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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,540

GERMAINE BERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. The respondent was the prosecution at trial and the appellee on appeal.

In this brief, the symbol "R" will be used to denote the record on appeal.

STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case but restates certain of the facts as follows:

At trial, the victim Nasezze Salako testified that he and his friend Sulieman Laro were watching television in Salako's apartment living room at about 7:00 p.m. on March 2, 1991. R. 16. Salako went down a flight of stairs to the front door to answer a knock. When he opened the door, he was confronted by a man with a gun pointed at his head who said that he would kill Salako if he did not show him his money. R. 19-21. Laro testified that his first sight during the incident was of a man with a gun pushing Salako up the stairs to the living room. R. 58. Salako stated that he was forced by the gunman to take him to where valuables were stored; Salako took him to Salako's room and to his then-absent roommate's room, which the gunman kicked through the door to enter. R. 22, 33.

In the meantime, three other individuals entered the apartment, including the defendant, who had a gun. R. 24025. Unlike the first gunman, the defendant did not point the gun at Salako but merely held it. R. 25. Two of the robbers tied Laro's hands and feet with telephone cord and coathangers that they had brought with them and left him draped over a dining room chair. R. 30, 35-36, 59-60. Laro was particularly frightened when the robbers unplugged the telephone. R. 24. Salako stated again that the defendant had a gun and went around the apartment taking VCR's, telephones, and the like, and placing them in a garbage bag he

carried. R. 33. He held the gun as if someone were going to attack him. R. 37. Meanwhile, Salako was required to open drawers, closets, and everything that held valuables, going back and forth among the rooms because the apartment was large. R. 42, 44. The robbers remained in the apartment for twenty to thirty minutes and used Salako's car to load the goods into; when they were finished, they tied Salako up in the living room with telephone cord, his legs and hands joined at the back, telling him that if he shouted or called the police they would blow his head off. R. 34, 38. Both victims were left in the living room, hands and feet bound, facing the floor. R. 34-35. As the robbers were leaving, the defendant held his gun at the back of Laro's head and said to the others, "Let's kill them." R. 61-65. After they left, taking Salako's car filled with his belongings from the apartment, Salako managed to untie himself and ran across the street to call the police, unable to do so from the apartment because the robbers had rendered the telephones there non-functional. He untied Laro when he returned. R. 32, 39-40.

SUMMARY OF THE ARGUMENT

In order for the defendant and others to rob an apartment, one victim was bound hand and foot and placed face-down over a dining chair for about thirty minutes; the other victim was forced to move about the apartment locating his valuables and then tied hand and foot and left face-down on the floor while the robbers exited the apartment and drove away in the second victim's car. The second victim freed himself but, because the telephones had been rendered inoperable, had to leave the apartment to summon police before returning to free his friend. Such facts are sufficient to satisfy the Faison test.

The Faison test has been applied by lower courts, along with further guidance from this Court through Walker and Ferguson, to identify the sort of movement or confinement during the commission of a felony that constitutes kidnapping under section 787.01(1)(a)(3). The test is difficult to apply to shifting factual situations but does not, as contended by the petitioner, require revision or abandonment. Moreover, it is both unwise and unnecessary for this Court to usurp the legislative function by redefining kidnapping to require, as urged by the petitioner, asportation and secret imprisonment.

ARGUMENT

UNDER THE FAISON TEST, THE EVIDENCE IN THE INSTANT CASE IS SUFFICIENT TO SUPPORT A CONVICTION OF KIDNAPPING; FAISON ITSELF, CAPABLE OF ENABLING COURTS TO DETERMINE ON A CASE-BY-CASE BASIS WHETHER A KIDNAPPING WAS OR WAS NOT COMMITTED, DOES NOT NEED REVISION.

The petitioner urges this Court to (1) abandon the Faison test[1] as ambiguous and confusing and (2) usurp the legislative function by redefining kidnapping. Neither is a wise or necessary course. Moreover, the facts of the instant case, requiring affirmance and not reversal, are inappropriate as a basis for either action urged by the petitioner.

Kidnapping is defined by statute in the following way:

> The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
> 1. Hold for ransom or reward or as a shield or hostage.
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
> 4. Interfere with the performance of any governmental or political function.

§ 787.01, Fla. Stat. (1993). National and international news reports provide us with unwanted familiarity with kidnappings associated with ransom, hostages, terrorists, and political motives. Memories of the Lindberg child, the Lebanon hostages, the Achille Lauro incident, and seizures of ranking individuals to pressure governments into doing the bidding of certain groups make

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[1]The Florida kidnapping test was first set out in Faison v. State, 426 So. 2d 963 (Fla. 1983).

numbers one, three, and four above easily recognizable as kidnappings. It is the sort of kidnapping referred to in number two, however, which is not so easily identifiable and which Faison was intended to, and does, assist courts in determining.

Faison adopted for Florida a rule developed in Kansas to interpret its almost identical kidnapping statute. Kansas' highest court dealt with a situation in which a mother and son late at night had locked up their store and were standing in the parking lot when they were accosted by two men who immediately forced them back inside the store, where the mother was robbed and raped. It stated, in pertinent part:

> We therefore construe our statute as requiring no particular distance of removal, nor any particular time or place of confinement. . . .[I]t is still the fact, not the distance, of a taking (or the fact, not the time or place, of confinement) that supplies a necessary element of kidnapping.

etc.

State v. Buggs, 547 P. 2d 720 (Kan. 1976).

This Court in Faison v. State, 426 So. 2d 963 (Fla. 1983), adopted the Buggs standard. Faison had raped two different women in two different locations (office and home) within a matter of a few minutes. He dragged the first victim from her desk situated in front of a big picture window to the rear of the office and then to the bathroom. He dragged the second victim from her kitchen to the bedroom. This Court upheld the kidnapping convictions. Noting the danger that a literal construction of the kidnapping statute "would convert every first-degree robbery and every forcible rape into two life felonies," id. at 965, this Court required that

> [i]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id.

The facts of the instant case, just as did those in Faison, conform with the test's requirements. Laro was confined by tying; Salako was both asported and confined. He was taken at gunpoint from room to room, forced to show the robbers where he kept those valuables in which they were interested. They could well have left him with Laro and made their own search, but help from him made the robbery easier. After they had taken what they wanted and loaded it into Salako's car, they tied him up, hands and feet joined together behind him, and then completed the robbery by driving off in his car. Neither the movement nor the confinement, then, was slight, inconsequential, or merely incidental to the robbery: the movement of Salako took place throughout the apartment and for twenty to thirty minutes and assisted the robbers in finding valuables; the confinement of both assisted by enabling them to concentrate their attention on Salako while searching the apartment and by buying the robbers time to get away before police could be summoned. Moreover, tying Salako prevented him from interfering with the final aspect of the robbery, the taking of his automobile.

Although Salako was able to loosen his bindings in a short time, Laro had to wait until Salako had found a public telephone and had come back to the apartment before he was freed. These actions were not inherent in the crime of robbery: both victims could have been held at gunpoint while the apartment was robbed. Leaving them free when the robbers left, however, would have brought its own set of problems, avoided by tying both of them up.

The petitioner urges this Court to abandon its well-reasoned decision in Faison on the basis of the facts presented by the instant case. Clearly, even if it were necessary to overturn Faison, this is not the case upon which to do so: its facts easily meet the test laid out therein. The petitioner contends, however, that Florida courts "have been struggling with this 'test'" since its approval. Petitioner's Brief at 6. In partial support, he quotes the Fourth District Court of Appeal in Johnson v. State, 509 So. 2d 1237, 1239 (Fla. 4th DCA 1987), as stating that the application of Faison's principles "continues to prove difficult in practice." Many applications of the law are difficult; that is not to say that they are therefore impossible and should be discarded. Inherent in an interpretation of fact-based law is the necessity to apply that law on a case-by-case basis. The Fourth District recognizes that fact by noting that courts are charged with the duty of "deciding how the statute may be used in shifting factual contexts" and "focusing ... attention less on what the supreme court said in Faison and more on what it has done in later cases . . . ." Id. The court said in the same case that "nothing is to

be gained by attempting to reconcile these cases," id. at 1240, indicating that it is the facts of each individual case upon which that case is to be judged.[2] The lower courts have been doing just that.

Two other cases decided by this Court have been of assistance to those courts in their determination of the existence vel non of kidnapping during the perpetration of another felony: Ferguson v. State, 533 So. 2d 763 (Fla. 1988), and Walker v. State, 604 So. 2d 475 (Fla. 1992). In Ferguson, the defendant moved the robbery victims from inside the store to an unlocked bathroom outside the store for approximately one minute. The supreme court upheld the kidnapping conviction, stating:

> The duration of the confinement is not an integral part of the test even though it may bear on whether the confinement was slight or inconsequential. Moreover, the determination of whether the confinement makes the other crime substantially easier of commission or substantially lessens the risk of detection does not depend upon the accomplishment of its purpose. *The question is whether the initial confinement was intended to further either of these objectives.*
>
> We hold that the movement and confinement of the victims in the instant case met the definition of kidnapping under the three-prong

[2]The cases to which the Johnson court referred were Taylor v. State, 481 So. 2d 97 (Fla. 3d DCA 1986)(confining clerk to bathroom was effort to lessen risk of detention), and Carter v. State, 468 So. 2d 370 (Fla. 1st DCA)(kidnapping affirmed where victim tied with belt to towel rack in bathroom to facilitate escape), rev. denied, 478 So. 2d 53 (Fla. 1985), compared with Chaney v. State, 464 So. 2d 1261 (Fla. 1st DCA)(kidnapping reversed where victim confined by heavy bags against bathroom door), rev. denied, 479 So. 2d 118 (Fla. 1985), and Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1985)(kidnapping reversed where robbery victims tied up), rev. denied, 492 So. 2d 1335 (Fla. 1986).

> test of Faison. First, the movement was not slight, inconsequential, or incidental to the robbery because the victims were forced out of the restaurant at gunpoint and into a restroom located in the rear. Second, the asportation wa not inherent in the nature of the crime because the robbery could have been committed on the spot without any movement whatsoever. Third, the confinement was intended to make it more difficult for the victims to identify the perpetrator and immediately call for help.

Id. at 764 (emphasis supplied).

In Walker, after taking money from a cash register and a customer, the defendant moved the four occupants a distance of 10 to 40 feet inside the store. He then exited the store. The clerk locked the door and called the police. This Court reversed the kidnapping conviction, stating that "[t]he limited movement and confinement of the four occupants within the interior of the store were not significant." Id. at 477. The Court emphasized that the victims were not bound and blindfolded, or dragged from room to room, or barricaded inside a room, or removed from inside to outside a building as victims in other cases had been. Id.

The petitioner claims that the lower courts are conflicted on these points. However, he cites case after case decided after Faison in which tying up, barricading in a confined area, or movement into a toilet stall to facilitate rape support kidnapping convictions. See Merrit v. State, 516 So. 2d 290 (Fla. 1st DCA 1988); Lamarca v. State, 515 So. 2d 309 (Fla. 3d DCA 1987); Sanborn v. State, 513 So. 2d 1380 (Fla. 2d DCA 1987); Johnson, 509 So. 2d 1237; Carter v. State, 468 So. 2d 370 (Fla. 1st DCA 1985), rev. denied, 478 So. 2d 53 (Fla. 1985). Other cases that he cites as

conflicting, in which there is no tying and only insignificant movement, obviously do not conflict with those just cited or with the teachings of Faison. See, e.g., Jones v. State, 20 Fla. L. Weekly D828 (Fla. 3d DCA Apr. 5, 1995); Wilcher v. State, 20 Fla. L. Weekly D12 (Fla. 4th DCA 1994).

A cited case seemingly in conflict with others is Chaney v. State, 464 So. 2d 1261 (Fla. 1st DCA), rev. denied, 479 So. 2d 118 (Fla. 1985). The district court in Chaney had held that a victim who broke out after sixty seconds from a barricaded bathroom had not been kidnapped because the duration had been minimal and the risk of detection had not been lessened because the victim had gotten free and had seen the robbers' car tag number. That result, however, was disapproved by this Court in Ferguson v. State, 533 So. 2d 763 (Fla. 1988), as an erroneous application of the Faison test.

Of cases decided after Faison, the petitioner in the instant case relies particularly on Kirtsey v. State, 511 So. 2d 744 (Fla. 5th DCA 1987), and Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1985), the case with which the instant case has been certified to conflict. Brinson was decided prior to Ferguson, however, and relied on the disapproved Chaney decision. (Chaney, in turn, had relied on its own pre-Faison decision in Friend v. State, 385 So. 2d 696 (Fla. 1st DCA 1980)). The State respectfully suggests that the Brinson court, like the Chaney court, misapplied the Faison test. If the statutory definition of kidnapping as it relates to the commission of other felonies is to have any meaning at all, it

must include such acts as tying victims up. Such an act signifies a frightening and dangerous form of aggression not adequately dealt with in the underlying felonies. Not only does such an act facilitate the actual commission of the underlying felonies, but it assists the perpetrator in avoiding detection and exposes the victim to increased risk of harm.

The State also must respectfully take issue with the Brinson court's effort to distinguish Carter, 468 So. 2d 370. Brinson, 483 So. 2d at 16 n.2. Although Carter could have been decided solely on the victim's forced movement from outside to inside the structure, that was not the basis for the court's decision. The opinion was devoted almost exclusively to a discussion of the defendant's conduct in tying up the victim. After quoting verbatim from the trial transcript, the court addressed Carter's argument relating to the nature and duration of the confinement:

> The fact that the defendant knew, when he tied up the victim, that she would be able to free herself by the use of determined efort--to the point of bruising her arms--does not, in our view, disqualify this case from meeting the Faison criteria. The defendant's purpose in typing up the victim was to buy time in making a "clean getaway." The fact that he was "charitable" enough with his victim to buy himself only a little time matters not.

Id. at 371.

This Court made clear through Faison that movement *or* confinement, not slight, inconsequential and merely incidental or inherent in the other crime, and rendering the other crime substantially easier to commit or detection less risky constitutes the separate crime of kidnapping. It has made clear through

Ferguson that duration of confinement may bear upon whether the confinement was slight or inconsequential but is not an integral part of the test; and that ease of committing the other crime or a lesser risk of detection does not depend on whether those ends were ultimately accomplished but whether the confinement was intended to further those ends. It has made clear through Walker that mere movement for neither of those purposes does not constitute kidnapping.

Kirtsey, the other case contended by the defendant to be consistent with Faison and therefore necessitating reversal of the instant case, reversed a kidnapping conviction where one of the victims was tied up and moved about the store. Applying the Faison test, the Fifth District found that one of the three factors had not been met because "the acts were slight and merely incidental to the robbery offense." Kirtsey, 511 So. 2d at 745. The facts set forth in Kirtsey are particularly sparse, however: "One of the employees was tied up and moved about the interior of the store. The other was forced to open the safe and threatened with a gun. No other acts of confinement or movement occurred." Id. It is likely that the record before the Fifth District indicated to it a lesser confinement than the record in the instant case reveals; the mere fact that the confinement and movement were limited to the interior of the restaurant in Kirtsey and to the interior of the apartment in the instant case does not require reversal in both cases. The Kirtsey robbers may have tied only the hands of the victim and brought him along with them as they moved around the

store, no more of a confinement than if he had been untied.

The review just made of the post-Faison case law fails to support the petitioner's contention that Faison should be abandoned. Several very recent decisions from the Third and First Districts illustrate that Faison has accomplished and continues to accomplish the purpose for which it was intended, to assist lower courts in recognizing the sort of kidnapping that facilitates the commission of another felony. In Puentes v. State, 20 Fla. L. Weekly D1652 (Fla. 3d DCA July 19, 1995), the district court affirmed a kidnapping conviction in which the victim was tied up for thirty or more minutes while the robbers ransacked her house for money and property. The affirmance relied on Marsh v. State, 546 So. 2d 33 (Fla. 3d DCA 1989), in which the court looked at the facts as follows:

> (1) Plainly, the confinement of the victim in this case was not slight or inconsequential; nor was it incidental to committing the armed robbery herein. The victim was bound, gagged, blindfolded, and wrapped in blankets for up to half an hour while the defendant and the codefendant ransacked the apartment where the victim was found, and stole the victim's money and house keys. (2) The confinement was not inherent in the armed robbery because the latter crime could have been committed without binding and gagging the victim. (3) The confinement obviously made it easier for the defendant to commit his armed robbery and substantially lessened the risk of detention after he escaped from the apartment.

Id. at 35. The confinement of Laro in the instant case was of a similar duration, of a similar nature, and for a similar purpose; that of Salako differed in duration only because of his good luck in being able to free himself. In Kellar v. State, 640 So. 2d 127

(Fla. 1st DCA 1994), the court found Walker and Brinson distinguishable and stated that the robber

> took the victim to his bedroom and tied him to a bed with ropes. The victim testified that the ropes were not tied very tightly, and indeed, the victim was able to free himself with little effort after the appellant had departed the scene. However, we note that the appellant forcibly moved and restrained the victim before the robbery was completed, for it was only after so incapacitating the victim that appellant stole the victim's car and its contents and drove from the scene. We do not agree, therefore, that the evidence was insufficient to support a kidnapping conviction.

Id. The facts in the instant case parallel those in Kellar, as should the result.

The petitioner further urges this court to usurp legislative prerogatives by redefining kidnapping to *require* secrecy and asportation. The Legislature has specifically stated those elements in the alternative: "forcibly, secretly or by threat" "confining, abducting, *or* imprisoning." § 787.01, Fla. Stat. Thus, the petitioner would have this Court ignore the clear meaning of the statute to hold that, because the robbers had not moved the victims *out of* the apartment in a *secret* fashion, only a robbery and not a kidnapping had occurred. He further appears to urge that no kidnapping occurred because the petitioner had not "considered abducting or significantly imprisoning the victims" and that "the binding was an act slight and merely incidental to the robbery." Petitioner's Brief at 16. The State submits that to Laro, who lay face-down over a dining chair with his hands and legs tied for thirty minutes, or to Salako, who also suffered, though

for a shorter period of time, having his hands tied behind his back and then his feet tied to his hands as he lay face-down on the floor, the binding was hardly "slight." Moreover, just as the commission of a robbery can result in a conviction of display of a firearm as well as of the robbery, a robbery such as that of Laro and Salako must result in the added conviction of kidnapping.

CONCLUSION

Based on the foregoing argument and authorities cited, the respondent respectfully submits that the decision below must be affirmed.

Respectfully submitted,

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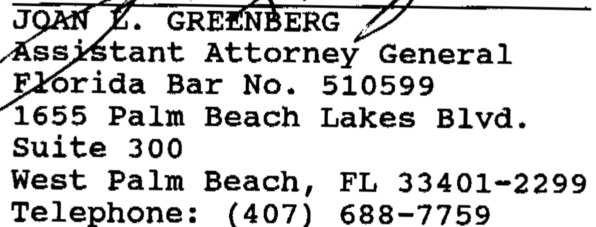

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by courier to FRANTZ K. VITAL, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, Florida 33401, on this 10th day of August 1995.

JOAN L. GREENBERG

Of Counsel