers even for rights personally entrusted to the client when the waiver relates to tactics. For example, although a client ultimately can choose to testify over counsel's objection, *Puglisi*, 112 So. 3d at 1204, a personal waiver of the right to testify is not required. *Torres-Arboledo v. State*, 524 So. 2d 403, 410–11 (Fla. 1988).

Just like the choice not to testify, the decision of whether to seek an additional *Allen* charge is a tactical one. When a jury deadlocks, a defendant must assess “the likelihood of conviction if deliberations continue and the likelihood of conviction at a retrial.” *Lane v. Lord*, 815 F.2d 876, 879 (2d Cir. 1987). Those considerations “depend not

only upon what is permissible under the rules of . . . procedure but also upon tactical considerations of the moment[.]” *Gonzalez*, 553 U.S. at 249. That type of tactical decision is best left to counsel’s waiver. *E.g.*, *State v. Singletary*, 549 So. 2d 996, 999 (Fla. 1989).

Petitioner’s cases are not to the contrary. Petitioner cites four rights requiring personal waiver: the right to a unanimous jury; the right to a jury; the right to a 6-person jury; and the right for a judge to be present at key stages of trial, Init. Br. 22–26; *but see Singletary*, 549 So. 2d at 998–99 (personal waiver not needed for judge to skip voir dire). Most of those rights involve the right to a properly structured jury, a personal right belonging to the client, and all four rights involve structural protections of the trial itself, not tactical decisions of how to conduct a trial.⁶

As this Court has made clear, that distinction matters. *Armstrong*, 579 So. 2d at 735 n.1. For one, structural protections,

⁶ To our knowledge, this Court has held only one non-structural, non-personal right to require a personal waiver: a capital defendant’s right to instruction on lesser-included charges. *Harris v. State*, 438 So. 2d 787, 797 (Fla. 1983). But even Petitioner does not press that right because this Court has limited it to the capital context. *Jones*, 484 So. 2d at 579.

because they relate to who decides guilt have pervasive effects on the trial, justifying the need for a personal waiver. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (justifying personal-waiver rule for guilty pleas by noting the number of other rights given up by the plea). Relatedly, structural protections are more likely than trial decisions to go “to the very heart of the adjudicatory process” because they determine the shape of the process itself. *Torres-Arboledo*, 524 So. 2d at 410. And finally, structural protections are more black and white: a defendant will know at the time of the waiver that she is entitled to a jury or a judge and will therefore know what she is waiving. The same is not true for contextual trial rights.

d. Petitioner elides this analysis by reframing the inquiry: to Petitioner, the question is whether the defendant consents to a coerced jury. But that framing assumes the premise—a coerced jury is the untenable result of a flawed *Allen* charge; it is not the error itself. That is not just academic: it is possible for a jury to be uncoerced (perhaps because it is uniquely hardy) even when a judge gives an unduly coercive charge. Asking whether a defendant waives a coerced jury is thus meaningless; the defendant will never know,

particularly at the outset, that the jury will be coerced. The only question that can be asked is whether to waive a challenge to trial court action that risks coercion. But that type of waiver, aimed at normal trial error, does not require personal, on-the-record assent.

Moreover, reframing the question as Petitioner does makes the inquiry unworkable. For one thing, how is a judge to know when to seek an on-the-record colloquy? Claims of coercion do not come only from supplemental charges—sometimes they come from waiting too long before giving a charge, *Washington v. State*, 758 So. 2d 1148, 1152 (Fla. 4th DCA 2000), or keeping deliberations going instead of declaring a mistrial. *McBurrows*, 93 So. 3d at 463–64. In those cases, Petitioner provides no guidance on when a judge must hold a colloquy.

And even then, what would the colloquy consist of? It would border on meaningless to ask the defendant whether she consents to a coerced jury (who would when so framed). It would be equally unhelpful to ask the defendant to consent to the judge's specific plan of action. Because the decision to accept an *Allen* charge is an uncertain one, defendants “could not . . . be[] expected to have . . .

significant input” on the question. *Singletary*, 549 So. 2d at 999; see also *United States v. Washington*, 198 F.3d 721, 724 (8th Cir. 1999) (explaining that the decision to request a mistrial “does not involve a choice that is as easily comprehensible to a lay person”). It would thus serve “no useful purpose” to demand a colloquy each time a trial judge takes a step that could later be impugned as coercive. *Jones*, 484 So. 2d at 579.

Altogether then, Petitioner’s new-found right to a personal colloquy in cases like this one is not supported by history, precedent, first principles, or practical effect. That leaves Petitioner bound by his counsel’s invited error (or waiver).

CONCLUSION

This Court should hold that there was no error. Alternatively, this court should approve the Third District's holding that any error was invited.

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains fewer than 13,000 words.

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