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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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REPLY 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 2083 words.

\s\ Eric A. Samler

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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.

Preservation/Standard of Review:

The People's plain error/preserved error analysis is misplaced and misguided. Colorado courts have repeatedly held that a constructive amendment of the charges is reversible *per se.* *See People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996); *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010); *People ex rel. H.W., III,* 226 P.3d 1134, 1137 (Colo. App. 2009); *People v. Rice*, 198 P.3d 1241, 1245 (Colo. App. 2008); *People v. Huynh,* 98 P.3d 907 (Colo. App.2004); *People v. Carlson,* 72 P.3d 411 (Colo. App. 2003); *People v. Pahl,* 169 P.3d 169, 177 (Colo. App. 2006); *People v. Foster,* 971 P.2d 1082, 1087 (Colo. App. 1998). Thus the only question this Court has to answer is whether the jury instruction acted as a constructive amendment. If the Court finds that the jury instruction acted as a constructive amendment, then the conviction for felony murder must be reversed.

Even if Colorado courts did not consistently hold that a constructive amendment is reversible *per se* and Mr. Esquivel-Castillo is required to

demonstrate prejudice, he was clearly prejudiced. The People presume that the question is whether Mr. Esquivel-Castillo was on notice that, to prevail on the felony murder charge, he had to defend against all possible manners of kidnapping. They then conclude that, even if he had notice, the result would not have been different because his defense was that there was not a kidnapping and therefore his defense strategy would not have changed. This is not, however the proper analysis.

The question this Court must both ask and answer is whether there is a reasonable probability that the result would have been different had the jury been properly instructed that in order to find Mr. Esquivel-Castillo guilty of felony murder, it must first find that he committed first-degree or second-degree kidnapping, seize and carry. When this question is asked, the answer is obvious. Because the jury acquitted Mr. Esquivel-Castillo of first-degree kidnapping (seize and carry) and second-degree kidnapping (seize and carry), then the jury would have necessarily acquitted him of felony murder as well. Thus even under a standard of review that requires a showing of prejudice, reversal is required.

The People "distinguish" *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), rev'd on other grounds 109 P.3d 647 (Colo. 2005) by claiming that it does not address the precise issue on which this Court granted *certiorari*. Therefore, the

People seem to conclude that the case provides no guidance for the issue before this court. Mr. Esquivel-Castillo agrees that the Court of Appeals' *Auman* decision does not precisely answer the question before this Court. Undoubtedly this Court granted *certiorari* on the precise issue before it because the issue has yet to be decided by a Colorado court. However, that does not mean that the reasoning of the *Auman* Court does not provide some guidance.

As the People acknowledge, in *Auman,* the Court of Appeals held that the defendant was on notice regarding the specifics of the predicate felony being charged by virtue of the two separate burglary counts for which she was charged. Even though the underlying question here arises in a different context, the question remains the same: when a defendant is charged with felony murder, and the predicate felony can be committed in several different ways, and the defendant is charged separately with the predicate felony, can the defendant rely upon the specifics of the separately-charged predicate felony in defending against the compound felony. Clearly in *Auman*, the answer was *yes*.

The Court of Appeals reached the same conclusion in *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003) and *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

In *Palmer, supra,* the defendant claimed that because the predicate felony of burglary in the felony murder count was stated in general terms and did not specify the manner in which the burglary was committed, he was not sufficiently informed of what he had to defend against. In rejecting that claim, the Court held :

> The information did not omit the predicate crime, but rather stated that the underlying offense was burglary. *See People v. Williams*,984 P.2d 56 (Colo.1999) (defect in form where no underlying crime was specified). Defendant also has shown no prejudice. The elements of burglary, including the intent to commit felony menacing, were specified in the burglary count; thus, defendant was on notice of the complete basis for felony murder.

Palmer, 87 P.3d 137, 139 (Colo. App. 2003).

The People's attempt to distinguish these cases by claiming that they concern only "whether the defendants were prejudiced" -- i.e. whether they were on notice of the charges against which they needed to defend -- but have nothing to do with whether those other counts (which provide notice to the defendant of what charges he needs to defend against) "limit or inform what the defendants were charged with under the charge the defendants were challenging." Under the People's argument, the Information provides proper notice when it charges the predicate felony in general terms as long as the defendant is separately charged with the predicate felony, and those separate charges are sufficiently detailed. Therefore a defendant

cannot claim under such circumstances that he was not put on notice as to what charges he would have to defend against.

However, because the compound felony count does not specify the manner in which the predicate felony was committed, those separate counts have no bearing on what the defendant will need to defend against at trial as the People are not bound by those specific details when the case goes to the jury. Therefore the jury can be instructed that they can convict the defendant on the compound felony by relying on a different method of proving the predicate felony than those specified in the separate counts. This is the ultimate "heads I win, tails you lose" argument.

The People's attempt to distinguish *People v. Petschow*, 119 P.3d 495, 503 (Colo. App. 2004) falls short. The People argue that because the felony murder count listed kidnapping but did not specify the manner in which the crime was to be committed, Mr. Esquivel-Castillo would necessarily have to defend against all manners of committing kidnapping even though he was charged with committing kidnapping in only a specific way. The People's argument relies upon their theory that the kidnapping count is irrelevant to the felony murder count, and that instead Mr. Esquivel-Castillo should have looked solely to the felony murder count. This, of course, is contrary to this Court's rationale in *Auman*, and the Court of Appeals'

rationale in *Palmer* and *Richardson*, that all deny defendant's claim that he was not on proper notice of the precise contours of the predicate felony by instructing the defendant to look at the other counts.

The People's contention that this Court's decision in *People v. Melillo*, 25 P.3d 769 (Colo. 2001) definitively answers the question before this Court in their favor is incorrect. In *Melillo*, the defendant claimed that the acts serving as the basis for the charge in Count Three must be the same acts serving as the basis for Count 1. The Court concluded that Count 1 did not necessarily refer to the same incidents as did Count Three, and that further, the defendant was on sufficient notice of this fact.

Similarly in *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981), the issue was whether the failure of the People to specify the location of the alleged crime in some of the counts can be overcome by referring to the location of other alleged crimes or by the caption of the pleading itself. In *Steiner*, the Court of Appeals concluded that the failure to allege the location of the crime results in a jurisdictional defect that cannot be overcome by reference to other counts or to the caption of the pleading.

The situation here is different, not just factually as the People claim, but also conceptually and legally. At issue here was whether, when a defendant is charged with a crime that is depedendent upon a finding that he committed a predicate crime, and he is also charged separately with that same predicate crime, the People must prove that the predicate crime occurred in the manner in which they alleged in the separate count. Unlike *Melillo*, where there were separate sexual assaults, or in *Steiner*, where there were separate drug transactions, here there was but one alleged kidnapping, and the felony murder conviction stands or falls on a finding by the jury that Mr. Esquivel-Castillo committed that kidnapping.

It is black-letter law in Colorado that "a defendant cannot be convicted of both felony murder and of the underlying causal felony because proof of the felony murder necessarily includes the very same elements required for the underlying felony." *People v. Rodriguez,* 914 P.2d 230, 286 (Colo. 1996), citing *Callis v. People,* 692 P.2d 1045, 1054–55 (Colo.1984); *People v. Bartowsheski,* 661 P.2d 235, 245–47 (Colo.1983). *See also People v. McCormick*, 881 P.2d 423, 428 (Colo. App. 1994):

> Defendant cannot be simultaneously convicted of kidnapping and felony murder because kidnapping was the predicate felony for the

> felony murder charge and conviction for this lesser-included offense is precluded under § 18–1–408(1), C.R.S. (1986 Repl.Vol. 8B).

One offense is a lesser included of another if "the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser." *People v. Rivera*, 186 Colo. 24, 26, 525 P.2d 431, 433 (1974). The question is not, as the People pose (nor as the Court of Appeals poses) whether Count 2 is "incorporated by inference" into Count 1 but rather whether it is included in Count 1. We know this is so because in order to prove Count 1 they must also establish all of the elements of the lesser Count 2. Thus the elements of the predicate felony and the elements of the substantive felony must be the same -- otherwise, it would not be a lesser included offense. The elements of Count 2 are that Mr. Esquivel-Castillo:

1) knowingly

2) Forcibly seized and carried (JF) from one place to another

3) With intent to force to make a concession or give up something of value

4) In order to secure [her] release

Instruction 24 CF p. 508. Thus the elements of the felony murder Count 1 necessarily include the above elements. Thus unlike *Melillo* and *Steiner,* the

question here is not whether Count 1 (the felony murder count) incorporates Count 2 (the predicate crime count). There can be no dispute that the predicate felony relied upon in Count 1 (kidnapping) was the same act as set forth as the substantive felony charged in Count 2 and did not refer to some other kidnapping. The question is whether the elements of the predicate felony and the substantive felony are the same. Clearly they are.

The People are bound by their choices: the People specifically limited the manner in which Mr. Esquivel-Castillo was alleged to have committed the same crime listed as both the predicate crime and the substantive crime, and then opposed a bill of particulars and claimed that Mr. Esquivel-Castillo was fully apprised of the charges against him both through the complaint and the discovery provided. See CF p. 374(motion for Bill of Particulars), CF p. 410 (People's objection to Motion for Bill of Particulars), and R.Tr. 2/25/09 p. 97 (ll. 16-17) (court's ruling denying the motion for a bill of particulars). More importantly, due process and fair notice requires that Mr. Esquivel-Castillo be able to rely upon the choices made by the People as to how they are prosecuting the case.

CONCLUSION

For the reasons set forth above as well as those set forth in the Opening Brief, this Court should hold that the jury instruction acted as a constructive amendment to the felony murder charge and thus the conviction for that offense cannot stand. The court should further hold that because Mr. Esquivel-Castillo was acquitted of the substantive (and predicate) felony, double jeopardy prevents him from being retried for the felony murder charge and thus a judgment of acquittal must be entered on that count.

Respectfully submitted this 5th day of January, 2015.

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CERTIFICATE OF MAILING

I certify that on the 5th day of January, 2015 I served via ICCES, the foregoing Reply Brief to:

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