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COLORADO SUPREME COURT
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Certiorari to the Colorado Court of Appeals,
09CA1506
El Paso County District Court No. 07CR3795

SALVADOR ESQUIVEL-CASTILLO,
PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

Case No.2013SC904

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OPENING BRIEF

COLORADO SUPREME COURT 2 E. 14th Ave., Denver, CO 80203 Certiorari to the Colorado Court of Appeals, 09CA1506 El Paso County District Court No. 07CR3795 **SALVADOR ESQUIVEL-CASTILLO,** **PETITIONER,** **v.** **THE PEOPLE OF THE STATE OF COLORADO,** **RESPONDENT.**	Case No. 2013SC904
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The brief complies with C.A.R. 28(g). It contains 4802 words.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

\s\ Eric A. Samler

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STATEMENT OF THE CASE AND FACTS

Mr. Esquivel-Castillo was charged by way of Complaint and Information with felony murder of his girlfriend "JF"with kidnapping as the predicate felony, and with first degree kidnapping (seize and carry) pursuant to CRS§ 18-3-301(1)(a)(2). R. CF p. 28. An amended information adding a third count of second degree murder was added. *Id*., p. 37. At the conclusion of the People's case, Mr. Esquivel-Castillo moved for judgment of acquittal arguing that there was no evidence that he seized or carried the victim, and thus there was no evidence of first or second degree kidnapping, and thus also no evidence of felony murder. R.Tr. 4/24/09 pp 100-103. In response to the People's argument of why there was sufficient evidence for the charges to go to the jury, Mr. Esquivel-Castillo argued that the prosecutor was "asking this court to greatly expand the law of kidnapping" beyond the carry and seize from one place to another as charged. *Id.* p. 109. The Court responded that kidnapping can be committed in one of two ways namely

"forcibly seized and carry away any person from one place to another or enticed or persuaded any person to go from one place to another." *Id.* at 109, citing CJI 11:03.

Mr. Esquivel-Castillo responded that

> Except they have not charged it that way. We have to look at the Information as presented and as charged against Mr. Esquivel-Castillo at this point. He has been charged -- if we look at Count 1, 'Acting alone, committed or attempted kidnapping in the course or furtherance of that crime.' First degree kidnapping, they stated, 'Forcibly seized and carried [JF] from one place to another.' That's in Count 2. If we look at the Information provided by the People, that's the charges that going forward to this jury on.

R.Tr 4/24/09 p. 110. The People argued that for the defintion of kidnapping in Count 1 they were not bound by how they charged the kidnapping in Count 2. *Id.* at p. 110. The court then responded

> Is what you argued that the jury could find the Defendant not guilty of first degree kidnapping in Count 2, but there would still be first degree kidnapping under the enticement and persuasion they that would support a conviction under Count 1?

Id. at p 111.[1] The People's responded that

> Felony murder is kidnapping, the underlying felony being kidnapping. You can commit kidnapping in several different ways. Just because we charged that Count 2, it doesn't mean that's the only way that kidnapping can be committed.

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[1] In fact this is precisely what happened.

Id. pp 111-12. The Court then continued to ask counsel about "enticing or persuading" and why in his opinion there was not enough evidence to go forward with that method of committing kidnapping. *Id.* pp 113-116. Ultimately the court, while not directly responding to Mr. Esquivel-Castillo's claim that the People cannot expand the defintion of kidnapping beyond that which specifically charged, found the evidence sufficient for the case to go to the jury. *Id.* pp. 116-117.

At the conclusion of trial the jury received an instruction on felony murder(R. CF. p 505 , Inst. 21) and three instructions on kidnapping - one for first degree kidnapping (felony murder) (*Id*., p. 506, Inst. 22), one for second degree kidnapping (felony murder) (*Id*. p.507, Inst. 23), and one for first degree kidnapping (as charged) (, *Id*., p. 508, Inst. 24). The jury instruction for first degree kidnapping (felony murder) listed three ways in which the kidnapping could be accomplished-: (1) forcibly seized and carried any person from one place to another; (2) knowingly enticed or persuaded any person to go from one place to another; or (2) knowingly imprisoned or forcibly secreted any person. *Id*., p. 506. The instruction for kidnapping (as charged) listed only one way in which to commit the crime – forcibly seize or carry. (*Id*., p. 508). The definitional instruction given (*Id*., p. 502, Inst. 18) defined "seize and carry" but did not define "entice or

persuade" or "imprison or forcibly secrete." The verdict form for Felony Murder required the jury to make a finding on the predicate felony of kidnapping. (*Id*., p. 521) In particular, the verdict form listed the three possible methods of committing first degree kidnapping and asked the jury to make findings as to which of the methods were employed. *Id*. p. 521. The verdict form instructed the jury to check all that applied. The verdict form for first degree kidnapping included the option of first-degree or second-degree kidnapping. *Id*., p. 522.[2]

The jury found Mr. Esquivel-Castillo guilty of felony murder, and further found beyond a reasonable doubt that he committed first degree kidnapping by knowingly enticing or persuading the victim. *Id*., p. 521. None of the other methods were checked. The jury found Mr. Esquivel-Castillo not guilty of first degree kidnapping (seize and carry) or second degree kidnapping (which also required the victim to be seized and carried.)

Ten days after the jury verdict was entered, Mr. Esquivel-Castillo filed a motion for judgment of acquittal as to the felony murder conviction arguing that he

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[2] While there is nothing specifically on the record regarding an objection to the instructions, a portion of the jury conference occurred off the record, and as counsel stated during his post-trial motion for acquittal, he objected during the portion of the conference in chambers R. Tr. . 6/19/09 pp 2-3;4-5. 8-9.

was not notified that he was being prosecuted under alternate theories and that this violated his right to be notified of the charges against him as guaranteed by U.S. Const. Amend. VI and Colo. Const. Art. II, §. 16. R. CF. p.539.

The issue was argued at the sentencing hearing on June 19, 2009. R. Tr. 6-19-09. The court did not recall defense counsel objecting to the instruction during the jury instruction conference, however the court did recall ruling in chambers that the two alternate theories would not be allowed for the kidnapping charge. *Id*., p. 8-9. The court held that becuse the predicate felony in the felony murder charge was not limited by any particular theory because it was not specified. *Id*., p. 10. The court also ruled that, even if it was error, it was not objected-to, and any such error was harmless because the defense theory was that there was no kidnaping at all not that it was committed only in a particular fashion *Ibid*.

SUMMARY OF ARGUMENT

The jury acquitted Mr. Esquivel-Castillo of both first degree kidnapping (seize and carry) and second degree kidnapping (which also requires that the victim be seized and carried). It convicted Mr. Esquivel-Castillo of felony murder (kidnapping) specifically finding that Mr.Esquivel-Castillo enticed or persuaded the victim. By instructing the jury that it could convict Mr. Esquivel-Castillo of

felony murder (kidnapping-entice or persuade) the court constructively amended the charges against Mr. Esquivel-Castillo and as a result the felony murder charges cannot stand. Furthermore, because the jury found Mr. Esquivel-Castillo not guilty of either first degree kidnapping or second degree kidnapping, the jury specifcially found that one of the elements of the crime of felony murder, namely the predicate crime, was not proven and therefore double jeopardy principles prohibit Mr. Esquivel-Castillo from being retried for the felony murder charges. Thus the proper remedy is to vacate the felony murder conviction and remand the matter to the district court with instructions to enter a conviction for second degree murder.

ARGUMENT

I. JURY INSTRUCTIONS THAT EXPANDED THE METHODS OF THE PREDICATE CRIME OF KIDNAPPING BEYOND THE METHOD IDENTIFIED IN THE SUBSTANTIVE KIDNAPPING CHARGE CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE FELONY MURDER CHARGE.

A. PRESERVATION

Whether the objection to the alleged consturctive amendment was preserved at trial is subject to dispute. It is Mr. Esquivel-Castillo's position that his objection to the expansion of the defintion of the predicate felony "kidnapping" in the felony murder instruction beyond what was charged in the substantive

kidnapping charge was made abundantly clear in the pre-verdict motion for judgment of acquittal. The Court implicitly ruled against the objections in the motion for judgment of acquittal when, despite Mr.-Esquivel-Castillo argument that the Court could not consider anything but kidnapping seize and carry in determining if there was sufficient evidence to submit the matter to the jury, the court continued to inquire about the evidence that supported "enticed and persuaded." Objections were also raised in chambers that were overruled. Moreover, the argument was then raised in a post-trial motion for judgment of acquittal.

The Court of Appeals, in *People ex rel. H.W., III*, 226 P.3d 1134 (Colo. App. 2009), when faced with a similar situation, found that the claim was properly preserved. In *H.W.*, the People had alleged in the delinquency petition that the juvenile had rendered aid to another "knowing that person was charged by pending information, indictment, or complaint with the crime of criminal attempt to commit murder in the first degree." *Id*. at 1346. At, trial evidence was presented that the juvenile had rendered aid knowing that the individual had committed a crime, not that the juvenile had knowledge that the individual was charged with the crime when he rendered aid. The juvenile moved for judgment of acquittal arguing that

the People had failed to prove an essential element of the charge. The court denied the motion. In closing argument the juvenile again argued that the People failed to prove the allegations in the petition. On appeal the juvenile argued that "there was a 'fatal variance' between the petition and the evidence presented at trial." *Id*. at 1137. The Court rejected the People's claim that the issue was not preserved, reasoning that even though the term "fatal variance" was not used below, by arguing that no evidence was presented to support an essential element in the petition, the juvenile

> presented ... the sum and substance of the argument he now makes on appeal. Consequently, we consider his argument properly preserved for appellate review. *People v. Silva,* 987 P.2d 909, 913 (Colo. App.1999).

People ex rel. H.W., III, 226 P.3d at 1137.

The arguments raised in the oral motion for judgment of acquittal and the post-verdict written motion for judgment of acquittal more than adequately apprised the Court of the nature of the claim and the court in fact did rule on the merits of that claim. Therefore the issue was fully and properly preserved.

B. STANDARD OF REVIEW

The Court of Appeals has consistently held that a constructive amendment to the charges is reversible *per se. People v. Foster,* 971 P.2d 1082, 1087(Colo. App. 1998); *People v. Huynh*, 98 P.3d 907, 911 (Colo. App. 2004); *People v. Pahl,* 169 P.3d 169, 177-78 (Colo. App. 2006). Therefore, if this Court finds that the jury instructions acted as a constructive amendment, Mr. Esquivel-Castillo's conviction for felony murder must be vacated.

Even if this Court were to find that a plain error standard of review applies, the error here meets that standard. Under the plain error standard the error must "so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. " *Hagos v. People* 238 P.3d 116, 121 (Colo. 2012), citing *Lehnert v. People,* 244 P.3d 1180, 1185 (Colo. 2010). See also *People v. Vigil,* 127 P.3d 916, 929–30 (Colo.2006); *People v. Miller,* 113 P.3d 743, 749 (Colo.2005).

C. ARGUMENT

In *People v. Rodriguez,* 914 P.2d 230 (Colo. 1996), this Court distinguished between a "simple variance" and a "constructive amendment":

> Case law recognizes two types of variances between the charge contained in the charging instrument and the charge of which a defendant is convicted: (1) simple variance, which "occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged" in the charging instrument, *United States v. Williamson,* 53 F.3d 1500, 1512 (10th Cir.) (citation and internal quotation marks omitted), *cert. denied,* 516 U.S. 882 (1995); and (2) constructive amendment, which changes an essential element of the charged offense and thereby alters the substance of the charging instrument. *See id.* With respect to a simple variance, "[c]onvictions generally have been sustained as long as the proof upon which they were based corresponds to *an offense* that was clearly set out in the indictment." *United States v. Miller,* 471 U.S. 130, 136 (1985) (emphasis added). The constitution prohibits only amendments that "effectively subject a defendant to the risk of conviction for an offense that was not originally charged" in the charging instrument. *United States v. Mosley,* 965 F.2d 906, 915 (10th Cir.1992).

Rodriguez, 914 P.2d at 257.

The question the Court must ask is whether the elements of the offense charged have changed, thus materially changing the charging instrument. When the facts required to be proven do not correspond to the offense set forth in the indictment, then the defendant's fundamental constitutional right to be notified of the charges against him has been violated. U.S. Const. Amend. VI; Colo. Const. Art. II § 16; *People v. Cooke,* 186 Colo. 44, 46, 525 P.2d 426, 428 (1974). "When [as here] ...the jury charge operates to 'broaden [ ] the possible basis for conviction from that which appeared in the indictment,' the indictment has been constructively

amended. [*Miller,* 471 U.S. at 138] (emphasis omitted)*" United States v. Milstein,* 401 F.3d 53, 65 (2nd Cir. 2005)[3]. *See Pahl,* 169 P.3d at 177:

> A constructive amendment occurs when jury instructions change an element of the charged offense to the extent the amendment 'effectively subject [s] a defendant to the risk of conviction for an offense that was not originally charged.' *Rodriguez, supra,* 914 P.2d at 257 (quoting *United States v. Mosley,* 965 F.2d 906, 915 (10th Cir.1992))

See also Hunter v. State of New Mexico, 916 F2d 595, 599 (10th Cir. 1990) (distinguishing a constuctive amendment from a simple variance:)

> a constructive amendment is more dangerous because it actually modifies an essential element of the offense charged. [*United States v. Hathaway,* 798 F.2d 902, 910 (6th Cir.1986).]In order to rise to this level, the change in the indictment must be more than the addition or deletion of nonessential factual averments. Rather, the amendment must effectively alter the substance of the indictment. *See United States v. Adams,* 778 F.2d 1117, 1123 (5th Cir.1985) (constructive amendment occurs where defendant indicted for using license with a false name but possibly convicted only due to false address).

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[3] While the presence of an indictment in the federal system presents its own set of problems, namely the Fifth Amendment guarantee that "[n]o person shall be held to answer for a[n] ... infamous crime, unless on a presentment or indictment of a Grand Jury," the prohibition agains consturctive amendments is also grounded in the Sixth Amendment requirement that the defendant be "informed of the nature and cause of the accusation" against him or her." See *United States v. Farr,* 536 F.3d 1174, 1179 (10th Cir. 2008**).**

Hunter v. State of New Mexico, 916 F2d at 599 (cited with approval in *Rodriguez, supra*; *People v. Madden*,11 P.3d 452 (Colo. 2005); *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004); *United States v. Floresca,* 38 F.3d 706, 710 (4th Cir. 1994) ("A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury.) See also *Stirone v. United States,* 361 U.S. 212, 217(1960); *United States v. Miller*, *supra*..

The First Degree Kidnapping statute allows the state to charge a defendant with alternative acts or elemental requirements. C.RS. §18-3-301. The State may allege that the defendant seized and carried the victim. C.R.S. §18-3-301 (l)(a). The State may allege the defendant enticed or persuaded the victim to go from one place to another. C.RS. §18-3-301(l)(b). Further, the State may allege the defendant imprisoned or secreted the victim. C.R.S. §18-3-301(l)(c). Each of these alternatives are in themselves a separate and distinct crime. Each creates different elements and different factual and legal defenses. When the information charging felony murder lacks specificity as to the predicate crime, notice in regards to the complete basis for the felony murder is provided by the remaining counts. *People v.*

Palmer, 87 P.3d 137 (Colo. App. 2003); *People v. Auman*, 67 P.3d 741 (Colo. App. 2002)(rev'don other grounds 109 P.3d 647 (Colo. 2005)); *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

In *Palmer, supra*, the predicate crime to the felony murder was burglary. The felony murder count failed to specify the elements of burglary, including what crime the defendant had the intent to commit. In holding that the defendant suffered no prejudice, the Court of Appeals stated "[t]he elements of burglary, including the intent to commit felony menacing, were subsumed in the burglary count; thus, defendant was on notice of the complete basis for the felony murder charge." *Palmer*, 87 P.3d at 140. *Cf. Casadas v. People*, 304 P.2d 626 (Colo. 1956)("Where a count of an information in a criminal case identifies with particularity the exact section of the statute upon which a prosecution is based, as in the instant case, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution."). *See also Sawyer v. People,* 173 Colo. 351, 478 P.2d 672 (1970), as cited and quoted in *People v. Dowell,* 182 Colo. 11, 14, 510 P.2d 436, 437 (1973): "When an indictment or information specifically states, as it does here, that a particular statute has been violated, that statement becomes a material allegation."

Count 2 of the information charged Mr. Esquivel-Castillo with First Degree Kidnapping. Count 2 specifically alleged that Mr. Esquivel-Castillo seized and carried the victim and specifically referenced C.R.S. §18-3-301(1)(a). While a defendant may be prosecuted under different legal theories and factual elements, the defendant is entitled to notice of such intent by the State. See C.R.S. § 16-5-202: "Pleading in either the conjunctive or the disjunctive shall place a defendant on notice that the prosecution may rely on any or all of the alternatives alleged."

In Count 1, the State chose not to specify alternative allegations. In Count 2 (kidnapping) the State chose to specify exactly one alternative. C.RS. §18-3-301 (1)(a). At no time prior to comments made by the prosecutor in response to the pre-verdict motion for acquittal, did the State notify Mr. Esquivel-Castillo he was being prosecuted under alternate theories. By specifying in the information a particular manner in which he allegedly committed the crime of kidnapping in Count 2, he was put on notice that he only had to defend against that particular manner of committing the crime of kidnapping. He had no notice that he had to defend against separate legal and factual scenarios. To provide adequate notice, an information must apprise the defendant of the charge he faces by setting forth the

essential elements of the crime. *Howe v. People*, 178 Colo. 248, 253-55, 496 P.2d 1040, 1042-43 (1972).

The Court of Appeals conveniently ignores its decision in *Petschow*, *supra,* where it was faced with the same situation as here but reached the opposite result. In *Petschow*, the defendant was charged with aggravated motor vehicle theft, alleging that without permission he retained possession or control of a motor vehicle for more than 24 hours in violation of CRS §18-1-409(2)(a). Without objection, the jury was instructed that it could convict the defendant if it found he either retained possession or control of the motor vehicle for more than 24 hours without permission **or** if he used the vehicle in the commission of another crime in violation of CRS §18-4-409(2)(d). The Court of Appeals held that this constituted a constructive amendment:

> the instruction at issue here not only defined the offense stated in the charging document, but also incorporated an alternative element that defined an uncharged crime. The additional element pertains to a crime that arises under a separate subsection of the statute that criminalizes auto theft and requires factual findings related to actions, times, and places not encompassed in the original charges. The addition of this element occurred after all evidence had been received in the case. *See People v. Jefferson,* 934 P.2d 870 (Colo. App.1996). Thus, because the constructive amendments added an uncharged crime, they were not merely technical changes; they were substantive and prejudicial**.**

Petschow, 119 P.3d at 504.

Just as in *Petschow*, the felony murder instruction and verdict form allowed the jury to find that Mr. Esquivel-Castillo committed the crime in a manner for which he was not charged and therefore acted as a constructive amendment of the criminal complaint.

Neither *People v. Melillo*, 25 P.3d 769, 777 (Colo. 2001) nor *People v. Steiner*, 640 P.2d 250, 252 (Colo. App. 1981) require a different result as neither case is relevant to the issues before this Court.

1. *Melillo* concerned multiple acts all of which were contained in the charging document.

In *Melillo*, the defendant was charged with three counts of sexual abuse. The first count alleged that the defendant, when he was in a position of trust, sexually assaulted the victim when she was more than fifteen but less than eighteen and when he was in a position of trust; the second alleged that when he was in a posiition of trust, he assaulted the victim when she was less than fifteen; the third count alleged that as part of a pattern of abuse, he assaulted the victim between a specific time frame when the victim was less than fifteen. The jury acquitted the defendant of the first count, was unable to agree on the second count, and

convicted the defendant of the third count. The People then dismissed count two. The defendant argued that the acts of abuse in count three must have referred to the acts of abuse in counts one and two, and therefore he could not have been convicted of count three. The issue before the Court was whether count three must refer to the incidents contained in counts one and two or whether it could refer to other incidents. The Court conlcuded that because cout three did not specifically refer to couts one and two it did not incorporate them as the sole factual basis for the charge. Moreover, the victim testifed to numerous other acts of sexual abuse other than the ones specifically set forth in counts one and two, and the jury was further instructed that in order to find the defendant guilty of count three "they must unanimously agree either that the defendant committed the same individual act or acts or that he committed all of the acts described by the victim." *Melillo*, 25 P.3d at 779. Thus the defendant was clearly on notice that he had to defend not only against the two specifics acts alleged in counts one and two but also the acts covered by count three.

The facts of *Melillo* are quite different than the situation here where it is undisputed that the kidnapping alleged in count 2 is the same act alleged as the predicate felony in count 1. Because there was only one alleged kidnapping, logic

dictates that the singular act alleged in both counts was alleged to have occurred in the same manner. Because count 2 specifies the manner in which the alleged predicate crime occurred, the only assumption that could be made was that the people intend to prove that the defendant committed the crime of kidnapping by seizing and carrying the victim and in doing so caused the death of the victim. This is what Mr. Esquivel-Castillo defended against, and in fact was successful in defending against.

2. *Steiner* involved a deficient information.

Steiner is concerned with whether the People could overcome a deficient information, which failed to allege jurisdiction, by referring to the caption of the information. In other words, was the fact that the county's name appeared in the caption sufficient to overcome the failure of the People to allege in the body of the complaint where the crime occurred. The court held it did not. This has nothing to do with whether the defendant was apprised of the charges against him.

"A fair trial, as the United States Supreme Court has observed, is 'one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.' *Strickland v. Washington,* 466 U.S. 668, 685,(1984) (emphasis added)." *State v. Sanders,* 68

P.3d 434, 439 (Ariz. App. 2003). Failure to properly advise the defendant of the charges against him violates the sixth amendment requirement that a person receive reasonable notice of the charges against him. *See In re Oliver,* 333 U.S. 257, 273 (1948): "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense a right to his day in court are basic in our system of jurisprudence ."

This case is strikingly similar to *Kelly v. State,* 535 N.E.2d 140 (Ind.1989), where the defendant was specifically charged with confining a person without his consent, but the jury was instructed that it could convict the defendant if there was proof that he had removed the victim from one place to another by fraud, enticement, force, or threat of force. The court reversed the defendant's confinement conviction because it violated the defendants right to be apprised of the charges against him. *Kelly,* 535 N.E.2d at 142. *See also Sanders*, *supra*, where the Arizona Supreme Court held that the trial court's mid-trial amendment of the aggravated assault charge alleging defendant knowingly touched police officer with intent to injure, insult or provoke, to charge that defendant intentionally placed the officer in reasonable fear of imminent bodily harm, changed the nature of the

charge and constituted a constructive amendment that violated the defendant's sixth amendment right to notice of the charges against him.

For the jury to convict Mr. Esquivel-Castillo of felony murder, it had to find beyond a reasonable doubt that Mr. Esquivel-Castillo kidnapped the victim and the victim died during the kidnapping. Mr. Esquivel-Castillo sucessfully defended against the kidnapping that was charged, yet he was still convicted of the felony murder because the court allowed the jury to consider a different basis for the predicate felony of kidnapping. By increasing the basis for the conviction, the court construcively amended the charges against Mr. Esquivel-Castillo.

D. PREJUDICE

Regardless of whether the Court applies a *per se* reversal rule, or applies a plain error standard of review, the same result occurs. Error is plain when it is "obvious and substantial" and "undermines the fundamental fairness of the trial itself" to such a degree that it "cast[s] serious doubt on the reliability of the judgment of conviction." *Miller*, 113 P.3d at 750, *citing People v. Stewart*, 55 P.3d 107, 119 (Colo.2002); *People v. Sepulveda,* 65 P.3d 1002, 1006 (Colo. 2003); *People v. Garcia,* 28 P.3d 340, 344 (Colo. 2001). If the jury was required to find that the kidnapping that formed the basis for the felony murder conviction (and was

the same act alleged in the separate count) was committed in the way it was alleged in count 2, because it acquitted Mr. Esquivel-Castillo of kidnapping the victim, it would have also found that there was insufficient evidence to sustain a conviction for felony murder based on the predicate crime of kidnapping. The erroneous instruction casts serious doubts upon the reliability of the felony murder conviction, undermined the fundamental fairness of the trial, and is obvious and substantial. Thus under either standard of review (*per se* reversal or plain error) Mr. Esquivel-Castillo is entitled to relief.

CONCLUSION

The jury instructions on felony murder, which expanded the method of the predicate crime of kidnapping beyond the method identified in the substantive kidnapping charge constituted a constructive amendment of the felony murder charge. Because the jury acquitted Mr. Esquivel-Castillo of kidnapping the victim in the manner prescrbed by the substantive count, under either standard of review reversal is required. Because the jur acquitted Mr. Esquivel-Castill of the predicate crime, the proper remedy in this case is to vacate the felony murder conviction, and impose the conviction for second degree murder.

Respectfully submitted this 29th day of September, 2014.

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CERTIFICATE OF MAILING

I certify that on the 29th day of September, 2014 I served via ICCES , the foregoing Opening Brief to:

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