IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA CASE NO. 96-0228

JAMES SCOGGINS

Petitioner,

vs.

90,627

STATE OF FLORIDA

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

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RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

The petitioner was the appellant in the appeal proceedings and the defendant at trial in the circuit court of the 17th Judicial Circuit. The respondent, State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used: "A" Appendix.

STATEMENT OF THE CASE AND FACTS

The State adopts the majority opinion of the Fourth District Court of Appeal as its statement of the Case and Facts (A1).

SUMMARY OF THE ARGUMENT

The discretionary jurisdiction of this Court should be declined under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The decision of the Fourth District Court of Appeal does not expressly and directly conflict with a decision of another district court of appeal on the same question of law. The facts are distinguishable, and therefore the conclusion of law is different.

Further, the Fourth District disagreed with the implication of the opinion of another district court of appeal, and not with its express holding.

ARGUMENT

POINT I

PETITIONER IMPROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS COURT WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

Petitioner contends that the Fourth District Court of Appeal's decision in Scoggins v. State, 22 Fla. L. Weekly D1029 (Fla. April 23, 1997), expressly and directly conflicts with the decision of the Third District Court of Appeal's decision in Rodriguez v. State, 559 So. 2d 678 (Fla. 3d DCA 1990) (A2). The State disagrees and submits that there is significant factual differences between the cases which leads to a different reasoning and conclusion of law, and thus this Court should decline to accept jurisdiction.

In order for two decisions to be in "express" as well as a "direct" conflict for the purpose of invoking this Court's discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312

So. 2d 732 (Fla. 1975); Padovano, Florida Appellate Practice, § 2.10("a district court of appeal decision is reviewable only if it *expressly* conflicts with a decision of the Supreme Court or another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate decision" [e.s.]).

In Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only reviews a decision of a district court of appeal that expressly and *directly* conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms "express" include: "to represent in words; to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary* (1961 ed. unabr.) (Emphasis in original).

See also Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986). See generally Withlacoochee River Electric Co-op v. Tampa Electric Co., 158 So. 2d 136 (Fla. 1963); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958). Also, although it is not necessary that the district court of appeal explicitly identify a conflict in its opinion, the district court must at least address the legal principals which

were applied as a basis for the decision. Padovano, Florida Appellate Practice, § 2.10. While a district court cannot thoroughly misapply a precedent of another court and then escape conflict certiorari review of its decision, see Gibson v. Avis Rent-a Car System, 386 So. 2d 521 (Fla. 1980) and Ascensio v. State, 497 So. 2d 640, 641 (Fla. 1986), this is not what happened here.

A review of the majority opinion is quite important as this Court has stated that "conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority opinion." Reaves v. State, 485 So. 2d 829, 830 n. 3("...we are not permitted to base our conflict jurisdiction on a review of the record.... Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citation to the record, as petitioner provided here.").

By his argument, Petitioner implicitly contends that the Fourth District applied a rule of law which produced a different and conflicting conclusion to substantially same controlling facts involved in the allegedly conflicting decision. The State disagrees and contends that the facts in this case are distinguishable from the facts in Rodriguez and therefore application of the same rule of law resulted in a different

conclusion.

Here, the Fourth District was well aware of the decision in Rodriguez. The Scoggins Court specifically addressed Rodriguez in its opinion, and factually distinguished this case from the Rodriguez and other similar cases. First, in Rodriguez, although out the presence of the jury, the trial judge "expressed exasperation before asking the jury for its numerical split. 559 So. 2d at 679.[1] In contrast here, the judge asked both counsel if they objected to his asking the jury for its numerical split. And only after neither objected, the court asked for the numerical split, but reminded the jury that he would reset the deliberations for the following day. 22 Fla. L. Weekly at D1029-D1030. The jury asked to come back the following day to continue deliberating. Id. The jury was excused for the evening. Unlike in Rodriguez, here there was no evidence of exasperation before the contact with the jury.

Next, in Rodriguez the jury came back fifteen minutes after the trial judge asked for the numerical split with the verdict of guilty. In contrast here, the jury was not placed under time

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[1]The opinion does not specify whether the trial judge asked counsel's permission to inquire about the jury's numerical split. It appears that the judge did not ask permission to do so.

pressure to return a verdict. The jury did not come back shortly after their contact with the judge. Thus, the facts of Rodriguez and Scoggins are certainly distinguishable.

Further, the Fourth District disagreed only with the *implication* in Rodriguez that such questioning is per se reversible error. There was no express holding in Rodriguez that it is per se reversible error. As such, the Third District's conclusion is based only on the particular facts in Rodriguez. The disagreement with an implication of an opinion would not satisfy the requirement of direct and express conflict.

Because the factual context is substantially different in the two cases, the conclusion resulted in each case is dissimilar. Therefore, no direct and express conflict exists. As stated by Judge Anstead: "Obviously two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J., Concurring, affirmed, 428 So. 2d 220 (Fla. 1982). See Department of Health and Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So. 2d 888 (Fla. 1986)("inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction.")

The Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960) this Court stated that:

> When our jurisdiction is invoked pursuant to this provision of the Constitution we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of the Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced.

Nielson v. City of Sarasota, 117 So. 2d at 734-735. The State contends that no such real, live and vital conflict exists. Here, the facts are substantially distinguishable, and thus the district courts arrived at different conclusions.

The Nielson Court also stressed that

> We do not here suggest that if we had been charged with the responsibility of the Court of Appeal in the instant case we would have arrived at the same conclusion which they reached. In fact, it is altogether possible that we might have arrived at an entirely different conclusion.... (citation omitted). Such a difference of view, however, is not the measure of our appellate jurisdiction to review decisions of Court of Appeal because of alleged conflicts with prior decisions of this Court on the same point of law. (Emphasis added).

Nielson v. City of Sarasota, 117 So. 2d at 734.

Thus, because petitioner's did not show that the Rodriguez

case directly and expressly conflicts with the Fourth District Scoggins opinion, jurisdiction of this Court should be denied.

CONCLUSION

Wherefore, based of the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court to deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Respondent" has been furnished by Courier to: Christine Sciarrino, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 2nd day of June, 1997.

Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

JAMES SCOGGINS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.

APPENDIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix" has been furnished by Courier to: Christine Sciarrino, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 2nd day of June, 1997.

Ettie Fink

Counsel for Respondent

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describe the gun. The appellate court agreed with the defendant that the trial court erred in allowing bullets, which were found in his vehicle, to be placed into evidence, since no weapon was found, no ballistics tests were performed and no link whatsoever established between the bullets and the defendant's case. Furthermore, a police officer testified at trial that because of caliber differences, the bullets seized from the defendant's car could *not* have been fired in the gun that was fired at the victim.

Defendant further argues that even if the gun was relevant, its prejudicial impact outweighed any probative value under § 90.403, *Fla. Stat* (1983). He characterizes the gun testimony as "Williams Rule" evidence and contends that the State used such evidence solely to suggest defendant's bad character and propensity to commit other crimes. Assuming *arguendo* that evidence of defendant's mere possession of a gun constituted "collateral crimes" evidence, such evidence was admissible if relevant and probative of a material issue other than bad character or propensity. *Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988), *cert. denied*, 490 U.S. 1028, 109 S. Ct. 1765, 104 L. Ed. 2d 200 (1989). The Florida Evidence Code, § 90.404(2)(a), provides that evidence of other crimes, acts or wrongs is admissible to prove identity. Thus, the identity of a particular individual may be proved circumstantially by other types of evidence which happen to disclose the commission of other crimes. Ehrhardt, *Florida Evidence* §404.10 (1995 Edition). *See Young v. State*, 601 So. 2d 636, 638 (Fla. 4th DCA 1992), *rev. denied*, 613 So. 2d (Fla. 1992), (no error to admit evidence that defendant had used victim's car in robberies committed during the two days following the robbery being prosecuted).

Here, the gun testimony was useful in establishing the defendant's identity. The victim/witnesses described the gun used to perpetrate the robbery as being very similar to the gun found in the defendant's possession just three weeks following the robbery. Clearly, the gun was relevant as possibly being the robbery weapon used. It served to provide another link in the chain of identification testimony presented at trial. Other identification testimony included positive identifications made by the victim/witnesses, before and during trial, based on their ability to recall the defendant's unique and distinctive physical features. Additionally, the State presented expert fingerprint evidence matching the defendant's fingerprints to latent prints found on a water fountain in the doctor's office. The fingerprint evidence was particularly powerful in refuting the defendant's claim of never having visited the doctor's office and in supporting the testimony of a State witness who saw the defendant drinking from that same water fountain immediately before the robbery.

While the gun evidence may not have been as strong and compelling as the witnesses' identification testimony or the fingerprint evidence, it was nonetheless deserving of the jury's consideration for whatever weight they chose to give it. Moreover, the defendant was free to, and, in fact, did fully cross-examine the witnesses on any differences between the guns at issue so that the jury could draw its own factual conclusions.

We further reject the defendant's position that the probative value of testimony concerning the gun was substantially outweighed by its prejudicial nature. An examination of the record belies that conclusion and reveals that the gun found in the defendant's possession was not made a "feature" of the trial but was fairly presented as evidence tending to identify the defendant as the perpetrator of the robbery.

Defendant also complains of remarks made by the prosecutor during her closing argument concerning the gun seized from the defendant. However, the defendant failed to timely object to the prosecutor's references to the gun and raises this issue for the first time on appeal. A claim of improper prosecutorial argument is procedurally barred when no contemporaneous objection is made and no fundamental error is present. *Kilgore v. State*, 22 Fla. L. Weekly S 105 (Fla. March 14, 1997); *Bonifay v. State*, 680 So. 2d 413 (Fla. 1966), *Gibson v. State*, 351 So. 2d 948, 950 (Fla.1977), *cert. denied*, 435 U.S. 1004, 98 S. Ct. 1660, 56 L. Ed. 2d 93 (1978); *State v. Jones*, 204 So. 2d 515, 519 (Fla. 1967). Here, the prosecutor's remarks about the gun were fair comment upon the evidence presented during the State's case. Viewing the contents of the final argument, as a whole, we are unable to conclude that the prosecutor's remarks constituted fundamental error.

For the reasons discussed above, we affirm the defendant's conviction and sentence in all respects. (POLEN and PARIENTE, JJ., concur.)

* * *

Criminal law—Trial court's inquiry into numerical division of deadlocked jury is error that must be analyzed under the totality of the circumstances to determine if jury was coerced into returning a verdict—Judge's inquiry into numerical split of jury is not per se reversible error—Absent fundamental error, objection is required to preserve issue of trial judge's coercion of verdict for appellate review—Conviction affirmed where judge's inquiry did not amount to fundamental or constitutional error, and no objection was made to inquiry

JAMES SCOGGINS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 96-0228. Opinion filed April 23, 1997. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Howard M. Zeidwig, Judge; L.T. Case No. 95-10920CF10A. Counsel: Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ettie Feistmann, Assistant Attorney General, West Palm Beach, for appellee.

(GROSS, J.) The primary issue in this case concerns the trial court's inquiry into the numerical division of the jury after being informed that the jury was at an impasse. We hold that such inquiry is error that must be analyzed under the totality of the circumstances to determine if the jury was coerced into returning a verdict.

Appellant James Scoggins was convicted of possession of cocaine following a jury trial. The evidence at trial was that the police found crack cocaine in the ashtray of Scoggins' truck after a traffic stop. Initially, Scoggins said that the drugs did not belong to him. He pointed out that he had recently loaned his truck to someone else. After his arrest, on the way to the police station, Scoggins admitted that the drugs were his.

After some deliberations, the jury sent a written question to the court:

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

Outside the presence of the jury, the judge asked both trial counsel if they objected to his asking the jury how it was numerically split. Neither objected. The following exchange between the court and the jury foreperson then occurred:

> COURT: . . . [D]o you think further deliberations would help at all?
>
> [FOREPERSON]: There are those who feel that further deliberations would not help them.
>
> COURT: Okay. Can I assume by that, that more than one person—the split is more than one person?
>
> [FOREPERSON]: Yes.
>
> COURT: So, in other words, at least four to two?
>
> [FOREPERSON]: Yes.
>
> COURT: Okay. And what about if I reset the deliberations until tomorrow, have you come back, you think that would serve any useful purpose?
>
> [FOREPERSON]: You have to do what you feel is right.
>
> 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—if you want to talk to the other jurors, and if you think there's no way, then I'll declare a mistrial.
>
> [FOREPERSON]: Am I allowed to express my personal feelings?
>
> COURT: No.
>
> [FOREPERSON]: Perhaps we should go back into the room.

just decide whether or not we should meet tomorrow, and then come back out again.

After retiring to the jury room, a short while later the jury sent a note to the judge indicating that they were "willing to come back tomorrow & deliberate for a little longer being we are still divided. We prefer morning." The court excused the jury for the evening. Neither side requested the jury deadlock charge and the trial judge did not give it. *See* Fla. Std. Jury Instr. (Crim.) 3.06. Following deliberations the next morning, the jury returned a guilty verdict.

Two Florida cases have held that it is error for a trial judge to ask the jury for its numerical split during deliberations. *McKinney v. State*, 640 So. 2d 1183, 1186-87 (Fla. 2d DCA 1994), reaches this conclusion without discussion and suggests that the harmless error analysis applies. *Rodriguez v. State*, 559 So. 2d 678 (Fla. 3d DCA 1990), takes a more extreme view, holding that the error is fundamental and indicating that such polling of the jury is per se reversible. *Rodriguez* adopts the rule of the United States Supreme Court in *Brasfield v. United States*, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926), from which it quotes at length:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry[1] itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded.

Rodriguez, 559 So. 2d at 679 (quoting *Brasfield*, 272 U.S. at 450, 47 S. Ct. at 135-36) (footnote added).

Since *Brasfield* was decided in 1926, there has been much litigation concerning the propriety of a trial court's inquiry into the jury's numerical division. *See* George R. Preist, Annotation, *Propriety and Prejudicial Effect of Trial Court's Inquiry as to Numerical Division of Jury*, 77 A.L.R. 3d 769 (1977). The federal courts follow *Brasfield's* holding that such an inquiry is per se reversible error. *See, e.g., United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987); *Cornell v. State of Iowa*, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126, 101 S. Ct. 944, 67 L. Ed. 2d 112 (1981); *Government of the Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979).[2]

Even though it is the rule in the federal system, *Brasfield* is not binding on the states. The source of the *Brasfield* rule is not the federal constitution; it is a rule of judicial administration based on the supervisory power of the Supreme Court over the federal court system. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40, 108 S. Ct. 546, 552, 98 L. Ed. 2d 568 (1988); *Cornell*, 628 F.2d at 1047; *Ellis v. Reed*, 596 F.2d 1195, 1197 (4th Cir.), *cert. denied*, 444 U.S. 973, 100 S. Ct. 468, 62 L. Ed. 2d 388 (1979). Every federal court of appeals that has addressed the issue has "rejected the notion that *Brasfield's* per se reversal approach must be followed" by the states. *Lowenfield*, 484 U.S. at 240, 108 S. Ct. at 552; *see, e.g., Montoya v. Scott*, 65 F.3d 405, 412 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1417, 134 L. Ed. 2d 542 (1996).

The states are divided on whether it is error for the trial judge to inquire into the numerical division of a jury. 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*, 442 P.2d 353, 356 (Cal. 1968), *abrogated on other grounds sub nom., People v. Gainer*, 566 P.2d 997 (Cal. 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*, 442 P.2d at 356; *Dunford*, 614 P.2d at 1118.

The fallacy in this approach is that it equates the state of numerical division with the stage of deliberations. For this reason we align ourselves with our sister courts, the federal courts and those state courts that have held that a trial judge should not inquire into the numerical division of the jury. *See State v. Roberts*, 642 P.2d 858 (Ariz. 1982); *State v. Rickerson*, 625 P.2d 1183 (N. Mex.), *cert. denied*, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981); *People v. Wilson*, 213 N.W.2d 193 (Mich. 1973); *State v. Hutchins*, 202 A.2d 678 (N.J. 1964). For whatever reason, whether to gauge the time for an evening recess or to decide whether to give the jury a deadlock charge, if a trial judge inquires into the sensitive area of the possibility of a verdict, the better practice is to admonish the jury at the outset not to indicate how they stand as to conviction or acquittal.[3]

The reasons for the rule precluding a judge from delving into the jury's numerical division are those articulated in *Brasfield*: the inquiry serves no useful purpose that cannot be attained through less intrusive questions; the inquiry has a tendency to be coercive; and it interferes with the proper relation of the judge to the jury. 272 U.S. at 450, 47 S. Ct. at 135-36. A principal aim of a jury trial is the receipt of a verdict that fairly reflects the considered judgment of each juror. *See* Fla. Std. Jury Instr. (Crim.) 2.09. Maintaining the secrecy in jury deliberations is important to insure an open and uninhibited exchange of ideas among the jurors. When combined with comments that belie the judge's feelings, or with instructions such as the jury deadlock charge, disclosure of the jury's numerical division risks conveying the message that the court believes that the majority should prevail, creating the "doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority." *Wilson*, 213 N.W.2d at 195.

Although we hold that it is error for a trial judge to delve into the jury's numerical split, we disagree with *Brasfield*, and the third district's implication in *Rodriguez*, that such questioning is per se reversible error. The better view is to analyze the judge's inquiry under the totality of the circumstances to determine if the trial court's actions had an improperly coercive influence upon the jury. *See, e.g., Lowenfield*, 484 U.S. at 236, 108 S. Ct. at 550; *Montoya*, 65 F.3d at 412; *Cornell*, 628 F.2d at 1048; *Roberts*, 642 P.2d at 860. A coerced verdict in a criminal case infringes upon two rights guaranteed by the Florida Constitution—the right to a fair trial under the due process clause and the right to an impartial jury. Article I, §§ 9, 16, Fla. Const.; *Webb v. State*, 519 So. 2d 748, 749 (Fla. 4th DCA 1988).

For example, although the use of a jury deadlock charge has long been sanctioned by the courts, *Lowenfield*, 484 U.S. at 237, 108 S. Ct. at 550; *Kelley v. State*, 486 So. 2d 578 (Fla.), *cert. denied*, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed. 2d 169 (1986), a trial court must leave the jury "free to reach its own conclusions and to record its conscientious convictions." *Wissel v. United States*, 22 F.2d 468 (2d Cir. 1927). The fear is that members of a deadlocked jury will use a judge's words and actions to support a position on the merits of the case or to pressure the minority to agree simply for the sake of a verdict. *McKinney*, 640 So. 2d at 1187. As Judge Glickstein observed in *Nelson v. State*, 438 So. 2d 1060, 1062 (Fla. 4th DCA 1983),

> [i]t is the genius of our jury system that twelve impartial persons, individually, applying a subjective standard, come to a common conclusion of a defendant's guilt beyond a reasonable doubt. This fundamental principle becomes subverted if a jury member is pressured to defer to the opinion of his peers, for unanimity is made a sham thereby. An objective standard is in effect substituted for the subjective, by virtue of the implication that the majority opinion is reasonable, and the minority unreasonable.

In this case, before questioning the jury about its numerical division, the trial judge asked if either the prosecution or the defense had any objection. Both lawyers acceded to the proposed inquiry and requested no additional instruction. Absent fundamental error, an objection is required to preserve the issue of a

trial judge's coercion of a verdict for appellate review. *See Palmer v. State*, 681 So. 2d 767 (Fla. 5th DCA 1996); *Gahley v. State*, 567 So. 2d 456, 459 (Fla. 1st DCA 1990), *review denied*, 577 So. 2d 1326 (Fla. 1991); *Warren v. State*, 498 So. 2d 472, 477 (Fla. 3d DCA 1986), *review denied*, 503 So. 2d 328 (Fla. 1987). One reason for requiring an objection is to place the "trial judge on notice that an error may have been committed" and to provide the judge with the opportunity to correct it on the spot. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). If certain judicial conduct could be construed as coercive, an objection can alert the court to the necessity of an additional instruction which might blunt the improper impact on the jury.

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*, 21 Fla. L. Weekly S345 (Fla. Aug. 29, 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*, 365 So. 2d at 704 n.7. 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).

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*, 567 So. 2d at 459. 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.

AFFIRMED. (KLEIN, J., and GERSTEN, CAROL R., Associate Judge, concur.)

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[1]In *Brasfield*, after some hours of deliberation, the trial judge inquired how the jury was divided numerically. The foreman advised that it "stood nine to three, without indicating which number favored a conviction." 272 U.S. at 449, 47 S. Ct. at 135.

[2]The Brasfield rule has not been inflexibly applied to situations devoid of coercion. *Beale v. United States*, 263 F.2d 215 (5th Cir. 1959) (no infraction of *Brasfield* where judge "actuated by solicitude for the jury, to arrange a suitable luncheon hour, and not by a desire to pry into or influence their deliberation); *Butler v. United States*, 254 F.2d 875 (5th Cir. 1958); *Anderson v. United States*, 262 F.2d 764 (8th Cir.), *cert. denied*, 360 U. S. 929, 79 S. Ct. 1446, 3 L. Ed. 2d 1543 (1959).

[3]For example, in the federal system, a standard jury instruction reads:

> If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. *I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.*

Eleventh Circuit Pattern Jury Instructions, Criminal Cases, Instruction 12 (District Judges Assoc. 1985) (emphasis supplied).

* * *

Criminal law—Probation modification—Error to modify probation by adding new condition on basis of conduct not charged in affidavit alleging violation of probation—Where defendant was charged with violation of probation for having carnal intercourse with person under age of 18 and interfering with custody of a child, was also charged with those substantive offenses in a separate criminal case, jury found defendant not guilty, and court orally announced that defendant had not violated his probation, court erred in enhancing probation upon finding that defendant contributed to the delinquency of a child

ROGER E. MARTIN, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 96-1705. Opinion filed April 23, 1997. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Ben L. Bryan, Jr., Judge; L.T. Case No. 95-173-CF. Counsel: Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) In May, 1995, appellant, Roger Martin was placed on probation for several crimes, including a lewd assault or indecent act on a child under the age of 16 in violation of section 800.04(1), Florida Statutes (1995). In September, 1995, a violation of probation was filed charging Martin with violating his probation by having carnal intercourse with a person under the age of 18 in violation of section 794.05, Florida Statutes (1995), and interfering with custody of a child contrary to section 787.03, Florida Statutes (1995).

The state also charged Martin with the substantive offenses in a separate criminal case. After a two-day trial, the jury found Martin not guilty after very brief deliberations. The court tried the violations of probation simultaneously with the substantive charges. Although the trial court orally pronounced that Martin had not violated his probation, the court amended the terms of probation to prohibit Martin from having any unsupervised contact with a child under the age of 18. In its written order, the court reiterated that the state had not proven carnal intercourse or interference with custody as charged in the affidavit of violation, but held that Martin violated a separate criminal statute, section 827.04(3), Florida Statutes (1995), by contributing to the delinquency of a child.

The state concedes that the order modifying Martin's probation must be vacated. Before probation can be enhanced by adding new conditions that a probationer must follow, a violation of probation must be formally charged and proven pursuant to the procedures in section 948.06, Florida Statutes (1995). *Clark v. State*, 579 So. 2d 109, 110-11 (Fla. 1991). Probation may not be revoked or enhanced for conduct not charged in the affidavit alleging a violation of probation. *Harrington v. State*, 570 So. 2d 1140, 1142 (Fla. 4th DCA 1990); *Butler v. State*, 450 So. 2d 1283 (Fla. 2d DCA 1984). Therefore, the court erred in enhancing probation since the affidavit of violation failed to allege that

Before SCHWARTZ, C.J., and HUBBART and GERSTEN, JJ.

PER CURIAM.

The order denying the motion to change venue filed by the defendant Valjean Corporation, Inc. [Valjean] is reversed and the cause is remanded to the trial court with directions to transfer the venue of this cause to either Brevard or Hillsborough County at the plaintiff's option. We reach this result for two reasons.

[1] First, the action below is improperly laid in Dade County and may only be brought, at the plaintiff's option, either (a) where the cause of action accrued, namely, Hillsborough County, or (b) where the defendant Valjean and a co-defendant mutually reside, namely, Brevard County. *Commercial Carrier Corp. v. Mercer*, 226 So.2d 270, 271 (Fla. 2d DCA 1969); §§ 47.021, 47.051, Fla.Stat. (1987).

[2] Second, the defendant Valjean did not, as urged, waive its defense of improper venue by filing a motion to dismiss and answer (neither of which raised improper venue) as the subject motion to change venue was filed *before* the motion to dismiss was heard and denied by the trial court, and before the answer was filed. *Gross v. Franklin*, 387 So.2d 1046 (Fla. 3d DCA 1980).

Reversed and remanded.

Manuel RODRIGUEZ, Appellant,

v.

The STATE of Florida, Appellee.

No. 88–104.

District Court of Appeal of Florida, Third District.

April 3, 1990.

Defendant was convicted in the Circuit Court, Dade County, Thomas M. Carney, J., for trafficking in cocaine, and he appealed. The District Court of Appeal held that: (1) trial court should not have polled jury on its numerical division; (2) erroneous polling of jury on its numerical division was fundamental error; and (3) trial court should have granted defense request to determine what statement jury wished to have read back before ruling on jury's request.

Reversed and remanded for new trial.

1. Criminal Law ⇐874

Jury in criminal case should not have been polled on its numerical division by trial court.

2. Criminal Law ⇐1040

Erroneous polling of criminal jury as to its numerical division by trial court was fundamental error, and court's comment that the case had been a "three-witness case" compounded the problem by indicating court's view that jury was taking too long to decide.

3. Criminal Law ⇐859

Defense request for determination of exactly what statement jury wished to have read back should have been granted in criminal case in which jury inquired whether it could have parts of statements read back to it; the information desired by the jury might have been readily suppliable.

4. Criminal Law ⇐859

Trial court has great discretion in ruling on request by jury to have statement read back, but that discretion cannot properly be exercised without knowing nature of jury's request for information.

Bennett H. Brummer, Public Defender, and J. Rafael Rodriguez, Sp. Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Joan L. Greenberg, Asst. Atty. Gen., for appellee.

Before HUBBART, COPE and LEVY, JJ.

PER CURIAM.

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PER CURIAM.

Manuel Rodriguez, defendant below, appeals his conviction for trafficking in cocaine. We reverse and remand for a new trial.

Defendant's trial lasted less than one day and was submitted to the jury at 4:40 p.m. After deliberating, the jury sent out several questions. One question was, "Can we have parts of statements read back to us?" The defense asked that the jury be directed to specify exactly what they wanted to hear. The court denied that request and instead responded to the jury that no statements would be read back to them.

[1, 2] Out of the hearing of the jury the judge expressed some exasperation that what appeared to be a simple, single issue case was taking so long to decide. At 7:20 the jury was brought back to the jury room and the following transpired:

> THE COURT: ...
> Ladies and gentlemen, you have been deliberating since about twenty to five. It's twenty after seven. This has been a three-witness case. Can I ask of you, please, can you tell me how far apart you are. I'm not asking whether you're voting guilty or not guilty, how far apart you are. In other words, five/one, four/two, three/three, that type of situation?
> [THE FOREMAN]: At the present time we're probably four/two and it's not closed at this point.
> . . . . .
> [A JUROR]: Your Honor, is there any way we can have the court reporter replay some of what we have heard?
> THE COURT: I have already ruled on that.

Fifteen minutes later, the jury returned with a verdict of guilty.

The trial court erred by polling the jury on its numerical division. The United States Supreme Court has said:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 135–36, 71 L.Ed. 345, 346 (1926). Such an error is fundamental. *Id.; see Warren v. State*, 498 So.2d 472, 478 (Fla. 3d DCA 1986), *review denied*, 503 So.2d 328 (Fla.1987). The comment, "This has been a three-witness case," compounded the problem by indicating the judge's view that the jury was taking too long. *See Warren*, 498 So.2d at 474–78.

[3, 4] We also find merit in the contention that the trial court should have granted the defense request to determine exactly what statement the jury wished to have read back. *Furr v. State*, 152 Fla. 233, 9 So.2d 801, 803 (1942). The trial court has great discretion in ruling on such a request, *see, e.g., DeCastro v. State*, 360 So.2d 474, 475 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1365 (Fla.1979), but the discretion cannot be properly exercised without knowing the nature of the request. It may be that the information desired by the jury could have been readily supplied; the defense request should have been granted.

Defendant also contends that the contraband should have been suppressed in light of such recent decisions as *State v. Wells*, 539 So.2d 464 (Fla.), *cert. granted*, — U.S. —, 109 S.Ct. 3183, 105 L.Ed.2d 692 (1989), and *Shelton v. State*, 549 So.2d 236 (Fla. 3d DCA 1989), *review dismissed*, 557 So.2d 869 (Fla.1990). Since there must in

any event be a new trial, we do not reach the defendant's fourth amendment issues. Instead, those issues should be raised in the trial court on remand.

We conclude that defendant's remaining point on appeal is without merit.

Reversed and remanded for new trial.

Stephen T. SIAS, Appellant,

v.

The STATE of Florida, Appellee.

No. 89-841.

District Court of Appeal of Florida, Third District.

April 3, 1990.

An Appeal from the Circuit Court for Dade County; Arthur I. Snyder, Judge.

Stephen T. Sias, in pro. per.

Robert A. Butterworth, Atty. Gen., and Jacqueline M. Valdespino, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

PER CURIAM.

Affirmed. *La Marca v. State*, 547 So.2d 350 (Fla. 3d DCA 1989); *Sias v. State*, 455 So.2d 1341 (Fla. 3d DCA 1984).

Dennis WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 87-01981.

District Court of Appeal of Florida, Second District.

April 4, 1990.

Following revocation of probation, defendant received upward departure sentence for conviction for grand theft in second degree, in the Circuit Court, Hillsborough County, Robert Bonanno, J., and defendant appealed. The District Court of Appeal, Hall, J., held that: (1) remand was necessary for entry of corrected guidelines scoresheet indicating trial court's intention to depart from guidelines and written order stating reasons for departure, and (2) repeated violation of probation would be valid reason for upward departure from sentencing guidelines range beyond the one-cell increase for violation of probation.

Affirmed in part; reversed and remanded in part; question certified.

Schoonover, J., filed opinion concurring in part and dissenting in part in which Campbell, C.J., and Lehan and Parker, JJ., concurred.

1. Criminal Law ⇐1181.5(8)

Remand was necessary for entry of corrected sentencing guidelines scoresheet indicating trial court's intention to upwardly depart from guidelines and written order stating reasons for departure, where no written reasons for departure were given in space provided on scoresheet other than scoresheet's notation of "3rd violation," and section of scoresheet for preparer to indicate whether guidelines sentence or departure sentence was imposed was marked as guidelines sentence.

2. Criminal Law ⇐982.9(7)

Repeated violation of probation is valid reason for upward departure from sentencing guidelines beyond the one-cell increase

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