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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,627

JAMES SCOGGINS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

POINT I 7

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE ALLEGED ERROR OF INQUIRING INTO THE NUMERICAL DIVISION OF THE JURY WAS NOT REVERSIBLE ERROR; NONETHELESS THE ALLEGED ERROR WAS HARMLESS. 7

POINT II 28

THE TRIAL COURT'S REINSTRUCTION OF "EXCLUSIVE" POSSESSION WAS CORRECT. 28

CONCLUSION 38

CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

FEDERAL CASES

Allen v. U.S., 164 U.S. 492 (1896) 15

Beale v. U.S., 263 F.2d 215 (5th Cir. 1959) 10

Brasfield v. United States, 272 U.S. 448 (1926) 7

Bryan v. Wainwright, 511 F.2d 644 (5th Cir.), cert. denied, 423 U.S. 837 (1975) 11

Butler v. U.S., 254 F.2d 875 (5th Cir. 1958) 10

Carlton v. U.S., 395 F.2d 10 (9th Cir. 1968), cert. denied, 393 U.S. 1030 11

Jimenez v. Myers, 12 F.3d 1474 (9th Cir. 1993) 10

Locks v. Sumner, 703 F.2d 403 (9th Cir.1983) 23

Lowenfiled v. Phelps, 484 U.S. 231 (1988) 8

U.S. v. Mack, 249 F.2d 321 (7th Cir. 1957) 10

United States v. Brokemond, 959 F.2d 206 (11th Cir. 1992) . 26

United States v. Walther, 867 F.2d 1334 (11th Cir. 1989) . . 32

Williams v. Parke, 741 F.2d 847 (6th Cir.1984), cert. denied, 470 U.S. 1029, 105 S. Ct. 1399, 84 L. Ed. 2d 787 (1985)23

STATE CASES

Armstrong v. State, 364 So. 2d 1238 (Fla. 1st DCA 1977), cert. denied, 373 So. 2d 456 (Fla.1979) 16

Bell v. State, 311 So. 2d 179 (Fla. 1st DCA 1975) 20

Blair v. State, 22 Fla. L. Weekly S517 (Fla. August 28, 1997) 21

Booker v. State, 514 So. 2d 1079 (Fla. 1987) 36

Brown v. State, 404 So. 2d 861 (Fla. 4th DCA 1981) 22

Castor v. State, 365 So. 2d 701 (Fla. 1978) 15

Colbert v. State, 569 So. 2d 433 (Fla. 1990) 27

Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, cert. denied, ___U.S. ___, 114 S. Ct. 321, 126 L.Ed. 2d 267 (1993) 32

Coley v. State, 626 So. 2d 1118 (Fla. 3d DCA 1993) 18

Crump v. State, 622 So. 2d 963 (Fla. 1993) 18

Darty v. State, 161 So. 2d 864 (Fla. 2d DCA), cert. denied, 168 So. 2d 147 (Fla. 1964) 35

Dunford v. State, 614 P.2d 1115 (Okla.Crim.App.1980) 11

Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 485 U.S. 924, 108 S. Ct. 1094, 99 L. Ed. 2d 256 (1988) . 32

Evans v. State, 303 So. 2d 68 (Fla. 3d DCA 1974) 26

Farrow v. State, 573 So. 2d 161 (Fla. 4th DCA 1990) 15

Green v. Ed Ricke and Sons, Inc., 438 So. 2d 25 (Fla. 3d DCA 1983) 17

Gunsby v. State, 574 So. 2d 1085 (Fla. 1991), cert. denied, 502 U.S. 43 16

Heddleson v. State, 512 So. 2d 957 (Fla. 4th DCA 1987) . . . 22

Henry v. State, 359 So. 2d 864 (Fla. 1978) 32

Hernandez v. State, 323 So. 2d 318 (Fla. 3d DCA 1975) . . . 26

Huff v. State, 569 So. 2d 1247 (Fla. 1990) 33

Huffaker v. State, 168 S.E.2d 895 (Ga. Ct. App. 1969) . . . 13

Jones v. State, 92 So. 2d 261 (Fla.1956) 23

Kiley v. State, 356 So. 2d 328 (Fla. 4th DCA 1978) 21

Kilgore v. State, 688 So. 2d 895 (Fla.1996) 21

Lowe v. State, 500 So. 2d 578 (Fla. 4th DCA 1986) 32

McElrath v. State, 516 So. 2d 276 (Fla. 2d DCA 1987) 17

McKinney v. State, 640 So. 2d 1183 (Fla. 2d DCA 1994) 15

Nelson v. State, 438 So. 2d 1060 (Fla. 4th DCA 1983) 26

People v. Carter, 68 Cal. 2d 810, 69 Cal. Rptr. 297, 442 P.2d 353 (1968) 12

People v. Gainer, 19 Cal. 3d 835, 139 Cal. Rptr. 861, 566 P.2d 997 (1977) 12

Pope v. State, 441 So. 2d 1073 (Fla. 1983) 16

Rodriguez v. State, 462 So. 2d 1175 (Fla. 3d DCA 1985) 20

Rodriguez v. State, 559 So. 2d 678 (Fla. 3d DCA 1990) 2

Sayan v. State, 381 So. 2d 363 (Fla. 4th DCA 1980) 16

Scoggins v. State, 691 So. 2d 1185 (Fla. 4th DCA 1997) 2, 13, 24

Sears Roebuck & Company v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1983) 17

Sharplin v. State, 330 So. 2d 591 (Miss. 1976) 8, 9, 12

Shepard v. State, 659 So. 2d 457 (Fla. 1995) 36

Smiley v. State, 641 So. 2d 976 (Fla. 4th DCA 1994) 35

State v. Bryan, 290 So. 2d 482 (Fla.1974) 23

State v. DiGuilio, 491 So. 2d 1129 (Fla.1986) 21

State v. Jones, 641 P.2d 708 (Wash. 1982) 13

State v. Keaulana, 784 P.2d 328 (Haw. 1989) 13

State v. Morris, 476 S.W.2d 485 (Mo. 1971) 13

State v. Odom, 682 S.W.2d 445 (Tex. Ct. App. 1984) 13

State v. Rickerson, 625 P.2d 1183 (N.M. 1981) 13

State v. Schmburge, 344 So. 2d 997 (La. 1977) 13, 15

Sullivan v. State, 303 So. 2d 632 (Fla. 1974) 16

Tejeda-Bermudez v. State, 427 So. 2d 1096 (Fla. 3d DCA 1983) 16

Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986) . . . 16, 23

MISCELLANEOUS

§ 924.051(7), Fla. Stat. (Supp. 1996) 22, 35

§ 924.051(3), Fla. Stat. (Supp. 1996) 22

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the following symbols will be used:

"R" = Record on appeal, including the transcript of trial;

"SR" = Supplemental record on appeal.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for purposes of this appeal, subject to the following additions, corrections, and/or clarifications:

The fourth district affirmed the petitioner's conviction, holding that inquiring into the numerical division of the jury after being informed that the jury was at an impasse was error. The fourth district also found that the error was not preserved by a contemporaneous objection, that the error was not fundamental, and that it was harmless. Scoggins v. State, 691 So. 2d 1185 (Fla. 4th DCA 1997).

Petitioner invoked this Court's jurisdiction by arguing that the fourth district's holding directly and expressly conflicts with that of Rodriguez v. State, 559 So. 2d 678 (Fla. 3d DCA 1990).

1. At trial, the evidence showed that Officer Oscar Gonzalez, a handler of a K-9 from the City of Wilton Manors police department, testified that on June 20, 1995, he was on patrol with Rocky, his K-9 (R 116-127). Gonzalez testified that he had been a police officer for seven years and that he had handled over a hundred investigations with his K-9 (R 141). Officer Gonzalez testified that his K-9 was alert to the specific odors of crack cocaine, heroin, hashish, methamphetamine, and marijuana (R 121).

Officer Gonzalez received a radio message from Officer Chadwick asking him to stop a speeding dark pick-up truck (R 126-127, 128). Gonzalez stopped petitioner's speeding truck and asked him to step out (R 129, 133, 162, 170). Petitioner was the sole occupant of the truck (R 128-129, 170). Meanwhile Officer Chadwick arrived at the scene (R 133).

Upon the officer's request for the driver's license, registration and proof of insurance, petitioner produced it (R 134). Gonzalez informed petitioner the reason he stopped him, and ran a license and tag check on the teletype (R 134). While waiting for the results, Gonzalez told petitioner that he had his K-9 with him, and requested petitioner's consent to search the truck (R 134, 171). Petitioner consented (R 134, 171). Rocky sniffed the exterior of the truck, and alerted to the driver's side door, then made another alert underneath the ashtray inside the car underneath the steering wheel (R 135-137, 172). Officer Gonzalez directed Chadwick to the ashtray, where Chadwick searched and found crack cocaine rocks laying on top of a piece of paper (R 138, 142, 174). Petitioner claimed that the rocks did not belong to him and that he had loaned his truck to someone else (R 162, 175, 182). Petitioner was placed under arrest (R 142).

2. Officer Chadwick, a six year veteran in the police

department, testified that petitioner was sweating, very nervous, jittery, and shifting his weight when the officers stopped him (R 171). Chadwick testified that after the K-9 alerted the officers to the ashtray of petitioner's car, Chadwick opened the ashtray and found three cocaine rocks (R 174). The ashtray, in which the rock cocaine was found, was in the center console in the middle of the dashboard and was within an easy reach of the driver (petitioner) (R 186, 187-188).

Chadwick testified that petitioner initially denied that the cocaine rock were his, and that petitioner told him that he had loaned the car to someone else (R 174-175). However, slightly afterward, after petitioner was arrested and transported to the police station, petitioner changed his story and stated that the cocaine rocks were his, and that he had come from 13th Street where he bought them (R 175). Petitioner offered to make a deal with the officers by being their informant (R 175). Petitioner told the officers that he would be able to tell them who the drug dealers were and make buys so that the officers could "bust" them (R 175).

SUMMARY OF THE ARGUMENT

1. The claim that inquiring into the numerical division of the jury was error was not preserved for appellate review by a contemporaneous objection. Although the trial judge specifically conferred with the parties before the inquiry, petitioner's counsel did not object. On the contrary, counsel's response could be viewed not only as an agreement, but as a tacit encouragement to do so. Additionally, defense counsel failed to object at the time the numerical split was actually asked of the foreperson. Therefore, the error was waived. Further, as held by the fourth district the facts in this case are not so egregious to create a fundamental error.

Even assuming it was preserved, it was harmless beyond a reasonable doubt, because the jury agreed on its own to continue deliberation the following day. The jury was not coerced or pressured to reach a verdict.

The state argues that because the inquiry into the jury's division was neutral without reference to guilt or innocence, it was not coercive in nature, and thus should not be considered error at all.

2. The trial court did not err in instructing the jury to relisten to the tape recorded instructions, and in instructing the

jury to rely on the ordinary meaning of "exclusive." There is no difference between the legal and ordinary definitions of the word "exclusive." The state was not relieved of any burden of proof, because the jury was instructed to listen to the tape recorded instructions and follow them. At no time during the trial was the jury instructed to ignore any of the instructions with which they were originally charged. Ordering the jury to go back and relisten to the tape recorded instructions without clarifying the word "exclusive" (as defense counsel suggested) would have been tantamount to ignoring the jury's difficulty with the instruction.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE ALLEGED ERROR OF INQUIRING INTO THE NUMERICAL DIVISION OF THE JURY WAS NOT REVERSIBLE ERROR; NONETHELESS THE ALLEGED ERROR WAS HARMLESS.

Petitioner contends that the trial court erred in inquiring into the numerical division of the jury after being informed that the jury was at an impasse. The state disagrees.

INQUIRING FOR THE NUMERICAL DIVISION WAS NOT ERROR IN THIS CASE

Although the fourth district in upholding petitioner's conviction found the inquiry into the numerical division of jury to be error, petitioner respectfully asserts that it was not error. The state acknowledges that this Court has the discretion to follow Brasfield v. United States, 272 U.S. 448 (1926). However, respondent contends that for the reasons discussed in this brief, this Honorable Court should not follow Brasfield. First, this Court does not have to follow the holding in Brasfield v. United States, 272 U.S. 448, because its holding is not binding on the states. The source of Brasfield's rule is not the federal constitution. Rather, it is a rule of judicial administration based on the supervisory power of the Supreme Court over the

federal court system. See Lowenfiled v. Phelps, 484 U.S. 231, 239-40 (1988). The Brasfield decision was announced as a rule of procedure to be followed in the federal courts. Sharplin v. State, 330 So. 2d 591, 595 (Miss. 1976). Thus, the case of Brasfield per se reversal approach does not have to be followed by the states. Id.; Sharplin v. State, 330 So. 2d 591, at 595. As argued by petitioner, Brasfield is merely a persuasive authority, but certainly - not binding. Further, many courts find the inquiry into the numerical division coercive in nature, only because Brasfield held so. But, Brasfield did not explain why it found such practice to be coercive. Thus, the state strongly contends that the inquiry into the numerical split of the jury is *not* error. Although the third district in Rodriguez does not explain why it thinks the error of inquiring into the numerical split of the jury is fundamental error, it apparently found so by following Brasfield.

Because the states are divided on this issue, the State of Florida respectfully requests this Court to align itself with the jurisdictions that permit disclosure of numerical division without reference to guilt or innocence on the theory that the trial court has the right to ascertain the probability of agreement among the jurors.

The "receipt of the jury's numerical division serves a legitimate purpose consonant with the trial judge's broad powers of control over the conduct of the a trial: it enables the trial judge to ascertain the likelihood of agreement among the jurors." Sharplin v. State, 330 So. 2d 591, at 595. Therefore, the mere request and receipt of the jury's numerical division *without reference to guilt or innocence* does not coerce the jury and is not error. Id. As explained in Sharplin:

> The object of the jury system is to secure a verdict by a comparison of views and by agreements among the jurors themselves. Although the verdict of the jury should represent the opinion of each individual juror, it does not follow that opinions of jurors may not be changed by conference with each other in the jury room. If the trial judge feels that there is a likelihood that the jury might reach a verdict, he may return the jury for further deliberations by simply stating to the jurors: 'Please continue your deliberations,' or he may give ... [an] instruction...

Sharplin v. State, 330 So. 2d 591, at 596.

The stated policy rationale behind restricting an inquiry into the jury's numerical split, is to prevent the jurors from feeling coerced based on how they cast their individual vote. However, such a restriction does not enhance the policy, and does not prevent coercion; whereas here, in the circumstances of this

particular case, the trial judge never asked the jury to specify its division as to guilt or innocence, but merely asked for the division. The inquiry was merely a general question as to the prospects for a verdict. No further comments were made so as to implicate or reveal the specific stance of any member of the jury, nor did the trial judge give the *Allen* charge. Here, there was nothing inherently coercive about such a neutral inquiry. The minority jurors were never told to succumb to the majority's opinion. The trial judge did not say anything that could have been interpreted as "a desire to pry into or influence" the jury's deliberation. See Beale v. U.S., 263 F. 2d 215, 217 (5th Cir. 1959). Thus, it is unlikely to have had a coercive effect. See Butler v. U.S., 254 F. 2d 875 (5th Cir. 1958). In fact, giving the *Allen* charge is far more coercive. See Jimenez v. Myers, 12 F. 3d 1474, 1483 (9th Cir. 1993)(Kozinski, J., dissenting). Also here, there was never an attempt to find out how each juror voted in terms of the split. Thus, the inquiry was not coercive and should not be considered error.

Rather, since the length of time that the jury should be permitted to deliberate is within the trial judge's discretion, the numerical inquiry is helpful in allowing the trial judge to find out how the jury progresses in its deliberation. See U.S. v. Mack,

249 F. 2d 321 (7th Cir. 1957). The trial judge is allowed to inquire as to how many jury members felt that further deliberations would help them arrive at a verdict before giving a modified *Allen* charge. See Lowenfield v. Phelps, 484 U.S. 231 (1988). Also, knowledge of the numerical count can often help a trial court decide whether further instruction or even a mistrial is in order. Dunford v. State, 614 P. 2d 1115 (Okla.Crim.App.1980). The Supreme Court held that, although the jury returned its verdict thirty minutes after the court gave them the supplemental instruction, "the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny petitioner any constitutional right." Lowenfield v. Phelps, 484 U.S. at 241. The Court specifically noted that the supplemental instruction did not inform the jury that it was required to reach a verdict. Id. at 239. See also Carlton v. U.S., 395 F. 2d 10 (9th Cir. 1968), cert. denied, 393 U.S. 1030 (an inquiry into how many jurors believed a verdict could be reached was held to be proper).

In Bryan v. Wainwright, 511 F.2d 644 (5th Cir.), cert. denied, 423 U.S. 837 (1975), the trial judge's inquiry of the jury if an additional 20 minutes to deliberate would be sufficient for them to reach a verdict "was not so prejudicial as to make the trial fundamentally unfair." Id. at 646.

The courts in the above cases held the inquiries of a deadlocked jury as proper. Thus, analogously here, the mere inquiry of the jury as to the numerical split should be held proper, because it is similar to inquiring the jury how close it was to reaching a verdict, or *how many* jurors felt that they could reach a verdict by additional time to deliberate. As in the above cited cases, the trial judge, here, inquired as to the jury's division for the purpose of determining the plausibility of reaching a verdict, and ascertaining the progress of deliberation. The inquiry was mild and entirely neutral. It did not attempt to coerce or invade the jury. There is no universal agreement that a judicial inquiry into a numerical division is coercive.

The fourth district in this case acknowledged that there are states where such an inquiry is *not* error, saying the following:

> Some states hold that the inquiry is proper, as part of the trial judge's power over the conduct of the trial. *See Dunford v. State*, 614 P.2d 1115 (Okla.Crim.App.1980); *Sharplin v. State*, 330 So.2d 591, 596 (Miss.1976); *People v. Carter*, 68 Cal.2d 810, 69 Cal.Rptr. 297, 300, 442 P.2d 353, 356 (1968), *abrogated on other grounds sub nom.*, *People v. Gainer*, 19 Cal.3d 835, 139 Cal.Rptr. 861, 566 P.2d 997 (1977). This view rests on the assumption that knowledge of the numerical division will assist the court in discharging a proper function, such as knowing when to grant a mistrial or give further instructions. *Carter*, 69 Cal.Rptr. at 300, 442 P.2d at 356;

Dunford, 614 P.2d at 1118.

691 So. 2d at 1187.

Similarly, other courts have held that the inquiry into the numerical division of the jury when the jury is at an impasse was not error. See State v. Morris, 476 S.W. 2d 485 (Mo. 1971)(no error to inquire into the numerical division of the jurors because the length of time that a jury should be permitted to deliberate is a matter very largely within the trial court's discretion); State v. Keaulana, 784 P. 2d 328 (Haw. 1989); State v. Jones, 641 P. 2d 708 (Wash. 1982); State v. Rickerson, 625 P. 2d 1183 (N.M. 1981); State v. Odom, 682 S.W. 2d 445, 448 (Tex. Ct. App. 1984)(defendant "has not cited a Texas case, nor have we found one, which makes the mere inquiry as to the numerical division of the jury reversible error per se"); State v. Schmburge, 344 So. 2d 997, 101 (La. 1977)("The trial court did no more than make a general inquiry as to prospects for a verdict and reminded the jury that ten of the twelve had to agree upon a verdict"); Huffaker v. State, 168 S.E. 2d 895 (Ga. Ct. App. 1969); People v. Carter, 442 P. 2d 353 (Cal. 1968).

Thus, respondent strongly asserts that inquiring of a jury when it is at an impasse as to its numerical division does not coerce or pressure the jury. On the contrary, it helps the trial judge find out how the jury is progressing in its deliberations,

and helps the judge to decide whether an *Allen* charge or a mistrial is in order. The state contends that inquiring into the numerical division is not more coercive or intrusive than any other permitted inquiry of a deadlocked jury. A neutral inquiry is not intrusive and thus not error.

THE CLAIM IS PROCEDURALLY BARRED

a. The Claim was Waived by Lack of Contemporaneous Objection

Even assuming arguendo the claim was error, it has not been preserved for appellate review. At no time during the trial did petitioner's counsel object to any of the errors now claimed on appeal. During the time the jury deliberated, and after the jury sent its note stating that it was at an impasse, the trial judge specifically asked the parties if they agreed to the court's inquiry of the foreperson regarding the jury's division (R 251). Defense counsel did not object (R 251). On the contrary, it appears from the record that defense counsel actually agreed to such inquiry and tacitly encouraged the judge to do so by not voicing any disagreement (R 251). Then, at the time the trial judge actually asked the foreperson, Juror Horvath, whether there was a split, defense counsel did not object (R 251-252). In fact, there was no objection at any other point during the rest of the trial as to this alleged error. Thus, this claim was waived. See

State v. Schamburge, 344 So. 2d 997 (La. 1977). Unlike the facts in McKinney v. State, 640 So. 2d 1183 (Fla. 2d DCA 1994), where the trial judge did not consult the parties before asking for the numerical split, did not allow defense counsel to approach the bench, and overruled objection to the modified Allen[1] charge, here appellant's counsel had the opportunity to object, but failed to do so.

In Castor v. State, 365 So. 2d 701 (Fla. 1978), this Court held the following regarding preservation by a contemporaneous objection:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. (Emphasis added).

Id. at 703. See also Farrow v. State, 573 So. 2d 161 (Fla. 4th DCA 1990)(error going to the foundation of the case is a limited exception to the rule requiring contemporaneous objection to preserve the issue for appeal, and should be applied only in rare instances where jurisdictional error appears or where the interests

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[1]Allen v. U.S., 164 U.S. 492 (1896).

of justice compel its application).

Further, because the trial judge extended defense counsel an opportunity to prevent the alleged error, and counsel failed to take advantage of the opportunity, the alleged error was invited and will not warrant a reversal. See Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983)("A party may not invite error and then be heard to complain of that error on appeal"); Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991), cert. denied, 502 U.S. 43.

Purposely allowing the trial judge to err without making a contemporaneous objection would be against basic fairness. For example, where the complained of error is an improper *Allen* charge which is not "particularly egregious," a contemporary objection is required to preserve the claim. See, e.g., Tejeda-Bermudez v. State, 427 So. 2d 1096 (Fla. 3d DCA 1983)(no objection to modified *Allen* charge constitutes a waiver); Sayan v. State, 381 So.2d 363 (Fla. 4th DCA 1980); Armstrong v. State, 364 So.2d 1238 (Fla. 1st DCA 1977), cert. denied, 373 So.2d 456 (Fla.1979); Warren v. State, 498 So.2d 472, 477 (Fla. 3d DCA 1986). Thus, the fourth district correctly held that the error was not preserved for appellate review by a contemporaneous objection.

b. Motion for a New Trial did not Preserve the Claim

Furthermore, respondent disagrees with petitioner's assertion that his motion for a new trial preserved the issue for appellate review even though he failed to make a contemporaneous objection. Petitioner argues that the claim was preserved for appellate review because he raised it during the hearing on the motion for a new trial, and in his written motion for a new trial. This is not so. A non-fundamental error in final argument is deemed to be waived when it is effectively presented for the first time in a post-verdict motion for a new trial. Green v. Ed Ricke and Sons, Inc., 438 So. 2d 25, 29 (Fla. 3d DCA 1983). See also Sears Roebuck & Company v. Jackson, 433 So. 2d 1319, 1322 (Fla. 3d DCA 1983)(timely objection is as much a predicate for grant of a new trial by the lower court as it is a predicate for reversal on appeal).

c. The Alleged Error is not Fundamental

In the alternative, the state contends that even if this Court finds petitioner's claim to be error, it is not fundamental. Generally, errors committed in the trial process are not deemed to be fundamental. Farrow v. State, 573 So. 2d at 163. For example, similarly related remarks to the jury were held by the court to be nonfundamental. See McElrath v. State, 516 So. 2d 276 (Fla. 2d DCA 1987)(the trial judge's remarks to a deadlocked jury after an Allen instruction had been given were not so egregious as to constitute

fundamental error); Coley v. State, 626 So. 2d 1118 (Fla. 3d DCA 1993). Cf. Crump v. State, 622 So. 2d 963 (Fla. 1993)(fundamental error goes to the foundation of the case or the merits of the cause of action; absent fundamental error, the issue is not preserved for appeal).

In the instant case, the record shows that after the jury retired for deliberation, it sent a note asking the trial judge to redefine the words "exclusive possession" (R 250). The trial judge answered the requested questions and sent the jury back to deliberate (R 250). Afterwards, the jury sent another note stating the following, verbatim:

> We do not have a unanimous jury at this time & those who are in disagreement feel they will not change their minds. What should we do?

(R 275).

After a brief recess the following transpired between the court and counsel:

> THE COURT: I'm going to talk to Miss Horvath [the foreperson]. Do you mind if I ask them how they're split? In other words, let's say five to one. If they say five to one, I say, you want to sleep on it.
>
> MS. ARNOLD [THE PROSECUTOR]: Doesn't matter to me.
>
> MS. THOMAS [DEFENSE COUNSEL]: It said those who don't agree, so it may be more.

THE COURT: Bring them out. I want to talk to them a little bit.

(R 251).

The jury entered the courtroom and the following ensued:

THE COURT: Okay. I just have a couple questions to ask you, then -- Miss Horvath --

MS. HORVATH [THE FOREPERSON]: Uh- huh.

THE COURT: -- do you think further deliberations would help at all?

JUROR HORVATH: There are those who feel that further deliberations would not help them.

THE COURT: Okay. Can I assume by that, that more than one person -- the split is more than one person?

JUROR HORVATH: Yes.

THE COURT: So, in other words, at least four to two?

JUROR HORVATH: Yes.

THE COURT: Okay. And what about if I reset the deliberations until tomorrow, have you come back, you think that would serve any useful purpose?

JUROR HORVATH: You have to do what you feel is right.

THE COURT: Really, I don't want -- this is a very sensitive area, because I'm not allowed to make inquiry about a jury's deliberations, just not allowed to. So I can't ask you more than that.

If you as a foreperson are advising me

> that you think in any way that by resetting this until tomorrow, that could help this jury come to a decision, I will do it. If you think there's no way, then I'll declare a mistrial.
>
> JUROR HORVATH: Am I allowed to express my personal feelings?
>
> THE COURT: No.
>
> JUROR HORVATH: Perhaps we should go back into the room, just decide whether or not we should meet tomorrow, and then come back out again.
>
> THE COURT: Okay. All right [sic].

(R 250-252). The record shows that the facts in this case are not so egregious as to constitute a fundamental error. The trial judge did not force or pressure the jury to agree on a verdict, and did not give the *Allen* charge. Additionally, the trial judge did not leave the impression on the jury that his view of the evidence was in agreement with the majority of jurors. The facts in this case were not so egregious as they were in Rodriguez v. State, 462 So. 2d 1175 (Fla. 3d DCA 1985)(fundamental error for the trial judge to give the jury a deadlock charge and instruct jurors they had to reach a verdict) and Bell v. State, 311 So. 2d 179 (Fla. 1st DCA 1975)(trial judge told a juror that all jurors have to agree).

As summarized by Judge Gross in Scoggins v. State, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997):

> Fundamental error has been defined as one that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process. *Kilgore v. State*, 688 So.2d 895 (Fla.1996) (citing *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir.1994)); *Rodriguez v. State*, 462 So.2d 1175, 1177 (Fla. 3d DCA 1985), *review denied*, 471 So.2d 44 (Fla.1985); *Castor [v. State]*, 365 So.2d 701] at 704 n. 7 [(Fla. 1978)]. One characteristic of a fundamental error can be that no corrective instruction or action by the court would have "obliterated the taint" caused by the improper conduct. *Webb*, 519 So.2d at 749. When confronting a claim that the jury's verdict was unconstitutionally coerced, our fundamental error analysis depends on the constitutional analysis. If the totality of the circumstances supports the finding of improper coercion of the jury, then there has been a type of constitutional violation which is fundamental error, and per se reversible. On the other hand, in this case, error not amounting to a constitutional violation is not fundamental error, so an objection at trial is necessary to preserve the issue and a harmless error analysis is appropriate. *See* § 924.051(3), *Fla. Stat.* (Supp.1996); *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

Respondent would call this Court's attention to analogous situations where this Court did not consider similar claims to be fundamental. Cf. Blair v. State, 22 Fla. L. Weekly S517 (Fla. August 28, 1997)(defendant waived his right to be tried by six jurors); Kiley v. State, 356 So. 2d 328 (Fla. 4th DCA 1978)(judge's alleged improper reinstruction following jury request for

reinstruction was error but not fundamental error warranting reversal in the absence of an objection or request for reinstruction); Brown v. State, 404 So. 2d 861 (Fla. 4th DCA 1981)(Florida Rule of Criminal Procedure 3.410 claim requires a contemporaneous objection to be preserved for appellate review).

The claimed error, then, was not preserved by a contemporaneous objection, nor could it constitute a fundamental error, and thus is procedurally barred.

HARMLESS ERROR

Even assuming *arguendo* petitioner's claim has been preserved, and assuming it was error, the error was harmless beyond a reasonable doubt. § 924.051(3), Fla. Stat. (Supp. 1996); § 924.051(7), Fla. Stat. (Supp. 1996).

The fourth district correctly found the error to be harmless, and summarized it eloquently in its opinion as follows:

> Other than the inquiry into the jury's numerical division, the trial judge's interaction with the jury presents none of those factors that courts have identified as being improperly coercive. The jury was not placed under time pressure to return a verdict. *Compare Webb*, 519 So.2d at 749 (where the court told the jury that the verdict "must be six votes and it has to be rendered tonight"); *Heddleson v. State*, 512 So.2d 957, 959 (Fla. 4th DCA 1987). There was no exhortation of the jury to consider extraneous and improper factors, such as the

government's fiscal health, in arriving at a decision. *Rodriguez*, 462 So.2d at 1175; *compare Warren*, 498 So.2d at 477-78 (court emphasized the "needless cost in retrying the case in the event of a hung jury"). No potential holdout juror was isolated and demeaned for being in the minority. *Compare Jones v. State*, 92 So. 2d 261 (Fla.1956)(judge's charge inferred that a lone holdout juror would be "a stubborn mule or jackass"). No charge indicated that the jury was required to reach a unanimous verdict or that the jurors had a duty to do so. *Kelley*, 486 So.2d at 584-85; *State v. Bryan*, 290 So.2d 482 (Fla.1974); *Webb*, 519 So.2d at 749; *Nelson*, 438 So.2d at 1062; *Rodriguez*, 462 So.2d at 1178; *Bell v. State*, 311 So.2d 179 (Fla. 1st DCA 1975). There was no threat of marathon deliberations. *See Gahley*[v. State], 567 So.2d [546] at 459 [(Fla. 1st DCA 1990),, *review denied*, 577 So.2d 1326 (Fla.1991)]. The judge did not ask whether the jurors in the majority were for acquittal or a guilty verdict; nor did he single out the minority jurors in imploring the jury to come to a decision. *Locks v. Sumner*, 703 F.2d 403, 407 (9th Cir.1983); *Williams v. Parke*, 741 F.2d 847, 850-51(6th Cir.1984), *cert. denied*, 470 U.S. 1029, 105 S.Ct. 1399, 84 L.Ed.2d 787 (1985). This case did not involve a jury minority that, because of its lengthy service, might be particularly susceptible to coercion. *Williams*, 741 F.2d at 850-51. The judge's comments were balanced, encouraging neither acquittal nor conviction. *Kelley*, 486 So.2d at 584.

Finally, the absence of prejudicial effect is demonstrated by the jury's choice to continue to deliberate the next day. The jurors did not return a verdict shortly after their contact with the judge. *See Id.* at 585.

> Looking at the totality of the circumstances, we find no fundamental or constitutional error. We also find no error in the trial court's reinstruction to the jury on the substantive charge.

691 So. 2d at 1188.

The record shows that after the colloquy between the court and the foreman in the presence of the parties, the jury sent another note stating the following:

> We are willing to come back tomorrow & deliberate for a little longer being we are still divided. We prefer morning.

(R 276). The record, then, establishes that without being pressured, influenced or coerced, the jury on its own decided to come back the following day to continue the deliberation. The trial court only verified what the jury wanted to do. The judge never pressured the jury to reach a verdict or to continue deliberation.

Based on the jury's note, the court (with the parties' agreement) told the jury to come back the following morning to continue deliberation (R 253-254). Before breaking for the evening the judge instructed the jury the following:

> THE COURT: So, now you can't deliberate tonight. You can't talk to each other. You can't discuss this case, or allow it to be discussed in your presence. You can't go home and say you're not going to believe what

> happened, can't do that; just like we had no break.
>
> We usually sequester the jury, okay, take you to a hotel, make sure you have no contact with anyone. Now, one of the jurors is taking Miss Diamond home, so -- so don't obviously, she's not going to be picked up tomorrow, but the point is, is that you can't talk to anyone. All right.
>
> So everybody okay? So I'll see you tomorrow.

(R 255-256). The following day the jury came back, continued deliberation, and reached a unanimous verdict of guilty as charged (R 264, 265).

The record shows that the jury wanted to come back the following morning to continue the deliberation (R 276). There was no pressure nor coercion by the judge to do so. It was the jury's choice. The following morning, on December 15, 1995, the jury came back and continued to deliberate, after which they reached a verdict (R 265-266). Thus, there was no need for an *Allen* charge in this case, and the trial judge never gave it.

The alleged error, if at all, was harmless beyond a reasonable doubt. There was testimony that petitioner owned the truck in which the rock cocaine was found, and was the sole occupant of it at the time the cocaine was found. Petitioner himself voluntarily admitted to the arresting officer that he had just bought the rocks, and offered to cooperate with the police by making "buys."

Petitioner obviously knew that the rock cocaine was there. Cf. Evans v. State, 303 So. 2d 68 (Fla. 3d DCA 1974)(giving a modified Allen charge did not have effect of coercing jury into returning verdict); United States v. Brokemond, 959 F. 2d 206, 210 (11th Cir. 1992)("even where the judge undertakes the inquiry into numerical split and thereafter follows it with an *Allen* charge, reversal is unnecessary absent a showing that either action, or combination of the two actions, was inherently coercive"). Here, no showing of inherent coercion was shown. The trial judge called the foreperson for the sole purpose of verifying if a verdict could be reached. That was certainly harmless error. See Hernandez v. State, 323 So. 2d 318 (Fla. 3d DCA 1975)(in prosecution for first degree murder and robbery in which both sides agree that jury be called in and asked if they could reach verdict, trial court did not err in calling jury back to ask if verdict could be reached, given more time).

The cases relied upon by petitioner are distinguishable from the case at bar. Unlike the case at bar, in cases cited by petitioner the trial judge coerced and pressured the jury to reach a verdict. In Nelson v. State, 438 So. 2d 1060 (Fla. 4th DCA 1983), for example, the trial judge coerced the jury to reach a verdict when the trial judge told the jury that a retrial would amount to

a "waste," and that reproducing the witnesses from Alabama would be difficult. On the contrary, here, no coercive statements were made by the trial judge. The jury on its own told the judge that they would come back the following morning after the judge told the foreperson that he would declare a mistrial if they felt that further deliberation would be fruitless. See Colbert v. State, 569 So. 2d 433 (Fla. 1990)(any error in instructing jury that mistrial would be declared as to any counts jury could not decide upon was harmless). Because the trial judge did not pressure or coerce the jury to reach a verdict, nor did he tell them that they all had to agree unanimously on the verdict, the error, if at all, was harmless.

Neutrally inquiring into the numerical split of a jury at impasse is not error. But, even if it is, it was waived. The facts in this case are not so egregious to make this claim a fundamental error. Thus, petitioner's conviction must be affirmed.

POINT II

THE TRIAL COURT'S REINSTRUCTION OF "EXCLUSIVE" POSSESSION WAS CORRECT.

Petitioner contends that the trial court erred in reinstructing the jury to rely on the ordinary meaning of the word "exclusive," asserting that the instruction relieved the state of its burden of proof on an essential element of the cocaine possession offense. The state disagrees.

During the charge conference the judge suggested the following definition of "exclusive" to be read to the jury, and to which petitioner's counsel agreed:

> If a person has exclusive possession, knowledge of its presence may be inferred, if a person does not have exclusive possession, knowledge of its presence may not be inferred or assumed.

(R 206). Before charging the jury, the trial judge told the jurors that the instructions would be recorded, and that they would be able to listen to them from a tape-recorder (R 235).[2]

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[2]The trial judge told the jury the following regarding listening to the jury instructions from the tape:

> Okay, ladies and gentlemen, I'm going to give you the instructions. I'm playing the tape-recorder, putting them on tape, so that if you want any of them playing back, or didn't get the full instruction, and you want to listen to it again, it will be here for your examination. And I'll give you a tape

Subsequently, the trial judge charged the jury the following:

> Before you can find the defendant guilty of possession of cocaine, the state must prove the following three elements beyond a reasonable doubt:
>
> Number one, the defendant possessed a certain substance.
>
> Number two, the substance was cocaine.
>
> And, number three, the defendant had knowledge of the presence of the substance.
>
> To possess means to have personal charge of, or exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive.
>
> If a thing is in the hand of, or on the person, or in the bag or container in the hand of, or on the person, or if it is so close as to be within ready reach, and under the control of the person, it is in the actual possession of that person.
>
> If a thing is in a place over which the person has control, or in which the person has hidden or concealed it, it is in the constructive possession of that person.
>
> If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

(R 235-236). At the end of the charge to the jury no objection was voiced by the defense (R 246). Petitioner agreed to the

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recorder.

(R 235).

instructions as read.

After retiring to deliberate, the jury sent out a note with the following question: "...Please define exclusive possession" (R 247-248, 277). At that point the following colloquy between the court and counsel took place:

> THE COURT: The jury has a question. Please define exclusive possession.
>
> MS. THOMAS [DEFENSE COUNSEL]: Judge, you already read all the definitions of possession that are supposed to apply.
>
> THE COURT: Exclusive possession; how do you define exclusive possession. Exclusive. Do you have a dictionary?
>
> ***
>
> You want me to say I've already defined what possession is. And as far as the term exclusive, you should use its ordinary meaning, or it's defined by its ordinary meaning?
>
> MS. THOMAS: Judge, I don't think you should say anything. I think you should say, I told you what the law is, I told you the definition. You just -- you need to just rely on what I already told you.
>
> THE COURT: Okay. That's over your objection, neither one of you want me to define it. So I'm going to tell them I've already defined possession. As to the word exclusive, you should rely on your own -- what did you say, your own what?
>
> MS. ARNOLD [THE PROSECUTOR]: Its ordinary

meaning.

THE COURT: Rely on your own what -- your own knowledge of what its ordinary meaning.--

MS. THOMAS: Judge, I mean, you already defined actual and constructive possession. Exclusive possession isn't -- he's charged with just simple possession. I'm going to object to anything, whether you say regular meaning, or how ever you're going to say it, I object.

THE COURT: Well, I don't know that I can tell them I'm not going to do it. I don't know that I'm --

MS. THOMAS: You can tell them, like on other times, you have to rely on your own memory.

THE COURT: When they want testimony read back -- but in this case, they asked a specific question. The specific questions is -- by the way, in most instances when they want testimony read back, I generally give it to them. But in this case, they asked me a specific question. The specific question, please define exclusive possession. And the answer that I'm prepared to give them, I've already defined possession for you, and that's on the tape. If you want to re-listen to it, you're welcome to do that.

As to exclusive, you should rely on your own knowledge of what the ordinary meaning is.

Really, I feel more comfortable giving them a dictionary definition, but neither side wants that; is that correct?

MS. ARNOLD: That's correct.

MS. THOMAS: (Nodding).

THE COURT: By agreeing to that, we don't agree -- you object to me saying anything?

> MS. THOMAS: Right. I think they should rely on the evidence, and the law that's been presented to them, and nothing more.

(R 247-249). The trial judge answered the jury's questions, as follows:

> I've already defined possession for you. That's on the tape, and you can re-listen if you want to.
>
> As to the word exclusive, you should rely on your own knowledge of what its ordinary meaning is.
>
> If that doesn't answer your question, then you can send me another note, and I'll address it at that time.

(R 250).

The extent and character of supplemental instructions are within the sound discretion of the trial court. See Lowe v. State, 500 So. 2d 578 (Fla. 4th DCA 1986)(generally, feasibility and scope of reinstruction of jury resides within the discretion of the trial judge); United States v. Walther, 867 F. 2d 1334, 1341 (11th Cir. 1989); Cf. Coleman v. State, 610 So. 2d 1283 (Fla. 1992) (trial court need only answer questions of law, not fact, when asked by the jury), cert. denied, ___U.S. ___, 114 S. Ct. 321, 126 L.Ed. 2d 267 (1993); Engle v. State, 438 So. 2d 803 (Fla. 1983) (no abuse of discretion in limiting reinstruction to a direct response to the jury's specific jury's request), cert. denied, 485 U.S. 924, 108 S. Ct. 1094, 99 L. Ed. 2d 256 (1988); Henry v. State, 359 So. 2d 864

(Fla. 1978)(same). The state submits that the trial judge acted within his discretion in this matter when he answered the jury's question. See Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)("discretion is abused only where no reasonable man would take the view adopted by the trial court").

At trial, in response to the jury's note, petitioner's counsel requested that the jury be instructed to relisten to the tape recorded instructions. The record shows that the trial judge told the jury more than once to do so if they needed to refresh their memory. Apparently, relistening to the tape recorded instruction did not help the jury, and they needed an additional instruction from the court. Thus, the trial judge was correct in clarifying the term "exclusive" rather than sending the jury back to relisten to apparently an unclear instruction to them. The jury was specifically instructed to rely on the definition of possession as it was given originally (R 250). Thus, contrary to petitioner's contention, the state was not relieved from proving any element of the crime.

The only disagreement during the reinstruction was as to the word "exclusive," not as to the word knowledge or possession. The jury was instructed to listen to the definition of "possession" from the tape as was agreed by the parties. The judge only

clarified the word "exclusive."

The underlying question is whether the ordinary meaning of word "exclusive" is substantially different from the legal definition, and whether it was misleadingly incorrect or confusing to warrant a reversal of the conviction. A comparison of a legal dictionary's definition to that of a non-legal dictionary reveals that the definitions are not different. Black's Law Dictionary defines "exclusive" as

> "Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone."

Black Law Dictionary 506 (5th ed. 1979). Webster's II New Riverside University Dictionary 450 (1994), defines exclusive: "Not shared with others, independent or single. Sole." Webster's Encyclopedic Unabridged Dictionary of the English Language 497 (1989) defines "exclusive" as "shutting out all others from a part or share; in which no others have a share; single or sole." Comparison of the legal definition to the ordinary definition of the word "exclusive" instantly reveals that there is no difference between the two. Therefore, because relistening to the recorded jury instruction would not have helped the jury in clarifying their misunderstanding, and because there is no difference between the

legal and non-legal definition of the word "exclusive," Judge Zeidwig correctly instructed the jury to rely on the ordinary meaning of "exclusive." Defense counsel's suggestions to instruct the jury to relisten to the tape, or to give no instruction at all, was unhelpful, and would have likely resulted in the interruption of the jury's deliberation for another question.

The cases relied upon by petitioner are distinguishable from the case at bar. In all of those cases the jury was allowed to take reading materials to the jury room, such as an entire jury-instruction book, a dictionary, etc. No such situation occurred here.

The error, if at all, was harmless beyond a reasonable doubt. It did not affect the outcome of the case. See Smiley v. State, 641 So. 2d 976 (Fla. 4th DCA 1994)("Although the trial court erroneously instructed the jury on the inference arising from proof of possession of recently stolen property, the error was harmless in this case"); § 924.051(7), Fla. Stat. (Supp. 1996).

A trial court's failure to give a requested instruction will not result in a reversal where, taken as a whole, the instructions actually given are clear, comprehensive, and correct. Darty v. State, 161 So. 2d 864 (Fla. 2d DCA), cert. denied, 168 So. 2d 147 (Fla. 1964). Additionally, trial judges have a wide discretion

regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of prejudicial error that would result in the miscarriage of justice. Shepard v. State, 659 So. 2d 457, 459 (Fla. 1995); Booker v. State, 514 So. 2d 1079, 1085 (Fla. 1987)(defining "abuse of discretion" -- discretion is abused only where no reasonable man could take view adopted by the trial court). No such abuse occurred here. At no point during the trial did the trial judge tell the jury to disregard the original instructions. On the contrary, the judge reminded the jury to listen to the tape recorded instructions as many times as they needed to. Therefore, the state was not relieved from proving any element of the crime.

Further, there was testimony that a search of petitioner's truck revealed three pieces of rock cocaine. Petitioner told the arresting officer that he knew about cocaine in the ashtray, and voluntarily offered information of how he had bought it. Petitioner also proposed to make a deal with the police. Petitioner told the police officer that he would be able to make "buys" for the police, and help the police catch drug dealers. Also, the ashtray was within an easy reach from the driver's seat where petitioner was sitting as the sole occupant of the car. The state, then, proved its case beyond a reasonable doubt. Because

the supplemental instruction was correct in context, petitioner's conviction must be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, appellee respectfully requests this Court uphold the fourth district court of appeal's decision.

Respectfully submitted,
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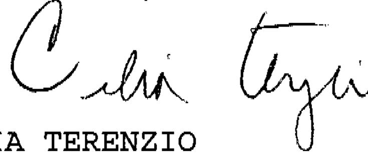

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing respondent's answer on the merits has been furnished by Courier to: Peggy Natale, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, FL 33401, on October 20, 1997.

Ettie Feistmann

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