

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1083

WILEME BAPTISTE,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS.....	ii
INTRODUCTION	1
ARGUMENT	2
THE TRIAL COURT COMMITTED FUNDAMENTAL, PER SE REVERSIBLE ERROR BY GIVING THE JURY AN IMPROPER MODIFIED ALLEN CHARGE, RESULTING IN A COERCED VERDICT THAT COULD NOT BE WAIVED BY COUNSEL’S AGREEMENT TO THE INSTRUCTION.....	1
A. The Third District Court of Appeal correctly examined the totality of the circumstances and concluded that the trial court coerced the jury into reaching a verdict.....	2
B. Because juror coercion goes to the heart of our adjudicatory system and violates a defendant’s fundamental constitutional right to a fair trial and an impartial jury, this Court should conclude that a waiver of the right to an uncoerced verdict must be made personally by the defendant and cannot be made by defense counsel.....	10
C. This Court should reject the Respondent’s arguments that the coerced verdict in this case was an invited error or was waived because it was not fundamental.....	14
CONCLUSION	19
CERTIFICATE OF SERVICE.....	20

CERTIFICATE OF COMPLIANCE	22
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TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Armstrong v. State</i> , 364 So. 2d 1238 (Fla. 1st DCA 1997)	12, 13
<i>Armstrong v. State</i> , 579 So. 2d 734 (Fla. 1991)	15
<i>Baptiste v. State</i> , 306 So. 3d 306 (Fla. 3d DCA 2020)	4
<i>Blanding v. State</i> , 298 So. 3d 712 (Fla. 1st DCA 2020)	9
<i>Cogmon v. State</i> , 338 So. 2d 562 (Fla. 1st DCA 1976)	7
<i>Colbert v. State</i> , 569 So. 2d 433 (Fla. 1990)	15
<i>Dixon v. State</i> , 603 So. 2d 86 (Fla. 5th DCA 1992)	9
<i>Flanning v. State</i> , 597 So. 2d 864 (Fla. 3d DCA 1992)	2, 13
<i>Gilvin v. State</i> , 418 So. 2d 996 (Fla. 1982)	10
<i>Lowe v. State</i> , 259 So. 3d 23 (Fla. 2018)	15
<i>Monforto v. State</i> , 28 So. 3d 65 (Fla. 2d DCA 2009)	9
<i>Nobles v. State</i> , 786 So. 2d 56 (Fla. 4th DCA 2001)	13

<i>Pope v. State</i> , 441 So. 2d 1073 (Fla. 1983).....	15
<i>Reid v. State</i> , 732 So. 2d 1171 (Fla. 3d DCA 1999).....	13
<i>Rodriguez v. State</i> , 462 So. 2d 1175 (Fla. 3d DCA 1985).....	10
<i>Rubi v. State</i> , 952 So. 2d 630 (Fla. 4th DCA 2007)	9, 11
<i>State v. Bryan</i> , 290 So. 2d 482 (Fla. 1974).....	12, 13, 15
<i>Tejeda-Bermudez v. State</i> , 427 So. 2d 1096 (Fla. 3d DCA 1983).....	12, 13
<i>Thomas v. State</i> , 748 So. 2d 970 (Fla. 1999).....	9
<i>United States v. Dorsey</i> , 865 F.2d 1275 (D.C. Cir. 1989).....	8
<i>United States v. Furlong</i> , 194 F.2d 1 (7th Cir. 1952)	12, 13
<i>United States v. Green</i> , 429 F.2d 754 (D.C. Cir. 1970).....	12
<i>United States v. Handy</i> , 454 F.2d 885 (9th Cir. 1971)	12
<i>United States v. McDonald</i> , 759 F.3d 220 (2d Cir. 2014).....	8
<i>Warren v. State</i> , 498 So. 2d 472 (Fla. 3d DCA 1986).....	9
<i>Washington v. State</i> , 758 So. 2d 1148 (Fla. 4th DCA 2000)	9

Rules

Florida Rule of Criminal Procedure 3.450 6, 7

ARGUMENT

THE TRIAL COURT COMMITTED FUNDAMENTAL, PER SE REVERSIBLE ERROR BY GIVING THE JURY AN IMPROPER MODIFIED *ALLEN* CHARGE, RESULTING IN A COERCED VERDICT THAT COULD NOT BE WAIVED BY COUNSEL'S AGREEMENT TO THE INSTRUCTION.

The issue in this case is whether trial counsel could waive Mr. Baptiste's right to an uncoerced verdict by agreeing to the final instruction for continued deliberations, after the jury had repeatedly indicated its division with a sole holdout juror. The issue is *not* whether the trial judge's final charge coerced the jury into reaching a verdict; the Third District Court of Appeal correctly concluded that it did based on the totality of the circumstances present in this case.

Prior to the final instruction at issue, the jury had three times indicated deadlock, and twice asked to replace the holdout juror. The judge had responded that they should continue to deliberate, and also read a full *Allen* charge. But after the standard *Allen* charge, the poll revealed that juror number five still did not agree with the verdict. At that point, Judge Zilber was required to declare a mistrial to avoid coercion, unless the defendant personally waived

his fundamental right to an uncoerced verdict and agreed to another *Allen* charge. That did not happen. Instead, the final instruction by the judge, directing the jurors to fill out a new verdict form, resulted in an impermissibly coerced conviction.

The Respondent misapprehends the issue, arguing that the giving of more than one *Allen* charge does not automatically constitute error. But that is not Petitioner's claim. Rather, Mr. Baptiste asks this Court to conclude that where the totality of the circumstances demonstrate that a jury was coerced into reaching a verdict, fundamental error has occurred. This error, like the right to a unanimous verdict examined in *Flanning v. State*, 597 So. 2d 864 (Fla. 3d DCA 1992), may not be waived by counsel.

A. The Third District Court of Appeal correctly examined the totality of the circumstances and concluded that the trial court coerced the jury into reaching a verdict.

The Respondent first argues that the trial judge's instruction to the jury after the failed poll was not coercive. Focusing on the moment and language of the final instruction, Respondent completely ignores the Third District's findings below, and the totality of the circumstances preceding the final charge.

The final instruction, however, must be examined by this Court in the context of what took place prior:

- Merely a few hours into their deliberations, the jurors sent the court a note asking if they could replace a juror so that they could reach a unanimous verdict. The judge said no. (T. 2212–15, R. 757, 851).
- Their second day of deliberations, the jury sent another note indicating again they could not reach a verdict. (T. 2256; R. 902, 912).
- The judge instructed the jury to “continue to deliberate and continue reviewing the evidence so that you can reach a unanimous decision.” (T. 2256–59; R. 902, 912).
- An hour later, the jurors sent a third note stating that they had reached a unanimous decision except for the holdout and that the holdout agreed to step aside so the jury could render a unanimous five-person verdict. (T. 2265–66; R. 904).
- The judge told the jurors the holdout could not be replaced and that they could not render a five-person verdict. The judge then read the full *Allen* charge. (T. 2266–71, 2282–89; R. 904).
- About two hours later, the jury reported that it had reached a unanimous verdict, and the clerk announced that they had found Mr. Baptiste guilty as charged. But the poll revealed that juror number five did not agree with the verdict. (T. 2289–93; R. 908–11).
- At this point, the judge sent the jury back into the jury room with instructions to fill out a new set of verdict forms. (T. 2294–96).
- Minutes later the jury unanimously found Mr. Baptiste guilty of the manslaughter offenses. (T. 2298–2300; R. 905. 923–26).

Examining the totality of these circumstances, the Third District Court of Appeal properly determined that the final act of sending the jury back to fill out new verdict forms was coercive. *Baptiste v. State*, 306 So. 3d 306, 309 (Fla. 3d DCA 2020). In doing so, the court noted that “it is clear that under a totality of the circumstances analysis, two or more consecutive Allen (or modified) charges provide sufficient indicia of coercion, particularly where the jury has repeatedly indicated its division with a sole holdout.” *Id.* at 308–09).

The Third District was correct. It is hard to imagine a more coercive situation than this. On three separate occasions before the final instruction, the majority indicated deadlock and sought to replace the holdout. When the judge told the jurors that juror replacement was not an option, and delivered the full *Allen* charge, the holdout relented and agreed to convict Mr. Baptiste as charged. But when the holdout was taken out of the isolated jury room and brought back into the supervised courtroom for pronouncement of this verdict and polling, he stated that he did not in fact agree with the verdict. At that point, the trial judge should have done what he promised to do if the jury could not reach a unanimous verdict –

discharge them and declare a mistrial – rather than send the jury back to again reconsider their position and fill out another verdict. The totality of these circumstances show that the jury would not have rendered the final verdict if the judge had not sent them back to the jury room to fill out new verdict forms, as the Third District recognized.

In support of its argument that no error occurred, Respondent offers five reasons as to why the final charge was not coercive. As noted above, these arguments not only ignore the Third District's conclusion that the totality of the circumstances demonstrated coercion, but they also are refuted by the record, misapprehend Mr. Baptiste's argument, and are meritless.

First, Respondent argues that the parties' failure to object somehow shows that there were no coercive circumstances. It is unnecessary to speculate about the parties' perceptions when the totality of the record as it exists for this Court's review establishes coercion.

Second, Respondent argues that because the jury was instructed on its proper role and asked to review the evidence and substantive jury instructions, they were not coerced. The majority

may have asked to review the evidence to attempt to convince the holdout juror, or vice versa. Either way, this request by the jury in no way demonstrates that the ultimate verdict was uncoerced. Further, the Respondent maintains that the jurors' early failure to agree does not prove that they continued to be deadlocked later, and that the failed poll did not demonstrate deadlock. This again ignores the totality of the circumstances, *i.e.*, the jurors' repeated indications of deadlock and persistent disagreement by the single holdout juror, which clearly demonstrated deadlock preceding the final charge.

Third, Respondent argues that [Florida Rule of Criminal Procedure 3.450](#) required the trial court to send the jury back for further deliberations after the juror dissented during polling. But the Respondent fails to recognize that this rule must be read in conjunction with the cases prohibiting a coerced verdict. The rule addresses only a failed poll; it does not address what a trial court must do when a juror dissents during polling *after* the jury had repeatedly indicated it cannot come to a unanimous verdict. When a court has already given *Allen* charges due to the jury's multiple indications of deadlock and told the jury it will discharge them and

declare a mistrial if they cannot agree, and *then* a juror dissents during a poll, the trial court must grant the mistrial to avoid undue coercion. See [Cogmon v. State, 338 So. 2d 562, 563 \(Fla. 1st DCA 1976\)](#) (citing [rule 3.450](#) and concluding that trial court was required to grant mistrial where juror dissented during poll after trial court had given *Allen* charge).

Fourth, Respondent looks to the language of the final charge in isolation and argues it did not expressly require a verdict.¹ Again, this Court must look to the full context in which this instruction was given. Each time this jury indicated they could not reach a unanimous verdict they were directed to try again. The failed poll demonstrated that the jury was still hung even after receiving the full *Allen* charge, and the court nevertheless failed to declare a mistrial and discharge the panel. Considering all the previous events along with the final instruction, any reasonable juror would

¹ The court's final instruction was as follows:

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 we'll bring you back out here. (T. 2296).

conclude under these circumstances that they had to reach a unanimous verdict.

The Respondent's reliance on *United States v. McDonald*, 759 F.3d 220 (2d Cir. 2014) and *United States v. Dorsey*, 865 F.2d 1275 (D.C. Cir. 1989) to support its claim that the charge was not coercive is unpersuasive. Neither of those cases involved a totality of coercive circumstances as in this case. Those cases each involved sending the jury back for further deliberations after merely one failed poll, without any previous deadlock and *Allen* charges.

Fifth, the fact that the majority of the jurors moved from second-degree murder to manslaughter does not rule out a claim of coercion but instead supports it. It is likely that the holdout juror the majority had tried to expel was finally pressured to abandon his not-guilty vote, and that all the jurors abandoned conscientiously held beliefs to reach a compromise verdict in the middle of manslaughter. Respondent's suggestion that perhaps "the entire panel was simply confused when it previously announced a verdict" and made a clerical error is meritless, inconsistent with the totality of the circumstances, and rebutted by the poll.

In sum, this Court should reject the Respondent's arguments that the final charge was not coercive because the totality of the circumstances clearly demonstrates otherwise, and the Third District correctly settled this issue below.

As to the Respondent's argument that giving multiple *Allen* charges is not per se fundamental error, that is not Mr. Baptiste's assertion. As noted in the initial brief, the standard is whether, under the totality of the circumstances, the trial court's actions were coercive. See *Thomas v. State*, 748 So. 2d 970, 976 (Fla. 1999); *Blanding v. State*, 298 So. 3d 712, 714 (Fla. 1st DCA 2020); *Monforto v. State*, 28 So. 3d 65, 68 (Fla. 2d DCA 2009); *Washington v. State*, 758 So. 2d 1148, 1152 (Fla. 4th DCA 2000). Though the number of *Allen* charges given by the court is certainly a relevant factor in the analysis, it is not the determinative factor. When the totality of the circumstances shows that the trial court coerced the jury into reaching a verdict, fundamental error has occurred. See *Monforto*, 28 So. 3d at 68–69; *Rubi v. State*, 952 So. 2d 630, 635 (Fla. 4th DCA 2007); *Dixon v. State*, 603 So. 2d 86, 87–88 (Fla. 5th DCA 1992); *Warren v. State*, 498 So. 2d 472, 477–78 (Fla. 3d DCA

1986); *Rodriguez v. State*, 462 So. 2d 1175, 1176–77 (Fla. 3d DCA 1985).

The Respondent’s reference to cases from other circuits and states which hold that multiple *Allen* charges are neither per se coercive nor fundamental error misses the point. Those cases are not inconsistent with Mr. Baptiste’s argument. Petitioner recognizes that there may be cases where a trial court gives more than one *Allen* charge, but the totality of the circumstances nevertheless demonstrates that the jury was not unduly pressured into reaching a verdict. See, e.g., *Gilvin v. State*, 418 So. 2d 996, 999 (Fla. 1982). But that was not what happened here.

B. Because juror coercion goes to the heart of our adjudicatory system and violates a defendant’s fundamental constitutional right to a fair trial and an impartial jury, this Court should conclude that a waiver of the right to an uncoerced verdict must be made personally by the defendant and cannot be made by defense counsel.

Because the Third District Court of Appeal correctly concluded that the totality of the circumstances showed that the jury was coerced into reaching a verdict, the only issue this Court must resolve is whether trial counsel’s agreement to the improper final charge waived the issue for appeal. Indeed, that is the basis of this

Court's conflict jurisdiction. The Third District's holding that Mr. Baptiste's counsel waived the error directly conflicts with the Fourth District's decision in [Rubi, 952 So. 2d at 635](#), which holds that trial counsel's affirmative request for a coercive *Allen* charge did not waive the issue for appeal.

Rubi correctly recognizes not only that a coerced verdict deprives an accused of his right to a fair trial, but also that a defendant's right to such a trial and an uncoerced verdict is such a foundational right in our justice system that it cannot be waived by defense counsel, even when counsel affirmatively requests the erroneous instruction. [Rubi, 952 So. 2d at 635](#). Implicit in *Rubi*'s holding is that any waiver of the right to an uncoerced verdict must be made personally by the defendant and cannot be made by counsel.

The Respondent argues that because Mr. Baptiste never raised the issue of a personal waiver in the trial court or the Third District, the issue is waived for this Court's review. Of course, had trial counsel advocated for a personal waiver in the trial court, this case would not be before this Court now. In the Third District, counsel specifically relied on *Rubi* and argued that the trial court was

required to declare a mistrial here regardless of counsel's request for the final instruction. The merits of this issue are properly before this Court.

So too should this Court reject the Respondent's arguments opposing a personal waiver. The Respondent cites several cases which found that counsel waived an *Allen* instruction issue by failing to object to the anti-deadlock charge. See [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); [State v. Bryan](#), 290 So. 2d 482, 484 (Fla. 1974); [Tejeda-Bermudez v. State](#), 427 So. 2d 1096, 1097 (Fla. 3d DCA 1983); [Armstrong v. State](#), 364 So. 2d 1238, 1238 (Fla. 1st DCA 1997). Significantly, none of those cases involved coercive circumstances and therefore none address the issue of whether trial counsel can waive a defendant's right to an uncoerced verdict by agreeing to an improper *Allen* charge. See [Handy](#), 454 F.2d at 889–90 (trial counsel agreed jury should be given one *Allen* charge after it indicated one time it was unable to reach a verdict, no repeated indications of deadlock or attempts to expel dissenting holdout); [Green](#), 429 F.2d at 756 n.2 (trial counsel agreed jury should be

given *Allen* charge as part of the initial charge to the jury but where jury never indicated it was deadlocked); *Armstrong*, 364 So. 2d at 1238 (same); *Furlong*, 194 F.2d at 3–4 (trial counsel failed to object to one line of *Allen* charge given after jury indicated it was deadlocked, but “record . . . persuasive that the jury was in no wise coerced, influenced or biased”); *Tejada-Bermudez*, 427 So. 2d at 1097–98 (same); *Bryan*, 290 So. 2d at 484 (trial counsel failed to object when trial court gave *Allen* charge after learning jury was not close to reaching a verdict, but jury had not previously indicated it was deadlocked or sought to replace holdout). The fact that no court has addressed personal waiver in this context merely suggests that there has been no case involving a modified *Allen* charge where the totality of circumstances established coercion.

Moreover, in cases involving waiver of the right to a unanimous verdict, a right practically identical to the right to an uncoerced verdict, Florida courts have required a personal waiver. See *Flanning*, 597 So. 2d 864; *Nobles v. State*, 786 So. 2d 56 (Fla. 4th DCA 2001); *Reid v. State*, 732 So. 2d 1171 (Fla. 3d DCA 1999). These cases recognize that though waivable, the right to a unanimous verdict is of such importance and is so inherent in an

accused's right to a fair trial that any waiver of that right must be made personally by the defendant.

Flanning, *Nobles*, and *Reid*, which were not addressed by the Respondent, implicitly recognize that requiring personal waiver of such a fundamental right does not offend principles of agency law as the Respondent suggests. Like the right to a unanimous verdict, the right to an uncoerced verdict is fundamental to our system of justice, and therefore structural, rather than "normal trial error" or merely "tactical" as the Respondent argues. Mr. Baptiste should not be precluded from challenging the coerced verdict that irreparably deprived him of a fair trial simply because his trial attorney agreed that the jury should keep deliberating under these uniquely coercive circumstances.

C. This Court should reject the Respondent's arguments that the coerced verdict in this case was an invited error or was waived because it was not fundamental.

The Respondent's arguments that any error in this case was invited or waived should likewise be rejected.

In arguing that Mr. Baptiste invited the error by agreeing to the charge, the Respondent does not even acknowledge *Rubi* let alone attempt to argue that it is distinguishable from this case or

wrongly decided. Instead, Respondent relies on cases that discuss the invited error doctrine in completely different contexts not involving coerced verdicts. *Lowe v. State*, 259 So. 3d 23, 50 (Fla. 2018) (no fundamental error where trial court sent letter not in evidence into jury room during deliberations because counsel acquiesced to the letter's presence in jury room); *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991) (defense counsel's affirmative request for limited instruction on excusable homicide waived any claim of error in the instruction); *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983) (defense counsel's statement that he had no reason to doubt witness' unavailability precluded defendant from challenging admission of witness' videotaped deposition on appeal).

The Respondent next argues that because Mr. Baptiste did not object to the charge at trial, he can only succeed now if the charge constituted fundamental error, and it did not. In support of this claim, the Respondent first argues that this Court in *Bryan*, 290 So. 2d at 483 and *Colbert v. State*, 569 So. 2d 433, 435 (Fla. 1990) rejected the view that *Allen* charge error is per se fundamental. Again, Mr. Baptiste is not arguing that *Allen* charge error is per se fundamental. Mr. Baptiste maintains that when the totality of the

circumstances demonstrate that the court coerced a verdict – either by giving multiple *Allen* charges despite ongoing juror deadlock, using coercive language in giving an *Allen* charge, or by otherwise placing undue pressure on the jury to return a verdict – fundamental error has occurred.

The Respondent next argues that any error was not fundamental because the State could have achieved a guilty verdict without the challenged instruction. The Respondent relies on the accuracy of the substantive instructions and legal sufficiency of the evidence to support this claim. Taken to its logical conclusion, the Respondent's argument means that so long as the judge correctly instructs the jury on the law and so long as the State presents legally sufficient evidence, the judge can order the jury to engage in marathon deliberations without risking reversal due to a coerced verdict. This Court must reject this argument.

Similarly, the record demonstrates that the final charge in this case caused the ultimate compromise verdict. Time and time again, the jury told the court it could not reach a verdict. The only reason they came to their final verdict was because the judge sent them back to the jury room to reconsider their initial verdict after the

failed poll. The final charge was not a technical error, it was the but-for cause of the final verdict. For the Respondent to suggest otherwise is patently inconsistent with the record.

Finally, the Respondent's claim that Mr. Baptiste's theory encourages strategic gamesmanship is meritless. If the judge gives a potentially coercive charge after conducting a colloquy with the defendant explaining the risks, and the defendant agrees to the charge, then he or she would be foreclosed from challenging the subsequent verdict on appeal. If the judge instead declared a mistrial, no defendant would be able to successfully claim that a mistrial was not manifestly necessary under circumstances such as those present in this case.

Mr. Baptiste was deprived of his fundamental right to a fair trial because the trial court erroneously coerced the jury into reaching a verdict. Issues involving juror coercion go to the heart of our adjudicatory system and implicate a defendant's fundamental constitutional right to a fair trial and an impartial jury. Given that a coerced verdict violates these sacrosanct rights, this Court must conclude that the coerced verdict which resulted from the trial court's undue pressure in this case was fundamental, per se

reversible error that was not waived by trial counsel's agreement to the erroneous instruction.

CONCLUSION

Based on the foregoing facts, authorities, and arguments, Mr. Baptiste respectfully requests that this Court quash the decision of the Third District Court of Appeal and remand this case with instructions that he receive a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Bookman Old Style. Undersigned counsel further certifies that this brief complies with the word count limit requirements and contains 3,653 words.

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