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 REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

I.

The Fourth District certified to this Court the following question:

> 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?

Mackerley, 754 So. 2d at 140. The petitioner respectfully rephrases the question as follows[1]:

> 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) BECAUSE IT FALLS OUTSIDE THE STATUTORY DEFINITION OF THE CRIME CHARGED, 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?

A.

Conspicuously absent from the 50 pages of the State's brief is the passage from *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) which is critical to the disposition of this case. Pursuant to *Griffin*, the harmless error doctrine does <u>not</u> apply where a jury is charged upon dual theories, one of which

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[1] The Fourth District's certified question refers to "the jury's finding of premeditation". The jury made no such finding in this case. The petitioner rephrased the question to eliminate that reference and also to provide more specifics.

is legally invalid, and the jury returns a general verdict which might be based upon the legally invalid theory.

In the case at bar, the jury was charged upon dual theories of first degree murder, to-wit: premeditated murder, and felony murder in which the felony was kidnaping. The prosecution's theory of kidnaping fell outside the statutory definition of that crime and the jury returned a general verdict that could have been based upon felony murder. In *Griffin*, the Supreme Court unequivocally stated that a theory of prosecution which falls outside the statutory definition of the crime charged constitutes a legally invalid theory. The State's brief ignores this dispositive aspect of *Griffin*. Under *Griffin*, Mackerley is entitled to a new trial regardless of the sufficiency of the evidence to support the charge of premeditated murder.

B.

In *Griffin*, the Supreme Court reiterated the rule that where two theories of prosecution are submitted to a jury, and the jury returns a general verdict of guilt, the defendant must be awarded a new trial if the verdict is possibly based upon a legally invalid theory of prosecution, even if the other theory is correct and supported by sufficient evidence. A legally invalid theory of prosecution falls into the category of "legal error". The Supreme Court drew a distinction between such "legal error" and "insufficiency of proof." Where the challenged theory of

prosecution merely suffers from insufficiency of proof, the verdict can stand if the unchallenged theory was supported by sufficient evidence. That is because jurors are deemed able to reject a factually insufficient charge, but not a legally invalid theory of prosecution.

The Supreme Court listed three examples of legally invalid theories of prosecution. The one which directly applies here is where the prosecution's theory falls outside the statutory definition of the crime charged. The State's brief discusses the other two examples at length but, as noted, omits the one which mandates a new trial in this case. The following is the critical passage from *Griffin* with emphasis upon the Supreme Court's example of the legal error applicable to the case at bar which the State omits from its brief:

> 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 59, 112 S.Ct. at 474.[2] Consequently, where a

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[2] *Griffin* receives relatively little attention in the State's brief at all, and as noted, none with regard to the legal error involved here. Although the State quotes a passage from *Griffin*, State's Brief at 29-30, the quotation inexcusably stops where the

general verdict of guilt might be based upon a legally invalid theory, the conviction cannot be saved by presuming that the jury rejected the legally invalid theory in favor of the alternative legally valid one. Put another way, the harmless error doctrine does not apply to legal error. But where a general verdict of guilt is based either upon a factually sufficient theory or a factually insufficient one, the jury is presumed to have rejected the insufficient one. In that sense, the harmless error doctrine does apply.[3]

C.

The Fourth District found that the prosecution's two theories of kidnaping in the case at bar were legally inadequate as failing to come within the statutory definition of the crime. The Fourth District reached this conclusion based upon the following analysis:

> The State's kidnaping charge is based on 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. We agree with Mackerley that neither one of the State's theories of prosecution as to kidnaping are legally valid since, even if proven, those allegations are insufficient to constitute kidnaping under Florida law. Consequently, the trial court erred in denying Mackerley's motion for judgment of acquittal on the kidnaping charge.

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critical passage quoted above begins.

[3] The Court in *Griffin* does not employ the term "harmless error". Rather, the Court speaks in terms of invalidating or upholding the general verdict. Thus, the Court held that when one of the possible bases for a general verdict is legally invalid, the verdict should be invalidated, whereas the general verdict should be upheld when one of the possible bases was inadequate evidence.

The State's first theory -- Mackerley's enticing Black to Florida by trick - is easily dismissed by reference to the text of the kidnaping statute itself. Kidnaping means "forcibly, secretly or by threat confining, abducting or imprisoning another person against his will." § 787.01(1)(a), Fla. Stat. (Supp. 1996). 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.

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 risks 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).

Mackerley, 754 So. 2d at 136-37.

The Fourth District stated that it would have ordered a new trial under *Griffin* (and its progeny) but for this Court's decision in *Delgado v. State*, 25 Fla. L. Weekly S790 [2000 WL 124832] (Fla. Feb.3, 2000).[4] The dilemma prompted the Fourth District to certify the question to this Court.

E.

The State misses the issue commencing with the first page of its argument. After quoting the question certified by the Fourth District, the State argues as follows:

> With all due respect to the 4th DCA, the certified question is based upon their [sic] mistaken finding below that the kidnaping charge in this case was "legally inadequate" to support a felony murder charge. The State submits that the kidnaping charge in this case was a legally valid charge -- an enumerated felony under the Florida Statutes which supported the felony murder charge to the jury.

State's Brief at 28.

"With all due respect" to the State, no one disputes that kidnaping is a "valid charge" in the sense that it is one of the enumerated felonies which can support a felony murder charge.[5] The dispute here is whether the harmless error doctrine applies where

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[4] The Fourth District stated: "We reverse the kidnaping conviction, and but for the Florida Supreme Court's recent decision in *Delgado* [citation omitted], we would also reverse the murder conviction and remand for a new trial." *Mackerley*, 754 So. 2d at 133.

[5] Section 782.04, Florida Statutes, enumerates the felonies which can underlie a felony murder charge.

the charged enumerated felony is based upon an invalid legal theory of prosecution within the meaning of *Griffin*. The State's argument, that as long as the prosecution charges an enumerated felony a related felony murder charge is valid, cannot be squared with *Griffin*, or with the cases where the Supreme Court of the United States, this Court, or the district courts of appeal have found "legal error" in dual-theory prosecutions. See, *e.g.*, *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *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). In all of those cases, new trials were ordered despite the so-called "legally valid charges" because those charges were based upon legally invalid theories of prosecution.

F.

Next, the State claims that "what the 4th DCA described in its opinion below relates to a factual insufficiency of evidence to support the felony murder theory, not a legal one." State's Brief at 28. Again, the State proceeds from a fundamentally flawed premise. The Fourth District did not analyze or describe a sufficiency of the evidence issue. Rather, the Fourth District analyzed the statutory definition of kidnaping and concluded that the prosecution's kidnaping theories fell outside the statute.

The State then characterizes the issue as one of "semantic

difficulty", citing a passage from *Griffin* where the Supreme Court addressed the assertion of the petitioner in that case that the distinction between legal error and insufficiency of proof was illusory. State's Brief at 29-30. The Supreme Court rejected the petitioner's assertion. The Court explained that in the context of *Griffin* error, the term "legal error" is used in the sense of "a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence", and then gave the aforementioned three examples of "legal error" (which included a prosecution theory which falls outside the statutory definition of the crime charged). Thus, the difference between legal error and insufficiency of proof is much more than a "semantic difficulty". In the case at bar, *Griffin* makes it easy to draw the line between the two. Because the prosecution's theories of kidnaping fell outside the statutory definition of kidnaping, the error was "legal" and it mattered not whether the premeditated murder theory was supported by sufficient evidence. Application of the harmless error doctrine is precluded here due to the legal error.

G.

Commencing at page 30 of its brief and continuing through page 36, the State purports to explain what is "legal error" in discussing decisions from the Supreme Court of the United States and this Court. The State concludes that "legal error" in these cases occurs in only one of two situations: "either the charge's

unconstitutionality, or the charge was legally non-existent on its face." State's Brief at 32. The State's continuing glaring omission is *Griffin*'s third example of "legal error", to-wit: a prosecution's theory which falls outside the statutory definition of the charge.

H.

The State's continued confusion shows through in its characterization of *Delgado* as follows: "This Court agreed with Delgado, that the felony murder theory, based upon the S[t]ate's factually insufficient theory of armed burglary, should not have been presented to the jury." State's Brief at 36. The prosecution's theory in *Delgado* was not "factually insufficient". It was legally erroneous under *Griffin* because it fell outside the statutory definition of burglary.[6]

I.

Following its discussion of *Delgado*, the State contends that the "problem in the instant case, is that the 4th DCA has misapplied the law with regard to general verdicts where factual insufficiency is the legal error." State's Brief at 37. Again, the State is confused. *Griffin* explains that factual insufficiency is distinguished from legal error. By mixing the two concepts, the State continues to miss the issue in this case.

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[6] Accordingly, and as argued in Mackerley's Initial Brief, the harmless error doctrine was erroneously applied in *Delgado*.

J.

Commencing at page 38 of its brief, the State returns to its previous erroneous argument that the kidnaping charge "is a legally valid charge" and "included all the essential elements required by § 787.01 to make out a legally valid kidnaping charge." State's Brief at 38-9. The State further argues: "The evidentiary theories the State argued to try and prove the kidnaping charge are not determinative of whether it is a legally valid charging [sic]." State's Brief at 39.

The State is contending that it can charge any crime regardless of the validity of the underlying theory of prosecution. That contention, of course, is squarely refuted by the line of authorities culminating with *Griffin*. If the State were correct, it would not matter that a prosecution's theory of a crime charged fell outside the crime's statutory definition. But as *Griffin* expressly held, such a theory of prosecution constitutes legal error and invalidates a verdict that might be based upon it.

K.

The State's failure to recognize *Griffin*'s third example of legal error results in its wrongful criticism of the Fourth District. The State contends: "What the 4th DCA is citing as legal invalidity in *Delgado* and in *Mackerley*, is in reality a lack of sufficient evidence presented by the State to prove the underlying, legally valid charge." State's Brief at 39. The "reality" is that

the Fourth District correctly viewed *Delgado* and the instant case as examples of prosecution theories which are legally invalid because they fall outside the statutory definitions of the crimes charged.[7]

L.

In conclusion, the harmless error doctrine is inapplicable to the legal error committed here. Mackerley is entitled to a new trial on the charge of premeditated murder.

II.

WHETHER THE KIDNAPING CHARGE WAS SUPPORTED BY SUFFICIENT EVIDENCE IS NOT PROPERLY BEFORE THIS COURT. ALTERNATIVELY, THE KIDNAPING CHARGE WAS BASED UPON A LEGALLY INVALID THEORY.

A.

This Court should not reach the merits of the State's Point II for either or both of the following two reasons.

1.

The petitioner has raised one issue before this Court. The State has raised its own issue in Point II of its Answer Brief. The State claims in its Point II that there was sufficient evidence of

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[7] In a case such as this, where there was no body, no confession, no motive, no physical evidence, and Mackerley claims his innocence, and where the testimony of the State's key witness (Anderson) is uncorroborated, the risk of a miscarriage of justice due to the felony murder charge is an additional ground for a new trial. The jurors could have disbelieved Anderson (who held a grudge against Mackerley), but found Mackerley guilty anyway pursuant to the prosecutor's closing argument that a guilty verdict would be justified pursuant to the invalid theory of kidnaping/ murder. The mere possibility that one or more jurors voted guilty due to the felony murder theory is enough to warrant a new trial.

kidnaping.

The State did not raise this issue in a motion for rehearing before the Fourth District. The State did not file a notice in the Fourth District seeking discretionary review by this Court of this issue. Nor did the State file a cross-notice for discretionary review.

This Court is requested to decline review of the issue for failure of the State to have timely or properly raised it.

2.

The State claims in its Point II that its theory of kidnaping was not based upon luring the victim to a place, but upon a "secret abduction." The record is to the contrary. The prosecution, essentially acknowledging that there was no forcible, physical abduction, argued to the trial judge that the Florida kidnaping statute should be construed so that a person is kidnaped if he is lured or inveigled to a place. The prosecutor's argument was as follows:

> MR. BELANGER: Your Honor, I think the reason that we may have struggled with this type of kidnaping before is because even attorneys sometimes wrongfully think of kidnaping as only embracing forcible, physical abduction, and the confinement cases talk about binding people up and wrapping them with duct tape and whether or not they're moved and transportation and all this, but the fact of the matter is that the Florida Statute embraces and common law and federal statute and model penal code all understand and all approve of a different type of species of kidnaping and that's inveigling, a luring under false pretenses by deception making someone act against their will such that if they knew the true circumstances, they would have never gone to a particular place or under -- or seen a particular person.

(T. 1155). Based upon the foregoing, the Fourth District correctly stated that one of the prosecution's theories of kidnaping was "Mackerley's enticing Black to Florida by trick". *Mackerley*, 754 So. 2d at 136. The State cannot now be heard to repudiate the very theory it advanced to the trial judge and upon which the Fourth District based its decision.[8]

B.

Even if this Court were to reach the merits of the State's Point II, the theory of kidnaping advanced therein is without merit for the same reasons enunciated by the Fourth District in its rejection of the State's "luring" theory. As previously noted, the Fourth District reasoned as follows:

> Kidnaping means "forcibly, secretly or by threat confining, abducting or imprisoning another person against his will." § 787.01(1)(a), Fla.Stat. (Supp.1996). 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.

Mackerley, 754 So. 2d at 137.

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[8] The State concedes in this Court that "luring is not expressly included in Florida's kidnaping statute...". State's Brief at 41.

The State also resorts to speculation as well as blatant misrepresentations of the trial record. These tactics belie the lack of merit in the State's arguments.[9]

Finally, the State attacks the Fourth District's rejection of the prosecution theory that the victim was kidnaped because he was supposedly held in a headlock while he was shot. The Fourth District correctly reasoned that this argument was foreclosed by the rule of *Faison v. State*, 426 So. 2d 963 (Fla.1983) in which this Court held that a confinement or movement of victims during the commission of another crime is 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 by making the other crime substantially easier to commit or substantially lessens the risk of detection. The Fourth District reasoned that holding the victim in a headlock "had no significance independent of the murder and was merely incidental to the shooting." *Mackerley*, 754 So. 2d at 137.

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[9] The following contentions made by the State have no support in the record: after Lisa Costello picked up Black in her rental car, he "was no longer in control of his movements", State's Brief at 44; "before his murder, he [Black] was isolated", State's Brief at 45; after Black came to Mackerley's house, "it is an infinitely reasonable inference to believe he [Black] tried to leave at that point, *id.*; "[t]he headlock was utilized by Appellant to prevent the victim from leaving, *id.*; Lisa Costello possessed a date-rape drug at her home and therefore the victim "may well have been incapable of leaving". State's Brief at 46. (In fact, with regard to the last contention, the prosecutor conceded in his closing argument that "[w]e don't have any evidence as to that...". T. 1252)).

The State contends that the "murder would not have occurred had there been no kidnaping." State's Brief at 47. This contention proves nothing because it assumes there was a kidnaping. The easy answer is that even if there were a murder, it was indeed committed without a kidnaping.

The State lastly contends that the "whole purpose of the secret abduction was to bring the victim to Appellant so he could kill him." State's Brief at 47. Again, the State has fantasized the record. The State adduced no evidence whatsoever to support this contention.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this corrected brief was mailed to Steven R. Parrish, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299, this 10th day of July, 2000.

Respectfully submitted,

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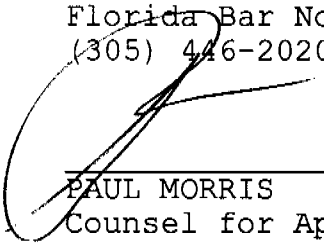

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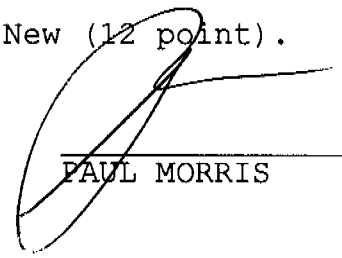

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