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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

In the brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion of the Fourth District Court of Appeal in Ferguson v. State, which the State adopts as its statement of the case and facts.

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the ground that this decision allegedly conflicts with two decisions of the First District, Chaney v. State and Friend v. State, infra, on the same question of law. However, no basis for conflict certiorari jurisdiction exists insofar as the cases petitioner relies on for same are legally consistent with, and factually distinguishable from, the decision over which review is sought.

## ISSUE

THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW OVER THE DECISION BELOW ON THE BASIS OF ALLEGED BUT NON-EXISTENT CONFLICTS WITH DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL.

## ARGUMENT

In Faison v. State, 509 So.2d 1238 (Fla. 1983), this Honorable Court was confronted with a factual scenario where a defendant, convicted of sexual battery, burglary and kidnapping, contested his kidnapping conviction based on Florida Statute §787.01. Here the defendant had dragged two victims into separate parts of an office and argued that this confinement or movement was insufficient to support a kidnapping conviction. This Court then adopted a definitive test for determining whether a confinement or movement in fact is sufficient to support a conviction for kidnapping.

Subsequently, in Chaney v. State, 464 So.2d 1261 (Fla. 1st DCA 1985), rev. denied 479 So.2d 1181 (Fla. 1985), the First District was confronted with a similar yet distinct factual scenario as Faison. In Chaney, the defendant and an accomplice robbed a plant nursery. During the commission of the crime they put a gun to an employee's side and directed him to open a cash register. The employee was then walked to the bathroom and requested to go inside. Once he was

inside a few heavy bags were placed in front of the bathroom door. The employee was able to escape as soon as the men left. The court held that in light of the Faison <sup>1</sup> test the facts did not support a conviction of kidnapping. Id. at 1263. Here the First District applied the test of Faison to the distinct factual scenario presented, found that the facts of that particular case did not meet the test and reversed the kidnapping conviction. As the facts are distinguishable from those in Ferguson v. State, 13 F.L.W. 399 (Fla. 4th DCA filed Feb. 10, 1988) (Ex. 1 Respondent's Appendix), no conflict between the two decisions exists.

Petitioner additionally argues that the Fourth District's decision in Ferguson conflicts with Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980). Friend v. State, was a decision which was rendered three years prior to the Faison decision. Again, the Faison decision adopted the test which both Ferguson and Chaney relied upon. Here, the court in Friend v. State, was not apprised of the Faison test and it cannot be said that the same rule of law applied in Friend and Ferguson. In fact, the Friend court only recognized one prong of the three prong Faison test 385 So.2d at 697.

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<sup>1</sup> Notably, the Chaney decision included a strong dissent by Judge Booth, who did not agree with the majority of the court that the Faison test was not met. Id. at 1263, 1264.

Respondent additionally maintains that even if both the Ferguson and Friend courts applied the same rule of law no conflict exists as the facts in the two cases are distinguishable. To illustrate, in Friend, the defendant and an accomplice, both armed, robbed an office in a building. While committing the robbery they motioned three employees into a bathroom. The employees were able to escape within five minutes of the defendant's exit. Here the court found that the facts in the case were insufficient to support a kidnapping conviction.

In Ferguson v. State, the Fourth District considered a situation which is factually distinct from those situations addressed in Chaney and Friend. In Ferguson a defendant robbed a restaurant. After being given the money the defendant forced employees, at gunpoint, to leave the building. The defendant then forced the employees to the rear of the building where he ordered them to enter a restroom and remain inside. The victims were able to escape soon after the defendant fled.

The Fourth District applying the Faison test and relying on a plethora of caselaw<sup>2</sup> held that the movement and confinement

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<sup>2</sup> Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987); Lamarca v. State, 515 So.2d 309 (Fla.3d DCA 1987); Sanborn v. State, 513 So.2d 1380 (Fla. 3d DCA 1987); Taylor v. State, 481 So.2d 97 (Fla. 3d DCA 1986); Carter v. State, 468 So.2d 370 (Fla. 1st DCA), rev. denied, 478 So.2d 53 (Fla. 1985); Sorey v. State, 419 So.2d 810 (Fla. DCA 1982); Dowdell v. State, 415 So.2d 144 (Fla.1st DCA 1982), rev. denied, 429 So.2d 5 (Fla. 1983); Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980).

involved in the instant case was sufficient evidence upon which to uphold the defendant's kidnapping conviction. Other district courts have similarly applied the Faison test to somewhat similar factual scenarios and rejected defense claims that the kidnapping conviction could not stand. See, Taylor v. State, 481 So.2d 97 (Fla. 3d DCA 1986); Carter v. State, 468 So.2d 370 (Fla. 1st DCA) rev. denied 478 So.2d 53 (Fla. 1985).

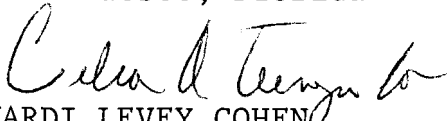
Do Friend and Chaney legally conflict with Ferguson as Petitioner claims, or with not only those but also Taylor and Carter? Respondent states they do not. All these decisions (except arguably Friend) consistently apply the test of Faison to distinct and incomparable factual scenarios. "Obviously, two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981) (Anstead J. Concurring), affirmed 428 So.2d 220 (Fla. 1982). This Court must accordingly deny Petitioner's petition for Writ of Conflict Certiorari.

CONCLUSION

Based on the foregoing argument and authorities cited therein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause.

Respectfully submitted,

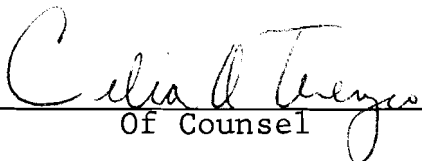
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, Fifteenth Judicial Circuit/9th Floor, Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 6th day of April, 1988.

  
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Of Counsel