ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-714

ALAN MACKERLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, Alan Mackerley, was the appellant in the Fourth District and the defendant in the circuit court. The respondent, the State of Florida, was the appellee below and the prosecution in the circuit court. The symbol "T" refers to the trial transcripts and "R" refers to the balance of the record on appeal. The supplemental record, consisting of the transcripts of the jury selection, is denoted by "SR".

STATEMENT OF THE CASE AND FACTS

Frank Black disappeared in 1996 and has not been heard from since. Mackerley was charged with Black's kidnaping and murder. From the outset of this case, Mackerley has "absolutely maintained his innocence" and "insists he is not guilty...". (SR. 749, statement of defense counsel to prospective jurors at jury selection). The testimony of the prosecution's witnesses established the following.

Black and Mackerley owned competing bus companies in New Jersey which bid for routes to carry children to school. According to prosecution witnesses, Black's business practices were unsavory and widely disliked. (T. 245, 443, 782-83 923-24). Black's business strategy was to underbid his competitors for school bus routes by as much as 50%. To make up for the losses incurred by the underbids, Black would overcrowd the buses and keep the school children on the buses for unlawful periods of time. (T. 783).

By contrast, Mackerley operated his company in accordance with the school districts' legal requirements and did so very

successfully. (T. 783). In fact, the prosecution's star witness, William Anderson, who had been in the same business, acknowledged that of the approximately 225 bus contractors in New Jersey, Mackerley was the finest due to his intelligence, skills, loyalty, and generosity. (T. 780; 908-09).

Black was considering selling his company and spoke to various companies and individuals about the sale. (T. 257-59; 286; 293; 295; 300; 323-24; 333; 420). Mackerley was among those who wanted to buy Black's bus company, but Black would not deal with him directly because of their years of competition. (T. 789-90; 927-28; 1056). Therefore, in February 1996, Mackerley's girlfriend, Lisa Costello, telephoned Black from Florida, and posed as Mia Giordano, a representative of a company interested in establishing a business relationship with Black. She proposed the purchase of 60 vans from Black which would be converted to small school buses for export to South America and suggested that Black fly from New Jersey to Florida to meet with her. (T. 361-64; 431; 439). Black agreed and on February 24, 1996, flew to West Palm Beach, Florida. (T. 264; 283-86; 326; 441). According to the undisputed testimony of the state's witnesses, Black's flight to Florida was entirely voluntary. (T. 291; 341). Black was never heard from again.

Mackerley had a residence in Stuart, Florida. (T. 452). The prosecution theorized that Black was shot in the house, that blood was splattered throughout the scene of the shooting, and that after the shooting, Mackerley, with the help of his son-in-law, cleaned the room where the shooting took place. Mackerley's son-in-law

testified for the prosecution as follows. On February 26, he helped Mackerley complete a small renovation project at Mackerley's house in the front hallway that leads to a weight room. The house is old and the two were constantly doing projects there. (T. 658-59; 674). They replaced a pocket door with a regular door which necessitated some drywall work, painting, and some carpet removal. As he had done in the past on projects with Mackerley, the son-in-law brought his truck and took the debris to the local dump. The vacuum cleaners used in the cleanup were also discarded at the dump. (T. 656-84). No washing of any walls or cleaning was requested by Mackerley or undertaken. The son-in-law stated that if there had been any blood, he would have seen it and that there was no blood anywhere in the house or on any of the items loaded in the truck. (T. 669-73).[1] Not all of the carpeting was removed. (T. 673). Nothing at all was done to the ceiling. (T. 671). All of the carpeting in the weight room remained. (T. 673). The son-in-law stated that Mackerley was an accomplished builder and carpenter and that if Mackerley had intended to hide any evidence of a crime, he could have performed this type of work entirely by himself. (T. 675).

The son-in-law testified that he has known and been close to Mackerley for 18 years and never heard him express any strong feelings about Black. (T. 674-75).

The prosecution introduced telephone records which established

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[1] Forensic testing of the house could neither confirm nor rule out the presence of blood. (T. 1404).

that from February 22-24, calls were made to Black's telephone numbers from Costello's and Mackerley's Florida residences. (T. 453-57). Also, Costello rented a car near the airport on February 24 in her own name[2] and she used her own credit card. She returned the car on February 26. (T. 505-09).

The prosecution also established that on February 25, between 1:30 a.m. and 2:30 a.m., Black's credit card was used by Costello in a telephone in the lobby of a hotel in Riviera Beach, calls were placed to directory assistance and to hotels in Miami Beach (T. 550-56; 573), and a credit card purchase for gasoline was made in North Miami using Black's credit card. (T. 559-61).

The above facts constitute the essence of the prosecution's case against Mackerley, save for Anderson's testimony. Anderson testified that Mackerley told him that he murdered Black. According to Anderson, on February 28, 1996, he received a telephone call from Mackerley who volunteered that he killed Black, took the body out on his boat, and dumped it overboard. Mackerley later asked Anderson, who was a pilot, to fly over the ocean to look for Black's body. (T. 812-13). Anderson declined on the ground that the flight could not be done secretly. (T. 815).

Anderson stated that he and Mackerley talked about the murder during the ensuing weeks. (T. 818). According to Anderson, Mackerley said that Black was brought into Mackerley's house by his "accomplice." When Black recognized Mackerley, he immediately

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[2] Costello is her maiden name. She is also known as Lisa Nardiello, her name by former marriage. (T. 518.)

grabbed Black in a headlock and shot him through the head. (T. 819; 1088; 1133). Mackerley said there was blood all over the ceiling, walls, carpets, and floors. (T. 820). Black's body was wrapped up with all of his personal belongings, along with the murder weapon, and taken out to sea in Mackerley's Formula boat where the body was thrown overboard. (T. 821-22; 826). Mackerley said he used one of Black's credit cards after the murder at a service station to make it appear that Black was then alive. (T. 826).

When Anderson was contacted by law enforcement agents investigating Black's disappearance, he hired an attorney. Only after he obtained immunity did Anderson claim that Mackerley confessed to him. Anderson also told the agents that the business rivalry between Mackerley and Black could not be a motive for murder. (T. 830, 914, 995). To the contrary, according to Anderson, Mackerley's business was so strong that he could have pursued Black's business simply through ordinary business practices. (T. 916).

The authorities were not confident about Anderson's uncorroborated claim. They told him the case against Mackerley was uncertain and that an admission by Mackerley was needed on tape. (T. 1112). Anderson wore a hidden microphone during a conversation with Mackerley at Anderson's house where a camera was hidden to videotape the conversation. (T. 831). The taped conversation took place on August 29, 1996. (T. 832). Not once did Mackerley ever

state that he killed Black. (T. 843-58; 1113).[3] (T. 843-58; 1113). In fact, Mackerley told Anderson that the investigating officers were making allegations that were not true. (T. 855-56). Thus, Anderson's claim that Mackerley confessed to him remained uncorroborated.

Anderson was not entirely without his self-interests in the case. As noted, he immediately demanded and obtained immunity when first contacted by the agents investigating the case. Additionally, Mackerley had a long-term affair with Anderson's wife. (Anderson claimed that he did not learn of the affair until October 1997.) (T. 221; 840; 1047-49; 1270)). Anderson also acknowledged that he became very close to two of the lead agents in the case (T. 1086) and that they shared information about the investigation. (T. 1102). Anderson requested that one of the FBI agents speak to a prosecutor in California who was prosecuting Anderson's son-in-law. The FBI agent complied. (T. 1079-81).[4] Furthermore, Anderson was hoping that his daughter would marry one of the agents. (T. 1081-82).

Over the course of the police investigation, Anderson gave several inconsistent versions of Mackerley's confession. Initially, Anderson claimed that Mackerley said the shooting took place in the

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[3] Curiously Anderson did not pose any questions to Mackerley that would elicit a direct admission or denial of guilt, such as: "Did you really kill Black?" or "Why did you kill Black?" or "Why didn't you hire someone else to kill Black?", or such inquiries. (T. 1124).

[4] The charges against Anderson's son-in-law were eventually dropped. (T. 1140).

weight room. (T. 1088). But when the investigation ruled out the weight room, Anderson stated that the shooting took place in the hallway near the weight room. (T. 1088-89). Initially, Anderson stated that Mackerley said he used his Formula boat to take the body 22 miles out to sea. But after the investigation found evidence suggesting that Mackerley's other boat might have been 16 miles out to sea, Anderson said that Mackerley simply used "a boat" (T. 1091) and that the body was put overboard 12 to 22 miles out at sea. (T. 1100).[5]

The prosecution could not prove Mackerley had a motive to kill Black. One of the prosecution's theories was that Mackerley murdered Black because he successfully underbid for a certain desirable school bus route known as "Mine Hill" which Mackerley's company held for several years.[6] (T. 443). Black's girlfriend since 1991, Sally Roberts, who was also Black's office manager, testified that Mackerley operated that bus route until 1995, when Black substantially underbid Mackerley to obtain the route. (T. 406-11). Roberts also testified that afterward, at a business meeting with several in the bus business, Mackerley complained that Black was

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[5] The investigation found that a point 16 miles out to sea had been logged in the Global Positioning System of Mackerley's other boat. (T. 1432; 1447). The Global Positioning System consists of satellites which encircle the globe and emit radio signals. A hand-held or mounted small computer (commonly called the "GPS") converts into latitude and longitude positions. (T. 1414). The investigation could not, however, determine when that point was logged into the GPS. (T. 1436).

[6] In this area of New Jersey, school bus routes were awarded to the lowest bidder and were continually re-bid and re-awarded. (T. 422).

the type of person who stepped on other's toes and went into their territory. According to Roberts, Mackerley also told everyone that he would bury Black. Roberts explained that in context, however, Mackerley's comment was strictly relating to business. (T. 426-27).[7]

By the end of the trial, the prosecutor's only theory of motive was that Mackerley hated Black. (See closing argument of prosecutor at T. 1247). But there was no evidence or behavioral history that Mackerley would ever hurt or kill anyone simply out of hatred. In fact, prosecution witnesses disputed the claimed hatred between Mackerley and Black. Joseph Cacia, a representative of Ryder, spoke with Black about buying his bus business. Cacia, who described Black as "eccentric" (T. 337), was told by Black that he was tired of being in the bus business and wanted to sell his business and retire. (T. 336-38; 396). (Eventually, Ryder did purchase Black's company. (T. 339)). Cacia knew both Black and Mackerley, observed them together, and detected no animosity between them. (T. 334; 341).

Another prosecution witness was a supplier to Mackerley's business. The witness testified that he was asked by Mackerley if he would be his exclusive supplier. The supplier said he would not, that he would continue supplying Mackerley's competitors, including Black. Mackerley responded that he understood, saw no conflict, and would nevertheless continue doing business with the supplier. (T.

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[7] Even Anderson testified that the Mine Hill route would not be a motive for murder. (T. 1144).

403-05).

Anderson acknowledged that when he once suggested that Mackerley could destroy Black financially, Mackerley responded he did not want any more trouble with Black, he did not want to start a war, and he and Black were "at peace". (T. 1054). Anderson also conceded he never heard Mackerley plan to kill Black, plan to hire anyone to kill him, or say anything ever that would lead Anderson to believe that Mackerley intended harm to befall Black. (T. 925-26).

The jury was instructed on the charges of kidnaping and first degree murder. The murder charge was submitted to the jury on dual theories: premeditated murder and felony murder. The underlying felony for the felony murder charge was kidnaping. The jury found Mackerley guilty of kidnaping and returned a general verdict of guilt of first degree murder. The jury recommended life imprisonment rather than the death penalty for the murder. (R. 908). The trial judge followed the jury's advisory recommendation and sentenced Mackerley to life imprisonment on the murder count. (R. 1014-26). A concurrent term of life imprisonment was imposed upon the kidnaping count. (R. 1019).

Mackerley appealed to the District Court of Appeal of Florida, Fourth District. On March 22, 2000, the Fourth District released its opinion. *Mackerley v. State*, 25 Fla. L. Weekly D722 [2000 WL 294507] (Fla.4th DCA 2000).

Mackerley claimed that the prosecution failed to prove the corpus delicti of a murder prior to admitting his statements. The

Fourth District ruled that "the record reveals that this issue is not preserved for appellate review and does not present fundamental error." 25 Fla. L. Weekly at D723.

Mackerley also challenged the kidnaping charge as legally invalid on the ground it failed to come within the statutory definition of the crime as provided in § 787.01(1)(a), Florida Statutes (Supp.1996). The Fourth District agreed for reasons discussed in the argument section of this brief.

Mackerley further argued that because his kidnaping conviction was legally invalid, he was entitled to a new trial on the first degree murder charge. Mackerley relied upon decisions of the Supreme Court of the United States, this Court, and the Fourth District, all of which recognize the following rule of law: when a jury is given dual theories of prosecution and returns a general verdict, if one theory is legally invalid, the defendant is entitled to a new trial when the verdict might be based upon the invalid theory. The Fourth District concluded that the authorities relied upon by Mackerley "indicate a clear reversal of the murder conviction in this case and remand for a new trial." *Id.* at D725. However, the court also found on point the contrary and intervening decision of this Court in *Delgado v. State*, 25 Fla. L. Weekly S790 [2000 WL 124832] (Fla. Feb.3, 2000).

In *Delgado*, a first degree murder charge went to the jury on dual theories of felony murder and premeditation. The underlying felony was armed burglary. This Court ruled that the armed burglary conviction was outside the scope of the burglary statute because

the defendant was an invitee on the premises. However, without any discussion of the aforementioned rule of law, this Court applied the harmless error doctrine and affirmed on the ground that the evidence was sufficient to support a conviction for premeditated murder.

The Fourth District found itself bound by *Delgado*, reasoning as follows:

> Following *Delgado*, we are constrained to conclude that the trial court's error in sending the kidnaping charge to the jury in the instant case was harmless; based upon our review of the record, viewed in the light most favorable to the State, there was evidence to support a finding of premeditation. Nevertheless, we remain troubled in affirming Mackerley's murder conviction, especially since the jury convicted Mackerley of kidnaping based on the State's theory of prosecution, which this court has rejected as a matter of law. In our analysis, we find it difficult to conclude that there was no reasonable possibility that the jury's improper consideration of the kidnaping charge did not contribute to Mackerley's first degree murder conviction; however, *Delgado* indicates that the error here is, as a matter of law, harmless.

Id. at D725. The Fourth District certified the following question to this Court as one of great public importance:

> Is it harmless error when a defendant is convicted by general verdict for first degree murder on the dual theories of premeditation and felony murder where the felony underlying the felony murder charge is based on a legally unsupportable theory of which the defendant is nevertheless convicted, and there is evidence in the record to support the jury's finding of premeditation?

Id. at D725. Contrary to the question certified, there was no finding by the jury of premeditation. Mackerley respectfully rewords the issue as follows:

WHEN A JURY IS CHARGED UPON THE DUAL THEORIES OF FELONY MURDER

AND PREMEDITATED MURDER, AND RETURNS A GENERAL VERDICT OF GUILT OF FIRST DEGREE MURDER, IF THE FELONY MURDER THEORY IS LEGALLY INVALID (AS OPPOSED TO EVIDENTIALLY INSUFFICIENT), MUST THE GENERAL VERDICT BE SET ASIDE AND THE DEFENDANT AWARDED A NEW TRIAL WITHOUT REGARD TO THE HARMLESS ERROR DOCTRINE IN ACCORDANCE WITH DUE PROCESS OF LAW WHERE THE JURY MAY HAVE BASED ITS VERDICT UPON THE LEGALLY INVALID THEORY?

Mackerley timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Where a jury is charged upon dual theories, one of which is legally invalid and the other legally valid, and the jury returns a general verdict of guilt which may rest upon the legally invalid theory, the defendant is entitled to a new trial without regard to the harmless error doctrine. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). A criminal charge which falls outside its statutory definition is an example of a legally invalid theory. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) The harmless error doctrine does apply, however, if one theory is merely factually insufficient as opposed to legally invalid. In such a case, the conviction will be upheld if the alternative theory was supported by sufficient evidence. *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970). The distinction between legal invalidity and factual sufficiency is made because jurors are presumed equipped to reject a factually insufficient theory but not a legally invalid one. *Griffin, supra*.

Here, Mackerley was charged with kidnaping and first degree murder. The jury was instructed that it could find him guilty of first degree murder based upon either of two theories: (1) premeditated murder; or (2) felony murder, the underlying felony being kidnaping. The jury found Mackerley guilty of kidnaping and returned a general verdict of guilt of first degree murder which did not specify whether the verdict was based upon felony/kidnaping murder or premeditated murder. On appeal, the Fourth District vacated the kidnaping conviction, agreeing with Mackerley's claim that the prosecution's theories of kidnaping were legally invalid because they fell outside the statutory definition of kidnaping.

Mackerley sought a new trial on the murder charge based upon the aforementioned rule of law from *Yates* which this Court adopted in *Valentine v. State*, 688 So. 2d 313 (Fla.1996) and the Fourth District in *Tricarico v. State*, 711 So. 2d 624 (Fla.4th DCA 1998). Mackerley contended that the jury might have based its verdict upon the legally invalid theory of kidnaping/murder. The Fourth District agreed with Mackerley, but reluctantly affirmed based upon this Court's recent decision in *Delgado*. The Fourth District certified the issue to this Court.

Delgado appears to be in conflict with the heretofore well-settled jurisprudence of the Supreme Court of the United States and Florida. A proper resolution of the conflict mandates a new trial on the murder charge.

ARGUMENT

WHEN A JURY IS CHARGED UPON THE DUAL THEORIES OF FELONY MURDER AND PREMEDITATED MURDER, AND RETURNS A GENERAL VERDICT OF GUILT OF FIRST DEGREE MURDER, IF THE FELONY MURDER THEORY IS LEGALLY INVALID (AS OPPOSED TO EVIDENTIALLY INSUFFICIENT), THE GENERAL VERDICT MUST BE SET ASIDE AND THE DEFENDANT AWARDED A NEW TRIAL WITHOUT REGARD TO THE HARMLESS ERROR DOCTRINE IN ACCORDANCE WITH DUE PROCESS OF LAW WHERE THE JURY MAY HAVE BASED ITS VERDICT UPON THE LEGALLY INVALID THEORY.

A. MACKERLEY'S MURDER CONVICTION SHOULD BE SET ASIDE AND A NEW TRIAL ORDERED PURSUANT TO THE RULE OF *GRIFFIN*, *YATES*, *VALENTINE*, AND *TRICARICO*.

It has been a fundamental rule that a general verdict of guilt that may rest upon either a legally invalid theory or a legally valid theory must be set aside and the defendant awarded a new trial if the basis for the verdict cannot be determined. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), overruled on other grounds, *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Valentine v. State*, 688 So. 2d 313 (Fla.1996); *Tricarico v. State*, 711 So. 2d 624 (Fla.4th DCA 1998). Thus, where a jury returns a general verdict of guilt where one of the bases of guilt is an unconstitutional theory and an alternative theory is constitutional, the Supreme Court of the United States has repeatedly held that such a verdict must be set aside, rejecting the prosecution's argument that the verdict should be upheld

because the jury presumably based it upon the alternative constitutional ground. See, *e.g.*, *Bachellar v. Maryland*, 397 U.S. 564, 569-571, 90 S.Ct. 1312, 1315-1316, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 585-590, 89 S.Ct. 1354, 1362-1365, 22 L.Ed.2d 572 (1969); *Williams v. North Carolina*, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed. 279 (1942). In *Yates*, the Supreme Court extended this rule to set aside a general verdict where the challenged ground was not unconstitutionality, but legal invalidity based upon a statutory time bar.

In *Griffin*, the Supreme Court upheld the defendant's conviction against a *Yates* challenge. The Court drew a distinction between a case where one of the possible grounds for the general verdict was legally invalid, as in the above-cited decisions, and the situation where, as in *Griffin* and *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), one of the possible grounds was insufficient evidence. The Court explained that when two theories are presented to a jury and one is factually insufficient, a conviction may be upheld. But the Court reaffirmed the rule that a conviction cannot be upheld when one of the theories is legally invalid. Speaking for a unanimous Court, Justice Scalia explained the distinction as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a

> legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence...".

Griffin, 502 U.S. at 58, 112 S.Ct. at 474 (emphasis supplied).

Mackerley's felony murder charge is legally invalid because the prosecution theory of the underlying felony, kidnaping, falls outside the statutory definition of that crime. Consequently, the harmless error doctrine is inapplicable because, as noted in the passage quoted above from *Griffin*, the jurors were not equipped to reject the felony murder charge on the ground of legal invalidity (as opposed to mere insufficiency of the evidence). Indeed, the jurors found Mackerley guilty of kidnaping, thereby raising the intolerable likelihood that they based their general verdict of guilt of first degree murder upon felony/kidnaping murder rather than premeditation.

Rather than order a new trial as required by *Griffin/Yates/Valentine/Tricarico*, the Fourth District felt compelled to follow this Court's decision in *Delgado*, which erroneously applied the harmless error doctrine to a *Yates* situation. Mackerley requests that this Court grant him a new trial on the murder charge based upon the correct rule of law and recede from *Delgado* to the extent it conflicts therewith.

B. MACKERLEY'S FELONY MURDER CHARGE IS LEGALLY INVALID BECAUSE THE UNDERLYING FELONY, KIDNAPING, FALLS OUTSIDE THAT CRIME'S STATUTORY DEFINITION.

The Fourth District noted that the kidnaping charge was based upon two theories: "1) Mackerley's luring Black to Florida under the false pretense of a business deal; and 2) Mackerley's placing Black in a headlock prior to shooting him." *Mackerley*, 25 Fla. L. Weekly at D724. The Fourth District correctly concluded that both theories fell outside the statutory definition of kidnaping for the reasons discussed below in "1" and "2".

1.

§ 787.01(1)(a), Florida Statutes (Supp.1996), defines kidnaping as "forcibly, secretly or by threat confining, abducting or imprisoning another person against his will." The Fourth District held that the prosecution's first theory of kidnaping, the luring of Black to Florida, fell outside the statutory definition of that crime for the following reasons:

> Since there was no force or threat, the State relies on the word "secretly" in the statute to argue that Mackerley's clandestine plan to lure Black to Florida qualifies as kidnaping. The problem with the State's argument here is that the word "secretly" modifies "confining, abducting or imprisoning." Taking the fact of Mackerley's alleged plan to secretly lure Black to Florida under false pretenses as true, there still was no confinement, abduction or imprisonment of Black. Black came to Florida voluntarily of his own free will, albeit as a result of a proposed business deal that turned out to be disingenuous. Black's trip to Florida as a result of this bogus invitation does not present a scenario which can support the State's claim that Black was confined, abducted, or imprisoned against his will by Mackerley.

25 Fla. L. Weekly at D724.

The Fourth District's construction of the kidnaping statute comports with the statute's plain language as well as the statutory

codification of the rule of lenity which requires that Florida criminal statutes be "strictly construed", *i.e.*, interpreted "most favorably to the accused" in the face of any alternative constructions. § 775.021(1), Florida Statutes (1997). This rule is not merely a convenient maxim of statutory construction. It is rooted in fundamental principles of due process of law which require that no person be forced to speculate whether his conduct is prohibited. See, *United States v. Granderson* U.S. 39, 54, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994); *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

The prosecution's "luring" theory constituted nothing less than a re-drafting of the Florida kidnaping statute. If the Florida Legislature wanted the kidnaping statute to include terms such as "luring" or "inveigling", it would have so provided, as it has employed those terms in past kidnaping statutes and as it presently uses those terms in other statutes[8], and as Congress and other states have used those terms in their kidnaping statutes.[9]

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[8] Earlier versions of Florida's kidnaping statute, which was patterned after the kidnaping statute of Massachusetts, employed the term "inveigles". See *Holroyd v. State*, 127 Fla. 152, 172 So. 700 (1937), quoting § 7159, Comp. Gen. Laws. Presently, § 787.025 and § 847.0135(3), Florida Statutes, prohibit, *inter alia*, "luring" and §§ 812.155(1) and 817.52(1) prohibit trickery and deceit.

[9] The federal kidnaping statute prohibits both physical and nonphysical takings. Nonphysical takings are those resulting from inveigling or decoying. See 18 U.S.C. § 1201(a) ("Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward ..."). However, even under the federal kidnaping statute, the Supreme Court of the

However, even in a jurisdiction where a kidnaping statute expressly prohibits "inveigling" or "luring", Mackerley could not be validly convicted because the false pretense must be used with the intent to abduct or restrain the victim against his will. See *Chatwin, supra.*

United States has warned: "[T]he broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping." *Chatwin v. United States*, 326 U.S. 455, 464, 66 S.Ct. 233, 237, 90 L.Ed. 198 (1946). "A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former...". *Id.*

Various state legislatures have enacted statutes similar to the federal kidnaping provision. See, *e.g.*, Okl.Stat.1951, Tit. 21, § 745 ("Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another ..."); S.C.Code (1976) § 1-3-20 ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, ..."); Virgin Islands Code., title 14 § 1052(a) ("Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain ..."); Mich.Comp.Laws Ann. § 750.349 ("Any person who ... shall inveigle or kidnap ..."); Tennessee Code § 39-2603 ("Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps ..."); 21 Oklahoma Stat. Ann. 741 ("Every person who ... forcibly seizes and confines another, or inveigles or kidnaps another..."); South Dakota Code 1960 Supp. § 13.2701 ("Whoever shall seize, confine, inveigle, decoy, kidnap, abduct or carry away..."); Nevada Revised Statutes § 200.310 ("Every person who shall willfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap ...").

In opposing the defendant's motion for judgment of acquittal on the kidnaping charge, the prosecution's argument was telling. The prosecutor relied upon federal law and common law for its theory that a Florida kidnaping charge can be based upon "inveigling" and "luring". (T. 1155).

2.

As for the prosecution's second theory, that placing a person in a headlock while shooting him constitutes a kidnaping, the Fourth District found that theory outside the scope of the kidnaping statute and therefore legally invalid as well. This Court has consistently limited the scope of the kidnaping statute to its terms so as to avoid converting any forcible felony into a kidnaping. *Berry v. State*, 668 So. 2d 967 (Fla.1996); *Faison v. State*, 426 So. 2d 963 (Fla.1983). Accordingly, if confining or moving a victim "is alleged to have been done to facilitate the commission of another crime, to be kidnaping, the resulting movement or confinement: (a) Must not be slight, inconsequential and merely incidental to the other crime; (b) Must not be of the kind inherent in the nature of the other crime; and (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Faison*, 426 So. 2d at 965.[10]

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[10] The rule of law of *Faison* applies to cases where the defendant is charged under § 787.01(1)(a)(2) with kidnaping with intent to commit or facilitate commission of any felony but not to cases where the defendant is only charged with an intent to inflict bodily harm upon or to terrorize under § 787.01(1)(a), (2). See *Bedford v. State*, 589 So. 2d 245 (Fla.1991). Here, Mackerley was charged with both (R. 29) and the jury returned a general verdict. Thus, the *Bedford* exception to *Faison* is inapplicable. Moreover, the record is devoid of any evidence supporting a kidnaping at all, much less one with intent to inflict bodily harm or terrorize, as the trial judge so found in the written sentencing order: "There is no evidence that the victim was held in fear or tormented for any period of time." (R. 1025).

In *Berry, supra*, this Court explained that the first element means "that there can be no kidnaping where the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it. It is the confinement of the victims, rather than their movement, which justifies the kidnaping conviction." Thus, there is no kidnaping where the "confinement" has been incidental to the underlying felony. *See Jenkins v. State*, 433 So. 2d 603 (Fla.1st DCA 1983) (defendant could not be convicted of kidnaping if victim was murdered immediately so that her confinement before death was inconsequential in the commission of other criminal acts). See also *Lawrence v. State*, 614 So. 2d 1092 (Fla.1993) (convenience store clerk shot to death by the defendant during a robbery and found face down in the storeroom; witness who accompanied the defendant to the store had seen the victim moving toward the back of the store during the crime; held: evidence failed to support the kidnaping conviction because the state produced no evidence that the defendant forced the victim into the storeroom); *Brown v. State*, 719 So. 2d 955 (Fla.4th DCA 1998) (confinement of victim, by ordering her to get down on floor board of car and remain there, did not amount to criminal conduct separate from sexual batter and robbery to justify conviction for kidnaping); *McCutcheon v. State*, 711 So. 2d 1286 (Fla.4th DCA 1998) (confinement of robbery victim did not amount to criminal conduct separate from store robbery to

warrant conviction for armed false imprisonment of store clerk who was pushed into stockroom and struck after she refused to open safe and clerk was not tied up or confined longer than robbery); *Hrindich v. State*, 427 So. 2d 212 (Fla.5th DCA), petition for rev. dismissed, 431 So. 2d 989 (Fla.1983) (no kidnaping where victim voluntarily accompanied defendant into his automobile and where victim's confinement in the front seat was incidental to attempted sexual battery).

Applying the foregoing, the Fourth District held as follows:

> The State's argument that Mackerley's holding Black in a headlock while shooting him amounts to kidnaping under the statute also lacks merit. Although Mackerley could have shot Black without putting him in a headlock, holding Black in the headlock had no significance independent of the murder and was merely incidental to the shooting. *See Faison v. State*, 426 So. 2d 963, 965(Fla. 1993) (holding that a confinement or movement of victims during the commission of another crime may be kidnaping only if the movement or confinement is not slight, is not of the kind inherent in the nature of the other crime, and has some significance independent of the other crime in that it makes the other crime substantially easier to commit or substantially lessens the risk of detection); *see also Rohan v. State*, 696 So. 2d 901 (Fla. 1997) (finding that the victim's confinement was indistinguishable from the battery where the defendant forced his way into the home, began pushing the victim, and forced her into the bedroom); *Berry v. State*, 668 So. 2d 967, 969 (Fla. 1996) ("[T]here can be no kidnap[]ing where the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it."); *Jenkins v. State*, 433 So. 2d 603 (Fla. 1st DCA 1983) (reversing the kidnaping charge because the record was consistent with a supposition that the victim was murdered immediately, so that, in this case, her confinement before death was inconsequential in the commission of further acts).

Id.

Based upon the foregoing authorities, the Fourth District

correctly concluded that no kidnaping was established by virtue of the alleged headlock.

C. BECAUSE THE JURY, WHICH FOUND MACKERLEY GUILTY OF THE LEGALLY INVALID KIDNAPING CHARGE, MAY ALSO HAVE FOUND MACKERLEY GUILTY OF THE LEGALLY INVALID FELONY (KIDNAPING) MURDER CHARGE, THE HARMLESS ERROR DOCTRINE IS INAPPLICABLE AND MACKERLEY IS ENTITLED TO A NEW TRIAL.

Having ruled the kidnaping conviction legally invalid, the Fourth District proceeded to Mackerley's claim that he was entitled to a new trial on his murder conviction. Mackerley relied upon the previously noted rule of *Griffin/Yates/Valentine/Tricarico* that when a jury is instructed on multiple theories of guilt, the jury's general verdict must be set aside and the defendant awarded a new trial where one of the possible bases of guilt is legally invalid. Such was the case in *Yates*. By contrast, a defendant is not entitled to a new trial where the general verdict is challenged because one theory of guilt is based upon insufficiency of the evidence where an alternative unchallenged theory is supported by sufficient evidence. Such was the case in *Turner*.

This critical distinction was recognized and applied by the Fourth District in *Tricarico*. In that case, the defendant's murder charge went to the jury upon the dual theories of premeditation and felony murder. The underlying felony was attempted trafficking in cocaine. However, attempted trafficking in cocaine was not one of the designated felonies in the first degree murder statute. Accordingly, the Fourth District found that the felony murder

theory was legally invalid and based upon Justice Scalia's reasoning in *Griffin*, ordered a new trial.

In *Tricarico*, the Fourth District also relied heavily upon this Court's decision in *Valentine*. In *Valentine*, the defendant was convicted for attempted first-degree murder. This Court reversed the conviction because the jury might have relied upon a legally invalid theory. This Court reasoned as follows:

> Valentine next argues that his conviction for attempted first degree murder is error. We agree. The jury was instructed on two possible theories on this count, attempted first degree felony murder and attempted first degree premeditated murder, and the verdict fails to state on which ground the jury relied. After Valentine was sentenced, this Court held that the crime of attempted first degree felony murder does not exist in Florida. Because the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed. See *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed.2d 371 (1991).

Valentine, 688 So. 2d at 317.

The Fourth District concluded that Mackerley's case was indistinguishable from *Valentine*, *Tricarico*, and *Yates*, thereby warranting a new trial, but also indistinguishable from *Delgado*, where this Court affirmed based upon the harmless error doctrine.

In *Delgado*, the defendant was charged with two counts of first degree murder and one count of armed burglary. The jury was instructed on felony murder with armed burglary as the underlying felony. The defendant was found guilty as charged and sentenced to death for each murder and to life for the armed burglary. On appeal to this Court, Delgado argued that because he was invited to enter

the victims' home, his conduct fell outside the scope of Florida's burglary statute. This Court agreed. However, the Court found the error harmless because there was sufficient evidence of premeditated murder. This Court reasoned as follows:

> This Court has previously stated that even if the evidence does not support felony murder, any error in charging the jury on that theory is harmless where the evidence supports a conviction for premeditated murder. *See Griffin v. United States*,502 U.S. 46 (1991); *McKennon v. State*, 403 So. 2d 389 (Fla.1981) (finding error to instruct on robbery as it relates to felony murder where there was no basis in the evidence for the robbery instruction). *See also San Martin v. State*, 717 So. 2d 462 (Fla. 1998) (reversal is not warranted where general verdict could have rested upon theory of liability without adequate evidentiary support when there was alternative theory of guilt for which evidence was sufficient) *cert. denied*, 119 S. Ct. 1468(1999).

Delgado, 25 Fla. L. Weekly at S82.

It appears that this Court in *Delgado* erroneously applied the *Turner* rule to a *Yates* situation. Indeed, *McKennon* and *San Martin*, cited in *Delgado*, were "*Turner*-sufficiency" challenges rather than "*Yates*-legal invalidity" challenges. In *McKennon*, the defendant challenged the sufficiency of the evidence, not the legal validity of, a robbery instruction in a felony murder case where robbery was the underlying felony. This Court found insufficient evidence of robbery and affirmed due to the overwhelming evidence of premeditation and because the record was "clear that the jury convicted McKennon of murder based on premeditation...". 403 So. 2d at 391. Similarly in *San Martin*, the defendant challenged the sufficiency of the evidence to prove premeditated murder. This

Court affirmed due to the sufficient evidence of felony murder. Assuming Delgado's jury was instructed on the dual theories of premeditated murder and felony (armed burglary) murder, and the jury returned a general verdict of guilt, *McKennon* and *San Martin* are inapplicable as the defendant in *Delgado* should have been awarded a new trial under the *Yates* rule if his conduct fell outside the burglary statute.

Mackerley's case is controlled by *Yates*, *Valentine*, and *Tricarico*. To the extent *Delgado* is in conflict with those decisions, *Delgado* should yield. Mackerley is entitled to a new trial.

CONCLUSION

When a jury is given dual theories of prosecution and returns a general verdict, if one theory is legally invalid, the defendant has been denied due process of law, the harmless error doctrine does not apply, and the defendant is entitled to a new trial. By contrast, if one theory is attacked as based upon insufficient evidence rather than legal invalidity, then the error is harmless if there is sufficient evidence to support the alternative theory.

Mackerley is entitled to a new trial because one of the two theories of murder submitted to the jury, which returned a general verdict of guilt, was legally invalid as failing to come within the statutory definition of the crime.

Respectfully submitted,

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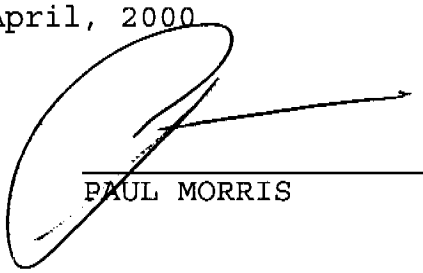
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed to Robert R. Wheeler, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299, this 27 day of April, 2000.



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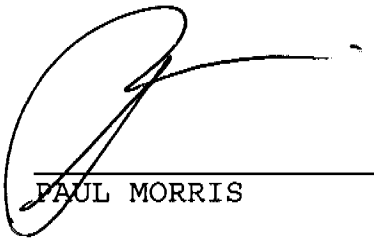

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