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STATEMENT OF THE CASE AND FACTS

After Petitioner robbed a convenience store clerk and customer, he ordered his victims and two of the clerk's teenage relatives who were present to move to the back of the store and lie on the floor. (App., pp. 2, 3-4). Although the clerk and her relatives moved the approximately twenty to forty feet as Petitioner demanded, the customer moved only about ten feet toward the specified location. (App., p.4).

Petitioner appealed his convictions of three counts of kidnapping with a weapon, one count of kidnapping, and two counts of robbery with a weapon, and the Second District Court of Appeal affirmed, with one judge dissenting as to the convictions of kidnapping and kidnapping with a weapon. (App.)

SUMMARY OF ARGUMENT

The decision below of the Second District Court of Appeal expressly and directly conflicts with the Fifth District's opinion in Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987), by holding that slight and inconsequential movements within the interior of a business premises in connection with a robbery are sufficient to support a conviction of kidnapping. This court thus possesses jurisdiction to review Petitioner's case on its merits.

## ARGUMENT

THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987), BY APPLYING THE ELEMENTS OF THE CRIME OF KIDNAPPING TO PRODUCE A DIFFERENT RESULT UNDER SUBSTANTIALLY SIMILAR FACTS.

For an accused to be convicted of kidnapping while committing another crime, the movement or confinement forced upon the victim 1) must not have been slight, inconsequential, and merely incidental to the other crime; 2) must not have been of the kind inherent in the nature of the other crime; and 3) must have had some independent significance by making the other crime substantially easier to commit or by lessening the risk of detection. Faison v. State, 426 So.2d 963, 965 (Fla. 1983). All three criteria of the Faison standard must be satisfied to sustain a kidnapping conviction which arises in conjunction with a another crime.

After Petitioner entered the convenience store and robbed the clerk and a customer (App., p.2), he ordered the clerk, the customer, and two teenage relatives of the clerk to move a distance of twenty to forty feet to the rear of the store. (App., pp. 3-4). The clerk and her relatives complied, but the customer moved only about ten feet toward

the specified location. (App., p.4). On these facts, the Second District Court of Appeal affirmed Petitioner's convictions of three counts of kidnapping with a weapon and one count of kidnapping. (App., p.2).

In Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987), Kirtsey and another individual entered a restaurant occupied by two employees. While the perpetrators forced one employee to open the safe at gunpoint, they tied up the other employee and moved him around the interior of the store. Reversing the conviction for kidnapping, the Fifth District held that the limited confinement and movement within the interior of the restaurant "were slight and merely incidental to" the offense of robbery. Id. at 745.

As noted by Judge Patterson in his dissent below, the facts of Kirtsey and those of the instant case are substantially similar. (App., p.4). Although both cases involved slight, inconsequential movement within the interior of a retail business premises, the Fifth District held those movements to be insufficient to sustain a conviction of kidnapping under the rule of law announced in Faison, while the Second District accepted the jury's finding on this issue and upheld Petitioner's conviction.

This court may invoke its discretionary jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, to review a decision of a district court of appeal where the decision applies a "rule of law to produce

a different result in a case which involves substantially the same controlling facts as a prior case ...." Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). On its face, the decision of the district court below "collides" with the prior decision of the Fifth District, so that "an inconsistency or conflict" exists among the precedents. Kincaid v. World Ins. Co., 157 So.2d 517, 518 (Fla. 1963). Had the decision below been reached by the Fifth District, it would have overruled Kirtsey. A conflict thus exists which justifies this court's exercising its discretionary jurisdiction. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

Petitioner respectfully submits that this court should exercise its discretion and entertain this case on its merits. The movement of the unbound convenience store occupants within the interior of the store did not rise beyond the level of slight and inconsequential. Thus, an essential element of the crime of kidnapping was absent from Petitioner's conduct, and his conviction should have been reversed under the holding of the Fifth District in Kirtsey.

CONCLUSION

Because the holding of the district court below conflicts with that of the Fifth District in Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987), Petitioner respectfully requests this Court to exercise its discretionary jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, and to grant review of Petitioner's case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Donna A. Provonsha, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, West Wood Center, Seventh Floor, Criminal Division, Tampa, Florida 33607, and to Richard Earl Walker, Inmate No. 491806, Calhoun Correctional Institute, 425 East Central Avenue, Blountstown, Florida 32424, this 19<sup>th</sup> day of October, 1991.

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Attorney