IN THE SUPREME COURT OF FLORIDA

FSC CASE NO. 09-2177

RICARDO JOSE DAVILA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
305.545.1961

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No. 320285

Counsel for Petitioner

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INTRODUCTION

This is the initial brief by the petitioner/defendant Ricardo Davila in this discretionary review based on certified direct conflict jurisdiction from the decision of the Third District Court of Appeal issued on October 21, 2009.

Citations are to the Appendix containing the decision from the Third District attached hereto, and references are to the record on appeal from the Third District.

STATEMENT OF THE CASE AND FACTS

The petitioner was charged on November 13, 2000, in an amended 45-count information as a principal with aggravated child abuse, false imprisonment, child neglect, child abuse, attempted felony murder and kidnapping. The three kidnapping counts [counts 43-45] were the same and alleged that the petitioner:

> 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 afflict 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 . . . .[1]

[1] The kidnapping offenses were enhanced from a first degree felony punishable by life to a life felony where the petitioner was charged with committing aggravated child abuse on the child under the age of 13 during the kidnapping. 787.01(3).

A jury trial took place in November 2000. The evidence at trial showed that the victim was the defendant's child, who was 11 years old at the time of the offenses. The child came to live with his parents, the petitioner and his wife, in February 2000, after living with his grandparents in Nicaragua. On July 7, 2000, the neighbor found the child with injuries and called the police. The evidence showed the petitioner inflicted various forms of abuse on the child, including tying him up and blindfolding him with a bucket on his head and locking him in a bathroom naked, as well as hitting him with different items, choking him, kicking him, and other forms of aggravated child abuse.

On November 21, 2000, the jury returned verdicts of guilty as charged of 29 counts of aggravated child abuse [counts 1-9, 13-21, 24, 27-36] in violation of 827.03(2), Florida Statutes (2000), one count of child neglect [count 40] in violation of 827.03(3)(c), one count of child abuse [count 41] in violation of 827.03(1), and three counts of kidnapping with aggravated child abuse [counts 43-45] in violation of 787.01(3)(a). The petitioner was acquitted of the other charges.

On January 22, 2001, the petitioner was sentenced to 30 years in prison on the aggravated child abuse in counts 1-9, 13-21, 24, and 27-36, to 5 years in prison on the child neglect and child abuse in counts 40 and 41, and to life in prison on the three counts of kidnapping in counts 43-45. All counts were to be

served concurrently.

The petitioner filed a direct appeal raising a Faretta issue about counsel's representation and whether the petitioner's request triggered a Faretta inquiry. The Third District affirmed petitioner's convictions on November 13, 2002. Davila v. State, 829 So.2d 995 (Fla. 3d DCA 2002).

On March 3, 2003, the petitioner filed a pro se motion for postconviction relief in the trial court, raising seven claims for relief. Claim III alleged fundamental error based on his illegal convictions for kidnapping because the petitioner was the parent and lawful custodian of the child victim and could not be legally convicted of kidnapping his own child, and claim IV was ineffective assistance of trial counsel for failing to file a motion to dismiss the kidnapping charges on those grounds.

In its response, the state argued the claims should have been raised on direct appeal and petitioner was precluded from raising them in a Rule 3.850 motion. The trial court ordered the state to file a supplemental response addressing the issues. On November 4, 2003, the state filed its supplemental response and argued that claims III and IV should be denied because a defendant could be convicted of kidnapping where he confined his own child for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself, citing Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995).

On November 15, 2005, the trial court denied the petitioner's postconviction motion without a hearing. On February 23, 2007, the trial court issued an omnibus order again denying the petitioner's postconviction motion, including claims III and IV, as well as petitioner's second motion for postconviction relief he had filed in the interim on September 27, 2005, alleging numerous sentencing issues pursuant to Rule 3.800(a).

On July 18, 2007, the petitioner filed a pro se appeal of the trial court's omnibus order denying his motion for postconviction relief. In claim III, the petitioner argued his kidnapping convictions should be reversed because under the kidnapping statute, 787.01(1), he was the biological parent of the child and thus his confinement of the child, who was under 13 years old, was not unlawful because it was done with the consent of the child's parent or legal guardian, and a parent cannot be convicted of kidnapping his own child.

The state responded to claim III that petitioner failed to establish fundamental error because the cases he cited, Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), and Johnson v. State, 637 So.2d 3 (Fla. 3d DCA 1994), were not controlling authority in situations where a defendant kidnapped his own child with a felonious purpose or intent. Instead, Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995), was controlling and held that a parent could be convicted of kidnapping his own child when the parent does not simply exercise

his rights to the child but takes him for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself. The state argued that evidence at trial showed the defendant kidnapped his child with the felonious intent to torture and abuse the child by repeatedly locking him up in a bathroom for extended periods of time, tied up and blindfolded with a bucket over his head, and thus, the parental exception to the kidnapping statute was not applicable.

With respect to claim IV, the petitioner argued his trial attorney was ineffective for failing to file a motion to dismiss the kidnapping counts based on the law that a parent cannot be found guilty of kidnapping his own child. The state responded that trial counsel was not ineffective because as previously shown, any motion made by defense counsel would have been denied based on the case law and the facts.

On October 21, 2009, the Third District issued its decision in the case and certified direct conflict with the Second District in Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), on the kidnapping issue. In its decision, the Third District noted the general rule was that a parent cannot be convicted of kidnapping his own child, citing Johnson v. State, 637 So.2d 3, 4 (Fla. 3d DCA 1994). (A: 2) The Third District observed that in this case, the petitioner was the father of the child at issue, there was no order which deprived the petitioner

of his custody rights, the child was under the age of 13 and was the victim of the kidnapping charge. (A: 2)

The Third District recognized an exception to this general rule, however, 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," citing to its earlier case of Lafleur v. State, 661 So.2d 346, 349 (Fla. 3d DCA 1995). (A: 2) The Third District acknowledged that the Second District disagreed with it on this issue in the case of Muniz v. State, 764 So.2d 729, 731 (Fla. 2d DCA 2000), and acknowledged that if this case were pending in the Second District, then the petitioner would be entitled to relief on the kidnapping issue. (A: 2) The Third District then followed Lafleur, denied petitioner relief on the issue, and certified direct conflict with Muniz. (A: 2)

On June 3, 2010, this Court accepted jurisdiction and requested briefing of the issue.

SUMMARY OF ARGUMENT

This case is on discretionary review based on certified direct conflict jurisdiction from the decision of the Third District Court of Appeal. The Third District certified direct conflict with the decision of the Second District in Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), on the issue whether the parent of a child under 13 years old, with no order depriving the parent of his custody right as a parent, can be convicted of kidnapping his own child under the Florida kidnapping statute, 787.01, Florida Statutes (2000).

In the present case, the Third District found that the petitioner, who was the father of the child who was under 13 and who was not divested of his custody rights by court order, was properly convicted of kidnapping, relying on its earlier case of Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995). The court noted the general rule that a parent cannot be convicted of kidnapping his own child, Johnson v. State, 637 So.2d 3 (Fla. 3d DCA 1994), but relied on its own exception from Lafleur that such a parent can be convicted of kidnapping where he takes the child for an ulterior and unlawful purpose specifically forbidden by the kidnapping statute.

In Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), the defendant, as the petitioner here, was the child's legal father and there was no order depriving him of his custody rights. The Second District held that, although the defendant

held the child hostage and could be convicted of child abuse offenses, he could not be convicted of the offense of kidnapping his own child.

The decision of the Third District Court of Appeal should be quashed and the petitioner's convictions and sentences for kidnapping reversed. Under the clear and unambiguous provisions of the Florida kidnapping statute, a father of a child under the age of 13 cannot be held criminally liable for kidnapping that child where there was no court order depriving him of his parental authority over or custody of the child and where the confinement of the child was not without the father's consent. Subsection (b) of 787.01(1) expressly provides that confinement of a child under the age of 13 is against his or her will if such confinement is without the consent of his parent or legal guardian. Thus, if the parent consents to the confinement, it is not against the child's will and that element of the kidnapping statute is not proved. The Third District's "exception" to this, that when the parent takes the child for an ulterior and unlawful purpose specifically forbidden by the kidnapping statute he can be convicted of kidnapping, is not found in the kidnapping statute. The legislature has not amended this statute and, under rules of statutory construction, the "exception" cannot be added to the statute by the court.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT SHOULD BE QUASHED WHERE, UNDER THE CLEAR AND UNAMBIGUOUS PROVISIONS OF THE KIDNAPPING STATUTE, 787.01, A FATHER OF A CHILD UNDER 13 CANNOT BE CONVICTED OF KIDNAPPING HIS OWN CHILD WHERE THERE IS NO COURT ORDER DEPRIVING HIM OF PARENTAL AUTHORITY OR CUSTODY AND WHERE THE CONFINEMENT WAS NOT WITHOUT THE FATHER'S CONSENT.

The issue in this case is whether the father of a child under the age of 13 can be held criminally liable for kidnapping that child under 787.01(1), Florida Statutes (2000), where there was no court order depriving him of his parental authority over or custody of the child and where the confinement of the child was not without the father's consent.[2]

The petitioner was convicted of three counts of kidnapping in violation of 787.01, Florida Statutes (2000),[3] which defines kidnapping as follows:

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[2] There is no issue here of one parent consenting and the other parent not consenting. Both the petitioner, who is the father, and the mother, consented to the confinement. The mother was charged separately with the same offenses.

[3] The 2000 version of the kidnapping statute is the same as the current version. Subsection (1) of the kidnapping statute defines the elements of kidnapping, subsection (2) makes a conviction a felony of the first degree punishable by life imprisonment, and subsection (3)(a)(1) enhances a conviction from the first degree felony to a life felony if the person commits kidnapping upon a child under 13 while committing aggravated child abuse. Here, the petitioner was

> **787.01 Kidnapping; kidnapping of child under age 13, aggravating circumstances.—**
>
> (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 his or her parent or legal guardian.

Thus, one of the elements for kidnapping is that the confinement of the person be "against her or his will." Since a parent has the right to confine his own child, and because young children may be incapable of consenting, the statute addresses this element in subsection (b) with regard to children under the age of 13 and provides that the "against her or his" element is met within the meaning of the kidnapping statute when the child is confined "without the consent of her or his parent or legal guardian."

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convicted of kidnapping with this aggravating factor in subsection (3)(a)(1).

In the present case, the petitioner is the biological parent of the child victim, the child was under the age of 13, there was no court order depriving the petitioner of his parental authority over or custody of the child, the petitioner confined the child in the bathroom, the petitioner did so with his own consent, and there was no "without the consent" of the parent. Consequently, pursuant to the unambiguous language of subsection (b), the confinement of the child victim in this case was not against his will within the meaning of the kidnapping statute because such confinement was not without the consent of his parent. The element of "against her or his will" necessary for kidnapping was not met.

In Johnson v. State, 637 So.2d 3 (Fla. 3d DCA 1994), the Third District held that under 787.01(1)(b), a biological parent cannot be convicted of kidnapping his own child. In Johnson, the defendant and his girlfriend had a 1-year-old child. The girlfriend took the child and moved out of their house and into her parent's house. The defendant was upset and entered the bedroom in the parent's house and forced both the girlfriend and the child to leave with him. The defendant was charged with kidnapping and argued he could not be convicted of kidnapping his own child. The court agreed with the Fifth District in State v. Badalich, 479 So.2d 197 (Fla. 5th DCA 1985), which relied on identical language in the false imprisonment statute, to hold that the subsection "clearly requires that the confinement contemplated by this charge must be

without the consent of the child's "parent *or* legal guardian," and consequently, a biological parent cannot be convicted of kidnapping his own child under section 787.01(1)(b).

In the present case, the Third District held, however, that there was an exception to this subsection (b) "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." (A: 2) This argument fails to comport with the unambiguous language of the kidnapping statute and adds an "exception" where none exists.

The Third District relied on its other earlier case of Lafleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995), for this "exception." In Lafleur, the father was subject to a domestic violence order which gave custody of his 1-year-old child to the mother and precluded him from contact with his child; his visitation rights to his child were to be "agreed by the parties." The father went to the mother's home anyway and took the child hostage for eight hours, threatening to kill the child as his "ace in the hole," and ultimately releasing him unharmed to the police. The Third District first found the father was not entitled to possession of his child because there was a valid court order granting custody of the child solely to the mother. The father was thus a noncustodial parent and could not give consent to the child's confinement. This conclusion comports with the

kidnapping statute since, by court order, the father no longer had the right to consent over the custody arrangements of his child. Since he no longer had the right to consent to custody of the child, under subsection (b), the father's confinement of the child was against the child's will because the confinement was without the lawful consent of his parent.

However, in Lafleur, the Third District then gave another reason the father could be convicted of kidnapping: he did not simply exercise his parental right to the child but took the child for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself, the intent to hold him "for ransom or reward or as a shield or hostage," what the court called the "exception" to subsection (b). Lafleur's reasoning was that

> 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,' s.787.01(1)(a), Fla. Stat. (1993), the child 'with intent [to hold him] as a shield or hostage,' s.787.01(1)(a)1, Fla. Stat. (1993).

The flaw in the Third District's opinion is that the issue is not the unlawful purpose element of kidnapping, the issue is the "against his will" element of kidnapping. All kidnappings require the intent to commit one of the listed ulterior and unlawful purposes for conviction, whether the kidnapping is of a

person over the age of 13 or under the age of 13. The kidnapping statute lists four unlawful purposes. At least one of these must be proven to convict a person of kidnapping - otherwise, the crime is false imprisonment, 787.02, which does not require one of the unlawful purposes. When a parent takes his child for one of these unlawful purposes it would be kidnapping – providing the other elements of the statute are met. Since one of the elements is that the confinement must be "against her or his will" and subsection (b) defines the element of "against her or his will" for children under the age of 13 as "without the consent of her or his parent or guardian," this element cannot be established when a parent takes his own child under age 13, even for one of these unlawful purposes. The statute makes no exception to this provision. The statute does not state that despite subsection (b) and even if the parent consents to the confinement, it is still kidnapping if the parent confines his child for an unlawful purpose. Indeed, if this were the meaning of the statute, then subsection (b) is completely irrelevant and unnecessary.

Subsection (b) addresses this element specifically for children under the age of 13 because children are always lawfully in the "custody" of or "confined" by their parents as part of parental duty in raising children and also because young children may be incapable of consenting. The statute addresses this situation and provides that the "against her or his will" element is met when

such children under 13 are confined "without the consent of his parent or legal guardian." Contrary to the Third District's view, subsection (b) of the kidnapping statute does not "simply" give the parent permission to "exercise his rights to the child." The parent already has those rights. The subsection would be totally unnecessary if this were its design. If the parent consents to the confinement, the "against his will" element of kidnapping is not met. If the parent has lawful authority or custody of the child, his taking of the child, as explained in Johnson, is not without consent of the parent and thus by definition, as set forth in subsection (b), is not kidnapping, regardless of whatever unlawful purpose the parent had for taking the child. As noted in Johnson and Muniz, whatever unlawful acts are committed would violate other criminal statutes, but would not violate the kidnapping statute.[4]

This is the situation in the present case. The lawful custodial parent, the petitioner, did not "not consent" to the child's confinement and thus, under the clear and unambiguous language of the kidnapping statute, the child's confinement was not without parental consent under subsection (b) and the petitioner cannot be guilty of kidnapping his own child.

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[4] It would not violate the false imprisonment statute either, since the confinement of a child under 13 "against her or his will" section is the same for false imprisonment. 787.02(1)(b). State v. Badalich, 479 So.2d 197 (Fla. 5th DCA 1985) (false imprisonment statute requires that the confinement be without the consent of the child's parent and thus, natural father of child under 13 cannot be criminally liable for false imprisonment of that child).

In the present case, the Third District certified direct conflict with Muniz v. State, 764 So.2d 729 (Fla. 2d DCA 2000), on this issue. In Muniz, the Second District held that 787.01(1)(b) prevented the prosecution and conviction of a parent for kidnapping his own child. In Muniz, the defendant was charged with kidnapping his five-week-old son. Muniz and the child's mother were drinking at home and got into an argument. The argument escalated, Muniz battered the mother, the mother fled the home, leaving the baby behind. The mother called the police to help her remove the defendant from the home and retrieve the baby. The mother opened the door and the police went inside, confronting Muniz as he held the baby in his arms. When the officers tried to take the baby, Muniz picked up a razor and warded off the officers by threatening himself and the baby with the razor. Three hours later, tactical officers seized Muniz and safely removed the baby.

The Second District said there is no question that Muniz's behavior was inappropriate and that he could have been charged with a variety of criminal offenses, including assault on the child, child abuse, and contributing to the delinquency of a minor. However, because he was the parent of the child and he was entitled to the custody of his child, his confinement of the child did not violate the kidnapping statute. The court held that subsection (b) of 787.01(1) prevented his conviction for kidnapping.

The Muniz court further explained that although Muniz confined the child for an unlawful purpose, subsection (b) still prevented him from being convicted of kidnapping his own child. The court stated the legislature first created subsection (b), "this exception to the crimes of false imprisonment and kidnapping in 1974," and that "neither the holding in *Badalich* nor in *Johnson* prompted the legislature to amend these statutes to permit the state to charge a parent with kidnapping or false imprisonment of his or her child under certain circumstances." Id., at 731. The court recognized that Lafleur emphasized the father's ulterior and unlawful purpose in taking the child, but the Muniz court refused to follow Lafleur and again pointed out the statute has never been amended by the legislature to permit the state to charge a parent with kidnapping his own child, even for an unlawful purpose.

As explained earlier, the issue is not the unlawful purpose of the confinement. The issue is whether the person was confined "against his will." The Third District's decisions in the present case and in Lafleur hold there is an exception to the exception, that the "exception" that a parent cannot kidnap his own child has an "exception" when the confinement or kidnapping is for "an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself." The Third District's exception to the exception is in contravention to the clear and unambiguous language of the statute.

Although the Third District calls subsection (b) an "exception" to the kidnapping statute, subsection (b) actually defines the element of "against his or her will" within the meaning of the kidnapping statute for children under the age of 13, the age under which the legislature deemed children were too young to articulate whether their confinement was against their will. Reference to parental authority for the "against the will" element is necessary and indeed, makes sense, because parents do have control and authority over the custody of their children. In Muniz, for example, the child was five weeks old, and in Lafleur, the child was 1 year old. Clearly the element of "against her or his will" could only be established by the parents of these children as to whether the confinement was consensual. The legislature enacted subsection (b) for this and has not amended the statute.

In Muniz, the father had the "right" to custody of his baby and "consented" to taking and confining the baby. The father committed crimes, but the crime was not kidnapping. See State v. Badalich, 479 So.2d 197 (Fla. 5th DCA 1985) (natural father who could not be convicted of false imprisonment of his own child because it was not without his consent could be convicted of interference with lawful custody as there was no exception in that statute for parents). In Lafleur, the father did not have the "right" to custody of his child because that right had been removed by a court order granting custody solely to

the mother; the father could not "consent" to taking the child because he did not have that lawful authority, and he could be convicted of kidnapping because the other parent, the mother, did not consent to him taking the child either.

The Third District's reliance in Lafleur on cases from California and Arizona is not persuasive. The court relied on People v. Senior, 3 Cal.App.4th 765, 5 Cal.Rptr.2d 14 (Ct.App.6th Dist. 1992), where the California appellate court found a defendant was guilty of kidnapping his daughter when he took her into a motel room in order to molest her. The California kidnapping statute, however, does not include the express element from the Florida statute that the confinement, abduction, or imprisonment of another person be "against her or his will" and without lawful authority and does not include the exception that confinement of a child under a certain age is "against her or his will" if it is without the consent of the child's parent. The California statute, Penal Code 207, instead requires that for kidnapping, "the amount of force to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." Thus, in Senior, the parent could be convicted of kidnapping if he took his daughter "for an illegal purpose or with an illegal intent," and there was no subsection (b) exception for parents. The Third District also relied on State v. Viramontes, 163 Ariz. 334, 788 P.2d 67 (Sup.Ct.Ariz. 1990), where the

Arizona court held a father could be convicted of kidnapping when he took his baby and left it in a cardboard box in a parking lot to abandon it, thereby restraining the child with the intent to commit a further act, aiding in the commission of a felony, child abuse by abandonment. The Arizona kidnapping statute, like the Florida statute, requires confinement with the specific intent to commit a further act and sets forth the enumerated acts. However, the Arizona statute does not include the subsection (b) exception for parents. Thus, reliance on these out-of-state cases is misplaced.

Principles of statutory construction hold that where, as here, the legislature has used particular words to define a term, the courts do not have the authority to redefine it. Baker v. State, 636 So.2d 1342 (Fla. 1994). Where the language of a statute is clear and unambiguous, as here, the language should be given effect without resort to extrinsic guidelines to construction. Stoletz v. State, 875 So.2d 572, 575 (Fla. 2004); Lamont v. State, 610 So.2d 435, 437 (Fla. 1992); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982) (even where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, the court is not authorized to depart from the plain meaning of the language which is free from ambiguity). Moreover, courts are not permitted to add words or phrases to criminal statutes that were not placed there by the Florida legislature. Valdes v.

State, 3 So.3d 1967 (Fla. 2009) (court could not place words or phrases in a statute that the legislature did not include); Fla.Dept. of Revenue v. Fla.Munipal Power Agency, 789 So.2d 320, 324 (Fla. 2001) (under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the legislature clearly has not done so); Hawkins v. Ford Motor Co., 748 So.2d 993, 1000 (Fla. 1999) (this Court may not rewrite statutes contrary to their plain language); Baker v. State, 636 So.2d 1343 (Fla. 1994) (same). And penal statutes must be strictly construed "according to their letter . . . Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute." Lamont, supra at 437; Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991).

A conviction imposed for a crime totally unsupported by evidence constitutes fundamental error. Troedel v. State, 462 So.2d 392, 399 (Fla. 1984); Andre v. State, 13 So.3d 103 (Fla. 4th DCA 2009) (the failure of the state to prove that the confinement was against the child's will, an essential element of false imprisonment, was fundamental error and defendant's conviction must be reversed even though issue was not preserved for appeal by trial counsel); Rodriguez v. State, 964 So.2d 833, 836, n.1 (Fla. 2d DCA 2007) ("it is . . . fundamental error to convict a defendant when the State has failed to prove an element that is essential to the commission of the crime"); Alvarez v. State, 963

So.2d 757, 764 (Fla. 3d DCA 2007) (fundamental error to convict defendant of carjacking when victim was unaware of the theft, an element of the offense).

In the present case, the petitioner has been convicted and sentenced to life in prison for three counts of a crime totally unsupported by the evidence and which, by definition, he could not commit. Consequently, the decision of the Third District must be quashed and the case remanded to the lower court with directions to vacate the three kidnapping convictions and sentences.

CONCLUSION

Based upon the foregoing, the petitioner submits that the decision of the Third District Court of Appeal in this case on the kidnapping issue is error and should be quashed and the case remanded to the Third District with directions to vacate the three kidnapping convictions and sentences.

Respectfully submitted,

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14 Street
Miami, Florida 33125
(305) 545-1961

By:_____

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No: 320285

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

I hereby certify that a copy of the foregoing was mailed to Assistant Attorney General Ansley Peacock, Office of the Attorney General, Criminal Division, 444 Brickell Ave., #650, Miami, Florida 33131, this ____ day of July, 2010.

By:_____
___

MARTI ROTHENBERG
#320285

Assistant Public Defender