IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

ROBERT RIMMER,

Petitioner,

v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Rimmer was deprived of fair and reliable trial proceedings.

Citations shall be as follows: The record on appeal is referred to as "R." followed by the appropriate page number. The transcripts from trial are referred to as "T." followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Rimmer's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Rimmer involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Rimmer. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Rimmer's

appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Rimmer would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Mr. Rimmer is entitled to relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Rimmer respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Rimmer's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the

fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Rimmer's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Rimmer asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT TESTIMONY FROM DYNETTE POTTER MALLARD DESPITE THE STATE'S DISCOVERY VIOLATION AND IN REFUSING TO GRANT DEFENSE MOTION FOR SEVERANCE. THESE ERRORS VIOLATED MR. RIMMER'S FOURTEENTH AND SIXTH AMENDMENT RIGHTS UNDER RICHARDSON AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND UNDER BRUTON AND RULE 3.152, RESPECTIVELY. MR. RIMMER DID NOT RECEIVE A FAIR DETERMINATION OF GUILT OR INNOCENCE DUE TO THESE VIOLATIONS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THESE CLAIMS.

I. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT DYNETTE POTTER MALLARD'S TESTIMONY UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND RICHARDSON.

A. THE COURT'S DENIAL OF DEFENSE MOTION FOR SEVERANCE AND THE STATE'S DISCOVERY VIOLATION.

Mr. Rimmer's defense counsel made a Motion for Severance pursuant to 3.152(b) on November 30, 1998. That motion stated:

"In that the issue in the trial will be the identification of the perpetrators, any reference to Mr. Rimmer and Mr. Parker as having known each other would be prejudicial and inadmissible" (R. 2179-80). The court denied the motion after a hearing on December 18, 1998, and reserved ruling on the admissibility of co-defendant Parker's statement (R. 248; R. 2193).

On January 6, 1999, Mr. Rimmer's counsel learned that the state placed Dynette Potter Mallard on its witness list. At that time, defense counsel had completed "95% or more of the discovery" and had no reason to know that Mallard had anything more to offer than what was in Detective Lewis' report- that she was Parker's girlfriend, she was aware that the police were looking for Parker and that she owned a Kia Sephia that Parker occasionally drove (R. 424). Defense counsel did not see how any of this was "germane" to the state's case against his client, Mr. Rimmer (Id.).

What defense counsel was unaware of, and what he did not learn until **January 15, 1999**, **the [last working day before trial]** was that the state attorney had taken a sworn statement from Mallard on **December 22, 1998** (Id.). In this statement, Mallard recounted Parker introducing her to Mr. Rimmer and the several times that she had seen Parker and Mr. Rimmer together (Statement at 9-11). She also said that Parker was at the Audio Logic store on the morning of the crime. She described Parker meeting Davis and her daughter there as Parker had recounted that meeting to her. Mallard said that Parker told her "that he walked to the

back" and that "[h]e saw some people or whatever and then he said he left" (Statement at 13). Later in the statement, Mallard says that Parker told her that Parker saw Mr. Rimmer at the Audio Logic store on the day of the murders (Statement at 15). Mallard further informed the state that Mr. Rimmer called her from jail after he had been arrested and asked her to tell people that he was "all right" (Statement at 30).

The state attorney, having opposed defense motion for severance (R. 6) and knowing that the admissibility of Parker's statement was at issue (R. 126)(where Parker tells Detective Lewis that he was at the Audio Logic, saw a robbery occurring and left and also that he and Mr. Rimmer are acquainted) waited three weeks - until the eve of trial - to inform defense counsel of Potter Mallard's statement (R. 126). Defense counsel informed the court of the state's failure to timely provide him with Mallard's statement during voir dire on January 19, 1999 (R. 122). The court subsequently conducted a hearing pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971). As he had in his motion for severance, defense counsel argued that any reference to Mr. Rimmer knowing Parker was highly prejudicial, stating:

> And basically, as you know Judge, I filed a motion to sever simply because I was concerned about the prejudice to Robert Rimmer of a statement made by Parker when he was arrested that he last saw Mr. Rimmer in December of 1997. This is a far greater import and damage and prejudice to my client. I felt like that if Mr. Magrino did take a statement on December 22, it should have been furnished to me much quicker than the last working day before trial, which would have afforded me an opportunity to investigate allegations and so forth, which I don't have anymore, not to mention the

> fact whatever Your Honor rules as to her being able to testify, there is a question as to the admissibility of the statement I'm singling out on May 15th *(referring to Parker's confession to Det. Lewis).*

(R. 125-6)(italics not in original). Later, defense counsel also stated:

> I'm concerned there is other references in the statement to the two of them being associated in some fashion with each other, which is highly prejudicial.

(R. 126).[1]

The trial court found a substantial, prejudicial discovery violation, though the court did not find the violation to be willful[2] (R. 130). The court did not exclude the witness, noting the requirement that the court use "the least restrictive remedy available" (Id.). As a remedy, the court ordered Mallard's deposition (R. 130-1). After some difficulty with getting the witness to show up, defense counsel deposed Mallard on January 21, 1999 – the same day jury selection was completed, opening statements made and the state presented the first two witnesses.

The state presented Mallard's testimony to the jury on January 25, 1999 (R. 929).

B. MALLARD'S TRIAL TESTIMONY.

Mallard testified that Parker and Mr. Rimmer knew one another. She said that Mr. Rimmer visited Parker at her

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[1] *See* Defense Motion to Exclude Testimony of Dynette Potter-Mallard at R. 2244-5.

[2] The colloquy does not support this finding. In its defense the state argued that it timely provided the statement and that there was no violation. The state did not address, nor did the court inquire into, the issue of willfulness (R. 125-30).

apartment, specifically that Parker and Mr. Rimmer had a conversation outside of her apartment in the beginning of May or end of April (R. 929; 934-6). Mallard also testified that Parker took her Kia Sephia on the morning of May 2, 1998, telling her that "he was going to have the speakers checked" (R. 940). Mallard continued:

> A: He said he went inside the store and waited, waited for a little bit. Said that some little girl was in there, baby girl was in there with her mom and they were waiting for someone to come to the counter. Little girl walked up to him. He turned the little girl around and gave her back to the mom. They were waiting. And he said that he walked out of the store and then he said he got in the car and he left.

(R. 941).

With some difficulty, the state elicited from Mallard that Parker told her that he walked to the back of the store, saw some people there and left (R. 940-62).

During the course of Mallard's testimony, Mr. Rimmer's counsel warned that he would move for a mistrial if Mallard said anything about Parker seeing Mr. Rimmer at the store (R. 950). Later in her testimony, Mallard informed the jury that Mr. Rimmer telephoned her apartment from jail after his arrest (R. 955). The court should have excluded Mallard's testimony under both Richardson and Bruton v. United States, 391 U.S. 123 (1968).

C. DETECTIVE LEWIS'S TESTIMONY REGARDING PARKER'S STATEMENT.

On direct examination during the state's case in chief, Detective Lewis testified:

A: He told me that he had nothing to do with it whatsoever. That he had gone in that morning. He had took Potter Mauer's [sic] car there to have the stereo fixed. He said he had called the store the day before, and that they had quoted him a price.

That he had driven the car in to have stereo system repaired. He said that this was the first time he had ever been into the store. And he had nothing to do with the robbery.

He told me that he walked in, out of the business, **and walked around the side, and he saw something going down, and he left.**

Detective Lewis continued:

Q: What if anything did Defendant Parker tell you he saw when he walked around outside the business over by the bay door area?

A: **He said there was something going down. He said there was a man standing there with his head down, and he saw a lot of people lying on the floor.**

Q: What if anything did Defendant Parker tell you he did after he walked over on the side where the bay doors were, and he saw something going down? What did he tell you he did when he observed that?

A: He said he left.

(R. 1230-1).

Throughout Detective Lewis's testimony, the jury heard that Parker admitted that he was at the Audio Logic and saw a robbery occurring - and there was a "man standing with his head down" and there were "a lot of people on the floor", while claiming to have left thereafter.

The state attorney further exacerbated the unfairly prejudicial nature of Detective Lewis's testimony by calling the jury's attention to the court's evidentiary rulings. During the course of Detective Lewis's testimony, after the testimony stated

above and before the jury's viewing the video-tape of Parker's statement, the jury was excused while the court considered defense motions. The court ruled for the defense only to the extent that the court suppressed the portion of Parker's statement where he told Detective Lewis that he last saw Mr. Rimmer in December of 1997 (R. 1243-5).

When the jury was brought back in, the state attorney completed his direct examination by stating "**Given the Court's ruling**, I have no further questions of Detective Lewis at this time" (R. 1251). The court granted Mr. Rimmer's counsel's request to strike the comment, but the damage was already done. The jurors had reason to believe that something even more incriminating to Mr. Rimmer in Parker's statement was being held back from them due to prosecutorial misconduct.[3]

D. THE LAW UNDER RICHARDSON.

Richardson obligates the trial court to "make a full inquiry into all the circumstances surrounding" state discovery violations under Florida Rule of Criminal Procedure 3.220. The state bears the burden of demonstrating that its discovery violations did not prejudice the defendant. Richardson at 777. The law does not require the defendant to claim prejudice or to request a remedy. Lavigne v. State, 349 So. 2d 178, 180 (1977).

[3] Appellate counsel raised this issue in a prosecutorial misconduct claim on direct appeal. This court found the claim to be without merit. Appellate counsel was ineffective for failing to raise this issue within the context of the state's discovery violation and the court's error in refusing the defense motion for severance. See Rimmer v. State, 825 So. 2d 304, 325 (Fla.

2002).

In ascertaining procedural prejudice caused by a discovery violation, the trial court must first "decide whether the discovery violation prevented the aggrieved party from properly preparing for trial. Second, [the court] must determine the appropriate sanction to invoke for the violation." Smith v. State, 372 So. 2d 86, 88 (1979). Procedural prejudice exists where "there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." State v. Shopp, 653 So. 2d 1016 (1995). Any change in trial preparation or strategy that "reasonably could have benefited the defendant" is materially different. "In making this determination every conceivable course of action must be considered." The error must be considered harmful where "there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected." Id.

To cure the prejudice, Florida Rule of Criminal Procedure Rule 3.220 (j)(1) and (2) authorize the court to impose a "broad spectrum of sanctions, ranging from an order to comply, to exclusion of evidence, to even a mistrial." Smith at 88. "Obviously, the rule is designed to afford a trial judge wide latitude in tailoring a sanction to the peculiar circumstances of a given case." Id. at 89.

E. PREJUDICE TO MR. RIMMER DUE TO THE STATE'S DISCOVERY VIOLATION.

The court found that the discovery violation did prejudice Mr. Rimmer (R. 130), however, the court's determination – ordering Mallard's deposition did nothing to remedy that prejudice. Mallard's testimony included hearsay that Mr. Rimmer could not cross-examine her about and testimony informing the jury that Mr. Rimmer and Parker knew one another. The deposition could not assist defense counsel in cross-examination because the declarant, Parker, was not testifying. As to the issue of Mr. Rimmer and Parker's acquaintance - had defense counsel known that the state intended to present this testimony in a timely manner there is no telling what arguments defense counsel would have made to prevent this testimony nor is there any way of knowing what strategy he would have adopted to handle this testimony. The mere fact that we are left with conjecture about what counsel would have done had the state turned the statement over in a timely manner demonstrates prejudice to Mr. Rimmer under Schopp. See State v. Evans, 770 So.2d 1174, 1183 (holding discovery violation prejudicial where defense counsel was unaware there was an eyewitness during trial preparation; had defense counsel been aware of eyewitness, trial strategy would have been different).

Well into the trial, during Detective Lewis's testimony, the court finally realized just how prejudicial Mallard's testimony was to Mr. Rimmer when the court finally granted defense motion to exclude the portion of Parker's statement wherein he stated he last saw Mr. Rimmer in December, 1997:

> The Court: . . . You know, the Court visited this matter in reference to Mr. Rimmer's Motion for Severance.

> Now we are at the, toward the close of the evidentiary phase of the trial, and the Court has a better picture of the respective position of the parties.
>
> * * *
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> This is the same information elicited from Potter Mallard. It's just hearsay, and it is clearly inculpatory as to Mr. Rimmer. That is the way it is going to be argued, too. And Mr. Rimmer is denied the right to cross-examine.
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> * * *
>
> The Court finds that the Parker declaration made to Detective Lewis was inculpatory as to Mr. Rimmer, in that Mr. Rimmer is denied his right of confrontation of cross examination. So the objection is sustained.

(R. 1239-45).

While the trial court was correct in its ruling, the only way to guarantee a fair determination of guilt or innocence for Mr. Rimmer was to declare a mistrial.

F. FLORIDA RULE OF CRIMINAL PROCEDURE 3.152(B) AND BRUTON.

Mr. Rimmer made a timely motion for severance pursuant to Florida Rule of Criminal Procedure 3.152(b) prior to trial (R. 2179-80). The trial court denied Mr. Rimmer's motion (R. 7; R. 2179-80; 2193).

Rule 3.152(b) provides for severance of co-defendant trials both where (1) "a co-defendant admission that incriminates the defendant is admitted or sought to be admitted" or (2) where "joinder would prejudice defendant's ability to receive a fair determination of guilt or innocence."

The United States Supreme Court addressed the first instance requiring severance in Bruton v. United States, 391 U.S. 123 (1968). Under Bruton, severance is required where the co-

defendant's statement makes reference to the defendant. Bruton at 136-7. It is not necessary that the co-defendant's statement specifically reference the defendant. Bruton necessitates severance of trials or the suppression of co-defendant statements "if the jury [is] highly likely to draw an incriminating inference against the defendant from a co-defendant's statement, **even if the inference drawn was incriminating only when considered in light of other evidence offered at trial**." Matthews v. State, 353 So. 2d 1274 (Fla. 2nd DCA 1978)(emphasis added).

In Matthews, the court held that a combination of trial testimony warranted severance where a co-defendant confessed merely that he observed the victim's injuries. When the co-defendant's statement was combined with other testimony, it was highly likely that the jury would infer that the defendant was at the scene of an aggravated battery. The court overturned the conviction despite the deletion by the trial court of any reference in the statement to the defendant. Id.

As in Bruton and Matthews, the presentation of Parker's hearsay statements and the fact of Parker's acquaintance with Mr. Rimmer failed to adhere to Rule 3.150(b) and Bruton v. United States, 391 U.S. 123 (1968). When Parker's statement is considered in light of Mallard's testimony, Parker's statement as presented by Detective Lewis inculpates Mr. Rimmer.

G. PREJUDICE TO MR. RIMMER FROM THE COURT'S DENIAL OF DEFENSE MOTION TO SEVER AND THE STATE'S DISCOVERY

VIOLATIONS.

Bruton upholds the intention of the Confrontation Clause by demanding severance in cases "[w]here the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." Bruton at 136. Bruton calls such "incriminations" "devastating to the defendant" and notes that such hearsay is "inevitably suspect." Id. Bruton also highlights the practice of instructing the jury to weigh the testimony of accomplices carefully "given the recognized motivation to shift blame onto others." Id. "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." Id.

The state attorney admitted to the trial court that: "for me to elicit from her [Potter Mallard] that Defendant Parker told her that Rimmer was committing the armed robbery of the Audio Electronic store, I would agree that that would be a clear Bruton issue" (R. 128). The distinction between Mallard specifically stating the words "Parker told me that he saw Rimmer committing an armed robbery of the store" and her testimony is meaningless. Her testimony, along with Detective Lewis' hearsay testimony informed the jury that Parker admitted to being at the scene of the crime and seeing a robbery occur while claiming to have left. This, along with testimony that Parker and Mr. Rimmer were acquainted is the powerfully incriminating evidence warned

against in Bruton. Undoubtedly, a confrontation clause violation occurred in Mr. Rimmer's case. Such an error would not have occurred had the trial court granted the defense motion for severance. Had the state not committed a discovery violation and turned Potter Mallard's statement over to defense counsel sooner, defense counsel may have had the opportunity to argue more persuasively to the court for severance under Bruton and Matthews.[4] The court's own comments about the prejudice Mallard and Lewis's testimony caused Mr. Rimmer demonstrate that the trial court would have granted severance had it understood defense counsel's arguments prior to trial.

[4] Defense counsel aggressively argued for severance under Bruton (11/30/98 Motion at R. 2179-80; 12/18/99 Hearing at R. 3; Renewed motion for severance at R. 2224; Objection to Detective Lewis's hearsay testimony at R. 1238-45), however, he never argued Matthews, a case that presents the very same scenario presented here. He may have had he had timely notice of Mallard's testimony.

There is no physical evidence placing Mr. Rimmer at the crime scene. The only evidence supporting that he was there is a controversial eye-witness identification.[5] Parker's statement placing himself at the crime scene and admission that he saw a robbery occurring and the fact that he knew Mr. Rimmer linked Mr. Rimmer to the crime scene. This is evidence that the jury should not have heard at Mr. Rimmer's trial and would not have heard had the court properly granted defense motion to sever. Without this hearsay testimony, the jury could very well have determined that the state did not meet its burden in regards to Mr. Rimmer's participation in the shooting at Audio Logic and likely would not have given Mr. Rimmer the death penalty. The admission of this

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[5] In Rimmer v. State, 825 So. 2d 304, 339 (Fla. 2002), Justice Pariente (joined by Justices Anstead and Shaw) dissents from the majority's reliance on the strength of the eyewitness identifications: "Certainly, there was an abundance of evidence that linked Rimmer to the crime in that he possessed the stolen goods. However, there was no physical evidence that linked him to the scene. Moreover, a third man involved with the crimes was never found. Although Rimmer was identified by two eyewitnesses, not only were there flaws with the procedures used, but I point out that both eyewitnesses identified the shooter as being five feet, ten inches tall and not wearing glasses, whereas Rimmer is six feet, two inches tall and is legally blind without his glasses. Furthermore, there was a discrepancy about Rimmer's weight.

In conclusion, although Rimmer is not entitled to a perfect trial, he is entitled to a fair trial. The State, as the beneficiary of the error, has not proved beyond a reasonable doubt that the error complained of did not contribute to the verdict of guilt and the ultimate death sentence imposed. In this case, justice demands that Rimmer should be given a new trial in light of the prejudicial nature of Detective Kelley's testimony and the prosecutor's improper reenactment of the crime."

testimony during the co-defendants' joint trial violated Mr. Rimmer's Sixth and Fourteenth Amendment rights. Appellate counsel was ineffective for failing to raise this claim. Relief is warranted.

CLAIM II

THE TRIAL COURT'S REFUSAL TO GRANT DEFENSE MOTION FOR MISTRIAL IN RESPONSE TO WITNESS MICHAEL DIXON'S IMPROPERLY INFORMING THE JURY THAT THE DEFENSE FILED A MOTION TO SUPPRESS VIOLATED MR. RIMMER'S RIGHT TO A FAIR DETERMINATION OF GUILT OR INNOCENCE UNDER FIFTH, SIXTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM.

During defense counsel's cross examination of Michael Dixon, the jury improperly learned of a defense motion to suppress. Defense counsel was questioning Dixon about his identifying Mr. Rimmer in the live line-up (R. 672) when the witness became frustrated with defense counsel's questioning:

> Q: Not that I'm questioning your identification, but when you went to that line-up on July 13th, 1998, you, in your mind, you knew Robert would be in that line-up?
>
> A: We have been through this several times before, you and me. But I guess for the Court . . .

(Id.).

In an effort to clarify that defense counsel had not been "hassling" Dixon over this issue, defense counsel asked several more questions to demonstrate that he had only questioned Dixon at one deposition and one prior hearing:

> Q: And we had a hearing which you testified for a short period of time, correct?
>
> A: Yes, the motion to suppress

(R. 672-73).

Defense counsel then moved for a mistrial at side-bar based on Dixon's unresponsive answer informing the jury that the defense made a motion to suppress (R. 674). The court instructed the jury to disregard the answer (R. 676). When Dixon continued to provide non-responsive answers to defense counsel's questions[6] the court again instructed the jury to disregard (R. 677).

Dixon's comment that he testified at a hearing on a motion to suppress is the type of commentary that this Court has found would be "difficult for the jurors to disregard" and "would likely influence the jury's decision." Walsh v. State, 418 So. 2d 1000, 1002 (1982). In Walsh this Court affirmed the trial court's grant of a mistrial where the appellant/witness improperly commented that he passed a lie detector test where the trial court had previously ruled the polygraph results inadmissible. Id. at 1002. Similarly, for the jury to learn that Mr. Rimmer had filed a motion to suppress was unfairly prejudicial as it implied that he was hiding evidence from the jury. As defense counsel argued to the trial court, the jury was left speculating as to what other evidence the defense was "hiding" (R. 676).

Mr. Rimmer is entitled to a fair determination of his guilt or innocence based on evidence properly presented to the jury under the Fifth, Sixth and Fourteenth Amendments. Appellate

[6] When defense counsel asked "You did assume that Robert Rimmer would be in that line-up?", Dixon answered, "Yes. I'm getting a quick education" (R. 677). The court instructed Dixon to "just listen to the question and respond to the question only." Mr. Dixon responded "All right. I will do my best. Well, you're being like real – " (Id.).

counsel's failure to raise this claim was ineffective. Relief is proper.

CLAIM III

THE TRIAL COURT'S REFUSAL TO GRANT DEFENSE MOTION FOR MISTRIAL BASED ON THE STATE'S PLAYING AN AUDIO TAPE OF RADIO TRANSMISSIONS FROM THE POLICE CHASE OF MR. RIMMER WHERE AN UNIDENTIFIED MALE VOICE WARNS NOT TO "LET HIM BARRICADE HIMSELF IN THE HOUSE" VIOLATED MR. RIMMER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM.

At Mr. Rimmer's trial, the state played the tape of radio transmissions during the police chase of Mr. Rimmer's vehicle. At the end of that tape "an unidentified male voice [says] we can't let him barricade himself in the house" (R. 585).

Mr. Rimmer filed a motion for mistrial based on this irrelevant hearsay that violated his right to a fair determination of guilt or innocence. The trial court denied Mr. Rimmer's motion.

Appellate counsel was ineffective for failing to raise this claim. Mr. Rimmer's sixth amendment "right to a fair trial" means that he was entitled to a determination of his guilt or innocence based solely "on the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial" Taylor v. Kentucky, 436 U.S. 478, 485 (1985). "To ensure the presumption [of innocence] remains viable, courts must guard against practices which 'unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone

conclusion.'" Jackson v. State, 698 So. 2d 1299, 1302 (Fla. 4th DCA 1997), quoting Harrell v. Israel, 672 F.2d 632, 635 (7th Cir. 1982). "If a defendant is to be presumed innocent, he must be allowed to display the indicia of innocence." Jackson citing United States v. Samuel, 431 F.2d 610, 614 (4th Cir. 1970).

As defense counsel argued to the trial court, admission of this inflammatory hearsay served no evidentiary purpose and was unfairly prejudicial to Mr. Rimmer as it gave the jury reason to view the defendant as a dangerous person worthy of fear and suspicion whose guilt was a foregone conclusion (R. 581-5). The trial court's refusal to grant the defense motion for mistrial was error. See Bello v. State, 547 So. 2d 914 (1989)(granting new penalty phase where defendant's shackling was prejudicial of presumption of innocence). Appellate counsel was ineffective for failing to raise this claim. Relief is warranted.

CLAIM IV

THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY AND IMPROPERLY CONSIDERED INVALID AGGRAVATING FACTORS IN VIOLATION OF MR. RIMMER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

A. USE OF THE "AND/OR" CONJUNCTION BETWEEN THE CO-DEFENDANTS' NAMES WHEN CHARGING THE JURY AS TO EACH OFFENSE.

In Mr. Rimmer's trial, the trial court erred by using the much maligned "and/or" conjunction between the names of Mr. Rimmer and his co-defendant, Kevin Parker, in each of the jury instructions charged. In Florida, most district courts which have reviewed the use of this phrase over the years found it to

be fundamental error, due to the likelihood that one defendant could be convicted based solely upon a finding that a co-defendant's conduct satisfied the elements of the offenses. See, e.g., Green v. State, 968 So. 2d 86 (Fla. 2d DCA 2007)(use of "and/or" fundamental error, despite the use of the standard principals instruction and the standard separate defendants instruction); Davis v. State, 922 So. 2d 279 (Fla. 1st DCA 2006)(same); Dorsett v. McRay, 901 So. 2d 225 (Fla. 3d DCA 2005)(appellate counsel rendered ineffective assistance by failing to assert on appeal that fundamental error occurred at trial when court gave a jury instruction using the "and/or" conjunction); Concepcion v. State, 857 So.2d 299 (Fla. 5th DCA 2003); Williams v. State, 774 So. 2d 842, 843 (Fla. 4th DCA 2000) (fundamental error where court used conjunction "or" between co-defendants because it was misleading to the jury).

Recently this Court addressed the "and/or" conjunction to resolve a split among the lower courts as to whether "and/or" amounts to fundamental error in every circumstance. See Garzon v. State, 980 So. 2d 1038 (Fla. 2008). In Garzon, this Court utilized a "contextual" approach and evaluated whether the "and/or" error was fundamental in light of other evidence of guilt. Id. at 1044-5. Of particular concern in Garzon was the quality of evidence which supported the conviction. See id. Ultimately, the Garzon majority found that there was substantial evidence supporting the conviction, and thus held that no fundamental error had occurred in that case. See id. However,

the majority also emphasized that the "and/or" instruction is indeed error, and frequently will render a jury verdict unreliable, thereby warranting reversal. See id. at 1045.

In Mr. Rimmer's case, fundamental error did in fact occur from the lower court's usage of the "and/or" instruction, due to the limited and questionable evidence against Mr. Rimmer. The Court's application of the standard "principals" and "separate defendants" instructions did not cure the defect. Mr. Rimmer did not receive a fair determination of guilt or innocence due to this fundamental error, and appellate counsel was ineffective for failing to raise this claim on appeal. Under the standard articulated by this Court in Garzon, Mr. Rimmer is entitled to a reversal of his conviction and a new trial.

Moreover, the constitutionality of jury instructions is governed by the Due Process clause of the Fifth and Fourteenth Amendments. See, e.g., Estelle v. McGuire, 502 U.S. 62 (1991) (due process is violated where a defective instruction "infected the entire trial"). However, the Sixth Amendment may be implicated if the defective instructions remove a necessary element of the prosecutor's case from the jury's consideration. See Cheek v. U.S., 498 U.S. 192, 203 (1991). Here, Mr. Rimmer's due process right to fair jury instructions and a properly instructed jury were violated by the lower court's use of the "and/or" phrase. Mr. Rimmer's Sixth Amendment rights were also violated because the use of "and/or" essentially allowed the jury to convict Mr. Rimmer even if they found that only Mr. Parker was

responsible for the crimes, thereby removing the State's burden of proving that Mr. Rimmer was guilty of each and every element charged. Finally, Mr. Rimmer was deprived of his Sixth Amendment right to effective appellate counsel by his attorney's failure to raise this issue on direct appeal. Taken individually or as a whole, these errors prejudiced Mr. Rimmer such that a new trial is warranted.

1. The State's Case Against Mr. Rimmer.

Mr. Rimmer and his co-defendant, Kevin Parker, were tried together for the Audio Logic crimes, despite a motion by Mr. Rimmer's defense counsel to sever the trials (R. 2179-80; see also *supra* Claim I). Evidence against co-defendant Parker included, *inter alia*, a statement that he made admitting that he was at the Audio Logic the day of the crimes; eyewitness identifications; and fingerprints found at the crime scene and on inventory removed from the store.

In contrast, the State's case against Mr. Rimmer was based in large part on identifications given by surviving victims Kimberly Davis-Burke and Joe Moore, who observed the robbery and murders and claimed that Mr. Rimmer was the gunman. Davis and her boyfriend, Moore, were customers at Audio Logic on the day of the crimes. (R. 784). Davis testified that she, Moore, and her child were in the waiting area when a man she identified as Parker entered the store (R. 784-96). Davis described another man present in the store as 5'9", less than 175 pounds, and dressed in a white t-shirt, khaki pants, and a baseball hat

pulled down low over his eyes (R. 796-8; 838). She specifically recalled that the man was about one or two inches taller than herself (R. 834-5). She did not describe him as wearing eyeglasses or gloves (R. 833-4). She stated that the man was armed with a handgun and told her to get on the floor (Id.) She identified Mr. Rimmer as that individual (R. 798-9).

Davis testified that the man she identified as Mr. Rimmer restrained Moore with duct tape, as well as the murder victims Aaron Knight and Bradley Krause, Jr. (R. 800-3). She stated that Mr. Rimmer and another perpetrator removed the store's inventory and placed it in a purple Ford Probe with alloy wheels (R. 803-6; 835-7). She testified that she saw Mr. Rimmer move her car, a white Dodge Dynasty, out of the work bay where it was parked so that the Ford Probe could be moved into its place. (R. 800-4; 837-9). Davis also stated that the third man[7], a young black male, who was present and helped move the stolen merchandise (R. 805). The man she identified as Mr. Rimmer removed receipts and a firearm from the business office (R. 806-8). That man then shot Aaron Knight and Bradley Krause, Jr., before leaving the store (R. 809-13; 869-70).

She stated that Mr. Rimmer drove the Probe away from the scene (R. 869-70). Davis had the opportunity to observe the gunman on and off over a 15 to 20 minute period while the robbery

[7] This third man was never identified or captured. Davis testified that she saw this individual (who was not identified as either Mr. Rimmer or Parker) taping up one of the victims during the robbery (R. 805).

was taking place (R. 839-40).

Eyewitness Joe Moore was present at the Audio Logic when Davis was confronted by a black male he described as 5’7” to 5’9”, about 160-170 pounds, wearing baggy jeans, a t-shirt, and a baseball cap (R. 870-9). He did not describe this man as wearing glasses, or as having facial hair (Id.). Moore identified Mr. Rimmer as that individual (R. 881-2). This man restrained Moore and took his wallet and cellular phone (R. 886-7). Moore observed this man loading store inventory into a purple Ford Probe with noticeably peeling window tint (R. 887-91; 907). This individual also took receipts and a handgun from the office, then shot Mr. Knight and Mr. Krause before departing (R. 895-8).

A third witness, Luis Rosario, was another customer at the Audio Logic the day of the crimes (R. 763-6). He was ordered to the floor by a black male armed with an automatic handgun (R. 767-1). Rosario then had his hands duct taped behind his back while the store was robbed over a 20 minute period (R. 772-6). He heard Mr. Knight and Mr. Krause being shot. After the perpetrators left the scene, Rosario broke free from his restraints and ran to a nearby business to call the police (R. 779).

When Rosario gave his initial statement to the detectives, he advised them that he would probably be able to make an identification (R. 783-4). However, when Detective Anthony Lewis showed Rosario a photographic line-up containing Mr. Rimmer’s image, he was unable to identify anyone as one of the

perpetrators (R. 780-1). Similarly, when Rosario attended a live line-up which included Mr. Rimmer, he was unable to make an identification (R. 781).

A few days after the crime, Moore assisted police in making a composite sketch of the gunman (R. 900). According to Moore, the gunman wore no eyeglasses, had a reddish-brown tint to his skin, weighed 150-160 pounds, and was three to five inches shorter than himself (R. 902-7). The gunman "had his hat . . . pulled in down over his eyes and he always told us to look the opposite way." He did not describe the gunman as having facial hair (Id.; R. 924). Davis also assisted with the sketch and gave substantially the same description as her boyfriend (R. 813-4). However, prior to assisting with the sketch, police showed Davis approximately 50 photographs of potential suspects.

Moore subsequently viewed a photo spread prepared by Det. Lewis which contained Mr. Rimmer's picture (R. 900). Before Moore viewed the photo spread, Det. Lewis showed Moore the composite sketch again (R. 905). Det. Lewis also instructed Moore to eliminate any subjects who looked less like the gunman, and instead narrow it down to the image which could possibly match his memory of the perpetrator (R. 1254-6). Despite his acknowledgment that the gunman "had his hat . . . pulled in a down over his eyes and he always told us to look the opposite way," Moore selected Mr. Rimmer out of this photo spread (R. 900-1).

Later that day, Davis viewed the same photo spread which

contained Mr. Rimmer's image (R. 841-2). However, she did not select Mr. Rimmer, but instead identified another photograph (#6) as the gunman at Audio Logic (See id.). She did not select Mr. Rimmer's image (which was photo #3) until Det. Lewis informed her that her boyfriend, Moore, had chosen that photograph (R. 841-5; 857-8; 860; see also 1174-5).[8] Even though Davis had observed the gunman closely and over the longest period of time of any of the witnesses, she admitted that her selection of images was not a definitive identification, but rather represented those persons who most closely fit her memory of the gunman (R. 845-6). In contrast, Davis was able to easily select a photograph of Parker out of a different photo spread – though she was unable to identify Parker in a live lineup several months later.[9] (R. 817; 1219-2).

Rosario was unable to identify the gunman from the photo spread. (R. 780-1).

Moore, Davis and Rosario all attended a live line-up as well. Prior to viewing the line-up, police had informed Moore that a suspect had been arrested, thereby implying that the

[8] In the statement she gave to the police following the photo lineup, Davis explained that she picked her second choice, Mr. Rimmer, because "after [Det. Lewis] told me that Joe [Moore] picked him I paid more attention to it. I paid more attention to it and thought it sort of looked like him." In later testimony on this issue, Davis would contradict this statement and claim that she picked both choices together, and *then* was told by Det. Lewis that Moore had chosen Mr. Rimmer's photo, which made her pay more attention to Mr. Rimmer's photograph (R. 844-5).

[9] However, she was not able to pick Parker out of a live line-up several months later (R. 1250-1).

suspect was present in the line-up. Moore and Davis admitted that they fully expected Mr. Rimmer to be in the live line-up, based upon conversations they had with Det. Lewis beforehand (R. 908). Additionally, Mr. Rimmer was the only person in the live line-up who had also been present in the photo spread.

Meanwhile, Mr. Rimmer had been arrested on May 10, 1998. (R. 1179). **One week after the homicides, Mr. Rimmer was described by lead detective Anthony Lewis as approximately 6'2" and 190-200 pounds** (R. 1252). When he was arrested, he was wearing eyeglasses (R. 1298). Items belonging to the victims were in his possession, including Moore's wallet (R. 1003-9), and a gun identified as one matching casings found at the crime scene (R. 1027; 1035-51). Following the arrest, Det. Lewis impounded two cars registered to Mr. Rimmer, which included a Ford Probe and an Oldsmobile (R. 1159-68). Nothing relating to the Audio Logic crime was found in the Ford Probe (R. 1184-5; 1193; 1253). Additionally, a photograph (introduced into evidence by the State) of the Ford Probe impounded from Mr. Rimmer did not have either alloy wheels or defective tint – in contrast to the testimony of Moore and Davis, who described the Probe at the Audio Logic has having both of those characteristics (R. 1518-9).

In the Oldsmobile, police discovered a day planner belonging to Mr. Rimmer which contained a lease agreement for a self-storage unit (R. 1193; 1196-202).[10] A search of the storage unit

[10] Mr. Rimmer moved to suppress this evidence as part of an unlawful search; this motion was denied.

yielded stolen electronics from the Audio Logic (Id.). However, there was no physical evidence which connected Mr. Rimmer to the scene of the crimes. Despite the testimony of Davis and Moore that the gunman had duct taped the victims, there were no fingerprints matching Mr. Rimmer on the duct tape removed from the victims' bodies (R. 1139-45). In fact, there were no fingerprints matching Mr. Rimmerfound anywhere in the business, including specifically the store's office door, glass front door, cash register, and storage room shelf – all items which Mr. Rimmer was described as coming in contact with during the robbery (Id.). Nor were there any prints matching Mr. Rimmer in Davis' Dodge Dynasty, which he allegedly drove during the crime (Id.). The only prints found which matched Mr. Rimmer were on the items seized from the self-storage unit (R. 1117-33).

Mr. Rimmer's defense at trial was misidentification. In addition to challenging the faulty and misleading eyewitness identifications[11], Mr. Rimmer presented additional evidence to support the fact that he was not the perpetrator of the Audio

[11] Defense counsel filed a motion to suppress the pretrial identifications of Mr. Rimmer by Davis and Moore, due to unnecessarily suggestive and highly prejudicial techniques employed by the police during the identifications. This motion was denied by the trial court (R. 2194). A renewed motion for suppression made during trial was likewise rejected (R. 1171-5; 1211). Appellate counsel challenged these denials on direct appeal. See Rimmer v. State, 825 So. 2d 304 (Fla. 2002). While the majority of this Court found no error with the admission of the identifications, the dissent found that the procedures utilized were unreliable and "unnecessarily suggestive," and as a result, "we cannot overlook the fact that their identifications may be flawed." Id. at 339.

Logic homicides. This evidence included testimony from an optician and an optometrist who established that Mr. Rimmer wears prescription eyeglasses, is legally blind, and would have been unable to drive a vehicle without his glasses (R. 1306-15; 1320-30).[12] Mrs. Rimmer's wife, Joanne Rimmer, testified about her husband's severe near-sightedness, and the fact that he wore glasses constantly (R. 1343-5). She had never known him to drive a car without his eyeglasses (R. 1356). Mr. Rimmer also presented alibi evidence from his wife that he was fishing with his son the day of the crime (R. 1346-56).

In sur-rebuttal, the State called Officer Kenneth Kelley, who had participated in the investigation and arrest of Mr. Rimmer (R. 1387-409). Over defense objection, Officer Kelley was permitted to testify to his own poor vision, which he said approximated Mr. Rimmer's (R. 1404). Officer Kelley stated that he had driven his car without his eyeglasses and had not gotten into a car accident (R. 1404-5), and that he only wore his glasses when he wanted to "make it clear." (R. 1408-9). He admitted that he normally wore corrective lenses when he was driving and in his duties as a police officer (Id.). The

[12] In its opinion affirming the conviction and sentence, this Court observed that "[t]here was no testimony in this case as to whether appellant wears contact lenses." Rimmer, 825 So. 2d at 322. In fact, as presented in Mr. Rimmer's 3.851 motion and evidentiary hearing, at the time of the crime Mr. Rimmer was (and still is today) medically unable to wear contact lenses due to a serious infection he suffered in his 20s. See Def. Ex. 19. As argued in his 3.851 brief on appeal, trial counsel was ineffective for failing to present this information to the jury in support of Mr. Rimmer's misidentification defense.

prosecutor then engaged Officer Kelley in a re-enactment of the shooting by lying down on the floor and asking Officer Kelley to point his right arm at the prosecutor's head with his glasses removed (R. 1406-7). Over defense objection, the Court permitted this highly inflammatory display (Id.).[13]

2. The Instructions and Jury Deliberations.

As noted above, Mr. Rimmer and his co-defendant, Kevin Parker, were tried together for the Audio Logic crimes, despite a motion by Mr. Rimmer's trial counsel to sever the two cases (R. 2179-80). Mr. Rimmer and Parker were each charged with two counts of first degree murder, three counts of armed robbery, four counts of armed kidnapping, one count of attempted armed robbery, and one count of aggravated assault (R. 2089-92). At the close of evidence, but before closing arguments, the Court and the parties held a charge conference to discuss the jury instructions (R. 1441-7; 1562-74). Each of the proposed jury instructions discussed during the charge conference contained the phrase "and/or" between the names of the co-defendants; at no time did either Mr. Rimmer's counsel or Parker's counsel object to the "and/or" conjunction during these discussions (see id.).

[13] Appellate counsel challenged Officer Kelley's rebuttal testimony on appeal. This Court found that "the trial court clearly erred in permitting [Officer] Kelley to testify in rebuttal." Rimmer, 825 So. 2d at 321. However, a majority found the error harmless, in large part due to the fact that there were eyewitnesses who identified Mr. Rimmer as the gunman. See id. However, the dissent found the Kelley testimony to be error warranting reversal because of the "highly suggestive" eyewitness identification procedures used by the police which rendered the identifications themselves unreliable. Id. at 339.

The next day, following closing arguments, the Court read the agreed-upon instructions to the jury, and a written copy of the instructions was also provided for the jury's use during deliberations (R. 1567-89). Each of instructions for the eleven charges against Mr. Rimmer and Parker contained the "and/or" conjunction (Id.). For example, in Counts I and II, which charged first degree murder, the Court defined the charge, in pertinent part, as follows:

> Now, as I have told you, in this case, Kevin Parker and Robert Rimmer are accused of murder in the first degree. Murder in the first degree includes the lesser crimes of murder in the second degree, murder in the third degree and manslaughter, which are all unlawful. A killing that is excusable or was committed by the use of justifiable deadly force is lawful. **If you find Aaron Knight and Bradley Krause, Jr. were killed *by Kevin Parker and/or Robert Rimmer*,** you will then consider the circumstances surrounding the killing in deciding if the killing was Murder in the first degree or murder in the second degree or murder in the third degree or manslaughter or whether the killing was excusable or resulted from the justifiable use of deadly force.

(R. 1576-7)(emphasis added). The Court went on to explain:

> I now instruct you on the circumstances that must be proved before **Kevin Parker and/or Robert Rimmer** can be found guilty of murder in the first degree or any lesser-included offense.
>
> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder. The other is known as felony murder. Before you can find the defendants guilty of first degree premeditated murder, as to Counts I and II, the State must prove the following three elements beyond a reasonable doubt: No. 1, Aaron Knight and Bradley Krause, Jr., are dead; **No. 2, the death was caused by the criminal act of Kevin Parker and/or Robert Rimmer;** No. 3, there was a premeditated killing of Aaron Knight and Bradley Krause, Jr.
>
> * * *
>
> Before you can find the defendants guilty of first

> degree felony murder. . . the State must prove the following three elements beyond a reasonable doubt: No. 1, Aaron Knight and Bradley Krause, Jr. are dead; No. 2, **(A) the death occurred as a consequence of and while Kevin Parker and/or Robert Rimmer were engaged in the commission of armed robbery and/or armed kidnapping or (B) the death occurred as a consequence of and while Kevin Parker and/or Robert Rimmer were attempting to commit armed robbery and/or armed kidnapping or (C) the death occurred as a consequence of and while Kevin Parker and/or Robert Rimmer were escaping from the immediate scene of an armed robbery and/or armed kidnapping;** No. 3, (A) Robert Rimmer was the person who actually killed Aaron Knight and Bradley Krause, Jr., ***or*** **(B) Aaron Knight and Bradley Krause, Jr. were killed by a person other than Kevin Parker but both Kevin Parker and the person who killed Aaron Knight and Bradley Krause, Jr. were principals in the commission of the armed robbery and/or armed kidnapping.**

(R. 1578-80)(emphasis added).

And so this continued throughout the remainder of the jury instructions with each and every count (and their lesser included crimes): the conjunction "and/or" was used to define the charges for armed robbery (R. 1584-7); armed kidnapping (R. 1588-9); attempted armed robbery (R. 1590-2); and aggravated assault (R. 1593-4). This conjunction was presented to the jury both by the judge in his oral pronouncement of the charges, as well as in the written instructions provided to the jurors for deliberation.

The Court also charged the jury with the standard instruction for principals:

> Principals. If **the defendant** helped another person on [sic] persons 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, No. 1, **the defendant** had a conscious intent the criminal act be done and No. 2, **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 the crime. To be a principal, **the defendant** does not have to be present when the crime is committed.

(R. 1594)(emphasis added).

In addition, the Court instructed the jury with the standard "separate defendants" instruction:

> A separate crime is charged against each defendant in each count of the indictment. 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 both of the defendants must not affect your verdict as to any other defendant(s) or other the crimes charged**.

(R. 1599)(emphasis added).

Early in the deliberations, the jury requested a substantial amount of evidence, including, among other things, the photo line-ups of Mr. Rimmer and Parker; the artist sketches of Mr. Rimmer and Parker; pictures of the Probe; and the testimony of Davis and Moore (R. 1616). After approximately four hours of deliberations, the foreperson sent out a question to the Court on behalf of the jury, which stated as follows:

> If someone helps move or hide stolen items, but has no prior involvement or involvement during the crime, would he be a princeable [sic] if he was involved away from the crime scene. If the person knows the items were stolen at a prior time.

(R. 1714-20). The Court responded to the jury by telling them only, "You have been instructed on the law regarding principals. You should apply the law to the facts as you see them." (R. 1718). Defense counsel objected to the vagueness of the court's response (see id.). After more than a day of deliberations, Robert Rimmer and Kevin Parker were ultimately convicted by general verdicts on all counts (R. 1721-7).

3. Prejudicial error warranting a new trial occurred when the trial court instructed the jury using the

"and/or" conjunction; appellate counsel was ineffective for not raising this issue in Mr. Rimmer's direct appeal.

The use of the conjunctive "and/or" phrase in jury instructions was first condemned by this Court over seventy years ago in Cochrane v. Florida East Coast Ry. Co., 145 So. 217, 218 (Fla. 1932): "In the matter of the use of the alternative, conjunctive phrase 'and/or,' it is sufficient to say that we do not hold this to be reversible error, but we take our position with that distinguished company of lawyers who have condemned its use." In the years since, the improper use of "and/or" has been held to be fundamental error in case after case 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. See, e.g., Green v. State, 968 So. 2d 86 (Fla. 2d DCA 2007)(use of "and/or" fundamental error, *despite the use of the standard principals instruction and the standard separate defendants instruction*); Davis v. State, 922 So. 2d 279 (Fla. 1st DCA 2006)(fundamental reversible error to use "and/or" conjunction *which was not cured by use of standard principal instruction*); Dorsett v. McRay, 901 So. 2d 225 (Fla. 3d DCA 2005)(appellate counsel rendered ineffective assistance by failing to assert on appeal that fundamental error occurred at trial when court gave a jury instruction using the "and/or" conjunction); Concepcion v. State, 857 So. 2d 299 (Fla. 5th DCA 2003); Williams v. State, 774 So. 2d 842, 843 (Fla. 4th DCA 2000)(fundamental error where court used conjunction "or" between

co-defendants because it was misleading to the jury)[14]. Cf. Garzon v. State, 980 So. 2d 1038 (Fla. 2008)(use of "and/or" condemned as error, but not fundamental error *in that case* based upon, *inter alia*, other evidence demonstrating defendant's guilt).

It is well-settled that jury instructions are subject to the contemporaneous objection rule. See State v. Delva, 575 So. 2d 643 (Fla. 1991). Absent an objection at trial, the error must be fundamental in order for relief to be obtained on appeal. See id. at 645. Fundamental error occurs when the erroneous conduct "reach[es] 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 v. State, 124 So. 2d 481, 484 (Fla. 1960). As expounded upon in detail below, fundamental error occurred in Mr. Rimmer's case when the trial court utilized the "and/or" instruction, such that a new trial is warranted.

This Court's recent opinion in Garzon, 980 So. 2d 1038 (Fla. 2008), is not to the contrary. In Garzon, the three defendants (Garzon, Balthazar, and Coles) were charged with the same seven crimes: criminal conspiracy, armed burglary of a dwelling, armed robbery, three counts of armed kidnapping, and extortion. See id. at 1039. The "and/or" conjunction was used in each of the jury

[14] Mr. Rimmer's appellate counsel, was the appellate counsel for the Mr. Williams and litigated this very issue in 1999-2000. To the extent that appellate counsel was aware of this claim and failed to raise it in Mr. Rimmer's appeal in 2000, he was ineffective, and relief is warranted.

instructions to separate the names of the three defendants, but was not objected to by trial counsel. See id. Balthazar was ultimately convicted as charged on all counts; in contrast, Garzon and Coles were acquitted of extortion, but convicted on all other counts. See id.

The issue presented on appeal in Garzon was whether the "and/or" instruction, together with the standard principals instruction, amounted to fundamental error. See id. at 1041. This Court held that the use of "and/or" was error, but not fundamental error as to either of the defendants based upon "the totality of the record."[15] Id. at 1043. In so finding, this Court relied upon record evidence which "strongly linked" Balthazar and Garzon to the crimes. Id. For example, Garzon was accused of orchestrating the crimes by phone, away from the crime scene. In support of that theory, the State presented phone records demonstrating that numerous calls were placed between Garzon and Balthazar at the same time as the home invasion, and that the cell phone identified with Garzon was in the vicinity of the crime scene. See id. This Court relied heavily upon these records as evidence of Garzon's guilt which negated Garzon's assertion that the "and/or" conjunction rendered his trial fundamentally flawed.

Additionally, this Court pointed to the numerous instances in the record where the State, the trial court, and the defense

[15] Zamir Garzon and one of his co-defendants, Ray Balthazar, consolidated their appeals.

all emphasized the law of principals as it related to Garzon: "This emphasis on the law of principals by the judge, the State, and defense counsel repeatedly communicated to the jury that it could not convict one defendant based on the other defendant's actions unless the requirements of the law of principals were met." Id. This Court also relied upon the use of the "separate defendants" instruction and the individualized verdict forms which emphasized the individual nature of the charges. See id.

Finally, the Court stressed that the "and/or" did not fundamentally damage the jury verdict due to the fact that Garzon was acquitted on the extortion charge, while his co-defendant Balthazar was convicted:

> [I]f the jury did in fact conclude that "and/or" meant that one defendant should be convicted based on the acts of the other defendant – even if the former defendant was not a principal – the acquittal of Garzon and Coles on the extortion count is anomalous. . . .**If the jury believed it should convict a given defendant based solely on whether a codefendant committed the elements, it logically follows that the jury would have convicted Garzon and Coles of extortion because it found Balthazar guilty.** The jury did not, however; it convicted only Balthazar of extortion. **[We agree with the Fourth District's conclusion] that this result "demonstrate[d] that [the jury] followed the law on principals and was not misled by the 'and/or' conjunction in the extortion instruction."**

Id. at 1044-5 (emphasis added). Based upon these factors, this Court held that "the use of the 'and/or' conjunctive phrase **in this case** was not fundamental error." Id. at 1045 (emphasis added).

Unlike in Garzon, in Mr. Rimmer's case there were not sufficient additional circumstances present to rectify the

clearly erroneous "and/or" instruction. When this Court considers the entire context of Mr. Rimmer's trial and reviews these instructions in light of the prejudicial identifications, prosecutorial misconduct, juror confusion, and the fact that Mr. Rimmer and Parker were convicted of exactly the same crimes, it is evident that the error here so "reach[ed] down into the validity of the trial itself. . .that a verdict of guilty could not have been obtained without the assistance of the alleged error." Delva, 575 So. 2d at 644-45 (quoting Brown v. State, 124 So. 2d 481, 481 (Fla. 1960)).

Mr. Rimmer's defense at trial was misidentification. As three members of this Court noted in their dissent from affirmance on direct appeal, there were significant problems with the eyewitness identifications introduced at trial:

> Certainly, there was an abundance of evidence that linked Rimmer to the crime in that he possessed the stolen goods. However, there was no physical evidence that linked him to the scene. Moreover, a third man involved with the crimes was never found. Although Rimmer was identified by two eyewitnesses, not only were there flaws with the procedures used, [but] both eyewitnesses identified the shooter as being five feet, ten inches tall[16] and not wearing glasses, whereas Rimmer is six feet, two inches tall and is legally blind without his glasses. Furthermore, there was a discrepancy about Rimmer's weight.
>
> [A]lthough Rimmer is not entitled to a perfect trial, he is entitled to a fair trial. . .

Rimmer, So. 2d at 339 (Pariente, J., dissenting). These faulty identifications were compounded by the State's prejudicial

[16] The record does not support this statement, as Moore testified that the gunman was between 5'7" and 5'9" (R. 870-9), and Davis described the gunman as 5'9" tall (R. 796-8; 838).

presentation of Officer Kelley's vision and the re-enactment of the crime. Again, three members of this Court found that these errors were so fundamental as to warrant a new trial:

> The majority concludes that the admission of [Officer] Kelley's testimony on rebuttal about his ability to see without eyeglasses was error and improperly admitted to rebut the defense expert's testimony that Rimmer wore eyeglasses and that without them he would be considered legally blind. I agree that not only was this testimony irrelevant, but placing this testimony before the jury through the police officer exacerbated the effect of the error. I do not, however, agree with the majority opinion that this testimony was harmless beyond a reasonable doubt.
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> * * *
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> **Our obligation is to look at the improper evidence to determine if it possibly might have influenced the jury verdict**.
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> * * *
>
> No matter how certain either eyewitness is of the identification of Rimmer as the person he or she saw commit these terrible murders, we cannot overlook the fact that their identifications may be flawed by the subsequent procedures utilized by the police.
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> * * *
>
> **In this case, justice demands that Rimmer should be given a new trial in light of the prejudicial nature of [Officer] Kelley's testimony and the prosecutor's improper reenactment of the crime.**

See id. at 337-9 (Pariente, J., dissenting (with Anstead, C.J. and Shaw, J., concurring))(emphasis added). If three justices on this Court were concerned with the sufficiency of the evidence against Mr. Rimmer for the robbery and murders at Audio Logic, it is certainly possible that the jury at his trial questioned whether Mr. Rimmer was actually at the scene of the crime, or if he simply was in possession of stolen goods after the crime.

However, because the "and/or" conjunctive instruction was used, the jury could have convicted Mr. Rimmer based wholly or in part upon the conduct of his co-defendant Kevin Parker, even if they questioned whether Mr. Rimmer was actually present at the Audio Logic. See Green, 968 So. 2d at 92 (Fla. 2nd DCA 2007)(recognizing that the use of "and/or" in some cases may be harmless, but finding fundamental error in the case at bar, *where the identity of the defendant was in dispute*; the error was not corrected by the application of the standard "principals" and "separate defendants" instructions).

The question sent out by the jury during deliberations illustrates their confusion:

> If someone helps move or hide stolen items, **but has no prior involvement or involvement during the crime, would he be a princeable [sic] if he was involved away from the crime scene. If the person knows the items were stolen at a prior time.**

(R. 1715)(emphasis added). Based upon this inquiry, it is very clear that the jurors were questioning whether Mr. Rimmer was present at the Audio Logic on the day of the crimes, and if he could be convicted as a principal even if he had "no prior involvement or involvement during the crime." Id. This is the only reasonable interpretation, especially since there was no issue as to whether Parker actually was present at the Audio Logic on the day of the crimes – he admitted as much during his interrogation and to his girlfriend, and Davis identified him in a photo line-up as the man she saw at the crime scene (R. 1220, 1228-30). Only Mr. Rimmer presented a misidentification defense

and argued that he was never present that day at all, but was merely in possession of the stolen goods after the crime.

The trial court's response to the jury question was not sufficient to correct the jury's confusion, as the judge simply referred them to the problematic principals instruction. Numerous lower appellate courts have found that the application of the principals instruction, standing alone, is not sufficient to cure an erroneous "and/or" instruction. See, e.g., Green, 968 So. 2d at 90; Zeno[17], 910 So. 2d at 396; Davis, 922 So. 2d 279; Brown v. State, 967 So. 2d 236 (Fla. 3rd DCA 2007).

One reason that the principals instruction is not adequate to correct the error caused by the use of "and/or" is because the principals charge directly conflicts with the primary instruction, thereby adding to the confusion rather than curing it. See Green, 968 So. 2d at 90. The separate defendants instruction has been found similarly inadequate to correct the "and/or" instruction. See id. Courts that have found "and/or" not to be cured by additional instructions have emphasized how those instructions directly conflict with the *primary* instructions which improperly and prejudicially link the defendants'

[17] In certifying conflict with the 2nd DCA opinion in Zeno, the Garzon court described Zeno as standing for the proposition that the "and/or" conjunction is *always* fundamental error. See 939 So. 2d at 287. However, in Green, the 2nd DCA clarified that their decision in Zeno did not hold that the use of the "and/or" instruction is always fundamental error. 968 So. 2d at 91. Rather, Zeno held that the use of the principals instruction does not "automatically" cure the erroneous use of "and/or" in the primary instruction. Id. Therefore, the 2nd DCA saw no reason to certify conflict with Garzon. See id.

culpability:

> [T]he confusion engendered by the "and/or" was, if anything, heightened rather than cured by the standard instruction. This is so because (a) even if the charges against each defendant were to be considered "separately," as the standard jury instruction stated, the *primary* instruction still provided that [Defendant A] might be criminality liable solely if [Defendant B] was liable; and (b) the reference to "any other defendant" is totally unrelated to this case in which no other defendant was on trial.

Dorsett, 901 So. 2d at 227.

This same concern is evident here. Here, not only was Mr. Rimmer's jury charged with ambiguous and misleading jury instructions, but they were given two inapposite instructions: On the one hand, they were instructed in the primary charges to actually convict Mr. Rimmer if Mr. Parker 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 Mr. Rimmer intended for the offense to be committed and did or said some word which encouraged Mr. Parker. Thus any reasonable observer is left to wonder whether Mr. Rimmer's conviction was based on his own guilt as a principal, his own guilt as the gunman, or solely based on the actions of Parker, without regard to Mr. Rimmer's actual guilt under the principal instruction.

In Garzon, this Court found no fundamental error and relied upon a confluence of factors which demonstrated that the jury had made the correct determination in convicting the defendant. A primary consideration for this Court in coming to that conclusion was the fact that Garzon was *not* convicted of extortion, but his

co-defendant Balthazar was. See Garzon, 980 So. 2d at 1044-5. In contrast, in Mr. Rimmer's case, he and his co-defendant Kevin Parker were convicted of *exactly the same crimes* (R. 1721-7). It is therefore impossible to state, as this Court did in Garzon, that the jury here clearly understood the instructions despite the erroneous use of "and/or" – or that the jury's understanding was evidenced by the fact that they made a distinction in their convictions based upon the differing actions of the defendants.

Rather, the convictions of Mr. Rimmer and Parker for exactly the same crimes leaves open a number of questions: namely, whether the jury found Mr. Rimmer guilty due to proper application of the principals instruction; or if they found Mr. Rimmer guilty based upon their belief that he was present at the crime scene; or if they found Parker guilty only, without an actual determination of guilt as to Mr. Rimmer, but convicted Mr. Rimmer due to the faulty "and/or" clause. Similarly, if the jury never reached the principals instruction, they could have wrongfully convicted Mr. Rimmer without ensuring that the State met its burden to prove the "conscious intent" required by the principals instruction. The very fact that such extensive guesswork and speculation must be utilized in order to determine whether the jury properly understood the charges levied against Mr. Rimmer is proof that the "and/or" clause used here amounted to fundamental error.

Moreover, the Sixth Amendment right to a jury trial "includes the right to a jury that is fairly and properly

instructed." Cheek, 498 U.S. at 203. There is no question but 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 with which he is charged. See Cheek; see also Chicone v. State, 684 So. 2d 736 (Fla. 1996). Here, not only was Mr. Rimmer's jury charged with ambiguous jury instructions, but they were given two inapposite instructions. Because of the convoluted and confusing jury instructions, it is simply not possible to determine why Mr. Rimmer was convicted. Considering that the only evidence actually tying Mr. Rimmer to the crime scene at the time of the homicides was a series of extremely faulty eyewitness identifications, and based upon the jury's question to the court during deliberations, it is more reasonable to believe he was convicted based on the evidence against his co-defendant, Parker. Coupled with the instruction which all but directed the jury to convict Mr. Rimmer based upon a finding of guilt as to his co-defendant, it is clear that under the facts of this case, the State was relieved of its burden of proof to establish that Mr. Rimmer was guilty beyond a reasonable doubt. As such a new trial is warranted.

The errors stemming from the use of the "and/or" instruction are aggregated by the fact that Mr. Rimmer was convicted by general verdict, such that it is impossible to now know whether the jury relied upon a legally valid basis when making its determination of guilt. 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. See Zant v. Stephens, 462 U.S. 862, 881 (1983); Hitchcock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984); Mackerly v. State, 777 So. 2d 960 (Fla. 2001); Delgado v. State, 776 So. 2d 223 (Fla. 2000)(first degree murder conviction overturned when there was adequate proof of premeditation, but a legally flawed felony murder theory due to improper language in the jury instruction for burglary); Tricarico v. State, 711 So. 2d 624 (Fla. 4th DCA 1998)(even where overwhelming evidence of premeditation exists, an invalid instruction on the felony murder resulted in fundamental error).

Here, Mr. Rimmer was convicted pursuant to a general verdict form. Because the jury did not specify upon which theory the verdict was based, it may well have been premised on the legally faulty determination that Parker's culpability was sufficient to find Mr. Rimmer guilty. The jury was specifically instructed several times to follow the law given by the court, even if they disagreed with the law. Presumably, 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.

In sum, the use of the "and/or" conjunction rendered the jury instruction in this case inaccurate and confusing, thereby depriving Mr. Rimmer of his right to a fairly and accurately instructed jury, and an individualized verdict. See Cheek, 498

U.S. at 202; Estelle, 502 U.S. at 67; Davis v. State, 895 So. 2d 1195 (Fla. 2nd DCA 2005). The lower court committed fundamental, prejudicial error by using the "and/or" conjunction between the co-defendants' names when defining the elements of each and every offense levied against them and these erroneous instructions were not cured by the application of the standard "principals" and "separate defendants" instructions. See Green, 968 So. 2d at 90. This error was compounded by the fact that the evidence of guilt presented against Mr. Rimmer was so prejudicial and unreliable. The end result was that, in the context of this trial, the erroneous conduct affected "the validity of the trial itself" such that a guilty verdict could not have been obtained against Mr. Rimmer but for the error. Brown, 124 So. 2d at 484; see also Garzon, 980 So. 2d at 1043. Mr. Rimmer's convictions must be reversed and the case remanded for a new trial.

As fundamental error was apparent, appellate counsel was ineffective for failing to raise this issue on appeal. See Dorsett v. McRay, 901 So. 2d 225 (Fla. 3d DCA 2005)(appellate counsel rendered ineffective assistance by failing to assert on appeal that fundamental error occurred at trial when court gave a jury instruction using the "and/or" conjunction); Scott v. Dugger, 686 F.Supp 1488, 1507 (S.D. Fla. 1988). Appellate counsel's failure to include this claim is striking considering that he had successfully raised this issue in a proceeding litigated prior to Mr. Rimmer's appeal. See Williams v. State, 74 So. 2d 841 (Fla. 4th DCA 2000)(fundamental error alleged and

found due to improper use of "and/or" instruction; new trial granted).[18] Appellate counsel was aware of this claim, and there is no explanation for his failure to raise it on behalf of Mr. Rimmer. This omission was highly prejudicial. Relief is warranted.

B. FINANCIAL GAIN AND ELIMINATION OF A WITNESS AGGRAVATORS.

The trial court improperly instructed Mr. Rimmer's jury to consider the following aggravating circumstance:

> No. 4, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody.
>
> And aggravator number five, over defense objection:
>
> No. 5, the crime for which the defendant is to be sentenced was committed for financial gain.

(R. 1982; 1790). However, the trial court found that the financial gain aggravator did not exist (R. 2072-3). This Court has repeatedly held that in order for aggravators to be applicable, they must be proven beyond a reasonable doubt. Scull v. State, 511 So. 2d 1137, 1142 (Fla. 1988)); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). The financial gain aggravating factor and the resulting instruction are not

[18] In Williams, the defendant was jointly tried with his co-defendant with two separate juries; however, the two juries were instructed simultaneously. See id. at 843. Prior to deliberation, the trial court instructed Williams' jury that it could find him guilty of the charged offenses if either he "or" his co-defendant had possession. Id. On appeal, the Fourth District held that "because Williams' jury may have been misled into thinking that it could convict him based solely on [his co-defendant's] conduct, . . . the instructions were fundamental error." Id.

supported by the evidence. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982).

Since this aggravating circumstance did not apply as a matter of law, it was error for this aggravating circumstance to be submitted for the jury's consideration over objection. Omelus v. State, 584 So. 2d 563 (Fla. 1991)(error to instruct the jury on an aggravator which as a matter of law did not apply). See Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).[19] The jury's consideration of this invalid aggravator in its sentencing calculus deprived Mr. Rimmer of a meaningful individualized sentencing.

Further, it was improper for the court to give both the elimination of a witness and financial gain aggravators. To find the pecuniary gain aggravator, the jury would have to have found that pecuniary gain was the motive for the killing. Elam v. State, 636 So. 2d 1312, 1315 (1994). Defense counsel argued exactly this point at the charge conference (R. 1785-90). It is impossible for the state to prove beyond a reasonable doubt that the primary motive for the killing was pecuniary gain, and at the same time prove beyond a reasonable doubt that the sole or dominant motive for the killing was elimination of a witness. That a sentencing court could instruct a jury to consider both aggravating factors illustrates the point that the aggravating

[19] In Omelus and Archer, this Court ordered new penalty phase proceedings where juries were instructed on an aggravating circumstance over objection and where the aggravating circumstance did not apply as a matter of law.

factors and the jury instructions are vague and overbroad.

Without the complete instruction, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present. The trial court found the existence of this aggravating circumstance without setting forth any basis for the finding whatsoever. This was error. The jury was never instructed that the state carried the burden of proving that the "primary motive" element of this aggravating circumstance existed beyond a reasonable doubt. Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel was ineffective for failing to raise this issue.

The fact that the court did not find the existence of this aggravating circumstance does not render the error of a vague instruction harmless. Kearse v. State, 662 So. 2d 677 (Fla. 1995). In Florida, neither the judge nor the jury is permitted to weigh invalid aggravating factors. Espinosa, 112 S. Ct. at 2929. As the Supreme Court has explained, the jury is unlikely to disregard a flawed legal theory and therefore instructing the jury to consider an invalid aggravating circumstance is not harmless error. Sochor, 112 S. Ct. at 2122.

Mr. Rimmer was denied a reliable and individualized capital

sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. However, despite the preservation of this issue by trial counsel, appellate counsel failed to raise this issue on appeal. But for counsel's deficient performance, Mr. Rimmer would have received penalty phase relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Rimmer respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this 9th day of July, 2009.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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