IN THE SUPREME COURT OF FLORIDA

GERMAINE BERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 85,540

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal.

Respondent was the prosecution and appellee.

The following symbol will be used:

R = record on appeal

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the statement in his initial brief on the merits.

SUMMARY OF ARGUMENT

Petitioner will rely on the summary in his initial brief on the merits.

ARGUMENT

UNDER THE CURRENT TEST THE EVIDENCE WAS INSUFFICIENT TO FIND PETITIONER COMMITTED ARMED KIDNAPPING BECAUSE THE MOVEMENT AND CONFINEMENT WERE SLIGHT, INCONSEQUENTIAL, AND MERELY INCIDENTAL TO THE ARMED ROBBERY. HOWEVER, BECAUSE THE CURRENT TEST ADOPTED IN FAISON TO DETERMINE WHETHER OR NOT THE CRIME OF KIDNAPPING HAS BEEN COMMITTED, WHEN THERE IS AN UNDERLYING FELONY IS CONFUSING AND AMBIGUOUS IN APPLICATION, IT NEEDS TO BE REVISED.

Respondent characterizes petitioner's argument as urging the court to usurp the legislative function by redefining kidnapping. That response ignores the fact that the current interpretation on kidnapping is based not on the literal wording of the statute but on the court-created "test" from Faison v. State, 426 So. 2d 963 (Fla. 1983); this Court has already determined that a literal application of the statute would necessarily convert many felonies from one to two, a result never intended by the legislature. Mobley v. State, 409 So. 2d 1031, 1034 (Fla. 1982), compare Mickenberg v. State, 640 So. 2d 1210 (Fla. 2d DCA 1994) (danger of conspiracy charge "is the tendency to make crime so elastic, sprawling and pervasive as to defy meaningful definition.") Contrary to the state's characterization, what petitioner in fact urges is that the court revisit the statute by eliminating or revamping the Faison criteria to get back to the real essence of kidnapping. When section 787.01 is read as a whole, the core evil which this statute seems to address is taking a person and holding him *as a particular means to some other end*. While the "merely incidental" language from the Faison test has some of that flavor, it does not go far enough. Further, petitioner suggests that the terms "confining, abducting, or imprisoning" were not intended by the legislature to be individual alternative elements of kidnapping but were to be read together as a method to define a type of confinement which is significantly more than mere restraint. Compare s.787.02, Fla. Stat. 1993.

While the Faison factors at least partially recognize the construction which petitioner urges, they have in application been so diluted as to be practically meaningless. That this is true is ably demonstrated by respondent's argument that the independent significance which is

suppose to attach to kidnapping is nothing more than making the underlying crime, here armed robbery, more convenient for the perpetrator to commit.

Respondent also repeatedly asserts that the Faison factors are "clear" and that the court's have "clearly" applied them, apparently pretending the numerous cases cited in the initial brief which reach opposite results on similar facts do not exist. Compare Brinson v. State, 483 So. 2d 13 (Fla. 1st DCA 1986), review denied, 492 So. 2d 1335 (Fla. 1986), Kirtsey v. State, 511 So. 2d 744 (Fla. 5th DCA 1987). Jenkins v. State, 433 So. 2d 603 (Fla. 1st DCA 1983), and Humphries v. State, 20 Fla. L. Weekly D1319 (Fla 5th DCA June 16, 1995) with Merritt v. State, 516 So. 2d 290 (Fla. 1st DCA 1988), Carter v. State, 468 So. 2d 370 (Fla. 1st DCA 1985), review denied, 478 So. 2d 53 (Fla. 1985) and Carron v. State, 414 So. 2d 288 (Fla. 2d DCA 1982), affirmed, 427 So. 2d 192 (Fla. 1983). Further, as this case demonstrates, what respondent characterizes as "clear" was not so to at least one of the judges who decided the instant case. Berry v. State, 20 Fla. L. Weekly D590 (Fla. 4th DCA Mar. 8, 1995), Klein, J. dissenting. See also Cathcart v. State, 643 So. 2d 702 (Fla. 4th DCA 1994), rev. denied, 651 So. 2d 1192 (Fla. 1995). If there is anything clear about this case it is that the courts differ on how to apply Faison and thus on what constitutes kidnapping. As the certification of conflict here demonstrates, the dispute is more than mere difficultly in applying Faison. A clearer standard for kidnapping needs to be reached.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court quash the decision of the Fourth District and vacate Petitioner's convictions for kidnapping.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Greenberg, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 5th day of September, 1995.

FRANTZ K. VITAL
Counsel for Appellant