IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2177
DCA CASE NO. 3D07-2103

RICARDO JOSE DAVILA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Ricardo Davila, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand in this Court. In this brief, references to the record on appeal and trial transcripts are from the direct appeal filed by Petitioner in case number 3D01-497 as they were considered by the Third District Court of Appeal in case number 3D07-2103. The symbol "P.R." will reference the record on appeal prepared for the postconviction proceeding in lower court case number 3D07-2103.

STATEMENT OF THE CASE AND FACTS

On November 13, 2000, Petitioner was charged in trial court case number F00-21978 in an amended forty-five (45) count information with thirty-six (36) counts of aggravated child abuse; three counts of false imprisonment of a child under the age of thirteen; one count of child neglect; one count of child abuse; one count of attempted felony murder; and three counts of kidnapping. The three counts of kidnapping were found in counts forty-three through forty-five of the amended information. (R. 47-94). In counts forty-three through forty-five of the information, Petitioner was alleged to have committed the following crimes:

> And the aforesaid Assistant State Attorney, under oath, further information make that Ricardo Jose Davila on or between February 5, 2000, and July 7, 2000, in the County and State aforesaid, without lawful authority did then and there forcibly, secretly, or by threat, confine, abduct, or imprison another person under thirteen (13) years of age, to wit: R.D. (a minor), against that person's will, with the intent to inflict bodily harm upon or to terrorize the victim or any other person, and in the course of committing said offense, the defendant committed aggravated child abuse, as defined in s. 827.03, in violation of s. 787.01(3)(a) and s. 777.011 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(R. 90-92).

On November 13, 2000, Petitioner was tried by a jury. The evidence presented at trial was that the victim, R.D., was Petitioner's minor son who came to live with his parents when he was eleven years old. He resided with Petitioner for a period of five months, from February 2000 to July 2000, and during this time

period was subjected to various forms of abuse by Petitioner and his wife. (T. 343-45). The abuse included striking the victim with various objects including electrical cords, shoes, juice cans, a hammer, a belt, and a plunger; and pulling off his fingernails and toenails with a knife and pliers. (T. 346-55, 378-85). The victim was also forced to eat various items that caused him to vomit, and then would be forced to eat his own vomit. (T. 372-76). Finally, the victim was tied up, blindfolded by placing a bucket over his head, and locked in the bathroom. (T. 357-59, 361-68). On July 7, 2000, the victim finally escaped from Petitioner's residence, and was discovered by a neighbor. (T. 306-07). When found, the victim had numerous bruises on his face, swollen eyes, and marks on his arms and neck. (T. 307-08).

After being arrested, Petitioner was interrogated by police officers and admitted to the abuse, including the fact that he hit the victim numerous times and locked the victim in the bathroom. (T. 911-50).

On November 21, 2000, following the presentation of the evidence, the jury found Petitioner guilty on twenty-nine (29) counts of aggravated child abuse, one count of child neglect, one count of child abuse, and three counts of kidnapping. (R. 151-59). The jury found Petitioner not guilty on seven counts of aggravated child abuse, and the trial court entered a judgment of acquittal on the three counts of false imprisonment. (R. 161-62). The trial court adjudicated Petitioner guilty

and sentenced him to thirty years in prison for twenty-nine (29) counts of aggravated child abuse convictions, five years in prison for the counts of child abuse and child neglect, and life in prison on the three counts of kidnapping. (R. 168-70). All counts were ordered to be served concurrently. (R. 171).

On February 19, 2002, Petitioner filed a direct appeal, and raised two claims concerning his request for self-representation and the trial court's denial of the request. In a written opinion, the Third District Court of Appeal affirmed Petitioner's judgment and convictions. *Davila v. State,* 829 So. 2d 995 (Fla. 3d DCA 2002).

The instant issue was raised pursuant to a pro-se motion for postconviction relief that was filed on February 27, 2003, in the Eleventh Judicial Circuit Court. The motion raised seven claims for relief, including claim four, that trial counsel provided ineffective assistance of counsel for failing to file a motion to dismiss counts forty-three through forty-five, aggravated kidnapping, due to the fact that Petitioner was the victim's parent and lawful custodian. On August 7, 2003, the State filed a response to the motion, and on October 20, 2003, the trial court issued an order denying part of Petitioner's motion, and ordering the State to file a supplemental response on other claims, including whether Petitioner could be found guilty of kidnapping his own child. On November 4, 2003, the State filed a supplemental response addressing the claims, including the claim as to whether

Petitioner could be found guilty of the aggravated kidnapping of his own child. The trial court failed to issue an order after the State filed the supplemental response. (P.R.).

While Petitioner filed a second motion for postconviction relief, that was also denied, and appealed to the Third District Court of Appeal, the first motion for postconviction relief, along with several of the issues, including the instant issue, were not ruled upon by the trial court. *See Davila v. State,* 948 So. 2d 931 (Fla. 3d DCA 2007). Finally, on November 14, 2006, Petitioner filed a petition for writ of mandamus alleging that the trial court had failed to issue a final order on the motion for postconviction relief that was originally filed on February 27, 2003. After the Third District Court of Appeal ordered the state to file a response to the petition, on February 23, 2007, the trial court entered an omnibus order denying Petitioner's motions for postconviction relief. (P.R.).

On July 18, 2007, Petitioner filed a pro-se notice of appeal with the Third District Court of Appeal, case number 3D07-2103, and on April 2, 2008, the court ordered the State to file a response. After the State filed a response, on October 21, 2009, the lower court issued an opinion affirming the trial court's order in part, and remanding in part. *Davila v. State,* 26 So. 3d 5 (Fla. 3d DCA 2009). For the issue currently before this Court, the lower court found that as a general rule, "a parent cannot be convicted of kidnapping his own child." *Johnson v. State,* 637 So. 2d 3,

4 (Fla. 3d DCA 1994). However, the lower court found that there was an exception to the general rule.

> We have recognized an exception, however, to the general rule where the parent "does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself." *LaFleur v. State,* 661 So. 2d 346, 349 (Fla. 3d DCA 1995). The Second District disagrees with this court on this issue. *Muniz v. State,* 764 So. 2d 729, 731 (Fla. 2d DCA 2000); *cf. Andre v. State,* 13 So. 3d 103, 105 (Fla. 4th DCA 2009) (fundamental error to convict child's father of aggravated false imprisonment where there was no testimony that the child's custodian, her godmother, had legal custody or guardianship).

Id. at 7. Thus, based on this difference, the lower court certified direct conflict.

On June 3, 2010, this Court accepted jurisdiction based on the direct conflict between *Davila v. State,* 26 So. 3d 5 (Fla. 3d DCA 2009), and *Muniz v. State,* 764 So. 2d 729 (Fla. 2d DCA 2000).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal did not err in finding that the parental exception set forth in section 787.01(1)(b), Florida Statutes, was not applicable to Petitioner's convictions for the aggravated kidnapping of the victim, his biological child. A review of the statutory language set forth in section 787.01, Florida Statutes, demonstrates that the parental exception is only for cases that allege the defendant subjected the victim to confinement, and is not applicable to those cases which allege abduction or imprisonment, as all three forms of kidnapping are listed in the statute. A review of the basic tenet for statutory construction supports the analysis of the parental exception set forth in *LaFleur v. State*, 661 So. 2d 346 (Fla. 3d DCA 1995), and followed by the Third District in the instant case.

Further, a review of the common law crime of kidnapping, which was incorporated by the Model Penal Code, and subsequently implemented by the State of Florida and numerous other states, demonstrates that the parental exception is not applicable in the instant case, because Petitioner was not confining the victim in order to establish custody rights, but was confining and imprisoning the victim with a felonious and unlawful intent, namely to commit aggravated child abuse.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DETERMINED, UNDER THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 787.01, FLORIDA STATUTES, THAT PETITIONER WAS PROPERLY CONVICTED OF THE AGGRAVATED KIDNAPPING OF HIS MINOR CHILD.

This case is in this Court for review as to whether the Third District Court of Appeal correctly determined that Petitioner could be convicted of aggravated kidnapping even though he was the lawful custodial parent of the victim, relying on their prior decision in *LaFleur v. State,* 661 So. 2d 346 (Fla. 3d DCA 1995). *Davila v. State,* 26 So. 3d 5 (Fla. 3d DCA 2009). The basis for this Court's jurisdiction is direct and expresses conflict with *Muniz v. State,* 764 So. 2d 729 (Fla. 2d DCA 2000), in which the Second District Court of Appeal held that a custodial parent could not be convicted of kidnapping his or her own child.

The offense of kidnapping has its origins in common law when it was originally a misdemeanor offense which prohibited the unlawful confinement and transportation of another person out of the country, beyond the protection of law. *See Click v. State,* 3 Tex. 282 (Tex. 1848). Subsequently, the Model Penal Code limited the offense of kidnapping while increasing the severity of the offense. Model Penal Code § 212.1 (2000). The current statute governing aggravated kidnapping in the State of Florida is adopted, in significant portion, from the Model Penal Code. *Sean v. State*, 775 So. 2d 343, 344 (Fla. 2d DCA 2000). An

examination of the origins of the offense of aggravated kidnapping, and a review of the statute governing aggravated kidnapping of a minor under the age of thirteen, section 787.01, Florida Statutes, demonstrates that the correct result was reached by the Third District Court of Appeal in *LaFleur v. State*, 661 So. 2d 346 (Fla. 3d DCA 1995), and in the instant case.

Pursuant to section 787.01, Florida Statutes, the elements of the offense of kidnapping a minor under the age of thirteen are set forth as follows,

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat **confining, abducting, or imprisoning** another person against her or 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.
> (b) **Confinement** 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 consent of her or his parent or legal guardian.

§787.01(1), Fla. Stat. (2000) (emphasis added).

In *Johnson v. State*, 637 So. 2d 3 (Fla. 3d DCA 1994), *review denied* 649 So. 2d 235 (Fla. 1994), the Third District Court of Appeal determined whether a custodial parent could be convicted of the kidnapping his own child. The evidence in the case was that the defendant, upset that his girlfriend had left him, taking their young child with her, broke into her parents' residence and forced his girlfriend and their daughter to leave with him. The court, when determining that the

defendant could not be convicted of aggravated kidnapping, focused on the use of confinement within the statute and stated, "Section 787.01(1)(a), Florida Statutes (1991) provides: 'The term "kidnapping" means forcibly, secretly, or by threat **confining** . . . another person against his will . . .'" *Id.* at 3 (emphasis added). Then, looking at the exception set forth in section (1)(b), wherein a parent cannot be found guilty of confining his minor child, the court found "[t]hat a biological parent cannot be convicted of kidnapping his own child under section 787.01(1)(b)." *Id.* at 4.

However, in *LaFleur v. State*, 661 So. 2d 346 (Fla. 3d DCA 1995), the Third District Court of Appeal limited the holding in *Johnson* to those cases where the information and evidence at trial supported the act of confinement, not the acts of abduction or imprisonment. *Id.* at 348. In this case, the defendant was separated from his wife, who had a domestic violence order against the defendant which prohibited him from contacting his wife and provided that visitation of the child had to be agreed upon by the parties. *Id.* at 347. During a disagreement over visitation rights, the defendant confronted his wife and her family with a firearm. *Id.* The wife and her mother fled the residence, and the defendant took his father-in-law and one year old son hostage. *Id.* After an eight hour stand-off with police, the defendant finally surrendered and was arrested on charges of kidnapping and aggravated assault. *Id.*

The defendant was convicted of the aggravated kidnapping of his son, and appealed, arguing that a biological parent could not be convicted of kidnapping his own child. *LaFleur,* 661 So. 2d at 348. The court disagreed and found that in certain situations a biological parent could be guilty of kidnapping his own child. *Id.* The court specifically distinguished their holding in *Johnson* by finding, "[i]n other words, under *Johnson,* one cannot be criminally liable simply for 'confining' or taking possession of one's child – an act which, by statutory definition, the parent is privileged to commit." *Id.* The court then found two reasons for finding that the defendant could be lawfully convicted of kidnapping. First, because he was not entitled to custody of his son due to a lawful and controlling court order granting sole custody to the mother of the child. *Id.* Second, the court found,

> Furthermore, and perhaps more significantly, ***Johnson*** **and cases like it do not control when the parent does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself**. . . Thus, LaFleur was lawfully convicted, as charged, of **"abducting or imprisoning,"** § 787.01(1)(a), Fla. Stat. (1993), the child "with intent [to hold him] as a shield or hostage," § 787.01(1)(a)1, Fla. Stat. (1993).

Id. at 348-49 (emphasis added). Thus, the Third District Court of Appeal while stating that *LaFleur* created an exception to subsection (1)(b), was not actually writing an exception into the exception, as alleged by Petitioner. Despite the arguably confusing usage of the word "exception," the lower court was in fact finding that the exception set forth in section 787.01(1)(b), Florida Statutes, was

not applicable because the defendant was not convicted of **confining** the child, but of **imprisoning** the child, which is not subject to the exception.

The Second District Court of Appeal, in *Muniz v. State,* 764 So. 2d 729 (Fla. 2d DCA 2000), disagreed with the Third District, holding that the defendant who restrained and threatened his five-week-old infant with a razor could not be found guilty of kidnapping because of the exception set forth in section 787.01(1)(b), Florida Statutes. However, an examination of case law discussing statutory interpretation demonstrates that *LaFleur v. State,* 661 So. 2d 346 (Fla. 3d DCA 1995), was the correctly decided case.

A basic tenet of statutory construction is that "where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused." *Thompson v. State,* 695 So. 2d 691 (Fla. 1997). However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quotations omitted). *See State v. Burris,* 875 So. 2d 408, 410 (Fla. 2004) ("the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent."). Further, "legislative intent is determined from the plain language of a statute." *Thompson,* 695 So. 2d at 693. Additionally, "to construe [a]

statute in a way that would extend or modify its express terms would be an inappropriate abrogation of legislative power." *Burris,* 875 So. 2d at 413-14 (*quoting Holly,* 450 So. 2d at 219).

"Unless we can say with absolute confidence that no reasonable legislature would have intended for the statute to carry its plain meaning, we should presume that our legislature says in a statute what it means and means in a statute what it says there." *Maddox v. State,* 923 So. 2d 442, 452 (Fla. 2006) (quotations and citations omitted). A review of the plain and ordinary meaning of section 787.01, Florida Statutes, demonstrates that subsection (1)(b) only concerns the definition of confinement, not the two other methods that the state can use in proving kidnapping, namely, abduction and imprisonment. A review of the standard jury instruction on kidnapping supports the fact that the three terms – confinement, abduction, and imprisonment – are mutually exclusive and the state is only required to allege and prove one of the three methods. § 787.01(1)(a), Fla. Stat. (2000)

Kidnapping F.S. 787.01

Before you can find the defendant guilty of Kidnapping, the state must prove the following three elements beyond a reasonable doubt:

1. (*Defendant*) [forcibly] [secretly] [by threat]
   [confined]
   [abducted]
   [imprisoned]
   (*victim*) against [his] [her] will.
2. (*Defendant*) had no lawful authority.

> 3. (*Defendant*) acted with intent to:
>
> (a) hold for ransom or reward or as a shield or hostage.
>
> (b) commit or facilitate commission of (applicable felony)
>
> (c) inflict bodily harm upon or terrorize the victim or another person.
>
> (d) Interfere with the performance of any governmental or political function.
>
> . . . .
>
> Confinement of a child under the age of thirteen (13) is against his will if such confinement is without the consent of his parent or legal guardian.

Fla. Std. Jury Instr. (Crim.), Kidnapping F.S. 787.01. Thus, the jury instruction specifically sets forth that a defendant can commit the offense through one of three methods. This is confirmed by the note that accompanies the jury instruction, namely, that subsection (1)(b) should only be read if confinement is alleged and the victim is under the age of thirteen. *Id.* Thus, arguably, if the information only alleged a defendant committed the act of abduction against his minor child, subsection (1)(b) would not have to be included in the standard jury instructions.

A review of the jury instruction read in Petitioner's trial confirms that the instruction followed the standard jury instruction and that the state did not only allege that Petitioner confined the victim against his will, but also alleged Petitioner imprisoned the victim against his will. (R. 140).

> Before you can find the defendants [sic] guilty of Kidnapping of a child under the age of 13, the State must prove the following four elements beyond a reasonable doubt:
>
> 1. RICARDO DAVILA, SR. forcibly or by threat **confined or imprisoned** R.D. against his will.

2. RICARDO DAVILA, SR. had no lawful authority.
3. RICARDO DAVILA, SR. acted with the intent to inflict bodily harm upon or terrorize R.D.
4. Victim was under the age of 13.
. . .

Confinement of a child under the age of thirteen (13) is against his will if such **confinement** is without the consent of his parent or legal guardian.

(R. 140) (emphasis added). Thus, the trial court instructed the jury that Petitioner could be guilty of kidnapping if the state proved either confinement or imprisonment, and then went on to give the parental exception for confinement, that if the jury determined Petitioner was guilty of confining the victim, not imprisoning, then they had to determine whether Petitioner was a custodial parent under subsection (1)(b).

The reasons for subsection (1)(b) only pertaining to the word "confinement," was elucidated by the Third District Court of Appeal in *LaFleur*, 661 So. 2d at 346, when the court found that a "parent does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself." *Id.* This highlights the distinction between mere confinement and confinement plus additional activity. Thus, as an example, a parent or custodian that confines a child to a bedroom as a disciplinary measure for a curfew violation or for not doing homework would constitute mere confinement and the parental exception set forth in subsection (1)(b) would be

applicable. However, a parent or custodian that confines a child to a dark secluded room for the purpose of sexually abusing a child without detection is not mere confinement, and constitutes imprisonment or abduction which is not subject to the exception within subsection (1)(b).

Thus, recognizing that a custodial parent will normally exercise his authority to confine the minor child, subsection (1)(b) sets forth the exception pertaining to confinement. However, also recognizing that in the normal course of parenting, a custodial parent does not have the right to imprison or abduct his minor child, the words "abduction" and "imprisonment" are not included in the exception carved out in section 787.01(1)(b), Florida Statutes. *See Taylor Woodrow Constr. Corp. v. Burke Co.*, 606 So. 2d 1154, 1156 (Fla. 1992) ("Where the statutory provision is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.").

A review of the origins of kidnapping in common law demonstrates that the parental exception has its foundation in common law and was for custody disputes. The offense of kidnapping, as it exists in the State of Florida is modeled on the common law definition of kidnapping and the Model Penal Code definition, which also incorporated common law. §775.01, Fla. Stat. (1829); Model Penal Code § 212 (2001). *See also Sean v. State*, 775 So. 2d 343, 344 (Fla. 2d DCA 2000). At common law, the crime of kidnapping was not a significant offense, but a

misdemeanor that prohibited the unlawful confinement and transportation of another person out of the country, beyond the protection of law. *See Click v. State*, 3 Tex. 282 (Tex. 1848). This crime was accompanied by a parental exception,

> The Laws of England specifically provided that: "no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to prosecuted by virtue hereof (of child stealing), on account of his getting possession of such child out of the possession of the mother, or any other person having the lawful charge thereof." 4 W. Blackstone, Commentaries, *Of Public Wrongs: Of Offenses Against the Persons of Individuals*, 168 n. 26 (1863). See generally Fleck, *Child Snatching by Parents: What Legal Remedies for "Flee and Plea"?*, 55 Chi-Kent L.Rev. 303, 313 n. 52.

People v. Algarin, 558 N.E.2d 457, 462 fn. 2 (Ill. App. 1990).

The current form of the offense of kidnapping, along with its limitation to conduct of a serious nature, did not exist in common law, but is a product of the Model Penal Code. The Model Penal Code sets forth the requirement that removal or confinement of a victim is for a specified, enumerated purpose, and also sets forth the current parental exception. Model Penal Code § 212.1 (2000).

> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
> (a) to hold for ransom or reward, or as a shield or hostage; or
> (b) to facilitate commission of any felony or flight thereafter; or
> (c) to inflict bodily injury on or to terrorize the victim or another; or
> (d) to interfere with the performance of any governmental or political function.

> Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian, or other person responsible for the general supervision of his welfare.

Model Penal Code § 212.1 (2000). The Model Penal Code has been adopted by a substantial number of states, including the State of Florida. LaFave, Substantive Criminal Law, vol. 3, § 18.1(a), (2003). Thus, since the parental exception was found in common law and incorporated into the Model Penal Code, the State of Florida's provision regarding the parental exception should be construed in light of common law antecedents.

Along with the State of Florida, over half of the other states also follow the Model Penal Code, thus, a review of cases from other jurisdictions offers guidance into the proper interpretation of the kidnapping statute and the parental exception. In *State v. Siemer*, 454 N.W.2d 857 (Iowa 1990), the defendant was the live-in boyfriend of the victim's mother. During a period of six months, the defendant committed unspeakable acts of abuse against the victim, including tying him up in the basement and repeatedly beating him with various objects. *Id.* at 858-59. On appeal, the defendant argued that he could not be found convicted of kidnapping because the victim's mother consented to his actions. *Id.*

The Iowa Supreme Court found that under Iowa law, the kidnapping statute required the state to prove three elements: "(1) confinement of the victim; (2) without authority or consent; [and] (3) with intent to inflict serious injury or secretly confine." *Id.* at 862 (*quoting* Iowa Code § 701.01 (1989)). While the defendant argued that the use of the word "authority" was to immunize parents from the crime, the Iowa Supreme Court disagreed and stated "we are unwilling to accept the proposition that concealing a child in the context of a custody dispute is equivalent to concealing a child with the intent to abuse and torture." *Siemer,* 454 N.W.2d at 862.

> The harm the kidnapping statute addresses is unlawful confinement or asportation which increases the potential or actual injury to the victim. *See State v. Ramsey*, 444 N.W.2d 493, 495 (Iowa 1989). While a parent has the authority to confine or remove a child under reasonable circumstances, we can conceive of no circumstance under which a parent could lawfully exercise such authority while harboring the intent to sexually abuse or subject the child to serious injury.

Siemer, 454 N.W.2d at 863.

This was also the result reached in *State v. Viramontes*, 788 P.2d 67 (Ariz. 1990). In this case, the defendant was convicted of kidnapping for abandoning his infant, a result of incest, in a parking lot. *Id.* On appeal, the defendant argued that he could not be guilty of kidnapping because he was the lawful custodian of the infant. The Arizona Supreme Court first examined the kidnapping statute and found that it required "a defendant knowingly restrain another person with the

intent to commit a further act." *Id.* at 69. (*citing* A.R.S. § 13-1304(A)). The statute defined the use of the word "restrain" to include an exception for lawful custodians of victims under the age of eighteen. *Viramontes,* 788 P.2d at 69 (*citing* A.R.S. § 13-1301(2)).

After setting forth the statutory definitions, the court found that the issue was "whether a parent of a minor child can 'acquiesce' to that child's movement or confinement by a person who intends to commit a felony upon the child." *Viramontes,* 788 P.2d at 69.

> We do not believe that a child's custodial parents may acquiesce in the restraint of the child for any of the purposes included in the kidnapping statute. We therefore hold that a lawful custodian's acquiescence to movement or confinement of a child for the purpose of their own or another's wrongdoing will not constitute the "consent" that would bar a kidnapping charge. Therefore, for the purposes of establishing the elements of kidnapping, the question of consent involves whether defendant intended to commit one of the acts included in the kidnapping statute. When a defendant is the child's parent, the proper inquiry should be directed at the purpose of the restraint and the defendant's intent.

Id. at 70. The court found that the general rule stating that a parent could not be guilty of kidnapping their own child was the result of the issue arising in custody disputes, which was not applicable to the case because "[d]efendant's purpose in taking the infant was to further the commission of a felony, not to establish custody or visitation rights. *Id. See also People v. Checketts,* 84 Cal. Reptr. 2d 491, 492-93 (Cal. Ct. App. 1999) ("We hold that a parent is not immune from criminal

prosecution for false imprisonment of his child where the act of confinement is done with an intent to endanger the health and safety of the child or to achieve an unlawful purpose, because such an act exceeds the scope of parental authority.").

This result was also reached by the federal court in *Byrd v. United States*, 705 A.2d 629 (D.C. Cir. 1997). In this case, the defendant, the step-father of the victims, took the children and held them captive from their mother. *Id.* at 631. Eventually, in an attempt to kill the victims and commit suicide, he took the children to an empty house, poured gasoline around the three of them, and set the house on fire. *Id.* The defendant and the children survived the attempt, and he was subsequently convicted of kidnapping, arson, and assault with a deadly weapon. *Id.* The Circuit Court of Appeals found that the defendant met the definition of parent and that the statute governing kidnapping stated in relevant part, '"[w]hoever shall be guilty of . . . seizing, confining, . . . kidnapping, abducting, concealing, or carrying away any individual . . . and holding or detaining . . . such individual for ransom or reward *or otherwise, except, in the case of a minor, by a parent therefore,* shall . . . be punished by imprisonment for life or for such term as the court in its discretion may determine.'" *Id.* at 630 (*quoting* D.C. Code § 22-2101 (1996)) (emphasis supplied).

Regardless of the parental exception, the court found, after examining the legislative history when the exception was enacted, that the defendant was properly

convicted of kidnapping because the intent of the exception "was that a parent who kidnapped a child, however misguidedly, out of affection and disagreement over custody should not be prosecuted for that act alone. *Byrd,* 705 A.2d at 633.

> [T]he parent exception to the District's kidnapping statute is not a defense where the defendant has engaged in separate felonious conduct during the kidnapping which exposes the child to a serious risk of death or bodily injury. That limitation is fully consistent with the purpose for which Congress adopted the parent exception in the first place.

Id. at 634.

Thus, in all of the above cited cases, where statutes are modeled after the Model Penal Code and have contained the parental exception the courts have found that a defendant who takes a child with a felonious and unlawful intent does not have immunity under the parental exception. Examining the exception in section 787.01(1)(b), Florida Statutes, also mandates this determination because the exception is only for those parents that commit the act of "confinement" of a child, not for those parents that commit the act of abduction or imprisonment. Thus, the Third District Court correctly decided that the reasoning in *LaFleur* was controlling in the instant case, and correctly determined that Petitioner could be lawfully convicted of the aggravated kidnapping of the victim.

Finally, if this Court determines that Florida law does not permit Petitioner to be convicted of the aggravated kidnapping of the victim, the case, in its entirety, should be remanded to the trial court to allow the court to determine whether the

remaining sentences should be imposed consecutively instead of the previous imposition of concurrent sentences. After the jury found Petitioner guilty on thirty-five counts, the trial court adjudicated Petitioner guilty and sentenced him to thirty years in prison for twenty-nine (29) counts of aggravated child abuse convictions, five years in prison for the counts of child abuse and child neglect, and life in prison on the three counts of kidnapping. (R. 168-70). All counts were ordered to be served concurrently. (R. 171). However, a review of case law concerning resentencing, demonstrates that if the three counts of aggravated kidnapping are vacated, the trial court should be allowed an opportunity to restructure the sentences.

"A trial court can legally restructure a defendant's sentences by changing concurrent terms to consecutive terms, as long as the new sentence is not found to be vindictive." *Richardson v. State*, 821 So. 2d 428, 431 (Fla. 5th DCA 2002) (*quoting Buchanan v. State,* 781 So. 2d 449, 450 (Fla. 5th DCA 2001)). In *Sands v. State*, 899 So. 2d 1208 (Fla. 5th DCA 2005), the defendant entered into a plea agreement whereby he pled nolo contendere to six counts charged in two informations, and received a sentence of 24.6 years in prison followed by ten years of probation. *Id.* at 1209. There were various lengths of time imposed on each count, and all of the counts were ordered to be served concurrently. *Id.* While serving the sentences, the defendant filed a motion to correct illegal sentence

alleging that one of the counts was in fact a second-degree felony, not a first-degree felony as charged, and therefore, he could only be sentenced to a maximum period of fifteen years on that count. *Id.* at 1210. The trial court agreed and granted the defendant's motion; however, on resentencing, restructured the sentences by running the counts consecutive to each other in order to facilitate a sentence that was still 24.6 years in prison. *Id.* The Fifth District Court of Appeal affirmed the restructured sentence, finding that after a remand, "a sentence can be restructured in a manner that effectuates the plea agreement." *Id.* at 1211. *See also Ramos v. State,* 931 So. 2d 1023 (Fla. 3d DCA 2006).

Finally, in *James v. State,* 868 So. 2d 1242 (Fla. 4th DCA 2004), the defendant was convicted, after a jury trial, of aggravated battery, shooting into an occupied dwelling, aggravated assault, and possession of a firearm by a convicted felon. *Id.* The defendant was sentenced to a total of fifty years, with many of the counts imposed concurrently, along with receiving two twenty-year minimum mandatory sentences under the 10/20/Life statute, and habitual felony offender designations on other counts. *Id.* at 1243. On appeal, the defendant contested, and the state conceded, that the 10/20/Life statute was illegally imposed, and thus, the consecutively imposed sentence of twenty years in prison was illegal, and he could only be lawfully sentenced to fifteen years in prison. *Id.* At the resentencing hearing, the trial court vacated the twenty-year minimum mandatory sentences, and

sentenced the defendant to fifteen years in prison on each count, and ordered the sentences to be served consecutively instead of the originally imposed concurrent sentences. *Id.* at 1244.

The defendant appealed the new sentence, arguing that the harsher sentence violated his double jeopardy rights pursuant to *North Carolina v. Pearce*, 395 U.S. 711 (1969). *James*, 868 So. 2d at 1244. The Fourth District Court of Appeal affirmed the restructuring of the sentence, finding that "[a] trial court can legally restructure a defendant's sentences by changing concurrent terms to consecutive terms, as long as the new sentence is not found to be vindictive." *Id.* at 1246 (internal quotations omitted). Thus, in the instant case, pursuant to *James*, the trial court should be afforded the opportunity to restructure Petitioner's sentence if this Court vacates the three convictions of aggravated kidnapping.

The State is cognizant of *Fasenmyer v. State*, 457 So. 2d 1361 (Fla. 1984), in which this Court held that in cases where one of a defendant's convictions is overturned, the trial court cannot change sentences on offenses that were not challenged or disturbed on appeal. *Id.* at 1364. In this case, the defendant was originally convicted of three counts: count one, armed breaking and entering with intent to commit a felony; count two, grand larceny; and count three, the use of a firearm while committing a felony. *Id.* at 1363. After the third trial, the defendant was sentenced to fifty years on the armed breaking and entering conviction and

five years on the grand larceny conviction, with the sentences to be served concurrently. *Id.* The conviction for the third count was merged into the first count, and accordingly, the trial court did not impose a sentence. *Id.* On appeal, the court found there was insufficient evidence to prove the first count, and reduced the conviction to entering without breaking, and remanded the case for the defendant to be resentenced. *Id.*

On remand, the trial court resentenced the defendant on all three counts, imposed a fifteen year sentence on count three, and ordered the sentence to run consecutive to the sentences imposed in counts one and two. *Id.* On appeal this Court found that the resentencing was improper because it violated the defendant's double jeopardy rights. *Id.* at 1365. This was based on the fact that the sentences imposed in counts one and two had already been served in their entirety, and thus, the resentencing of the counts violated double jeopardy principles. *Id.*

This case can be distinguished from the instant case in that Petitioner has not served the entirety of his other sentences. Petitioner was also convicted of twenty-nine counts of aggravated child abuse and sentenced to thirty years in prison on each count, to be served concurrently. As Petitioner was sentenced in 2000, these sentences are still currently being served. Thus, ordering the sentences to be served consecutively would not violate double jeopardy principles.

Additionally, in *Fasenmyer*, the defendant was convicted in 1973, approximately ten years before the sentencing guidelines were enacted in 1984, and the subsequent enactment of the Criminal Punishment Code in 1998. Petitioner was sentenced pursuant to the Criminal Punishment Code, thus, his sentences should be treated differently than the sentences found in *Fasenmyer*, because the Criminal Punishment Code mandates a unified sentence in which each count is not treated separately, but is part and parcel of the calculation of a defendant's minimum sentence. Therefore, a successful challenge to one or more of Petitioner's convictions should result in the entire sentence being remanded back to the trial court for a new sentencing hearing. See rules 3.701, 3.702, 3.703, 3.704, 3.988, Florida Rules of Criminal Procedure.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court affirming the decision of the district court.

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 mailed this _____ day of September, 2010, to Marti Rothenberg, Assistant Public Defender, Office of the Public Defender, 1329 NW 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I HEREBY CERTIFY that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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