IN THE SUPREME COURT OF THE STATE OF FLORIDA

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | |
| | ) | Case No. SC 01-1456 |
| LORENZO SMITH, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

**APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT**

# RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## SUMMARY OF ARGUMENT

Point 1. Petitioner's argument is that "Faison Test" - a test devised to determine whether confinement is incidental to another offense for which the defendant was convicted - applies only to kidnaping, not to false imprisonment. Petitioner's reasoning focuses on the specific intent required for kidnaping, not on the confinement involved. The "Faison Test" evolved to prevent every felony from becoming a duplicitous conviction simply by the fact of restraint inherent in the core felony. The "Faison Test" did not focus on the intent element of offenses; rather, the focus was on inconsequential confinement, a collateral consequence of the core felony.

There is no logical reason to distinguish between kidnaping and false imprisonment. This Court and four other district courts have applied the "Faison Test" to false imprisonment cases. The only case cited by Petitioner which even marginally addresses the issue is a First District Court case dealing with jury instructions. If Petitioner's argument were accepted by this Court, every person charged with a robbery, murder, sexual battery, burglary, battery or assault could be convicted also of false imprisonment. Petitioner's position is precisely what the "Faison Test" was designed to preclude.

Petitioner also argues that the legislative intent was to allow convictions for

inconsequential confinements when incidental to a core felony, but has cited no authority for this argument. On the contrary, the only intent apparent from the face of the false imprisonment statute is to exclude dual punishments.

The lower court's ruling should be affirmed on this issue.

## ARGUMENT

FAISON APPLIES EQUALLY TO BOTH KIDNAPING AND FALSE IMPRISONMENT WHERE THE CONFINEMENT ALLEGED TO BE FALSE IMPRISONMENT IS INCIDENTAL TO ANOTHER FELONY.

The first issue Respondent would like to address is that of jurisdiction[1]. While this Court has accepted jurisdiction in this case, it is still the position of the Respondent that such was done improvidently. In Jenkins v. State, 385 So.2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958:

> It was never intended that the district courts of appeal should be intermediate courts ... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

This Court's jurisdiction should not be invoked for the purpose of seeking a second appellate review. The Petitioner in this case admits that this Court applied the test espoused in Faison v. State, 426 So. 2d 963 (Fla. 1983), to false imprisonment, as

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[1]This court has also accepted jurisdiction in another Fifth District case, Waits v. State,795 So.2d 237 (Fla. 5th DCA 2001); Case No. SC01-2269. A Notice of Similar Issue has been filed concurrently with this brief.

have three other district courts of appeal[2].

The real issue Petitioner argues is whether the facts of this case constitute false imprisonment[3]. Whether the facts support a conviction and whether the Fifth District Court of Appeal correctly found insufficient evidence to support the conviction, are both issues which are not novel and are ones which do not need this Courts review for resolution.

The issue presented to the appellate court was whether there was sufficient evidence for false imprisonment independent of the robbery. Consistent with case law from this Court and other district courts, the Fifth District found there was insufficient evidence to support the jury's verdict. Petitioner sought to invoke this Court's discretionary jurisdiction on the ground that the decision in this case expressly and directly conflicts with the decisions in Chaeld v. State, 599 So. 2d 1362 (Fla. 1st DCA 1992); Scott v. State, 757 So. 2d 574 (Fla. 4th DCA 2000); and

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[2] See page 16 of Petitioner's brief, citing State v. Lindsay, 446 So.2d 1074 (Fla. 1984), Waits v. State, 795 So.2d 227 (Fla. 5th DCA 2001); Stringer v. State, 783 So.2d 1153 (Fla. 4th DCA 2001); Taylor v. State, 771 So.2d 1233 (Fla. 2d DCA 2000), McCutcheon v. State, 711 So.2d 1286 (Fla. 4th DCA 1998); Waddell v. State, 696 So.2d 1229 (Fla. 3d DCA 1997), Rohan v. State, 696 So.2d 901 (Fla. 4th DCA 1997); Hibbs v. State, 652 So.2d 515 (Fla. 3d DCA 1995); Keller v. State, 586 So.2d 1258 (Fla. 5th DCA 1991); Perez v. State, 566 So.2d 881 (Fla. 3d DCA 1990); and Hrindich v. State, 427 S(.2d 212 (Fla. 5th DCA 1983).

[3]Petitioner's brief, pages 17-19.

Dowling v. State, 723 So. 2d 307 (Fla. 4th DCA 1998). Only Chaeld was mentioned in the lower court decision, and was not mentioned as conflicting. Smith v. State, 785 So.2d 623, 626 (Fla. 5th DCA 2001).

These preceding decisions do not support Petitioner's interpretation and are factually inapposite. Chaeld involved a defendant who followed a woman to her door, grabbed her and tried to pull her into her apartment and ultimately let her go after she resisted and screamed. He was charged with battery and false imprisonment. Defense counsel requested an instruction based on Faison v. State, 426 So.2d 963 (Fla. 1983) that the confinement for false imprisonment must be incidental to the battery. The district court discussed the inapplicability of a jury instruction when the State charged kidnaping with the intent to commit a felony. Chaeld did not address the same issue as the court in this case: whether a false imprisonment can exist independently of the underlying crime. The Fifth District court recognized Chaeld as inconsistent; however, there is no express and direct conflict because the issues were different and the district courts interpreted Faison according to the facts of the case.

Neither is there express and direct conflict between Smith and Scott. Scott involved a motion for post conviction relief in which counsel failed to object to an instruction on false imprisonment. The court held that the current instruction was

given and the trial judge did not err in giving the instruction. The instruction did not include that confinement be for some other purpose than the commission of a felony. The court cited Dowling as being identical. The present case involves whether false imprisonment, like kidnaping, can be charged as an additional crime every time a person is confined in order to commit a robbery. The issue raised in Smith is factually different from the issue in Scott and Dowling. Although all the cases cited interpret a nuance of Faison, they are not in direct and express conflict with each other.

The decision below does not conflict with the decisions of other courts. Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four corners of the majority decision. Moreover, jurisdiction depends upon whether the conflict between decisions is express and direct and not whether the conflict is inherent or implied. Dept. Of HRS v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986). The district courts are

ordinarily the court of final appellate jurisdiction, and this Court's review on the basis of conflict of decisions is limited. Viewed in this light, there is no basis to exercise jurisdiction in this case.

Petitioner first claims that the test derived from Faison ("Faison Test"). Does not apply to false imprisonment, only kidnaping, because the test is based on the specific intent to commit an underlying felony and only the kidnaping statute contains language regarding intent to commit a felony. This argument defies logic. The Faison Test evolved to prevent every felony from becoming a duplicitous conviction simply by the fact of restraint inherent in the core felony. Faison, 426 So.2d at 965; see also Berry v. State, 668 So.2d 967, 969 (Fla. 1996); Walker v. State, 604 So.2d 475, 477 (Fla. 1992). The same reasoning is as true for false imprisonment as for kidnaping. Both statutes require confinement. The Faison Test did not focus on the intent element of offenses; rather, the focus was on inconsequential confinement, a collateral consequence of the core felony which should not be considered an offense independently of the core offense.

Under Faison, there must be a confinement independent of the core felony. The confinement:

> (1) Must not be inconsequential and merely incidental to the other crime;
> (2) Must not be of the kind inherent in the nature of

> the other crime; and
> (3) 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. Petitioner argues that since Faison talks of "another crime" and the kidnaping statute refers to "intent to commit any felony" which the false imprisonment statute does not include, that Faison necessarily only relates to kidnaping. Faison prevents the State from bootstrapping offenses. If there is a felony such as robbery, sexual battery, murder, etc., that would necessarily include some type of restriction on a person's freedom, Faison prevents the State from stacking charges. If the State's argument were viable, it would turn every burglary of an occupied dwelling or robbery in which a defendant says "Don't move" into false imprisonment. If, as in the present case, the jury found there was a firearm or weapon, that offense is escalated to a second-degree felony.

The State has seized upon the only distinction between the kidnaping and false imprisonment statutes to try to make chicken salad out of chicken feed. This is a distinction without a difference. False imprisonment is a necessarily lesser-included offense of kidnaping and proof of the elements of kidnaping also proves false imprisonment. State v. Sanborn, 533 So.2d 1169 (Fla. 1988); McCutcheon v. State, 711 So.2d 1286, 1288 (Fla. 4th DCA 1998). The fact that kidnaping includes

language referring to committing a felony does not preclude Faison being applied to false imprisonment when it is incidental to a felony. Kidnaping must be committed with intent to commit another felony in order to elevate it to a second-degree felony. Kidnaping is false imprisonment enhanced because of the specific intent to commit another felony. This enhancement has nothing to do with whether confinement is inconsequential or incidental to the other felony. Faison focuses on the confinement aspect, not with whether the crime is specific or general intent. Both kidnaping and false imprisonment involve the intent to confine. However, that confinement cannot be inconsequential or incidental to another charged offense. In other words, if the confinement is part and parcel of the core felony, it cannot be a separate offense. That has nothing to do with the intent to commit the core felony. False imprisonment can exist alone, kidnaping cannot. But when false imprisonment accompanies another felony, the rule of Faison applies.

The State points to the jury instructions on kidnaping and false imprisonment as evidence that Faison applies only to kidnaping. In Biggs v. State, 745 So.2d 1051 (Fla. 3d DCA 1999), the district court noted that, in actuality, the Faison instruction should only be given for subparagraph 2 of Section 787.01(1)(a). The instruction should not be given where the specific intent is to inflict bodily harm or terrorize the victim. Biggs, 745 So.2d at 1052, citing Chaeld

v. State, 599 So.2d 1362, 1365 (Fla. 1st DCA 1992). In Chaeld, the defendant was charged with false imprisonment and battery, a misdemeanor. The court stated that, like in Biggs, the Faison instruction only applied to subparagraph 2 of the kidnaping statute, not subparagraphs 1, 3 or 4. This is so because the accompanying felony of subparagraph 2 is not independent of the confinement of the kidnaping. Whether to give the Faison instruction has nothing to do with the specific intent to commit the underlying felony, as illustrated by the fact the instruction is not given for subparagraphs 1, 3, or 4, which also require specific intent. The Chaeld court even cited to Sanborn for the premise that:

> [t]he "general intent" of the false imprisonment statue is included in the "specific intent" of the kidnaping statute, and, thus, false imprisonment is a necessarily lesser included offense of the crime of kidnaping.

Chaeld, 599 So.2d at 1363. The Chaeld court then went off the deep end and held that since false imprisonment does not "by definition" require proof of the intent to commit another felony, the Faison instruction should not be given. In other words, since false imprisonment can stand alone without an underlying felony, the defendant is not entitled to the Faison instruction even if there is an underlying felony involving confinement which is inherent in that felony. This reasoning flies in the face of the intent of Faison.

The so-called "Faison Test[4]" was announced by this Court in 1983, in order to prevent duplicitous convictions in conjunction with other offenses, where there was no proof that the confinement supporting the incidental confinement was separate and distinct from some other offense committed in a single criminal transaction. Faison, 426 So.2d at 966, citing Mobley v. State, 409 So.2d 1031, 1034 (Fla. 1982). Significantly, the Court endorsed the construction of the kidnaping statute as construed by the Fifth District Court of Appeal in Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980). Harkins set forth the test adopted in Faison, which Harkins adopted from a Kansas case. State v. Buggs, 219 Kan. 203, 547 P.2d 720 (1976). It seems ironic that the court which gave birth to the Faison Test is now being challenged as not knowing what it means.

Petitioner also notes that one year after Faison was decided, this Court applied the Faison Test in a case involving false imprisonment. State v. Lindsey, 446 So.2d 1074 (Fla. 1984). The Lindsey opinion included language indicating that the question of whether the confinement element of kidnaping had been proven as distinct from some other offense, had implications beyond the State's burden of proof. Specifically, this Court indicated that application of the Faison Test involved a double jeopardy question as well; that is, the question as to

whether a conviction for false imprisonment along with another offense would violate the prohibition of multiple punishments for a single offense. The double jeopardy ramifications will not be discussed in this brief since it was not the basis for the opinion of the lower court. This omission would not, however, preclude this Court's consideration of the double jeopardy argument; nor would it preclude this Court from reliance upon the double jeopardy argument in affirming the decision of the District Court[5]:

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[5]Petitioner notes that the section of the false imprisonment statute, section 787.02(3) provides:

> (a) A person who commits the offense of false imprisonment upon a child under the age of 13 and who, in the course of committing the offense, commits any offense enumerated in subparagraphs 1.-5., commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.
> 1. Aggravated child abuse, as defined in s. 827.03;
> 2. Sexual battery, as defined in chapter 794, against the child;
> 3. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, in violation of s. 800.04;
> 4. A violation of s. 796.03 or s. 796.04, relating to prostitution, upon the child; or
> 5. Exploitation of the child or allowing the child to be exploited, in violation of s. 450.151.
> (b) *Pursuant to s. 775.021(4), nothing contained herein shall be construed to prohibit the imposition of separate judgments and sentences for the first degree offense described in paragraph (a) and for each*

Last, Petitioner argues that under the facts of this case, the confinement was not incidental to the robbery. The victims were in the bathroom and opened the door when they believed Respondent left. They were not locked or blocked in the bathroom, tied up, or otherwise restrained. The only purpose of their being in the bathroom was to facilitate the robbery. Under the Faison Test, any confinement was inconsequential and merely incidental to the robbery, inherent in the nature of the robbery, and had no significance independent of the robbery. The victims being in the bathroom did not make the robbery substantially easier and should have been a relief to Ms. Loughlin, who was so fearful during the robbery she knelt at the foot of the bed. Once inside the bathroom, she could lock Appellant out of the bathroom. Neither did being inside the bathroom lessen the risk of detection since the victims were inside a motel room with no access to a telephone. If anything, being in the bathroom would have allowed the victims the opportunity to summon help either on a cell phone or by knocking on the wall.

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*separate offense enumerated in subparagraphs (a)1.-5.* (Emphasis added)

Thus, the legislature expressly enumerated offenses for which double convictions were not barred. The legislature could likewise have designated specifically that double convictions were not precluded if that were the intent for Section 787.02(2).

## CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Respondent respectfully requests that the ruling of the District Court in this case be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Lorenzo Smith, DC# 369508, Charlotte Correctional Institution, 33123 Oil Well Rd., Punta Gorda, FL 33955 on this 18th day of March, 2002.

_____
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER

## CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER