ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,641

THE STATE OF FLORIDA,

Petitioner,

vs.

ALUDIN JAEL MATUTE-CHIRINOS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY
CRIMINAL DIVISION

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Defendant' was charged by indictment filed on June 22, 1994, in the Eleventh Judicial Circuit of Florida, Dade County, case no. 94-18663, with the June 3, 1994, first-degree premeditated or felony murder and aggravated child abuse of two-year-old Lesly Marcella Melendes. (R. 1-2). Trial was held, and on February 11, 1997, Defendant was found guilty as charged by the jury. (R. 98-99) .

On May 6, 1997, the penalty-phase proceedings commenced. (R. 101). On May 9, 1997, the court initially determined that sufficient evidence existed to instruct the jury on the aggravators of commission during a kidnaping and HAC. On May 9, 1997, at Defendant's request, a mistrial was granted. Subsequently, the trial court announced that it would reconsider its rulings on the aggravator motions, finding the mistrial to be an opportunity to have an appellate court rule on the question:

> [The] issues involving aggravating factors are, quite candidly, very interesting legal issues which this Court does not feel is clear cut one way or the other. No matter what my rulings have been, upon reflection my rulings may be different so that there can be an appeal taken, so that an Appellate Court can tell us if we're going forward with this part of the trial in good faith or not.

(R. 120) .

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[1] The parties will be referred to as they stood in the trial court.

Accordingly, Defendant filed, on May 28, 1997, a "Motion to Preclude the Aggravating Factor of Heinous, Atrocious and Cruel and/or Evidentiary Hearing." (R. 126). On May 30, 1997, he filed a "Renewed Motion to Preclude Aggravating Factor: Heinous, Atrocious or Cruel & Memorandum of Law." (R. 130). On May 31, 1997, he filed a "Renewed Motion to Preclude Aggravating Factor: Felony Murder (Kidnaping) & Memorandum of Law." (R. 139). Finally, he filed a "Notice of Supplemental Authority to Preclude Ex Post Facto Application of Child Abuse Aggravating Factor." (R.149). The State filed a memorandum in opposition. (R. 153). The Court held a hearing on these motions on June 26, 1997. (R. 166). The court granted the defense motions as to the HAC and kidnaping aggravators. (R. 190, 196). It denied the ex post facto challenge to the child-abuse aggravator. (R. 188). These rulings were memorialized in a written order on filed on September 2, 1997. (R. 57).

On October 3, 1997, the State filed a petition for common law certiorari in the Third District Court of Appeal, case number 97-2870. (R. 22). In that petition, the State sought review of the trial court's order of September 2, 1997. The State also requested that the District Court "pass through" jurisdiction of the petition, which involved purely capital issues, to this court, as was done in State v. Hootman, 22 Fla. L. Weekly D1793 (Fla. 2d DCA

July 25, 1997). (R. 23). On October 15, 1997, the DCA granted that request, and on November 12, 1997, the Court accepted jurisdiction. (R. 20). This brief follows.

STATEMENT OF THE FACTS

At the guilt-phase trial, the State presented. evidence that 23-year-old Lesly Melendes had a daughter who was born on January 8, **1992.** The child? died in June of 1994, at the age of 2%. (R. 205-05a). In June of 1994, Melendes shared an apartment with her mother, Florestilla Calix, Calix's husband, Juan Enchaste, Defendant, and two other men, Ramon Rosales and Narciso Jimenez. (R. 206). Calix usually took care of the baby while Melendes worked. (R. 293). Defendant sometimes did also. The baby adored Defendant, and he was very fond of her. (R. 238, 293).

Melendes described Defendant as her husband, although they were not legally married. They had lived together for two years, but Defendant was not the father of the baby. (R. 213-14). At the time of the murder, Melendes, along with Calix and Enchaste, were planning on moving out. (R. 281). A week prior to the murder, Melendes had told Defendant that she was going to leave him. (R.

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[2] The murder victim and her mother share the name Lesly Melendes. For clarity, the mother will be referred to as Melendes, and the daughter as "the baby," "the child," or "the victim."

214). Defendant told her at that time that if she left, he would kill her or himself. (R. 215).

Melendes worked as a waitress at the Villa del Rio, a restaurant at NW 27th Avenue and 16th Street in Miami. The evening of the murder, her shift ran from 7 p.m. to 3 a.m. (R. 221). Calix and Enchaste drove her to work that night. (R. 222). Between 12:30 and 1:00 a.m., Defendant called her on the phone, and then came to the restaurant. Melendes met him in the parking lot, and per his request, she gave him twenty dollars, so he could play pool. She went back to work, and then Defendant asked her for a beer through the outside service window. (R. 224). She declined, because when she served him, he would leave the check for her to pay, which she did not like. (R. 225). She also did not like the appearance that she was catering to her boyfriend rather than working. (R. 243). Defendant became upset and said that he wanted her to serve him. Then he came inside to the counter and again asked for her for a beer. To avoid a scene, she gave it to him. He then went and sat at the end of the counter. (R. 225). She sat at the far end. The did not converse at that time. Later, the phone rang, and Melendes answered it. (R. 226). Defendant, thinking the call was for her,[3] came behind the counter and grabbed the phone to see who was on the line. He became upset and hung up

[3] It was not.

the phone. Defendant then demanded that they go home, although it was only around 1 a.m. or so. (R. 227). She told him that she had to finish her shift. Defendant then grabbed her and dragged her out to where the tables were. Then he punched her in the mouth, and she bled. (R. 228). As he was pulled from the restaurant, Defendant yelled that Melendes was his woman and he could do with her what he pleased. At that point she went to call the police. When Defendant saw her making the call,[4] he said that if she called the police, she would be sorry, so she hung up. After she hung up, the police called back. (R. 229). She explained to them what was happening. Defendant continued to yell at her not to talk to them. Eventually, Defendant left. On his way out, after Melendes told him she had already called the police, Defendant made a threatening gesture from his car.

Police Sergeant Mendez and Officers Lopez, Piedra, and Campbell responded to the call at the restaurant. (R. 306-07, 335, 351-52). Mendez arrived at 2:48 a.m. Melendes was very scared and apprehensive. (R. 307, 323, 332, 352). She was trembling, nervous and crying when the police arrived. (R. 230, 308). She had already cleaned herself up and was no longer bleeding; her lip was only swollen. (R. 247). She told the police that her boyfriend

[4] The area behind the inside counter was visible through the window at the outside service counter. (R. 221).

had struck her and threatened her with a knife. (R. 332, 355). She asked the officers to accompany her to her apartment so she could get her things and her child, because she was in fear for her life. (R. 231, 324, 332). Melendes then proceeded to an apartment at 481 SW 9th Street with Mendez and his partner Campbell. (R. 231, 306-07, 337).

After they dropped Melendes off at work, Calix and her husband had returned home. Around 8 p.m. Rosales and Jimenez went to bed, and Calix locked up.' Defendant was not home. (R. 283). Calix then went into the baby's room and watched some more television, until the baby fell. asleep around midnight. (R. 285). Calix left her sleeping, face-down. (R. 287). Rosales and Jimenez were sleeping, and she went to bed with her husband in the kitchen. As usual, she left the baby's door open, in case she cried. Calix fell asleep. (R. 287).

Jimenez was awakened when Defendant arrived home around 2:30 a.m. Defendant went into the bathroom, then the bedroom, and then

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[5] The apartment consisted of a living room, a kitchen, a bathroom and one bedroom. The front door opened into the living room, where Rosales and Jimenez slept. (R. 210-11). Behind the living room was the kitchen, where Calix and her husband slept, and which had a door to the outside. Also behind the living room, two to three feet to the right of the kitchen, was the bedroom. The bath was between the kitchen and the bedroom. (R. 212). Melendes, Defendant, and the baby shared the bedroom; they had only one bed. (R. 213-14).

he went back out. (R. 377). Defendant remained outside for three to five minutes. Then he came back in, got a glass from the refrigerator in the kitchen, and started to go back outside. However, Defendant saw Melendes and the police, who had just arrived, and remained in the doorway. (R. 378). Defendant did not have any blood on him at that time. (R. 390). Defendant told Melendes that she was going to be sorry and that "she was going to cry tears of blood." (R. 379). Then Defendant went and locked himself in the bedroom. (R. 379).

As Melendes and the police arrived at the apartment, Defendant saw them. Defendant yelled something, and then ran back into the house. (R. 231, 309-10). He seemed to be in a hurry. (R. 333, 337). At the door, he turned, and ripped his shirt open; Meiendes could not understand what he said. Then he went in and closed the door. (R. 232). At Melendes's invitation, the officers accompanied her into the apartment. Melendes pointed to the bolted bedroom door. (R. 232-33, 310-12, 338, 380). Mendez had Melendes knock to see if Defendant would come out. (R. 232, 312). Defendant asked why Melendes had called the police. (R. 232). He did not come out, so the officers began to knock on the door. Enchaste also tried to convince Defendant to come out. Enchaste told Defendant that nothing was going to happen, that he should come out. Mendez also told Defendant that he did not care about

anything that had happened between Defendant and his wife, but that he needed to see the child in the bedroom. (R. 233, 313, 333, 380). As time went on, they knocked harder and harder. Mendez reiterated that he was not concerned about any problems between Defendant and his girlfriend, but that he was not leaving until he determined that the child was okay. Eventually he gave up knocking. They did not hear anything from inside the room after they stopped knocking. (R. 314). After he started banging harder, Mendez heard Defendant saying in a whining or crying voice that he was dead already, so they might as well kill him. (R. 315, 328, 333). At that point Mendez became even more concerned, called his supervisor, and got approval to break down the door. (R. 315, 339). The door was very strong, but after he and Lopez kicked it repeatedly, the bottom half gave way, but the bolt held. (R. 316, 339). Mendez, Lopez, Campbell and Piedra then entered the room. Defendant was just standing there and stated that he did not care any more, that they should go ahead and kill him. Mendez and Campbell grabbed Defendant by his wrists and pulled him from the room, and took him outside, -He did not notice any blood on Defendant. (R. 318, 340, 356-57). As they took him out, Defendant gave Melendes a "hateful" look "as if he was going to kill her." (R. 290, 299).

Lopez remained in the room with Piedro. They noticed there were blood stains on the side of the bed facing the door. (R. 340,

358). There was a pile of blankets and sheets in the middle of the bed. It looked like it had been slept in, but then covered up. (R. 349, 358). Lopez pulled back the sheets, and found the baby, face-down, in a pool of blood. (R. 341, 345, 361). The pool of blood was fresh and still wet. (R. 350). Lopez immediately called fire-rescue. (R. 344). When the paramedics arrived, the turned the baby over and checked for vital signs, but did not make any attempts at resuscitation. (R. 345). At the station, Mendez noticed that Defendant had a red substance caked on the inside and outside of his hands, and he had a cut on one of his hands. (R. 320).

Associate Medical Examiner Eroston Price arrived at the murder scene at 5:35 a.m. (R. 413). The victim's eyes were open, indicating that she had been awake when she was killed. (R. 415). The fatal injury was a "very large gaping inch size wound to the front of her neck that extended pretty much from ear to ear." (R. 428). The child's neck muscles were completely severed. Her trachea or windpipe, the jugular vein, and the carotid artery were all completely cut in two. The cervical vertebrae bone was also incised into two. The gaping throat wound would have resulted in

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[6] The following is based both on Price's February 6, 1997 trial testimony, (R. 408-81), and a deposition given between the verdict and the aborted penalty phase on April 16, 1997. (R. 483-537).

the child being unable to cry out because there was no way for any air to go over her vocal cords. (R. 429).

In addition to the fatal wound, there were two additional superficial incised wounds to the neck, near her chin. They were also caused by a sharp object, such as Defendant's knife, around the same time as the fatal wound. (R. 433-34).

The child also had five recent abrasions on her right shoulder. (R. 425-26, 435). They were "fresh," and appeared to have happened at the same time as the murder. (R. 444, 467). The abrasions could have been caused by fingernails, but Price was unable to line them up with her hand at one time; they did not appear to be made by a single hand at the same time. (R. 427, 452, 471). There was no "corresponding wound" behind the shoulder consistent with the abrasions having resulted from the child having been held down at the time the fatal wound was inflicted. (R. 469). Although Defendant's fingernails were very short, they could have caused the abrasions. (R. 478).

The child had bled to death as a result of the incised wound to the neck. (R. 415). It would have taken less than five minutes for her to bleed to death. (R. 416). The earliest possible onset of loss of consciousness would have been ten to fifteen seconds,

but it "could definitely have been longer." (R. 457, 491). She could have been conscious for 45 seconds to a minute. (R. 461-493). She would have felt pain. (R. 473). The skin that was cut had a lot of nerves and would have been very sensitive. (R. 514). There were also nerves in the muscles that were cut which also would have caused pain. (R. 515). She also had blood in her lungs from the wound, which she would have been unable to cough up because of her severed trachea, and which would have been an irritant. (R. 519-20). She would also have felt pain from the other cuts and abrasions she suffered. (R. 529). The knowledge that she had been injured by another person would have caused great fear. (R. 523). The child was "100% aware of what was happening to her" at the time she was cut. Even babies will fear their lives being threatened. (R. 524). Further, children do not handle fear well, and the effect would have been magnified. (R. 523). The cut probably had a tremendous effect on her. (R. 524). Because there was no trauma to the nervous system, she could have felt pain even after the loss of consciousness, for at least three to five minutes, until brain-death set in. (R. 461, 489, 494, 509).

SUMMARY OF THE ARGUMENT

1. The trial court departed from the essential requirements of the law when it refused to give an instruction on the heinous, atrocious, or cruel aggravating factor where the evidence showed that the 2-year-old murder victim was nearly beheaded in her own bed by her father figure, where the wound rendered her unable to call for help, and where she would have suffered excruciating pain for three to five minutes.

2. The trial court departed from the essential requirements of the law when it refused to give an instruction on the "during a kidnaping" aggravating factor where the evidence showed that the 2-year-old murder victim was confined against her will and against the will of her mother, and that the purpose of the confinement was to either terrorize the mother, with whom Defendant was having a domestic dispute, or to inflict bodily harm upon the child. Kidnaping for these purposes is not subject to the "slight or insubstantial" rule of Faison. Moreover, the evidence also showed that the confinement was accomplished with an intent to commit a felony, i.e., murder. Although Faison applies to this aspect of kidnaping, the evidence showed that the confinement was not slight or inconsequential, was not inherent in the nature of murder, and made the crime substantially easier to commit, where the victim was locked in a room by a bolt substantial enough to withstand the

repeated battering of two police officers and the confinement prevented the nine adults present from rescuing the child.

ARGUMENT

I.

THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE HAC AGGRAVATOR APPLIED.

The trial court concluded that "the facts d[id] not support a jury instruction on" the heinous, atrocious, or cruel aggravator. (R. 58). This conclusion, in light of the facts outlined above, was a departure from the essential requirements of the law.

The Z-year-old victim was nearly decapitated by the Defendant, whom she loved, and in addition to the fatal wound, she also suffered two other cuts to her chin, and five abrasions or scrapes on her right shoulder, consistent with a struggle. The expert testimony revealed that she would have suffered substantial pain, from the cutting of all her neck muscles and veins, the other injuries, and the inhaling of blood into her lungs, which her injuries would have prevented her from coughing out. The expert further testified that even a baby will fear its own impending death. The child here would have been conscious and aware when she was cut, and would have realized she was being killed, and been terrified. The injury to her windpipe, however, would have prevented her from even crying out. She would have been conscious for at least 10 to 15 seconds, and would have continued to feel pain for three minutes, possibly five, as the blood flowed out of her body.

The standard for whether the jury should be instructed on a particular aggravating circumstance is whether there was competent and credible evidence presented in support of it. Banks v. State, 22 Fla. L. Weekly S52 (Fla. Aug. 28, 1997)(no error in instructing jury on factor despite judge's ultimate conclusion that aggravator not proven beyond a reasonable doubt where competent credible evidence supported it); Hunter v. State, 660 So. 2d 244, 25.2 (Fla. 1995) (noting that standard for instruction, that there be competent and credible evidence, differs from ultimate standard of proof, which must be beyond a reasonable doubt); Mordenti v. State, 630 so. 2d 1080, 1085 (Fla. 1994)(instruction on HAC properly given, even where the trial court did not ultimately find factor, where there was a dispute as to length of suffering because it was unclear whether stab or gunshot caused death). Based upon the evidence outlined above, there was clearly competent and credible evidence for the giving of an instruction on HAC in this case. Moreover, "for the purposes of this aggravator, a common-sense inference as to the victim's mental state may be inferred from the circumstances." Banks, 22 Fla. L. Weekly at 5522; Swafford v. State, 533 so. 2d 270, 277 (Fla. 1988)(same).

There was ample evidence from the medical examiner's testimony that the Z-year-old victim suffered great fear as she lay face down in her own blood, unable to even cry for help, during the fifteen

to twenty seconds that she was conscious after being slashed in her own bed by a man who was a father figure to her. This evidence supports the aggravator. Adams v. State, 412 So. 2d 850, 857 (Fla. 1982)("fear and emotional stress preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of a capital felony"); James v. State, 22 Fla. L. Weekly S223, S225 (Fla. April 24, 1997)(near immediate death by strangulation by a known assailant was HAC); Parker v. State, 476 so. 2d 134, 139 (Fla. 1985)(fear and emotional stress may be considered); Swafford, 533 So. 2d at 277 (same). Dr. Price was very explicit in describing how children tend to be especially fearful by nature, that even babies have an instinctual fear of being killed, and that therefore the child here, who would have been conscious at the time of the slashing, would have suffered great fear. There have been numerous cases where the fear naturally engendered when a child is fatally attacked by an adult has been held sufficient to warrant the finding of the HAC factor. Davis v. State, 22 Fla. L. Weekly S701, 5703 (Fla. Nov. 6, 1997) (despite claim that there was "no conclusive means of knowing," HAC was supported by evidence, including testimony of the medical examiner, that showed that two-year-old victim must have felt "sheer terror"); Adams, -412 So. 2d at 857 ("a frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel"); James,

22 Fla. L. Weekly 5225 (near instantaneous strangulation of eight-year-old by her grandmother's boarder is HAC); Sanchez-Velasco v. State, 570 so. 2d 908 916 (Fla. 1990)(strangulation of eleven-year-old by her mother's boyfriend, who was baby-sitting her, was HAC).

There was also ample evidence of her suffering; Dr. Price testified, without contradiction, that the child would have felt great pain from the tremendous wound that nearly decapitated her, and that the pain would have continued until she died five minutes later, despite the loss of consciousness, because there was no damage to her nervous system. This court appears to have upheld the finding of the HAC aggravator in every case it has ever considered where the cause of death was the slashing of the victim's throat. See, e.g., Suaas v. State, 644 So. 2d 64, 70 (Fla. 1994)(rejecting defendant's claim that murder was not HAC because there were only two knife wounds and no evidence of how long victim suffered where defendant "nearly cut the victim's head off"); Preston v. State, 444 So. 2d 939, 939 (Fla. 1984)("deliberate slashing of the throat of the victim from one side to the other with the force necessary to sever the jugular veins, trachea and main arteries is especially heinous, atrocious and cruel"); Pittman v. State, 646 So. 2d 167 (Fla. 1994); Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Hooser v. State, 476

So. 2d 1253 (Fla. 1985); Hallman v. State, 305 So. 2d 180, 181 (Fla. 1974); Card v. State, 453 So. 2d 17 (Fla. 1984).

Moreover, where the victim is attacked in his or her own bed, as here, and stabbed or slashed, even where there was only one wound, it has been held to be heinous atrocious and cruel. Rolling v. State, 22 Fla. L. Weekly 5141, S147 (Fla. Mar. 20, 1997), revised op., 22 Fla. L. Weekly S347 (June 12, 1997)(victim attacked in bed and conscious thirty to sixty seconds before dying); Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982)(where victim did not die "immediately" from single stab wound, the Court held that "although pain and suffering alone may not make this murder heinous, atrocious, or cruel, the attack occur-red while the victim lay asleep in his bed. This is far different from the norm of capital felonies, and sets this crime apart from murder committed in, for example, a street, a store, or other public place").

For all of the foregoing reasons, there was clearly "competent and credible evidence" warranting the giving of an instruction on HAC. As such, in granting Defendant's motion barring such an instruction, the trial court departed from the essential requirements of the law, and that portion of its order addressing the HAC aggravator should be quashed.

II.
THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE KIDNAPING AGGRAVATOR APPLIED.

The trial court also departed from the essential requirements of the law in granting Defendant's motion to not instruct the jury on the kidnaping aggravator, (R. 57), because there was credible and competent evidence supporting that aggravating circumstance as well. Banks; Hunter; Mordenti.

The kidnaping statute provides that kidnaping may be committed in several ways:

> (l)(a) The term "kidnaping" 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. The facts here support a finding that this murder was committed during the commission or attempted commission of a kidnaping' under both the second and third subparagraphs of

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[7] §921.141(5)(d), Fla. Stat.

§787.01(1)(a), as will be shown below. That the victim was confined against her will may be inferred from the circumstances. Presumably, she did not consent to be locked in a room with her murderer. Moreover, the statute specifically provides that the confinement of a child under the age of 13 is against its will if it was without the consent of the child's parent.' The evidence clearly showed that the child was confined, and that it was without Melendes's consent.

As for the required intent, there was clearly credible and competent evidence that Defendant confined the child to terrorize her or her mother, or to inflict bodily harm upon her. Immediately before locking himself in the room, Defendant screamed at Melendes that she would be sorry, and that she would "cry tears of blood." Earlier that evening, he had told Melendes that she would be sorry, and made a threatening gesture. These statements, coupled with Defendant's subsequent actions, make it abundantly clear that his

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[8] Even if the victim has initially consented to be with the defendant, circumstantial evidence may indicate that "at some point" the "accompaniment . . . ceased to be voluntary." Gore v. State, 599 So. 2d 976, 985 (Fla. 1992); see also Gay v. State, 607 so. 2d 454, 458 (Fla. 1st DCA 1992)(any confinement of children under 13 beyond degree of consent originally given by parents is "against their will"); Raleigh v. State, 22 Fla. L. Weekly S711, S712 (Fla. Nov. 13, 1997)(for purposes of burglary aggravator, jury could conclude that any consent given by the victim was withdrawn when defendant proceeded to murder him). Plainly neither the child nor her mother gave Defendant consent to confine her for the purpose of killing her.

intent was to make Melendes suffer. Likewise, immediately after asserting that Melendes would "cry tears of blood,"" Defendant did inflict grievous, and fatal, bodily harm on the child, which supports the inference that that was his intent in barricading himself and the child in the room. See Sanborn v, State, 513 So. 2d 1380, 1382 (Fla. 3d DCA 1987)(confining victim to his bed and cutting his ear satisfied elements of "terrorization" kidnaping); Dopazo v. State, 428 So. 2d 360 (Fla. 3d DCA 1983) (death threat before confinement supported kidnaping conviction under "terrorization" provisions).

The contention, asserted below, that the evidence did not show whether the murder took place before the confinement, is meritless. There was sufficient evidence to send this question to the jury. Jimenez testified that immediately before locking himself in the room, Defendant had gone to the refrigerator and gotten a glass, then started out the front door. Jimenez stated that Defendant had no blood on him at that time. After his arrest, Sergeant Mendez observed blood caked on both of Defendant's hands. Moreover, Defendant was standing outside when he first saw the police. Had he already committed the crime, he would have had ample opportunity

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[9] One reasonable interpretation of this phrase, which was originally uttered in, and translated from, Spanish, is that Melendes would be crying over the loss of a family member or her "blood."

to have fled, or upon reentering the house, have fled through the rear door of the apartment, which was located in the kitchen, rather than locking himself in the bedroom with the child. Defendant also argued below that this contention was supported by the evidence that no one outside the room ever heard the baby cry out. However, the evidence also showed that she was probably asleep at the time she was initially assaulted, and further, that once Defendant had completely severed her windpipe, she would have been unable to cry out.

Likewise, any assertion that the evidence was insufficient under Faison v. State, 426 So. 2d 963 (Fla. 1983), to show -that the confinement was more than incidental to the bodily harm or terrorization would be misplaced. The "incidental" test of Faison only applies where the confinement was with the intent to facilitate the commission of a felony under §787.01(1)(a)(2). Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991)(Faison not apply to "inflict bodily harm or terrorize," under §787.01(1)(a)(3)); Dopazo, 428 So. 2d at 360 (same).

Furthermore, although the evidence was more than sufficient to support a finding that the confinement was with the intent to terrorize or inflict bodily harm, it would also support a finding that the confinement was intended to facilitate the commission of

a felony as well. Contrary to Defendant's assertions below, the Faison test was satisfied. That case provides:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping 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.

Faison, 426 So. 2d at 965, Here, the confinement'" constituted the bolting of a 2-year-old child in a room. The confinement was not slight nor incidental to the crime. See Ferguson v. State, 533 So. 2d 763, 764 (Fla. 1988)(barricading victims into bathroom not slight nor incidental); Johnson v. State, 509 So. 2d 123'7, 1240 (Fla. 4th DCA 1987)(same), cited with approval in Walker v. State 604 So. 2d 475, 477 (Fla. 1992); Hipp v. State, 509 So. 2d 1208, 1210 (Fla. 4th DCA 1987)(locking victim in stall of public bathroom not inconsequential); Berrv v. State, 668 So. 2d 967, 969 (Fla. 1996) (noting that locking victim in a room satisfies the "nonincident al confinement" requirement); Tavlor v. State, 481 So. 2d 97 (Fla. 3d DCA 1986)(same). The confinement was substantial,

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[10] As noted in Berrv v. State, 668 so. 2d 967 970 (Fla. 1996), "movement" is not necessary to satisfy Faison where the confinement itself satisfies the elements of the test.

requiring two police officers to kick a door for several minutes to overcome it. Even when the door eventually gave way, the bolt held. Further, neither murder nor aggravated child abuse, of which Defendant was convicted, intrinsically require confinement to carry them out. Feruuson, 533 So. 2d at 764. Finally, the confinement clearly made it easier to accomplish the other crimes, as the amount of effort required to breach the door demonstrated. Confining the child to the room allowed Defendant the time to slash the child's throat, which probably would not have been otherwise possible had the four police officers, or the other five adults present, been able to get into the room immediately. See Garvin v. State, 685 So. 2d 17, 18 (Fla. 3d DCA 1996)(Faison satisfied where confinement prevented the summoning of help); State v. Davis, 688 so. 2d 323, 324 (Fla. 3d DCA 1996)(taking child into another room away from others to commit crime satisfied Faison because made it easier to commit); Kellar v. State, 640 So. 2d 1.27, 128 (Fla. 1st DCA 1994)(confinement of victim to bedroom made crime easier to commit); Lamarca v. State, 515 So. 2d 309, 311 (Fla. 3d DCA 1987)(confining rape victim in stall of public bathroom satisfied Faison because it made detection less likely); Sanborn v. State. 513 so. 2d 1380, 1381 (Fla. 3d DCA 1987)(Faison satisfied, because even though victims never moved from their own bed, confinement there made the summoning of help impossible).

In view of the foregoing, there was clearly competent and credible evidence supporting the kidnaping aggravator under either §787.01(1)(a)(2) or (3). As such, the refusal to instruct on the factor was a departure from the essential requirements of the law, and that portion of the trial court's order pertaining to the kidnaping factor should be quashed.

CONCLUSION

For the foregoing reasons, Petitioner, the State of Florida, respectfully requests that the portions of the trial court's order of September 2, 1997, granting Defendant's motion to prohibit the instruction of the jury on the HAC and kidnaping aggravators be quashed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by U.S. mail to **LOUIS CAMPBELL,** Assistant Public Defender, counsel for Respondent, 1320 Northwest 14th Street, Miami, Florida 33125, this 8th day of December, 1997.

RANDALL SUTTON
Assistant Attorney General

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