IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2030

ROGELIO DELGADO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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INTRODUCTION

Rogelio Delgado ("the Petitioner") was the defendant in the trial court and the Appellant in the district court of appeal. The State of Florida was the prosecution in the trial court and the Appellee in the district court of appeal. The symbol "R." will refer to the Record on Appeal from Case Number 3D08-1008. References to the trial transcripts will be designated by the symbol "T."

STATEMENT OF THE CASE AND FACTS

Procedural History

The State charged the Petitioner and co-defendant[1] by amended information with: one count of burglary of an occupied conveyance, a second degree felony in violation of § 810.02(3)(d), Fla. Stat.; one count of grand theft, a third degree felony in violation of § 812.014(2)(c); one count of grand theft of a motor vehicle, a third degree in felony violation of § 812.014(2)(c)(6); and, one count of kidnapping, violation of § 787.01(2), a first degree felony punishable by life. (R. 26-32). Following a jury trial, the Petitioner was found guilty of burglary of an occupied conveyance, grand theft of a motor vehicle (which the court reduced to petit theft) and kidnapping. (R. 115-16; T. 399-401). The trial court adjudicated the Petitioner guilty and sentenced him as a habitual offender to 30 years in prison on the burglary of an occupied conveyance count; credit for time served on the petit

[1] The Petitioner was tried separately from his co-defendant. (R. 1-16, 54-55).

theft count and 10 years for the count of grand theft of a motor vehicle. As to the kidnapping charge, the trial court sentenced the Petitioner to life in prison as a prison releasee reoffender. (R. 117-20; 201-02; T. 402).

On direct appeal, the Petitioner argued that the trial court erred in denying his motion for judgment of acquittal as to the kidnapping charge. Specifically, he asserted that there was no evidence indicating that he knew that the child was in the vehicle when the auto theft was committed and that the movement of the child did not facilitate the commission of the auto theft. The majority opinion from the Third District Court of Appeal found that the evidence was sufficient to support the Petitioner's conviction for kidnapping. *See Delgado v. State*, 19 So. 3d 1055 (Fla. 3d DCA 2009). In affirming the conviction, the Third District analyzed this Court's decision in *Faison v. State*, 426 So. 2d 963, 965 (Fla. 1983) finding that "[e]ach of *Faison*'s three elements was satisfied," and noting that in the present case:

> it is reasonable to infer from the evidence that 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 vehicle in an obvious search for other valuables (if not at the time Delgado jumped into the front seat).

Delgado, 19 So. 3d at 1057.

The Third District concluded that the child's confinement in this case "continued through the theft of contents within the vehicle and even after

Petitioner's abandonment of the unlocked, still-idling vehicle." *Id*. at 1057. This continued confinement of the child, the Third District reasoned, "was essential to [Petitioner]'s attempt to avoid apprehension for the theft of the vehicle and its contents." *Id*. Thus, the Third District concluded that "the confinement of the child was not slight, inconsequential, and "merely incidental" to the theft of the truck and contents" because once the Petitioner drove away with the child, "he moved from the realm of a crime against property to that of a crime against persons." *Id.*

The Third District further found that *Faison*'s second and third prongs were satisfied because "[k]idnapping a child is not inherent in the nature of the theft of a vehicle and the property within the vehicle, and the confinement of the child had significance independent of those crimes;" and that "the continuation of that confinement substantially lessened [the Petitioner]'s risk of detection and apprehension." *Id*.

Thereafter, the Petitioner sought review in this Court, contending that the Third District Court of Appeal's decision in *Delgado* conflicted with this Court's decision in *Faison* because (1) the child's confinement and movement were inseparable from the theft of the vehicle and were incidental to the taking, and (2) the fact that a child was in the backseat of the vehicle did not facilitate the commission of the auto theft. This Answer Brief follows.

FACTS ADDUCED AT TRIAL

On May 24, 2006, Juan Gonzalez, accompanied by his girlfriend, Luisa A. Alvarado, their two year old daughter, and Gonzalez's aunt, drove Gonzalez's two-door pickup truck to a furniture store. Mr. Gonzalez parked his truck almost in front of the store and went inside the store with his aunt. They were there to pick up previously purchased children's furniture. Ms. Alvarado and her daughter, whose feet can touch the front seat of the truck, but not the floor, stayed inside the extended cab of Mr. Gonzalez's truck. Ms. Alvarado was sitting in the back seat with her child, who was asleep in her car seat. Mr. Gonzalez and his aunt were having trouble loading the furniture into the truck and called on Ms. Alvarado for help. When Ms. Alvarado exited the truck in order to help, the truck's engine was running and the keys were in the ignition. Once she reached the store's doors, Ms. Alvarado noticed that the truck was missing. After yelling that the truck was gone to Mr. Gonzalez, Ms. Alvarado took off running. Mr. Gonzalez followed her. None of them saw who took the truck. However, prior to the truck being stolen, Ms. Alvarado had noticed two men in the area. (T. 183-85, 192-95, 198-99, 209-12).

Within 30 minutes of the incident, Detective Roger Hernandez found the truck parked in the back of a business parking lot, which was about 3.6 miles away from the furniture store. (T. 247-48). The parking lot where the truck was found

was not visible from the main avenue and one of the two entrances to the parking lot was closed. (T. 250-52).

After notifying the dispatcher that he found the truck, Detective Hernandez walked towards the truck. He then noticed that the truck's engine was running and the doors of the truck were not locked. Detective Hernandez then looked through the truck's tinted windows, which he described as old because of their purplish color. Although Detective Hernandez admitted that the condition of the truck's tints made it a little difficult for him to see into the complete cab of the truck, he was able to tell that there were no adults in the front seat. After opening the driver's side door, he saw an exhausted child in the back seat, whose eyes were puffy from crying. Mucus was on her face. (T. 253-54, 257-58).

Detective Hernandez testified that he did not have to get in the front seat and look back to see the child. Detective Hernandez specifically stated that he:

> moved the seat over a little bit, then there was a little crease and then I looked and then I could see her, then I folded the car seat forward because I remember having a clear view of the little girl.

(T. 255).

The truck's cab had been ransacked. The truck's glove compartment had been damaged. The truck's radio was missing, as well as Gonzalez's tools, which were under the front seat of the truck. (T. 191-92).

Shortly thereafter, the Petitioner and co-defendant were identified from a surveillance video[2] that was recovered from shopping center where the furniture store was located. The surveillance recorded the two men getting into the truck. (T. 293). The Petitioner voluntarily went to the police station. (T. 320, 323). After observing video footage showing two men getting into the truck at the police station, the Petitioner stated: "That is not me, I was with my father." (T. 230-31). The Petitioner was then taken into custody. (T. 230-31).

At the close of the State's case, the Petitioner moved for judgment of acquittal on all charges. (T. 332-40). With respect to the kidnapping charge, the Petitioner argued that the State failed to present sufficient evidence to satisfy the

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[2] The video was introduced into evidence and played for the jurors. (T. 224, 286). At trial, it was explained that the video was not actually a motion video, but a sequence of images of still pictures. Humberto Perez, a supervisor from the shopping center from where the truck was taken, explained that the cameras at the shopping did not record as a video recorder:

> Cameras record 1.5 second frames, it is not video, it won't record as a video recorder; it records frames and frames are—takes seven pictures per second and it works like this. It takes seven pictures and then it takes one second and-a-half and records another seven pictures and it goes like this.
>
> ***
>
> There is no way you are going to miss—for the reason you are looking at the video it will show you frame by frame and if you be walking it won't even miss one step because it will take pictures step by step of you.

(T. 280).

Faison test. (T. 335-36). The trial court denied the motion for judgment of acquittal. The Petitioner was subsequently convicted. (R. 115-16; T. 399-401).

SUMMARY OF ARGUMENT

There was sufficient evidence under *Faison* to support the kidnapping conviction. First, the child's confinement or movement was not slight, inconsequential, and merely incidental to the theft of truck. The child was confined for a substantial period and moved for a substantial distance to an isolated place before she was found. By moving the child 3.6 miles and confining her for approximately 30 minutes, the Petitioner placed the child in a different environment. The movement itself seriously endangered the child as she was isolated from the protection of her parents, the police or anyone who might have been able to rescue her. As such, the child was left in a "precarious and vulnerable state for a period beyond" the substantive offense, thus exposing the child to a substantially increased risk of harm.

Second, the confinement or movement of the child here was not inherent in the commission of auto-theft, because the theft of the truck and its contents could have been committed without the confinement, i.e., the Petitioner could have removed the child from the truck.

Third, the child's confinement or movement here lessened the risk of detection. Removing the child at the outset would have slowed the Petitioner's

departure from the scene at the taking of the vehicle, thereby increasing the risk of apprehension.

Further, the Petitioner's argument that the Third District Court misapplied the "special danger analysis" applied by the Indiana Court of Appeal in *Taylor* to this case is flawed. In its application of the "special danger analysis," the Third District Court recognized that unlike the Indiana statute, the Florida statute does not include the special danger language. The Third District Court, however, reasoned that the factual situation here was similar enough to apply the special danger analysis because of the "continued and dangerous confinement of the helpless child." This conclusion, however, is not erroneous as this Court has not excluded the danger analysis from its analysis of the kidnapping statute.

Lastly, in viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the State, there was competent, substantial evidence to support the conclusion that the Petitioner knew that the child was in the truck. The evidence demonstrated that the child could have been seen from inside the truck, where the Petitioner was when he stole the truck. Even if the Petitioner did not know that the child was there at the time of the taking, the reasonable inference was that he would have become aware of her presence, shortly after he occupied the vehicle, or when he ransacked the interior of the vehicle, but did nothing to return the child.

Alternatively, if the evidence is insufficient to support the kidnapping conviction, this Court can still find the evidence sufficient to support a conviction of false imprisonment as a lesser included offense.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT UNDER THE *FAISON* TEST TO SUPPORT THE KIDNAPPING CONVICTION.

The Petitioner alleges that there was insufficient evidence to support the kidnapping conviction because the child's movement and confinement[3] inside the stolen vehicle were incidental to the auto-theft. He argues that the asportation requirement of kidnapping was not satisfied because inherent in the crime of auto-theft is the movement of the stolen vehicle along with its contents. As such, he argues that since the child, "like the rest of the vehicle's contents," was transported "as result of the theft." (*See* Petitioner's Brief on the Merits. at 7).

As a preliminary matter, the State rejects the Petitioner's depiction of the child victim as part of the contents of the vehicle as it attempts to portray the child as an inanimate lifeless object. Kidnapping is defined in §787.01(1)(a), Florida Statute, in relevant part, as "forcibly, secretly, or by threat confining, abducting, or imprisoning another ***person*** against her or his will and without lawful authority, with intent to… [c]ommit or facilitate commission of any felony." Paragraph (1)(b) of the statute states that "[c]onfinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the

[3] Kidnapping requires confinement or movement, not both. *See Faison*, 426 So. 2d at 965.

consent of her or his parent or legal guardian." (emphasis added). In *Faison v. State*, 426 So. 2d 963 (Fla. 1983), this Court adopted the following three-prong test to determine whether the movement or confinement of a victim during the commission of another felony is sufficient to support a conviction for kidnapping:

> [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.

Faison, 426 So. 2d at 965.

In *Berry v. State*, 668 So. 2d 967, 969 (Fla. 1996), this Court revisited *Faison* and construed prong (a) 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.

In applying this test, the Court explained the difference between the sorts of confinement that are, and are not, incidental to an underlying crime as follows:

> if [the robbers] 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. ***By contrast, in this case the robbers left the scene of the robbery without untying the victims, thereby leaving them both in a precarious and vulnerable state for a period beyond the robbery. Like the situation where the victim of a forcible felony is barricaded or locked in a room or closet, the confinement continued even after the robbery had ceased. This is not the sort of confinement that is incidental to robbery.***

Id. (emphasis added).

Recently, in *Conner v. State*, 19 So. 3d 1117, 1122-24 (Fla. 4th DCA 2009), the Fourth District Court of Appeal examined whether the evidence supported a conviction for kidnapping under subsection (1)(a)(3). *Conner* is instructive in that it discussed the problem of defining the term "confinement"[4] in the context of the kidnapping statute. The Fourth District noted that the "common and ordinary definition[s] of the word confine" were of "limited value in [its] search for clarification … because they provide synonyms as definitions that are not necessarily consistent with the way the kidnapping statute has been interpreted by Florida courts. *Id*. at 1123. The Fourth District Court further noted that:

> Turning to Florida case law, we do find a few cases that provide some guidance concerning the use of the word "confining" in the kidnapping statute. Generally, the act of binding the victim is sufficient to constitute a "confinement." *See Berry v. State*, 668 So. 2d 967, 969 (Fla. 1996), *aff'g Berry*, 652 So. 2d 836; *Henderson v. State*,

[4] *See generally*, John L. Diamond, *Kidnapping: A Modern Definition*, 13 Am. J. Crim. L. 1 (1985) (discussing the problem of defining the crime of kidnapping); "*Double Offense" Problems in Kidnapping and False Imprisonment Cases*, 77 Fl. B.J. 10 (2003) (discussing the double offense problems in kidnapping and false imprisonment cases).

> 778 So. 2d 1046, 1048 (Fla. 1st DCA 2001). Holding a carjacking victim down in her own car while travelling 200 yards before forcibly ejecting the victim from the vehicle is also a "confinement," *Cathcart v. State,* 643 So. 2d 702, 703 (Fla. 4th DCA 1994), as is the removal of a child from a location near her home to a place or places unknown for a period of at least four hours without the knowledge or consent of the child's parents, *Miller v. State*, 233 So. 2d 448, 450 (Fla. 1st DCA 1970). However, holding a victim in a headlock in order to shoot the victim is not a "confinement." *Mackerley v. State*, 754 So. 2d 132, 137 (Fla. 4th DCA 2000), *quashed on other grounds*, 777 So. 2d 969 (Fla. 2001).

Conner, 19 So. 3d at 1124. In its analysis, the Fourth District noted that:

> ***In considering whether conduct involving another crime also amounts to a kidnapping, [this Court] teaches that one must closely examine[ ] the facts to determine whether the confinement or movement was incidental to the other charged crime or whether it took on an independent significance justifying a kidnapping conviction.***

Id. at 1124. (citing to *Mobley v. State*, 409 So. 2d 1031, 1035 (Fla. 1982)) (emphasis added). The Fourth District found this principle "applies whether the State charges the defendant under subsection (1)(a)(2) or subsection (1)(a)(3)." *Id*.

This Court has recognized that the *Faison* test "is not an easy one to apply," attributing the test's difficulty "not to the test itself but rather to the diverse factual situations to which it must be applied." *Berry*, 668 So. 2d at 970. Applying the test to the specific facts of this case, there is sufficient evidence to support the Petitioner's conviction for kidnapping under subsection (1)(a)(2).

In this case, the child's confinement or movement was not slight, inconsequential, and merely incidental to the theft of the truck. The child was

confined and transported approximately 3.6 miles before being found by the police. The truck was taken from the furniture store to a secluded business' parking lot. The child's confinement lasted approximately thirty minutes. (T. 212, 248, 256). As the Third District Court of Appeal correctly noted, "[o]nce [the Petitioner] 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. That distance is all the greater with respect to a two-year old child, removed from her family and security, unable to survive on her own if not located quickly.

The Petitioner, however, contends that since "the child was already confined by virtue of having been secured to a safety seat," the child's confinement was not caused by him. He claims that the taking of the truck just "prolonged the child's confinement." As such, he argues that the movement of "the child, like the rest of the vehicle's contents," was incidental to the theft. (*See* Petitioner Br. at 8). In support of these claims, the Petitioner relies on *Sanders v. State*, 905 So. 2d 271 (Fla. 2d DCA 2005) and *Griffin v. State*, 705 So. 2d 572 (Fla. 4th DCA 1998). The Petitioner's reliance is misplaced because *Sanders* and *Griffin* are factually distinguishable from this case.

In *Sanders*, the Second District Court of Appeal held that the defendant's confinement of the victim in her apartment during the commission of a sexual battery was not kidnapping although confinement was not slight or inconsequential

due to its three-hour duration, and the victim was briefly confined in the bathroom. The Second District explained that the victim's confinement was the sort likely to naturally accompany sexual battery because it could not be accomplished without the victim's presence, and thus was incidental to the sexual battery. It further stated that nothing about the duration of the confinement made it substantially easier for the defendant to commit the sexually battery, rather, it probably increased the risk of detection. By the time the defendant left the victim's apartment, it was day time and he had lost the opportunity to escape under cover of darkness. *Sanders*, 905 So. 2d 271.

In *Griffin*, the Fourth District Court of Appeal found that the defendant's conviction for kidnapping a three-year old child was fundamentally erroneous as it was a conviction for a crime that did not take place. The Fourth District noted that the child was not tied up in any way, but was merely confined first to an unlocked broom closet, and then to another unlocked room. It further noted that the child's confinement did not extend any longer than the robbery because once the robbers left the store, the child was not confined in any way. Nor was the child left in a precarious and vulnerable state for a period beyond the robbery. *Griffin*, 705 So. 2d at 574.

Unlike, *Sanders* and *Griffin*, this case does not involve the movement of the victim within the premises of a house. Nor does it involve holding the victim in a

particular room or rooms within the structure. *See e.g., Johnson v. State*, 969 So. 2d 938, 955-56 (Fla. 2007); *State v. Lumarque*, 990 So. 2d So. 2d 1241 (Fla. 3d DCA 2008); *Biggs v. State*, 745 So. 2d 1051 (Fla. 3d DCA 1999). To the contrary, this case involves transporting a child in a moving vehicle for a substantial distance, away from familiar surroundings, to an isolated place, which would make her discovery much more difficult, and for a substantial period of time, without the consent of her parents. *See, e.g.*, *Cathcart*, 643 So. 2d at 703; *Miller*, 233 So. 2d at 450. Further, unlike the victims in *Sanders* and *Griffin*, the child victim here was left in "a precarious and vulnerable state beyond the scope" of the auto-theft, as she was left in a secluded isolated place, without the protection of her parents or society. *See Berry*, 668 So. 2d at 969.

In *Cathcart*, the defendant was convicted of robbery with a weapon, by taking a vehicle from the victim, and kidnapping. The victim was sitting in her car when the defendant demanded her money. The defendant got the victim's keys and sat on top of the victim. He then drove the car 200 yards before ejecting the victim. He was finally arrested after more than a twenty minute chase. *Id*. at 702-03. The Fourth District Court of Appeal rejected the defendant's argument that there was insufficient proof of kidnapping after finding that each *Faison* prong was satisfied:

> Appellant's actions not only facilitated the robbery of the automobile but also satisfy all three prongs of *Faison.*

> First, Appellant's confinement of Moore was not slight in that he held Moore down for a certain period of time and confined her for some 200 yards before forcibly ejecting her from the moving vehicle. Second, the confinement in this case was in no way inherent in the commission of the underlying robbery because the robbery could have been committed without the confinement, i.e., Appellant could have ejected Moore from the car before driving away. *See Ferguson v. State*, 533 So. 2d 763, 764 (Fla. 1988). Finally, Moore's confinement lessened the risk of detection; ejecting the resisting Moore at the outset would have slowed Appellant's departure thereby increasing the risk of apprehension. Because all of the prongs of the *Faison* test have been met, Appellant's conviction for kidnapping is affirmed.

Cathcart, 643 So. 2d at 703. The same points apply to the facts of this case.

Similarly, in this case, the child's confinement or movement was not slight, inconsequential, and merely incidental to the theft of the truck and its contents. As previously noted, the child was moved 3.6 miles, which is a distance that cannot be considered insignificant in this case. Nor was it insignificant that the child here was isolated for approximately thirty minutes. By moving the child for 3.6 miles and confining her for approximately 30 minutes, the Petitioner placed that child in a different environmental setting, removed from the security of familiar surroundings. The movement itself seriously endangered the child, as she was moved from the protection of her parents, the police, or anyone who might have been able to rescue her. The parking lot where the truck was found was not visible

from the main intersection, where pedestrian and vehicular traffic is heavy.[5] As such, the child was left in a ***"precarious and vulnerable state for a period beyond" the auto-theft,*** increasing therefore the risk of harm, as she was not in full view of others that could rescue her. *Berry*, 668 So. 2d at 969 (emphasis added).

Second, the confinement or movement of the child here was not inherent in the commission of auto-theft, because the theft of the truck and its contents could have been committed without the confinement, i.e., the Petitioner could have removed the child from the truck. Lastly the child's confinement or movement lessened the risk of detection. Removing the child at the outset would have slowed the Petitioner's departure, thereby increasing the risk of apprehension. Thus, the evidence satisfied all three prongs of *Faison*. *See Cathcart*, 643 So. 2d at 703.

It was the child's exposure to an increased risk of harm that the Third District Court reasoned made the child's movement and confinement in this case not slight, inconsequential or merely incidental to the theft of the truck. Arriving at this conclusion, the Third District Court relied on the special danger analysis

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[5] *See generally* Karen Barlett, *Hines 57: THE CATCHALL CASE TO THE TEXAS KIDNAPPING STATUTE*, 35 ST. Mary's L.J. 397 (2005) (arguing that Texas should adopt the Model Penal Code's kidnapping definition, interpreted by case law from other jurisdictions as occurring when movement or detention is not merely incidental to the commission of another substantive crime and such movement or detention substantially increases the risk of harm over and above the underlying crime. Additionally, it cites numerous cases defining substantial distance, confinement for substantial period and place of isolation under kidnapping statutes).

applied by the Court of Appeal of Indiana in *Taylor v. State*, 879 N.E.2d 1198 (Ind. Ct. App. 2008).

In *Taylor*, the Indiana Court of Appeal found sufficient evidence of force to sustain a conviction of kidnapping by hijacking where Taylor drove off in a car where children were already restrained in car seats. Two small children were riding in the backseat, ages four and seven. The children's father began to follow in another car. Eventually, Taylor decided to abandon the vehicle, but not before stealing a purse, and shooting the children's father. *Id*. at 1201. Following a jury trial, Taylor was convicted of numerous offenses, including kidnapping, confinement, and two counts of theft for stealing the vehicle and the purse. *Id*. at 1202. With respect to the kidnapping convictions, Taylor argued that there was no evidence he used or threatened to use force. In rejecting, Taylor's argument, the Indiana Court of Appeal stated:

> The danger to the Ardizone children falls squarely within the risk the legislature intended to prevent:
>
> > We discern that the legislature had it in mind in enacting this part of the kidnapping statute 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 commandeered vehicle. The message intended for the would-be wrong doer, is that if you are going to steal or commandeer a vehicle, let the people in it go and don't force people into it against their will.

> When the victims are children, a defendant may need only minimal force to accomplish a hijacking. That the victims are relatively helpless does not absolve the defendant of liability for kidnapping. Taylor took advantage of the fact the children were restrained in car seats and locked in the car. He took further steps to prevent their escape by driving at a high rate of speed.

Taylor, 879 N. E. 2d at 1202-03. (citation omitted). The court rejected Taylor's comparison of his case to those "where the defendants were found not guilty of kidnapping despite their knowledge the vehicles they entered were occupied." In doing so, the court noted that the victims in those cases "were adults who were able to remove themselves from the vehicle without injury." The *Taylor* court went even further by stating that even if "children could have gotten out of their car seats and unlocked the doors, they could not have exited the vehicle safely." *Id*.

The Petitioner, however, takes issue with the Third District's Court reliance on the "special danger analysis" applied by the Indiana court in *Taylor*. Specifically, the Petitioner contends that *Taylor* involves a discussion of the legislative intent behind the Indiana's anti-hijacking law, which was designed to prevent persons from being exposed to an increase risk of harm. Further, he argues that, unlike *Taylo*r, there is no evidence in this case that: (1) he had knowledge that the child was in the truck when he stole the truck, (2) he used force, and (3) exposed the child to reckless driving. (*See* Petitioner's Br. at 10-12).

The Petitioner's arguments are flawed. First, the Third District Court of Appeal recognized in its analysis of this case that unlike the Indiana statute, the

Florida statute does not include the special danger language. *Delgado*, 19 So. 3d at 1056. The Third District Court, however, reasoned that the factual situation here was similar enough to apply the special danger analysis because of the "continued and dangerous confinement of the helpless child." *Id*. The factors relied upon by the Indiana court serve to explain why the confinement in this case was not merely slight, inconsequential or incidental.

In *Mobley v. State*, 409 So. 2d 1031 (Fla. 1982), this Court considered whether the confinement of guards and a visiting lawyer by several prisoners during an unsuccessful attempt to escape from a jail qualified as the separate offense of kidnapping. Noting that "[i]f construed literally this subsection would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery," *id.* at 1034, the *Mobley* court conducted a comparative analysis of Florida cases and cases and statutes of other jurisdictions and adopted the prevailing view that the court should "closely examined the facts to determine whether the confinement or movement was incidental to the escape or whether it took on an independent significance justifying a kidnapping conviction." *Id*. at 1035. Applying this approach to the facts in that case, this Court concluded that although the initial confinement of the victims may have been incidental to the attempted escape,

> [t]his confinement was not incidental to the attempted escape once they began using them as hostages and threatening physical harm.

> Although appellants were not charged with confining the victims with the intent of using them as hostages, evidence that they did use them as hostages is relevant and sufficient proof that the kidnappings were not incidental to the attempted escape. ***The evidence shows that the confinement of the victims was significantly independent of the crime of escape and that it substantially increased the risk of harm to the victims.***

Id. at 1037. (emphasis added). Thus, without relying on the Indiana doctrine of "special danger analysis," this Court relied on the very same concept, as did the Third District Court of Appeal when explaining why the confinement was not slight, inconsequential or merely incidental. Simply put, danger to the victim is a relevant factor.

In *Berry*, the Court used two hypotheticals to explain what constitutes confinement. Applying the hypotheticals to the fact of the case, the *Berry* court concluded that the confinement of the victims was not slight, inconsequential and merely incidental to the robbery:

> By contrast, in this case the robbers left the scene of the robbery without untying the victims, ***thereby leaving them both in a precarious and vulnerable state for a period beyond the robbery***. Like the situation where the victim of a forcible felony is barricaded or locked in a room or closet, the confinement continued even after the robbery had ceased. This is not the sort of confinement that is incidental to robbery.

Id. at 969. (emphasis added). In explaining the confusion in the application of the *Faison* test, the *Berry* Court stated that:

> It [was] the confinement of the victims rather than their movement which justifies the kidnapping conviction.

Id. at 970.

Thus, *Mobley* and *Berry*, are indicative of the fact that this Court has not excluded the danger analysis even if the Florida statute does not contain the special danger language. In fact, in its analysis of the kidnapping statute, this Court noted some criteria of a danger analysis such as (1) the victim's exposure to an increased risk of harm or (2) the precarious and vulnerable state the victim had been left beyond the scope of the substantive offense. *See Mobley*, 409 So. 2d at 1037; *Berry*, 668 So. 2d at 969.

While applying the same or a similar *Faison* test as the Third District Court of Appeal did in this case, and this Court, itself, has done in *Mobley* and *Berry*, the increased danger or vulnerability of the victim is a commonly relied upon factor by other jurisdictions. Tennessee and California cases have relied on the enhanced risk of harm on the victim factor in the context of determining the sufficiency of evidence for kidnapping in conjunction with another offense such as robbery. *See e.g. State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991) (holding that a defendant's actions did not constitute separate kidnapping offense, where there was no significant difference between what happened to employees inside building and those who were outside, employees were held only briefly, were not harmed in any way, and were not forced to move to different location, and ***they were not subjected to any substantially increased risk of harm over and above that***

necessarily present in crime of robbery itself.) (emphasis added) (superseded by the enactment of a new kidnapping statute); *State v. Smith*, 1997 WL254182 * 1, 4 n.7) (Tenn. Crim. App 1997) (adopting the Supreme Court of Kansas's test promulgated in *State v. Buggs*, 547 P.2d at 731, adopted by the Florida Supreme Court in *Faison*, 426 So. 2d at 963, and cited with approval by the Supreme Court of Tennessee in *Anthony*; and noting that "one method of resolving the question of whether the confinement is necessarily incidental to the accompanying felony, is to ask ***whether the defendant's conduct substantially increased the risk of harm over and above that necessarily present in the crime of robbery itself.***") (emphasis added); *State v. Rollins*, 605 S.W.2d 828 (Tenn. Crim. App. 1980) (finding that in view of the ***substantially increased likelihood of harm to robbery victims*** when defendant, in drunken condition and acting under influence of marijuana, ordered them to drive away from the convenience market and then forced them out of their car and onto a highway into the dark of night; when the defendant left the victims stranded on the side of the road, he certainly decreased the possibility of his apprehension and at the same time subjected them to increased risk of harm; moreover, the defendant committed the very act prohibited by statute, that is, carrying away individuals with intent to rob them and subsequently robbing them. Accordingly, removal of the victims was not only incidental to robbery itself and thus was sufficient to give rise to offense of kidnapping for robbery separate from

robbery itself.) (emphasis added); *People v. Nguyen*, 997 P.2d 493, 501 (Cal. 2000) (holding that substantial movement of a robbery victim, by force or fear, which poses a substantial increase in the risk of psychological trauma to the victim beyond that to be expected form a stationary robbery, support a conviction for kidnapping for robbery, or aggravated kidnapping because ***increased risk of harm is not limited to risk of bodily harm***) (emphasis added); *People v. Daniels*, 459 P.2d 225(Cal. 1969) (holding that kidnapping does not occur when asportation or detention is merely incidental to the commission of another substantive crime and ***does not substantially increase the risk of harm over and above the present crime*.)** (emphasis added); *In re Earley*, 534 P.2d 721, 725 (Cal. 1975) (upholding the two-part *Daniels* test). Numerous cases from Pennsylvania, Colorado, Illinois, Iowa, Missouri, Nevada, Ohio, North Carolina, and New Jersey have applied this reasoning as well.[6]

Lastly, a reasonable trier of fact could conclude that the Petitioner knew there was a child in the car as he: 1) approached the vehicle, 2) almost immediately

[6] *In re T.G.*, 836 A.2d 1003 (Pa. Super. Ct. 2003) *People v. Owens*, 97 P.3d 227 (Col. Ct. App. 2004); *Catlett v. United States*, 545 A.2d 1202 (D.C. 1988); *People v. Thomas*, 516 N.E.2d 901 (Ill. App. Ct. 1987); *State v. Folck*, 325 N.W.2d 249 (Iowa 1982); *State v. Lyles*, 996 S.W.2d 713 (Mo. Ct. App. 1999); *Mendoza v. State*,130 P.3d 176 (Nev. 2006); *Garcia v. State*, 113 P.3d 836 (Nev. 2005) (holding modified by *Mendoza*); *State v. Foust*, 823 N.E.2d 836 (Ohio 2004); *State v. Karshia Bliamy Ly*, 658 S.E.2d 300 (N.C. Ct. App. 2008), *State v. Bryant*, 524 A.2d 1291 (N.J. Super. Ct. App. Div. 1987).

after he entered the vehicle, or 3) during ransacking the interior of the vehicle. At trial, Ms. Alvarado testified that she was sitting in the back seat with her two year old daughter, who was sleeping in her safety seat. (T. 209-10). She also stated that although her daughter's feet could not reach the floor of the truck while sitting in her car seat, her daughter's feet could reach the front seat of the truck, if she kicks. (T. 208-09). When Ms. Alvarado arrived at the scene where the truck was found, she noticed that her daughter looked frightened and had tears on her face. (T. 201, 203, 213). Mr. Gonzalez testified that his truck has been rummaged through since everything was on the floor. (T. 192).

Detective Hernandez also testified that he found the truck in the back parking lot of a business. The truck's engine was running, and the doors of the truck were not locked. He then looked through the truck's tinted windows and he was able to tell that there were no adults in the front seat. Thereafter, he opened the driver's door and saw the child. (T. 253-54, 257-58). Furthermore, when asked if looking for the child required him to actually get in the seat and look in the back, Detective Hernandez stated:

> No, I just moved the seat over a little bit, then there was a little crease and then I looked and then I could see her, then I folded the car seat forward because I remember having a clear view of the little girl.

(T. 255). Detective Hernandez also stated that the child looked exhausted, her eyes were puffy from crying, and mucous was running down her face when he found her. (T. 255).

Lastly, the use of force or exposure to reckless driving is not dispositive or controlling factors. These are just factors that may be considered in determining whether the Petitioner exposed the child to an increased risk of harm.

Thus, in viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the State, there was competent, substantial evidence to support the conclusion that the Petitioner knew that the child was in the truck. The evidence demonstrated that the child could have been seen from inside the truck, where the Petitioner was when he entered and stole the truck. Even if the Petitioner did not know at the time of the taking, the reasonable inference was that he would have become aware of her presence while driving. Instead, the Petitioner and the codefendant continued driving, rather than releasing the child. The child was upset and crying, which the Petitioner would have heard. Further, the truck had been ransacked, which would have required the Petitioner to see the child in the back seat, yet the Petitioner still abandoned the vehicle in a secluded area without taking steps to assist in the discovery or safe placement of the child. For any and all of those reasons, the lower court's decision should be affirmed.

Alternatively, if this Court should find that the evidence is insufficient to support the kidnapping conviction, this Court can still find the evidence sufficient to support a conviction of false imprisonment as a lesser included offense. Section 787.02(1)(a) defines false imprisonment as "forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will. "[F]alse imprisonment is a necessarily lesser included offense of the crime of kidnapping." *State v. Sanborn*, 533 So. 2d 1169, 1169 (Fla. 1988). Thus, if this Court finds the evidence insufficient to sustain the Petitioner's kidnapping conviction, it can still find the evidence sufficient to support a conviction of false imprisonment. *See Mills v. State*, 407 So. 2d 218, 221 (Fla. 3d DCA 1981) (holding that although the evidence would have sustained a conviction for kidnapping to commit a felony, the State failed to prove charged offense of kidnapping with intent to hold for ransom, but the conviction would be reduced to lesser included offense of false imprisonment.); *Cole v. State*, 942 So. 2d 1010, (Fla. 2d DCA 2006) (reversing armed kidnapping conviction and remanding for entry of judgment for lesser offense of false imprisonment with a firearm when evidence showed that that the defendant restrained the victim against her will by forcing her at gunpoint into the bathroom.)

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida respectfully requests that this Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was mailed to Manuel Alvarez, Assistant Public Defender, the Office of the Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, this 27th day of July 2010.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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