IN THE SUPREME COURT OF FLORIDA

SC CASE NO: SC06-2290

DCA CASE NO: 4D04-4705

RAY BALTHAZAR)

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

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Ray Balthazar
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PRELIMINARY STATEMENTS

Petitioner, Ray Balthazar, 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 the defendant and Respondent may be referred to as the State or the prosecution.

The following symbols will be used:

"R" Record proper contained in the single volume of the record on appeal which is bound at the top.

"T" Transcript of proceedings in the lower tribunal, bound at the side and contained in Volumes 1-20 of the record on appeal, followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS[1]

Petitioner, was charged by information along with his co-defendants, Charlie Coles and Zamir Garzon, 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 12-16). 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 "soldier pants" (T8/1007). This person was armed with a handgun and pushed her into the home (T8/1007). She was made to lay on the kitchen floor and heard her employer, Sandra Smith, yelling in another room (T8/1009). Thereafter, the Smith's daughter, Jamie Smith, was brought into the kitchen and made to lay down on the ground next to her (T8/1010). She noted that there was a second intruder inside of the home who was also wearing "soldier pants" (T8/1011- 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 (T8/1012-1014). Jamie Smith testified that

[1] The statement of the case and facts was copied in large part, with permission from Samuel Halpern, Esq., from co-defendant's initial brief, Case No.: 4D04-4699.

on that morning, June 4, 2003, she was awakened from her sleep when she heard her mother screaming in the other room (T11/1261-1263). A man then came into her room wearing camouflage pants and a mask (T11/1265). He walked up behind her and placed a gun behind her right shoulder (T11/1266). He then took her into the kitchen where he made her lie down on the kitchen floor next to her housekeeper (T11/1267). The intruder placed a pillowcase over her head (T11/1268). Soon, her mother came into the kitchen crying when she saw her laying on the ground (T11/1269). She never saw either of the two perpetrators' faces because they were wearing masks (T11/1277).

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 (T11/1297), she noted that there were two gunmen in the house; one was wearing dark clothing, gloves and a ski mask, and was armed with a firearm (T11/1300). The other intruder was tall and dark with dark hair, no mask, no gloves, and also carrying a gun (T11/1300). She noted that both of these intruders were wearing badges on chains

around their necks (T11/1301). One of the gunmen put a gun to the back of her head and took her to a safe which was concealed in the hallway (T11/1303-1304). He told her to open it, which she ultimately did, revealing a large stash of Rolexes and other jewelry, with a value in excess of $150,000.00 (T11/1307-1309). After she placed the items which were in the safe into a pillowcase which the gunman was holding, he donned a mask and gloves (T11/1309-1310).

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 (T11/1311). The gunman told her that she could not keep the wedding ring because "your husband does not deserve you to wear it" (T11/1311). He also told her that he was aware that her husband was having an affair with a woman in the Dominican Republic and that he (her husband) had shipped a car to her (T11/1311-1312). This gunman was on and off the cell phone throughout the course of the robbery (T11/1312).

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 (T12/1450-1454). He was able to lift prints from inside of the residence (T12/1454). Further, he canvassed the area and was able to locate a potential witness by the name of Kim Strothman (T12/1456). 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. (T12/1504-1505).

Kim Strothman's testimony was perpetuated pretrial via video tape (T14/1726). Ms. Strothman was a neighbor of the Smith family (T14/1727). In 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 (T14/1731). They made note of the color of the car and recognized that it was moving (T14/1732). They did not notice anyone inside (T14/1732). After approximately 45 to 60 minutes, when they returned from their walk, they saw the car again and Ms. Strothman made a mental note of it (T14/1732). Later that morning, her husband left for work at around 8:00 a.m. (T14/1734). As her husband was leaving, she noticed that the car that

she had seen earlier was parked across the street in a lot (T14/1734). She left to take her daughter to school and then saw that the car was driving in the area (T14/1736-1738). At that time, she made a U-turn and wrote down the license plate, make and model of the car (T14/1738). 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 (T14/1740-1742). On that paper, she had written that the car was a Honda with a license tag U37MLU and that it was a two-door car (T14/1749). She testified that she had seen that car in the neighborhood the previous day (T14/1751) and that the car was dark green (T14/1733).

Metro-Dade Robbery Detective Osmel Cordero testified that on June 5, 2003, he made contact with Charlie Coles. His role was to execute an arrest warrant on Mr. Coles at a particular address in Miami (T12/1522). He was particularly interested in a 1997 green Honda Civic (T12/1523). Subsequent to the arrest of Mr. Coles, a search of the car revealed a firearm in the glove box (T12/1524).

The State called Alfredo Nunez who was a gun shop and police supply store employee. He testified that on February 22, 2003, he sold

Charlie Coles' two handguns, a Beretta and a Glock, as well as a shotgun (T12/1535). He identified Mr. Coles as the purchaser of those weapons (T12/1536).

BSO crime scene unit Detective Rick Leitner processed the interior of the vehicle which had been seized by the Metro-Dade Police Department (T12/1471). In addition to photographing the interior of the car, he also took a photograph of the license tag which was U37MLU (T12/1473). 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 the plastic bag (T12/1477-1482). Detective Holbrook testified that he analyzed those latent prints and found that four fingerprints on the passenger window belonged to petitioner and that two fingerprints on the passenger window belonged to Mr. Coles (T12/1506-1507).

The State presented evidence that a cell phone call was made between a phone associated with petitioner and a phone which purported to be one belonging to co-defendant, 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, petitioner called a cell phone registered to a person named Susan Garzon (T6/712). This phone call lasted 39 minutes which was the length of the robbery (T6/712). 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 by getting him a cell phone (T6/712). He implied that the 39 minute call placed between petitioner and the phone registered to Susan Garzon was received by Mr. Garzon (T6/712). The phone the state alleged was used by petitioner was owned by an Alkhalb Balthazar (T13/1617-1623).

The State filed a notice of intent to offer evidence of other crimes, wrongs or acts (R 50-51). 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 (T1/12, 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 a trailer attached (T1/15-16). He recounted how a red Explorer had rear-ended him but that the collision was not severe (T1/16-17). Kerry Smith described how he was standing at the side of the Explorer while the driver was on the cell phone telling an unknown party on the other end, "I hit a kid, I need to take care of this" (T1/19). He noticed that there was a passenger wearing military fatigues in

the car (T1/19). The passenger had what looked like a gas mask sitting on his lap (T1/20). 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 (T1/21). Kerry began to scream and the grip on his throat was so tight he could not breathe (T1/22). The passenger attempted to pull him into the car (T1/23). Ultimately, he was able to break free by elbowing the assailant and ran to his car and escaped (T1/26).

After this incident Kerry drove straight home and told his mother what had occurred, and she in turn called the police (T1/27).

Kerry Smith was able to make an in-court identification of both of the perpetrators. He identified Charlie Coles as the passenger and petitioner as the driver (T1/28-29).

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 (T1/69-71). 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 (T1/75). 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 (T1/78). She noted that there were two perpetrators inside the house (T1/76-77). The perpetrators then took her to the kitchen and made her get down on the floor (T1/78-79). They demanded to know where the safe was and she told them (T1/79). When they demanded to know the combination to the safe, she told them that she did not know what it was (T1/81).

During the course of this crime she heard one of the perpetrators on his cell phone stating "[T]his is not the motherfucking way you said it was" (T1/82.) She was unable to see either of these perpetrators well enough and was therefore not able to make any identification (T1/83-84).

The Court heard arguments as to the law and ultimately ruled on the State's request to introduce collateral crime evidence. The Court ruled that with regard to appellant, both the March 21st and March 22nd incidents were sufficiently similar to the June 4th crime to be admissible pursuant to Fla.Stat. 90.404 (T3/285-292).

At the conclusion of the trial, the Court read the instructions to the jury and a written copy of the instructions was provided for their use during deliberations (T17/2177). Petitioner was charged jointly along with his two co-defendants, with committing all seven crimes (R 12-16). In the charge

to the jury the Court used the conjunction, "and/or", among the three co-defendants names, when reading the elements of the offenses (T19/2351-2359).

Petitioner was convicted as charged on all counts (R 115-121). The Court sentenced Petitioner to life in prison as to Counts II through VI and to thirty years in prison as to Counts I and VII. These sentences were all as an habitual violent felony offender (T20/13-14).

Petitioner appealed to the Fourth District Court of Appeal, raising four issues. The Fourth District Court of Appeal reversed Petitioner's convictions for Kidnapping under Counts V and VI of the Information, and affirmed in all other respects. Garzon v. State, 939 So.2d 278 (Fla. 4th DCA 2006).

This opinion also dealt with the appeal of Petitioner's co-Defendant, Zamir Garzon. In a subsequent opinion dealing with the final co-Defendant, Charley Coles, the lower court handed down Coles v. State, 31 Fla. L. Weekly D2934 (Fla. 4th DCA, November 22, 2006). In both Garzon and Coles, the Fourth District certified a 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 "and/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 issue.

This appeal follows.

SUMMARY OF THE ARGUMENT

POINT I: Jury instructions on charged offenses were inaccurate and misleading, constituting fundamental error, where trial court's repeated use of the conjunction "and/or" in instructing the jury on elements of the crimes charged could have led the jury to convict Petitioner based solely on co-defendants' conduct. Because there is no way to discern whether the jury convicted petitioner based on the legally infirm "and/or" instruction, petitioner's convictions must be reversed.

POINT I

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY ON THE OFFENSES WITH WHICH PETITIONER WAS CHARGED BY INCLUDING THE CONJUNCTION "AND/OR" BETWEEN HIS NAME AND THE NAMES OF THE TWO CO-DEFENDANTS AS TO THE ELEMENTS THE STATE WAS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT.

Petitioner was charged by information along with co-defendants Charlie Coles and Zamir Garzon with criminal conspiracy (count I), armed burglary of a dwelling (count II), armed robbery (count III), armed kidnapping (counts IV, V, VI) and extortion (count VII). (R 13-16). Petitioner and his co-defendants were tried together before a single jury. The thrust of Petitioner's defense was misidentification.

At the conclusion of all the evidence and argument of counsel, the court instructed the jury *inter alia* of the elements of the crimes charged 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 robbery or 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.
(T19/2351).

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.
(T19/2352).

To prove the crime of robbery with a firearm, the State must prove the following four elements beyond a reasonable doubt. Number one, Zamir Garzon and/or Charlie Coles and/or Ray Balthazar took the jewelry and United States currency from the person or custody of Sandra Smith.

Number two; force, violence, assault or putting in fear was used in the course of the taking.

Number three, the property taken was of some value.

Number four, the taking was with the intent to permanently or temporarily deprive Sandra Smith of her right to the property or any benefit from it.
(T19/2355-2356).

> To prove the crime of armed kidnapping as charged in 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 forcibly, secretly or by threat confined, abducted or imprisoned Maria Azzarone as to Count Four or Jamie Smith as to Count Five or Sandra Smith as to Count Six against her will.
>
> Number two, Zamir Garzon and/or Charlie Coles and/or Ray Balthazar had no lawful authority.
>
> Number three, Zamir Garzon and/or Charlie Coles and/or Ray Balthazar acted with intent to commit or facilitate the commission of robbery.
> (T19/2358).
>
> To prove the crime of extortion as charged in the information, the State must prove the following beyond a reasonable doubt. Zamir Garzon and/or Charlie Coles and/or Ray Balthazar maliciously threatened by verbal communication to cause injury to the person of another, to wit Jamie Smith. Such communication having been made with the intent thereby to compel any other person, to wit Sandra Smith, to do any act or refrain from doing any act against her will.
> (T19/2358-2359).

A set of identical written instructions was given to the jury during deliberations (T19/2368, T18/2344).

Jury instructions are subject to the contemporaneous objection rule, and absent such an objection at the trial, errors in instructions cannot be raised on appeal unless fundamental error occurred. State v. Delva, 575 So.2d 643, 644 (Fla. 1991). The failure to give a complete or accurate

instruction in a criminal case constitutes fundamental error if it relates to an element of the charged offense. Dowling v. State, 723 So.2d 307, 308 (Fla. 4th DCA 1998). It is also fundamental error to give an inaccurate or misleading instruction where the effect of that instruction is to negate a defendant's only defense. See Sigler v. State, 590 So.2d 18, 20 (Fla. 4th DCA 1991).

This state's appellate courts have unanimously declared the type of instruction given in this case to constitute fundamental error. Davis v. State, 804 So.2d 400 (Fla. 4th DCA 2001); Williams v. State, 774 So.2d 841 (Fla. 4th DCA 2000); Cabrera v. State, 890 So.2d 506 (Fla. 2d DCA 2005); Dorsett v. McCray, 901 So.2d 225 (Fla. 3d DCA 2005); Concepcion v. State, 857 So.2d 299 (Fla. 5th DCA 2003).

The rational of the opinions cited above is that the improper use of the conjunction "and/or" in the written and oral instructions was fundamental error because the jury could have convicted appellant based solely upon a conclusion that the co-defendant(s)' conduct satisfied an element of the offenses, (See Concepcion, 857 So.2d at 301). The instruction deprived petitioner of his right to an individualized verdict. (See Davis, 804 So.2d at 403-404).

This error is not cured by virtue of the fact that the trial judge gave the jury the multiple counts, multiple defendants instruction, Fla. Std. Jury Instr. (Crim) 3.12(c). Dorsett v. McCray, 901 So.2d 225 (Fla. 3d DCA 2005); Harris v. State, 937 So.2d 211 (Fla. 3d DCA 2006). Likewise, the use of the standard "principals" instruction, Fla. Std. Jury Instr. (Crim) 3.5(a), does not cure the erroneous instructions on the substantive elements of the offense. Zeno v. State, 910 So.2d 394 (Fla. 2d DCA, 2005); Davis v. State, 922 So.2d 279 (Fla. 1st DCA 2006).

In Garzon v. State, 939 So.2d 278 (Fla. 4th DCA), the Fourth District Court of Appeal held that under the facts of this case, no fundamental error occurred, since the principals instruction placed the substantive crime instructions in the proper context.

Under an "and/or" instruction the jury is informed that if defendant A has committed all the elements of the crime, B is guilty without having committed any elements of the crime. Or the jury could find both defendants guilty where it found only A committed some elements of the crime and only B committed other elements.

In this case the Court gave the principals instruction which explains that if the defendant assisted another person in committing a crime, it is as

though the defendant were a principal in committing the crime. The instruction requires that the defendant "had a conscious intent that the criminal act be done." The "and/or" instructions, however, are inconsistent with the principals instructions, because the "and/or" instructions do not require that the defendant intended that the act be done. The principals instruction was given after all of the "and/or" instructions on the elements of the crimes, so the jury could have concluded that petitioner was guilty because of the conduct of his co-defendant, before it considered the principal instruction.

An error in the giving of an incorrect jury instruction on the element of a crime is such a serious error that it can be fundamental error. Reed v. State, 837 So.2d 366 (Fla. 2002). The "and/or" instructions in this case, given orally and in writing, which were incorrect as to the elements which had to be proven by the State for each defendant, require a new trial.

The above language, used by the Fourth District Court of Appeal in Dempsey v. State, 31 Fla. L. Weekly D2663 (Fla. 4th DCA, October 25, 2006), is equally applicable to this case. The giving of the principals instruction in this case did not, as found by the Garzon Court, place all the other instructions in the proper context anymore than it did so in Dempsey.

As stated by the Fourth District Court of Appeal, Florida Courts have placed the responsibility on the trial judge to ensure "that the jury is fully and correctly instructed as to the applicable law." Moore v. State, 903 So.2d 341, 342 (Fla. 1st DCA 2005). This Court has stated, in another context, that the yardstick by which Jury instructions are measured is clarity, for jurors must understand fully the law that they are expected to apply fairly. Perriman v. State, 731 So.2d 1243 (Fla. 1999). There is nothing clear about giving an "and/or" instruction and a principals instruction in the same breath because they are at odds with each other.

The Court's assertion in Garzon that the law presumes that the jury has followed all of the trial Court's instructions in the absence of evidence to the contrary does not change the fact that the jury may have convicted petitioner based on a legally adequate basis (principal), or it may have convicted petitioner on the basis of a legally inadequate theory (the "and/or" instruction).

It is well established that a general jury verdict cannot stand where one of the theories of the prosecution is legally inadequate. Delgado v. State, 776 So.2d 233 (Fla. 2000); Mackerley v. State, 777 So2d 969 (Fla. 2001); Fitzpatrick v. State, 859 So.2d 486 (Fla. 2003). As explained in

Fitzpatrick, the rationale underlying this rule is that a jury's expertise as fact finder does not extend to determining the legality of multiple theories of prosecution. As noted by the Court in Griffin v. United States, 502 U.S. 46 (1991), "when.....jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." Id at 59.

The question is not whether evidence existed which would support petitioner's convictions based upon the valid theory (principal), but rather is whether it is possible that the convictions were based upon the invalid "and/or" instructions.

The Court's conclusion in Garzon that "[T]he jury's acquittal on the extortion count demonstrates that it followed the law on principals and was not misled by the "and/or" conjunction in the extortion instruction" is pure speculation. At best, the jury's acquittal of the co-defendants on the extortion count makes the giving of the "and/or" instruction, as to the extortion count only, a harmless error.

Because there is no way to discern whether the jury convicted petitioner based on the legally infirm "and/or" instruction, this Court should reverse his convictions, vacate his sentences, and remand the case for a new trial.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, Petitioner requests that this Court reverse the judgement and sentence below and remand this cause with such directions as it deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to the Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, this 13th day of January, 2007.

JOHN F. COTRONE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner's initial brief complies with the font requirements of Rule 9.210, Fla.R.App.P.

JOHN F. COTRONE