IN THE SUPREME COURT OF FLORIDA

NO. SC09-1250

ROBERT RIMMER,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

COMES NOW, the Petitioner, **ROBERT RIMMER**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Rimmer's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument made by the State. The absence of any rebuttal is not, however, a waiver or abandonment of any claim or argument made previously. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

ISSUE 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.

The testimony of Dynette Potter Mallard and Det. Lewis which highlighted the connection between Mr. Rimmer and his co-defendant Parker was prejudicial error necessitating a new trial. Such testimony should never have been admitted, as the trial court erred in denying both Mr. Rimmer's discovery motion and his motion to sever. The prejudicial nature of the testimony in question demonstrates that the error was fundamental, such that appellate counsel should have raised the issue on appeal.

Appellee maintains that nothing said by either Mallard or Detective Lewis inculpated Mr. Rimmer in violation of Bruton v. United States, 391 U.S. 123 (1968) because neither statement specifically mentioned Rimmer (Answer 22). Moreover, claims Appellee, "the jury could not have been confused by this testimony in light of the strong eyewitness identifications given by Davis and Moore" (Id.). Appellee's assertions are simply not borne out by the record or the applicable law.

At trial, Mallard testified that Mr. Rimmer and Parker knew each other, and that she had witnessed the two men having a conversation outside of her apartment some time in late April or early May 1998 (R. 929; 934-6). With some difficulty, Mallard also admitted that Parker told her that on the day of the crimes, he walked to the back of the store, saw some people there, and left (R. 940-62). Similarly, Detective Lewis testified that Parker told him "that he walked in, out of the business, and walked around the side, and he saw something going down, and he left. . . .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" (R. 1230-1). The prosecutor then improperly exacerbated the prejudicial nature of this testimony by stating "Given the court's ruling [on defense motions, heard outside the jury], I have no further questions of Detective Lewis at this time" (R. 1251).

Appellee's position ignores the fact that Bruton does not require that a co-defendant's statement specifically reference the defendant. Rather, the standard is "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**," then a trial severance is necessary. Here, Mallard's testimony, which establishes that Parker and Mr. Rimmer knew each other and had a conversation shortly before the date of the crime, allowed the jury to draw a prejudicial inference from Parker's statement to Detective Lewis that he witnessed a robbery at the Audio Logic.

Appellee argues that "the jury could not have been confused by this testimony in light of the strong eyewitness identifications given by Davis and Moore" (Answer 22). While Mr. Rimmer disagrees with Appellee's characterization of the identifications as "strong" (see Habeas Petition Issues I and IV; Reply Argument to Issue IV, *infra*), in order to evaluate the present claim this Court must consider how the eyewitnesses trial testimony influenced the jury's interpretation of Mallard's and Lewis's testimony. For example, Kimberly Burke Davis testified that she interacted with Parker and watched him enter and exit the Audio Logic (R. 792-5). Immediately thereafter, she was approached by a man she identified as Mr. Rimmer, who led her

into another room where she saw Parker and a third man loading inventory into a car (R. 797-804). The man she identified as Mr. Rimmer then proceeded rob the business, and to bind and shoot the homicide victims (R. 796-805; 895-6).

In light of Davis's testimony, the harmful nature of Mallard and Lewis's testimony is apparent. It is highly likely that the jury would have drawn an incriminating inference against the defendant from Parker's statement, when Mallard established that Parker and Mr. Rimmer knew each other, and Davis testified that she saw the two men together during the robbery of the Audio Logic. Parker's extrajudicial statement therefore amounts to the type of "devastating" hearsay, exempt from the crucible of cross-examination, which Bruton holds is violative of the Confrontation Clause. Such an error would not have occurred had the trial court properly granted the defense motion for severance. Likewise, had the State not committed a discovery violation and turned Mallard's statement over to defense counsel earlier, trial counsel could have relied upon Bruton in order to more effectively argue the need for severance. The serious Constitutional errors which arose from the trial court's denial of the defense discovery and severance motions were evident from the record, and appellate counsel was ineffective for failing to raise them on appeal.[1]

[1] Contrary to Appellee's claims, had the issues properly

ISSUES II AND III (Restated)

THE TRIAL COURT'S REFUSAL TO GRANT DEFENSE MOTIONS FOR MISTRIAL VIOLATED MR. RIMMER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THESE CLAIMS.

Mr. Rimmer moved for a mistrial after State's witness Michael Dixon improperly referenced a prior hearing on a defense motion to suppress (R. 672-6). Although the court instructed the jury to disregard the answer (R. 676), Mr. Rimmer maintains that the curative instruction was not sufficient to rectify the error, and that appellate counsel should have raised a claim regarding the trial court's failure to grant the mistrial.

Appellee argues, *inter alia,* that because the ruling on the suppression hearing was not disclosed to the jury, that the court did not abuse its discretion in denying the mistrial (Answer 25). However, the prejudicial nature of the comment does not hinge on whether the jury knew the outcome of the suppression hearing; rather, what matters is that the jury was improperly led to believe that Mr. Rimmer, who filed the motion to suppress, therefore had something to hide – i.e., his guilt. Such commentary is exactly the type of incriminating information that this Court has found would be "difficult for the jurors to

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been raised on appeal, the errors would not have been considered harmless. As illustrated above, Appellee's reliance (Answer 23) upon the eyewitnesses' testimony as negating the Bruton violation is misplaced.

disregard" and "would likely influence the jury's decision." Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982). Contrary to Appellee's argument (Answer 25), the Walsh case actually does "further Rimmer's position," as the nature of the testimony which was improperly revealed in that case (the outcome of a lie detector test) is of the same type of evidence – namely, that which improperly implicates guilt or innocence – which would improperly influence a jury.

Appellee's reliance upon Evans v. State, 995 So. 2d 933, 953-54 (Fla. 2008), is misplaced. There, a motion for mistrial based upon testimony which revealed that Evans was in a gang was held to have been properly denied. 995 So. 2d at 953-54. However, evidence that a defendant was in a gang, while possibly prejudicial, is not the same as revealing that a defendant filed a motion to suppress. For the jury to learn that Mr. Rimmer had filed a motion to suppress was unfairly prejudicial as it implied that he was hiding something from the jury, and amounted to an implication of guilt which the jury should not have considered. As defense counsel argued to the court, the jury was left to speculate what other evidence the defense was "hiding," (R. 676), and no curative instruction was sufficient to overcome the prejudice which accrued to Mr. Rimmer.

Similarly, appellate counsel erred by not raising a claim regarding the denial of the defense motion for mistrial when the

jury heard a police tape wherein "an unidentified male voice [says] we can't let him barricade himself in the house" (R. 585). Mr. Rimmer relies upon, *inter alia,* Jackson v. State, 698 So. 2d 1299, 1302 (Fla. 4th DCA 1997) and Bello v. State, 547 So. 2d 914 (1989) in support of this claim, where the jury learned of defendant's shackling, and such inflammatory information was found to be prejudicial of defendant's right to a presumption of innocence. Appellee dismisses these cases as "not on point" because "they are addressing the defendant's treatment in court where he is presumed innocent" (Answer 28). Appellee fails to recognize, however, that a defendant is presumed innocent at all stages of the investigation and trial, unless and until he is proven guilty. Thus, any "practices which 'unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion'" – whether inside or outside of the courtroom – must be withheld from the jury. Jackson, 698 So. 2d at 1302 (internal citations omitted). The admission at Mr. Rimmer's trial of an inflammatory hearsay statement by the police about Mr. Rimmer barricading himself in his house following a chase is just as much of an improper comment to the jury on his guilt or innocence as shackles around his ankles.

The defense motions for mistrial should have been granted, and appellate counsel was ineffective for not raising these issues on appeal.

ISSUE 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 ÇAND/ORÇ CONJUNCTION BETWEEN THE CO-DEFENDANTS' NAMES WHEN CHARGING THE JURY AS TO EACH OFFENSE.

In Garzon v. State, 980 So.2d 1038 (Fla. 2008), this Court held that while the use of "and/or" in jury instructions charging multiple defendants is clearly error, a reviewing court must consider the totality of the circumstances of a given case in order to determine whether the error was harmless or fundamental. 980 So.2d at 1045. In addressing the merits of Mr. Rimmer's claim that it was fundamental error for the trial court to have used the "and/or" conjunction when charging the jury, the State improperly claims that this Court's recent decision in Hunter v. State, 8 So.3d 1052 (Fla. 2008) precludes relief. However, the situation in Hunter is clearly distinguishable from Mr. Rimmer's case, and indeed, actually supports Mr. Rimmer's contention that the totality of the circumstances at his trial rendered the use of "and/or" fundamental error.

In Hunter, as here, the conjunction "and/or" was used between the defendants' names in each of the jury instructions, and both the principles and multiple defendants instructions were also given. 8 So.3d at 1070-71. This Court found that although

the use of "and/or" was in error, based on the totality of the circumstances the error was not fundamental. Id. at 1071. In support, this Court pointed to the fact that Hunter's defense counsel specifically "discussed how a verdict as to guilt for one defendant did not mean that the same verdict had to be arrived at for the others [and] explained that the evidence was to be weighed 'as to each defendant as to each count.'" Id. at 1071. Moreover, in Hunter's case there were individualized verdict forms "both as to the defendants and in respect to the crimes charged." Id. Finally, this Court noted that the evidence at trial "strongly tied Hunter to these crimes," such that the use of "and/or" must be considered harmless. Id.

The facts of Mr. Rimmer's case are easily distinguishable from those in Hunter, and demonstrate fundamental error warranting relief. For example, Mr. Rimmer's counsel never addressed how the actions of Parker (or the third, unidentified perpetrator) could or should be distinguished from Mr. Rimmer's actions (R. 1504-30). Moreover, unlike in Hunter, in Mr. Rimmer's case the prosecutor addressed both defendants in the same closing arguments, even over objections by both Mr. Rimmer's and Parker's trial counsel (R. 1478-1502; 1531-46). Additionally, whereas in Hunter the crimes charged were individualized as to each defendant, in Mr. Rimmer's case, he and Parker were charged and convicted of exactly the same crimes (R.

1721-7).

However, the most persuasive distinguishing factor between Hunter and Mr. Rimmer's case was the quality of the evidence supporting the conviction. As Mr. Rimmer established in his initial habeas petition, there were serious problems with the State's case against Mr. Rimmer, particularly the faulty eyewitness identifications (Petition 23-31). As three members of this Court noted in their dissent from affirmance on direct appeal, the problems with these eyewitness identifications significantly impacted the State's case against Mr. Rimmer:

> **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[2] 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.
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> [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) (emphasis added). These faulty identifications were compounded by the State's prejudicial 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

[2] This statement is not supported by the record. Moore actually testified that the gunman was between 5'7" and 5'9" (R. 870-9); Davis described the gunman as 5'9" tall (R. 796-8; 838).

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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> **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).

Mr. Rimmer's defense was and remains misidentification. Unlike in Hunter, the only evidence the State had which specifically linked Mr. Rimmer to the murders were those faulty eyewitness identifications. Appellee stresses over and over that the eyewitnesses in this case "at all times. . .placed the gun in

Rimmer's had [sic] and identified him as carrying out all of the charged crimes including being the shooter of both victims" (Answer 33; 36). Yet Appellee does not bother to mention the serious discrepancies between the initial eyewitness descriptions of the perpetrator – given within an hour of the crime taking place – and Mr. Rimmer's actual physical characteristics (R. 796-8; 838; 870-9). Appellee also fails to acknowledge that there was absolutely no forensic evidence at the scene which linked him to the crimes – despite the fact that the perpetrator was not wearing gloves, but was described as touching numerous items at the Audio Logic (e.g., the cash register, various doors, the bindings on the victims, Davis's car).[3] Additionally, without the egregious misconduct of the prosecutor regarding the issue of Mr. Rimmer's eyesight, the State provided absolutely no explanation as to how Mr. Rimmer, who is legally blind and cannot wear contact lenses, could have engaged in the Audio Logic crimes without wearing glasses. Finally, neither Mr. Rimmer nor Parker gave any statements which placed Mr. Rimmer at the scene of the crime. Thus, in contrast to the facts presented in Hunter, the totality of the circumstances of Mr. Rimmer's trial demonstrate that the use of "and/or" could not be harmless.

Appellee maintains that "Rimmer's argument that three members

[3] "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." Rimmer, So. 2d at 339 (Pariente, J., dissenting).

of this Court dissented on the issue of the prosecutor's rebuttal testimony. . .somehow equates to confusion by the jurors is not well reasoned. One has to do with identification procedures and the other informs the jury of the elements of the crimes charged" (Answer 34). However, Appellee fails to recognize that the view of the dissenters in Rimmer goes to the totality of the circumstances assessment which is required by Garzon. Moreover, the majority in Rimmer agreed that the prosecutor's actions were inappropriate, but disagreed that the error warranted a new trial. 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, and all of the justices found that the actions of the prosecutor regarding Officer Kelley were in error, 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 Parker, even if they questioned whether Mr. Rimmer was actually present at the Audio Logic. See Green v. State, 968 So. 2d 86, 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*).

Appellee also argues that "the evidence was such that there was no confusing Rimmer's actions with those of Parker" (Id.), but the jury's own questions during deliberation belies this statement:

> 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). Appellee argues that this question was "more likely. . .directed at Parker's activities as his statement placed him at the scene, but not in the service area or as the shooter" (Answer 34-35). Such an interpretation is seriously flawed. Appellee accuses Mr. Rimmer of "merely speculating" that the jury question related to him; yet the Appellee does the same thing by improperly parsing what the jury potentially meant by "crime scene," and arguing that the question must have applied to Parker because his statement never placed him in the service area (Id.)

The jury's inquiry clearly applies to Mr. Rimmer. The jury specifically asked whether someone could be a principle if he was involved "away from the crime scene" and if the person knew "the items were stolen at a prior time" (R. 1715). Only Mr. Rimmer alleged that he was never at the crime scene at all on the day in question. In addition, only Mr. Rimmer was accused of being in possession of the stolen goods after the crime – thus, the only

way it would matter if a defendant "knew the items were stolen at a prior time" is if he were in possession of it after the crime. The language of the question indicates that the jurors were confused about 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 c 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).

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 – in addition to assessing the totality of the evidence presented against Garzon – 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 cand/orc c 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.

Finally, unlike in Hunter, the use here of the principals instruction was not adequate to overcome the confusion engendered by the "and/or" instruction. Numerous lower appellate courts have found that the application of the principals instruction is not sufficient to cure an erroneous "and/or" instruction. See, e.g., Zeno v. State, 910 So. 2d 394, 396; 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 (Fla. 2d DCA 2007). Whereas in Hunter, the prosecution addressed the principals instruction separately as to each defendant, in Mr. Rimmer's case, the principles instruction was discussed by the prosecution in a closing argument which addressed both defendants (R. 1478-1502; 1531-46).

On these facts, it cannot be said that the use of "and/or" was harmless. Rather, because the evidence of guilt presented against Mr. Rimmer was so flawed and unreliable, the use of "and/or" in this case resulted in fundamental error necessitating a new trial. 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. Thus, it is clear 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.

Appellee asserts that appellate counsel did not render ineffective assistance because "there is little likelihood counsel would have been successful on appeal" (Answer 37). Mr. Rimmer disagrees. When considering the totality of the circumstances of this case – including the limited and flawed evidence against Mr. Rimmer, the obvious jury confusion regarding Mr. Rimmer's culpability, the fact that (unlike in Garzon and Hunter) Mr. Rimmer and Parker were convicted of exactly the same crimes, and the failure of trial counsel and the prosecutor to properly distinguish the actions and culpability of the two

defendants – there is no question but that fundamental error occurred in this case. Because 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); 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); Scott v. Dugger, 686 F.Supp 1488, 1507 (S.D. Fla. 1988).

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed herein and in Mr. Rimmer's petition for writ of habeas corpus, Mr. Rimmer respectfully urges this Court to grant habeas corpus relief.

CERTIFICATION OF TYPE SIZE AND STYLE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U.S Mail to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this ____ day of December, 2009.

Respectfully submitted,

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