IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-2247

STATE OF FLORIDA,

Petitioner,

-vs-

DAVID DWAYNE BROWN,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
Of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

HOWARD K. BLUMBERG
Assistant Public Defender

Counsel for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-2247

STATE OF FLORIDA,

Petitioner,

-vs-

DAVID DWAYNE BROWN,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

INTRODUCTION

Respondent, David Dwayne Brown, was the appellant in the district court of appeal and the defendant in the circuit court. Petitioner, State of Florida, was the appellee in the district court of appeal, and the prosecution in the circuit court. In this brief, the symbol "R" designates the record on appeal, the symbol “TR” designates the transcripts of the trial proceedings which began on May 3, 2004, and the symbol “T” designates the transcripts of the trial proceedings which began on June 1, 2004.

STATEMENT OF THE CASE AND FACTS

On August 15, 2003, the State filed an information charging David Dwayne Brown with two counts of second degree murder, one count of attempted first degree murder, one count of possession of a firearm by a violent career criminal, and one count of use of a firearm in the commission of a felony (R. 29-35). On September 24, 2003, an indictment was filed charging Brown with two counts of first degree felony murder, one count of attempted first degree murder, one count of possession of a firearm by a violent career criminal, and one count of use of a firearm in the commission of a felony (R. 37-42). An amended indictment was filed on November 25, 2003 (R. 43-47). In that amended indictment, the two counts of first degree felony murder and the one count of attempted first degree murder alleged that the offenses were committed by David Dwayne Brown and Collies Jasper Robinson (R. 43-44).

Pretrial Proceedings

A speedy trial demand was filed on March 22, 2004 (R. 595-596). At the request of the prosecutor, the court set the case for trial on April 26, 2004 (TR. 523, 525). The judge subsequently delayed the start of the trial until May 3rd, when jury selection commenced (R. 474; TR. 1, 84). After eight days of jury selection without seating a jury, the State offered to waive the death penalty if the defense agreed to abort the jury selection proceedings and start a new jury

selection process with a new panel of prospective jurors (TR. 884). At that point, 23 jurors had been tentatively selected pending further questioning (R. 230-231, 268-269, 272-273). Mr. Brown told the judge that he refused to waive his speedy trial rights or his right to continue with the panel of jurors tentatively selected just because the State decided to change its position concerning the death penalty (TR. 885-887). When the judge ruled that if the State waived the death penalty, the panel of tentatively selected jurors would be dismissed, and jury selection would begin anew with a new panel of prospective jurors on the following Monday, May 17th, defense counsel advised the court that Mr. Brown was not waiving his speedy trial rights (TR. 887-889). The judge told Mr. Brown that he had not waived any speedy trial rights he might have (TR. 891). At the end of the hearing, the State announced that it was waiving the death penalty (TR. 891).

On May 17th, jury selection began with a new panel of prospective jurors (TR. 905). At the outset of the proceedings on May 20, 2004, the fourth day of the second jury selection proceedings and the twelfth total day of the jury selection proceedings, the prosecutor told the trial judge "with a certain sense of shame" that he had just realized for the first time that the indictment filed in the case did not charge the defendant with first degree premeditated murder (TR. 1382-1383). At that point in the jury selection proceedings, 19 prospective jurors had been tentatively selected (R. 279-280; TR. 1224). The State proposed that the judge

dismiss the panel of tentatively selected jurors and begin a new jury selection proceeding with a new panel of prospective jurors after the State had obtained a new indictment from the grand jury (TR. 1390-1391). Defense counsel objected to the court taking any such action (TR. 1390-1391). The judge then dismissed the panel of potential jurors and scheduled new jury selection proceedings for the following week (TR. 1399-1400). At a hearing later that same day, defense counsel argued that the speedy trial period which commenced when the speedy trial demand was filed was still running because all the delays in the jury selection proceedings had been caused by the State (TR. 1401-1402).

At a hearing on May 25th, the prosecutor moved to strike the notice of expiration of speedy trial period filed by the defense, based on the commencement of jury selection proceedings in the case (R. 579). Defense counsel argued that because those jury selection proceedings had been aborted due to actions by the State (the State's decision to no longer seek the death penalty and the State's realization that it needed to seek a new indictment charging first degree premeditated murder), the speedy trial period which commenced with the filing of the demand for speedy trial continued to run notwithstanding the aborted jury selection proceedings (R. 579-581, 583-585). The defense noted that Mr. Brown had consistently maintained his speedy trial rights from the time that the demand was filed, and moved for a dismissal based on the State's filing of the new

indictment (R. 585, 587-590). The judge responded, "I understand your position" and stated that after the new indictment was filed, new jury selections proceedings would begin within ten days (R. 590). A new indictment was then filed, charging David Dwayne Brown with two counts of first degree premeditated murder and first degree felony murder, one count of attempted first degree murder, one count of possession of a firearm by a violent career criminal, and one count of use of a firearm in the commission of a felony (R. 53-57).

Brown was arraigned on the new indictment at a hearing on May 27, 2004 (R. 571-576). He stood mute to the charges in the new indictment and the court entered a plea of not guilty on his behalf (R. 573-574). Brown then renewed his objections to being tried on the newly filed indictment (R. 575). The court ruled that trial on the new indictment would begin the following week (R. 575).

On June 1, 2004, trial commenced on the charges in the new indictment filed May 25, 2004 (T. 1). At the outset of the trial, the defense renewed its previously stated objection to being tried on the newly filed indictment (T. 4-5). The judge overruled the objection, and told Brown, "The Appellate Court can tell me if I am wrong." (T. 5-6). Jury selection proceedings then commenced, and a jury was selected in one day (T. 11-268).

The Evidence at Trial

The evidence presented at the trial by the State established the following. On the night of July 20, 2003, a party was held at a house in the area of Northwest 50th Street and 20th Avenue in Miami (T. 329, 393). Edward Leon Bernard, also known as "Leon", lived at that house, and drugs were being sold from the house around the time of the party (T. 499, 512). The party on the night of July 20th was a "drinking party" and the people at the party were smoking marijuana and using cocaine (T. 329). The only eyewitness testimony at trial concerning the events on the night of July 20th came from three men who were at the party that night: Ramlah Aquamina, Nathan Mathis, and Lorenzo Evans (T. 324-392, 497-542, 799-834). Aquamina had thirteen prior felony convictions at the time of his trial testimony (T. 360, 417). Mathis had two prior felony convictions at the time of his testimony (T. 535). Evans had been convicted of a felony at least three times (T. 823-824). All three of these men admitted at trial that they had been smoking marijuana at the party that night, and Mathis and Evans admitted they had been drinking alcohol as well (T. 329, 506, 801-802). The three men gave varying accounts of what happened that night.

Mathis testified that David Brown came to the party twice that night (T. 504). On Brown's first visit to the house, Mathis saw him talking to Leon and Eric Williams, who was also known as "E" (T. 504-507). Mathis claimed that he

overheard Brown repeatedly say, "[D]on't play with my money" to Leon and Williams (T. 507). According to Mathis, Leon and Williams did not say anything in response to Brown, and Brown got back in his car and left the party (T. 507-508). Brown did not appear to be upset when he left (T. 507-508).

Brown returned to the party sometime after midnight (T. 508-509). He parked his car on the street in front of the house (T. 336). Six people were present at the party when Brown returned (T. 336). Seated at a table playing cards were Mathis, Leon, Williams and Lorenzo Evans (T. 513, 804). Ramlah Aquamina was sitting off to the side smoking marijuana (T. 501, 514). A man named Wade was standing behind Williams (T. 514-515). According to Mathis, prior to the time that Brown returned to the party Williams had retrieved an AK-47 assault rifle from inside the house and placed it against a wall outside the house (T. 509-512). This assault rifle was used to protect against robberies committed by persons who came to the house to buy drugs (T. 512).

Aquamina testified at trial that he never saw any weapons at the house prior to Brown's arrival (T. 337-338). He was sitting in the yard outside the house when he saw Brown park his car in front of the house and walk into the yard (T. 333-336). Aquamina claimed that the first time he saw a gun that night was when he saw Brown, Williams and Bernard wrestling to gain control of a gun (T. 338-339). Upon seeing that struggle, Aquamina ran to the yard of the next-door neighbor (T.

339). Before he ran, Aquamina heard shots fired and he heard a man who had been standing by himself screaming that he had been shot (T. 339-341). Aquamina saw that the man was bleeding (T. 341). When things quieted down, Aquamina drove off in Williams' car to call for help (T. 342-344). He then drove back to the house where he directed a nearby police officer to the scene of the shooting (T. 344-345). He gave the police a false name because he had a warrant out for his arrest for possession of cocaine (T. 359-360). Aquamina later identified a photograph of Brown as the man he had seen struggling with Williams and Bernard (T. 345-346). Aquamina testified at trial that police officers told him to pick out that photograph (TR. 390).

Mathis testified at trial that while he was seated at the table playing cards, he saw David Brown drive up to the side of the house and get out of his car (T. 517-518). Brown walked up to the table and just stood there for a short period of time (T. 516-518). He then reached for the AK-47 and picked it up (T. 518). Brown tried to "click" the gun, but he did not point the gun at anyone (T. 519). The gun was pointed down at all times (T. 541-542). Williams and Bernard ran at Brown, and everyone else ran away (T. 518-519). Williams and Bernard jumped on Brown and fought with him (T. 529-530). Mathis ran to an area in back of a house, and then jumped on top of a roof (T. 520-522). As he ran away, Mathis heard six or seven shots fired (T. 522). Mathis kept his head down once he was on

the roof (T. 523). When he looked up for the first time he saw Bernard's body covered in blood (T. 524). When he looked up again a short time later he saw someone driving away in Williams' car (T. 524). Mathis never saw Brown's car leave the area (T. 525).

Evans testified that he first noticed Brown when Brown walked through the gate toward the table where the men were playing cards (T. 806-807). Evans saw Brown reach and grab for the AK-47, and then wave the gun at everyone sitting at the card table (T. 807-808). Williams and Bernard jumped up and grabbed for the gun, and Evans ran away (T. 808). After unsuccessfully trying to jump over a fence to get away, Evans went behind a nearby building (T. 809-810). Evans heard a few shots fired as he tried to run away (T. 810). When he looked back at the scene from that location, he saw Brown struggling with Williams and Bernard over the gun (T. 810-812). Evans heard the sound of someone unsuccessfully trying to shoot a gun, and then he heard several shots fired (T. 812). Evans then ran off and jumped over a gate to get away (T. 812-813). He did not return to the scene that night (T. 813). He did not know who was shot or where Brown went (T. 813).

When police officers arrived on the scene, they found the bodies of Edward Bernard and Eric Williams (T. 397-399). A man who identified himself as Lawrence Wade told an officer that he had been shot and pointed to the area where

the shooting had occurred (T. 418-419). The man said he had been shot in the back and the officer saw that the man had multiple pellet shots in his back (T. 419).

It was subsequently determined that Edward Bernard had died as the result of a single shotgun wound to the chest (T. 577-578). The shot had been fired from a maximum distance of four feet (T. 582-583). Eric Williams had died as the result of multiple gunshot wounds consistent with having been caused by a high-powered rifle such as an AK-47 (T. 587-588, 595-596, 669-670). One of these gunshots was to the head and would have been immediately fatal (T. 599). Another of the gunshots which was to the back would have physically incapacitated Williams (T. 600). None of the shots had been fired from close range (T. 610).

Crime scene investigators found three spent gunshot shells and three unfired shotgun shells at the scene (T. 430-431). All six shells had been cycled through the same shotgun (T. 659-660). No automatic weapon casings were found at the scene (T. 461-462, 545-546). A metal part from an AK-47 was found near the card table (T. 547, 662-663). A knife was found on the ground next to the right hand of one of the victims (T. 431, 444). Underneath a hat on the card table the investigators found plastic bags containing cocaine, marijuana, and cash (T. 431-433). A cap with Brown's DNA was found on the grass in the yard (T. 453-455, 641, 732-733). A blood-stained shirt was found on the next street over from the scene of the shooting (T. 484-486). A pattern of small holes in the area of the

blood stains on the shirt was consistent with having been caused by shotgun pellets (T. 585-586). A gunshot residue test performed on the hands of Aquamina Ramlah shortly after the shooting revealed the presence of gunshot residue on his hands (T. 455-456, 691). Similar tests conducted on the bodies of Williams and Bernard also revealed the presence of gunshot residue on their hands (T. 689-690).

Six days after the shooting, police officers pulled over a gold Honda with distinctive silver rims pursuant to a BOLO which had been issued by the police department (T. 561-563). The vehicle was being driven by David Brown, who immediately stopped the car and got out of the vehicle (T. 563). Brown gave the officers his name, and he was taken into custody (T. 563-564). The passenger in the car identified himself as Collies Robinson (T. 564). The officers did find any weapons inside the car (T. 564). A single .223 caliber bullet was found on the passenger seat (T. 564, 568). A .223 bullet can be fired from several different types of weapons, including an AK-47 (T. 644, 666). The bullet found on the passenger seat could not be matched to any particular firearm (T. 671-672).

The Jury Instructions and Closing Arguments

At the prosecutor's request, the jury was given the following modification of the standard jury instructions on the elements of first degree premeditated murder and attempted first degree murder:

I now instruct you on the circumstances that must be proven before the defendant may be found guilty of murder in the first degree or any lessor included crime and/or attempted first degree murder or any lessor included crime.

There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.

Before you can find the defendant guilty of first degree premeditated murder the state must prove the following three elements beyond a reasonable doubt. As to Count one, first Eric Williams is dead. Second, the death was caused by the criminal act of *the defendant or another person acting as a principal*. Third there is a premeditated killing of Eric Williams.

As to Count 2, Edward Leon Bernard is dead. Second, the death was caused by the criminal act of *the defendant or another person acting as a principal*. Third, there was a premeditated killing of Edward Leon Bernard.

* * * * *

Before you can find the defendant guilty of attempted first degree murder premeditated murder the state must prove the following three elements beyond a reasonable doubt.

First, *the defendant or another person acting as a principal* did some act intended to cause the death of Lawrence Wade that went beyond just thinking or talking about it.

Second, *defendant or another person acting as a principal* acted with a premeditated design to kill Laurence Wade.

Third, the act would have resulted in the death of Lawrence Wade except that someone prevented the defendant from killing Lawrence Wade or he failed to do so.

(T. 948-49)(emphasis added).

During his closing argument, the prosecutor told the jury that based on these instructions David Brown could be convicted based solely on the actions of another person acting as a principal:

> The Judge is going to read to you if the defendant helped another person or persons commit or attempt to commit a crime the defendant is a principal and must be treated as if he had done all of the things that the other person or persons did if – and then the Judge will give you circumstances which I am about to go through. *But that instruction can also be read backwards. It can also be read this way. If the other person helped the defendant commit or attempt to commit a crime the other person is a principal and must be treated as if he had, as if – the other person must be treated as a principal and must be treated as if he had done all the things that the other person or the defendant had done.*

(T. 902-03)(emphasis added).

The jury subsequently returned a verdict of guilty as charged of two counts of first degree murder, one count of attempted first degree murder, and one count of use or display of a firearm in the commission of a felony (R. 378-380; T. 966-967). Adjudications of guilt were entered pursuant to the jury's verdicts (R. 399; T. 969). The judge sentenced Brown to consecutive terms of life imprisonment for the two first degree murder convictions (R. 402-405). He imposed a concurrent term of life imprisonment with a life mandatory minimum imprisonment for the attempted murder conviction and a concurrent thirty-year term of imprisonment for the conviction of use or display of a firearm in the commission of a felony (R. 402-406).

The Decision of the Third District Court of Appeal

On appeal to the Third District Court of Appeal, the court first held that the trial court properly denied Brown's motion to dismiss under the speedy trial rule as to the charges of first degree premeditated murder filed after the expiration of the speedy trial time period. *Brown v. State*, 967 So. 2d 236, 236-38 (Fla. 3d DCA 2007). The district court of appeal recognized that Brown never waived his right to a speedy trial and that it was undisputed that the indictment which added the charges of premeditated murder was filed by the State after the speedy trial period had expired. *Id*. at 237. The court further recognized that if the charges of premeditated murder were new charges, then the amended indictment was time barred under this Court's decisions in *State v. Naveira*, 873 So.2d 300 (Fla.2004) and *State v. Williams*, 791 So.2d 1088 (Fla.2001). *Id*. However, the court concluded that the charges of first degree premeditated murder in the amended indictment were not "truly 'new' charges" because the previously filed indictments "stated that counts one and two against Brown were for first degree murder, and cited to section 782.04(1), Florida Statutes (2003), which section encompasses the specific element of premeditation." *Id*. The court found that "the new, post-speedy indictment did not charge a 'new' offense, rather, it merely more specifically elucidated the elements of the originally charged offense." *Id*. The court also found that the motion to dismiss under the speedy trial rule was properly

denied because "as the original indictment sufficiently apprised Brown of the premeditation element of the murder charges against him prior to expiration of the speedy trial period, there was no prejudice to him in proceeding under the May 25, 2004, indictment." *Id*. at 238.

Addressing the trial judge's modifications of the standard jury instructions by adding the phrase "the defendant or another person acting as a principal," the district court of appeal held that the trial judge's modifications of the standard jury instructions in this fashion constituted fundamental error as to one count of first degree murder and one count of attempted first degree murder:

> These instructions as modified by the trial court incorrectly implied that David Brown could be convicted of first degree premeditated murder and attempted first degree murder based solely on a finding that the criminal conduct of another person acting as a principal satisfied the elements of those offenses. As applied to Counts 2 and 3, we find this to be fundamental error.
>
> * * * * *
>
> As applied to Counts 2 and 3 of the indictment, however, we agree with Brown that the trial court committed fundamental error when it modified the standard jury instructions for first degree murder and attempted first degree murder by using language that allowed the jury to convict Brown based solely on the criminal conduct of another, where the evidence supporting those counts did not directly implicate Brown. The evidence showed that Wade and Bernard were shot with a shotgun, and Williams was killed with a rifle. The state's argument that Brown was a principal in the shotgun killings is based on an inference that Brown returned to the scene with a co-defendant who had the shotgun. With the modified instructions, all the jury had to do was conclude that the other man shot Wade and Bernard with the

> shotgun, and it could thereby convict Brown based on the criminal acts of another. As discussed above, this is error.

Id. at 238-39. However, the district court held that in the context of the particular facts of the case, the use of the phrase "the defendant or another person acting as a principal" in the jury instruction did not constitute fundamental error as to the remaining count of first degree murder:

> Although the court applied the erroneous language to the jury instructions for Count 1, the murder of Eric Williams, we conclude no fundamental error occurred in that instance. Eric Williams was shot by a rifle, and eyewitnesses saw Brown with the rifle. The State made no argument that the jury should attribute guilt to Brown where some other person may have participated in Eric William's shooting. The only claim was that Brown shot Williams, and for this reason we find no fundamental error as to the jury instructions for Count 1 of the indictment.

Id. at 239. The district court of appeal thus affirmed Brown's conviction and sentence for the murder of Eric Williams (Count 1), but reversed and remanded for a new trial on Counts 2 and 3 for the murder of Edward Leon Bernard and the attempted murder of Lawrence Wade. *Id*. at 239.

Both the State and Brown sought to invoke this Court's discretionary jurisdiction to review the decision of the Third District Court of Appeal. On December 19, 2007, this Court stayed the proceedings in the State's petition for discretionary review, Case No. SC07-2247, pending disposition of *Garzon v. State*, Case No. SC06-2235, and *Balthazar v. State*, Case No. SC06-2290, which were

pending in this Court. On May 22, 2008, this Court directed Brown to show cause why this Court should not accept jurisdiction in this case, summarily quash the decision being reviewed, and remand for reconsideration in light of this Court's decision in *Garzon v. State*, 980 So. 2d 1038 (Fla. 2008). After receiving Brown's response this Court, on September 10, 2008, accepted jurisdiction and dispensed with oral argument. On September 19, 2008, this Court declined to accept jurisdiction based on the petition for review filed by Brown in Case No. SC07-2321.

SUMMARY OF ARGUMENT

ISSUE I

The trial judge in this case modified the standard jury instructions to state that as to the charges of first degree murder and attempted first degree murder, David Brown could be found guilty based on his own acts or the acts of another person acting as a principal. This Court's decision in *Garzon v. State*, 980 So. 2d 1038 (Fla.2008), establishes that although it is error to use the phrase "and/or" between the names of defendants in jury instructions because of the danger that the jury might conclude that one defendant should be convicted based on the acts of the other defendant, the totality of the record must be examined to determine if the error rises to the level of fundamental error. In *Garzon*, this Court examined the totality of the record and held that the error did not rise to the level of fundamental error due to the presence in the case of a number of factors which served to make it highly unlikely that the erroneous use of "and/or" in the jury instructions would have led the jury to conclude that defendant Garzon should be convicted based on the acts of the other defendants in the case.

Examination of the totality of the record in this case reveals the absence of many of the factors which led to this Court's finding of no fundamental error in *Garzon*, and establishes a clear danger that the erroneous use of the phrase "the defendant or another person acting as a principal" in the jury instructions would

have led the jury to conclude that David Brown should be convicted based solely on the acts committed by another person present at the scene along with Brown. That being the case, the decision of the district court of appeal in this case finding that the erroneous modification of the standard jury instructions did constitute fundamental error as to some of the charges but not others is wholly consistent with this Court's decision in *Garzon*.

ISSUE II

Having accepted jurisdiction to hear the appeal in this case to resolve the alleged legal conflict on the jury instruction issue, this Court may, in its discretion, consider the speedy trial issue which has been properly raised and argued, even though the speedy trial issue is not the one on which jurisdiction is based. As the speedy trial issue goes to the very power of the court to try David Brown on the charges of first degree premeditated murder, and as the decision of the district court of appeal on that issue cannot be reconciled with speedy trial principles established by this Court and the district courts of appeal in Florida, Mr. Brown respectfully requests this Court to exercise its discretion and consider the speedy trial issue along with the jury instruction issue in this case.

The two charges of premeditated first degree murder in the indictment filed after the expiration of the speedy trial time period were new charges, and therefore

the trial court erred in denying the motions to dismiss those charges. The charges of first degree premeditated murder arose from the same facts and circumstances giving rise to the original charges, and those charges were filed after the expiration of the speedy trial period triggered by the defendant's demand for speedy trial. The indictment filed prior to the expiration of the speedy trial time period which charged the defendant with first degree felony murder without alleging premeditation did not charge the defendant with the crime of premeditated first degree murder, notwithstanding its citation to section 782.04(1), Florida Statutes in the indictment. As a result, the charges of premeditated first degree murder in the indictment filed after the expiration of the speedy trial time period did constitute new charges, and therefore the trial court erred in denying the defendant's motions to dismiss those new charges, and the district court of appeal improperly affirmed that denial.

ARGUMENT

I.

THE TOTALITY OF THE RECORD OF THE TRIAL IN THIS CASE ESTABLISHES THAT THE THIRD DISTRICT COURT OF APPEAL PROPERLY DETERMINED THAT AS TO ONE CHARGE OF FIRST DEGREE MURDER IT WAS NOT FUNDAMENTAL ERROR TO INSTRUCT THE JURY THAT IT COULD CONVICT BROWN BASED ON HIS OWN ACTS OR THE ACTS OF ANOTHER PERSON ACTING AS A PRINCIPAL, BUT THAT THE GIVING OF SUCH AN INSTRUCTION DID CONSTITUTE FUNDAMENTAL ERROR AS TO ANOTHER CHARGE OF FIRST DEGREE MURDER AND A CHARGE OF ATTEMPTED FIRST DEGREE MURDER.

In *Garzon v. State*, 980 So. 2d 1038 (Fla.2008), this Court held that the use of the phrase "and/or" between the names of defendants in jury instructions was error because of the danger that the jury might conclude that one defendant should be convicted based on the acts of the other defendant. However, this Court held that the use of "and/or" in the jury instructions did not constitute fundamental error based on the totality of the record at trial in the case. *Id*. at 1043-45. This Court disapproved the district court of appeal decisions in *Davis v. State*, 922 So.2d 279 (Fla. 1st DCA 2006), *Zeno v. State*, 910 So.2d 394 (Fla. 2d DCA 2005), and *Cabrera v. State*, 890 So.2d 506 (Fla. 2d DCA 2005), which held that the use of the "and/or" instructions was fundamental error, "to the extent that they are inconsistent with" this Court's opinion in *Garzon*. *Id*. at 1045.

An examination of the totality of the record in this case demonstrates the absence of many of the factors which led this Court in *Garzon* to conclude that the use of the "and/or" instructions was not fundamental error. Accordingly, the Third District Court of Appeal properly determined that as to one charge of first degree murder it was not fundamental error to instruct the jury that it could convict David Brown based on his own acts or the acts of another person acting as a principal, but that the giving of such an instruction did constitute fundamental error as to another charge of first degree murder and a charge of attempted first degree murder.

Garzon

In *Garzon,* defendants Zamir Garzon, Ray Balthazar and Charly Coles were all tried together before the same jury. *Id*. at 1039. All three defendants were charged with the same seven crimes. *Id*. The instructions given used "and/or" between the defendants' names for the seven counts. *Id*. at 1040. For example, in instructing the jury on the elements of armed burglary, the trial court stated:

> To prove the crime of armed burglary of a dwelling, as charged in Count Two of the information, the State must prove the following three elements beyond a reasonable doubt. Number one, Zamir Garzon *and/or* [Charly] Coles *and/or* Ray Balthazar entered or remained in a structure owned by or in the possession of Sandra Smith.
>
> Number two, Zamir Garzon *and/or* [Charly] Coles *and/or* Ray Balthazar did not have the permission or consent of Sandra Smith or anyone authorized to act for her to enter or remain in the structure at the time.
>
> Number three, at the time of entering or remaining in the structure, Zamir Garzon *and/or* [Charly] Coles *and/or* Ray Balthazar had a fully

> formed, conscious intent to commit the offense of grand theft and/or robbery in that structure.

Id. (emphasis in original). In addition to charging the jury on the substantive crimes, the trial court gave the following standard charge on principals:

> If the defendant helped another person or persons commit or attempt to 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 the defendant had a conscious intent that the criminal act be done and 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 or attempt to commit the crime. To be a principal, the defendant does not have to be present when the crime is committed or attempted.

Id. The trial court also gave a multiple defendants instruction, which read:

> A separate crime is charged against each defendant in each count of the information. 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 one or some of the defendants must not affect your verdict as to any other defendants or other crimes charged.

Id.

In its closing argument the State emphasized the proper application of the law of principals. *Id*. at 1044. Each jury verdict form was individualized to each defendant and did not use the "and/or" language. *Id*. On one of the counts, the jury found defendant Balthazar guilty but acquitted defendants Garzon and Coles. *Id*. at 1044-45.

Under these circumstances, this Court held that the use of "and/or" between the defendants' names was error, but not fundamental error. *Id*. at 1043-45. This Court found that giving the jury the standard charge on principals, in conjunction with the State's emphasis in its closing argument on the proper application of the law of principals, adequately communicated to the jury that it could not convict one defendant based on the other defendants' actions unless the requirements of the law of principals were met. *Id*. at 1044.

This Court further found that the multiple defendants instruction also served to lessen the chance that the jury would be misled by the "and/or" instruction:

> This instruction told the jury that separate counts were charged against each defendant and that "[a] finding of guilty or not guilty as to one or some of the defendants must not affect your verdict as to any other defendant or other crimes charged." This instruction clearly explained to the jury that its verdict as to one defendant should not affect its verdict as to another. It reinforced that the jury was to consider each defendant individually.

Id.

This Court also based its holding that the "and/or" instruction did not constitute fundamental error on the fact that the jury was given separate verdict forms for each of the three defendants:

> Further, the verdict forms focused on one defendant and one crime each. The jury therefore had before it individualized jury forms that further reinforced the individualized consideration each defendant was to receive. Working in tandem, the instructions and verdict forms strongly emphasized to the jury that each defendant was to receive an individualized consideration.

Id.

This Court found further support for its holding that the "and/or" instruction did not constitute fundamental error in the nature of the verdicts returned by the jury as to each of the three defendants:

> We also note, as the Fourth District set forth in its opinion, that if 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. Balthazar was convicted of extortion, but Coles and Garzon were not. 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. The Fourth District concluded 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*.

Id. at 1044-45.

<u>This Case</u>

Although the indictment in this case charged both defendants David Brown and Collies Robinson, Brown stood trial alone. The modified standard jury instructions given in this case as to the charges of first degree murder and attempted first degree murder did not, as in *Garzon*, simply insert the phrase "and/or" between the names of the defendants. The instructions given in this case stated that as to the charges of first degree murder and attempted first degree

murder, David Brown could be found guilty based on his own acts *or the acts of another person acting as a principal*:

> I now instruct you on the circumstances that must be proven before the defendant may be found guilty of murder in the first degree or any lessor included crime and/or attempted first degree murder or any lessor included crime.
>
> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.
>
> Before you can find the defendant guilty of first degree premeditated murder the state must prove the following three elements beyond a reasonable doubt. As to Count one, first Eric Williams is dead. Second, the death was caused by the criminal act of *the defendant or another person acting as a principal*. Third there is a premeditated killing of Eric Williams.
>
> As to Count 2, Edward Leon Bernard is dead. Second, the death was caused by the criminal act of *the defendant or another person acting as a principal*. Third, there was a premeditated killing of Edward Leon Bernard.
>
> * * * * *
>
> Before you can find the defendant guilty of attempted first degree murder premeditated murder the state must prove the following three elements beyond a reasonable doubt.
>
> First, *the defendant or another person acting as a principal* did some act intended to cause the death of Lawrence Wade that went beyond just thinking or talking about it.
>
> Second, *defendant or another person acting as a principal* acted with a premeditated design to kill Laurence Wade.
>
> Third, the act would have resulted in the death of Lawrence Wade except that someone prevented the defendant from killing Lawrence Wade or he failed to do so.

(T. 948-49)(emphasis added).

Thus, while in *Garzon* there was a possibility that the jury might infer from the "and/or" instruction that the defendant could be convicted based on the acts of the other defendants in the case, the jury in this case was specifically instructed that David Brown could be convicted based on either his own acts or the acts of some other person acting as a principal.

In this case, as in *Garzon*, the trial court gave the standard charge on principals. However, unlike *Garzon*, the State in its closing argument did not emphasize the proper application of that instruction. Rather, the State in its closing argument perpetuated the trial court's erroneous modification of the standard jury instructions on the elements of the charged offenses of first degree murder and attempted first degree murder by telling the jury that the principals instruction could be read in a manner consistent with the trial court's erroneous insertion of the phrase "the defendant or another person acting as a principal" in the standard instructions:

> The Judge is going to read to you if the defendant helped another person or persons commit or attempt to commit a crime the defendant is a principal and must be treated as if he had done all of the things that the other person or persons did if – and then the Judge will give you circumstances which I am about to go through. *But that instruction can also be read backwards. It can also be read this way. If the other person helped the defendant commit or attempt to commit a crime the other person is a principal and must be treated as if he had, as if – the other person must be treated as a principal and must*

> *be treated as if he had done all the things that the other person or the defendant had done.*

(T. 902-03)(emphasis added). Thus, a critical factor in this Court's finding of no fundamental error in *Garzon* --- the State's emphasis in closing argument on the proper application of the principals instruction notwithstanding the improper insertion of "and/or" in the instructions --- is not present in this case.

Because David Brown was not tried with the other defendant in the case, the trial court did not give the multiple defendants instruction. Thus, unlike *Garzon*, the jury in this case was not given a separate instruction which "reinforced that the jury was to consider each defendant individually." *Id*. at 1044. Because David Brown was not tried with the other defendant in the case, the jury was not given separate verdict forms for each of the defendants. Thus, unlike *Garzon*, the verdict forms in this case did not "further reinforce[] the individualized consideration each defendant was to receive." *Id*. Accordingly, it cannot be said in this case, as this Court said in *Garzon*, that "[w]orking in tandem, the instructions and verdict forms strongly emphasized to the jury that each defendant was to receive an individualized consideration." *Id*. Finally, the jury in this case found David Brown guilty as charged on all counts. Thus, unlike *Garzon*, nothing in the verdicts returned by the jury in this case demonstrated that the jury followed the law on principals and was not misled by the erroneous instructions given by the trial court.

The nature of the evidence in *Garzon* is also significantly different from the nature of the evidence in this case. In *Garzon*, there was no evidence that Garzon was ever at the scene of the crime and the State's entire case against Garzon was based on the theory that he directed the home invasion by his cell phone conversation with defendant Balthazar. *Id*. at 1039. As noted by the Fourth District Court of Appeal in its decision in the case, "It is a stretch for the average juror to believe that someone not present at the scene of a crime is as culpable as the defendant who actually committed the criminal acts." *Garzon v. State*, 939 So. 2d 278, 285 (Fla. 4th DCA 2006). Thus, the State's entire case against Garzon as to all the charges against him was based on the law of principals.

In this case, the State presented evidence at trial that David Brown was present at the scene of the two murders and the attempted murder. The State's case was based on a combination of the theory that Brown personally committed the offenses and the theory that Brown acted as a principal in the commission of the offenses. Thus, it would not be a stretch for the average juror in the present case to believe that David Brown was just as culpable as the defendant who actually committed the criminal acts because Brown was present at the scene at the time the criminal acts were committed.

In its decision in this case, the Third District did not simply find *per se* fundamental error because the jury was instructed that David Brown could be

convicted of the two counts of first degree murder and one count of attempted murder based on his own acts or the acts of another person acting as a principal. The Third District carefully examined the totality of the record and determined that the improper modification of the standard jury instructions did constitute fundamental error as to the charge of first degree murder of Edward Leon Bernard and attempted first degree murder of Lawrence Wade:

> These instructions as modified by the trial court incorrectly implied that David Brown could be convicted of first degree premeditated murder and attempted first degree murder based solely on a finding that the criminal conduct of another person acting as a principal satisfied the elements of those offenses. As applied to Counts 2 and 3, we find this to be fundamental error.
>
> * * * * *
>
> As applied to Counts 2 and 3 of the indictment, however, we agree with Brown that the trial court committed fundamental error when it modified the standard jury instructions for first degree murder and attempted first degree murder by using language that allowed the jury to convict Brown based solely on the criminal conduct of another, where the evidence supporting those counts did not directly implicate Brown. The evidence showed that Wade and Bernard were shot with a shotgun, and Williams was killed with a rifle. The state's argument that Brown was a principal in the shotgun killings is based on an inference that Brown returned to the scene with a co-defendant who had the shotgun. With the modified instructions, all the jury had to do was conclude that the other man shot Wade and Bernard with the shotgun, and it could thereby convict Brown based on the criminal acts of another. As discussed above, this is error.

Brown, 967 So. 2d at 238-39. However, the district court held that in the context of the particular facts of the case, the use of the phrase "the defendant or another

person acting as a principal" in the jury instruction did not constitute fundamental error as to the remaining count of first degree murder:

> Although the court applied the erroneous language to the jury instructions for Count 1, the murder of Eric Williams, we conclude no fundamental error occurred in that instance. Eric Williams was shot by a rifle, and eyewitnesses saw Brown with the rifle. The State made no argument that the jury should attribute guilt to Brown where some other person may have participated in Eric William's shooting. The only claim was that Brown shot Williams, and for this reason we find no fundamental error as to the jury instructions for Count 1 of the indictment.

Id. at 239. The district court of appeal thus affirmed Brown's conviction and sentence for the murder of Eric Williams (Count 1), but reversed and remanded for a new trial on Counts 2 and 3 for the murder of Edward Leon Bernard and the attempted murder of Lawrence Wade. *Id*. at 239.

This Court's decision in *Garzon* establishes that although it is error to use the phrase "and/or" between the names of defendants in jury instructions because of the danger that the jury might conclude that one defendant should be convicted based on the acts of the other defendant, the totality of the record must be examined to determine if the error rises to the level of fundamental error. In *Garzon* this Court examined the totality of the record and held that the error did not rise to the level of fundamental error due to the presence in the case of a number of factors which served to make it highly unlikely that the erroneous use of "and/or" in the jury instructions would have led the jury to conclude that defendant Garzon

should be convicted based on the acts of the other defendants in the case. Examination of the totality of the record in this case reveals the absence of many of the factors which led to this Court's finding of no fundamental error in *Garzon*, and establishes a clear danger that the erroneous use of the phrase "the defendant or another person acting as a principal" in the jury instructions would have led the jury to conclude that David Brown should be convicted based solely on the acts committed by another person present at the scene along with Brown. That being the case, the decision of the district court of appeal in this case finding that the erroneous modification of the standard jury instructions did constitute fundamental error as to some of the charges but not others is wholly consistent with this Court's decision in *Garzon*.

II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO DISMISS THE NEW CHARGES OF PREMEDITATED FIRST DEGREE MURDER WHERE THOSE CHARGES WERE NOT FILED UNTIL AFTER THE SPEEDY TRIAL TIME PERIOD HAD EXPIRED FOR THE CHARGES.

A.

THIS COURT HAS JURISDICTION TO CONSIDER THE SPEEDY TRIAL ISSUE IN THIS CASE.

Once this Court accepts jurisdiction to hear an appeal to resolve alleged legal conflict, it may, in its discretion, consider other issues properly raised and argued, although other issues are not the ones on which jurisdiction is based. *Price v. State*, 33 Fla. L. Weekly S821 (Fla. Oct. 8, 2008); *Savoie v. State*, 422 So. 2d 308, 310 (Fla.1982).

This Court has accepted jurisdiction to hear the appeal in this case based on an alleged conflict between the decision of the district court of appeal and the decision in *Garzon* on the jury instruction issue addressed in Issue I. In both the trial court and the district court of appeal, David Brown raised and argued the issue that he was entitled to a dismissal of the charges of premeditated first degree murder based on the State's violation of the speedy trial rule. *See Brown*, 967 So. 2d at 236-38. Brown sought discretionary review of this issue in Case No. SC07-2321, and this Court declined to accept jurisdiction of the appeal based solely on

that issue. However, now that this Court has accepted jurisdiction to hear the appeal in this case to resolve the alleged legal conflict on the jury instruction issue, it may, in its discretion, consider the speedy trial issue which has been properly raised and argued, even though the speedy trial issue is not the one on which jurisdiction is based. *Price*; *Savoie*. As the speedy trial issue goes to the very power of the court to try David Brown on the charges of first degree premeditated murder, and as the decision of the district court of appeal on that issue cannot be reconciled with speedy trial principles established by this Court and the district courts of appeal in Florida, Mr. Brown respectfully requests this Court to exercise its discretion and consider the speedy trial issue along with the jury instruction issue in this case.

B.

THE CHARGES OF PREMEDITATED FIRST DEGREE MURDER IN THE INDICTMENT FILED AFTER THE EXPIRATION OF THE SPEEDY TRIAL PERIOD WERE NEW CHARGES AS THE PREVIOUSLY FILED INDICTMENT WHICH CHARGED THE DEFENDANT WITH FIRST DEGREE FELONY MURDER WITHOUT ALLEGING PREMEDITATION DID NOT CHARGE THE DEFENDANT WITH THE OFFENSE OF PREMEDITATED FIRST DEGREE MURDER.

The State cannot wait until after the speedy trial period to charge a defendant. *State v. Naveira*, 873 So.2d 300 (Fla.2004); *State v. Williams*, 791 So.2d 1088 (Fla.2001). The speedy trial time "continues to run even if the State

does not act until after the expiration of that speedy trial period. The State may not file charges based on the same conduct after the speedy trial period has expired." *Williams*, 791 So.2d at 1091. "Essentially, then, the speedy trial deadline also acts as the deadline for charging the defendant." *Naveira*, 873 So.2d at 305.

These principles apply with equal force to amended informations and indictments. The speedy trial time period for all crimes arising out of the same criminal conduct or episode commences on the date the defendant is taken into custody, even for crimes not charged in the information or indictment. *Reed v. State*, 649 So.2d 227 (Fla.1995). Accordingly, if an amended information or indictment is filed after the speedy trial time period has expired and the defendant has not previously waived his right to speedy trial, then upon proper motion by the defendant the new charges contained in the amended information or indictment must be dismissed if they arose from the same criminal episode as the charges contained in the original information or indictment. Under these circumstances, it is not necessary to file a notice of expiration because the time limit has expired. All that is required is that the defendant move for discharge based on the filing of the new charges. *Pezzo v. State*, 903 So.2d 960 (Fla. 1st DCA 2005); *State v. Clifton*, 905 So.2d 172 (Fla. 5th DCA 2005).

In *Pezzo*, the defendant was arrested and charged with lewd and lascivious battery. *Id*., 903 So. 2d at 961. When the State did not bring him to trial by the

176th day following his arrest, Pezzo filed a notice of expiration of the speedy trial period. *Id*. Jury selection for the charge of lewd and lascivious battery began on the 189th day following arrest. *Id*. Then, after the expiration of the 15-day speedy trial recapture period, the State filed an amended information charging the defendant with lewd and lascivious molestation against a person under the age of twelve instead of the previous charge of lewd and lascivious battery. *Id*. The State then was allowed to file a second amended information which charged the defendant with lewd and lascivious molestation against a person older than 12 but younger than 16. *Id*.

Defense counsel moved for discharge because the State had not brought the charge in the amended information until after the speedy trial period had expired. *Id*. The defense also moved to dismiss the amended information because the jury had been selected to try a case of lewd and lascivious battery, not lewd and lascivious molestation. *Id*. The trial court denied the defense motions for dismissal and discharge. *Id*. at 962. However, based on the prejudice to the defendant from the new charge being filed after the jury selection process had begun, the trial judge dismissed the jury with the intent to allow the defense to select a new jury to try the defendant on that new charge. *Id*. On appeal, the court reversed and remanded with instructions that the defendant be discharged:

> The trial court erred by denying the motion for speedy trial discharge. The state may file charges against a defendant at any time

> during the speedy trial period, up to and including the 175th day. See *State v. Naveira*, 873 So.2d 300, 305 (Fla.2004). However, the state may not file any charge based on the facts giving rise to the arrest after the 175th day. Moreover, although the state may amend an information after the speedy trial time expires, the state may not circumvent the intent and effect of the speedy trial rule by lying in wait until the speedy trial time expires and then amending an existing information in such a way that results in the levying of new charges (if those new charges arise from the same facts and circumstances giving rise to the original charge). Because lewd and lascivious battery requires proof of union or penetration, whereas lewd and lascivious molestation can be proven by proof of inappropriate touching even on the outside of the victim's clothing, the state's amendment had the effect of charging Pezzo with a new crime which arose from the same facts and circumstances giving rise to the original charge. This the state may not do.

Id. (footnote omitted).

In *Clifton*, the defendant was arrested on May 16, 2003 and charged with arson. *Id*., 905 So. 2d at 174. On August 20, 2003, the State filed an information charging the defendant with four counts of arson of a dwelling. *Id*. On December 3, 2003, after the speedy trial time period had expired, the State filed an amended information adding another count of arson. On December 15, 2003, the defendant filed a motion to dismiss the amended information because it had been filed after the expiration of the speedy trial time period. The trial court granted the motion. On the State's appeal, the court affirmed the dismissal of the arson count added in the amended information:

> Here, Clifton never waived his right to a speedy trial; the crime charged in count five of the amended information arose out of the same criminal episode as the four charges contained in the original

> information; and the amended information was filed after the speedy trial time period had expired. Filing an amended information that contains a new charge based on the same criminal episode as the previously filed charges is certainly prejudicial. Failure to extend [*State v. Agee*, 622 So.2d 473 (Fla.1993)] in such instances may present to some overzealous prosecutors a far too tantalizing opportunity to intentionally avoid application of the remedial provisions of the speedy trial rule through the artifice of an amended information that attempts to breathe life into an otherwise failed prosecution of the original charges. We conclude that the trial court properly dismissed that count.

905 So.2d at 178-179.

In the present case, David Dwayne Brown was taken into custody on July 26, 2003 for the murder of Eric Williams and Edward Leon Bernard and the attempted murder of Lawrence Wade (R. 29). On March 22, 2004, he filed a demand for speedy trial (R. 595-96). Pursuant to Florida Rule of Criminal Procedure 3.191(b), that demand triggered a 60-day speedy trial time period, which expired May 21, 2004, in which to bring Brown to trial.

At the time he filed the demand for speedy trial, Brown was charged by indictment with two counts of first degree felony murder, one count of attempted first degree murder, one count of possession of a firearm by a violent career criminal, and one count of use of a firearm in the commission of a felony (R. 43-47). The two counts of first degree felony murder contained the following allegations:

COUNT I

DAVID DWAYNE BROWN, also known as "DABO", and COLLIES JASPER ROBINSON, each in concert with the other from a common scheme or plan, did unlawfully and feloniously kill a human being, to-wit: ERIC WILLIAMS, also known as "E", *while engaged in the perpetration of, or in an attempt to perpetrate any murder of another human being*, to-wit: LAWRENCE WADE and/or EDWARD LEON BERNARD, also known as "LEON", also known as "BOO", by shooting the said ERIC WILLIAMS, also known as "E", and during the course of the commission of the offense, said defendant discharged a firearm or destructive device and as a result of the discharge, death or great bodily harm was inflicted upon ERIC WILLIAMS, also known as "E", a human being, in violation of s. 782.04(1), s. 777.011 and s. 775.087, Florida Statutes . . .

COUNT II

DAVID DWAYNE BROWN, also known as "DABO", and COLLIES JASPER ROBINSON, each in concert with the other from a common scheme or plan, did unlawfully and feloniously kill a human being, to-wit: EDWARD LEON BERNARD, also known as "LEON", also known as "BOO", *while engaged in the perpetration of, or in an attempt to perpetrate any murder of another human being*, to-wit: LAWRENCE WADE and/or ERIC WILLIAMS, also known as "E", by shooting the said EDWARD LEON BERNARD, also known as "LEON", also known as "BOO", and during the course of the commission of the offense, said defendant discharged a firearm or destructive device and as a result of the discharge, death or great bodily harm was inflicted upon EDWARD LEON BERNARD, also known as "LEON", also known as "BOO", a human being, in violation of s. 782.04(1), s. 777.011 and s. 775.087, Florida Statutes . . .

(R. 43-44)(emphasis added).

On May 20, 2004, during jury selection proceedings at the trial on those charges, the prosecutor told the trial judge "with a certain sense of shame" that he had just realized for the first time that the indictment filed in the case did not

charge the defendant with first degree premeditated murder (TR. 1382-1383). The judge thereupon dismissed the panel of potential jurors to allow the prosecutor to obtain a new indictment from the grand jury (TR. 1399-1400). On May 25th, after the expiration of the speedy trial time period triggered by the demand for speedy trial, the State filed an amended indictment which added two new charges of first degree premeditated murder (R. 53-57). Brown's motions to dismiss based on the filing of this amended indictment were denied (R. 575, 587-590; T. 4-6).

As to the two new charges of first degree premeditated murder, the trial court erred in denying the motions to dismiss.[1] Those charges clearly arose from the same facts and circumstances giving rise to the original charges, and those charges were clearly filed after the expiration of the speedy trial period triggered by the defendant's demand for speedy trial. That being the case, it was not necessary for the defendant to file a notice of expiration, and the trial judge was required to grant the defendant's motions to dismiss unless Brown had waived his right to a speedy trial. *Pezzo*, *Clifton*.

In its decision in this case, the district court of appeal recognized that Brown never waived his right to a speedy trial after he filed the speedy trial demand. *Brown*, 967 So. 2d at 237. The district court of appeal also recognized that it was undisputed "that the indictment which added the premeditation charges was filed

[1] The standard of review on this issue is a de novo review because it presents a pure question of law. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla.2000).

by the state after the speedy trial period had expired." *Id.* The district court of appeal nevertheless held the trial court had not erred in denying the defendant's motions to dismiss because the added charges of premeditated first degree murder "did not charge a 'new' offense, rather, it merely more specifically elucidated the elements of the originally charged offense." *Id.*

The two charges of premeditated first degree murder in the indictment filed after the expiration of the speedy trial time period were new charges, and therefore the trial court erred in denying the motions to dismiss. An indictment which charges a defendant with first degree felony murder without alleging premeditation does not charge the defendant with the crime of premeditated first degree murder. *See Harris v. State*, 674 So.2d 854 (Fla. 3d DCA 1996), *reversed on other grounds*, 690 So.2d 1297 (Fla. 1997); *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977); *see also Lightbourne v. State*, 438 So. 2d 380, 384 (Fla.1983)(rejecting defendant's claim based on *Ables* that State improperly charged only first degree felony murder and then proved premeditated first degree murder where indictment clearly incorporated an allegation that the murder was premeditated in design).

In *Ables*, the defendant was charged by indictment with one count of first degree felony murder under section 782.04(1)(a), Fla. Stat. (1975). *Id.*, 338 So.2d at 1096. "No charge was made that the unlawful killing was 'perpetrated from a

premeditated design to effect the death' of the victim, which is proscribed by the same statute." *Id*. Over objection, the trial court charged the jury that the defendant could be convicted of first degree murder if the jury found either that the defendant killed the victim from a premeditated design or that the defendant killed the victim while perpetrating a felony. *Id*. On appeal, the First District Court of Appeal held that such an instruction was error because an indictment which only alleges first degree felony murder does not charge the offense of first degree premeditated murder:

> The court's charge thus potentially exposed appellant to a jury determination of his guilt on a charge not made by the indictment. That was error, for an accused is entitled to have the charge proved substantially as laid; he cannot be charged with one offense and convicted of another, even though the offenses are of the same character and carry the same penalty. *See Perkins v. Mayo*, 92 So.2d 641 (Fla.1957); *Penny v. State*, 140 Fla. 155, 191 So. 190 (1939); Art. I, s 16, Florida Constitution.

Id. Thus, in *Ables*, the First District Court of Appeal ruled that an indictment which only alleges first degree felony murder does not by implication also allege the crime of premeditated first degree murder just because both offenses are defined in section 782.04(1).

Similarly, in *Harris*, the defendant was charged by indictment with attempted first degree felony murder. *Id*., 674 So. 2d at 854. At trial, without defense objection, the trial court instructed the jury on both attempted first degree felony murder and attempted first degree premeditated murder. *Id*. at 854-55. The

jury returned a verdict of guilty of "attempted first degree murder as charged in count I of the Indictment." *Id*. at 855. On appeal, the Third District held that Harris could not be convicted of attempted first degree premeditated murder because an indictment which only charges a defendant with attempted first degree felony murder does not also charge that defendant with attempted first degree premeditated murder:

> Harris was never charged with the crime of attempted first degree premeditated murder and it is most assuredly not a lesser included offense of either of the two charged offenses. Although the evidence adduced by the state may very well have been sufficient to support an attempted first degree murder charge, we conclude, as did the First District in *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977), that it was error for the trial court to charge the jury under count I on attempted first degree premeditated murder where the indictment charged only attempted felony murder . . .

Id. at 855-56.

In this case, as in *Ables* and *Harris*, the State filed an indictment which only charged the defendant with first degree felony murder and which did not contain any allegation of premeditation. Accordingly, that indictment did not charge David Brown with premeditated first degree murder. That being the case, when the State filed its indictment which did for the first time contain an allegation of premeditation, those charges of premeditated first degree murder constituted new charges, and because those new charges were filed after the expiration of the

speedy trial time period, the trial court erred in denying Brown's motions to dismiss those charges. *Pezzo*; *Clifton*.

In determining that the trial court did not err in denying the defendant's motions to dismiss based on the State's filing of the new indictment after the expiration of the speedy trial time period, the district court of appeal ruled that the charge of first degree premeditated murder in the new indictment did not charge a new crime because the crime of first degree premeditated murder was charged in the original indictment as a result of the original indictment's citation to section 782.04(1), Florida Statutes (2003), which defines both the offense of first degree premeditated murder and first degree felony murder:

> The original indictment of September 2003 and the amended indictment of November 2003, without tracking statutory language precisely, stated that counts one and two against Brown were for first degree murder, and cited to section 782.04(1), Florida Statutes (2003), which section encompasses the specific element of premeditation. The new, post-speedy indictment filed on May 25, 2004, adding the specific element of premeditation similarly did not track the statutory language exactly but included the same citation to section 782.04(1). Thus, under a *DuBoise* analysis, the statute cited in the original and amended indictments was sufficient to apprise Brown of the element of premeditation. It follows that the new, post-speedy indictment did not charge a "new" offense, rather, it merely more specifically elucidated the elements of the originally charged offense.

Brown, 967 So. 2d at 237 (footnote omitted). This reasoning was based on *DuBoise v. State*, 520 So.2d 260 (Fla.1988), where this Court stated that the failure to include an essential element of a crime does not necessarily render an indictment

so defective that it will not support a judgment of conviction when the indictment references a specific section of the criminal code which sufficiently details all the elements of the offense.

This Court's decision in *Duboise* does not support the district court of appeal's conclusion that adding a charge of first degree premeditated murder to an indictment charging only first degree felony murder does not constitute a new charge. The defendant in *Duboise* claimed that his indictment was fundamentally defective for failure to charge the crime of sexual battery using actual physical force because the indictment failed to include an allegation of the essential element of the use of actual physical force. This Court rejected this argument because the count of the indictment charging the defendant with sexual battery cited to section 794.011(3), Florida Statutes, which specifically defined the offense of sexual battery using actual physical force. Thus, *Duboise* is a case where the indictment charged a single specific crime, the indictment cited to the specific statutory section which defined that single specific crime, and the indictment failed to allege one of the essential elements of that specific crime.

The indictment originally filed in this case did not simply omit one element of a single specific crime defined in a statute, so that reference to the specific statutory section cited in the indictment would supply that missing element. Under section 782.04(1), Florida Statutes, the statute cited in the counts of the indictment

charging first degree murder in this case, two completely different offenses are defined: premeditated first degree murder is defined in section 782.04(1)(a)1 and first degree felony murder is defined in section 782.04(1)(a)2. Thus, an indictment citing section 782.04(1), which defines both the offense of premeditated first degree murder and the offense of first degree felony murder, but only alleging the elements of first degree felony murder, does not charge the crime of first degree premeditated murder, notwithstanding a citation to section 782.04(1) in the indictment. *Harris*; *Ables; see also Long v. State*, 92 So.2d 259, 260 (Fla.1957) ("where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment."); *Lewis v. State*, 53 So.2d 707, 708 (Fla.1951) ("No principle of criminal law is better settled than that the State must prove the allegations set up in the information or the indictment.").

Accordingly, the indictment in this case filed prior to the expiration of the speedy trial time period did not charge the crime of first degree premeditated murder, notwithstanding its citation to section 782.04(1) in the indictment. As a result, the charges of premeditated first degree murder in the indictment filed after the expiration of the speedy trial time period did constitute new charges, and therefore the trial court erred in denying Brown's motions to dismiss those new charges.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent David Dwayne Brown respectfully requests this Court to approve the decision of the Third District Court of Appeal on the jury instruction issue, quash the decision of the Third District Court of Appeal on the speedy trial issue, and remand this case with instructions that the charges of first degree premeditated murder be dismissed, and that he be granted a new trial on the charges of first degree felony murder and attempted first degree murder.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125

BY:_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 29th day of December, 2008.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
HOWARD K. BLUMBERG
Assistant Public Defender