IN THE SUPREME COURT OF FLORIDA

MAURICE L. FLOYD,)
)
Appellant,)
)
vs.) CASE NUMBER SC95-824
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

SECOND SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ISSUE

WHETHER THE RULE OF LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT IN ***YATES V. UNITED STATES***, 354 U.S. 298 (1957) AND FOLLOWED BY THIS COURT IN ***DELGADO V. STATE***, 776 SO. 2ND 233 (FLA. 2000), AND ***MACKERLY V. STATE***, 777 SO. 2ND 969 (FLA. 2001) HAS ANY IMPACT ON THE INSTANT CASE?

Appellant apparently has misconstrued the issue. In writing his Second Supplemental Initial Brief in response to this Court's October 2, 2002, order for supplemental briefing, undersigned counsel erroneously focused on the two different theories (premeditated and felony) of first-degree murder. After reading the state's answer brief, appellant now understands that this Court is concerned

about the applicability of ***Yates v. United States***, 354 U.S. 298 (1957) to the two different theories presented to the jury through the improper jury instruction pertaining to burglary, not murder. Undersigned apologizes for his own confusion.

As stated in appellant's Second Supplemental Brief, ***Yates v. United States***, 354 U.S. 298 (1957) involved the prosecution upon a single count indictment charging the defendants with conspiring (1)to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The United States Supreme Court ultimately held that the charge of conspiring to **organize** the Communist Party of the United States with the intent of causing the overthrow of the Government was barred by the statute of limitations. Since **the jury returned a general verdict** on both counts, one of which was legally inadequate (i.e. barred by the statute of limitations), the conviction was improper. Since the **general verdict** could have rested on multiple bases, one of which was legally inadequate, reversal was required.

As this Court pointed out in ***Delgado v. State***, 776 So.2d 233, 241 (Fla.

2000), reversal is not warranted where the **general verdict** could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient. ***Griffin v. United States***, 502 U.S. 46, 59-60 (1991) explained the distinction between a legally inadequate theory and a factually insufficient theory.

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

The first opinion issued by this Court in ***Delgado v. State***, 25 Fla. L.Weekly S79 (Fla. Feb. 3, 2000) held that the error in sending the felony murder charge to the jury was harmless since the evidence supported the conviction for premeditated murder. On rehearing in ***Delgado***, this Court acknowledged the rule of law announced in ***Yates v. United States***, 354 U.S. 298 (1957), and ultimately reversed Delgado's convictions.[1] ***See Mackerley v. State***, 777 So.2d 99 (Fla. 2001).

Similarly, appellant's jury returned a general verdict for armed burglary which

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[1] The ***Delgado*** jury also apparently returned a **general verdict** of first - degree murder.

therefore affected the application of the felony murder theory of appellant's guilt under these facts. In addition to the jury instruction pertaining to an unlawful entry with the intent to commit an offense therein, appellant's jury was also improperly instructed that he could be found guilty of burglary where he lawfully entered his mother-in-law's home and subsequently formed the intent to commit an offense therein. Since the jury's verdict could have been based on this legally unsupportable theory, ***Yates v. United States***, 354 U.S. 298 (1957) does apply.

As this Court stated in ***Delgado v. State***, 776 So.2d 233, 242 (Fla. 2000):

> This is not a case where there was merely insufficient evidence to support the burglary charge. The jury in this case was instructed that a defendant can be found guilty of burglary, even if the initial entry was consensual, if the victims later withdrew their consent. The theory of burglary was also relied on by the State as the underlying felony to support the felony murder charge. Pursuant to our analysis in today's opinion, such a theory of burglary (and felony murder) is legally inadequate.

Appellant's case is indistinguishable from the situation presented in ***Delgado***. This Court rightfully applied ***Yates***, ***supra***, in ***Delgado***, ***supra***. Likewise, ***Yates*** applies here.

CONCLUSION

Based on the foregoing cases, authorities and policies, appellant concludes that the Rule of Law announced by the United States Supreme Court in ***Yates v. United States***, 354 U.S. 298 (1957) and filed by this Court in ***Delgado v. State,*** 776 So.2d 233 (Fla. 2000) and ***Mackerley v. State,*** 777 So.2d 99 (Fla. 2001) was correctly applied by this Court in its opinion issued on August 22, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444

Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Maurice Lamar Floyd, #V01514, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 9th day of December, 2002.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
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