**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

ZAMIR GARZON,

Petitioner,

Case No.: SC06-2235
L.T. Case No.: 4D04-4699

-VS-

STATE OF FLORIDA,

Respondent.
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# REPLY BRIEF OF PETITIONER ON THE MERITS

On Discretionary Review
From the Fourth District Court of Appeal

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## PRELIMINARY STATEMENT

Petitioner was the Defendant and the Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. 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 the Respondent may also be referred to as the State or the Prosecution and Petitioner may be referred to as Garzon.

The following symbols will be used:

AR@ Record on Appeal

AT@ Transcripts of Hearings and Trial Proceedings

AAB@ Answer Brief of Respondent

## SUMMARY OF ARGUMENT

The court instructed the jury with two separate and distinct theories upon which it could convict Petitioner. Of those, only one was legally permissible. This court is now asked to speculate whether the jury properly applied the law of principals to reach their guilty verdicts, or whether they convicted Petitioner based on the courts= erroneous Aand/or@ instruction. As Respondent has not demonstrated the error did not contribute to the verdict, the case should be remanded for a new trial.

## ARGUMENT

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

A. *Harmless Error Analysis*

Respondent argues that in the event the lower court committed error in instructing the jury with the conjunctive/disjunctive Aand/or@, such error was harmless. AB 15-19. The State has the burden to establish beyond a reasonable doubt that the complained of error did not affect the jury verdict. *State v. DiGuillio*, 491 So.2d 1129 (Fla. 1986). For the reasons that follow, the prosecution has failed in their burden to establish that the insertion of the offensive conjunctive/disjunctive did not contribute to the jury=s verdict.

B. *Principals Instruction*

Respondent suggests that the court cured any potential error by instructing the jury with the standard principals instruction. Fla. Std. Jury Instr. Crim.(3.5(a)). The principals instruction did not cure the fundamental error of inclusion of the Aand/or@ phrase between co-defendants when instructing on each of the substantive crimes, nor does the case law support such a determination. By virtue of improperly inserting the conjunction Aand/or@ between each co-defendant on

each substantive crime, the jury may well have been confused into convicting Petitioner based solely upon the acts of his co-defendants, Coles and Balthazar. Respondent has quoted from the Fourth District=s Opinion in *Garzon v. State*, 939 So.2d 278 (Fla. 4th DCA 2006);

> AA possibility of what the jury Acould@ 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.2nd 215, 216 n.1 (Fla. 1st DCA 1998).

*Garzon*, at 285, AB page 20.

Respondent=s argument sidesteps the argument that an Appellate Court must now rely on guesswork and speculation to determine which of the two inapposite instructions the jury relied upon in rendering its verdict. Here, the jury was invited to convict Garzon based solely upon the actions of either one of his two co-defendants or a combination of the actions of both of his co-defendants. Without a special verdict to determine whether they followed the principal instruction, it is simply impossible to glean from this record whether the jury followed the court=s improper instruction, or as Respondent would have it, that the principal instruction cured all. Although jurors are presumed to follow the law which is given by the

court, when the law is *internally inconsistent*, fundamental fairness mandates reversal. This case was submitted to the jury on a general verdict of guilt based on two distinct alternative theories of guilt. Only one of these theories was legally valid. That theory was the idea that Garzon could have been convicted based upon the State proving beyond a reasonable doubt that he was guilty as a principal to the actions of Coles and Balthazar. On the other hand, a separate theory was presented to the jury via the instructions provided by the court. That theory instructed the jury to find Garzon guilty if it was determined that either Balthazar or Coles committed all of the elements of the offenses. Because there were two alternative theories presented, only one of which was legally valid, the conviction must be reversed as the error is fundamental. *Mackerly v. State*, 777 So.2d 960 (Fla. 2001);*Delgado v. State*, 776 So.2d 223 (Fla. 2000); *Tricarico v. State*, 711 So.2d 624 (Fla. 4th DCA 1998)(even where overwhelming evidence of premeditation exists, instruction of invalid felony murder theory, attempted trafficking, constitutes fundamental error).

C. *Appellate Courts should not speculate as to the basis of a jury verdict.*

It is axiomatic that the State must prove not only that a crime has been committed but also that the defendant is the

one who committed the crime. Fla. Std. Jury Instr. Crim.(3.7). At bar, there is no question that the prosecution established a number of crimes were committed. The sole issue for the jury to determine was whether Garzon was one of the perpetrators. Certainly it would be an injustice to allow a conviction to stand based upon crimes committed by Coles or Balthazar without requiring proof that Garzon was a principal to those crimes. As it stands, and based on the court=s internally inconsistent instructions to the jury, this Court is left to speculate whether the jury convicted Garzon based on a sound and legal principal theory or whether he was convicted based solely on the acts of his co-defendant without a determination that he was guilty as a principal.

Respondent has sought to distinguish numerous cases that have held uniformly that the Aand/or@ conjunction is fundamental error. Respondent sought to distinguish *Cabrera v. State*, 890 So.2d 506 (Fla. 2nd DCA 2005) by pointing out that *Cabrera* involved the named defendant and several co-defendants, only one of whom was tried with Cabrera, thereby raising the possible inference that the other co-defendants were not involved in every offense underlying the alleged conspiracy and trafficking. AB at 29. *Cabrera* is similar to the case at bar most notably because Cabrera was *acquitted* of one of the six counts against

him. Further, the opinion did not mention whether the principals instruction was given in that case. Respondent has sought to distinguish *Concepcion v. State*, 857 So.2d 299 (Fla. 5th DCA 2003) by suggesting that, Ait does not appear that the principals instruction was given@ and pointing out that the opinion did not indicate how the case was argued. AB at 29. In *Concepcion*, three men were tried together for the offenses of trafficking in cocaine and conspiracy to traffic in cocaine. The court reversed based upon the improper use of the insertion of the conjunction Aor@ between the co-defendants. The opinion does not indicate one way or the other whether the principals instruction was submitted to the jury.[1] Respondent has likewise sought to distinguish *Dorsett v. McRay*, 901 So.2d 225 (Fla. 3rd DCA 2005). Respondent indicated that it did not appear that the principals instruction was given and the opinion did not indicate how that case was argued. AB at 29. In *Dorsett*, the court began their discussion by stating the following:

> Dorsett was charged, convicted and sentenced for acting as a Awheelman,@ and, therefore, a ***principal*** in an armed robbery involving multiple victims at the place of his former employment.

[1] It is respectfully submitted that it is more likely than not that any competent prosecutor would insist on a principals instruction when trying co-defendants in a trafficking and conspiracy to traffic case.

*Dorsett* at 225, (e.a.).

It appears, therefore, that Dorsett ***was*** charged as a principal and it was more likely than not that the principals instruction was given in that case. Nonetheless, *Dorsett* determined that the insertion of the disjunctive Aor@ between co-defendants constituted fundamental error. Notably, the court in *Dorsett* did give the Aseparate crimes, multiple defendants@ jury instruction. Fla. Std. Jury Instr. (Crim.) 3.12( c). The court in *Dorsett* noted:

> Because the entire instruction was, in fact, given in *this* case, the State argues that, Aand/or@ cases do not control. We do not agree. First, the ***Williams*** holding that the instruction containing, Aor@ conjunction was fundamental error did not, at all, depend upon the omission in question, which was referred to generally as a makeweight. Second, the confusion engendered by the Aand/or@ was, if anything, highlighted rather than cured by the standard instruction. This is so because (a) even if the charges against each defendant were to be considered Aseparately,@ as the standard jury instruction stated, the *primary* instruction still provided *Dorsett* might be criminally liable solely if Lloyd was liable...

*Dorsett* at 227, citations omitted.

Pursuant to *Dorsett*, the *primary instructions* at bar were the substantive counts defining the elements of the offenses. These instructions were fundamentally flawed because of the

Aand/or@ conjunction. It was only the *secondary* principals and Amultiple crimes, multiple defendants@ instructions which Respondent suggests cured the error. However, because the primary and secondary instructions were internally inconsistent and confusing, the prospect looms large that Petitioner was convicted without any analysis by the jury of the law of principals.

It should not go unnoticed that the long line of Aand/or@ cases hold fundamental error even where only the *prospect* of an invalid conviction exists. ***Williams v. State***, 774 So.2d 841, 843 (Fla. 4th DCA 2000)(A[B]ecause Williams= jury *may have been misled* into thinking that it could convict him based solely on Adderly=s conduct, we hold that the instructions were fundamental error.@, emphasis added). [2] In ***Davis v. State***, 804 So.2d 400 (Fla. 4th DCA 2001) Antoinette Davis was charged along with her husband, Lonnie Bynes. The trial court inserted the Aand/or@ conjunction in the instruction defining the defense of entrapment. This had the effect of eliminating the defense for Ms. Davis based on her husband=s predisposition to commit drug offenses. There, the court held:

If the jury believed that appellant had been induced

[2] Respondent stated at AB page 30 that the principals instruction was not given in *Williams*. A careful review, however, of the opinion does not indicate whether it was given.

> by law enforcement or its agent (the confidential informant) into the commission of the crimes charged, the jury ***could*** nonetheless be misled into convicting appellant if it concluded that Bynes alone had a predisposition to commit the crimes. Certainly, the two prior convictions for possession, sale and distribution of cocaine would be powerful evidence of predisposition. Therefore, we hold that it was harmful error for the trial court to give the inaccurate and misleading instruction on the defense of entrapment and reverse the convictions and remand for a new trial.

*Davis*, at 405 (e.a.).

Thus, the courts have held that when the possibility exists that a jury could convict based solely on another=s conduct, even when the Amultiple defendants, multiple counts@ instruction was given, fundamental error has occurred.

At bar, Respondent argues that because Garzon was acquitted of one of the numerous counts against him, this verdict is proof that the jury correctly applied the law of principals.[3] Respondent=s position requires this court engage in speculation to determine the reason the jury may have acquitted Garzon of that one count. Speculation and guess work should play no role in determining one=s fate. It cannot be established beyond a reasonable doubt why the jury acquitted Coles and Garzon of the

[3] *Cabrera* dealt with a similar situation wherein he was acquitted of one of the several counts against him. That opinion did not indicate whether Cabrera=s co-defendant was likewise acquitted of that very same count.

extortion count. Perhaps the jury simply pardoned them without considering the principals instruction at all. We simply are not in a posture now, based upon the internally inconsistent and confusing jury instructions, to speculate as to the basis of the jury verdict; an invalid, non-individualized guilty verdict based on the culpability of one or both co-defendants, or, alternatively, a valid and well reasoned application of the law of principals. As one=s liberty should hardly be based on pure guesswork and speculation, the guilty verdicts should be reversed and remanded.

## CONCLUSION

Based upon the foregoing arguments and authorities cited, it is respectfully submitted that this Honorable Court should overrule the opinion of the Fourth District Court of Appeal and hold that fundamental error was committed in this case requiring a new trial.

Respectfully submitted,

By:
Samuel R. Halpern

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this reply brief 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 Monique E. L:Italien, Esquire, Assistant Attorney General, Attorney General:s Office, 1515 North Flagler Drive, Suite 900, West Palm Beach, Fl 33401 this _____ day of March, 2007.

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## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that Petitioner:s reply brief complies with the spacing and font requirements of Fla. R. App. P. 9.210. This brief is double-spaced, set in 12 point font, Courier New, which is not proportionally spaced.

By:
Samuel R. Halpern