IN THE SUPREME COURT OF FLORIDA

SC CASE NO.: SC06-2235

DCA CASE NO. 4D04-4699

ZAMIR GARZON,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.
_____\

INITIAL BRIEF OF PETITIONER ON THE MERITS

On Petition for Discretionary Review from
the Fourth District Court of Appeal

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CERTIFICATE OF INTERESTED PARTIES

Counsel for Petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case:

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Zamir Garzon
(Petitioner)

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PRELIMINARY STATEMENT

Petitioner, Zamir Garzon, was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and was the Appellant in the Fourth District Court of Appeal. Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as Mr. Garzon and Respondent may be referred to as the State or the prosecution.

The following symbols will be used:

AR@ Record on Appeal

AT@ Transcripts of Hearings and Trial Proceedings

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by Information along with his co-defendants, Charly Coles and Ray Balthazar, with Count I, Criminal Conspiracy; Count II, Armed Burglary of a Dwelling; Count III, Armed Robbery with a Firearm; Counts IV through VI, Kidnapping with a Firearm; Count VII, Extortion (R 9-12). All three defendants were tried before one jury.

On June 4, 2003, as Marie Azzarone was entering the home of Sandra and Michael Smith where she was employed as their housekeeper, she was accosted by a gunman wearing Asoldier pants@ (T9/1007). This person was armed with a handgun and pushed her into the home (T9/1007). She was made to lay on the kitchen floor and heard her employer, Sandra Smith, yelling in another room (T9/1009). Thereafter, the Smith=s younger daughter, Jamie Smith, was brought into the kitchen and made to lay down on the ground next to her (T9/1010). She noted that there was a second intruder inside of the home who was also wearing Asoldier pants@ (T9/1011-1012). One of the intruders had a badge hanging around his neck. Both intruders looked through drawers and told

Ms. Smith that if she did not cooperate that they would burn Jamie on the stove (T9/1012-1014).

Jamie Smith testified that on that morning, June 4, 2003, she was awakened by her mother screaming in the other room (T12/1261-1263). A man then came into her room wearing camouflage pants and a mask (T12/1265). He walked up behind her and placed a gun behind her right shoulder (T12/1266). He then took her into the kitchen where he made her lay down on the kitchen floor next to her housekeeper (T12/1267). The intruder placed a pillowcase over her head (T12/1268). Soon, her mother came into the kitchen crying when she saw her laying on the ground (T12/1269). She never saw either of the two perpetrators faces because they were wearing masks (T12/1277).

Sandra Smith testified that at approximately 8:15 to 8:30 on the morning of June 4, 2003, when she was walking out of her master bedroom to get Jamie ready for school (T12/1297), she noted that there were two gunmen in the house; one was wearing dark clothing, gloves and a ski mask, and armed with a firearm (T12/1300). The other intruder was tall and dark with dark hair, no mask, no gloves, and also carrying a gun (T12/1300). She noted that both of these intruders were wearing badges on chains around their necks (T12/1301). One of the gunmen put a gun to the back of her head and took her to a safe which was concealed

out of view in the hallway (T12/1303-1304). He told her to open it, which she ultimately did, revealing a large stash of Rolexes and other types of jewelry, with a value in excess of $150,000.00 (T12/1307-1309). After she placed the items which were in the safe into an outstretched pillowcase which the gunman was holding, he donned a mask and gloves (T12/1309-1310).

The gunman demanded that she produce her wedding ring which she was wearing. When she asked if she could keep her ring, the gunman, who was on a cell phone to an unknown party, asked the party on the other end whether or not she could do so (T12/1311). The gunman told her that she could not keep the wedding ring because Ayour husband does not deserve you to wear it@ (T12/1311). He also told her that he was aware that her husband was having an affair with a woman in the Dominican Republic and that her husband had shipped a car to her (T12/1311-1312). This gunman was on and off the cell phone throughout the course of the robbery (T12/1312).

The State called a number of crime scene detectives to testify as to the physical evidence that they recovered. To this end, the State called Detective Mark Davis who processed the scene for latent fingerprint evidence (T13/1450-1454). He was able to lift prints from inside of the residence (T13/1454).

Further, he canvassed the area and was able to locate a potential witness by the name of Kim Strothman (T13/1456). The State also called BSO latent examiner Robert Holbrook. He was accepted as an expert in the field of latent analysis. Detective Holbrook compared all of the fingerprints found inside of the residence to all three of the defendants. None of these fingerprints matched Petitioner (T13/1504-1505).

Ms. Strothman was a neighbor of the Smiths (T15/1727). On the early morning of June 4, 2003, she and her girlfriend were taking an exercise walk when they noticed a suspicious car at the end of the street (T15/1731). They made note of the color of the car and recognized that it was moving (T15/1732). They did not notice anyone inside (T15/1732). After approximately 45 to 60 minutes, when they returned from their walk, they saw the car again, whereupon Ms. Strothman made a mental note of it (T15/1732). Later that morning, her husband left for work at around 8:00 a.m. (T15/1734). As her husband was leaving, she noticed that the car that she had seen earlier was parked across the street in a lot (T15/1734). She left to take her daughter to school and then saw that the car was driving in the area (T15/1736-1738). At that time, she made a U-turn to get behind the car and wrote down the license plate, make, and model of the car (T15/1738). Later, she saw a number

of police officers at the Smith:s residence. At that time, she stopped and asked what had happened and gave the note which she had made of the description of the car to a police officer (T15/1740-1742). On that paper, she had written that the car was a Honda with a license tag of U37MLU and that it was a two-door car (T15/1749). She testified that she had seen that car in the neighborhood the previous day (T15/1751) and that the car was dark green (T15/1733).

Metro-Dade Robbery Detective Osmel Cordero testified that on June 5, 2003, he made contact with Charly Coles. His role was to execute an arrest warrant on Mr. Coles at a particular address in Miami (T13/1522). He was particularly interested in a 1997 green Honda Civic (T13/1523). Subsequent to the arrest of Mr. Coles, a search of the car revealed a firearm in the glove box (T13/1524).

BSO crime scene unit Detective Rick Leitner processed the interior of that vehicle which had been seized by the Metro-Dade Police Department (T13/1471). In addition to photographing the interior of the car, he also took a photograph of the license tag which was U37MLU (T13/1473). He recovered a number of latent fingerprints from within the vehicle as well as physical evidence including a Motocross mouth shield and goggles and a pair of wire cutters inside of a plastic bag (T13/1477-1482).

Detective Holbrook testified that he analyzed those latent prints and found that four fingerprints on the passenger window belonged to Mr. Balthazar and that two fingerprints on the passenger window belonged to Mr. Coles (T13/1506-1507).

The State called Alfredo Nunez who was an employee of a gun shop and a police supply store. He testified that on February 22, 2003, he sold Charly Coles two handguns, a Beretta and a Glock, as well as a shotgun (T13/1535). He identified Mr. Coles as the purchaser of those weapons (T13/1536).

Essentially, the evidence against Petitioner boiled down to a cell phone call which was made between a phone associated with Ray Balthazar and a phone which purported to be one belonging to Petitioner, Zamir Garzon, on the date of the robbery. Indeed, in the State=s opening statement, the prosecutor stated that on the morning of June 4, the date of the crime, at approximately 8:35 in the morning, Ray Balthazar called a cell phone registered to a person named Susan Garzon (T7/712). This phone call lasted 39 minutes which was the length of the robbery (T7/712). The prosecutor went on to say that Susan Garzon is the sister of Zamir Garzon and was kind enough to do her brother a favor and get him a cell phone (T7/712). He implied that the 39 minute call placed between Balthazar and the phone registered to Susan Garzon was answered by Mr. Garzon (T7/712).

Nowhere in the record did the State present any evidence whatsoever to establish who Susan Garzon was, or that she was even related to Zamir Garzon, much less that she had purchased a phone for him. Rather, the State called a variety of witnesses in an attempt to establish that Zamir Garzon used the telephone number which was dialed by Mr. Balthazar on the date of the crime. For example, the State called James Jones, a records custodian from Verizon Wireless who testified that Susan Garzon activated two cell phones on December 6, 2002 (T14/1576). Both accounts were registered to her with a billing address of 4600 N.W. 199th Street (T14/1576). The two cell phone numbers in question were; (786)512-6840 and (785)512-7774, respectively (T14/1576). An objection was raised by Petitioner regarding introduction of cell phone records or testimony concerning the cell phone number. Petitioner argued there was no evidence in the record to connect Susan Garzon to Petitioner, or even to establish that they were brother and sister (T14/1582). The Court asked the prosecutor if he was going to have Susan Garzon testify she is the sister of Zamir Garzon (T14/1584).[1] The Court

[1] The prosecutor proffered to the Court in a pre-trial hearing on the admissibility of Williams rule evidence the following as it pertains to the cell phone in question: AJust so the court understands, Mr. Garzon is the brother of Susan Garzon who is registered to the phone who is going to testify that she got it for her brother and gave it to him@ (T2/147). No such testimony was offered, either at the Williams rule hearing or at

stated that Ait=s going to come in (Susan Garzon=s cell phone records) as long as she (Susan Garzon) testifies these are, that she is the sister of Zamir Garzon and I can always do it subject to any further testimony. If she doesn=t testify, I am sure you guys are going to jump up and down and present whatever objection@ (T14/1584).[2] Petitioner advised the Court that he would prefer to have the evidence admitted only after Susan Garzon testified, however, the Court permitted the evidence concerning these records to be admitted without her testimony (T14/1584-1585).[3]

In an effort to tie Petitioner to the telephone number in question, the prosecution called his former probation officer, Sandra Schadlebauer, as a witness.[4] She testified that she had contact with Petitioner as of June 3, 2003 (T14/1610). She

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trial.

[2] Indeed Petitioner did Ajump up and down@ at the close of the State=s case in the form of moving for a Judgment of Acquittal and a Motion for a Mistrial (T18/2128-2129). This effort was not successful as the motions were denied (T18/2130-2131).

[3] Regarding the cell phone records which the State argued were those of Ray Balthazar, the testimony and evidence indicated that the cell phone number which was placed to one of the phone numbers registered to Susan Garzon on June 4, 2003 during the crime, was actually registered to Alkhalb Balthazar (T14/1620).

[4] It was not made known to the jury that she was his probation officer.

stated that he provided her with two contact numbers; (786)512-7774 and (786)512-6840. He also provided her with a number for Juan Cruz, his boss, which was (954)854-6106 (T14/1609-1610). She stated that she was never told that these numbers belonged to Petitioner. Rather she admitted that when she deals with people, it is common for them to simply provide a contact number of family, friends or acquaintances if they do not have a phone of their own (T14/1611). She stated that the numbers which Petitioner gave her were merely contact numbers and that Petitioner never said these were his personal numbers (T14/1612-1613). Further, she never saw Petitioner in actual possession of a cell phone (T14/1613).

The only other evidence which was offered in an attempt to connect Petitioner to the cell phone was the testimony of Howard Elliott and Steven Mejia. Mr. Elliott was a bail bondsman working for Best Bail Bonds. Petitioner had referred a client to Mr. Elliott and Mr. Elliott knew Petitioner by the name of ASammy@ (T16/1826). In an out-of-court identification photo spread, Mr. Elliott had identified Petitioner as ASammy@ (T16/1826). Mr. Elliott had employed the services of Ray Balthazar to help him find a bail bond absconder whom ASammy@ had referred to him (T16/1830-1831). Mr. Elliott had a contact

number for Sammy which was (786)512-6840 (T16/1836).[5]

Mr. Mejia was a handyman who knew Petitioner as ASam@ (T16/1849). Mr. Mejia made an in-court identification of Petitioner and indicated that he worked with him in 2003 (T16/1851). He went on to testify that he was able to reach Petitioner at two different cell phones; (305)512-6840 or (305)512-7714 (T16/1852 and 1854). On re-direct examination, his memory was refreshed and he then recalled the correct area code was A786" rather than A305" (T16/1853).

The State filed their Notice of Intent to offer evidence of other crimes, wrongs or acts (R33/34). A hearing on this Notice was held on October 11, 2004, in which the State offered the testimony of Kerry Smith, Doris Smith and Detective Pugliese (T2/12, 68, 93). At that hearing, Kerry Smith testified about a staged car accident which took place on March 21, 2003, while he was driving his truck with the trailer attached (T2/15-16). He discussed how a red Explorer had rear-ended him but that the collision was not severe (T2/16-17). Kerry Smith described how he was standing at the side of the Explorer while the driver

[5] That number, 786-512-6840, corresponds to one of the two cell phones registered to Susan Garzon and is the number called on the morning of the crimes (T14/1576;1585-1588).

was on the cell phone telling an unknown party on the other end, AI hit a kid, I need to take care of this@ (T2/19). He noticed that there was a passenger wearing military fatigues in the car (T2/19). The passenger had an item which looked to be a gas mask sitting on his lap (T2/20). Suddenly, the driver of the Explorer dropped a vehicle manual which he had taken ostensibly to write on, spun out of the car and grabbed him by the throat (T2/21). Kerry began to scream and the grip on his throat was so tight he could not breathe (T2/22). The passenger attempted to pull him into the car (T2/23). Ultimately, he was able to break free by elbowing the assailant and ran to his car to escape (T2/26).

After this incident Kerry drove straight home and told his mother about what had occurred, who in turn called the police (T2/27).

Kerry Smith was able to make an in-court identification of both of the perpetrators. He identified Charly Coles as the passenger and Ray Balthazar as the driver (T2/28-29).

With regard to the March 22nd incident, the State called Doris Smith. She testified how she agreed to care for the dogs belonging to her son, Michael Smith, who lived across the street from her (T2/69-71). As she was letting the dogs out for their last break of the evening, an intruder entered the house and

placed his hand over her nose and mouth making it difficult for her to breathe (T2/75). She was placed on a bedroom floor and was shown the barrel of a gun and asked whether or not she wanted to be shot (T2/78). She noted that there were two perpetrators inside of the house (T2/76-77). The perpetrators then took her to the kitchen and made her get down on the floor (T2/78-79). They demanded to know where the safe was and she told them (T2/79). When they demanded to know the combination to the safe, she told them that she did not know what it was (T2/81).

During the course of this crime she heard one of the perpetrators on his cell phone stating, A[T]his is not the motherfucking way you said it was@ (T2/82). She was unable to see either of these perpetrators well enough and was therefore not able to make any identifications (T2/83-84).

In addition to the testimony which was offered at the hearing, the prosecutor proffered that there was a phone call somewhere between the hours of 5:00 and 5:30 on March 21st between the cell phone connected to Petitioner and one of his co-defendants, Ray Balthazar (T2/144).

The Court heard arguments as to the law and ultimately granted the State=s request to introduce collateral crime evidence, which was presented at trial in substantially the same

manner as was testified to in the ***Williams Rule*** hearing (T7/735-774; T8/826-894).

Petitioner chose not to become a witness in his trial (T18/2139).

The Court read the instructions to the jury and a written copy of these instructions was provided for their use during deliberations (T20/2368; R 76-98). In the charge to the jury the Court used the conjunction, Aand/or@, between the three co-defendants, when reading the elements of the offense to the jury. For example, in Count I which charged criminal conspiracy, the Court defined the charge in part, as follows:

> To prove the crime of criminal conspiracy as charged in Count One of the Information, the State must prove the following two elements beyond a reasonable doubt. Number One, the intent of ***Zamir Garzon and/or Charlie Coles and/or Ray Balthazar*** was that the offense of armed burglary of a dwelling would be committed. Number Two, in order to carry out the intent, ***Zamir Garzon and/or Charlie Coles and/or Ray Balthazar*** agreed, conspired, combined or confederated with each other to cause either the offense of armed robbery or armed burglary to be committed either by all of them or one of them or by some other person (emphasis added).
>
> (T20/2351).

The same language defining criminal conspiracy was delivered to the jury in written form(R 80).

In Count II, the Court defined armed burglary of a dwelling as follows:

> To prove the crime of armed burglary of a dwelling, as charged in Count Two of the Information, the State must prove the following three elements beyond a reasonable doubt. *Number One, Zamir Garzon and/or Charlie Coles and/or Ray Balthazar* entered or remained in a structure owned by or in the possession of Sandra Smith. Number Two, *Zamir Garzon and/or Charlie Coles and/or Ray Balthazar* did not have the permission or consent of Sandra Smith or anyone authorized to act for her to enter or remain in the structure at the time. Number Three, at the time of entering or remaining in the structure, *Zamir Garzon and/or Charlie Coles and/or Ray Balthazar* had a fully formed, conscious intent to commit the offense of grand theft and/or robbery in that structure. (Emphasis added).
>
> (T20/2352).

Again, that same language was used to define armed burglary in the written instructions provided to the jury (R 81).

And so it was throughout the remainder of the jury charge with each and every count; the conjunction, Aand/or@, was used to define armed robbery (T20/2355; R 84), the conjunction, Aand/or@, was used to define armed kidnapping (20/2358; R 86), and the conjunction, Aand/or@, was used to define extortion (T20/2358; R 87).[6]

Petitioner was convicted as charged as to Counts I through VI and was found not guilty as to Count VII (R 103-109). The Court sentenced Petitioner to thirty years in prison as to Count I and life in prison as to Counts II through VI (R 173). These

[6] All co-defendants= convictions for kidnapping were reversed on other grounds. *Garzon*, at 288; *Coles*, at D2934.

sentences were all as an habitual felony offender (T21/13-14).

Petitioner appealed to the Fourth District Court of Appeal which resulted in the issuance of an opinion. *Garzon v. State*, 937 So.2d 278 (Fla. 4th DCA 2006). This opinion also dealt with the appeal of Petitioner=s co-defendant, Ray Balthazar. In a subsequent opinion dealing with the final co-defendant, Charly Coles, the lower court handed down *Coles v. State*, _____ So.2d _____, WL 3373079 (Fla. App. 4th Dist), 31 Fla. L. Weekly D2934 (Fla. 4th DCA Nov. 22, 2006). In both *Garzon* and *Coles*, the Fourth District Acertified@ conflict with *Davis v. State*, 922 So.2d 279 (Fla. 1st DCA 2006) and *Zeno v. State*, 910 So.2d 394 (Fla. 2nd DCA 2005) on the issue of whether the use of the conjunction Aand/or@ in the jury charge is fundamental error regardless of context. This Court has deferred jurisdiction and ordered counsel for Garzon and Balthazar to brief the issues. [7] This appeal follows.

[7] In the related case of *Coles v. State*, _____ So.2d _____, WL 3373079 (Fla. App. 4th Dist), 31 Fla. L. Weekly D2934 (Fla. 4th DCA Nov. 22, 2006), a Notice to Invoke Discretionary Jurisdiction is pending with this Court.

SUMMARY OF ARGUMENT

There can be no question but that the Court committed fundamental error by utilizing the conjunction, Aand/or@, between co-defendants in the jury charge. In virtually all reported cases, use of this conjunction has been held to constitute fundamental error. These cases are premised on the risk that a jury could possibly convict an *innocent person* by finding that *one of his co-defendants* independently committed the charged offense. In this case, the error is particularly egregious and is compounded by the fact that there was precious little evidence to connect Petitioner to any of the crimes. The jury verdict may well have reflected the concerns that the appellate courts have with the use of this conjunction; that an innocent person could be convicted for the actions committed independently by others.

Accordingly, this case should be reversed and remanded with instructions for a new trial based on the trial court=s improper use of the conjunction Aand/or@ between co-defendants in the jury instructions.

ARGUMENT

POINT ONE: FUNDAMENTAL ERROR WAS COMMITTED WHICH MANDATES REVERSAL BECAUSE THE COURT INSTRUCTED THE JURY UTILIZING THE CONJUNCTIVE, AAND/OR@, BETWEEN THE THREE CO-DEFENDANTS= NAMES WHEN CHARGING THE JURY AS TO EACH OFFENSE.

The Court utilized the conjunction Aand/or@ between each of the three co-defendants when she read the elements of the offences to the jury (T20/2351, R 80; T20/2352,R 81, T20/2355,R 84; T20/2358,R 86; and T20/2358,R 87). Petitioner did not object to these instructions (T20/2368).

Jury instructions are subject to the contemporaneous objection rule and absent an objection at trial, the error must be fundamental to be raised on appeal. *State v. Delva*, 575 So.2d 643 (Fla. 1991), citing, *Castor v. State*, 365 So.2d 701 (Fla. 1978) and *Brown v. State*, 124 So.2d 481 (Fla. 1960). In order for the contemporaneous objection rule not to be enforced, Athe error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.@ *Brown*, at 484. It is axiomatic that a criminal defendant has the absolute right to have the trial court correctly and intelligently instruct the jury as to the essential and material elements of the crimes

charged. *Chicone v. State*, 684 So.2d 736 (Fla. 1996).

The improper use of the conjunctive/disjunctive phrase Aand/or@ has uniformly been held to be fundamental error because of the risk that a jury may convict one defendant based solely on the conclusion that a co-defendant satisfied the elements of the offense.[8] *Cabrera v. State*, 890 So.2d 506 (Fla. 2nd DCA 2005)(use of Aand/or@ in defining substantive charge is fundamental error in conspiracy to traffic in heroin due to risk of guilty verdict upon finding either defendant conspired with co-conspirators); *Rios v. State*, 905 So.2d 931 (Fla. 2nd DCA 2005)(co-defendant of *Cabrera* and reversed on identical grounds). Such an instruction deprives the defendant of a right to receive an individualized verdict. *Davis v. State*, 895 So.2d 1195 (Fla. 2nd DCA

[8] The rare exception where such an error has been held harmless can be found in Tolbert v. State, 922 So. 2d. 1013 (Fla. 5th DCA 2006), rev. denied,924 So.2d 451 (Fla. 2006). There, the use of the objectionable conjunction Aand/or@ was held to be harmless because the co-defendant was acquitted of all charges. As such, the jury could not have convicted Mr. Tolbert solely based upon the conclusion that his co-defendant satisfied all of the elements of the offenses. On this point the court noted that the purpose of the general rule prohibiting the use of the conjunction is Ato prevent one individual from being convicted for the criminal conduct of another@ and held Athat when the [sic] codefendant is acquitted of all charges, the jury cannot be misled into believing that the defendant can be held criminally responsible for the conduct of the [sic] codefendant@. Tolbert, at 1016.

2005)(fundamental error to instruct jury using the conjunction Aand/or@ in conspiracy and trafficking cases because the instruction deprived defendant of right to individualized verdict); ***Randolph v. State***, 903 So.2d 264 (Fla. 2nd DCA 2005)(co-defendant of ***Davis*** and reversed on identical grounds). See also, ***Concepcion v. State***, 857 So.2d 299 (Fla. 5th DCA 2003) (reversal of trafficking convictions mandated where trial court orally instructed correctly, but sent written instructions which erroneously combined the defendants names with the conjunction Aor@ instead of Aand@); ***Dorsett v. McRay***, 901 So.2d 225 (Fla. 3rd DCA 2005)(use of Aand/or@ is not cured by giving standard jury instruction 3.12(c), separate crime/multiple defendant, because the primary instruction including the offensive conjunction still provides for a guilty verdict based solely on the criminal conduct of a co-defendant); ***Pizzo v. State***, 916 So.2d 828 (Fla. 2nd DCA, 2005)(use of Aand/or@ conjunction between co-defendants in racketeering charge to jury fundamental error); ***Williams v. State***, 774 So.2d 842, 843 (Fla. 4th DCA 2000)(fundamental error where court used conjunction Aor@ between co-defendants because Ajury may have been misled into thinking that it could convict him based solely on Adderly=s conduct@); ***Davis v. State***, 804 So.2d 400 (Fla. 4th DCA 2001)(fundamental reversible error to use Aand/or@ conjunction in entrapment instruction because it could

have misled jury into erroneous belief co-defendant/spouse was ineligible for defense due to predisposition of her spouse, even where error in using same Aand/or@ conjunction in definition of trafficking harmless due to defendant=s admission of all elements); *Zeno v. State*, 910 So.2d 394 (Fla. 2nd DCA 2005) and *Davis v. State*, 922 So.2d 279 (Fla. 1st DCA 2006)(fundamental error to use Aand/or@ conjunction which is not cured by use of stand principal instruction).[9]

There can be absolutely no question that the Court committed fundamental error in the manner in which it instructed the jury by using the conjunction Aand/or@ between all three defendants= names when defining the elements of each and every offense. In this case, the error was highlighted significantly based on the scant evidence of guilt presented against Petitioner.

On the other hand, there was overwhelming evidence introduced as to the guilt of Balthazar and Coles. Proof of Petitioner=s involvement in this criminal episode was tenuous, to say the least. It is not an overstatement to suggest the evidence against Petitioner was dangerously close to being legally insufficient. By including an Aand/or@ conjunction, the

[9] Although not specifically mentioned in most of the opinions which addressed the improper use of the Aand/or@ conjunction, it seems apparent that trial judges will routinely instruct juries as to the law of principal whenever defendants are jointly tried.

overwhelming guilt of Balthazar and Coles very likely could have *served as the sole basis* for the conviction of Petitioner, notwithstanding the juries= conclusion of *his actual* innocence. Such a manifestly unfair result can not be allowed to stand.

Petitioner=s basic right to due process mandates that he not be allowed to continue to languish in prison for another day, much less the rest of his life, very possibly based on confusion caused by these instructions. Petitioner=s trial was so fundamentally flawed based on the jury instructions that one is simply left to wonder if his conviction represents: a finding of guilt as to Garzon beyond a reasonable doubt due to proper application of the principal instruction; a finding of guilt as to Balthazar beyond a reasonable doubt, without an actual guilt determination as to Garzon; or, a finding of guilt as to Coles beyond a reasonable doubt, without an actual guilt determination as to Garzon.

Guesswork and speculation must be utilized to determine whether the jury *ever reached* the principal instruction. In fact, as Judge Klien pointed out in his dissent:

> This jury, going through the written instructions, could have concluded that all defendants were guilty, based on the Aand/or@ instructions, before ever reaching the principals instruction. The principals instruction, 3.5(a), requires that the defendant Ahad a conscious intent that the criminal act be done.@ If the jury did not reach the principals instruction, it would be wrongfully convicting a defendant who could

> only be guilty under a principals instruction, where the state failed to prove the Aconscious intent@ required by the principals instruction.

Garzon, at 288.

The opinion below suggests the verdict on the extortion count finding Coles and Garzon not guilty and Balthazar guilty is proof the jury correctly understood and used the principal instruction as to each count in the information.[10] *Garzon*, at 285. Respectfully, the lower court has engaged in speculation on this point. The theme of the prosecution was premised on the argument that this was a common scheme which had been planned jointly by all three co-defendants. The jury verdict as to all of the counts can just as easily be attributed to jury confusion as it can be attributed to a scrupulous and meticulous application of the law of principals.

It is equally reasonable to explain the acquittal of Garzon and Coles on the extortion count by suggesting the jury engaged in Ajury pardon@, as it was Balthazar, not Coles or Garzon, who threatened to burn Jamie if cash was not turned over.

Failure to instruct on an essential element of the crime is fundamental error because of the risk of conviction despite

[10] All three co-defendant=s at bar were convicted of all charges except for the extortion count for which Petitioner and co-defendant Charly Coles were acquitted. Balthazar was the only defendant convicted of extortion.

insufficient proof on one or more essential elements of the offense. *Reed v. State*, 783 So.2d 1192 (Fla. 1st DCA 2001). At bar, there is a risk substantially more dire than that set forth in *Reed*. To permit conviction of one co-defendant (Garzon) where there may be no proof whatsoever of his criminal intent or involvement, based solely on the crimes of the co-defendants (Balthazar or Coles) is grossly unfair.

There can be no reasonable debate as to whether a criminal defendant is entitled to clear and unambiguous jury instruction. Here, not only was Petitioner's jury charged with ambiguous jury instructions, they were given two inapposite instructions. On the one hand, the jury was instructed to *actually convict* Petitioner if any one of his co-defendants was guilty of the offense. On the other hand, the jury was instructed to convict him only if it was proven beyond a reasonable doubt that he intended for the offense to be committed and did some act or said some word which encouraged his co-defendants. Thus, one is left to wonder whether the jury convicted Petitioner based on proof beyond a reasonable doubt that he was guilty as a principal, or whether his conviction was based on a determination of guilt of one or both of his co-defendants without regard to the principal instruction. Under the facts of this case, the State was relieved of it's burden of proof to establish Petitioner was

guilty as a principal beyond a reasonable doubt. To suggest, as the court did below, that Petitioner must have been convicted as a principal is simply speculation. It is not possible to determine why Petitioner was convicted based upon the convoluted and confusing instructions. If one were to guess, it is more reasonable to believe he was convicted because of the overwhelming evidence against Coles and Balthazar. This statement is based on the scant and inconclusive evidence against Petitioner coupled with the instruction which all but directs the jury to convict him based upon the finding of guilt as to either or both of his co-defendants.

As indicated, one is required to engage in pure and utter guesswork in order to determine whether the jury followed the order of the judge to convict Petitioner based solely on the despicable actions of his co-defendants, or whether a meaningful and thoughtful analysis was conducted as to each count wherein the law of principal was legally applied. If a general verdict of guilt is based on alternative theories, only one of which is legally valid, the conviction *must be* reversed as such error is fundamental. *Mackerly v. State*, 777 So.2d 960 (Fla. 2001). In *Mackerley*, the defendant was accused of first degree premeditated. There was sufficient evidence to support a conviction based upon a theory of premeditation. The case was

also submitted to the jury on the alternative theory of felony murder which was legally unsupportable. The court held reversible error occurred when the conviction was based on a general verdict which rested on multiple bases, one of which was legally inadequate. *Delgado v. State*, 776 So.2d 223 (Fla. 2000)(first degree murder conviction based on adequate proof of premeditation but legally flawed underlying felony murder theory, improper Aremaining in@ language in burglary instruction, fundamental error); *Tricarico v. State*, 711 So.2d 624 (Fla. 4th DCA 1998)(even where overwhelming evidence of premeditation exists, instruction of invalid felony murder theory, here attempted trafficking, is fundamental error).

Petitioner was convicted pursuant to a general verdict form. The jury did not specify which theory the verdict was based. It could have been premised on a principal theory. On the other hand, the verdict may have been premised on a determination that one or both co-defendants were guilty without regard for Garzon=s culpability, based on the Aand/or@ conjunction. The jury was specifically instructed on two occasions to follow the law given by the court, even if they disagreed with the law.[11] Presumably,

[11] AThese are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:

the jury did as they were told. Unfortunately, it is impossible from this record to determine which of the two inapposite instructions the jury followed. Accordingly, the convictions must be reversed and the case remanded for a new trial.

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1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter@ (R 94).

AIn closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have lived by the constitution and the law. No juror has the right to violate the rules we all share@ (R 98).

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully submitted that this Court should resolve the conflict by holding the use of the conjunction Aand/or@ is fundamental error notwithstanding the principal instruction or context, reverse the holding below, and order a new trial.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Notice was delivered by U.S. Mail to John Cotrone, Esquire, 509 S.E. 9th Street, Ste. 1, Fort Lauderdale, FL 33316, Attorney for Ray Balthazar; Kendall Coffey, Esquire, Grand Bay Plaza, Penthouse 2B, 2665 S. Bayshore Dr., Miami, FL 33133 and Benedict P. Kuehne, Esquire, and Susan Dmitrovsky, Esquire, 100 S.E. 2nd Street, Ste. 3550, Miami, FL 33131, Attorneys for Charly Coles, Jr. and David Schultz, Esquire, Assistant Attorney General, Attorney General's Office, 1515 North Flagler Drive, Suite 900, West Palm Beach, Fl 33401 this _____ day of December, 2006.

_____
Samuel R. Halpern

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner=s brief complies with the spacing and font requirements of Fla. R. App. P. 9.210 and this Honorable Court=s order dated July 13, 1998. This brief is double-spaced, set in 12 point font, Courier New which is not proportionally spaced.

By: _____
Samuel R. Halpern