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IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

RICHARD EARL WALKER,

Petitioner,

vs.

Case No. 78,759

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW FROM THE  
FLORIDA DISTRICT COURT OF APPEAL  
SECOND DISTRICT  
IN LAKELAND, FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

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SUMMARY OF THE ARGUMENT

Petitioner attempts to create conflict of holdings from a dissent. A dissent does serve as a jurisdictional basis for further review.

JURISDICTIONAL ISSUE

WHETHER A "DISSENT" IS A DECISION UPON  
WHICH THIS COURT CAN FIND EXPRESS  
AND DIRECT CONFLICT OF HOLDINGS?

(As Restated by Respondent)

Petitioner attempts to create a conflict of holdings where there is none. Here, in Walker v. State, 585 So.2d 1107 [West Reserved Citation], 16 F.L.W. D2389, 1991 W.L. 178167 (Fla. 2d DCA No. 90-00190)(Opinion filed September 11, 1991), there is reliance by Judge Patterson in his dissent on Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987). See, Pet.App. 001, p. 4. The majority has relied on this Court's opinion in Ferguson v. State, 533 So.2d 763 (Fla. 1988) and Faison v. State, 426 So.2d 963 (Fla. 1983) to support its holding. See, Pet.App. 001, pp. 2 & 4. The majority does not mention Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987) in its opinion. See, Pet. App. 001, pp. 1 & 2.

Florida is a state whose growth has mushroomed. There are increasing demands on all Courts; and, those demands are increasing in this Court with its exclusive direct and collateral review of capital cases. There, are, therefore jurisdictional limitations. At bar, Petitioner attempts to create express and direct conflict of decisions through a dissent. See, Pet.App. 001, pp. 3 & 4. Now, a per curiam affirmance without an opinion is not reviewable under Art. V § 3(b)(3) because it does not "expressly" conflict with another appellate decision. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980). And, this Court

has held that "conflict" cannot be shown from a dissent. See, Reaves v. State, 485 So.2d 829 (Fla. 1986) and Jenkins v. State, supra. In other words, a dissent is not a decision upon which conflict of decisions can be based. Justice Ehrlich relied on Reaves in dismissing the petition for discretionary review in Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) writing:

As we recently noted in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision."

Text of 498 So.2d at 889

Petitioner has failed to demonstrate from the opinion below that express and direct conflict of decisions appears "within the four corners of the majority decision."

At bar, the Second District has held that a question of fact for the trier of fact arose when Richard Earl Walker admitted [after robbing a convenience store] that he ordered the four occupants to go to the back of the store and lie on the floor; and, he threatened the four victims with a gun to accomplish this purpose. See, Pet.App. 001, pp. 2. In light of Petitioner's admission, the majority held that a factual question arose under Ferguson v. State, 533 So.2d 763 (Fla. 1988) and Faison v. State, 426 So.2d 963 (Fla. 1983) as to whether Petitioner's movement of the victims was of such a degree as to constitute kidnapping. The majority opinion notes that the jury was properly charged as

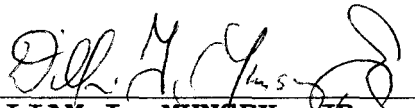
to the elements of kidnapping; and, there is sufficient evidence to sustain the findings of the trier of fact. The majority has declined to substitute its judgment for that of the trier of fact. In other words, whether the movement of the victims was a matter of consequence was a factual matter. Petitioner points to Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987) as found within the four corners of the dissent. See, Pet.App. 001, pp. 4. As an aside, the instant decision is harmonized with Kirtsey as the kidnapping conviction is sustainable. Why? Because at bar, Petitioner admitted that he ordered the victims' movement to the back of the store in order to escape. Pet.App. 001, pp. 2. The prosecution has established and the trier of fact found that the confinement and movement of the victims "...has independent significance in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." Faison v. State, 426 So.2d 963, 965 (Fla. 1983). At bar, the trier of fact has found that victims' confinement and movement was not "slight, inconsequential and merely incidental." Id. at 965. Thus, even the reliance on Kirtsey in the dissent is harmonized with Faison and Ferguson.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent would pray that this Court would make and render an Order denying discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Elizabeth S. Wheeler, Esq. of 710 Oakfield Drive, Suite 159, Brandon, FL 33511 on this 12<sup>th</sup> day of November, 1991.

  
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OF COUNSEL FOR RESPONDENT