

IN THE SUPREME COURT OF FLORIDA

CHARLES W. FERGUSON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. _____
(4th DCA No. 87-714)

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Statement of the Case and Facts	1-2
Summary of Argument	3
Argument	4-6

THE DISTRICT COURT'S DECISION EXPRESSLY AND
DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER
DISTRICT COURT OF APPEAL ON THE SAME QUESTION
OF LAW.

Conclusion	7
Certificate of Service	7

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Brinson v. State</u> , 483 So.2d 13 (Fla. 1st DCA 1985)	5
<u>Chaney v. State</u> , 464 So.2d 1261 (Fla. 1st DCA), <u>rev.den.</u> 479 So.2d 118 (Fla. 1985)	2,3,4,5,6
<u>Faison v. State</u> , 426 So.2d 968 (Fla. 1983)	1,5,6
<u>Ferguson v. State</u> , 13 F.L.W. 399 (Fla. 4th DCA Feb. 10, 1988)	1,4
<u>Friend v. State</u> , 385 So.2d 696 (Fla. 1st DCA 1980)	3,4,5,6
<u>Johnson v. State</u> , 509 So.2d 1237 (Fla. 4th DCA 1987)	6
<u>Mancini v. State</u> , 312 So.2d 732 (Fla. 1975)	5

OTHER AUTHORITIES

Constitutional Provisions

Art. V, Sec. 3(b)(3), Florida Constitution 3,4

Florida Rules of Appellate Procedure

9.030(a)(2)(A)(iv) 3

STATEMENT OF THE CASE AND FACTS

Petitioner, CHARLES FERGUSON, was convicted of robbery and kidnapping in the Circuit Court of the Seventeenth Judicial Circuit of Florida. He timely appealed to the District Court of Appeal, Fourth District, contending that the facts of his case did not support a separate conviction for kidnapping according to the test adopted by this Court in Faison v. State, 426 So.2d 968 (Fla. 1983). Ferguson v. State, 13 F.L.W. 399 (Fla. 4th DCA Feb. 10, 1988) (Appendix 1-4).

In its decision affirming petitioner's separate conviction for kidnapping the court set forth the facts as follows:

The defendant robbed an Arby's restaurant. After he was given the money, the defendant, at gunpoint, forced the manager and three employees outside of the store and put them into a restroom located in the rear. The defendant told the victims to stay inside. After thirty seconds the manager peeked out. The defendant yelled, "get back into the bathroom." The victims obeyed for another thirty seconds when they looked out and observed the defendant riding off on a bicycle. (Appendix 1-2).¹

The Fourth District concluded that the movement and confinement of the victims was sufficient to meet the Faison test because putting the victims in the restroom and warning them to stay put was sufficient confinement, independent of the robbery, not slight, inconsequential or merely incidental to it so as to justify a separate conviction for kidnapping (Appendix at page 3).

1

The Arby's was not yet open for business for the day so no customers were present.

The district court did specifically recognize a conflict with Chaney v. State, 464 So.2d 1261 (Fla. 1st DCA), rev.den. 479 So.2d 118 (Fla. 1985). (Appendix 5-8).

Petitioner timely filed his notice to invoke this Court's discretionary review jurisdiction. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision in petitioner's case expressly and directly conflicts with the decisions of the First District Court of Appeal in Chaney v. State and Friend v. State because the Fourth District applied the same rule of law to essentially the same facts of those cases to come up with a different result. Further, the court recognized that the decision in this case conflicts with the decision in Chaney; this explicit recognition of conflict is a sufficient basis to invoke this Court's discretionary review jurisdiction on the basis of express and direct conflict. Accordingly, this Court has jurisdiction under Article V, Section 3(b)(3) of the Constitution of the State of Florida. Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

It is obvious that the decision of the Fourth District expressly and directly conflicts with the decision of the First District in Chaney v. State, supra, (Appendix 5-8) because the district court explicitly identified the conflicting district court decision in the written opinion in petitioner's case. (Appendix 3). Also, the decision directly and expressly conflicts with Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980). (Appendix 9-11). Accordingly, petitioner invokes this Court's jurisdiction under Article V, Section 3(b)(3), Florida Constitution.

In Chaney, the victim, following a robbery, was confined to a bathroom area with heavy bags placed in front of the door. The First District held that no kidnapping occurred because the victim was so confined for only 90 seconds and thus the movement was without any independent significance. Although the Fourth District declined to follow the precedent of Chaney v. State in the instant case, it did recognize conflict with Chaney, which is a sufficient basis on which to invoke this Court's discretionary review jurisdiction upon conflict of decisions. (Appendix 3).

The facts of petitioner's case are almost identical to the facts in Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980), (Appendix 9-11) where after committing a robbery with a firearm

in a business office, Mr. Friend motioned three employees into a bathroom and commanded them to stay there. Within five minutes the employees opened the door and found that the robbers had departed. The First District Court concluded those facts were insufficient to sustain a kidnapping conviction. On substantially the same set of facts in this case the Fourth District upheld petitioner's conviction for kidnapping: an armed robber's placing employees in a restroom and ordered them to stay there was found to be sufficient confinement to justify a separate conviction for kidnapping, even though the victims only stayed there for 60 seconds. Ferguson v. State, 13 F.L.W. 399 (Fla. 4th DCA Feb. 10, 1988) (Appendix 1-4).

The Fourth District's application of the Faison rule of law to produce a different result in petitioner's case, which involves substantially the same facts as Friend or Chaney properly invokes this Court's conflict discretionary review jurisdiction. Mancini v. State, 312 So.2d 732 (Fla. 1975). Petitioner's case should not achieve a different and conflicting result because it arose out of Broward County then if it had occurred within the First District Court of Appeal. See Chaney v. State, supra, Friend v. State, supra, Brinson v. State, 483 So.2d 13 (Fla. 1st DCA 1985).

This Court should exercise its discretionary review jurisdiction and hear the merits of the instant case because the Fourth District continues to come up with expressly different

results than what is achieved in the First District on essentially the same set of facts in these armed robbery and kidnapping cases which involve confining a robbery victim in an unlocked bathroom. Barricading the bathroom door with heavy bags was not a kidnapping in the First District, Chaney v. State, supra, but a similar slight confinement of a robbery victim in a convenience store robbery by barricading the bathroom door with shopping carts was kidnapping in the Fourth District, Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987). In Friend v. State the First District concluded that an armed robber's placing victims in an unlocked bathroom with an order to stay put was not sufficient confinement to justify a kidnapping conviction but a similar placing of victims in an unlocked bathroom by an armed robber with a threat to stay put was kidnapping in the instant case.

If application of the law in Florida as established by this Court in Faison v. State is to be uniformly applied throughout the state, this Court should accept jurisdiction to resolve the growing conflict so directly expressed between the Fourth District and the First District on this issue under the kidnapping law.

CONCLUSION

Based on the foregoing, this Court should exercise its discretionary review jurisdiction due to the express and direct conflict between the decision in the instant case and the decisions of the First District on the same point of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to ALFONSO SALDANA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 17th day of March, 1988.

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