IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-2030

ROGELIO DELGADO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Rogelio Delgado, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" designates the record on appeal; the symbol "T" refers to the transcript of the trial proceedings.

STATEMENT OF THE CASE AND FACTS

On May 24, 2006, Juan Gonzalez drove his pickup truck to a furniture store in Hialeah along with his girlfriend, Luisa Alvarado, and his aunt (T. 183-84). The two-door truck had a large extended cab. Luisa sat in the back seat with her two year old daughter, M (T. 209). They parked about ten yards from the store. Juan and the aunt tried to load some furniture into the truck bed, but needed assistance. Luisa exited the vehicle, which had the keys in the ignition with the engine running, in order to help. She left M. in the back sleeping in a child safety seat and walked into the store for about five minutes (T. 194, 199-211). At some point she realized the truck was missing, but did not see who took it (T. 200, 210-11).

The police located the parked truck thirty (30) minutes later with the engine running and M. in the back seat (T. 248-54). The officer said that due to the dark tinting on the windows he was unable to see the child when he looked into the truck from the outside (T. 257). Juan Gonzalez testified that the radio was missing as well as some tools (T. 191-92).

Mr. Delgado and the codefendant were later arrested and identified based on a surveillance video of the parking lot from which the truck was taken. When questioned by police, Mr. Delgado denied his involvement in the crime (T. 231). At the close of the State's case in chief, the defense attorney moved for a judgment

of acquittal on the kidnapping charge on the grounds that the evidence did not satisfy the three-pronged *Faison* test (T. 332-44).[1] The court denied the first motion for a judgment of acquittal and reserved on the second motion (T. 344).

The jury found the defendant guilty of burglary of an occupied conveyance (count I), grand theft (count II), which was reduced by the court to petit theft, grand theft of a motor vehicle (count III), and kidnapping (count IV) (R. 115-16). Mr. Delgado was sentenced to life imprisonment on the kidnapping conviction (R. 199-202).

On appeal, the Third District Court of Appeal found that the evidence demonstrated circumstantially that Mr. Delgado "became aware that the child was confined in the truck in the course of removing the radio, taking the owner's tools, and ransacking the interior of the truck. . ." *Delgado v. State,* 19 So. 3d 1055, 1057 (Fla. 3d DCA 2009). The court based its rationale on the fact that the child's confinement continued after the defendant had become aware of the child's presence in the truck and during the theft of certain items from inside the passenger compartment. The court then asserted that the confinement was not inconsequential, or incidental to the theft and that it facilitated the commission of the underlying offenses. *Id.* 1057-58.

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[1]*See Faison v. State,* 426 So. 2d 963 (Fla. 1983).

A notice invoking this Court's discretionary jurisdiction based on a direct conflict was timely filed and this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

In this case, the evidence failed to meet the *Faison* test. First, the defendant did not cause the child's confinement to the backseat of the truck since she was already in the backseat when the defendant entered the truck to commit a theft. The defendant's actions at most prolonged the child's pre-existing confinement to the vehicle by thirty (30) minutes. The child's confinement, therefore, cannot form the basis for the kidnapping conviction. Secondly, the child's movement was the result of the auto-theft and was thus incidental to the other crime. Lastly, the child's presence in the truck did not facilitate the theft, or lessen the risk of detection. As such, the *Faison* test was not met and the lower court should have reversed the kidnapping conviction.

ARGUMENT

WHERE THE CHILD VICTIM'S MOVEMENT AND CONFINEMENT INSIDE A STOLEN VEHICLE WAS INCIDENTAL TO THE AUTO-THEFT, THE EVIDENCE FAILED TO ESTABLISH A KIDNAPPING.

The evidence of the victim's movement and confinement required to establish kidnapping must satisfy the following three criteria:

> "(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."

Diez v. State, 970 So. 2d 931, 932-33 (Fla. 4th DCA 2008); *see also*, *Faison v. State*, 426 So. 2d 963 (Fla. 1983).

Kidnapping is a specific intent crime which means that the perpetrator must intend to move and/or confine the victim in order to accomplish (c), above. *See Viglione v. State*, 906 So. 2d 1158 (Fla. 5th DCA 2005).

The non-incidental confinement criterion of *Faison* requires the defendant to confine the victim in such a manner that the confinement is beyond the scope of the underlying felony. Otherwise, the confinement is merely inherent to the other

felony. In *Berry v. State*, 668 So.2d 967 (Fla. 1996), this Court acknowledged that "the inquiry into whether a kidnapping has occurred does not end with an examination of the statute." *Id.* 969. This Court interpreted the " slight" or "inconsequential" language of the *Faison* test to mean that "there can be no kidnapping where the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it." *Id.*

The crime of auto-theft naturally involves the movement of the stolen vehicle from one location to another in order to effectuate a taking. Movement of the vehicle, or its attempted movement, without the owner's consent is an integral factual component of the crime.

In this case, Mr. Delgado's complicity in the movement of the truck was insufficient to satisfy the asportation requirement of kidnapping because asportation of the truck, along with its contents, constituted the *corpus* of the theft itself. The fact that a child was restrained inside a child-safety-seat in the truck's rear compartment did not facilitate the taking of the truck. The subsequent movement of the child was incidental to the theft of the truck. The child, like the rest of the vehicle's contents, was transported from point "A" to point "B" as a result of the theft. In order to establish kidnapping, the State needed to prove an additional movement of the child which would have somehow contributed to the commission,

or the concealment, of the auto-theft.

Mr. Delgado did not confine the child inside the truck. The child was already confined by virtue of having been secured to a safety seat. The taking of the truck at best prolonged the child's confinement by about thirty (30) minutes, but it did not cause the confinement as such. This situation is thus analogous to *Sanders v. State,* 905 So. 2d 271 (Fla. 2d DCA 2005), where the defendant imprisoned the victim in her apartment for three hours before sexually assaulting her. The Second District held that although the duration of the confinement could be considered a factor in determining whether it was inconsequential, the confinement of the victim in her apartment was incidental to the sexual battery. *Sanders,* 905 So. 2d at 274. Since the victim was already in her apartment when the defendant broke in, her inability to leave the apartment was incidental to the sexual battery.

In *Griffin v. State,* 705 So. 2d 572 (Fla. 4th DCA 1998), Griffin was convicted for the armed robbery of a beeper store. Griffin and a codefendant robbed the business and forced the manager and her three-year-old daughter into an unlocked closet. The defendant then removed both victims from the closet to another room where he tied the manager's feet and covered her mouth with duct tape. The child was also moved from the closet to the other room, but she was not bound. The Fourth District held that the child's confinement did not satisfy the first

prong of the *Faison* test and relied on this Court's hypothetical in *Berry, supra*, as a basis for its holding.

> For example, if Berry and the others had confined the victims by simply holding them at gunpoint, *or if the robbers had moved the victims to a different room in the apartment, closed the door and ordered them not to come out, the kidnapping conviction could not stand. In both hypotheticals, any confinement accompanying the robbery would cease naturally with the robbery.*

Griffin, 705 So. 2d at 574 (quoting *Berry v. State*, 668 So. 2d at 969).

In the case *sub judice*, although the child's confinement did not cease with the termination of the auto-theft, it also did not begin with the auto-theft. The child was completely undisturbed by the defendants. The only change in the child's circumstances resulted from the transportation of the truck which, as indicated above, was a natural consequence of the theft and thus incidental with respect to the alleged kidnapping.

The Third District's finding that the child's confinement was not inconsequential was based on the misappropriation of an Indiana appellate court's interpretation of that state's hijacking statute. *See Taylor v. State*, 879 N.E. 2d 1198, 1202-03 (Ind. Ct. App. 2008). The Indiana court discussed the legislative intent

behind the state's anti-hijacking law which was designed to "'prevent persons from being exposed to that *special danger,* that increased probability of injury or death, which results when one is seized and confined or transported in a comandeered vehicle.'" *Taylor,* 879 N.E. 2d at 1202-03 (quoting *Wilson v. State,* 468 N.E. 2d 1375, 1378 (Ind. 1984)) (emphasis added). *Taylor*, however, is significantly distinguishable from the present case because *Taylor* involves a construction of an Indiana law specifically dealing with vehicle hijackings where the occupants are used as either hostages for ransom, or as a shields:

> Sec. 2. (a) A person who knowingly or intentionally confines another person:
>
> (1) with intent to obtain ransom;
>
> (2) while hijacking a vehicle;
>
> (3) with intent to obtain the release, or intent to aid in the escape, of any person from lawful detention; or
>
> (4) with intent to use the person confined as a shield or hostage;
>
> commits kidnapping, a Class A felony.
>
> (b) A person who knowingly or intentionally removes another person, by fraud, enticement, force, or threat of force, from one place to another:
>
> (1) with intent to obtain ransom;
>
> (2) while hijacking a vehicle;

(3) with intent to obtain the release, or intent to aid in the escape, of any person from lawful detention; or

(4) with intent to use the person removed as a shield or hostage;

commits kidnapping, a Class A felony.

IC 35-42-3-2 (2008).

Moreover in *Taylor,* the defendant stole a car which contained two children in safety-seats. The child's father pursued the defendant, who drove at a high rate of speed in an effort to evade capture. Taylor then abandoned the car and fired a weapon at the father. *Taylor,* 879 N.E. 2d at 1200. Using *Taylor* as a template, the Third District found that "once Delgado drove away with someone else's child, he moved from the realm of a crime against property to that of a crime against persons." *Delgado,* 19 So. 3d at 1058. The Court then merged the *"special danger"* concept in *Taylor* with the 'not inconsequential' *Faison* criterion: "[a]lthough the Florida statute does not include such language, the 'special danger' analysis of kidnapping squares neatly with the 'not slight', inconsequential, and merely incidental' element of *Faison.*" *Delgado,* 19 So. 3d at 1058.

There is no evidence, in this case, that Mr. Delgado had knowledge that there was a child asleep inside the rear compartment of the truck when he stole the vehicle. Neither Mr. Delgado, or the codefendant, used any force; they were unarmed and there was no indication that they drove the truck in a dangerous or

reckless manner. *Taylor*, *supra*, is thus inapplicable to this case.

The evidence thus clearly failed to meet the requirements of the *Faison* test and the Third District's decision upholding the kidnapping conviction must be overturned.

CONCLUSION

Based on the foregoing arguments and authorities cited, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal and remand this case with instructions that the defendant's conviction for kidnapping be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this 2nd day of June, 2010.

BY:_____
MANUEL ALVAREZ

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY:_____
MANUEL ALVAREZ