

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1083

**WILEME BAPTISTE,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

---

**INITIAL BRIEF OF PETITIONER ON THE MERITS**

---

---

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

---

CARLOS J. MARTINEZ  
Office of the Public Defender  
Eleventh Judicial Circuit of Florida  
1320 N.W. 14th Street  
Miami, Florida 33125  
(305) 545-1958

MARIA E. LAUREDO (FBN: 059412)  
Chief Assistant Public Defender  
SHANNON HEMMENDINGER (FBN: 97947)  
Assistant Public Defender  
AppellateDefender@pdmiami.com  
MLauredo@pdmiami.com  
SHemmendinger@pdmiami.com

*Counsel for Petitioner*

RECEIVED, 12/13/2020 04:58:30 PM, Clerk, Supreme Court

**TABLE OF CONTENTS**

	<b>PAGE</b>
INTRODUCTION .....	1
STATEMENT OF THE CASE AND FACTS .....	2
SUMMARY OF ARGUMENT .....	9
STANDARD OF REVIEW .....	11
ARGUMENT .....	13
<b>THE TRIAL COURT COMMITTED FUNDAMENTAL, PER SE REVERSIBLE ERROR BY GIVING THE JURY AN IMPROPER MODIFIED <i>ALLEN</i> CHARGE, RESULTING IN A COERCED VERDICT THAT COULD NOT BE WAIVED BY COUNSEL’S AGREEMENT TO THE INSTRUCTION.....</b>	
<b>A. The trial court’s decision to give the jury a modified <i>Allen</i> charge rather than grant a mistrial after the polling of the jury established that the initial verdict was not unanimous resulted in a coerced verdict.....</b>	
<b>15</b>	
<b>B. A coerced verdict is fundamental, per se reversible error that is not waived by counsel’s failure to object to an improper <i>Allen</i> charge or by counsel’s agreement to the instruction.....</b>	
<b>20</b>	
<b>C. Because juror coercion goes to the heart of our adjudicatory system and violates a defendant’s fundamental constitutional rights to a fair trial and an impartial jury, this Court should conclude that any waiver of the right to an uncoerced verdict must be made personally by the defendant and cannot be made by defense counsel.....</b>	
<b>22</b>	
CONCLUSION.....	29
CERTIFICATE OF SERVICE .....	30

CERTIFICATE OF FONT .....31

## TABLE OF CITATIONS

Page(s)

### Cases

<i>Allen v. United States</i> , 164 U.S. 492 (1896) .....	2, 6, 13, 15
<i>Almeida v. State</i> , 157 So. 3d 412 (Fla. 4th DCA 2015) .....	15, 17
<i>Baptiste v. State</i> , 45 Fla. L. Weekly D1536 (Fla. 3d DCA June 24, 2020) .....	<i>passim</i>
<i>Blair v. State</i> , 698 So. 2d 1210 (Fla. 1997) .....	13, 26, 27
<i>Brown v. State</i> , 538 So. 2d 833 (Fla. 1989) .....	26
<i>Bryant v. State</i> , 656 So. 2d 426 (Fla. 1995) .....	26
<i>Dixon v. State</i> , 603 So. 2d 86 (Fla. 5th DCA 1992) .....	21
<i>Flanning v. State</i> , 597 So. 2d 864 (Fla. 3d DCA 1992) .....	22, 23, 24
<i>Floyd v. State</i> , 90 So. 2d 105 (Fla. 1956) .....	13
<i>Hibbert v. State</i> , 675 So. 2d 1016 (Fla. 4th DCA 1996) .....	26

<i>Hibdon v. United States</i> , 204 F.2d 834 (6th Cir. 1953) .....	23
<i>Lewis v. State</i> , 369 So. 2d 667 (Fla. 2d DCA 1979) .....	14
<i>Lowenfield v. Phelps</i> , 484 U.S. 231 (1988) .....	13
<i>Martinez v. State</i> , 933 So. 2d 1155 (Fla. 3d DCA 2006) .....	11
<i>Nelson v. State</i> , 438 So. 2d 1060 (Fla. 4th DCA 1983) .....	14
<i>Nobles v. State</i> , 786 So. 2d 56 (Fla. 4th DCA 2001) .....	22
<i>Reid v. State</i> , 732 So. 2d 1171 (Fla. 3d DCA 1999) .....	22
<i>Robinson v. State</i> , 674 So. 2d 160 (Fla. 3d DCA 1996) .....	25
<i>Rodriguez v. State</i> , 462 So. 2d 1175 (Fla. 3d DCA 1985) .....	11, 13, 21
<i>Roma v. State</i> , 785 So. 2d 1269 (Fla. 5th DCA 2001) .....	14, 15, 16
<i>Rubi v. State</i> , 952 So. 2d 630 (Fla. 4th DCA 2007) .....	<i>passim</i>

<i>Sanchez v. United States</i> , 782 F.2d 928 (11th Cir. 1986) .....	24
<i>Scoggins v. State</i> , 691 So. 2d 1185 (Fla. 4th DCA 1997) .....	11, 21
<i>State v. Delva</i> , 575 So. 2d 643 (Fla. 1991) .....	11
<i>State v. Singletary</i> , 549 So. 2d 996 (Fla. 1989) .....	26
<i>State v. Upton</i> , 658 So. 2d 86 (Fla. 1995) .....	25
<i>Thomas v. State</i> , 748 So. 2d 970 (Fla. 1999) .....	11, 14, 17, 21
<i>Tomlinson v. State</i> , 584 So. 2d 43 (Fla. 4th DCA 1991) .....	11, 17
<i>Tucker v. State</i> , 559 So. 2d 218 (Fla. 1990) .....	25
<i>United States v. Pachay</i> , 711 F.2d 488 (2d Cir. 1983) .....	23
<i>Warren v. State</i> , 498 So. 2d 472 (Fla. 3d DCA 1986) .....	21
<i>Washington v. State</i> , 758 So. 2d 1148 (Fla. 4th DCA 2000) .....	11

*Webb v. State*,  
519 So. 2d 748 (Fla. 4th DCA 1988) .....16

**Statutes**

Amend. VI, U.S. Const .....13

Amend. XIV, U.S. Const .....13

Art. I, § 16(a), Fla. Const .....13

Art. I, § 22, Fla. Const..... 13, 25

**Rules**

Florida Rule of Appellate Procedure 9.330(a)(2)(C).....8

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1083

**WILEME BAPTISTE,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

---

**INITIAL BRIEF OF PETITIONER ON THE MERITS**

---

---

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

---

**INTRODUCTION**

The petitioner, Wileme Baptiste, was the appellant in the Third District Court of Appeal and the defendant in the Circuit Court. The respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the Circuit Court. In this brief, “R” will refer to the record on appeal and “T” will refer to the trial transcripts.

## STATEMENT OF THE CASE AND FACTS

During Wileme Baptiste's trial for second-degree murder, two counts of attempted second-degree murder, and possession of a firearm by a juvenile,<sup>1</sup> the jurors sent the judge several notes indicating that they were deadlocked in their deliberations and could not reach a unanimous verdict. After receiving two such notes, the judge instructed the jurors to keep deliberating so they could reach a unanimous verdict. After receiving a third note from the jury regarding their inability to reach a verdict, the judge read the standard jury deadlock instruction, known as an *Allen* charge, pursuant to *Allen v. United States*, 164 U.S. 492 (1896). Shortly thereafter, the jury returned guilty verdicts on all four counts. When the jurors were polled, however, one juror stated that he did not agree with the verdict.

After discussing the issue, the judge and the parties agreed that the judge should send the jurors back to the jury room with new verdict forms and instructions to complete the verdict forms if they had a unanimous verdict. The jury shortly thereafter returned unanimous guilty verdicts for the lesser-included

---

<sup>1</sup> The charges in this case arose out of a dispute between two high school girls over whether one of the girls was making sexual advances on the other girl's boyfriend. The dispute, which began on Facebook, quickly escalated to a fist fight and culminated in a shooting wherein one victim was killed, and two others were injured. At trial, there was no dispute that Mr. Baptiste was the shooter. The only issue for the jury to decide was whether he was acting in self-defense at the time of the shooting.

offenses of manslaughter with a deadly weapon, two counts of attempted manslaughter, and possession of a firearm by a juvenile.

The Third District Court of Appeal held that trial court's instruction to fill out new verdict forms was a modified *Allen* charge which, based on the totality of the circumstances, was erroneous. But the Third District nevertheless affirmed Mr. Baptiste's convictions, on the ground that defense counsel waived the error by agreeing to the modified *Allen* charge. The issue this Court must resolve is whether the coerced verdict that resulted from the final improper *Allen* charge was fundamental, per se reversible error that could not be waived by counsel's agreement to the instruction.

### ***Jury deliberations***

After four days of testimony, the jury began deliberating. (T. 2212; R. 851). A few hours into their deliberations, the jurors began sending notes to the court indicating that they were having trouble coming to a unanimous decision. The first note asked, "[c]an we replace a juror in order to come to a unanimous verdict?" (T. 2212; R. 757, 851). The trial court responded "no." (T. 2214–15; R. 757). In discussing the question with counsel, the judge noted "they're 5-1 one way or the

other.” (T. 2218).<sup>2</sup> At 5:00 p.m., the jury, unable to reach a verdict, was sent home for the evening. (T. 2232; R. 852).

The jury resumed deliberations at 10:00 a.m. the next morning. (T. 2249; R. 912).<sup>3</sup> At 12:20 p.m., the jury sent another note stating, “[a]t this point, we’re having a problem coming to a unanimous decision. What are our options?” (T. 2256; R. 902, 912). The State and the defense specifically requested that the court give the jury an *Allen* charge, but the judge refused and instead wrote back to the jurors that they were to “continue to deliberate and continue reviewing the evidence **so that you can reach a unanimous decision.**” (T. 2256–59; R. 902, 912) (emphasis supplied).

Approximately one hour later, the jury sent another note to the court. (T. 2265–66; R. 904, 912). This note indicated that the verdict was not unanimous amongst the six-member panel and that there was one holdout juror:

The jury has reached a unanimous decision with the exception of one juror. The jury (sic) agrees to step aside so that the panel can reach a unanimous decision. May a request be granted to replace juror or have a verdict rendered with five jurors?

---

<sup>2</sup> The jury also asked the court if they could have a copy of the transcript of Mr. Baptiste’s interview with police after the shooting. (T. 2219–23). The judge told the jurors that the transcript was not available, but that they could view the recorded statement if they felt it necessary. (T. 2224–31; R. 851–52, 898).

<sup>3</sup> Shortly after the jurors resumed their deliberations, they asked to review the video of Mr. Baptiste’s statements, to which the court responded yes. (T. 2252–53; R. 900, 912).

(T. 2265–66; R. 904). The State and the defense agreed that the answer to both questions had to be “no,” and again asked the court to give the jury an *Allen* charge. (T. 2266; R. 904). The judge finally agreed. (T. 2267–71). While the judge was questioning Mr. Baptiste about whether he agreed with counsel’s request for an *Allen* charge, the jury sent yet another note to the court. (T. 2267–73; R. 906, 912). In this note, the jury sought clarification as to the intent element for second-degree murder. (T. 2267–73; R. 906). After the judge read the standard *Allen* charge, he answered the jurors’ question about second-degree murder by telling them to review the applicable law provided to them in the jury instructions. (T. 2282–89; R. 906).

The jury continued deliberating for about two hours after the judge read the *Allen* charge. (R. 913). When the jurors returned to the courtroom, it was announced that they found Mr. Baptiste guilty of second-degree murder, both counts of attempted second-degree murder, and possession of a firearm by a juvenile. (T. 2289–92; R. 908–11). Pursuant to defense counsel’s request, the clerk polled the jury. (T. 2292–93). The first four jurors acceded to the verdict, but juror number five did not. (T. 2292). After juror number six acceded to the verdict, the panel was sent back to the jury room so the court could discuss the issue with counsel. (T. 2292–93).

Defense counsel initially stated that he believed that the jury should be instructed to keep deliberating and provided with a new set of verdict forms to fill out. (T. 2294). The judge stated that since the jury had already received an *Allen* charge, it would be improper to instruct the jury to continue deliberating. (T. 2294–95). The judge also acknowledged that the polling of the jurors revealed that they had not reached a unanimous verdict. *Id.* But rather than declare a mistrial, the court decided to instruct the jury to memorialize on a new verdict form what their verdict was, if they had one. (T. 2294). Counsel for both parties agreed, and the jury was instructed as follows:

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

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

If you do not have a unanimous verdict, please knock on the door . . . and we'll bring you back out here.”

(T. 2296). Just a few minutes later, the jury returned a unanimous guilty verdict for the lesser-included offense of manslaughter with a deadly weapon, two counts of attempted manslaughter, and possession of a firearm by a juvenile. (T. 2298–2300; R. 905, 923–26).

***Motion for new trial and sentence***

After trial, defense counsel filed a motion arguing that Mr. Baptiste was entitled to a new trial because the court failed to declare a mistrial, and instead

gave a modified *Allen* charge, when the polling of the jurors revealed that they had not reached a unanimous verdict. (R. 990–91, 1327, 1329). The judge ruled that his instruction to the jurors to fill out new verdict forms if they had a unanimous verdict was not a modified *Allen* charge, and that counsel’s failure to move for a mistrial waived the issue. (R. 1326–32). After denying the motion for new trial, the court sentenced Mr. Baptiste to a total of forty-five years in prison. (R. 1278–81, 1334, 1463–65).

### ***Appeal and decision of the Third District Court of Appeal***

Mr. Baptiste timely appealed to the Third District Court of Appeal. On appeal, Mr. Baptiste asserted that the trial court’s final instruction to the jury constituted an improper modified *Allen* charge which resulted in an unconstitutionally coerced verdict requiring a new trial. The Third District agreed that “it is clear that under a totality of the circumstances analysis, two or more consecutive *Allen* (or modified) charges provide sufficient indicia of coercion, particularly where the jury has repeatedly indicated its division with a sole holdout.” *Baptiste v. State*, 45 Fla. L. Weekly D1536 (Fla. 3d DCA June 24, 2020). The court thus held that given the initial *Allen* charge, the jury’s repeated indications of deadlock, and the sole holdout juror, the court’s final instruction to the jury in this case was erroneous. *Id.* at \*2. But the Third District nevertheless affirmed Mr. Baptiste’s convictions, on the ground that defense counsel waived the

error in the instruction by failing to move for a mistrial after the non-unanimous poll and by failing to object to the subsequent, modified *Allen* charge. *Id.* The court held that “even if we were to consider this error to be fundamental, Baptiste waived it by agreeing to the modified charge.” *Id.* Mr. Baptiste filed a timely motion for certification of conflict pursuant to [Florida Rule of Appellate Procedure 9.330\(a\)\(2\)\(C\)](#), but the Third District denied the motion. Thereafter, a notice invoking this Court’s discretionary jurisdiction based on express and direct conflict of decisions was timely filed.

## SUMMARY OF ARGUMENT

The question before this Court is whether trial counsel can waive a defendant's right to an uncoerced verdict by agreeing to an improper *Allen* charge after the jury repeatedly indicated its division with a sole holdout juror. The jury that decided Mr. Baptiste's case finally rendered a verdict after receiving multiple instructions from the judge requiring a unanimous verdict as well as a full *Allen* charge. The final instruction, another modified *Allen* charge, came after the jury had indicated it was deadlocked three to four times, and a single juror disagreed with the initial verdict.

The Third District Court of Appeal correctly concluded that under these circumstances, it was error for the trial court to issue the final instruction and send the jurors back to the jury room again with new verdict forms to complete. However, the court nevertheless held that a new trial was not required because defense counsel waived the error in the instruction by failing to object to the modified *Allen* charge.

This Court should conclude that an accused has a fundamental right to an uncoerced verdict that cannot be waived by trial counsel's agreement to an erroneous and coercive *Allen* charge. Because a coerced verdict destroys a defendant's most inviolable rights to a fair trial and impartial jury, this Court should conclude that when a trial court engages in conduct which results in a

coerced verdict, fundamental error has occurred regardless of counsel's acquiescence to the court's actions.

This Court should also conclude that the right to an uncoerced verdict can be waived only by the defendant personally and that there was no valid waiver in this case. Given the paramount importance of the defendant's right to an uncoerced verdict, if counsel requests an additional *Allen* charge, the trial court must engage in an on-the-record colloquy with defendant to make sure he understands the consequences of the court instructing the jury to continue deliberating. Such a colloquy did not happen here. Mr. Baptiste should not be precluded from challenging the coerced verdict that irreparably deprived him of a fair trial simply because his trial attorney agreed that the jury should keep deliberating after it was revealed that their initial verdict was not unanimous. This Court should quash the decision of the Third District Court of Appeal and remand this case with instructions that Mr. Baptiste receive a new trial.

## STANDARD OF REVIEW

When reviewing a trial court's decision to give an *Allen* charge to the jury, the applicable standard of review is whether, under the totality of the circumstances, the trial court's actions were coercive. *Thomas v. State*, 748 So. 2d 970, 976 (Fla. 1999); *Washington v. State*, 758 So. 2d 1148, 1152 (Fla. 4th DCA 2000).<sup>4</sup>

While jury instructions are subject to the contemporaneous objection rule, *see, e.g., State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991), Florida law recognizes that it is fundamental error for a trial court to give an improper *Allen* charge or otherwise coerce the jury into reaching a verdict, as this deprives the accused of a fair and impartial trial and renders the jury's verdict unreliable. *Thomas*, 748 So. 2d at 980; *Rubi v. State*, 952 So. 2d 630, 633 (Fla. 4th DCA 2007); *Tomlinson v. State*, 584 So. 2d 43, 45 (Fla. 4th DCA 1991); *Rodriguez v. State*, 462 So. 2d 1175, 1177–78 (Fla. 3d DCA 1985); *see generally Martinez v. State*, 933 So. 2d 1155,

---

<sup>4</sup> Some of the factors which courts have looked at to determine jury coercion include: 1) whether the jury was placed under time pressure to return a verdict; (2) exhortation of the jury to consider extraneous and improper factors, such as the government's fiscal health, in arriving at a decision; 3) a potential holdout juror was isolated and demeaned for being in the minority; 4) a charge indicating that the jury was required to reach a unanimous verdict or that a juror had a duty to do so; 5) a threat of marathon deliberations; 6) whether the judge asked the jury what verdict the majority of the jurors favored; and 7) whether the judge singled out the minority jurors in imploring the jury to come to a decision. *Rubi v. State*, 952 so. 2d 630, 634 (Fla. 4th DCA 2007); *Scoggins v. State*, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997).

1158–59 (Fla. 3d DCA 2006) (discussing fundamental error, stating it is error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error, error that would result in a miscarriage of justice if not corrected, error that amounts to a denial of due process and goes to the very heart of the judicial process, and concluding that “fundamental error occurs if the error extinguishes a party’s right to a fair trial”).

## ARGUMENT

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

An accused’s right to a fair trial by an impartial jury “is indisputably one of the most basic rights guaranteed by our constitution.” *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997); *Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956); Art. I, § 16(a), Fla. Const.; Art. I, § 22, Fla. Const; *see* Amend. VI, U.S. Const; Amend. XIV, U.S. Const.; *Rodriguez*, 462 So. 2d at 1177 (explaining that “the right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government, and is the cornerstone of a fair and impartial trial”). Implicit in the right to a fair trial is the accused’s right to a unanimous and uncoerced verdict rendered by a jury of his peers. *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) (“Any criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body.”); *Allen v. United States*, 164 U.S. 492, 501 (1896) (“The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.”). The integrity of the justice system demands that a jury be able to reach a verdict without undue pressure or coercion from the court:

It is the genius of our jury system that twelve impartial persons, individually, applying a subjective standard, come to a common

conclusion of 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.

*Nelson v. State*, 438 So. 2d 1060, 1062 (Fla. 4th DCA 1983). Further, as recognized by this Court,

. . . jury deliberations in a criminal case are perhaps the most critical and sacred parts of a trial, and care should be taken to ensure that those deliberations are conducted in such a way that there is no question of their reliability. **A coerced verdict in a criminal case deprives the accused of a fair and impartial trial and is contrary to the mandate of the Declaration of Rights of the Constitution of the State of Florida.**

*Thomas*, 748 So. 2d at 980 (emphasis supplied); see also *Roma v. State*, 785 So. 2d 1269, 1271 (Fla. 5th DCA 2001) (“A coerced verdict in a criminal case infringes upon two rights guaranteed by the constitution – the right to a fair trial and the right to an impartial jury.”). “A defendant has the right to have a hung jury, and nothing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientious belief as to the correctness of his position.” *Lewis v. State*, 369 So. 2d 667, 669 (Fla. 2d DCA 1979) (internal citations, quotation marks, and alterations omitted).

Here, the jury indicated at least three times that it could not reach a unanimous verdict due to a single holdout juror, and there is no question that the trial court's repeated instructions requiring further deliberations resulted in a

coerced verdict as a matter of law, rendered that verdict unreliable, and deprived Mr. Baptiste of his right to a fair trial. Though Mr. Baptiste's trial attorney agreed to the final coercive instruction, this Court should conclude that because a coerced verdict infringes upon an accused's most basic due process rights to a fair trial and an impartial jury, trial counsel's agreement to the erroneous instruction was not a valid waiver of this issue, absent any colloquy by the court with Mr. Baptiste.

**A. The trial court's decision to give the jury a modified *Allen* charge rather than grant a mistrial after the polling of the jury established that the initial verdict was not unanimous resulted in a coerced verdict.**

When a jury is deadlocked, it is permissible for a trial court to read an *Allen* charge, derived from *Allen v. United States*, 164 US. 492 (1896), in an effort to secure a verdict. *Almeida v. State*, 157 So. 3d 412, 415 (Fla. 4th DCA 2015); *Roma*, 785 So. 2d at 1271. However, the instruction must be carefully worded so it properly informs the jurors that they do not have to abandon their conscientiously held beliefs to reach a unanimous verdict, and can in no way coerce or pressure the jury to reach a unanimous verdict if they are unable to do so. This is recognized in Florida's carefully worded standard jury deadlock instruction, which reads:

I know that all of you have worked hard to try to find a verdict in this case. It apparently has been impossible for you so far. Sometimes an early vote before discussion can make it hard to reach an agreement about the case later. The vote, not the discussion, might make it hard to see all sides of the case.

We are all aware that it is legally permissible for a jury to disagree. There are two things a jury can lawfully do: agree on a verdict or disagree on what the facts of the case may truly be.

There is nothing to disagree on about the law. The law is as I told you. If you have any disagreements about the law, I should clear them up for you now. That should be my problem, not yours.

If you disagree over what you believe the evidence showed, then only you can resolve that conflict, if it is to be resolved.

I have only one request of you. By law, I cannot demand this of you, but I want you to try and go back into the jury room. Then, taking turns, tell each of the other jurors about any weakness of your own position. You should not interrupt each other or comment on each other's views until each of you has had a chance to talk. After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services.

You may now retire to continue with your deliberations.

Fla. Std. Jury Instr. (Crim.) 4.1; see *Webb v. State*, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) (explaining that an *Allen* charge “may not be couched in terms which may tend to coerce the jury into reaching a verdict or to coerce a member of the jury to change positions in order to achieve a unanimous decision”). Because of the potential coercive effects of an *Allen* charge, when giving this type of instruction to the jury, a trial court must avoid coercive deadlines, threats of marathon deliberations, pressure for the surrender of conscientiously held beliefs, and any implication of a false duty to decide. *Rubi*, 952 So. 2d at 633; *Roma*, 785 So. 2d at 1271.

Not only must a trial court avoid coercive language when giving an *Allen* charge to a deadlocked jury, but the court must also avoid giving multiple *Allen* charges. This is because repeated orders to continue deliberating and return a unanimous verdict can pressure the jurors in the minority to abandon their conscientiously held beliefs to comply with the court's orders and thereby result in a coerced verdict. *See, e.g., Almeida, 157 So. 3d at 417* (reversing where, “[h]aving reported that they were deadlocked twice, the jury could have viewed the court’s additional instruction as demanding a verdict and imposing ‘marathon deliberations’ until a verdict was reached”); *Rubi, 952 So. 2d at 634* (concluding that trial court’s instruction to jurors after they announced a second deadlock was a modified *Allen* charge which resulted in constitutionally impermissible coerced verdict); *Tomlinson, 584 So. 2d at 44–45* (holding it was fundamental error for the trial court to send the jury back for further deliberations with an instruction that implied that the jurors would have to deliberate up to seven days, after the jury had announced a second deadlock). Moreover, this Court has recognized the danger of continued deliberations when the record establishes only one juror is holding out since this situation is “fraught with the danger that any further instruction to deliberate might be construed as pressure on the single ‘holdout’ to give in.” *Thomas, 748 So. 2d at 979–80.*

In this case, almost immediately after beginning their deliberations, the jurors sent the judge three notes indicating they could not reach a unanimous verdict and sought to replace the holdout juror. (T. 2212, 2256, 2265–66; R. 757, 851, 902, 904, 912). The judge told the jurors they could not replace anyone and ordered them to keep deliberating so they could reach a unanimous verdict. (T. 2256–59; R. 902, 912). When the jurors told the court they were unanimous except for the holdout, the judge read an *Allen* charge and instructed the jurors to keep deliberating. (T. 2267–71). When it was revealed that the holdout did not accede to the initial verdict, the judge gave the jury new verdict forms and ordered them to record a unanimous verdict if they had one. (T. 2289–93; R. 908–11). Only then did the jury announce a final, unanimous verdict. (T. 2298–2300; R. 905, 923–26).

The Third District Court of Appeal correctly held that, under these circumstances, the trial court erred in sending the jury back to the jury room with new verdict forms. [Baptiste, 45 Fla. L. Weekly D1536 at \\*2](#). The Third District recognized that “[a] trial court commits error when it couches an instruction to a jury or otherwise acts in a way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position,” and noted that “under a totality of the circumstances analysis, two or more consecutive Allen (or modified) charges provide sufficient indicia of coercion particularly where the jury has repeatedly indicated its division with a

sole holdout.” *Id.* at \*1–\*2. The court then concluded that “the modified Allen charge given here after the prior instruction and the jury’s third, if not fourth, showing of deadlock was erroneous.” *Id.* at \*2.

It is hard to imagine a situation wherein one juror could have been under more pressure to reach a verdict than juror number five was in this case. On two separate occasions, the jury sent a note back to the trial judge urging the court to dismiss a juror, who obviously was juror number five, since he did not agree with the other jurors. (T. 2212, 2265–66; R. 757, 851, 904, 912). When the court refused to accommodate that request, juror number five, obviously under pressure from the other five jurors, relented and agreed to convict Mr. Baptiste as charged. However, as soon as juror number five was taken out of the isolated juror room and was in a supervised courtroom, he stated during polling that he did not agree with the verdict. (T. 2292–93). At that point, the trial judge should have ended the deliberations and granted a mistrial, as the Third District recognized in its decision. *Baptiste*, 45 Fla. L. Weekly D1536 at \*2. Instead, the court sent juror five back into the jury room with the other jurors with instructions to either reach a unanimous verdict or tell the bailiff they were hung. (T. 2296). It was only after these coercive actions on the part of the trial court did the jury announce that they had reached another verdict. (T. 2298–2300). The Third District Court of Appeal

therefore correctly concluded that the trial court erred in giving the modified *Allen* charge.

**B. A coerced verdict is fundamental, per se reversible error that is not waived by counsel’s failure to object to an improper *Allen* charge or by counsel’s agreement to the instruction.**

Though the *Baptiste* court properly held that the trial court’s actions were highly improper and resulted in a coerced verdict, the court nevertheless held that “because *Baptiste* failed to move for mistrial after the non-unanimous jury poll, or object to the subsequent, modified Allen charge, he waived the error in the court’s instruction.” *Baptiste*, 45 Fla. L. Weekly D1536 at \*2. The court further held that “even if we were to consider this error to be fundamental, *Baptiste* waived it by agreeing to the modified charge.” *Id.*

This holding directly conflicts with the Fourth District Court of Appeal’s decision in *Rubi*, 952 So. 2d at 635. There, the Fourth District found that the trial court erred in giving multiple, coercive *Allen* charges where the jury had indicated there was a single holdout juror. *Id.* at 634. As in this case, defense counsel in *Rubi* affirmatively requested a modified *Allen* charge, and “the trial court agreed with the defense’s suggestions.” *Id.* at 633. But contrary to this case, the *Rubi* court reversed. The Fourth District recognized, as have several other district courts, that a coerced verdict resulting from an improper *Allen* charge or other undue pressure from the court is fundamental, reversible error that is not waived by counsel’s

failure to object in the trial court. See *Rubi*, 952 So. 2d at 635; *Dixon v. State*, 603 So. 2d 86, 87–88 (Fla. 5th DCA 1992); *Warren v. State*, 498 So. 2d 472, 477–48 (Fla. 3d DCA 1986); *Rodriguez*, 462 So. 2d at 1176–77. The *Rubi* court went further, however, and found that constitutional error of this type resulting in a coerced verdict is both fundamental and per se reversible, regardless of defense counsel’s affirmative agreement to the coercive jury instruction:

In reviewing the second note and the court’s instruction, we conclude that not only was the note an announcement of a second deadlock but the court’s subsequent charge amounted to coercion. The court’s instruction pressured a holdout juror to conform to the views of his peers.

...

This pressure on the holdout juror satisfies the test of coercion, and a coerced verdict is constitutionally impermissible. See *Thomas*, 748 So. 2d at 980. Even though defense counsel agreed with the charge, we still conclude that it constitutes fundamental error. As we said in *Scoggins*: 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 an improper coercion of the jury, then there has been a type of constitutional violation which is fundamental error, and per se reversible. 691 So. 2d at 1189. In this case, we conclude that because the totality of the circumstances indicate juror coercion, the verdict is fundamentally and constitutionally defective, regardless of counsel’s failure to object.**

*Rubi*, 952 So. 2d at 634–35 (emphasis supplied). The *Baptiste* court failed to recognize *Rubi* and thus, departed from its sister court’s conclusion that trial counsel cannot waive a defendant’s right to an uncoerced verdict.

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

*Rubi*, which is factually indistinguishable from this case, recognizes not only that a coerced verdict deprives an accused of the free and dispassionate trial to which he is entitled, but also that a defendant's right to a fair trial and an uncoerced verdict rendered by a jury of his peers is such a foundational right in our justice system that it cannot be waived by defense counsel. This Court should adopt the rationale of *Rubi* and conclude that when a trial court engages in conduct which results in a coerced verdict and thereby irreparably deprives the defendant of a fair trial and an impartial jury as guaranteed by the federal and state constitutions, fundamental error has occurred regardless of the defense counsel's acquiescence to the trial court's actions. Any waiver of the right to an uncoerced verdict must be made personally by the defendant, and because no such waiver occurred in this case, this Court must conclude that Mr. Baptiste was denied of his rights to a fair trial and impartial jury.

Florida law recognizes that a defendant can waive a number significant rights, including the right to a unanimous verdict, but can only do so personally. *Flanning v. State*, 597 So. 2d 864 (Fla. 3d DCA 1992); *see also Nobles v. State*, 786 So. 2d 56 (Fla. 4th DCA 2001); *Reid v. State*, 732 So. 2d 1171 (Fla. 3d DCA

1999). In *Flanning*, the jury sent several notes to the trial court indicating they were having trouble reaching a verdict. *Flanning*, 597 So. 2d at 865. Defense counsel indicated that he would discuss with the defendant the possibility of stipulating to a five-person verdict. *Id.* The jury told the court they were split 5-1, following which the court gave the jury an *Allen* charge. *Id.* at 866. When the jury retired to continue deliberating, the judge asked the defense if it was still interested in accepting a 5-1 majority verdict, to which counsel responded affirmatively. *Id.* The trial judge colloquied the defendant about his decision “to determine whether the defendant understood what he was doing,” before ordering the jury back to the courtroom and accepting the 5-1 majority verdict. *Id.*

On appeal, the defendant argued that he did not validly waive his right to a unanimous jury verdict. *Id.* The Third District Court of Appeal concluded that “the right to a unanimous jury verdict may be validly waived by the defendant under certain circumstances,” but recognized such a waiver is fraught with danger and only permissible when certain criteria are met:

“The principal concern of opponents of a waiver provision is the potential for coercion by judges and prosecutors who would propose the waiver to the defendant and then be in a position to recommend or impose a harsh sentence upon a defendant who refuses. *See, United States v. Pachay*, 711 F.2d 488, 493 (2d Cir. 1983); *Hibdon v. United States*, 204 F.2d 834, 839 (6th Cir. 1953). Such an argument is persuasive for finding that a defendant cannot waive the right where the suggestion comes from the Government or the judge, but does not follow when requested by the defendant himself.

...

Clearly there is a constitutional right to a unanimous verdict, but in exceptional circumstances the defendant should be allowed to waive that right. It is hard to imagine a situation in which the defendant would want to accept a non-unanimous verdict rather than have a mistrial declared, but there could be a case where the defendant anticipates a favorable outcome ultimately if a nonunanimous verdict is accepted, and in those circumstances the defendant should be allowed to do so. Before allowing the defendant to waive the right, the following criteria should be met: (1) the waiver should be initiated by the defendant, not the judge or prosecutor; (2) the jury must have had a reasonable time to deliberate and should have told the court only that it could not reach a decision, but not how it stood numerically; (3) the judge should carefully explain to the defendant the right to a unanimous verdict and the consequences of a waiver of that right; and (4) the judge should question the defendant directly to determine whether the waiver is being made knowingly and voluntarily.”

*Flanning*, 597 So. 2d at 867–68 (quoting *Sanchez v. United States*, 782 F.2d 928, 934 (11th Cir. 1986)). Because the trial court failed to explain to the defendant his right to a unanimous verdict and the consequences of a waiver of that right, the Third District concluded that the defendant did not validly waive his right to a unanimous jury verdict. *Flanning*, 597 So. 2d at 868.

Under *Flanning*, before the defendant can waive his right to a unanimous verdict, certain criteria must be met, and the judge must engage in an extensive on-the-record colloquy with the defendant to make sure he understands the consequences of waiving his right to a unanimous verdict. *Id.* A unanimous verdict is a cornerstone of the right to a fair trial, much like the right to an uncoerced verdict. Like a defendant who agrees to a majority verdict as opposed to a mistrial,

it is hard to imagine a situation in which a defendant would want a jury to keep deliberating after announcing they are deadlocked instead of having the court declare a mistrial. Nevertheless, there may be situations in which some defendants believe it in their best interest to have the court instruct the jury to continue deliberating in an effort to reach a verdict instead of taking his chances with an entirely new set of jurors. In that situation, it must be the defendant, not defense counsel, who agrees to an additional *Allen* charge, and such agreement can only come after the court engages in an extensive on-the-record colloquy with the defendant to make sure he understands consequences of the court continuing to instruct the jury to deliberate until they reach a verdict.

Like the right to an uncoerced verdict and the right to a unanimous verdict, the law recognizes other rights that are so fundamental and of such a constitutional magnitude that they can only be waived personally by the defendant and not by defense counsel. The right to a trial by jury, for example, is a fundamental right that “shall be secure to all and remain inviolate.” [Art. I, § 22, Fla. Const.](#) Though a defendant may waive his right to a jury trial, such a waiver must be made personally by the defendant either in writing or orally after a thorough colloquy with the judge. [State v. Upton, 658 So. 2d 86, \(Fla. 1995\)](#); [Tucker v. State, 559 So. 2d 218, 220 \(Fla. 1990\)](#). A waiver signed solely by counsel is insufficient to waive this fundamental right. [See Robinson v. State, 674 So. 2d 160, 161 \(Fla. 3d DCA](#)

1996) (“In this case, the record of the oral colloquy is, at best, equivocal. Although the defendant's attorney and the State had signed a written stipulation waiving a jury trial, it is not at all clear that defendant understood the import of that stipulation.”); *Hibbert v. State*, 675 So. 2d 1016, 1016 (Fla. 4th DCA 1996) (“The plea of not guilty and request for a “trial by judge” was signed by defense counsel, but not by appellant. The trial court made no on-the-record inquiry of appellant concerning his waiver of jury trial. . . . There is no indication in the record that appellant agreed to the written waiver or otherwise made a knowing, voluntary and intelligent waiver of his right to a trial by jury.”).

Similarly, a defendant can waive his right to a six-person jury, *Blair*, 698 So. 2d at 1217–19, and his right to have the judge present during readback of testimony, *Bryant v. State*, 656 So. 2d 426, 428–29 (Fla. 1995); *Brown v. State*, 538 So. 2d 833, 836 (Fla. 1989), but each of these rights can only be validly waived by the defendant personally. A waiver by counsel will not suffice. *Id.* Personal waiver in these instances is necessary because each of these rights, like the right to an uncoerced verdict, are foundational to our system of justice. *See State v. Singletary*, 549 So. 2d 996, 997 (Fla. 1989) (requiring a defendant’s on-the-record waiver for “those rights which to go the very heart of the adjudicatory process, such as the right to a lawyer or the right to a jury trial.”). As recognized by this Court in *Blair*,

[I]n whatever context the issue of waiver arises, the goal of waiver remains constant: to ensure that any waiver of a substantial right be done knowingly, intelligently, and voluntarily and that a record be made to demonstrate this fact. . . . [W]e remind trial courts of the importance of securing a personal waiver and of conducting an “appropriate oral colloquy” to be certain that any waiver is knowing, intelligent, and voluntary.

*Blair*, 698 So. 2d at 1218.

If any of these above-listed rights can be waived only under very particular circumstances and after a thorough colloquy between the judge and the defendant, then the right to an uncoerced verdict should only be waivable if the court engages in an on-the-record colloquy with defendant to make sure he understands consequences of the court continuing to instruct the jury to deliberate until they reach a verdict. Such a colloquy did not happen here, and Mr. Baptiste should not be precluded from challenging the coerced verdict that irreparably deprived him of a fair trial simply because his trial attorney agreed that the jury should keep deliberating after it was revealed that their initial verdict was not unanimous.

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

pressure in this case was fundamental, per se reversible error that was not waived by trial counsel's agreement to the erroneous instruction.

## CONCLUSION

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

Respectfully submitted,

CARLOS J. MARTINEZ  
Public Defender  
Eleventh Judicial Circuit of Florida  
1320 N.W. 14th Street  
Miami, Florida 33125  
(305) 545-1958

BY: /s/ Maria E. Lauredo  
MARIA E. LAUREDO  
Chief Assistant Public Defender  
Florida Bar No. 059412

/s/ Shannon Hemmendinger  
SHANNON HEMMENDINGER  
Assistant Public Defender  
Florida Bar No. 97947

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 13th day of December 2020 to the following:

Amit Agarwal  
*Solicitor General*  
Jeffrey Paul DeSousa  
*Chief Deputy Solicitor General*  
Evan Ezray  
*Deputy Solicitor General*  
Office of the Attorney General  
The Capitol, PL-01  
Tallahassee, Florida 32399  
(850) 414-3300  
amit.agarwal@myfloridalegal.com  
jeffrey.desousa@myfloridalegal.com  
evan.ezray@myfloridalegal.com  
jennifer.bruce@myfloridalegal.com  
jenna.hodges@myfloridalegal.com

Michael Mervine  
*Chief Assistant Attorney General*  
Brian H. Zack  
*Assistant Attorney General*  
Office of the Attorney General  
SunTrust International Center  
1 SE 3rd Ave Ste 900  
Miami, FL 33131-1706  
crimappmia@myfloridalegal.com  
michael.mervine@myfloridalegal.com  
brian.zack@myfloridalegal.com

*Counsel for Respondent*

Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to

be served pursuant to Rule 2.516 in this proceeding:  
AppellateDefender@pdmiami.com (primary E-Mail Address);  
SAH@pdmiami.com (Secondary E-Mail Address).

/s/ Shannon Hemmendinger  
SHANNON HEMMENDINGER  
Assistant Public Defender

### **CERTIFICATE OF FONT**

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

/s/ Shannon Hemmendinger  
SHANNON HEMMENDINGER  
Assistant Public Defender