IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2235
L.T. CASE NO. 4D04-4699

ZAMIR GARZON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. On appeal to the Fourth District Court of Appeal, Petitioner was the Appellant and Respondent was the Appellee. In this brief, the parties will be referred to as they appear before this court, except that Respondent may also be referred to as "the State."

The following references will be used in this brief:

(IB) Petitioner's Initial Brief on the Merits

(T.) Trial Transcript (The Transcript Number refers to the Volume Number on the outermost cover, not the inside cover.

(R.) Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts subject to the additions and clarifications set forth below and in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal. In addition, Respondent relies upon those facts set forth in the opinion of the Fourth District Court of Appeal ("Fourth District") in the instant case, *Garzon v. State*, 937 So. 2d 278 (Fla. 4th DCA 2006). (Appendix A)

This case is before the Court pursuant to conflict certified by the Fourth District. In *Garzon*, the Fourth District certified direct conflict with *Cabrera v. State*, 890 So.2d 506 (Fla. 2d DCA 2005), and *Zeno v. State*, 910 So. 2d 394 (Fla. 2d DCA 2005) and conflict with *Davis v. State*, 922 So.2d 279 (Fla. 1st DCA 2006) based on its reliance on *Zeno*. This Court has deferred jurisdiction and asked the parties to brief the issue on the merits. The pertinent facts are as follows:

Maria Azzarone, the housekeeper of Sandra and Michael Smith, testified that on June 4, 2003, she was trying to open the Smith's door when a man with a gun came up behind her and pushed her through the door. (T9, 1006-1007) Sandra Smith was in the kitchen in front of her. (T9, 1007/22-23) As this man grabbed Ms. Azzarone by the neck and put a gun to her head, another man came through the door and immediately took Sandra Smith to another room. (T9, 1007/24-1008/2, 1009/8-9) Both men had guns. (T9, 1066/15-22) Ms. Azzarone

did not see the second man, because she was facing away from the door. (T9, 1011/14-21) The first man pushed Ms. Azzarone into another area where he made her lay face down on the floor. (T9, 1008/25-1009/1)[1] This man also found the Smith's daughter, Jamie, in an adjacent room and forced her at gunpoint to lay down beside Ms. Azzarone. (T9, 1009/23-1010/15). He covered Ms. Azzarone's head, but she could hear this man ask Jamie about her brother. Ms. Azzarone never told him that Jamie had a brother. (T9, 1010/17-23)

Subsequently, the second man brought Sandra Smith back to the kitchen. (T9, 1011/11) All three ladies were told to sit in chairs, and Ms. Azzarone was allowed to uncover her head; however, she could not see the two men because they then were both wearing masks. (T9, 1012/11-17) She recalled the men telling Sandra Smith that she was lying about not having any money in the house, and that if she did not tell them where it was they would burn Jamie on the stove. (T9, 1013/20-1014/4) After that, one man took Sandra Smith to her bedroom where he found a briefcase with something in it. (T9, 1014/10-14) After that, the men were talking about having followed the Smith family to the mall and a restaurant. (T9,

[1]On cross-examination, when confronted with her deposition Ms. Azzarone appeared to say that it was the first man that grabbed her who then took Sandra Smith to another room (T8, 1040/20-1041/12); however, she also indicated that she did not know whether this first man was wearing a mask at the time, because she was focused on the gun (T8, 1038/3-19).

1014/15-20) Before the men left, they tied up the victims and told them not to move. (T9, 1017/18-25)

Sandra Smith (the mother) testified that on the day of the incident at about 8:30 a.m., she was standing in the kitchen/dining area heading toward Jamie's room to get her up for school when she heard Ms. Azzarone's (Betty) key in the door. (T12, 1296, 1299/25) She looked up and Ms. Azzarone was fighting to get the door shut because a man with a ski mask was forcing his way through the door. (T12, 1300/3-8, 20). He got in and forced Ms. Azzarone to the ground, while another man charged at her. (T12, 1300/10-15) The second man who charged at her did not have a mask on at the time. (T12, 1300/22-23) The second man grabbed her, put a gun to the back of her head, asked her if she wanted to die, and said, "Let's get to the safe." (T12, 1301/9-1303/15) She did not take him to the safe, because essentially he carried her there. (T12, 1303/16-24) He knew where the safe was located. (T12, 1385/22-1386/21) The safe was in a concealed hallway behind a false wall that looked like bookshelves. (T12, 1303/25-1304/23) He told her to open the safe, but she indicated that she could not because in addition to the keypad the safe also required a key, which was located in her bathroom. (T12, 1305/11-1306/3) The man took her to get the key, returned to the safe, and then she opened the safe. (T12, 1306/7-12) All this time, this man was still not wearing a mask. (T12, 1306/12) He took from the safe several Rolex

watches worth three to four thousand dollars and jewelry worth in excess of one hundred fifty thousand dollars. (T12, 1307/23-1309/20) As she started to get the jewelry from the safe, as instructed, this man finally put on a mask. (T12, 1310/5-11) He also took the Rolex and jewelry that she was wearing. (T12, 1310/19-23) She asked if she could keep her wedding ring. (T12, 1311/10) As this was happening, the man was speaking on a cell phone and "asked" into the phone that Mrs. Smith wanted to keep her wedding ring. (T12, 1311/5-12) She surmised that the person he was speaking to must have had a response, because this man then told her that she was not allowed to keep the ring because her husband was f******g another woman in the Dominican Republic and he did not deserve for her to wear it. (T12, 1311/12-23) She recalled that this individual was on and off the cell phone during the entire episode. (T12, 1312/18-22) This individual then took her back to the front of the house. (T11, 1312/24) She saw her daughter Jamie and Maria on the floor and the other man standing over them with a gun. (T12, 1313/2-12) The man that was with her started telling them that they had followed her and Jamie during the end of May when they went to the Coral Square Mall and then to meet her husband at the Big Bear Brewing Company. (T12, 1313/20-1314/20) He also kept asking her where the cash was, and when she said that she had none he asked if she had an iron and then said to turn on the stove threatening to burn her daughter's beautiful ass unless she told him where the cash was. (T12,

1314/22-1315/4) She watched as her stove got red heating up. (T12, 1315/5-8) Then he took her to her bedroom where he found a briefcase containing thirteen thousand dollars in cash and a check. (T12, 1315/14-22, 1354/7) Mrs. Smith identified Ray Balthazar as the man who had her. (T12, 1332/6-1333/10) She testified that she will never forget his face. (T12, 1333/13) She also identified Charly Coles as the man who had her daughter. (T12, 1335/9-21) She explained that the mask that Charly Coles wore had one wide opening around his nose and eyes. (T12, 1329/20-24, 1404/4-6)[2] She also identified Petitioner as a man who had, on several occasions, been in her home in Pompano (prior to the incident). (T12, 1336/7-1337/21)

Jamie Smith (the daughter) testified that on the morning of the incident she was awakened by her mother's screams. (T12, 1263/6-15) She peeked out her bedroom door and saw someone holding her mother. (T12, 1263/22-1264/10) Then her dog pushed her door open, and a man with a mask on and holding a gun followed the dog into her bedroom and ordered her to go to the kitchen and lay face down with Md. Azzarone. (T12, 1263/4-1267/124) She only saw this one man when she was taken into the kitchen, because by then her mother had already

[2]Gun shop salesperson Alfredo Nunez testified that on February 22, 2003, Charly Coles bought two handguns and a shotgun (T13, 1534/21-1536/10). During the transaction, Mr. Coles gave him Ray Balthazar's bail bond business card (T13, 1541).

been taken away. (T12, 1268/12-22) The man put a pillowcase over her head. (T12, 1268/2) When her mother returned to the kitchen, the men started calling her mother a liar about having said there was no money in the home, because Jamie had indicated that there was. (T12, 1269/1-12) Some time thereafter, the two men removed her pillowcase. (T11, 1270/2-11) They kept asking if there was money in the house, and saying things about her father and why they were there. (T12, 1271/23-25) They indicated that her father was in the habit of screwing people over. (T12, 1272/6-9, 1289/22-1290/3) They also indicated that they saw her and her mother at the mall and then go meet her father at Big Bear Restaurant. (T12, 1272/24-1273/1) They also indicated that if they burned her butt her mother would give them the money. (T12, 1273/22-1274/5) She never saw the perpetrators' faces, because they wore masks. (T12, 1277/8-10) The man who was with her mother had a mask on when she took off her pillowcase and saw him. (T12, 1291/16-21)

Michael Smith (the father) was not at home at the time of this incident. (T11, 1186/5-8) He admitted to having an extramarital affair with a woman in the Dominican Republic named Maria Perez. (T11, 1168/23-1169/2, 1181/22-1182/4) He identified Petitioner as a man he was introduced to named Mario, who was associated with John Cruz and who had worked in his homes in Kissimmee and Pompano. (T11, 1175/9-1177/1, 1255/3-15) They built the false wall for the safe

in his home. (T11, 1226/17-20, 1241/10-12) Petitioner was in his home under this false identity numerous times. (T11, 1256/12-15)

Detective Leitner testified that on June 19, 2003, he processed a 1997 Honda Civic with Florida paper tag with number U37-MLU. (T13, 1471-1474) He lifted latent prints from the interior passenger window of this vehicle. (T13, 1478-1479) Latent examiner, Robert Holbrook, testified that four of these prints belonged to Ray Balthazar and one of the prints belonged to Charly Coles. (T12, 1506-1507) Detective Cordero explained that this car was green in color and belonged to Charly Coles. (T13, 1519-1527) Defense counsel elicited from Deputy Seaman on cross-examination that he reported that the suspects departed in a green Honda accord. (T14, 1636/9-12) Angela Kim Strothman, a neighbor of the Smiths, testified that on June 4, 2003, between 5:30 a.m. to 8:45 a.m. she observed, several different times, a suspicious dark green two-door Honda in the neighborhood, which had dark tint, a small dent in the rear bumper, and license tag U37-MLU. (T15, 1727-1750)

Verizon Wireless employee James Jones testified that Suzan Garzon had two cell phones activated on December 6, 2002, with phone numbers (786) 512-7774 and (786) 512-6840. (T14, 1575-1576)[3] In regard to number (786) 512-6840, her

[3]Appellant's probation officer (proffered T14, 1597), Sandra Schadlbauer, testified that appellant told her that he could be contacted at (786) 512-7774 and then at (786) 512-6840 beginning June 3, 2003 (T14, 1609-1610).

records indicated that on June 4, 2003 an incoming call which lasted 39 minutes was received on this phone at 8:34 a.m. from a phone in Pompano Beach.[4] (T14, 1585-1588) Verizon Wireless employee Thomas Daly testified that this call was made by (954) 257-2977 (Ray Balthazar's cell phone) (T17, 2063)

Cingular Wireless employee Peter Mills testified that company records for phone number (954) 257-2977 (Ray Balthazar's phone) showed that on June 4, 2003, the user of that phone was in Miami at 2:53 a.m. (T18, 2099). At 5:15 a.m., 5:38 a.m., 5:39 a.m., and 5:40 a.m., the user of this phone called (786) 512-6840 (Petitioner's phone). (T18, 2101-2102) At 5:47 a.m. and 7:19 a.m., the user of this phone called (305) 761-7955 (Coles phone).[5] (T18, 2102) At 8:35 a.m., when the user of this phone called (786) 512-6480 (Petitioner's phone), he was in the area of the Smith home. (T18, 2108)

Bail bondsman Shawn Fernandez testified that Ray Balthazar (T14, 1564) cell phone number was (786) 355-9986 and before that it was (954) 257-2977 (T14, 1567/22-25).[6] Cingular Wireless employee Jorge Mori testified that number

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[4]The Smith residence, which is the crime scene in this matter, is located in Pompano Beach (T11, 1293/8-12).

[5]Crystal Lee Danko, records custodian for Sprint, testified regarding cell phone records for phone number 305/761-7955 in the name of Jocelyn Coles at 7132 S.W. 154th Court in Miami (T8, 979/22-981/7).

[6]Nidia Diaz also testified that Ray Balthazar's cell phone number is (954) 257-2977) (T14, 1697/11).

(954) 257-2977 was activated on April 9, 2003, was listed in the name of Alkhalb Balthazar, and that on June 4, 2003, at 8:35 a.m. this phone made a call to phone number (786) 512-6840 which lasted 39 minutes (T14, 1620-1624)

Best Bail Bonds employee Nidia Diaz testified about the relationship between Ray Balthazar and a man named Sammy. (T15, 1693-1698, 1703-1710) Howard Elliott, a former employee of Best Bail Bonds, testified that Petitioner is a friend of his, and that Petitioner is also known as Sammy. (T16, 1825-1826) He also explained how Petitioner and Ray Balthazar could have known each other and recalled Petitioner's cell phone number as (786) 512-6840. (T16, 1827-1837) Steven Mejia testified that he has known Petitioner for several years, that he knows Petitioner as both Zamir and Sam, and that Petitioner's cell phone numbers were (786) 512-6840 and (786) 512-4414 (T16, 1850-1854).[7]

Detective Pugliese testified that Petitioner lived at 4955 N.W. 199th Street in Miami; Ray Balthazar lived at Sunset Manor Apartments, at 7500 S.W. 59th Place in Miami (T16, 1886/24-1887/23); and Charly Coles lived at 7132 S.W. 154th Court in Miami. (T16, 1877/11-1878/1)

Verizon Wireless employee Thomas Daly testified that company records for phone number (786) 512-6840 showed that on June 4, 2003, the user of that phone

[7]Appellant indicates that Mr. Mejia testified that the area code was "305" (IB 25); however, his memory was refreshed and he recalled that the correct area code was "786" (T16, 1853/8-12).

was in Miami at 5:14 a.m., Coconut Creek at 7:12 a.m., in Pompano Beach at 8:34 a.m., back in Coconut Creek at 9:20 a.m., back in Coral Springs at 9:26 a.m., in Davie at 9:44 a.m., and back in Miami at 10:41 a.m. (T16, 2040-2052). At 9:44 a.m., this phone dialed (954) 257-2977.[8] (T17, 2052/1-2)

Doris Jean Smith (the grandmother) testified that on March 22, 2003 (T8, 830), two men, who she could not identify, forced themselves into her son Michael Smith's home, (T8, 828-837) One went to the office in the house, while the other dragged her into a bedroom. (T8, 838/11) One individual had on a sock cap. (T8, 840/6) and threatened her with a gun. (T8, 845/18-25) He also said to her that her son is nothing but a crook (T8, 847/18-20) and wanted to know when her daughter was coming home. (T8, 850/21) She believed that he was also talking on a cell phone, because she heard him say, "this ain't the motherf******g way it's supposed to be" and "where are you, are you in the middle of the street." (T8, 848/13-22) He also asked her where the safe was. (T8, 846/9) She testified that although the perpetrators did not know where the safe was, they did know how to get in there. (T8, 895/22-23) Since she could not open the safe, these individuals removed the safe which was in a closet behind the stereo equipment[9] but for some reason had to

[8]Ray Balthazar's phone number.

[9]Detective Way testified that there was a second safe behind a bookcase (T10, 951/12-18).

leave it behind at the entrance to the house. (T7, 846-850, 863/4-13) Mrs. Smith's testimony is a little vague as to the final location of the safe, but Detective Way clearly indicated that the safe was left lying on the floor inside the entrance to the front door. (T8, 935/24-25)

Kerry Smith (the son) testified that on March 21, 2003, Ray Balthazar and Charlie Coles attempted to abduct him. (T6, 739-768) Mr. Balthazar was driving a Red Explorer (T6, 741/10) and was using a cell phone. (T6, 744/12-747/7) Mr. Smith testified that neither man was wearing a mask. (T7, 804/8-9)

Eyewitness Lorenzo Clark testified that on March 21, 2003 (T9, 1072/13-16), he witnessed the above incident involving Kerry Smith. (T9. 1075-1080) He believed that the perpetrator's vehicle was a red Expedition. (T9, 1076-1077) He also noticed that there was a passenger in the red vehicle. (T9, 1079) He recalled that both perpetrators were wearing some sort of mask. (T9, 1089/23-1090/7) He did get a portion of the red vehicle's tag number but did not recall what it was in court. (T9, 1080/3-7, 1081/4-8); however, at the time of the incident he did relate this information to a deputy. (T9, 1081/12-20)

Joseph Schloten testified that he owned the Sunset Manor apartment complex where Ray Balthazar lived. (T8, 904-905) Balthazar's rental application (T8, 905/18-22) dated February 23, 2003 (T8, 907/6), reflected a cell phone for

Mr. Balthazar as 786/234-5880.[10] (T8, 911/17-912/3). It also reflected that Mr. Balthazar drove a red Ford Explorer. (T8, 912/12-16) Eugene Bauden managed this complex. (T8, 915/7-14) He testified that Balthazar told him that he was a bounty hunter and bail bondsman. (T8, 917/6-7) He also knew that Ray Balthazar drove a red Ford Explorer. (T8, 918/21) Bail bondsman Shawn Fernandez testified that he also knew that Ray Balthazar drove a red Ford Expedition. (T13, 1568/15-16) Pierre Carrie testified that on February 23, 2002, he transferred title to a red Ford Explorer to Ray Balthazar. (T14, 1-17)

Having previously provided all counsel with a packet of instructions, the court asked all the lawyers if they had reviewed the instructions and whether they had any objections. The prosecutor and all defense counsel indicated that nothing in the instructions needed to be changed. (T19, 2344) The trial court instructed the jury on criminal conspiracy, armed burglary, robbery with a firearm, armed kidnapping, extortion, principals, and multiple defendants. (T20, 2364) Petitioner did not object after the jury was instructed. (T20, 2368) Additionally, the jury was provided with separate verdict forms for each defendant. (R. 103-109; T20, 2364-2366) The jury returned verdicts of guilty as to all counts as charged in the

[10]Metro PCS employee Jannan Chandler testified that phone number (786) 234-5880 was in the name of Jovan Erick, and that it was terminated on May 5, 2003 (T15, 1664-1665). The last outgoing call on this phone was on April 5, 2003 (T15, 1666/9-12).

information except for extortion for which the jury found Petitioner not guilty. (T21, 2385-2387)

SUMMARY OF THE ARGUMENT

The use of "and/or" between the names of the co-defendants in the substantive jury instructions was not objected to by Petitioner. Following the unobjected-to instructions on the substantive charges, the trial court also gave the standard “principal” instruction and instruction on multiple defendants. In light of the undisputed applicability of the standard jury instruction on “principals” and the well-settled legal principles governing conspiracy prosecutions, Petitioner submits that the unobjected-to jury instructions did not constitute fundamental error. Rather, the additional jury instructions on principals and multiple defendants, the argument of counsel, the evidence presented, and the individualized verdict forms, placed the “and/or” language in the proper context. Under these circumstances, the Fourth District Court of Appeal was correct and any error was harmless.

ARGUMENT

THE USE OF THE "AND/OR" CONJUNCTION BETWEEN THE NAMES OF THE CO-DEFENDANTS IN THE JURY INSTRUCTIONS ON THE SUBSTANTIVE CRIMES DID NOT CONSTITUTE FUNDAMENTAL ERROR; EVEN IF IT WAS ERROR, IN LIGHT OF THE STANDARD PRINCIPALS INSTRUCTION, MULITPLE DEFENDANTS INSTRUCTION, AND THE EVIDENCE SUCH ERROR WAS HARMLESS.

In this case, Petitioner and his two co-defendants were tried before a single jury for criminal conspiracy, armed burglary, robbery, armed kidnapping, and extortion. The jury instructions on all substantive offenses utilized an "and/or" conjunctive/disjunctive between the names of the co-defendants immediately followed by the standard instruction on principals and multiple defendants. Petitioner did not object to any of the jury instructions. (T19, 2344; T20, 2364) Petitioner was convicted on all counts as charged in the information save for the extortion count for which he was acquitted.

On appeal, the Fourth District concluded that the use of the conjunction "and/or" in the jury instructions between the names of the co-defendants was not fundamental error. Rather, analyzed in the context of the entire trial, the error, if any would be considered harmless. The Fourth District also noted that even had the defense made the proper objection, it still would not find reversible error. Consequently, the Fourth District certified direct conflict with cases out of the First

and Second District Courts of Appeal. Respondent urges this Court to affirm the Fourth District's analysis and ultimate conclusion.

It appears to be Petitioner's contention that the use of the "and/or" conjunction is fundamental error because of the risk a jury may convict one defendant based solely on the conclusion that a co-defendant satisfied the elements of the offense. (IB 17, 22)

While Petitioner asserts fundamental error based on the mere use of "and/or" in the jury instructions, he does not mention or dispute the State's theory of the case, facts, or other jury instructions and verdict forms; except to say Petitioner's involvement was tenuous and the jury's consideration of the principal instruction speculative (IB 19, 20, 23) thus attempting to portray the issue as one of law only. Respondent disagrees. The discernment of fundamental error must be made in the context of the entire trial.

This court has held that jury instructions are subject to the contemporaneous objection rule. *See State v. Delva*, 575 So.2d 643 (Fla.1991). The requirement of a contemporaneous objection to preserve an issue for appeal "is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." *Castor v. State*, 365 So.2d 701, 703 (Fla.1978). As the Fourth District pointed out in its opinion below,

in *Delva*, this Court took a contextual approach when it considered whether fundamental error occurred because the trial court failed to properly instruct the jury on an element of trafficking in cocaine, i.e., whether the defendant knew the substance he possessed was cocaine. *Id.* at 644. Although this Court found that the jury instruction was erroneous, it nonetheless held the error was not fundamental, because the defense at trial was that the defendant "did not know the package of cocaine was even in his car," not that the defendant "knew of the existence of the package[, but] did not know what it contained." *Id*. at 645. This Court concluded that "[b]ecause knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime could not be fundamental error and could only be preserved for appeal by a proper objection." *Id*.

This Court utilized a similar contextual approach to fundamental error analysis in *Floyd v. State*, 850 So.2d 383, 403 (Fla.2002). In *Floyd*, this Court held that an erroneous, incomplete instruction in the penalty phase of a capital case was not fundamental error, in part because the defense attorney's closing argument "fully present[ed] and discuss[ed]" those mitigation factors that had been omitted from the court's instructions. *Id*. at 403.

Applying that approach to the case at bar, the "and/or" instructions examined in the context of the other jury instructions, the attorneys' arguments, and the evidence in this case if error, it is harmless under the facts of this case.

Principals Instructions

In the trial below, after charging the jury on all of the substantive crimes, the trial court read the standard charge on principals. *See Fla. Std. Jury Instr*. (Crim.) 3.5(a),

> If the defendant helped another person or persons commit or attempt to commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did, if the defendant had a conscious intent that the criminal act be done and the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit or attempt to commit the crime. To be a principal, the defendant does not have to be present when the crime is committed or attempted.

(T20, 2359) In light of the evidence in this case, this standard principals instruction without "and/or" placed all the other instructions in the proper context. *Garzon* at 284. This instruction explained that Petitioner was responsible for the criminal acts of a co-defendant if "the defendant had a conscious intent that the criminal act be done" and the "defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person ... to actually commit the crime." *Fla. Std. Jury Instr*. (Crim.) 3.5(a). If

the jury found the principals instruction applied to him, Petitioner could lawfully have been found guilty of crimes that one co-defendant or both committed in the house.

Understandably, Petitioner aligns himself with Judge Klein's dissent in claiming the majority relied on guesswork and speculation in determining whether the jury ever reached the principal instruction. (IB at 20) However, as the Fourth District stated,

> "A possibility of what the jury "could" do in response to a jury instruction is not the stuff of fundamental error. The law presumes that the jury has followed all of the trial court's instructions, in the absence of evidence to the contrary." *See Sutton v. State*, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998).

Garzon, 939 So.2d at 285.

Further, Petitioner contends based on the general verdict form, the jury did not specify upon which theory the verdict was based. However, this Court should not presume that the resulting general verdict rested on the infirm ground and must be set aside,

> While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.

See San Martin v. State, 717 So. 2d 462, 470 (Fla. 1998) *citing Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). It is a well established principle that a jury is unlikely to disregard a theory flawed in law, but it is likely to disregard an option simply unsupported by the evidence. *See also Sochor v. Florida*, 504 U.S. 527, 538, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). The Supreme Court explained this distinction in *Griffin* as follows,

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, three is no reason to think that their own intelligence and expertise will have them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence, *see Duncan v. Louisiana*, 391 U.S. 145, 157 [88 S.Ct. 1444, 20 L.Ed.2d 491] (1968).

And, as stated in *Garzon*,

> 'Jurors are not potted plants.' *Grant v. State*, 738 So.2d 1020, 1022 (Fla. 4th DCA 1999). It is more likely that they would resist the notion of the principals charge rather than blindly convict defendant A for defendant B's conduct, without proof of defendant A's culpability. It is a stretch for the average juror to believe that someone not present at the scene of a crime is as culpable as the defendant who actually committed the criminal acts. This is why prosecutors spend time in voir dire and closing argument discussing the principals charge.

Id.

Multiple Defendants Instructions

In addition to the principals instruction, however, the jury was also instructed on deliberations involving multiple counts and multiple defendants,

> A separate crime is charged against each defendant in each count of the information. The defendants have been tried together, however the charges against each defendant and the evidence applicable to him must be considered separately. A finding of guilty or not guilty as to one or some of the defendants must not affect your verdict as to any other defendants or other crimes charged.

(T20, 2364; R. 97) Again, referencing the ability of jurors to properly apply the facts, Respondent submits this instruction would have further aided the jury in resolving any confusion allegedly brought about by the "and/or" in the substantive instructions.

Evidence

As the Fourth District so aptly pointed out below,

> With respect to Garzon, everyone in the courtroom knew that the issue boiled down to whether the state had proven that he was the person to whom Balthazar spoke over the cell phone during the home invasion.

Garzon at 284. The State presented the following evidence on this issue,

Verizon Wireless employee James Jones testified that Suzan Garzon had two cell phones activated on December 6, 2002, with phone numbers (786) 512-7774 and (786) 512-6840 (T14, 1575-1576). Petitioner's probation officer (proffered

T14, 1597), Sandra Schadlbauer, testified that Petitioner told her that he could be contacted at (786) 512-7774 and then at (786) 512-6840 beginning June 3, 2003 (T14, 1609-1610). In regard to number (786) 512-6840, her records indicate that on June 4, 2003 an incoming call which lasted 39 minutes was received on this phone at 8:34 a.m. from a phone in Pompano Beach. The Smith residence was located in Pompano Beach. (T14, 1585-1588). Verizon Wireless employee Thomas Daly testified that this call was made by (954) 257-2977 (Ray Balthazar's cell phone) (T17, 2063). Cingular Wireless employee Peter Mills testified that company records for phone number (954) 257-2977 (Balthazar's phone) show that on June 4, 2003, the user of that phone was in Miami at 2:53 a.m. (T18, 2099). At 5:15 a.m., 5:38 a.m., 5:39 a.m., and 5:40 a.m., the user of this phone called (786) 512-6840 (Petitioner's phone) (T18, 2101-2102). At 5:47 a.m. and 7:19 a.m., the user of this phone called (305) 761-7955 (Coles phone)[5] (T18, 2102). At 8:35 a.m., when the user of this phone called (786) 512-6480 (Petitioner's phone), he was in the area of the Smith home (T18, 2108). Bail bondsman Shawn Fernandez testified that Ray Balthazar's (T14, 1564) cell phone number was (786) 355-9986 and before that it was (954) 257-2977 (T14, 1567/22-25). Cingular Wireless employee Jorge Mori testified that number (954) 257-2977 was activated on April

[5]Crystal Lee Danko, records custodian for Sprint, testified regarding cell phone records for phone number 305/761-7955 in the name of Jocelyn Coles at 7132 S.W. 154th Court in Miami (T9, 979/22-981/7).

9, 2003, was listed in the name of Alkhalb Balthazar, and that on June 4, 2003, at 8:35 a.m. this phone made a call to phone number (786) 512-6840 which lasted 39 minutes (T14, 1620-1624). Best Bail Bonds employee Nidia Diaz testified about the relationship between Ray Balthazar and a man named Sammy. (T15, 1693-1698, 1703-1710). Howard Elliott, a former employee of Best Bail Bonds, testified that Petitioner is a friend of his, and that Petitioner is also known as Sammy. (T16, 1825-1826). He also explained how Petitioner and Ray Balthazar could have known each other and recalled Petitioner's cell phone number as (786) 512-6840. (T16, 1827-1837). Steven Mejia testified that he has known Petitioner for several years, that he knows Petitioner as both Zamir and Sam, and that Petitioner's cell phone numbers were (786) 512-6840 and (786) 512-4414 (T16, 1850-1854).

Detective Pugliese testified that Petitioner lived at 4955 N.W. 199th Street in Miami; Ray Balthazar lived at Sunset Manor Apartments, at 7500 S.W. 59th Place in Miami (T16, 1886/24-1887/23); and Charly Coles lived at 7132 S.W. 154th Court in Miami (T16, 1877/11-1878/1).

Verizon Wireless employee Thomas Daly testified that company records for phone number (786) 512-6840 (Petitioner's number) show that on June 4, 2003, the user of that phone was in Miami at 5:14 a.m., Coconut Creek at 7:12 a.m., in Pompano Beach at 8:34 a.m., back in Coconut Creek at 9:20 a.m., back in Coral

Springs at 9:26 a.m., in Davie at 9:44 a.m., and back in Miami at 10:41 a.m. (T16, 2040-2052). At 9:44 a.m., this phone (Petitioner's number) dialed (954) 257-2977 (Ray Balthazar's number) (T17, 2052/1-2).

Indisputably, the evidence showed that Petitioner did not physically enter the Smith's residence on the day of the offenses. However, based on all of the evidence and testimony the State had put forth, it was the inescapable conclusion that at the actual time of the offenses, Petitioner was in Pompano; that co-defendant Balthazar called Petitioner at or about the time he entered the Smith residence and stayed on the phone with Petitioner for 39 minutes, and that Petitioner was instructing Balthazar while Balthazar and Coles were in the Smith residence. Further, Petitioner had worked in the Smith's Pompano home helping to build the false wall safe. Petitioner had worked there under an assumed name – Mario. (T11, 1175/9-1177/1, 1226/17-20, 1241/10-12, 1255/3-15, 1256/12-15) They built the false wall for the safe in his home.

It is well settled that a co-conspirator generally is criminally responsible for a crime committed in pursuance of the common purpose or which results as a natural and probable consequence of the conspiracy. "This is so even if the criminal act was not intended as part of the original design or the co-conspirator did not participate in the act." *Martinez v. State*, 413 So. 2d 439 (Fla. 3d DCA 1982), *citing Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L.Ed

1489 (1946). Respondent submits in light of all of the jury instructions provided the jury, and this evidence, the jury could reasonably have concluded that Petitioner was providing instructions to Balthazar during the commission of these offenses. It simply does not bear out that the jury could have found Petitioner guilty based on a finding that another co-defendant committed some of the elements of a particular offense, while he or the third co-defendant committed the rest of the elements of that offense.

Theory of the Case

As discussed by the Fourth District below, in closing argument, the prosecution focused on the jury instruction on principals to emphasize Petitioner was guilty of the crimes committed by his co-defendants. The state did not use the "and/or" conjunctions to argue for a legally incorrect or improper theory of guilt. The prosecutor argued:

> [On June 4], there were only two people with firearms inside the house, yet there are three people on trial charged with the same crimes. How is that possible? The Judge is going to read you an instruction that's titled principals. This is your classic example of the getaway driver being held responsible for the completed act of the person who drives to the scene. Principals will read as follows:
> [Reads principals instruction]
> [A]nd the kicker is, to be a principal the defendant does not have to be present when the crime is either committed or attempted. That's the law.... To be a

> principal the person does not even have to be present when the crime is attempted or committed.
> How do you apply that to this case? The person on the other end of the phone during the course of the crime feeding information to the people inside the house about the layout of the home, about intimate information relating to the family, assisting the people inside the home to commit the offense, encouraging them to do so, and I submit to you benefiting on the back end from the proceeds of the crime, all people that participate and assist and encourage are to be treated as if the had done all the things the others did. Keep that in mind as a backdrop to the evidence that we're going to analyze.

Id. at 284-285.

And, in Petitioner's closing argument, defense counsel emphasized that there was insufficient evidence to prove that Petitioner was the person on the other end of the phone during the crime. He also argued that it was reasonable to conclude it was some other individual, uncharged by the state, that was on the phone with Balthazar. *Id*. at 285.

Accordingly, the jury was asked to determine whether factually Petitioner's participation could allow them to reach the conclusion that he was a principal in the substantive crimes.

Extortion Charge

Respondent submits the fact that the jury acquitted Petitioner of the extortion charge "demonstrates that it followed the law on principals and was not misled by the "and/or" conjunction in the extortion instruction." *Id*. at 285.

The extortion charge arose from co-defendant Balthazar's threat to use the stove to burn Jamie unless her mother told him where the cash was hidden in the house. (T8, 1013-1014; T11, 1314-1315). Unlike the other aspects of the encounter where Balthazar communicated with Petitioner, it was reasonable for the jury to conclude that this threat was the spontaneous idea of Balthazar alone when faced with Mrs. Smith's reluctance to provide information.

Petitioner contends this can be explained by suggesting the jury pardoned. Arguing that it was Balthazar not Coles or Garzon that threatened to burn Jamie. The flaw in Petitioner's argument is it supports Respondent's suggestion that the jury factually resolved the issue and found that on this *one charge* Balthazar acted solely and without direction from Petitioner.

Verdict Forms

Although not addressed by the Fourth District, it is worth noting that the verdict forms in this case were separate and mentioned only one defendant each; and did not use the term "and/or." Thereby lending further guidance to the jury to properly convict each defendant under each charge.

Finally, and practically speaking, it would arguably be laborious and more confusing to provide the jury with individualized instructions on each crime as to each co-defendant.

Petitioner cites to a number of cases for the proposition that the use of "and/or" has uniformly been held to be fundamental error. (IB 17-19) However, many of these cases can be distinguished from the case sub judice: *See e.g. Cabrera v. State*, 890 So. 2d 506 (Fla. 2d DCA 2005) (Cabrera involved the named defendant and "several codefendants," only one of which was tried with Cabrera possibly permitting an inference that the co-defendants were not involved in every offense underlying the alleged conspiracy and trafficking.); *Rios v. State*, 905 So. 2d 931 (Fla. 2d DCA 2005) (co-defendant of Cabrera and reversed on identical grounds); *Davis v. State*, 895 So. 2d 1195, 2005 Fla. App. LEXIS 2001, [30 Fla. L. Weekly D520] (Fla. 2d DCA 2005)(without analysis, the court simply followed his prior holding in *Zeno v. State*, 910 So. 2d 394 (Fla. 2d DCA 2005); *Randolph v. State*, 903 So. 2d 264 (Fla. 2d DCA 2005)(co-defendant of *Davis* and reversed on identical grounds); *Concepcion v. State*, 857 So. 2d 299 (Fla. 5th DCA 2003)(it does not appear that the principals instruction was given and the opinion does not indicate how the cases were argued.); *Dorsett v. McRay*, 901 So. 2d 225, 226 (Fla. 3d DCA 2005) (it does not appear that the principals instruction was given and the opinion does not indicate how the case was argued.); *Davis v. State*, 804 So. 2d 400 (Fla. 4th DCA 2001)(the instruction was fundamental error because it misstated a crucial element of the defense-it told the jury that it could convict Mrs. Davis if "it concluded that" her husband "alone had a predisposition to commit the

crimes" and it did not involve a principals instruction that placed the "and/or" language in the proper context.); *Williams v. State*, 774 So. 2d 841 (Fla. 4th DCA 2000)(the trial court erroneously charged the jury on elements of the offense; the court incorrectly told the jury "that the evidence applicable to each crime, and not to each defendant, must be considered separately, and the standard principals instruction was not given).

In sum, Respondent urges this Court to affirm the Fourth District and find that under these circumstances, the use of "and/or" in the substantive jury instructions was not fundamental error. Viewed in the context of the entire trial with the giving of the standard instructions on principals and multiple defendants; the evidence; the fact that Petitioner was acquitted on one of the substantive charges, and the use of separate verdict forms without "and/or", any error simply did not go to the fairness or validity of the entire trial. Even if this court concludes the use of "and/or" was erroneous, it should conclude as did the Fourth District, the error was harmless.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: Samuel R. Halpern, Esquire, 2856 East Oakland Park Blvd., Fort Lauderdale, Florida 33306 this _____ day of _____, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

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